

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

NEIL BASTA,

Plaintiff-Appellant

v.

NOVANT HEALTH, INC., *et al.*,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

---

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*  
SUPPORTING APPELLANT AND URGING REVERSAL

---

KRISTEN CLARKE  
Assistant Attorney General

TOVAH R. CALDERON  
CHRISTOPHER C. WANG  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, D.C. 20044-4403  
(202) 514-9115

---

---

## TABLE OF CONTENTS

	PAGE
INTEREST OF THE UNITED STATES .....	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT .....	6
ARGUMENT	
A PLAINTIFF’S ALLEGATIONS THAT A HOSPITAL KNEW THAT HE NEEDED AN EFFECTIVE AUXILIARY AID AND FAILED TO PROVIDE ONE SUFFICE TO STATE A COMPENSATORY DAMAGES CLAIM UNDER SECTION 504 OF THE REHABILITATION ACT.....	8
A. <i>Compensatory Damages Are Available For Intentional             Violations Of Section 504 Where A Plaintiff Can Show             That A Defendant Acted With “Deliberate Indifference”             —That Is, It Knew That Harm To A Federally Protected             Right Was Substantially Likely And Failed To Act On             That Likelihood.....</i>	8
B. <i>The District Court Erred In Holding That, To Show That             Novant Possessed The Knowledge Required To Establish             “Deliberate Indifference,” Basta Had To Show That The             Hospital Had “Systemic And Pervasive Problems” With             The Auxiliary Aids That It Provided To Deaf Individuals .....</i>	14
C. <i>Basta’s Complaint Sufficiently Alleged That Novant Failed             To Act On Its Knowledge That Basta Needed An Effective             Auxiliary Aid.....</i>	21
CONCLUSION .....	23
CERTIFICATE OF COMPLIANCE	

**TABLE OF CONTENTS (continued):**

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

CASES:	PAGE
<i>Alexander v. Choate</i> , 469 U.S. 287 (1985).....	10-11
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	21
<i>Barber ex rel. Barber v. Colorado Dep’t of Revenue</i> , 562 F.3d 1222 (10th Cir. 2009) .....	13, 21
<i>Bax v. Doctors Med. Ctr. of Modesto, Inc.</i> , 393 F. Supp. 3d 1000 (E.D. Cal. 2019) .....	17
<i>Cannon v. University of Chi.</i> , 441 U.S. 677 (1979) .....	2, 12
<i>Consolidated Rail Corp. v. Darrone</i> , 465 U.S. 624 (1984).....	8
<i>Crane v. Lifemark Hosps., Inc.</i> , 898 F.3d 1130 (11th Cir. 2018).....	22
<i>Duvall v. County of Kitsap</i> , 260 F.3d 1124 (9th Cir. 2001) .....	13-14, 21
<i>Esparza v. University Med. Ctr. Mgmt. Corp.</i> , No. 17-cv-4803, 2017 WL 4791185 (W.D. La. Oct. 24, 2017) .....	17-18
<i>Fantasia v. Montefiore New Rochelle</i> , No. 19-cv-11054, 2022 WL 294078 (S.D.N.Y. Feb. 1, 2022) .....	19
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 524 U.S. 274 (1998) .....	11-12
<i>Gitterman v. Pocono Med. Ctr.</i> , 361 F. Supp. 3d 392 (M.D. Pa. 2019).....	17
<i>Godbey v. Iredell Mem’l Hosp., Inc.</i> , No. 5:12-cv-4, 2013 WL 4494708 (W.D.N.C. Aug. 19, 2013), aff’d, 578 F. App’x 317 (4th Cir. 2014) .....	4-5, 10, 18
<i>Liese v. Indian River Cnty. Hosp. Dist.</i> , 701 F.3d 334 (11th Cir. 2012) .....	5, 12-13, 15

**CASES (continued):****PAGE**

<i>Loeffler v. Staten Island Univ. Hosp.</i> , 582 F.3d 268 (2d Cir. 2009) .....	13, 16, 21-22
<i>Luckey v. St. Luke’s Cornwall Hosp.</i> , No. 20-cv-1161, 2021 WL 4124840 (S.D.N.Y. Sept. 9, 2021) .....	19-20
<i>Mark H. v. Lemahieu</i> , 513 F.3d 922 (9th Cir. 2008) .....	10
<i>McCullum v. Orlando Reg’l Healthcare Sys., Inc.</i> , 768 F.3d 1135 (11th Cir. 2014) .....	13
<i>Mullen v. South Denver Rehab., LLC</i> , No. 18-cv-01552, 2020 WL 2557501 (D. Colo. May 20, 2020) .....	19
<i>Newman v. Piggie Park Enters.</i> , 390 U.S. 400 (1968) (per curiam) .....	2
<i>Pandazides v. Virginia Bd. of Educ.</i> , 13 F.3d 823 (4th Cir. 1994) .....	9
<i>Paulone v. City of Frederick</i> , 787 F. Supp. 2d 360 (D. Md. 2011) .....	10
<i>S.H. ex rel. Durrell v. Lower Merion Sch. Dist.</i> , 729 F.3d 248 (3d Cir. 2013) .....	10-11, 13
<i>Silva v. Baptist Health S. Fla., Inc.</i> , 838 F. App’x 376 (11th Cir. 2020) .....	20
<i>Sunderland v. Bethesda Hosp., Inc.</i> , 686 F. App’x 807 (11th Cir. 2017) .....	16-17
<i>Tokmenko v. MetroHealth Sys.</i> , 488 F. Supp. 3d 571 (N.D. Ohio 2020) .....	18-19
<i>Trafficante v. Metropolitan Life Ins. Co.</i> , 409 U.S. 205 (1972) .....	2

**STATUTES:**

Americans With Disabilities Act, 42 U.S.C. 12133 (Title II) .....	1
--	---

<b>STATUTES (continued):</b>	<b>PAGE</b>
42 U.S.C. 12134.....	1
42 U.S.C. 12181 (Title III) .....	6
42 U.S.C. 12182(a) .....	6
Education Amendments of 1972 (Title IX),	
20 U.S.C. 1681 <i>et seq.</i> .....	11
20 U.S.C. 1681(a) .....	12
20 U.S.C. 1682.....	12
Patient Protection and Affordable Care Act,	
42 U.S.C. 18116 (Section 1557).....	6
Rehabilitation Act of 1973,	
29 U.S.C. 701.....	8
29 U.S.C. 794 (Section 504).....	2, 4
29 U.S.C. 794(a) .....	1, 9
29 U.S.C. 794a.....	12
29 U.S.C. 794a(a) .....	1
<b>REGULATIONS:</b>	
45 C.F.R. 84.4(b)(1)(ii).....	9, 15
45 C.F.R. 84.4(b)(1)(iii).....	9, 15
45 C.F.R. 84.52(a)(4) .....	9
45 C.F.R. 84.52(d)(1).....	9, 15
45 C.F.R. 84.52(d)(3).....	9, 15
<b>RULE:</b>	
Fed. R. App. P. 29(a)(2).....	2

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 21-2375

NEIL BASTA,

Plaintiff-Appellant

v.

NOVANT HEALTH, INC., *et al.*,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

---

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*  
SUPPORTING APPELLANT AND URGING REVERSAL

---

**INTEREST OF THE UNITED STATES**

This appeal concerns the proper standard for proving intentional discrimination under Section 504 of the Rehabilitation Act, which prohibits discrimination against persons with disabilities in any program or activity receiving federal financial assistance. 29 U.S.C. 794(a). The Department of Justice has significant responsibility for the enforcement and implementation of Section 504 and Title II of the Americans With Disabilities Act (ADA). See 29 U.S.C. 794a(a); 42 U.S.C. 12133, 12134. Because both statutes entitle private

plaintiffs to compensatory damages upon a showing of intentional discrimination, the outcome of this appeal will affect the ability of such plaintiffs to obtain complete relief in these cases. The United States has a strong interest in ensuring that these individuals will serve as “private attorneys general” to supplement its enforcement efforts. See *Cannon v. University of Chi.*, 441 U.S. 677, 708 n.42 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam). The United States files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a)(2).

### STATEMENT OF THE ISSUE

Whether the district court erred in holding that, to show the “deliberate indifference” necessary to receive compensatory damages for an intentional discrimination claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, the plaintiff, who is deaf, was required to allege that the defendant hospital had “systemic and pervasive problems” with the nonfunctional auxiliary aid that it provided to him instead of the in-person interpreter that he requested.



## STATEMENT OF THE CASE

1. Plaintiff Neil Basta is a deaf individual who communicates primarily in American Sign Language (ASL) and requires auxiliary aids and services to communicate effectively in a medical setting. J.A. 10.<sup>1</sup> In anticipation of his pregnant wife giving birth, Basta contacted Novant Health Huntersville Medical Center and requested that a qualified in-person ASL interpreter be provided to him and his wife upon their arrival, pursuant to Novant's stated policy of providing free interpreter services, including oral interpreters, TTY, and other services, to hearing impaired individuals. J.A. 67-68. Despite receiving assurances from Novant that it was working to locate an ASL interpreter, Basta and his wife instead were provided with a Video Remote Interpreter (VRI) on their first day at the hospital. J.A. 68. Both this VRI machine and a subsequent one brought to the delivery room malfunctioned and failed to provide a sufficiently clear picture to allow effective communication between Basta and Novant staff. J.A. 68. Basta repeatedly requested an ASL interpreter during the remainder of his wife's three-day hospital stay, but Novant failed to provide him with an in-person interpreter or an effective alternative auxiliary aid. J.A. 11-12.

---

<sup>1</sup> "J.A. \_\_\_\_" refers to page numbers in the Joint Appendix filed by plaintiff-appellant Neil Basta. "Doc. \_\_, at \_\_\_\_" refers, respectively, to the document recorded on the district court docket sheet and page number.

2. Basta filed suit in the United States District Court for the Western District of North Carolina against Novant and two corporate parent companies. J.A. 5-21. Basta's complaint alleged, among other things, that defendants discriminated against him solely on the basis of disability in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. 794. J.A. 15-16. The complaint alleged that defendants violated the statute by denying him meaningful access to the services, programs, and benefits they offered to other individuals, and by refusing to provide auxiliary aids and services necessary to ensure effective communication. J.A. 16. The complaint sought damages to compensate him for the injuries that he and his wife sustained as a result of defendants' discriminatory conduct and deliberate indifference. J.A. 16. Defendants filed a motion to dismiss the complaint for failure to state a claim. J.A. 22-24, 67.

3. The district court referred the case to a magistrate judge, who recommended granting defendants' motion to dismiss. J.A. 25-37, 69. In adopting the magistrate judge's recommendation, the district court first observed that, although this Court has not yet articulated the standard for proving an intentional discrimination claim under Section 504, both the district court and the Eleventh Circuit have defined the standard as "deliberate indifference," which occurs when "the defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood." J.A. 71-72 (quoting *Godbey v.*

*Iredell Mem'l Hosp., Inc.*, No. 5:12-cv-4, 2013 WL 4494708, at \*7-8 (W.D.N.C. Aug. 19, 2013), *aff'd*, 578 F. App'x 317 (4th Cir. 2014) and *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012)).s

Next, the district court held that Basta's complaint failed to set forth allegations that "Novant knew harm was substantially likely to occur sufficient to meet the deliberate indifference threshold." J.A. 74. The court disagreed with Basta's interpretation of the relevant cases as showing that "a hospital's reliance on a malfunctioning VRI system and its failure to provide an effective substitute auxiliary aid is evidence of deliberate indifference." J.A. 72 (citation omitted). Instead, the court concluded that the central "theme" of the cases was that "systemic and pervasive problems, rather than an isolated incident, must exist to succeed in showing intentional discrimination through deliberate indifference." J.A. 73. Basta's complaint alleged only that "on a single three-day visit, [he] was not given an in-person ASL-interpreter and that the two different VRI devices were ineffective." J.A. 74. According to the court, this meant that Basta's situation was "not analogous to the case law on deliberate indifference where the medical facility had systemic and pervasive problems with the VRI system and failed to proffer in-

person interpreters over a number of separate visits for numerous plaintiffs.” J.A.

74. Accordingly, the court dismissed the complaint. J.A. 74, 76.<sup>2</sup>

4. Basta filed a timely notice of appeal. J.A. 78.

### **SUMMARY OF ARGUMENT**

The district court erred in holding that a deaf individual pursuing a compensatory damages claim under Section 504 of the Rehabilitation Act against a hospital for failing to provide an effective auxiliary aid must allege that the hospital had “systemic and pervasive problems” with such aids.

Although this Court has yet to adopt a standard for proving the intentional discrimination required for compensatory damages under Section 504, a majority of federal courts of appeals that have considered the issue have concluded that a plaintiff in this context satisfies that requirement by showing that the hospital acted with “deliberate indifference”—in other words, that it (1) knew that harm to a

---

<sup>2</sup> Basta’s complaint also alleged that defendants’ actions violated Title III of the ADA, 42 U.S.C. 12181 *et seq.*, and Section 1557 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18116. J.A. 14-15, 16-18. The district court dismissed the ADA claim because Basta did not appeal the magistrate judge’s finding that the complaint had failed to allege an intent to return to Novant, and thus failed to plead imminent future harm entitling him to injunctive relief—the only relief available to private plaintiffs (other than attorney’s fees) under Title III. J.A. 70-71 (citing 42 U.S.C. 12182(a)). And because the ACA incorporates by reference Section 504’s protections against disability discrimination in federally funded health programs, the court concluded that “the ACA claim fails for the same reason as the [Rehabilitation Act] claim” and that “the two claims rise and fall together.” J.A. 75.

federally protected right was substantially likely and that it (2) failed to act on that likelihood. The deliberate indifference standard is appropriate in this context, as it is consistent with the Rehabilitation Act's broad remedial purposes and with Supreme Court precedent interpreting the similarly worded Title IX of the Education Amendments of 1972.

A plaintiff can satisfy the knowledge prong of the deliberate indifference standard by alleging, as Basta did here, that the defendant hospital knew that he needed an in-person ASL interpreter or other effective auxiliary aid and that the malfunctioning VRI machines that it provided to him instead were inadequate. This position is supported by the relevant cases, which, contrary to the district court's conclusion, do not require a plaintiff to allege that the hospital had "systemic and pervasive problems" with its auxiliary aids based on multiple hospital visits by the plaintiff or others. While allegations of past problems can help to establish the requisite knowledge, they are unnecessary to show that a hospital had notice of a particular plaintiff's need for an effective auxiliary aid.

Because the district court held that Basta failed to allege sufficiently that Novant knew that harm was substantially likely to occur, the court did not address the sufficiency of his allegations with respect to the second prong of the deliberate indifference standard, *i.e.*, the hospital's failure to act. Should this Court vacate and remand, it would be appropriate for the Court to provide guidance to the

district court on this issue. Here, Basta's complaint alleged that, after the hospital had provided two malfunctioning VRI machines in the delivery room that prevented him from communicating effectively with hospital staff, it then failed to provide him with any effective auxiliary aid in response to his repeated requests for an in-person interpreter. Accepted as true, these allegations state a plausible claim that Novant acted with deliberate indifference and thus violated Section 504 by denying him an equal opportunity to benefit from its services.

## **ARGUMENT**

### **A PLAINTIFF'S ALLEGATIONS THAT A HOSPITAL KNEW THAT HE NEEDED AN EFFECTIVE AUXILIARY AID AND FAILED TO PROVIDE ONE SUFFICE TO STATE A COMPENSATORY DAMAGES CLAIM UNDER SECTION 504 OF THE REHABILITATION ACT**

#### *A. Compensatory Damages Are Available For Intentional Violations Of Section 504 Where A Plaintiff Can Show That A Defendant Acted With "Deliberate Indifference"—That Is, It Knew That Harm To A Federally Protected Right Was Substantially Likely And Failed To Act On That Likelihood*

1. Congress enacted the Rehabilitation Act as a "comprehensive federal program," *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984), to promote, among other things, the integration and inclusion of individuals with disabilities into mainstream American society. See 29 U.S.C. 701. To that end, Section 504 of the 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(a). Department of Health and Human Services regulations implementing Section 504 prohibit a federal funding recipient from providing an individual with a disability “an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others” or “that is not as effective as that provided to others.” 45 C.F.R. 84.4(b)(1)(ii) and (iii). The regulations also prohibit a recipient from providing health services or benefits “in a manner that limits or has the effect of limiting the participation” of individuals with disabilities. 45 C.F.R. 84.52(a)(4).

Of particular salience to this case, funding recipients with 15 or more employees “shall provide appropriate auxiliary aids to persons with impaired sensory \* \* \* skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.” 45 C.F.R. 84.52(d)(1). “[A]uxiliary aids may include \* \* \* interpreters, and other aids[,] for persons with impaired hearing.” 45 C.F.R. 84.52(d)(3).

2. Courts, including this Court, have recognized an implied remedy for compensatory damages under Section 504 where a plaintiff can show that the defendant’s failure to provide him an equal opportunity to benefit from its services was intentional. See *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830-832 & n.9 (4th Cir. 1994). This Court has not yet articulated the standard for proving

intentional discrimination under Section 504. See *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 373 (D. Md. 2011). However, the majority of federal circuits that have addressed the issue have held that compensatory damages may be awarded if the federal funding recipient “intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.” *Ibid.* (quoting *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) and citing cases). “Deliberate indifference does not require a showing of personal ill will or animosity toward the disabled person,” but it “must be a deliberate choice, rather than negligence or bureaucratic inaction.” *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013) (citations and internal quotation marks omitted).<sup>3</sup>

The deliberate indifference standard is appropriate in this context, as it is consistent with the Rehabilitation Act’s broad remedial purposes. In *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court observed that, in passing the Act, Congress perceived discrimination against individuals with disabilities “to be most often the product, not of invidious animus, but rather of thoughtlessness and

---

<sup>3</sup> Based on decisions of other federal courts and prior decisions of the district court, see *Godbey v. Iredell Mem’l Hosp., Inc.*, No. 5:12-cv-4, 2013 WL 4494708, at \*7-8 (W.D.N.C. Aug. 19, 2013), *aff’d*, 578 F. App’x 317 (4th Cir. 2014), the parties agreed that deliberate indifference is the applicable standard. See Doc. 15, at 7 (Defs.’ Br. in Support of Mot. to Dismiss); Doc. 16, at 4 (Pl.’s Br. in Opp’n to Defs.’ Mot. to Dismiss).



indifference—of benign neglect.” *Id.* at 295. The Court further noted that federal agencies and commentators similarly found that such discrimination “is primarily the result of apathetic attitudes rather than affirmative animus.” *Id.* at 296.

Because the Act is “targeted to address more subtle forms of discrimination than merely obviously exclusionary conduct,” a showing of deliberate indifference as the basis for compensatory damages “will give meaning to [the Act’s] purpose to end systematic neglect.” *S.H.*, 729 F.3d at 264 (citation and internal quotation marks omitted).

Application of the deliberate indifference standard to Section 504 compensatory damages claims finds additional support in the Supreme Court’s decision in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), which adopted the standard for implied damages claims under the similarly worded Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The *Gebser* Court concluded that “deliberate indifference” was the appropriate standard following examination of Title IX’s purposes, contractual framework, and express remedial scheme. See *Gebser*, 524 U.S. at 286-291. Title IX prohibits sex discrimination in federally funded education programs and activities and, therefore, like Section 504 and Title VI of the Civil Rights Act of 1964 (the statute after which both Title IX and Section 504 were modeled), was designed to “avoid the use of federal resources to support discriminatory practices” and “to provide

individual citizens effective protection against those practices.” *Id.* at 286 (quoting *Cannon v. University of Chi.*, 441 U.S. 677, 704 (1979)).<sup>4</sup>

These statutes, which were enacted pursuant to Congress’s spending power, operate like “a contract between the Government and the recipient of funds,” because they “condition[] an offer of federal funding on a promise by the recipient not to discriminate.” *Gebser*, 524 U.S. at 286. And their administrative enforcement schemes are “limited by the twin requirements that the defendant-entity had actual notice that it was in violation of [the statute] and had an opportunity to rectify the violation.” *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012) (citing 20 U.S.C. 1682 and *Gebser*, 524 U.S. at 290); see also 29 U.S.C. 794a (incorporating by reference Title VI’s remedial scheme in Section 504). These notice-and-opportunity requirements “rough[ly] parallel,” and are “fully consonant with,” a deliberate indifference standard for implied remedies. *Liese*, 701 F.3d at 348 (quoting *Gebser*, 524 U.S. at 290). Given the “striking similarities” between the principal purposes, constitutional foundation, and express remedial schemes of Title IX, Title VI, and Section 504,

---

<sup>4</sup> Title IX provides in pertinent part that “[n]o person \* \* \* shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681(a).

“*Gebser*’s purpose-and-scope reasoning applies with similar force to [Section 504] and yields the same result.” *Liese*, 701 F.3d at 346-348.

3. The federal courts of appeals that have applied the deliberate indifference standard in Section 504 cases agree on what that standard requires. To establish a defendant’s deliberate indifference, “a plaintiff must show that [1] the defendant ‘knew that harm to a federally protected right was substantially likely’ and [2] ‘failed to act on that likelihood.’” *McCullum v. Orlando Reg’l Healthcare Sys., Inc.*, 768 F.3d 1135, 1147 (11th Cir. 2014) (quoting *Liese*, 701 F.3d at 344); accord *S.H.*, 729 F.3d at 265; *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275-276 (2d Cir. 2009); *Barber ex rel. Barber v. Colorado Dep’t of Revenue*, 562 F.3d 1222, 1228-1229 (10th Cir. 2009); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001). Accordingly, to state a compensatory damages claim for failure to provide an effective auxiliary aid, a plaintiff “must show that the defendants knew there was a substantial likelihood that they would be unable to communicate effectively with him absent [the requested aid] but still made a deliberate choice not to provide one.” *McCullum*, 768 F.3d at 1147-1148 (citation and internal quotation marks omitted).

*B. The District Court Erred In Holding That, To Show That Novant Possessed The Knowledge Required To Establish “Deliberate Indifference,” Basta Had To Show That The Hospital Had “Systemic And Pervasive Problems” With The Auxiliary Aids That It Provided To Deaf Individuals*

1. The district court dismissed Basta’s Section 504 claim for compensatory damages for failure to satisfy the first prong of the deliberate indifference standard, concluding that, because Basta had not alleged that Novant had “systemic and pervasive problems” with its VRI devices, he could not show that Novant “knew harm was substantially likely to occur sufficient to meet the deliberate indifference threshold.” J.A. 74. The court erred in focusing on Novant’s lack of widespread VRI issues, rather than on its knowledge of Basta’s need for an effective auxiliary aid for his hearing impairment.

“When the plaintiff has alerted the [defendant] to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the [defendant] is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test.” *Duvall*, 260 F.3d at 1139. Basta alleged that he alerted Novant before his visit of his need for an in-person ASL interpreter, pursuant to the hospital’s stated policy of providing free interpreter services to hearing impaired individuals, and that Novant reassured him upon his arrival at the hospital that it was looking for one. J.A. 10. The complaint further alleged that Novant instead provided Basta with two malfunctioning VRI machines, which prevented him from

effectively communicating with Novant staff and understanding what was going on throughout his wife's delivery of their child. J.A. 10-11. According to the complaint, Basta made repeated requests for an in-person interpreter during the rest of his wife's stay in the hospital, but Novant failed to provide him with an interpreter or any other effective auxiliary aid. J.A. 11-12.

These allegations sufficiently plead that Novant knew that harm to Basta's Section 504 rights was substantially likely to occur. Basta's initial request for an in-person ASL interpreter, before his arrival at Novant, put the hospital on notice that he was a hearing impaired individual who was entitled under Section 504 to an appropriate auxiliary aid for his disability. See 45 C.F.R. 84.4(b)(1)(ii) and (iii), 84.52(d)(1). Novant responded to Basta's request by providing him with two VRI machines, which would have satisfied its Section 504 obligations had the machines provided Basta with effective communication. See *Liese*, 701 F.3d at 343 (explaining that "the proper inquiry is whether the auxiliary aid that a hospital provided to [a] hearing-impaired [individual] gave that [individual] an equal opportunity to benefit from the hospital's treatment," not whether a hospital failed to provide a requested interpreter); 45 C.F.R. 84.52(d)(3) (stating that appropriate auxiliary aids may include aids apart from interpreters). These machines malfunctioned, however, leading Basta to reiterate his request for an in-person interpreter. These subsequent requests put Novant on notice that the VRI machines

were inadequate and that Basta *still* needed an interpreter or an effective alternative auxiliary aid to have an equal opportunity to benefit from the hospital's services. See *Loeffler*, 582 F.3d at 276 (holding that a reasonable jury could find the requisite knowledge for deliberate indifference where the plaintiffs made repeated attempts before and after surgery to secure an ASL interpreter from the hospital).

2. The cases cited by the district court do not compel a different conclusion. In *Sunderland v. Bethesda Hospital, Inc.*, 686 F. App'x 807 (11th Cir. 2017), nine deaf patients sought Section 504 compensatory damages from a hospital for its failure to provide them with requested interpretive aids to allow them to communicate effectively with hospital staff. *Id.* at 809. The Eleventh Circuit actually permitted five of the plaintiffs to proceed on their claims of deliberate indifference, because the nurses "were put on notice that the VRI was not accommodating the patients; and chose to persist in using the VRI without correcting its deficiencies." *Id.* at 816-817. To be sure, these plaintiffs had visited the hospital after hospital personnel became aware of a few prior instances in which the VRI previously malfunctioned. See *id.* at 810. But the Eleventh Circuit did not base its conclusion on the hospital personnel's "prior notice of the pervasive VRI failures," as the district court suggested. J.A. 73. Instead, the court of appeals focused on triable issues regarding the nurses' knowledge that each

patient's right to effective communication likely would be violated by their use of poorly functioning VRI machines. *Sunderland*, 686 F. App'x at 817-818.

Similarly, in *Bax v. Doctors Medical Center of Modesto, Inc.*, 393 F. Supp. 3d 1000 (E.D. Cal. 2019), a deaf plaintiff sought Section 504 compensatory damages from a healthcare facility, alleging that it failed to provide him with a requested interpreter during two separate visits and instead provided him with ineffective auxiliary aids. *Id.* at 1004, 1006. The district court denied the defendant's motion for summary judgment, concluding that the evidence of the plaintiff "contemporaneously" complaining about the "insufficiency of the accommodations provided to him" presented a triable issue of fact regarding whether the hospital staff knew that there was a substantial likelihood that his rights would be violated. *Id.* at 1013-1015. The court based this finding on the evidence of the plaintiff's complaints, not on the number of times he visited the hospital.<sup>5</sup>

Finally, in *Esparza v. University Medical Center Management Corp.*, No. 17-cv-4803, 2017 WL 4791185 (W.D. La. Oct. 24, 2017), the district court denied

---

<sup>5</sup> So too in *Giterman v. Pocono Medical Center*, 361 F. Supp. 3d 392 (M.D. Pa. 2019), where the district court based its finding of a triable issue of deliberate indifference not on the defendants' technical difficulties with their VRI machines over the plaintiff's separate visits, but on the plaintiff's testimony that she requested live interpreters when she did not fully understand hospital staff and evidence that the defendants failed to provide her with appropriate auxiliary aids. *Id.* at 411-413.

a hospital's motion to dismiss a plaintiff's complaint for Section 504 compensatory damages alleging that, on several occasions, the hospital refused her request for an in-person ASL interpreter, instead providing her with a "heavily pixilated" and ineffective VRI machine and forcing her to rely on alternative means of communication that were inadequate. *Id.* at \*1-2 (citation omitted), \*17-18.<sup>6</sup> Like the *Bax* court, the *Esparza* court based its decision on the hospital's knowledge of the inadequacy of the auxiliary aids that it provided to the plaintiff, not on problems with the VRI machine throughout numerous hospital visits, as the district court mistakenly implied was the basis for the decision. J.A. 73-74.

3. Additional cases beyond those cited by the parties and the district court reinforce the conclusion that the proper focus of the first prong of the deliberate indifference standard is the defendant's knowledge of the plaintiff's need for an effective auxiliary aid for a hearing impairment. In *Tokmenko v. MetroHealth System*, 488 F. Supp. 3d 571 (N.D. Ohio 2020), a deaf plaintiff sought Section 504 compensatory damages from a hospital, alleging that it knew of her preference for ASL to communicate, but instead provided alternative means of communication—writing messages, a VRI, and using relatives as interpreters—that were ineffective. *Id.* at 575. The district court denied the hospital's motion for summary judgment,

---

<sup>6</sup> This decision amended and superseded the September 5, 2017 decision that the district court cited. The analysis of the plaintiff's Section 504 compensatory damages claim is the same in both decisions.



finding a triable issue based on the plaintiff's evidence that the hospital had notice of her need for an accommodation, that her vocabulary and grammar skills are considerably better when she uses ASL to communicate, and that the hospital's actions, services, and auxiliary aids resulted in ineffective communication between the plaintiff and its medical providers. *Id.* at 581; see also *Fantasia v. Montefiore New Rochelle*, No. 19-cv-11054, 2022 WL 294078, at \*7 (S.D.N.Y. Feb. 1, 2022) (finding triable issue on knowledge prong where deaf plaintiff and her daughter testified that they requested an interpreter from multiple hospital staff but none was provided); *Mullen v. South Denver Rehab., LLC*, No. 18-cv-01552, 2020 WL 2557501, at \*15-17 (D. Colo. May 20, 2020) (finding triable issue on knowledge prong where deaf plaintiff presented sufficient evidence that both owner and operator of medical services provider knew she needed a full-time ASL interpreter).

And in *Luckey v. St. Luke's Cornwall Hospital*, No. 20-cv-1161, 2021 WL 4124840 (S.D.N.Y. Sept. 9, 2021), a deaf plaintiff sought Section 504 compensatory damages from a hospital, alleging that its failure to provide her with either a requested ASL interpreter or functioning VRI machine over her two-week hospitalization prevented her from communicating effectively with medical providers regarding her diagnosis and treatment. *Id.* at \*1-2. The district court denied the hospital's motion to dismiss, concluding that the plaintiff's allegations

that the hospital's medical staff were aware that the hospital's ability to communicate with her without an interpreter "was so compromised that it disrupted [the hospital's] ability to provide ideal medical services" established the requisite knowledge for deliberate indifference. *Id.* at \*6.

4. In short, the district court erred in requiring that Basta allege that Novant had "systemic and pervasive problems" with its VRI devices to survive a motion to dismiss. While a history of VRI devices malfunctioning over multiple past visits by Basta or other deaf individuals would suffice to put Novant on notice that providing such a device to a deaf patient or family member would not ensure effective communication, see, e.g., *Silva v. Baptist Health S. Fla., Inc.*, 838 F. App'x 376, 382 (11th Cir. 2020), such a history is not necessary. As the cases discussed above make clear, the first prong of the deliberate indifference standard requires only that Basta set forth allegations sufficiently pleading that Novant knew that harm to Basta's Section 504 rights was substantially likely to occur if it did not provide Basta with an ASL interpreter or an effective alternative auxiliary aid. Basta's allegations—(1) that he requested an in-person ASL interpreter before arriving at Novant, (2) that the hospital instead provided him with two VRI machines that were inadequate to allow him to communicate effectively during the delivery process, and (3) that he made repeated requests for an in-person

interpreter for the remainder of his wife’s hospital stay—sufficiently plead the requisite knowledge.

*C. Basta’s Complaint Sufficiently Alleged That Novant Failed To Act On Its Knowledge That Basta Needed An Effective Auxiliary Aid*

Because the district court erroneously concluded that Basta was required to allege Novant had systemic and pervasive problems with its VRI machines to show that it knew that harm to Basta’s Section 504 rights was substantially likely to occur, it did not address the second prong of the deliberate indifference standard—whether Novant failed to act. Should the Court vacate and remand, it would be appropriate to provide some guidance on this issue to the district court, as follows.

“[I]n order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness.” *Duvall*, 260 F.3d at 1139; accord *Loeffler*, 582 F.3d at 276; *Barber*, 562 F.3d at 1229. A plaintiff’s burden is light on a motion to dismiss, however, and a complaint need only “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). In other words, a complaint need only “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ibid*.

Here, Basta's complaint alleged that, after the hospital provided two malfunctioning VRI machines in the delivery room that prevented him from communicating effectively with hospital staff, he repeatedly requested in-person ASL interpreter services for the rest of his wife's hospital stay, but Novant failed to provide him with an interpreter or an effective alternative auxiliary aid. J.A. 11-12. Accepted as true, this factual allegation states a claim that Novant deliberately failed to provide Basta with an auxiliary aid that would give him an equal opportunity to benefit from the hospital's services. See *Crane v. Lifemark Hosps., Inc.*, 898 F.3d 1130, 1133, 1136 (11th Cir. 2018) (concluding that a patient presented sufficient evidence of deliberate indifference to withstand summary judgment when he was not provided an interpreter despite "repeatedly ask[ing] for [one] throughout his entire hospital stay" and was unable to understand the medical evaluation process using written notes); *Loeffler*, 582 F.3d at 276-277 (holding that a reasonable jury could find deliberateness where the plaintiffs' numerous requests for an ASL interpreter and another auxiliary aid were ignored by hospital officials and one demand for an interpreter was "laughed off" by the patient's doctor).<sup>7</sup>

---

<sup>7</sup> The United States takes no position on the ultimate merits of Basta's claim.

## CONCLUSION

The Court should reverse the district court's order and remand for further proceedings.

Respectfully submitted,

KRISTEN CLARKE

Assistant Attorney General

s/ Christopher C. Wang

TOVAH R. CALDERON

CHRISTOPHER C. WANG

Attorneys

Department of Justice

Civil Rights Division

Appellate Section

Ben Franklin Station

P.O. Box 14403

Washington, D.C. 20044-4403

(202) 514-9115

## **CERTIFICATE OF COMPLIANCE**

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 5,047 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney

Date: February 25, 2022

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL with the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system and filed with the court four paper copies of the same. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney