

Equal Access for Deaf and Hard of Hearing Students — The Evolving Nature of the Dialogue

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Merri Pearson: Good morning. You've had enough coffee so you're going to stay awake? I see very little movement. (Laughter.)

Maybe they will fall asleep. I don't know. Well, it's my honor to introduce a wonderful advocate of ours. This individual has supported Deaf and hard-of-hearing people for years. She has assisted NETAC with many projects. And she herself is one of the best attorneys that I know. She is a friend to PEPNet and has been and will continue. So she is going to talk for about an hour, and then we have the opportunity for questions. If you have a question that comes up in your mind while she's presenting, please write it down, hold it until the end, and then when she's finished with her presentation, if we can make a line right near the microphone, right there, we will have interpreters set up so that both the audience and anyone sitting up here can understand them. We will have signing and voicing interpreters available and ready for all of you. Okay? So I would like all of you and myself to provide a warm welcome to Jo Anne Simon, Esquire. (Applause.)

Jo Anne Simon: Thank you.

As many of you know, I do sign, but for today's purposes, I've elected to utilize the interpreters. The interpreters are free to tell me to stop and slow down. I am from New York, so I do talk fast.

I also want to note that you can get RID CEUs from listening to my speech and from attending this conference. Ironically, I just recently got a letter from the RID saying—because I hadn't done my CEUs—I was no longer certified. So I just lost my certification, but you can keep yours by lis-

tening to me! My lapse was totally intentional; I had no intention of keeping it up because I don't sign often enough to inflict myself upon anyone as an interpreter. (Laughter.) But I think it's just a little ironic.

My remarks today are going to be fairly broad in nature and focus more on policy and advocacy issues than specific case law. I'm not necessarily going to tell you about what different cases in higher education said. I will refer to a few cases, but on the whole that's not the purpose of my discussion. I want to talk about where we have been, where we are going, and what we are going over again in some cases, and what kinds of things we may be able to do as we move into the future.

I'm not the first person to have said this, but past is prologue. When I started in graduate school at Gallaudet in 1974, which is a hideously long time ago, there was great excitement about the hearings going on on Capitol Hill. We learned about the Babbidge Report from the '60s that talked about how deaf children were undereducated, particularly in preschool, and how we didn't get them into education soon enough and that we needed to focus on the specific needs that were unique to them as children who were Deaf and hard-of-hearing. Throughout the hearings on what is now the IDEA and what we referred to at the time as P.L. 94-142, none of the states objected in any way to the passage of federal legislation requiring them to provide special education, because federal dollars were going to accompany that. Most states didn't have much in the way of laws requiring education of students with disabili-

ties. Some of them did have laws, but those that did, didn't do very much education. They had laws on their books and they didn't enforce them; they didn't provide much in the way of educational programming, and they certainly didn't provide much in the way of choice.

One of the ironies now is that the U.S. Supreme Court is taking aim at all of these kinds of statutes on the grounds that the states already have statutes. The states can apply the statutes and enforce them themselves, they don't need the federal government to tell them what to do. And I propose that we do need the federal government to tell the states what to do, because the states weren't doing it. Since P.L. 94-142, they have been doing it kicking and screaming, and if we do not have that big stick that is the federal government and the federal government's money, we are going to find ourselves in a great deal of difficulty. And we are going to find ourselves right back in the '50s and '60s when our students weren't being educated at all.

I want to talk about three basic things. One is the promise of the ADA, whether it has been fulfilled, and where we are in what I think is going to be a long course of fulfillment.

I want to talk about a few recent legal decisions and connect legal trends, one of which I just referred to. And finally, I will talk about some things that we can do and things that I suggest you do as service providers in your institutions to make sure that we do fulfill the promise of the ADA.

One of the things that I find the most disheartening about what's happened since the ADA was passed is that if you look at the purposes of the statute, it says that decisions with regard to the abilities of persons with disabilities should not be made on the basis of stereotype, myth, presumptions, ignorance or fear; and yet that's exactly how these decisions are being made in many cases. The ADA has not led to the public education and public awareness of the civil rights notion of disability, as it was supposed to. We still have courts, service providers, employers, and testing agencies making decisions about what's a reasonable accommodation or whether or not you have a disability, based on a very antiquated and, I submit discriminatory, notion of what disability is all about.

And I'll give you an example. I have a case now in another state in which a woman who has

Attention Deficit Disorder and a learning disability was diagnosed late in life. She struggled and utilized a lot of informal accommodation, with friends and family helping her and reading to her and checking her work throughout her education, she managed to graduate from Veterinary School. She has now taken the veterinary exam 7 times. The first few times, she didn't have accommodations because she didn't have a formal diagnosis. She went back and got that formal diagnosis by a very good organization which is, in fact, fairly conservative.

The examination agency then provided her accommodations — and this is the key to our case. She needed a reader and additional time. So they provided her with a reader who couldn't read the words on the test. And I have argued that the notion of a qualified reader, which the law does not define with the specificity that it does for a qualified interpreter, should be analogous to the qualified interpreter definition. If you are reading to someone and you cannot pronounce the terminology, if it's jargon or medical terminology or just your having difficulty pronouncing words because you yourself are not familiar with them, then you're not a qualified reader.

This State essentially said, you asked for a reader, and we gave you one. In other words, we didn't guarantee that the reader could actually read. Now, since we deposed those readers who really couldn't read, they had no way of winning this case, except to challenge that my client does not have a disability. So now they are arguing she's not really disabled because she got through veterinary school. In other words, she can't be disabled, because if she were disabled, she wouldn't have been able to succeed.

This notion of one-size-fits-all accommodations, as in this person has a Master's degree in elementary education, so they can read; therefore they can read for any purpose, is like saying that this interpreter, who has never interpreted in a computer course or has no knowledge of that area, can interpret for that particular course or this person who has no knowledge of the legal system would be a good legal interpreter. We know that is not the case. And yet we are subjecting people with disabilities to those kinds of one-size-fits-all services based on ignorance. There is a reason why separate qualification is needed. That, in fact, a veterinary licensing exam is not the same

as a cosmetology or plumbing exam in terms of the reader's ability and knowledge. That access to legal interpreting is not the same as access to interpreting on the stage.

One resource I can refer you to, which is an excellent resource in general for people in higher education, is the Office for Civil Rights decision last summer in the San Diego Community College case. It's fairly lengthy. It talks a lot about interpreter shortages. It talks a lot about the need to assess interpreters and how to select which interpreters for which courses, interpreters who might sign in certain ways for students who use certain types of sign language, or possess the ability to use realtime captioning, and it outlines some best practices.

I think that best practices is the next key point. One of the things we have done since the ADA came into being, much more so than under 504, was overfocus on the law. And you may think that is strange, coming from an attorney. But the fact is people are overfocusing on this shifting line in the sand. And if you are really following the law, the law says to make these determinations on a case-by-case basis. So that means what works for Johnny over here may not work for Susie, not for reasons that you necessarily anticipate or understand, and it may not be effective. You can't insist that Mary use Johnny's accommodations if they don't work for her, if they are not effective.

You can and should use the law and legal decisions as guidance, but the law will not make your decisions for you. You're going to have to do the analysis and think it through yourselves and make your own decisions. And if you over-rely on prior case law, you might just make a mistake as to where that line in the sand shifted in that particular matter. And if you go to court or if there is an OCR complaint, OCR really isn't going to care whether this accommodation worked for someone else. They will care if it worked for the student who filed the complaint.

So, I suggest that you follow a best practices approach, and I refer you again specifically, in terms of interpreter policies, to the San Diego Community College case. I think it did a very good job of outlining how the school went about dealing with a lot of these very, very difficult problems of interpreter shortages, a very large population of deaf students, deaf students with different communication needs, a lot of the misunderstandings on the part of the faculty as well as the administration, and

some misunderstandings of their rights on the part of the students. And so I again refer you to that decision. It is posted on the AHEAD website at <www.AHEAD.org>.

I further suggest that we not stand on ceremony as much as we have in some cases. I know from talking to people, that one of the contentious issues that has come up is who gets the transcript, or do they get a transcript, when CART or realtime captioning is being used. I honestly don't understand why a transcript can't be provided. I honestly don't understand why a student would want to read the thing again and again and again. It's not effective as notes for most purposes. Nevertheless, you've got a transcript. The accuracy of the transcript could be a problem, but even if it's accurate, students who are using CART are not students who are interacting with the information in the same way as you would with a sign language interpreter. And interacting with information is key to education. It's key to really learning. So if you are reading on a screen, you are just reading words, not necessarily interacting.

One of the things I'll talk about later is how deaf students read and why this may or may not be an appropriate accommodation. But if it's appropriate — let's say, for someone who becomes hard of hearing due to old age, and is 60 years old, has a terrific English background, and is reading realtime reporting for a play or something. It's a very different kind of function for most students who are deaf from birth or shortly thereafter. That means you are relying on the reading skills of a population of students who have, in many cases, not very good reading skills. Even if they are fairly well developed compared to a lot of deaf students, they are not well developed in relation to most hearing students. So we are asking these students to do a much more difficult task than we realize.

There is nothing legally that says you shouldn't give or can't give transcripts. I know that some people object to having to pay the extra money to have that transcript edited. That may be a resource issue and you may be able to negotiate that with the student. The student may prefer to have the unedited transcripts. I know that a lot of times the transcripts are on disk. The student can have them on disk. The student can edit them for notetaking purposes. And the faculty members often like having the transcripts for their reference.

The other issue is overfocusing on the law. No, it's not a copyright violation for you to tape a faculty member's lecture or for you to have it put into a transcript through realtime reporting. Every word that comes out of the faculty member's mouth is not copyrighted, number one. If they are reading from copyrighted material, then that material is already copyrighted. But taking that information and putting it into a usable media for a person with a disability is an exemption to the copyright laws. So whether they are correct that every pearl that drops from their mouth is copyrighted, which I dispute, but let's say, assuming for argument's sake, that they are correct, it doesn't matter. There is an exemption, okay? So don't let them tell you that it's copyrighted. They may think so, and they may give you academic freedom reasons; academic freedom has nothing to do with this whatsoever.

Another problem that I'm seeing is the elevation of the definition of disability itself to become a barrier to access. And, again, this is that antiquated notion of disability meaning incompetence. As we say in New York, it's almost as if people think if you're not in the gutter, you are not really disabled. And the two things that have become key in the definition of disability are a substantial limitation to a major life activity.

There has been a lot of jockeying about what constitutes a major life activity. The regulations list certain illustrative examples, such as breathing, caring for one's self, hearing, speaking, walking, that kind of thing. But the courts have found other major life activities, and they have upheld reading as a major life activity. They have upheld sleeping as a major life activity. There is one court that is well-known for saying that paying attention and concentrating is not a major life activity. I'd like to see how you do any of the other ones without the concentration or attention—learning, for example.

Some courts have agreed although I must say that the only court I know that has done it was in the *Bartlett* case, that test taking is a major life activity. Because today test taking is a critical activity, it can dramatically affect the course of your life. And so can studying and spelling and other skill areas. So we are searching to articulate more major life activities that the courts will actually be able to adopt.

Recently, courts have found that concentration, attention, and thinking are major life activities. The Supreme Court upheld reproduction

as a major life activity. As an aside, the other thing about the ADA is that the defendants have no shame whatsoever. They will argue anything. They don't embarrass easily. And in the *Braddon* case, two years ago in the Supreme Court, the defense argued that reproduction was not a major life activity because you didn't do it in public. (laughter.) Now, I know people who have done that. (laughter)

But, you know, a lot of things you don't do in public are fairly major, like caring for one's self, sleeping. So the Supreme Court upheld the notion that the list in the regulations is only illustrative. Reproduction is a major activity, whether you choose to engage in it or whether you choose to engage in it in public, and opened the doors for other activities. Courts have since held that things like engaging in sexual activity, and communicating or interacting with others are major life activities.

Of course, these are not the primary major life activities you think about with regard to deafness, but deafness affects other major life activities besides hearing. It can affect speech. It can affect cognition to some extent, depending on the person's circumstances. It can certainly affect reading. It can certainly affect writing. So those are major life activities that people don't necessarily think of right off the bat, yet we in deafness understand to be affected by deafness.

The other issue that comes up here is substantial limitation. What is "substantially limiting," and what does that mean? The regulatory guidance tells us that a substantial limitation is a significant restriction in the condition, manner or duration under which the person with a disability performs major life activities, compared to the way most people do them. So that raises the question, what about all these people who are hard-of-hearing and wear hearing aids? Are they substantially limited? How substantial is substantial? How significant is the restriction? Every time you turn around a defendant has raised the bar or lowered the bar in the sense of how much more restricted one has to be than most people? And they apply, of course, their own sense of that, not based necessarily in any particular knowledge of the disability or what the true impact of that condition might be.

And so now defendants may say: Well, I don't dispute that you have a hearing loss, but I don't

see that it's really all that limiting for you. You know, you seem to be fine by me. You know, you seem to understand what I'm saying. And in the legislative history, the committee reports always refer to, as an example of a mitigating measure, an adaptive device, such as medication or hearing aids. Well, if a hearing aid is a mitigating measure, you use one, and it improves your hearing, how much can it improve your hearing that you'll still be considered to have a disability and still be protected by the law? These are questions we don't really know the answers to.

There is a case right now that has been petitioned to the Supreme Court on that. And I'm not sure how that's going to work out. But I think that one of the ways that this affects people who are Deaf and hard-of-hearing is this notion of well, you don't seem to have it so bad to me, so therefore you are not substantially limited. And there isn't really a good way, scientifically or legally, to split those hairs at this time. One of the things I think that will be developing out of the case law is some mechanism for analyzing and articulating what is a substantial limitation, but we really haven't arrived there yet.

One of the other problems which has arisen is morphing one disability into another. You are all looking at me saying, what does that mean? Well, we know that people are making a lot of these decisions based on ignorance. And we also know that they don't understand a lot of the terminology we use in this field. And I will give you a classic example. Last summer I represented a young deaf man who is a graduate of an excellent university, has a severe to profound hearing loss from the age of one, and wasn't diagnosed until he was three, therefore, he lost a lot of language learning years. He is very, very bright. He worked very hard. He has very attentive, educated, intelligent parents who were very supportive of him. He went through a major university with realtime reporting and extended time because he read very well, but very slowly, because he is duking it out with the language, with the double meanings, with the idioms, with the passive voice, with all of those language issues that are so hard for prelingually deaf people to grapple with.

He applied to take the LSAT, law school admissions test, with extended time. He said he needed the time because he read slowly, because of his deafness, and because his deafness affected the way he processed written language. And the

LSAT then refused to provide this, because he is just deaf. As soon as he raised the word "processing," they insisted that he have an LD evaluation. They wanted him to have a neuropsychological assessment.

Now you know that the LSAT has been sued for doing this with students with CP. And one of the people that joined that suit later was a young man who was a quadriplegic, and they again didn't understand why he would read slowly. And they insisted that he needed to have neuropsychological evidence of slow reading.

With my client, I thought I'd show proof of impact, as a matter of good faith. I had him take a reading comprehension test, administered by an appropriately licensed clinician, timed and untimed. Timed, his comprehension was in the first percentile. The reading speed was obviously slow. With the extended time norms, he was at the 9th percentile. When she gave him all the time he needed, which was slightly more than double-time, he was in the 98th percentile of comprehension. So this is obviously a young man who can read, who certainly has the ability, but couldn't do it fast enough to take this test. That wasn't enough for them. I had to give them IEPs from third and fourth grade. I had letters from teachers that all his life, he read slowly. Well, who gives timed reading comprehension tests to deaf children? Anybody here know who gives deaf children timed reading comprehension tests? They don't. So all of the data from school was untimed anyway. So what was the point? Simply to harass, in my view.

They finally gave him time and a half, even though I substantiated a need for double-time. But since he had originally requested time and a half because he didn't know better, they gave him time and a half, one time only. And they made it clear that if he decided to take it again, they would once again challenge his documentation.

Now, this student does not have a neuropsychological problem. He is not learning disabled. The person who is the service provider at his college, who is very familiar with the student, is a licensed psychologist, who happens to be very familiar with learning disabilities. The student does not have a learning disability. But the LSAT insisted, apparently because the word "processing" was used, that it was now a neurological disability. And that is the way they are defending that other lawsuit I mentioned. But, again, it's based on *their* notions of what "pro-

cessing” means. And, of course, if you know anything about language, there are language processing issues that are language issues, not neurological issues. So we are not talking about learning disability here. We could be, and there certainly are students who are deaf and who have learning disabilities, but that clearly was not the case for this student.

So here we see then the student’s disability being morphed into another disability, and then the determination to accommodate is based on an entity’s own uninformed notions of what a learning disability is. They knew that this was a well-heeled parent that could sue, so maybe that’s why they gave in. But we are seeing this happening again and again. We are seeing more of the testing agencies requiring additional documentation, documentation we can’t get because we don’t have the tools, or documentation that is really inappropriate for the disability at issue. And deaf students will become more susceptible to that type of challenge.

It’s happening at all levels of standardized testing, not just the professional exams. If you have a student in a Community College and he wants to take an exam to be a fireman, a plumber, or anything else, those kinds of problems are going to arise.

Now I want to talk a bit about the recent cases. Many of you probably know about these cases; one is called *Sutton v. United Airlines*. One is called *Murphy v. United Parcel*. And the other is called *Albertson’s v. Kirkingberg*. *Albertson’s* is a grocery store. *Sutton* involved twins who had 20/200 vision correctable to 20/20. They were both pilots. They applied for a job with United Airlines as a global airline pilot. They were told their vision wasn’t good enough. They were corrected to 20/20, but United wanted uncorrected vision of 20/100. The standard appears to have come from the fact that military pilots in World War II were required to have 20/100, and it’s just evolved from there.

Obviously, there is a strong sense of a safety issue here. And when there is a safety issue, employers will be given a certain amount of deference. But there is also this question: was the ADA meant to cover people who had myopia that was correctable to 20/20? A lot of people didn’t think that that was the population that was meant to be covered. On the other hand, there was this contradiction, as in are we going to deny you a job based on your uncorrected vision because — when corrected you don’t have a disability?

And it went up to the Supreme Court, asking: When you make a determination whether someone has a disability, do you include the effect of a mitigating measure like eyeglasses, medication, hearing aids, or do you make that analysis without the glasses, without the hearing aid, without the medication? Now, the legislative history and all the regulations said you do it without the mitigating measures. Why? Well, there are some classic examples in the legislative history. People with epilepsy who are medicated and may not have had a seizure for years have been denied jobs, will continue to be denied jobs, based on people’s assumptions that they might have a seizure. And they might. But, how likely is that? Is that really an imminent threat? Now, if someone with epilepsy takes their medication, according to the Supreme Court, and if they are just like everybody else, so to speak, just like the most people out there, the mythical average person with their medication, then they don’t come under the protections of the ADA. And employers are now free to discriminate against them based on their misunderstandings, their ignorance, their fear, and their stereotypes about people with epilepsy. That is the sum total of the Supreme Court’s decision in *Sutton*.

The same thing holds here for *Murphy* and *Albertson*. Murphy had high blood pressure, and the Albertsons plaintiff, Kirkingberg, had monocular vision. Kirkingberg was a truck driver. He passed the vision screening tests twice, and then he later failed the vision screening, and the defendant said ‘oops, you can’t see.’ But, he had been driving for Albertsons for 18 months, doing just fine, but apparently now he couldn’t. Again the court said if he does well enough, and drives well enough and hasn’t substantiated any substantial limitations on the record, we can’t determine that, *per se*, the use of a mitigating measure should not be considered. If he can see as well as other people by using subconscious brain adjustments, then he is not going to be found to have a disability.

In reality, in that case, the Court found that they just didn’t have the record to support finding a disability. They used some wiggly words, and I like all those words I can get these days — to the effect that monocular individuals would ordinarily qualify under the ADA, but they would still need to demonstrate what limitations they had. So the law is forcing people with disabilities to really focus on the negative, focus on the prob-

lem, and focus on the limitations in a way that they may never have actually perceived them, because if you never didn't have that disability, you don't know how other people do things. So how do you articulate how substantial your limitation is when you don't know how substantial it is, because you never have not had that condition?

It puts plaintiffs in a very difficult position in terms of how to articulate their disability. And it also then encourages and forces people to look at their limitations and not look at their abilities, which the ADA was supposed to do. The ADA was supposed to make society focus on people's abilities and accommodate the disabilities so that the disabilities didn't become barriers to someone taking their rightful place in society.

On a factual basis, there were a lot of reasons why these cases could have gone the way they went. But the Supreme Court set up what I believe to be a very, very bad policy for future decision-making. And it has led to a number of quirky decisions. There is one case out of Texas where a guy with epilepsy who was having a seizure once a day and who also clearly needs a better doctor. Nevertheless the court said that since the seizures last about five seconds, that's not such a big deal. The rest of the time he does just fine. That is not a substantial limitation. The court also noted that it would have found for the plaintiff before the Supreme Court decisions, but now it couldn't. Well, that Judge has no real idea what he is talking about. Just think of the continual damage to this person's brain by seizing every day. It's wrong, and it's tragic.

There is another case where a man with post-polio syndrome who used crutches and a brace, was found to have a substantial limitation. So that was a good analysis.

There was a recent case out of the fifth circuit, which is again located in and covers Texas, the Southwest, where a woman who is hard-of-hearing took a job as a telephone rep for a collections company. And that is the *Finical* case. If I remember the facts, when the trainer hooked into the conversation, it altered the signal so that the plaintiff wasn't able to hear well enough and she couldn't respond to the directions of the trainer. And one time I think they called to her down the hall, and she didn't hear them.

The company alleged both that she was not qualified and that she wasn't substantially limited. You know, the whole point from the

defendant's perspective is to get you into this box where you're too disabled to be qualified, or you're not disabled enough to be substantially limited. Here, the plaintiff won on the district court level. They won in the Circuit Court level, and I understand that the employer is now appealing this to the Supreme Court.

So while people who are hard-of-hearing probably didn't think of themselves as being particularly vulnerable to these decisions about somebody wearing glasses because of myopia, you may very well be. We need to think, how do we articulate the effect of being hard-of-hearing to someone? What are the substantial impacts? A lot of people don't know how to quantify them or how to articulate them.

The other part of this issue says you are to be compared to most people or the average person. We find that defendants argue that if you got to veterinary or medical school, then you are not substantially limited in learning compared to the average person, because you obviously learned more than the average person who never gets to medical school. And what they don't look at is the part of the regulation that requires that you look at the condition, manner or duration in which that person learns; that they learn, but they learn in a significantly and fundamentally restricted manner.

And there are several courts taking that line. It's an easy analysis. It's a very attractive analysis; they don't have to think, and they don't have to learn anything about these disabilities to make those kinds of determinations. And we are seeing that happen again and again and again. Don't let anybody kid you. The standardized testing groups have all banded together. They are all sharing information. It's a huge network. In my veterinary case, they were willing to—they even admitted to me, this is not going to be a disability issue. This woman clearly has a disability. They couldn't believe how severely impaired this woman was, until they called up the National Board of Medical Examiners and got advice. Well, now of course she is not disabled at all. And they hired the routine expert witnesses, who come in to rediagnose in absentia and determine that you don't have a disability, and they hold a certain set of assumptions which most often are not true. This is a very heated battle, and it's going to be fought again and again and again. And eventually this issue of substantial limitation, what it really means, and

how we really analyze—that is going to go up to the Supreme Court.

The other thing that the defendants have been doing is raising constitutional challenges. Right now, if you're in the 8th circuit, and you work for or go to a state school, you have no rights to sue for money damages in federal court under the ADA. The ADA was unconstitutionally enacted in the 8th circuit and now, as of about 2 weeks ago, the 7th circuit as well. Why? Well, the argument is that the Congress did not have the right to exercise this power under the 14th amendment; that the powers under the 14th amendment to remediate violations of civil rights don't extend as far as the ADAs provisions.

There are issues about people with disabilities, such as, are they in fact a "suspect class?" Are they entitled to heightened or extra scrutiny? And from a defendant's point of view, with all the nonsense about reasonable accommodations that cost us money, we have to *do* something different. We have to actually do something to provide equal rights for people with disabilities, unlike other classes of people, such as people who are African American or people who are women or people who are religious minorities. All we have to do is refrain from discriminating against them. But we don't have to do anything else. It's a pocketbook issue.

So many of the states have now banded together to do this. Last year in the *Olmstead* case that was in front of the Supreme Court—that was the case about whether or not Georgia had to provide care to developmentally disabled people in the community or whether they could just put them in an institution, even though the people wanted to be located in the community, in the most integrated setting. A number of states joined in a brief defending the State of Georgia. And this past year there were two cases that the Supreme Court was taking on the constitutionality of the ADA; one out of the 8th circuit and one out of the 11th. One went one way and said the ADA was constitutional—that is the 11th circuit case from Florida, or *Kimel*. The other was *Alsbrook*, out of Arkansas. Well, they settled after they got to the Supreme Court, and there was a lot of pressure on the states by people with disabilities to not sign on to the Amicus briefs supporting this. And in New York the community was able to get the Attorney General to just not do anything, which was better than doing the wrong thing.

Ultimately, these two cases settled. Its very unusual for cases to settle at the Supreme Court level.

Why might this have happened? Well, who is the Governor of Florida? Who is running for president? Whose signature piece of legislation was the ADA? President Bush. Do we really, in this election year, want the sons of President Bush, who pushed through the ADA, to challenge the constitutionality of the ADA? And the Republican Governor of Arkansas probably did not want to stick his foot in his mouth, either. So those cases settled.

Nevertheless, there are other cases. One out of the 11th circuit, called *Garrett*, is going up. And that raises similar employment-based ADA questions. One of the ways that the court makes the analysis is what kind of congressional hearings were there? And what was the evidence that Congress intended to do what it did? Well, the Court just struck down the Age Discrimination in Employment Act, as it applied to states. So if you are over 40 and you work for a state entity, you have no federal rights to be protected against discrimination on the basis of age at least not for money damages. End of discussion.

Supreme Court did away with them. Now, if your state law gives you those rights, that's fine. This is a very states-rights-oriented Supreme Court. They argued was that there really wasn't any evidence that Congress had looked at or had any evidence that the states were, in fact, guilty of age discrimination. They had evidence about employment in general, but not that state employers were guilty of discrimination. So, therefore, the Court found no basis for Congress decision.

Well, we certainly have plenty of evidence about the ADA and had plenty of hearings for years on the ADA. But how many of them were people who complained about discrimination on the part of the states? Well, if it's an employment case, state employers are included in many of the references to discriminatory practices. But you know the states do more than just hire people. The states provide services that are unique to states in many respects, for example transportation, access to voting, access to other state services, access to benefits, et cetera, et cetera, and so I think that there is a very real possibility that if the ADA is scrutinized as to whether it is constitutional as applied to the states, the Court has to look at areas other than employment discrimination and look at what else the states do and how states are,

themselves, unique entities with unique powers and unique responsibilities to all of their citizens, including citizens with disabilities.

On the other hand, they might split the baby in half and find that there wasn't enough evidence to show discrimination in employment by the states, but the states nevertheless have to comply with regard to other kinds of services. There are many different ways that the Court could go on that. But there are now four or five cases on their way up to the Supreme Court that are seeking certiorari, and we don't know how that will go. The Court will make a choice on constitutional-ity some time soon.

Now, 504 has a similar problem. If you remember, it was originally envisioned as an amendment to the Civil Rights Act and President Nixon vetoed it. So they sneaked it into the Rehab Act. And the problem with that is there's little or no record of hearings about all of these problems for 504. So, 504 has the same problem as age discrimination in that respect. But the thing that 504 has that the ADA doesn't have, that the age discrimination statute doesn't have is federal dollars. Under the spending clause, 504 could still survive, because once the Civil Rights Restoration Act was passed in 1987, the states then knew that if they took federal financial assistance, and those strings were attached, they waived their rights to be immune from suit in federal court by taking that money.

The Supreme Court has consistently upheld that knowing waiver with regard to obligations other than those under 504. So, my sense is that on a spending clause issue alone, 504 should survive. The 8th Circuit, however, has determined that the spending clause was superseded and nobody knew what an excessive burden this was going to be; therefore even under the spending clause, it's an unconstitutional exercise of Congress's authority.

They have also, in the 8th circuit, undone the IDEA as well. They are just really active, aren't they? But they are not activists. You know, the activist judges are only the liberals. The conservatives are not activists. They are not acting. They are undoing 30 years of law, but they are not acting. The case that held that Congress did not have the authority to enact the IDEA was recently re-argued, and there has been no decision yet. So it's possible they could backtrack, because I think they may have taken a lot of flack for it.

But that's where we are as a country in terms of where we are going with the ADA. We are finding more and more challenges being mounted. We are finding challenges to whether or not you have a disability, and challenges to how disabled you really have to be. The thing that is eating away at the civil rights notion of disability is this notion that disabled people are incompetent. And if you are not incompetent enough, you'll not have protections and you'll have to fend for yourself, which is where we started off in the first place.

You may think I seem a little negative, and you'd be right. I am a little negative about where things are going.

So what to do? My first suggestion is educate, educate, educate—the public, your administration, your elected officials, your faculty. Write responsive articles, and write letters to the editor, not just about deafness, about other disabilities as well. Because hidden disabilities, in particular those that people don't see, are very much under attack and very vulnerable. And as you know, this has been an issue for people who are Deaf and hard-of-hearing all along, the notion that people don't realize what the situation is, that people just don't see the deafness so they don't pay attention to it and they don't understand.

Second, dispute the myth of mildness, which could go like this: 'You're hard-of-hearing, it's like a mild problem. I don't see it. It's not such a big deal.' Well, regarding this notion of substantial limitation, I have seen brief after brief after brief from defendants saying 'well, they only have a moderate disability. They need to be substantially limited,' inferring that substantial means severe. Well, when you look at the ADA as a whole, it clearly was never meant to mean you had to be severely disabled in order to be protected by the law. But that's the way defendants are arguing these cases. And defendants hire the big firms and spend the big bucks on a defense and are making a lot of inroads with that notion. So the concept of what is substantial is coming back to haunt us.

And, in fact, you know, I don't know how to quantify it precisely. I don't think that anyone does yet. But I envision defenses for example, where somebody has an 80 percent speech discrimination score. A defendant may argue that may not be substantial enough. You know why? Because it might be argued, the speech discrimination score should be below 50 percent in order to be substantial. I don't know. Maybe I am imag-

ining the worst. But someone, somewhere, will come up with that kind of purely quantitative, but ridiculous, analysis at some point and then you'll have to disprove it. How do you do that? Therefore, one of the things we have to think about is how to do that kind of thing, how to articulate the concept of substantial limitation. How do we establish a paradigm for that? I also suggest that we be careful about our sound bites. I recall, for example, a sound bite by King Jordan. Now, I'm not being critical of him; I worked with him for years, I love him dearly. He is a wonderful man. But one of the things he said when he became president of Gallaudet University was: "The only thing that deaf people can't do is hear." And the fact is that other people believe that to the extent that they think that means that deaf people don't have any problems reading or writing or any problem speechreading, because of course, King can speechread well. Deaf people don't have any problems with English proficiency.

Well in fact, people who are Deaf and hard-of-hearing do often have those problems, and those are things that they really need to have accommodated. And so, unfortunately, the advocacy statements we make to highlight our abilities will come back to haunt us. And I can tell you that from an evidentiary point of view, every single one of my clients who worked around their problem, got their families involved, got help, and didn't go to some third-party in authority, and make demands, but instead, worked out the arrangements themselves, has had that used against them. Okay? It's evidence against them. Defendants argue that plaintiffs are not really disabled if they didn't get accommodated formally from some higher being in authority.

Third, support research in establishing these functional impacts. We need to start thinking about major life activities, and we need to start thinking about how people read who are deaf—not just that they have comprehension difficulties, but how is it that they read? For example, a lot of deaf students that I know read very slowly, because they are tangling with the language in a different way. That doesn't mean they have a learning disability, but it means an impact of deafness may be slower reading. And some of the research that has been done, even with second language learners who are not deaf, is that when reading in the second language, there is always a

delay of some sort, and it's always a slightly slower process. And these are hearing people who have second language proficiency. And so I think that we have to be aware of those kinds of impacts.

Ask things like; do your students have integrated, automatic skills in speaking, in reading, in writing? Are they able to write fluently or are they struggling with the writing process? As you know, a lot of students who are Deaf and hard-of-hearing struggle with these skills. Again, explore how to better articulate these things.

Fourth, support each other. One of the problems that inevitably arises is that we will have different views about things, and we sometimes criticize each other, or the running of each other's offices. In a speech last year, I recall using a quote from a German minister shortly after World War II, and the quote is basically this: First, they came for the socialists, but I wasn't a socialist so I didn't speak up. And then they came for the trade unionists, but I wasn't a trade unionist, so I didn't speak up. Then they came for the Jews, but I wasn't a Jew, so I didn't speak up. And then they came for me, but there was no one left to speak for me.

I think that we have to be very careful that we don't divide and conquer ourselves; that we support each other and that we support our efforts to learn more. We have a lot of people who are doing these kinds of jobs without the benefit of some of the education and training that others of us have. They are new to the field, they need to be supported and educated in a way that is collaborative and conducive to their learning. They shouldn't be trying to make these decisions based on a seat-of-the-pants analysis.

Fifth, support the development of interpreter standards, training and state licensing. I think that the states who are trying to get off easy by relying on the RID are making a big mistake. First of all, it's the state's responsibility. Second of all, the RID is a trade organization. And they have been running this certification process for years. They don't really have the resources in many respects. They have done a very good job in some ways. While there is certainly a lot of criticism of the RID and what it has done and how it has done it, the RID really shouldn't be doing it in the first place. The state should be doing it, whether or not they want to use the RID as a consultant to develop their programs, the states need to be doing this. We

need to have evaluation and we need to have training so that people can improve their skills on a continual, evolving basis.

We also have to be careful that we don't overpaper the field, in the sense that someone who may be qualified may not be certified on paper. This is one problem with the RID. For example, if you don't pay your dues, your certification is dropped. Well, that doesn't mean you lost your skill. That simply is a function of whether you paid your dues. Now, state licensing could do that as well, but the states generally don't drop you for a while. But you have to be careful with the RID. If you don't keep paying your dues, you're not going to be certified, and it will have nothing to do with whether you are a qualified interpreter. So that's one reason why I think we have to find different ways of determining whether someone is qualified and whether they are qualified for a particular position or assignment.

Finally, you have to be proud of what you do and the mission that you serve, and not apologize for that mission. I think a lot of times we feel very beleaguered and we equivocate on whether we are doing the right thing and whether we should be doing this or that — and gee, do we give the students too much? There are always a few students that will try to pull the wool over our eyes, but there is no real harm if we give most of them an inch more than we have to give them. That is education.

So I leave you with these words, *illegitima non corborandum est*. That's Latin for "don't let the bastards get you down." I thank you very much. And I'll be happy to take a few questions. (applause.)

Audience: My question is related to the settlement of cases compared to decisions being made. Over the past few years it seems to me that settlements are turning out better than the decisions are, supported by the point of view for people with disabilities. So that is what seems to be happening to me. But it seems like maybe we don't need the settlements, because case law is becoming more important.

Jo Anne Simon: Well, it's a very good point. When parties settle, they are the maker of their own bargain. And you can settle for things that you would not get from a court, certain kinds of remedies, for example.

About a year and a half ago I had a client who challenged a grade for very legitimate reasons. But there is no court in the country that is going to change a grade; it's just not going to happen. They won't do it. But in settlement, I could get that grade changed to a pass, so that it didn't affect his grade point average. So you can do things in settlement that you will not get from the court in terms of remedies.

The other thing is that once a defendant has invested the money of going to trial, it gets its back up and it digs in its heels, and you are always taking a chance with the Judge. There are some wonderful judges out there. The greater percentage of federal judges, however, are still Reagan/Bush appointees and there are a lot of judges who simply don't understand this stuff and are not necessarily interested in learning about it. They have full dockets. They want to clear the cases. And if some defendant comes to them with what sounds like a reasonable argument, they may go that route.

I mean, in my case in Georgia, we had a third reader interviewed who read much more smoothly than the first two, and still made a lot of mistakes, but the other lawyer doesn't know the mistakes were made because they are medical terms. He would say well, 'this is a reasonable reader.' Well, the jury doesn't know what the medical terms are, either. So of course, I had a veterinarian listen to this videotape of the deposition, and he made 23 mistakes in 12 questions. I've now got evidence to say he really didn't do a good job. But he could sound like he is doing a good job. And courts are just as vulnerable to that kind of argument as other people.

The problem with settlements is that we are not guided by settlements. They are out of court. We don't know what happened. We don't know what kind of dirt somebody may have had on the other party that encouraged that settlement. And so we are stuck with case law. And most cases don't go to court.

Also, with the ADA, we have a lot of people filing cases *pro se*, meaning they are representing themselves, and they have no idea what they are doing. They make a lot of strategic mistakes and they also misunderstand the law, and so they are doomed from the beginning. And that is a problem. One study found that 92 percent of employment cases under the ADA have been lost by plaintiffs. And a great percentage of those are *pro se* plaintiffs.

Any other questions? There is a microphone over there.

Audience: You had mentioned about the one person who was taking the LSAT test, and he used the word “processing,” and they thought—because of that—he was LD. What do you suggest a person would use in the future to avoid that? Instead of saying “processing,” how should they address themselves?

Jo Anne Simon: I don’t know. I mean, I’m trying to find the words myself. In that case, a neuropsychologist who had a deaf son who was very familiar with this young man wrote a four page letter about what she meant by the impact of deafness on language and how it affected reading. And they didn’t buy it. They don’t care. You know, they believe that their own thinking is more important than anybody who is an expert. And I don’t really know what the best way to articulate that is.

I would like to try and find a different way of saying “processing.” But, you know, I’m not sure how to explain to someone who has no background the difference between language processing and neuropsychological processing. And they are in different centers of the brain, and there are people who have articulated that. But a request for accommodations shouldn’t have to get to that depth of technical information. It’s ridiculous. You know, you shouldn’t have to submit enough evidence for a request for accommodations that would be sufficient at trial. That is not what this was supposed to be about. So, you know, while I want to respond to these concerns, I also object to responding to these concerns at a certain level because I think it’s outrageous. They keep raising the bar. So I’m happy to take any suggestions on how to articulate it.

Audience: It follows the same line. We have got several discussions going on about testing, extended time for deaf students throughout this conference. But in an age where we keep hearing documentation, documentation, documentation based on an audiogram, which is the documentation basically we use, are we able legally to provide extended time?

Jo Anne Simon: Of course. There is nothing in the law that says you can’t provide extended time

based on an audiogram or the student’s word, for that matter. The law says nothing about it. The people who say this are the people who are trying to get all this excess documentation so they can weed out as many people as possible. That has basically been the position raised by a lot of the testing groups who are firmly wedded to the notion of standardized testing and standard people. And they don’t want nonstandard people to be taking these tests or joining these fields. And I have heard some of these people say: ‘If nobody else will keep them out, I will. So, there really is intent to discriminate.’

Don’t believe any of the bologna you hear. Their function at some level (licensing exams) is to weed out to some extent, but not to weed out what it is they are weeding out. This focus on documentation, arises from having to provide test accommodations, and the people who are doing the provision of accommodations don’t necessarily understand enough about the disability to make those judgment calls themselves. So they are going to rely on expert evidence, i.e., a report from someone, to help them make that determination.

Also, many of our students don’t really know what they need depending on the circumstances. I always encourage trial and error. I know of a student with a panic disorder in the law school where I taught, and I wasn’t responsible for the accommodations, but I was consulted about it. And of course one of the things that set off the panic was the time limit itself. So I suggested that they give him unlimited time and wean him back once he found out how long it took him to do a law school exam. Well, the law schools don’t ever want to give unlimited time. It’s heresy. And as it happened in practice, he used double-time. The school had given double-time to a lot of people, so it was no problem. But the student would get panicked by knowing it was double-time. So, we held his hand through the first year. And he was a very responsible young man; he never overdid it. He was grateful to have the opportunity to not have the time limit, to give him the opportunity to find out how long it would take him to do this, and he never abused that. He was happy to deal with a double-time limit after that point. So, you can negotiate this. You can use trial and error. The law encourages that. The law requires an interactive process and encourages discussion.

There are higher ed cases that talk about the nature of the interactive process. Accom-

modations are not just an edict from on high. We don't have to be wedded only to the Holy Grail of documentation. Certainly, with something like deafness, your documentation is an audiogram, which tells you nothing about how that person functions. And we don't generally do functional assessments for deafness. You might if you go to VR: they will give you certain types of functional tests for some kinds of training programs. Otherwise, we don't generally do that kind of assessment. And the law doesn't require you to do it.

It's really just people wanting to protect themselves, wanting guidance, and wanting to make sure they are not giving away the farm; whatever crisis would be engendered by giving away that farm, I'm not sure, but that is what is propelling a good deal of this problem.

Audience: I have a job for you.

Audience: Talk about tutoring. We are told that it's a personal service, and —

Jo Anne Simon: It is.

Audience: And our funding comes for accommodations. How can we get around this? Because in many cases students need tutoring in order to succeed in college. And it does speak to their limitations.

Jo Anne Simon: Unfortunately, when the Department of Education passed the regulation about what would be a personal service, and included tutoring, they didn't ask me. (chuckles.)

The only argument I think you could make and at this point, I think, is probably premature in terms of where we've evolved in our understanding of this and our acceptance of these

things. That is the notion that if tutoring is provided to other students, real access to tutoring requires specialized tutoring. Access to tutoring — and this presupposes that there is a level of tutoring provided on campus to everybody — is not simply providing an interpreter for a deaf student. This is a common problem for students with learning disabilities as well.

For example, having an upper classman who is good in math is not the kind of tutor that a student with a learning disability or a deaf student needs, and therefore it's really not access, it's not really tutoring that is provided. In many cases, it's a waste of time.

So, I think you can argue that meaningful access requires additional training and somebody with knowledge of the disability. But, I don't think you'd win on that at this point in time. I think if a case like that went to court we would lose hands down. I don't think anybody is ready for it. Tutoring is key for a lot of students. It's the key access service that many students need. But who knows what they were thinking of when they promulgated that regulation. Probably they were not thinking of deaf students and they probably were not thinking of LD students. Also, many visually impaired students need tutoring, particularly in subjects like math. And they are not able to get it. I think it's a real gap in the regulatory mechanism. But, unfortunately, that is the regulation.

Okay. That's it. I see my time is up. (applause.) Thank you very much. (applause.)

Merri Pearson: Thank you, Jo Anne. We appreciate your comments. I think you will be here for awhile, so maybe we can get you individually if we need to. The next meeting has begun. So enjoy yourselves. We will see you at lunch or dinner tonight or something. Thanks. (End of session.)

