IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01814-ODS-MJW

DEBBIE ULIBARRI, *et al.*,

Plaintiffs,

v.

CITY & COUNTY OF DENVER,

Defendant.

PLAINTIFFS' REPLY SUGGESTIONS
CONCERNING STANDING AND MOOTNESS

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INTRODUCTION

Plaintiffs, by and through their counsel, hereby submit their Reply Suggestions Concerning Standing and Mootness.

Plaintiffs' claims for injunctive relief are not moot because Defendant City and County of Denver ("the City") cannot satisfy its heavy burden of persuading the Court that its Americans with Disabilities Act and Rehabilitation Act violations will not recur. Specifically:

- Many of the policies the City points to are either not new or represent only superficial changes;
- The City presents no evidence of policy change concerning detainees with diabetes or with respect to the Denver Police Department and very little at the Denver County Jail;
- Crucially, there has been no improvement in training despite the fact that officers were not aware even of existing policies at the time of the challenged violations.

For these and other reasons, it is likely that deaf arrestees and detainees -- including members of the Colorado Cross-Disability Coalition ("CCDC") and the Colorado Association of the Deaf ("CAD") -- will continue to be denied effective communication during encounters with the Denver Police Department ("DPD") and Denver Sheriff Department ("DSD"), and that the City will thus continue to violate the Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. ("ADA"), and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehab Act").

Defendant's Corrected Response to Suggestion re: Organizational and Associational Standing ("City's Response"), ECF 417, offers no meritorious rebuttal to Plaintiffs'

demonstration that CCDC and CAD (collectively the "Organizational Plaintiffs") have standing. The City demands Plaintiffs produce evidence to support associational standing, which evidence is submitted herewith. And it relies on a single, long-rejected, district court case on organizational standing that cannot rebut the many, more recent, circuit and district court cases on which Plaintiffs rely.

For the reasons set forth below, Plaintiffs respectfully request that this Court overrule the arguments in the City's Response and hold that the Organizational Plaintiffs have standing and that their claims for injunctive relief are not moot.

FACTS

1. Roger Krebs has been a member of CCDC since on or before September 21, 2007. Declaration of Julie Reiskin in Support of Plaintiffs' Reply Suggestions Concerning Standing and Mootness ("Second Reiskin Decl.") ¶ 4.

2. Sarah Burke has been a member of CCDC since on or before January 25, 2008. *Id.* ¶ 5.

3. Major Jon Michael Scott has been a member of CCDC since on or before February 17, 2012. *Id.* ¶ 6.

4. Roger Krebs is currently a member of the CAD and has been since August, 2006. Declaration of Jennifer Pfau in Support of Plaintiffs' Reply Suggestions Concerning Standing and Mootness ("Second Pfau Decl.") ¶ 3.

5. Sarah Burke is currently a member of CAD and has been since September, 2007. *Id.*

6. Major Jon Michael Scott is currently a member of CAD and has been since earlier this year. *Id.*

7. On or about February 16, 2009, Sarah Burke was ticketed by the DPD for shoplifting. The DPD did not provide an interpreter, and simply gave her a ticket. They did talk verbally to her but she did not understand. She did not have an opportunity to ask questions, and did not understand what was happening. Declaration of Sarah Burke in Support of Plaintiffs' Reply Suggestions Concerning Standing and Mootness ("Burke Decl.") ¶ 2.

8. On or about May 11, 2009, a warrant was issued for Ms. Burke's failure to appear because she did not pay the required fine. She did not understand that she needed to go to court because she was unable to communicate with the police officer. *Id.* ¶ 3.

9. The warrant was in place for approximately ten months until she paid the fine in March of 2010. *Id.* ¶ 4.

10. The chain of events that led to Ms. Burke's arrest in August, 2007 started with a request from an anonymous person that the police perform a welfare check on her children. She believes it was her husband's ex-wife or ex-girlfriend who requested this welfare check. Whether or not this is the case, the only thing the individual had to do to cause the police to come to her door and spend several hours inspecting her house and interviewing her children and neighbors was to express concern -- whether or not justified -- that her children's welfare was in jeopardy. *Id.* ¶ 5.

11. Ms. Burke believes it is likely that this same person may, in the future, ask the police to perform a welfare check. This not because her children's welfare is in jeopardy, but because this is a way that this person has chosen to antagonize her and her husband. That is, the

police could conduct a welfare check at any time, regardless of any action that Ms. Burke might or might not take. *Id.* ¶ 6.

12. At the end of the welfare check in August, 2007, the police discovered that Ms. Burke had an outstanding warrant for failure to appear. They arrested her based on that warrant. Since that time, she has had another warrant for failure to appear in connection with the shoplifting ticket described above. It did not result in an arrest because she arranged to pay the fine. *Id.* ¶ 7.

13. Ms. Burke hopes that she will not have future warrants for failure to appear, but because of the lack of effective communication, she often does not understand where she is supposed to appear in response to instructions from law enforcement. As such, it is likely that she will, in the future, face additional warrants for failure to appear and future arrest. *Id.* ¶ 8.

14. Jennifer Pfau, the past president of CAD, has worked as an advocate with the disability community. In that capacity, she has received complaints from deaf parents who were subjected to "welfare checks" by police or social services in response to calls made by their families or "concerned" friends. These parents explained to her their frustration in communicating with law enforcement and social services during these welfare checks. This often created difficulties for the deaf parents to communicate and request effective communication, and as a result, the situation between the deaf parents and law enforcement or social services would escalate. Second Pfau Decl. ¶ 4.

15. It is Ms. Pfau's observation, as an advocate in the Deaf community, that when deaf individuals are involved in family disputes, it is not uncommon for their family members to contact law enforcement to conduct a welfare check, knowing that deaf individuals have limited access to

communication and that law enforcement has limited knowledge how to interact or communicate with deaf individuals. This has created unnecessary arrests due to the misunderstanding between both parties. *Id.* ¶ 6.

16. Deaf people are overrepresented in jails and prisons. One reason is that they did not understand the process that led to their imprisonment nor were they able to participate in their trial proceedings. Supplemental Andrews Report at 1.[1]

17. Major Jon Michael Scott is deaf and primarily communicates with American Sign Language ("ASL"). Declaration of Major Jon Michael Scott in Support of Plaintiffs' Reply Suggestions Concerning Standing and Mootness ("Scott Decl.") ¶ 2.

18. Mr. Scott is the plaintiff in the case of *Scott v. City and County of Denver*, 12-cv-00053-MSK-BNB. He alleges that the City failed to provide effective communication on a number of occasions while he was in detention. Declaration of Caitlin R. Anderson in Support of Plaintiffs' Reply Suggestions Concerning Standing and Mootness ("Anderson Decl.") Ex. 1 (Complaint in *Scott*).

19. English and ASL are very different languages. Scott Decl. ¶ 2.

20. Mr. Scott has only a limited ability to read and understand English. In order to effectively communicate in situations involving medical or legal information, decision making, or more than very simple language, he requires the services of a qualified sign language interpreter. *Id.* ¶¶ 2-3.

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[1] Dr. Jean Andrews is Plaintiffs' expert on deaf communications. Her original 2008 report is attached as Exhibit 1 to the Declaration of Jean Andrews in Support of Plaintiffs' Reply Suggestions Concerning Standing and Mootness ("Andrews Decl."). Her Supplemental Report, disclosed contemporaneously with this brief, is Exhibit 2 to her declaration.

21. Mr. Scott is not able to read lips well at all. Very occasionally, on simple subjects, he can read lips after asking people to repeat themselves many times. He cannot read lips for complex subjects or stressful situations. *Id.* ¶ 4.

22. In 2007, Mr. Scott was convicted for burglary. By 2010, he was on probation. *Id.* ¶ 5.

23. Mr. Scott has been arrested and detained by the City on numerous occasions since that time as well. Anderson Decl. Ex. 2 at 1-2 (City's interrogatory responses in the *Scott* case). On a number of those occasions, Mr. Scott was not provided a sign language interpreter. *Id.* at 1-4.

24. To provide just one example, on or about October 20, 2010, Mr. Scott was arrested for violation of probation. Scott Decl. ¶ 6.

25. On or about October 21, 2010, he was subjected to an intake interview and health screening. He was not provided with a sign language interpreter for any part of the intake or health screening process. *Id.* ¶ 7; *see also* Anderson Decl. Ex. 2 at 1, 4 (City's interrogatory responses in the *Scott* case stating that he was detained from October 21, 2010 through May 9, 2011, but was not provided a sign language interpreter at any time during the months of October, November or December, 2010).

26. Mr. Scott signed the Denver Sheriff Department General Inmate Information form but does not understand very much of the language in that form. It was never interpreted for him. Scott Decl. ¶ 8 & Ex. 1.

27. He does not believe he was provided a copy of the Denver County Jail Inmate Handbook while he was in custody of the City and County of Denver. He has since reviewed a

copy of the Denver County Jail Inmate Handbook, but did not understand much of the language in it. He was never provided general information about the Jail -- like the information in the handbook -- in sign language. *Id.* ¶¶ 9-10.

28. He does not understand much of the language in the Denver Sheriff Department Health Services Questionnaire; it was never interpreted for him. *Id.* ¶ 11.

29. Mr. Scott's Denver Sheriff Department Health Services Questionnaire, dated October 21, 2010, states "Inmate is deaf with hearing aids -- is difficult to understand. Reads lips. Has wound to left knee ... and states that he has 2 different meds for this that are in his property. Not able to understand where he gets his meds. . . . Is housed separately due to deafness." Scott Decl. Ex. 2 at DENVER000146.

30. Mr. Scott signed the Intake Pre-Class Questionnaire but does not understand much of the language in that form. It was never interpreted for him. *Id.* ¶ 12 & Ex. 3.

31. The City's interrogatory responses also indicate that Mr. Scott was detained in October, 2011, but was not provided a sign language interpreter. Anderson Decl. Ex. 2 at 1, 4.

32. The Prisoner Intake Form that the City represents as relating to Mr. Scott's October, 2010, detention, contains only two words: his middle name "Jon;" and the word "Deaf." Anderson Decl. Ex. 4.

33. A "Treatment Plan" completed on November 11, 2010, states incorrectly that Mr. Scott reads lips. Anderson Decl. Ex. 5. No interpreter was provided for this medical appointment. *See id.* Ex. 2 at 4 (no entry for interpreter on that date).

34. The City's Response references a number of exhibits that are supposed to represent new measures relating to communications with deaf inmates. None of the documents in the exhibits had been previously produced in discovery. Anderson Decl. ¶ 19.

35. Plaintiffs' expert Jean Andrews is of the opinion that the DSD's policies and training as set forth in the City's Response and its exhibits are inadequate. Supplemental Andrews Report at 5-9.

36. Many of the measures that the City lists as new were in fact already in place when the violations alleged in the Second Amended and Supplemental Complaint ("SASC"), ECF 48, occurred. For example:

a. The City's Response asserts that it has an office of sign language services headed by Lorrie Kosinski. *Id.* at 14. Ms. Kosinski has been employed by the City since 1987. Kosinski Dep. 11:23-25.[2]

b. The City's Response makes clear that the availability of sign language interpreters and TDDs has been unchanged since before the events in the SASC. *Id.* at 14-16, 25, Ex. 4-9; *see also* Defendant's Mot. for Summ. J. ("MSJ"), ECF 197 at 11, 20 (TDDs have been available at the Denver County Jail ("DCJ") since before 2005).

c. The City's Response asserts that all TV sets at the Downtown Detention Center ("DDC") and DCJ have closed captioning. *Id.* at 16. In its Motion

[2] All deposition excerpts are attached to the Anderson Declaration.

for Summary Judgment, it asserted that "[a]ll television sets within the Denver County Jail have closed caption capabilities." MSJ at 31.

d. While the City has not previously produced the "Vital Signs" poster or brochure, City's Response Ex. 3-2, Ms. Kosinski testified that she previously provided trainees with "an ABC card or an 8-and-a-half-by-11 of the ABCs and numbers, some general signs." Kosinski Dep. 17:7-19. The brochure attached as Exhibit 3-4 to the City's Response is very similar to one previously produced by the City. *See* Anderson Dec. Ex. 15. When Ms. Kosinski was deposed in 2009, she testified that her "training has been basically the same over the years." Koskinski Dep. 20:20-23. Dr. Andrews is of the opinion that these posters are limiting and may in fact be misleading because they do not address the seriousness of the situation that a deaf inmate face in needing a certified sign language interpreter. Supplemental Andrews Report at 6.

e. The call-out sheet attached to the City's Response is virtually identical to the one that has been in use throughout the relevant time period. *Compare id.* Ex. 3-13 *with* Affidavit of Lorrie Kosinski, Ex. 3, ECF 197-7, at ULIBARRI000866.

f. The City's Response discusses the Administrative Review Board process. It is clear that it has not changed since Mr. Vigil attempted unsuccessfully to appear before the ARB. *Compare* City's Response at 26 with MSJ at 13. Specifically, even in this recent brief -- arguing for mootness -- it is not

clear how a deaf inmate would access a sign language intepreter to either request or appear before the ARB.

37. The City's Response asserts that "[u]pon entering the facility, each inmate is provided an Inmate Handbook in either English or Spanish." *Id.* at 18-19, Exs. 4-6, 4-7. This has been the case since before Shawn Vigil was booked in. MSJ at 9. The Inmate Handbook will not constitute effective communication for most deaf people because, as Dr. Andrews has analyzed, it is written at a college level, whereas most deaf people read at an elementary school level. Report for Shawn Vigil ("Andrews Report") at 6-7 (assessing the reading level of the 2004 and 2007 handbooks at grade levels 18.4 and 15.6, respectively, and opining that "Among the prelingually profoundly deaf population similar to Mr. Vigil, the median reading level for seventeen and eighteen year olds is grade four. Thirty percent of deaf students leave school functionally illiterate, reading at the 2.8 reading grade level and below."); *see also* Andrews Dep. 74:21-25.

38. With its brief, the City presents a new version of the Inmate Handbook, which includes new material concerning the availability of TDDs and videophones. City's Response, Ex. 4-6 at 15 (page 24 of the handbook). Nowhere does the new handbook explain the availability of sign language interpreters, and nothing has been done to adjust the reading level. Dr. Andrews's Supplemental Report concludes that the 2010 Inmate Handbook is written at the 12th grade level. Supplemental Andrews Report at 2. Most deaf adults seldom go beyond the third to fourth grade level in reading. *Id.* at 4.

39. Ms. Kosinski testified that the best way to make the handbook accessible to people who are culturally deaf would be to "have it explained to them through a sign language

interpreter." Kosinski Dep. 27:12-20. There is no evidence that this is done, and the single DVD produced by the City does not cover the topics in the Handbook. City's Response Ex. 3-12.

40. Although the City's Response says, "Deaf inmates have the same access to special phones that hearing inmates have to regular phones," City's Response at 14, the Handbook makes clear that ordinary phones are turned on for inmate use from 9:00 a.m. through 10:00 p.m., *id.*, Ex. 4-6 at 23, but "TDD machines are available upon request" and deaf inmates must contact a supervisor to use either a TDD or video phone, *id.* at 24; *see also* City's Response at 15 (deaf inmates can request access to videophones by writing a note, writing a "kite," or "mak[ing] a common gesture indicating talking on a phone").

41. In 2007, the sign language interpreter policy read as follows: "All inmates identified as being hearing impaired will be asked what means of communication they prefer (i.e. lip reading, written notes, sign language (ASL)) upon book-in by the classification department. If an inmate prefers ASL, he/she will be informed that a Sign Language Interpreter is available and requires a 72-hour advance notice for an appointment." Foos Dep. Ex. 31; *see also* Foos Dep. at 195:11 - 196:4.

42. The current policy reads as follows: "Upon book-in at the Detention Center, Inmates identified as being deaf or hard of hearing shall be asked by the book-in officer as to their preferred means of communication. This preference shall be documented in the comment field of the JMS [jail management system software]. If the communication is by sign language, the inmate shall be informed that a sign language interpreter is available upon request. In the event that an Inmate requests an interpreter, the officer shall immediately call to schedule an interpreter to assist in the communication process." City's Response Ex. 4-10 at 001806-07.

43. The latter policy is set forth in the Procedure Manual for the Downtown Detention Center in the section on "Inmates with Disabilities." *Id.* It is not, however, part of the DSD's Department Order on Inmate Intake/Booking. Anderson Decl. Ex. 3.

44. Although the requirement that an interpreter be provided upon request during book-in appears to be a new part of the City's policy, *see, e.g.,* City's Response at 15, 18, 22, the impact of this written policy is qualified considerably by the fact that the intake officer is to call an interpreter "unless the intake officer feels he/she is communicating satisfactorily with the deaf prisoner." City's Response at 18; Kosinski Aff. ¶ 12(e)(4) (same). Thus, it is still discretionary with the intake officer to decide when effective communication is taking place.

45. This will almost certainly guarantee that, in many cases, interpreters and thus effective communication will not be provided. Deaf adults will often nod in agreement and smile without really understanding what is being asked of them. Supplemental Andrews Report at 6; *see also* Andrews Dep. 19:20 - 20:4 (in the context of training attorneys who work with deaf people, "when a deaf person is asked a question and they smile and they nod, that they understand, and many deaf people will do this in anxiety situations, so an attorney should be trained to know that they should ask the -- he or she should ask the deaf person to paraphrase back the question that's asked to make sure there's comprehension when they talk about their case.").

46. For example, when Plaintiff Sarah Burke was arrested by the DPD, "Officer Merino believed that he had effective communication with" her. MSJ at 27, Merino Dep. 37:11-23. Ms. Burke, however, testified that she did not understand the officers who came to her house and arrested her. Burke Dep. 28:5 - 30:21.

47. The City does not provide evidence of whether or how interpreters would be available for other significant events, such as meetings with case managers or nurses, classes and programs, or religious services. It is essential that qualified interpreters be available for such events. Supplemental Andrews Report at 7.

48. Although the City touts its assertion that it tracks deaf inmates by placing an "alert" in the inmate's computerized file, City's Response at 19, it directly contradicted this assertion in related litigation.

49. In the *Scott* case, Mr. Scott propounded an interrogatory requesting the identity of "all individuals who are deaf or hard of hearing who have been arrested or detained by the City from 2005 to the present." Anderson Dec. Ex. 2 at 5.

50. The City responded that "neither DSD's nor DPD's computer systems are designed to track encounters with deaf or hard of hearing arrestees or inmates. As such, at this time, Defendant has not identified any reasonably efficient, effective or accurate method to obtain the information responsive to" the interrogatory in question. *Id.* at 6.

51. That is, the City asserts in support of mootness in this case that it tracks all deaf inmates, while asserting in *Scott* that it does no such thing.

52. Similarly, although the City asserts that it established a "deaf advocate" program in 2009-2010 and that each deaf advocate completes a checklist and prepares a report and returns them to the City after visiting an inmate, City's Response at 19-22, the City has not produced either a checklist or a report for any of Mr. Scott's four periods of detention in 2010 and 2011. Anderson Decl. ¶ 8. Mr. Scott's requests for production included one asking for "[a]ll documents relating to Plaintiff Scott." Anderson Decl. Ex. 2 at 14.

53. Although Ms. Kosinski claims to have "updated the Power Point presentation she makes to DSD recruits at the DSD training academy," City's Response at 17 & Ex. 3-5, in fact she added only two slides, *compare* Kosinski Dep. 16:18 - 17:2, Ex. 34 (earlier version of PowerPoint slides) *with* City's Response, Ex. 3-5 (pages 001714 & 001730 are new). The new slides do not relate to the requirement or timing of providing a sign language interpreter. *Id.*

54. Dr. Andrews is of the opinion that the PowerPoint shows good intentions but it does not provide adequate, accurate and in-depth professional training for jail officials. It does not address

a. the safety issues of being in prison and having no one to communicate with;

b. the mental health issues of being lonely and isolated in prison and having no other inmates or guards to communicate with because they do not know sign language;

c. the literacy issues that a deaf inmate faces in not being able to fill out a "kite," or a commissary request, to read the posted notes on the walls, or to hear the loudspeaker announcements;

d. the issue that the prison environment is primarily an auditory environment that depends on loudspeaker announcements, verbal commands of guards, buzzers and closing doors, and conversations between inmates and guards all of which exclude the deaf inmate who lives in a visual world;

e. that most deaf inmates often do not understand their Constitutional Right to due process; or

f. that deaf adults will often nod in agreement and smile and sign any document put in front of them without really understanding what is being asked of them.

Supplemental Andrews Report at 5-6.

55. The Powerpoint also contains inaccurate information such as inflating the abilities to deaf adults to lipread. *Id.* at 6.

56. Significantly improved training is necessary to prevent recurrence of the discrimination experienced by Messrs. Vigil, Krebs and Scott, and Ms. Burke.

57. Depositions of the officers who arrested Sarah Burke and Roger Krebs and who supervised Shawn Vigil in jail as well as the City's Rule 30(b)(6) designee on training revealed that they were largely unaware of the policies in place at the time. *See, e.g.*, Than Dep. 60:22 - 61:4 (Maj. Than did not know if deputies received training on where to record communications preference), 58:5-9 (unaware of training re: providing interpreters to deaf inmates prior to 2005); *see also generally* Romero Dep. 90:14 - 91:5; Pablo Dep. 106:8 - 108:1 (officer who supervised Mr. Vigil unaware of policies concerning when a sign language interpreter was to be brought in to communicate with a deaf inmate); Pacheco Dep. 48:8 - 49:15 (another officer who supervised Mr. Vigil unaware of policies concerning communications with deaf inmates).

58. Officer Pacheco testified, "I don't know what the policy was. We -- a lot of times they would write stuff down on pieces of paper for us, that's how we'd communicate with them most of the time, with a deaf inmate." Pacheco Dep. 48:18-24. Officer Pablo testified that he was trained that "the best tool is pen or pencil and paper." Pablo Dep. 10:16 - 11:1. However, Ms. Kosinski testified that she would generally not "advise a sheriff's deputy that communicating

with pen and paper is the most effective way to communicate with somebody who is culturally deaf." Kosinski Dep. 24:19-23. When Officer Pablo's testimony was pointed out to Ms. Kosinski, she testified that she was not surprised because "I think people remember what they want to remember, not necessarily what was told." Kosinksi Dep. 23:21 - 24:11.

59. Besides the training that each recruit receives at the police or sheriff's academy, the only additional training are non-mandatory sign language classes available to any City employee. Kosinski Dep. 39:20 - 41:8; Than Dep. 9:6-25; 58:5-9.

60. During her 2009 deposition, Ms. Kosinski expressed the view that "there needs to be some ongoing refresher and/or reminder protocols . . . of the basic information of how to communicate with people who are deaf or hard of hearing," and that such training should occur "twice a year, quarterly would be great." Kosinski Dep. 51:21 - 52:9.

61. The City offers in-service training on a yearly basis on topics such as first-aid and defensive training. These trainings run from two to four days. Pablo Dep. 14:18 - 15:2. Despite this, despite the fact that officers do not appear to recall what they've learned from Ms. Kosinski, and despite Ms. Kosinski's view that there should be refresher or reminder protocols concerning communications with deaf people, there is no evidence that the City conducts any sort of required periodic refresher courses to ensure that police officers and sheriff's deputies remain up-to-date in their knowledge concerning effective communications policies.

62. The DVD submitted by the City contains information concerning the booking process at the Downtown Detention Center. It does not provide information that might be specifically useful to a deaf or hearing-impaired inmate, for example, the right to request a sign language interpreter, how to make such a request, or how to gain access to a TDD or video

phone. It also does not address the vast majority of the information in the Inmate Handbook, including, for example, Denver County Jail procedures, classes, commissary, visits, etc. *Compare* City's Response, Ex. 3-12 (video) *with id.* Ex. 4-6 at i-ii (table of contents of the Inmate Handbook).

63. Dr. Andrews also opined that the orientation DVD fell short in a number of ways:

a. The information is presented too fast. It will not allow the deaf inmate to process the information.

b. Interpreting should be done consecutively, not simultaneously.

c. Concepts such as "booking," "intake," "filing a grievance," should be expanded upon with expanded explanations.

d. The DVD overloads the viewer with information: voice, pictures, and signing and print all at the same time. It is visually distracting to look at pictures, rolling texts, and the interpreter in the corner.

e. This DVD would not be comprehensible to deaf adults with low reading levels.

f. The reading level of the English print for booking and intake is at the 12th grade reading level.

g. While the ASL translation of the booking and intake would be accessible to deaf persons fluent in ASL, it would be problematic for deaf persons with only poor signing skills.

h. The signer on the DVD uses lots of fingerspelling. To understand fingerspelling, one must be able to read. Deaf persons with a low reading

level would not be able to understand the eight concepts that were fingerspelled on the DVD. These were: downtown, detention, booking, staff, sheriff, statute, bond, bond co. and kite. The interpreter on the DVD did not define these terms adequately. Expansion techniques would be required to explain them to deaf inmates.

ARGUMENT

I. Procedural Posture and Standard of Review.

The present briefing had its genesis in the Court's Order (1) Denying Plaintiffs' Motion for Clarification of Outstanding Issues and (2) Directing Plaintiffs to Provide Additional Briefing Establishing Jurisdiction. ECF 352. The Court set a briefing schedule for Plaintiffs to "submit additional briefing explaining the basis for this Court's jurisdiction in light of the issues noted earlier in this Order," and for the City to respond. *Id.* at 4-5. Those issues were organizational and associational standing. *Id.* at 1-4.

As ordered, Plaintiffs submitted their Suggestions re: Organizational and Associational Standing ("Plaintiffs' Suggestions"). ECF 375. In response, the City filed a 35-page brief, nine pages of which address organizational and associational standing and 26 pages of which address mootness. ECF 417. In support of the latter argument, the City also submitted a series of exhibits, none of which had previously been disclosed or produced to Plaintiffs. Facts ¶ 34. The City's Response concludes with a request for the Court to dismiss the claims of the Organizational Plaintiffs. *Id.* at 35. This essentially converts the Court-ordered supplemental briefing process into a summary judgment motion.

While Plaintiffs would likely have grounds to move to strike under Rule 37(c) or submit an affidavit under Rule 56(f) requesting additional discovery on the newly-disclosed documents, they elected to respond under Rule 56 and demonstrate that the City was incorrect as a matter of law and fact.

In considering a motion for summary judgment, the Tenth Circuit "repeatedly has emphasized that [courts] must draw all inferences in favor of the party opposing summary judgment." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999). "The non-movant is given 'wide berth to prove a factual controversy exists.'" *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 966 (10th Cir. 2002). The "moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002) (internal quotation omitted). "'If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything.'" *Id.* (citation omitted).

II. The Organizational Plaintiffs Have Standing.

Plaintiffs have previously established that the Organizational Plaintiffs have both associational and organizational standing. *See generally* Plaintiffs' Suggestions re: Organizational and Associational Standing ("Plaintiffs' Suggestions"), ECF 375. The City offers no meritorious rebuttal.

A. The Organizational Plaintiffs Have Associational Standing.

In previous briefing, Plaintiffs set forth the standard for an organization to have associational standing -- "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) -- and demonstrated that CCDC and CAD both met this standard. Plaintiffs' Suggestions at 2-4.

The City's response is to demand Plaintiffs' evidence in advance of trial. City's Response at 5 ("Plaintiffs attached *no affidavits or other evidence* to the Suggestion of Standing") (emphasis in original). Plaintiffs submit herewith evidence sufficient to satisfy the *Hunt* test for associational standing.

1. Plaintiffs Burke and Krebs and witness Scott are members of CCDC and CAD.

Roger Krebs, Sarah Burke, and Major Jon Michael Scott are members of both CCDC and CAD. Mr. Krebs was a member of both Organizational Plaintiffs on or before October 24, 2007, when the Amended Complaint was filed adding him as a plaintiff; Ms. Burke was a member of both Organizational Plaintiffs on or before February 25, 2008, when the SASC was filed adding her as a plaintiff. Facts ¶¶ 1-6.

The City argues that both Ms. Burke and Mr. Krebs had to have been members of both Organizational Plaintiffs on October 24, 2007. City's Response at 6.[3] As an initial matter, both Plaintiffs were members of CAD on that date. Facts ¶ 4-5.

The City's premise is incorrect, however. Plaintiffs filed the SASC on February 25, 2008, and it became the operative complaint for jurisdictional purposes. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."). For example, in *Equal Rights Center v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510 (D. Md. 2010), the case was initiated by an organization -- the Equal Rights Center ("ERC") -- alleging associational standing. A later amended complaint added as plaintiff an ERC member who had experienced discrimination after the original complaint but before the amended complaint. The court first held that the member had standing:

> Defendants fail to identify a single case (nor can I find one) in which a plaintiff was found to lack standing simply because her alleged injury occurred before the filing of an amended complaint but after the filing of the original. . . . Accordingly, for the purposes of the standing inquiry, [the ERC member's] alleged injuries existed at the commencement of the litigation.

Id. at 515. The court went on to hold that that member's standing supported the first prong of ERC's associational standing, despite the fact that she experienced discrimination after ERC filed its original complaint. *Id.* at 524.

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[3] The City's brief uses the date October 18, 2007. City's Response at 6. That was the date of the motion to amend. The Amended Complaint itself was filed on October 24, 2007. ECF 16.

Although *Daniels v. Arcade LP*, 2012 WL 1406299 (4th Cir. Apr. 24, 2012), did not involve associational standing, it underscores that, for standing purposes, the operative complaint here is the SASC. In that case, the only remaining plaintiff had been added through an amended complaint. The court held that even if he did not have standing at the time of the original complaint, under *Rockwell*, he had standing to pursue the case. "[E]ven if Daniels had not visited the Market until the period between the filing of the original complaint and when he became a party to this case by way of the amended complaint, Daniels had standing to pursue, and the district court had jurisdiction to adjudicate, the claims alleged in the amended complaint." *Daniels*, 2012 WL 1406299, at *5.[4]

Thus, because both Mr. Krebs and Ms. Burke were members of both Organizational Plaintiffs before the filing of the SASC, their experiences can support the Organizational Plaintiffs' standing.

Mr. Scott's experiences also provide a basis for the Organizational Plaintiffs' standing. While he was not a member in 2007 or 2008, in a situation like this where members may lose standing during the pendency of the litigation, it is appropriate to consider the standing of later-joining members. The situation is analogous to that in *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), a case in which an

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[4] It is important to note, too, that Plaintiffs' SASC is not only an amended complaint but a supplemental complaint. *See Clark v. McDonald's Corp.*, 213 F.R.D. 198, 227 (D.N.J. 2003) (noting that the plaintiff could have established standing under Title III of the ADA if he had filed a "supplemental complaint that cured defective allegations as to standing by pleading facts occurring subsequent to Plaintiffs' original filing.").

organization sued on behalf of members who were terminally ill and seeking access to drugs that had not yet been approved. *Id.* at 134. The D.C. Circuit held:

> It is understandably difficult for the Alliance to produce the affidavits typically used to establish standing. Because of the nature of their predicaments, many of those Alliance members who were members on July 28, 2003, when the complaint was filed, have succumbed to their terminal illnesses. However, the allegations in the complaint supplemented by the affidavits supplied by the Alliance establish that "at least one member . . . has standing to pursue this challenge."

Id. (internal citations omitted). Similarly, where the DPD and DSD violate the rights of a series of deaf people -- including CCDC and CAD members -- during periods of incarceration that are generally shorter than the time it takes to bring a federal case to trial, it is appropriate for the Court to consider not only Ms. Burke's experiences -- a member who had standing to seek injunctive relief when she came into the case and continues to have such standing -- but also those of Mr. Scott, a new member who also has standing to seek injunctive relief.

2. It is Likely that Ms. Burke and Mr. Scott Will be Injured in the Future by the City's ADA and Rehab Act Violations.

The City argues that Ms. Burke and Mr. Krebs do not have standing for injunctive relief because they have been released from detention by the City. City's Response at 6. To the contrary, because it is likely rather than merely speculative that Ms. Burke -- as well as witness Major Jon Michael Scott -- will have future interactions with the DPD and DSD, their experiences support associational standing.

Since the experiences detailed in the SASC, Ms. Burke has been ticketed for shoplifting by the DPD, in an interaction in which the officers spoke to her verbally and she did not understand them. This ticket resulted in another warrant for failure to appear, similar to the warrant from Arapahoe County that formed the basis of the arrest in the SASC. In addition, the chain of events

that led to the arrest detailed in the SASC started with a request from an anonymous person that the DPD perform a "welfare check" on Ms. Burke's children. As explained in greater detail in the Facts section above, it is likely that this same person will do this in the future, once again bringing the DPD into Ms. Burke's house. Facts ¶¶ 7-12. This alone, is sufficient likelihood of future injury to support standing.

In addition, however, Ms. Burke explains that because of the lack of effective communication, she often doesn't understand where she is supposed to appear in response to instructions from law enforcement, making it likely that she will, in the future, face additional warrants for failure to appear and future arrest. Facts ¶ 13. CAD past-president Jennifer Pfau has observed that it is not uncommon for deaf people in family disputes to be subjected to "welfare checks" when family members contact law enforcement. *Id.* ¶ 14-15. Furthermore, this creates unnecessary arrests due to lack of communication and misunderstanding. *Id.*

Mr. Scott has repeatedly been arrested, detained, and imprisoned by the City since his conviction for burglary in 2007. During a number of those detentions, he was not provided a sign language interpreter. Facts ¶¶ 17-25. Overall, deaf people are overrepresented in jails and prisons. *Id.* ¶ 16.

Under these circumstances, both Organizational Plaintiff members Burke and Scott have standing to pursue injunctive relief because there is a "credible threat" that they will be injured in the future by the City's ADA and Rehab Act violations. *See Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983). In *Kolender*, the Court held that a plaintiff who had been stopped by the police on 15 occasions in two years had standing to seek injunctive relief. *Id.* As one court observed, while "no one can predict future arrests. . . . [S]ome groups of people are more vulnerable than

others. Plaintiffs with a criminal record, for example, are more likely to be arrested and detained than those with no criminal history." *Mack v. Suffolk County*, 191 F.R.D. 16, 20 (D. Mass. 2000) (citing, among others, *Kolender*). Ms. Burke and Mr. Scott have both had repeated encounters with the DPD and DSD, and their status as deaf people puts them in a group that is "more vulnerable than others." *See Mack*, 191 F.R.D. at 20; *see also* Second Pfau Decl. ¶¶ 4, 6.

Because both Ms. Burke and Mr. Scott have standing to seek injunctive relief and because both are members of CCDC and CAD -- Ms. Burke from the time of the SASC -- the Organizational Plaintiffs have associational standing to seek injunctive relief.

3. The Organizational Plaintiffs Satisfy the Third Prong of the *Hunt* Test.

The City argues that the Organizational Plaintiffs cannot meet the third prong of the test for associational standing because the individual plaintiffs will have to provide evidence substantiating the City's violations. City's Response at 7-8. This misconstrues the third prong. The *Hunt* standard mandates that the claim not require participation of *each* member. It does not preclude the participation of any member at all. *See Hunt*, 432 U.S. at 342-43 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Indeed, the injunctive relief sought by the Organizational Plaintiffs[5] here is precisely the type of relief that satisfies the third prong:

> "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually

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[5] The Organizational Plaintiffs seek only injunctive relief under the rubric of associational standing, that is, on behalf of their members. Under the rubric of organizational standing, they seek nominal damages on their own behalf as organizational entities.

> injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."

Hunt, 432 U.S. at 343 (quoting *Warth*, 422 U.S. at 515); *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("[B]ecause only declaratory and injunctive relief against [the defendant] are sought, individual members need not be present for a court to afford relief.").

B. The Organizational Plaintiffs Have Organizational Standing.

1. Plaintiffs' Allegations and Evidence Substantiate Organizational Standing.

An entity has organizational standing when it can show frustration of its organizational mission or diversion of resources to combat the challenged discrimination. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). In response to the City's September 17, 2009, Motion for Summary Judgment, ECF 197, Plaintiffs submitted the declarations of Julie Reiskin, the Executive Director of CCDC, and Jennifer Pfau, former President of CAD, describing how the City's discrimination had impacted the Organizational Plaintiffs in these ways. ECF 229-59 & 229-60.

In denying the City's motion for summary judgment on the ADA and Rehab Act claims, Judge Miller held that the organizational plaintiffs had organizational standing:

> I conclude that the organizational Plaintiffs have established that they have suffered a concrete and particularized injury traceable to the alleged conduct of Denver and its agencies. Further, there is adequate evidence that the injury is actual and likely to recur in the future and can be redressed by the relief requested. There is significant disputed evidence regarding the current existence and effectiveness of the accommodations for deaf detainees and inmates at the PADF and Jail. For example, at least one deputy was still unaware of any policy regarding the availability of sign language interpreters. Similarly, there is evidence that the PDD at the PADF was not operational at a visit during the pendency of this litigation.

> Accordingly, it is reasonable to infer that other deaf persons detained will have some of the same difficulties as the detained Plaintiffs here. Because the organizational Plaintiffs have shown that this will require them to expend further resources, I conclude they have adequately demonstrated their standing to seek injunctive relief. *See, e.g., Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (in Fair Housing Act case, "an organization may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular housing discrimination in question.").

Order on Pending Motions, ECF 265, at 42.

That is, the Organizational Plaintiffs have already met the summary judgment standard for organizational standing.

In the most recent version of its argument against organizational standing, the City asserts that the Court has limited the case to the SASC and that Ms. Reiskin's and Ms. Pfau's declarations do not "comport with the allegations in the" SASC because "the allegations in the first and second claims for relief focus exclusively on actions and omissions relating to the three individual plaintiffs." City's Response at 8. This is incorrect. The SASC describes in detail the injuries the City's discrimination caused CCDC and CAD and other facts supporting their standing. SASC ¶¶ 83-108. These allegations are substantiated by Ms. Reiskin's and Ms. Pfau's declarations. For example, the SASC alleges that both CCDC and CAD have diverted resources from other activities to attempting to remedy the City's discrimination and its effects. SASC ¶¶ 86, 87, 89, 90, 99, 100, 102, 103. Ms. Reiskin's declaration provides some specifics, including staff member time devoted to advocacy to get the City to provide auxiliary aids and services and staff member participation in meetings with the City's Office of the Independent Monitor to address access issues for individuals with disabilities who are incarcerated. Reiskin Decl. ¶¶ 12-14. Similarly, Ms. Pfau's declaration states that CAD has received complaints concerning

discrimination by the City, the DSD, and DPD, and that CAD representatives have spent time teaching sign language and educating members concerning grievance procedures and their rights to interpreters as a result of the City's discrimination. Pfau Decl. ¶¶ 7; 11-12.

If the City's assertion that "there are no allegations of injury to CCDC or CAD in the first or second claims for relief," City's Response at 8, is an attempt to narrow the focus to only those paragraphs of the SASC describing the claims for relief, ¶¶ 109-138, it overlooks the fact that both Plaintiffs' Rehab Act claim and their ADA claim start by stating, "Plaintiffs reallege and incorporate by reference the allegations set forth in this Complaint as if fully set forth herein." SASC ¶¶ 109, 125. Thus the first and second claim -- the Rehab Act and ADA respectively -- both incorporate ¶¶ 83-108 describing the injuries to the organizational plaintiffs.

2. Organizations May Have Standing To Bring Claims Under the ADA and Rehab Act.

In their Suggestions re: Organizational and Associational Standing, Plaintiffs demonstrated that the enforcement provisions of both the ADA and Rehab Act are sufficiently broad to encompass any person or organization who is harmed by discrimination against individuals with disabilities. Plaintiffs' Suggestions at 5 (*citing* 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133). In support, Plaintiffs cited to three circuit court cases and a number of district court cases holding that organizations had organizational standing under the ADA and Rehab Act. Plaintiffs' Suggestions at 5-6 (citing, among others, *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 405 (3d Cir. 2005); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 334-35 (6th Cir. 2002); and *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997)).

In response, the City does not attempt to distinguish these cases, but rather cites to a single 1995 district court case from New Jersey. City's Response at 8-9 (citing *Kessler Inst. for Rehab., Inc. v. Mayor & Council of the Borough of Essex Fells*, 876 F. Supp. 641, 653 (D.N.J. 1995)). *Kessler* relies on the anti-discrimination language of Title II, but ignores the enforcement provision, a shortcoming explained and rejected in detail by the Second Circuit in *Innovative Health*, 117 F.3d at 46-47; *see also Access Living of Metro. Chicago v. Chicago Transit Auth.*, 2001 WL 492473, at *2 (N.D. Ill. May 9, 2001) (rejecting *Kessler* on the grounds that "the majority of other courts addressing this issue have found that an organization does have standing to sue under the ADA, if organizational or representational standing requirements under the ADA are met."). The City thus has no legal support for its position that an organization cannot have standing under the ADA or Rehab Act.

III. Plaintiffs' Claims for Injunctive Relief Are Not Moot

The City argues that its policy changes have mooted Plaintiffs' injunctive claims and that this Court would thus be unable to grant meaningful relief. City's Response at 10-11. While there are several laudable new policies set forth in the City's Response, they remain incomplete and inadequate in crucial areas -- most notably training -- that defeat the City's attempt to show that its discriminatory conduct will not recur. The remainder of the policies and documents set forth in the City's Response were already in place when the challenged discrimination took place.

A. The City Has the "Heavy Burden" To Demonstrate That Its Discrimination Against Deaf Arrestees and Detainees Will Not Recur.

It is well established that the City's "'voluntary cessation of a challenged practice'" cannot moot Plaintiffs' claim unless "'subsequent events [make] it absolutely clear that the allegedly

wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). Defendants have the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189 (citations omitted; alteration in original).

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012); *see also United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983) ("The possibility that [the defendant] may change its mind in the future is sufficient to preclude a finding of mootness."); *W.T. Grant Co.*, 345 U.S. at 632 (Holding that if voluntary cessation could render an action moot, "[t]he defendant is free to return to his old ways").

Ultimately, "[i]t is no small matter to deprive a litigant of the rewards of its efforts . . .. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that is sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000); *see also Knox*, 132 S.Ct. at 2287 ("A case becomes moot only when it is impossible for a court to grant '""any effectual relief whatever' to the prevailing party."' . . . '[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" (Internal citations omitted)).

Regulatory change cannot moot a case where the challenged practice "'continues to the extent that it is only superficially altered by a subsequent regulation.'" *Wyoming v. U.S. Dep't of*

Interior, 674 F.3d 1220, 1229 (10th Cir. 2012) (quoting *Conservation Law Found. v. Evans*, 360 F.3d 21, 26 (1st Cir. 2004)).

B. The City Cannot Satisfy Its Heavy Burden Of Demonstrating that Its Discrimination Will Not Recur.

There are only three new features in the City's policy -- the requirement that an interpreter be provided at book-in; the orientation DVD; and the deaf advocate program. The remainder of the measures listed in the City's Response represent at best superficial changes, and in most cases no change at all. Facts ¶ 36.

The ostensibly new booking policy is undermined by the discretion it affords officers to decide whether they are communicating effectively with deaf detainees, as well as a lack of training. The DVD is limited to the book-in process, and thus cannot assure effective communication outside of that context; it also has flaws that would make it hard for many deaf inmates to understand. Finally, a single visit by a deaf advocate cannot substitute for required effective communication. These three measures thus do not satisfy the City's "heavy burden" to show that the challenged conduct -- here, lack of effective communication between the DPD or DSD and deaf arrestees and detainees throughout the arrest and detention process -- "cannot reasonably be expected to start up again." *See Friends of the Earth*, 528 U.S. at 189 (citation omitted).

1. The Measures Set Forth in the City's Response Do Not Purport to Address All of Plaintiffs' Allegations.

The measures described in the City's Response do not include any measures addressing arrestees or detainees with diabetes. The measures described also include very little concerning the DPD. For example, the City's Response describes its own scope as showing "actions to

ensure that [the City] provides appropriate services for deaf inmates and that *the City and DSD* comply with the law." City's Response at 13 (emphasis added). This excludes the DPD. In fact, the DPD is only mentioned in the City's Response when it notes generally that Ms. Kosinski provides sign language services to that department, has held meetings with citizens and representatives of that department, and has provided that department with notepads with her name and phone number. *Id.* at 14, 17. Thus, such crucial measures as the timing and availability of sign language interpreters and training in how to ensure effective communication when required have apparently not changed at the DPD since Ms. Burke was denied effective communication during her arrest in 2007.

Finally, the measures described in the City's Response focus on the Downtown Detention Center. While there is some mention of the Denver County Jail, in many areas the City has failed to show any improvement in DCJ policies or procedures. For example, the policy requiring a sign language interpreter at book-in is a DDC policy. City's Response Ex. 4-10. The City does not provide evidence of any equivalent policy at the DCJ. While Maj. Koonce states that "[t]he County Jail can contact Lorrie Kosinski or the two 'deaf advocates' whenever there is a need for a sign language interpreter," Koonce Aff. ¶ 13, she does not state when such a call is required or how quickly an interpreter will be provided. Indeed, as the City's Response makes clear, "[s]ign language interpreters have been available at all Denver Sheriff facilities 24 hours per day, 7 days per week since the early 1990s." *Id.* at 14. Given the repeated failures of the DSD to provide interpreters throughout that time, the fact that they are *available* -- as Maj. Koonce testifies -- is a long way from guaranteeing that they will be provided, and that effective communication will occur. Similarly, the orientation video addresses only the process and procedure at the DDC.

The City has submitted no evidence that it explains any of the process and procedure at the DCJ through a signed and captioned orientation video.

2. The New Measures Cannot Ensure Effective Communication.

The City's new interpreter policy looks good on paper but its effectiveness is significantly undermined by two things: (1) the apparent delegation to individual deputies of discretion to apply it; and (2) the lack of appropriate training.

The language of the new policy appears to require that a sign language interpreter be provided upon request for intake and medical screening procedures. *See* City's Response Exs. 3-7 & 4-10. However, the City's Response makes clear that, in practice, whether this happens is left up to the discretion of individual officers: "After sending the e-mails *and unless the intake officer feels he/she is communicating satisfactorily with the deaf prisoner*, the intake officer calls Ms. Kosinski or one of the interpreter referral agencies listed." *Id.* at 18 (emphasis added); *see also* Kosinksi Aff. ¶ 12(e)(4)(same). As explained in greater detail in the Facts section, *supra*, this qualification virtually guarantees that effective communication will not occur in many situations, as individual officers are not qualified to determine the communications skills of deaf arrestees and inmates, and deaf people will often feign understanding to avoid conflict. Facts ¶ 45.

The new policy will also not be effective in the absence of significantly improved training. In 2007, the City's policy required that all inmates be asked what means of communication they prefer and that if that preference was for a sign language interpreter, the inmate be informed that an interpreter required a 72-hour advance notice. Facts ¶ 41. The recently amended policy requires that, if the preference is for an interpreter, one be provided immediately. Facts ¶ 42.

However, even under the old policy, the relevant deputies as well as one of the City's Rule 30(b)(6) witnesses on the subject of training did not know what the policy was. Facts ¶¶ 57-61. Despite this, and despite the fact that Ms. Kosinski herself believes that quarterly or semi-annual refresher courses are necessary, the only improvements to training in evidence are two additional slides in Ms. Kosinski's power point presentation. *Id.* ¶ 53. Neither of these slides relates to the requirement or timing of providing a sign language interpreter, so neither will do anything to ensure that the challenged violations -- including failure to provide interpreters -- will not recur. The slides are also deficient and inaccurate in the training they provide. *Id.* ¶ 54.

Thus while the new policy of providing an interpreter immediately upon request at book-in is laudable, it cannot, ultimately, satisfy the City's heavy burden to show that discrimination -- that is, lack of effective communication -- will not recur.

While the orientation DVD is also a good idea, it is limited to the book-in process at the DDC and does not address a number of useful deaf-specific issues, such as the availability of sign language interpreters. Facts ¶ 62. Similar signed and captioned videos are necessary to cover any other information routinely conveyed to inmates, all information relating to the right to and availability of effective communication, as well as the entire contents of the Inmate Handbook. Finally, the content of the video will likely not be fully understandable to deaf inmates. *Id.* ¶ 63.

A single visit by a "deaf advocate," while likely helpful, cannot substitute for systematic effective communication. These advocates are not regular City employees, much less DSD officers, and thus have no authority to ensure compliance with the ADA and Rehab Act. It also appears that the records that the deaf advocate is supposed to make are not being made, as Mr. Scott has been detained on four occasions since the policy was put in place, but the City has not

produced -- in response to a request for production for all documents relating to Mr. Scott -- any documents prepared by a deaf advocate. Facts ¶ 52.

3. The City Still Contests Liability And Only Attempted Reform Long After Being Sued.

Shawn Vigil committed suicide in September, 2005, and the present lawsuit was filed in August, 2007, yet only now -- in 2012 and on the eve of trial[6] -- has the City even attempted to reform the DSD's policies concerning effective communication during intake at the DDC. (As noted above, the City presents little evidence of policies addressing the DPD or the DCJ.) At the same time, the City has continued to defend its former practices as sufficient and compliant. A "defendant's failure to acknowledge wrongdoing . . . suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007) (holding that a medical office that changed its service animal policy in response to a lawsuit alleging claims under the ADA and Rehab Act did not moot the plaintiff's claims); *see also United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 430 F. Supp. 2d 996, 1006 (N.D. Cal. 2006) (holding that the defendant's persistent representations that the challenged operations were legal "are an

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[6] Ms. Kosinski states that the new protocol was updated in March or April, 2012. Kosinski Aff. ¶ 12(e). Trial in this case was originally scheduled to begin on March 12, 2012.

additional factor suggesting that there is a likelihood that [the defendant] will resume the challenged activity.”).

4. Major Scott’s Experiences Demonstrate that Plaintiffs’ Claims for Injunctive Relief are Not Moot.

Major Jon Michael Scott is deaf. He was originally convicted of burglary in 2007, and has been arrested and detained by the City on several occasions since that time. Facts ¶¶ 22-23. When he was arrested and detained in October, 2010 -- over five years after Mr. Vigil committed suicide -- he was not provided a sign language interpreter for either his intake or his medical screening. Facts ¶ 25. He was also not provided an interpreter during his detention in October, 2011. Facts ¶ 31. This is so despite the fact that a July 29, 2010 memo to all classification staff in the DSD instructed that “[w]hen interviewing a deaf inmate using the initial health questionnaire, the classification officer shall contact Lorrie Kosinski or one of her resources as listed below.” City’s Response, Ex. 4-2. Mr. Scott’s experience suggests that the City’s policy changes on paper will not be carried out in practice.

5. The City’s Cases Are Not On Point.

All of the cases on which the City relies in its mootness argument were decided before last month’s *Knox* decision in the Supreme Court, which reinforced that “[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot” and held that “[a] case becomes moot only when it is impossible for a court to grant ‘““any effectual relief whatever’ to the prevailing party.”’ . . . ‘[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.’” 132 S.Ct. at 2287 (citations omitted). It is clear that this

Court can grant effective relief, *see infra* section II.C, and that the parties -- including the Organizational Plaintiffs -- continue to have a concrete interest in the outcome of the litigation.

In any event, the cases on which the City relies are distinguishable. For example, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, on which the City primarily relies, involved a challenge to two "biological opinions" issued by the Fish and Wildlife Service ("FWS"). 601 F.3d 1096, 1106-07 (10th Cir. 2010). After the litigation was filed, the FWS issued a new biological opinion that superceded the challenged opinions, and that the plaintiffs did not challenge. *Id.* at 1111. Because the relief requested by the plaintiffs was a declaration and injunction concerning the superceded opinions, it "would be wholly without effect in the real world." *Id.* at 1112. Similarly, in *Southern Utah Wilderness Alliance v. Smith*, the relief sought by the plaintiffs was an order requiring the Bureau of Land Management to consult with the FWS concerning an endangered plant. 110 F.3d 724, 726-27 (10th Cir. 1997). The Tenth Circuit held that the claim was moot because, although the consultation was apparently not done in a timely fashion, it was eventually done, so that "the relief ha[d] already been obtained and an injunction would be unnecessary." *Id.* at 727; *see also Los Alamos Study Group v. U.S. Dep't of Energy*, 794 F. Supp. 2d 1216, 1223 (D.N.M. 2011) (prudential mootness applied where plaintiff requested an injunction pending issuance of new environmental impact statement and record of decision, in light of the fact that both processes were underway).[7]

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[7] The other two cases on which the City relies are even more attenuated. The inmate plaintiff in *Jordan v. Sosa* sued specific prison officials at the ADX facility in Florence, Colorado; his claims were mooted by his transfer to a different facility. 654 F.3d 1012, 1029-30 (10th Cir. 2011). In *Chihuahuan Grasslands Alliance v. Kempthorne*, the plaintiffs challenged the sale of two leases that were terminated in the middle of the litigation. 545 F.3d 884, 893

(continued...)

In each of these environmental cases, the plaintiffs challenged a study that was later superceded or the lack of a report or consultation that later occurred. In none of these cases were the plaintiffs challenging the conduct of the defendants' representatives in their personal interaction with the plaintiffs or members of plaintiff organizations. Discriminatory conduct such as that challenged in the present case cannot be mooted with the issuance of a new document, as could the challenge to the biological opinions in *Silvery Minnow* or the lack of an environmental impact statement in *Los Alamos Study Group*. Because it is impossible for the City's paper policies to ensure that its discriminatory conduct will not recur, Plaintiffs' claims for injunctive relief are not moot.

C. This Court Will Be Able to Grant Meaningful Relief.

As *Adarand* and *Knox* make clear, the crucial question in assessing mootness is whether the Court can still order effective injunctive relief. *See supra* at 30. The City agrees with this standard. City's Response at 11. Here, the above recitation demonstrates conclusively that this Court can enter effective relief and that Plaintiffs still have "need of the judicial protection that is sought."

At this juncture, in order to ensure that the City does not discriminate against deaf or hard of hearing arrestees or detainees, the injunction will need to require, *at a minimum*:

1. TRAINING:

a. Comprehensive Pre-Service Training to DSD and DPD officers and staff on effective communication with the deaf and hard of hearing, including but not limited to such

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[7](...continued)
(10th Cir. 2008).

topics as security risks posed by and to those who are deaf and hard of hearing during arrest and/or detention, deaf culture and awareness issues, methods of ensuring effective communication, and appropriate assistive devices and accommodations that must be provided.

b. Annual Refresher Training of DSD and DPD officers, staff, and medical and mental health personnel regarding appropriate effective communication with the deaf and hard of hearing and the policies of the DSD and the DPD regarding providing accommodations, including but not limited to appropriate assistive devices, contacting and providing appropriate qualified interpreters, and deaf cultural issues. DSD officers, staff, and medical and mental health personnel will also be trained on the housing and detention of the deaf or hard of hearing, including the risks associated with such detention, the warning signs related to those risks, and appropriate remedial action.

2. IMPLEMENTATION OF DENVER POLICE DEPARTMENT POLICIES:

The following policies should be adopted and fully implemented by the DPD:

a. DPD officers shall make arrangements to provide auxiliary aids and services, including the provision of qualified sign language interpreters, during the interview, detention and/or arrest of individuals who are deaf or hard of hearing, unless exigent circumstances exist which justify the need to make an imminent arrest. If exigent circumstances exist, reasonable accommodations, including the provision of a qualified sign language interpreter shall be provided as soon as possible after the arrest.

b. DPD officers shall allow individuals with disabilities to take assistive devices with them upon arrest, including such devices as pagers, penscript devices, Sidekicks, and appropriate

medication or medical supplies, to the detention facility. These accommodations would be returned to the individuals with disabilities upon their release from detention.

c. The DPD shall designate a position within the DPD that is responsible for overseeing and coordinating the provision of accommodations, including interpreters, to individuals who are deaf or hard of hearing, and shall track the DPD contacts with such persons, the nature of the contact, and the type of accommodations provided.

3. IMPLEMENTATION OF DENVER SHERIFF DEPARTMENT POLICIES:

The following policies should be adopted and fully implemented by the DSD:

a. Upon intake at any DSD facility, a qualified sign language interpreter (SLI) shall be provided to assist deaf or hard of hearing detainees during the intake process, including but not limited to the classification process, and the medical and mental health examination. The SLI shall also be provided to explain the orientation process, including the process for obtaining the benefits and services of the facility, obtaining assistance with communication with the facility staff, and obtaining information on the detainee’s rights under the ADA, the assistive devices available to accommodate the inmate’s disability, and how the person can obtain assistance with any of these matters.

b. Upon intake, DSD shall ascertain from the detainee the detainee’s preferred means of communication and shall document this means of communication in the detainee’s file that is available to all DSD staff and medical and mental health personnel. DSD staff and contractors shall honor the detainee’s request regarding the preferred means of communication during the period of detention and shall inform appropriate court personnel of the detainee’s need for the accommodation prior to scheduled court appearances.

c. Reasonable accommodations shall be provided to ensure that deaf or hard of hearing detainees have the same level of access to the programs, services and benefits of the DSD facilities as do other detainees. Such accommodations shall include, but are not limited to, the provision of sign language interpreters, access to functional TTYs, videophones, sound amplification devices, and close-captioned televisions. Inmates with disabilities will be informed of the availability of these programs, services and benefits, the assistive devices and accommodations available to access these programs, services and benefits, and who they should contact if they need to request an accommodation.

d. Videos with qualified sign language interpreters shall be provided to all deaf or hard of hearing inmates regarding all information routinely conveyed to other inmates, including information relating to the right to and availability of effective communication, as well as the entire contents of any literature distributed to the detainees, including the inmate handbooks, and any forms distributed to detainees for participation in the programs, benefits and services of the facility.

e. Qualified sign language interpreters shall be provided to deaf or hard of hearing inmates during the provision of medical services, during any disciplinary actions, and at times when critical information is being sought from the detainee, such as during other classification interviews, questioning about the person's desire to see any administrative review board and participation in attending such meetings, and, if appropriate, for the arraignment bond/process, other court appearances or release issues.

f. DSD shall adopt specific policies regarding the housing of inmates who are deaf or hard of hearing which recognize that these individuals 1) should not be placed in segregation or

housed alone because of their disability; 2) have unique risks of depression and suicide because of the nature of their disability, and; 3) the need for special monitoring of these individuals to prevent harm during detention.

g. DSD shall allow deaf or hard of hearing detainees to retain personal assistive devices during their detention when such accommodations may be provided consistent with safety concerns, and all such personal assistive devices will be returned to these detainees upon their release from the DSD facility. Upon release from any DSD facility, DSD staff and their contractors will provide reasonable accommodations to deaf or hard of hearing individuals and/ or individuals with diabetes to ensure the person's safety when released from the facility.

h. DSD shall designate one position at each of its detention facilities who shall be responsible for overseeing and coordinating the provision of accommodations, including interpreters, to individuals who are deaf or hard of hearing, shall track all detainees who are deaf or hard or hearing at the DSD facilities and shall ensure that they are not denied the programs, services and benefits of the DSD because of their disability. This position shall develop a system to record all deaf and hard of hearing detainees who have been held by the DSD on an annual basis and the accommodations provided to those persons.

This position will also maintain an ADA grievance procedure to allow the detainees with disabilities to file complaints regarding any ADA related issue and the grievances shall be maintained by the DSD upon release of the detainee. Copies of all such ADA grievances shall be maintained in the detainee's file and in a separate DSD file containing all grievances. Detainees shall be informed of this grievance process during orientation and in the videos made available to deaf and hard of hearing detainees during their stay at the facility. Any and all action taken with

respect to the grievance shall be documented by the DSD and maintained by the DSD with the grievances in a manner that can be tracked on a bi-annual basis.

i. DSD shall maintain obvious postings in the common areas of each of its detention facilities informing individuals with disabilities of their rights participate in the programs, benefits and services of the DSD, to assistive devices and accommodations to access these programs, benefits and services, and provide information regarding the person to contact if they need assistance or to file a grievance.

4. MONITORING

Monitoring by Plaintiffs' counsel or a jointly-selected independent monitor (paid for by the City) for a two-year period. Monitoring will require the City to track the arrest and/or detention of deaf individuals, the provision of accommodations or assistive devices to individuals, including tracking of the provision of interpreter services, and the production of such records to Plaintiffs' counsel or the independent monitor on a periodic basis.

Conclusion

For the reasons set forth above and in Plaintiffs' Suggestion re: Standing, Plaintiffs respectfully request that this Court deny the City's motion to dismiss, City's Response at 35, and hold:

1. that CCDC and CAD have organizational standing;
2. that CCDC and CAD have associational standing; and
3. that Plaintiffs' claims for injunctive relief are not moot.

Respectfully submitted,

s/ Amy F. Robertson

Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
303.595.9700 (voice)
303.595.9705 (fax)
arob@foxrob.com

Laura E. Schwartz
Paula Dee Greisen
King & Greisen, LLP
1670 York Street
Denver, CO 80206
(303) 298-9878 (voice)
(303) 298-9879 (fax)
schwartz@kinggreisen.com
greisen@kinggreisen.com

Carrie Ann Lucas
The Center for Rights of Parents with Disabilities
P.O. Box 756
Windsor, CO 80550
720.363.1131 (voice)
970.818.9295 (fax)
clucas@disabledparentrights.org

Dated: July 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

Suzanne A. Fasing
Robert A. Wolf
Richard A. Stubbs
Denver City Attorney's Office
Litigation Section
201 W Colfax Ave, Dept 1108
Denver, CO 80202
dlefiling.litigation@ci.denver.co.us

By: /s/ Caitlin R. Anderson
Caitlin R. Anderson
Paralegal
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
303.595.9700 (voice)
303.595.9705 (fax)
canderson@foxrob.com