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EXPERT OPINION

Persons Who are Deaf-blind Need a Seat at the Legal Table

Daniel Pollack and Elisa Reiter | February 16, 2022

We have all heard about Helen Keller, who, when she was only 19 months old, contracted an illness that left her deaf, blind, and mute. Quite likely, few of us have ever interacted with someone who is both deaf and blind. As a young adult, I (D.P.) had the opportunity to spend five summers working at a camp for adults who were blind. A subgroup of

the campers was both deaf and blind, a/k/a "deafblind." Recollections of going fishing and bowling with these individuals — and many other memories — are still fresh, and in part, the motivation for this article.

The data

The National Center for Deaf-Blindness provides information helpful to families as well as information regarding current events, and national and state initiatives. The World Federation of the Deafblind (WFDB) has just concluded a Global Survey on the Situation of Persons with Deafblindness. According to the 2019 National Deaf-Blind Child Count Report, "The total December 1, 2019 point-in-time deaf-blind "snap shot" count of 10,627 is an increase of 723 from the 2018 total of 9,904." It adds that "the age group distribution has remained relatively stable over the past five years":

Birth through 2 – 571 (2015) to 658 (2019)

3 through 5 – 1,160 (2015) to 1,299 (2019)

6 through 17 – 6,277 (2015) to 6,757 (2019)

18 and older – 1,566 (2015) to 1,913 (2019)

The unfortunate fact is that while there are many individuals and groups who are left underserved by society, the deaf-blind population is certainly one of the most underserved. Aside from its obviously small size, one key reason for this is that the population has hard-wired difficulty speaking for itself. This is particularly evident in the legal realm. In an informal search of recent (2020 to the present) cases, only

two involved plaintiffs who were deaf-blind. These cases are briefly summarized below.

Two recent cases

In Melton v. Cal. Dep't. Of Developmental Disabilities, plaintiff Selena Melton, by and through her guardian ad litem, Beverly Cannon Mosier, filed suit against defendant California Department of Developmental Services ("DDS"), Regional Residential Care Center #3 ("Arleen's") and Regional Center of the East Bay, Inc. ("RCEB"). The suit alleged that the defendants violated Federal and state antidiscrimination laws by placing Ms. Melton in a group home that lacked effective communication aids. Motions to dismiss were filed by all three defendants, arguing a lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) for failure to state a claim as required by Federal Rule of Civil Procedure 12(b)(6). Ms. Melton presented as a 52-year-old woman who is deaf-blind, with:

1. Mild intellectual disability,
2. Mild cerebral palsy,
3. Epilepsy, and
4. Anxiety.

Deaf since birth, and blind since 2010, Ms. Melton uses Tactile American Sign Language, or "ASL" to communicate. As noted in the case, "Tactile ASL is a language in which the receiver places their hands lightly over the signer's hands to interpret the signs through touch and movement." In light of her disabilities, Ms. Melton had been receiving services through DDS, through California Services Lanterman Act, California Welfare & Institutions Code, Section 4500 et seq.

Services are rendered under the foregoing statutes whereby DDS contracts with nonprofits to establish a network throughout California of regional centers. Those regional centers are in turn responsible for "determining eligibility, assessing needs, and coordinating the delivery of services for developmentally disabled persons (referred to in the statutes as 'consumers')." If and when a regional center concludes that an individual has a developmental disability, a planning team meets to coordinate services. The planning team consists of the disabled individual, that person's parents or guardian, one or more of the regional center's representatives, and any other person who may be included as a participant; the planning team then drafts an individual program plan for the disabled person.

The goal is for the individual program plan to "maximize opportunities for the individual to be part of community life, enjoy increased control over his or her life, acquire positive roles in community life, and develop the skills to accomplish the foregoing." Ms. Melton had been a client for approximately 50 years. Prior to being placed with Arleen's, the administrator of the home where Ms. Melton had previously been placed recommended that Ms. Melton be placed at a home where staff could communicate using ASL. In addition, the administrator in Ms. Melton's prior placement also requested that Ms. Melton have a placement where there were other residents who were deaf and who could sign. Despite these recommendations, Ms. Melton was placed at Arleen's, where no staff member could communicate using ASL, nor did any of the staff have training in dealing with a consumer who was deaf-blind. Given the foregoing, Ms. Melton's suit noted that her current placement was one that kept her in almost complete isolation, thereby violating her rights,

and "causing her physical and mental pain and severe emotional distress" for decades. Ms. Melton sought injunctive relief and damages.

"Federal courts are courts of limited jurisdiction. . .[and] it is to be presumed that a cause lies outside of this limited jurisdiction." Under a facial attack, the court determines whether the allegations are sufficient to invoke the court's jurisdiction, presuming that the plaintiff's allegations are true. Under a factual attack, defendants contest the truth of the plaintiff's assertions. Here, Ms. Melton, as a plaintiff, bore the burden of proving her case by a preponderance of the evidence. California's Lanterman Act provides that issues pertaining to the rights of disabled individuals who receive services pursuant to the act shall be decided pursuant to the statute. The Lanterman Act sets out an administrative procedure for those dissatisfied with the actions or services of an agency, through a fair hearing process. In addition, the Lanterman Act sets out a means of informal meetings to resolve issues prior to such an administrative hearing. While the parties are bound by the administrative decision, either side may appeal the decision "to a court of competent jurisdiction."

Melton's pleadings argue that there have been two types of discrimination: 1. That RCEB placed her in Arleen's group home which had neither a trained staff member nor an interpreter trained to provide services to someone deaf-blind, and 2. That RCEB and DDS "lack policies reflecting their obligation to provide effective communication."

The defendants moved to dismiss Melton's complaint in its entirety. As the court held that Melton failed to exhaust her administrative remedies, the case was dismissed without prejudice. However, the Court notes

in *dicta* that because it is dubious that amending pleadings can "cure the jurisdictional defect of these claims against RCEB and Arleen's, it will allow plaintiff an opportunity to amend such claims against the systematic failure to accommodate the communication needs of deaf clients." Here, the court notes that there seems to be a lapse of policy, much needed to accommodate those who might assert claims such as Melton's. The court goes on to note that if administrative efforts are unsuccessful, that it will be incumbent upon DDS to "issue a letter of noncompliant activities and establishing a specific timeline for the development of a corrective action plan."

Regarding Melton's claims tied to violations of the ADA as to systematic violations of her rights as a disabled person, the court finds that "plaintiff must show that she was excluded from participating in or denied the benefits of a program's services or otherwise discriminated against." There must be a showing of discriminatory intent. In other words, the agency's failure to act must be related to something more than mere negligence, but "involve an element of deliberateness." The defendants' motion for dismissal is granted; however, plaintiff is afforded the opportunity to cure the factual defects in her pleadings. The court grants Ms. Melton "leave to plead a theory that exempts her from the Lanterman Act's hearing process."

In Am. Council of the Blind of N.Y., Inc. v. City of New York, the court granted a summary judgment for the plaintiffs in a class action suit brought against the City of New York, Mayor Bill de Blasio, the New York City Department of Transportation ("DOT") and the DOT Commissioner. Summary judgment was granted on October 20, 2020. Thereafter, the Court sets out its rulings "as to the remedy necessary to bring the City

into prompt compliance" with the ADA as to Accessible Pedestrian Signal devices (APS). How many intersections require APS devices? There are 13,200 signalized intersections that should have both "Walk" and "Don't Walk" signals, as well as APS information in non-visual formats. What action is to be taken? By 2031, the Court rules that the City must install at least 10,000 of the APS devices at signalized intersections, which translates to at least 9,000 such devices being installed over the next nine years, with all of such intersections having APS signals installed no later than 2036. In the event that the defendants can show prior to 2036 that the Court's directive has been fulfilled, the defendants can move to adjourn the latter deadline. How? By showing that by the time that the defendants move for adjournment that New York City's "pedestrian grid has by then become meaningfully accessible to the blind and visually impaired."

Two cases. In each case, the respective courts strive to assure the accommodation of the plaintiffs. In one case, the focus is primarily on one plaintiff. In the other case, the focus is on not only the plaintiff(s), but on their city. "New York City has the highest population density of any major American city. Walking 'is a major form of transportation in the city, and access to sidewalks is an important component of city life.'" In each case, a court's reach is extended to assure equal protection.

Courts, lawyers, and other potential players must be reminded that equal justice for all is a basic doctrine. This core principle is assured for persons with disabilities in Section 504 of the Rehabilitation Act of 1973, as well as in Title II of the Americans with Disabilities Act of 1990. These laws protect parents, prospective parents, and children with disabilities from unlawful discrimination in regard to child welfare programs,

activities, the ability to present to a court as a litigant, and services to be provided through the court.

Conclusion

After centuries of neglect, the voices of the deaf-blind population need to be heard. Society in general, and the legal profession in particular, must be committed to empowering persons who are deaf-blind. It's time to make room at the legal table. Pull up a chair.

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