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INVESTIGATIVE REPORT

HRC Case No. PA18- 0011

Complainant: Latonia Congress
Respondent: Department of Corrections (DOC) & Centurion of Vermont
Charge: Discrimination based on disability

Summary of Complaint

Latonia Congress has been incarcerated at Chittenden County Correctional Facility (CRCF) since 2009. Records show that she first complained of hearing loss in July of 2014. In January of 2015, an audiology exam showed she had mild to moderately severe hearing loss and long-term difficulties with speech discrimination. Correct Care Solutions, (CCS), DOC's then medical provider, fitted her with bilateral hearing aids. In April of 2016, she complained that the hearing aids were not working properly and requested new batteries or a new hearing test. Medical staff at Centurion (which had taken over from CCS) denied her request stating she was "functional in the facility" without them. By December of 2016, Ms. Congress had stopped wearing the hearing aids due to an echo resulting from the failing batteries which caused discomfort. In January of 2017, she brought the hearing aids to medical staff so they could be sent to an audiologist and checked. Ms. Congress did not get them back for almost nine months. When she got them back in October of 2017, they were still not useable. Centurion waited nearly two more months, then sent the hearing aids out to two separate audiologists. They found nothing wrong with them although one suggested she needed an updated hearing test. Ms. Congress filed a complaint of discrimination based on disability alleging that DOC and Centurion failed to provide her with auxiliary aids for 18 months as required by the Vermont's Public Accommodations Act. After her complaint was filed, Ms. Congress was given a new exam in March of 2018. The test showed her hearing had deteriorated. Centurion provided her with one hearing aid.

Summary of Response

Centurion and the DOC both denied depriving Ms. Congress of effective communication, i.e. auxiliary aids. They argued that staff observations showed that Ms. Congress was functioning

in the facility without the benefit of hearing aids and they challenged the original finding that she was a person with a disability under the statute.

PRELIMINARY RECOMMENDATIONS

- 1) This investigation makes a preliminary recommendation that the Human Rights Commission find there are **reasonable grounds** to believe that the Respondent, Centurion Health Care, discriminated against Latonia Congress based on disability in violation of 9 V.S.A. §4502.
- 2) This investigation makes a preliminary recommendation that the Human Rights Commission find there are **reasonable grounds** to believe that the Respondent, Department of Corrections, discriminated against Latonia Congress based on disability in violation of 9 V.S.A. §4502.

DOCUMENTS

- Department of Corrections Response – 12/22/2017
- Centurion Response – 12/19/2017
- “DR” – Disciplinary History Report for period of 6/4/2010 - 12/7/2018
- Latonia Congress School Records – Received 2017-2018 plus current enrollments
- Latonia Congress Recognitions/Certifications/Certificates of Completion
- Centurion Hearing Guidelines (New) – 2/25/2018
- Latonia Congress Medical Records 2013-2018 -Correct Care Solutions [CCS] & Centurion
 - In-Patient Hospital Records
 - Progress Notes (Physician & Nursing)
 - Medical History
 - Notes from Physical Exams
 - Physical Therapy Notes
 - Imaging Reports
 - Medication Records
 - Request for Reasonable Accommodation Form (not related to hearing)
 - Healthcare Requests by Ms. Congress
 - Dental Records
 - Lab Results
 - Referral Requests
- Adirondack Audiology Report – Dr. Keith Walsh – Audiologist - 1/25/2015
- Audiometry Test – Mary Marino, Audiologist – 3/21/2018
- Audiology Note from Mary Marino, Audiologist – 4/11/2018

INTERVIEWS

- Dr. Steven Fisher – Medical Director - Centurion – 5/15/2018
- Ben Watts – Health Services Director - DOC – 5/15/2018
- Heidi Fox, R.N. – Nurse Program Coordinator - DOC 5/15/2018
- Latonia Congress – Complainant – 5/18/2018
- Desiree Crump – DOC Case Manager – 9/12/2018
- Mary Marino – Licensed Hearing Aid Specialist – 9/18/2018
- Gail McAllister – Administrator - DOC - CRCF – 10/1/2018
- John Howe – DOC Instructor – 1/23/2019
- John Long – Correctional Educator – 1/23/2019
- Jess Kell – KAPS (Kids Apart Program) - 1/31/2019
- Kira Krier – DIVAS (Domestic Violence Program) - 1/31/2019

I. BACKGROUND OF THE COMPLAINT

Ms. Congress has been incarcerated at Chittenden Regional Correctional Facility (CRCF) since 2009.¹ Ms. Congress indicated to this investigator that her hearing loss and lack of functional hearing aids have affected her in several ways, specifically, (but not only), in terms of speech discrimination and levels at which she can hear. She noted that having problems with hearing and speech discrimination in a prison setting put her at a disadvantage and represented a potential safety issue. She stated that she was not able to hear her TV if the volume was not turned way up, which annoyed her cell mates. She indicated she was not always sure what other people said, which carried with it the possibility of conflict with other inmates if a misunderstanding resulted and offense was taken. Similarly, she risked trouble with correctional officers and other facility staff if her difficulty with speech discrimination resulted in her not following directions.² She stated that at times, she had difficulty during class and on the phone with family or her children's teachers as well as during in-person family visitation because of the background noise.³

Ms. Congress's complaint is focused on the question of whether the Department of Corrections and Centurion, its medical contractor, violated the Vermont Fair Housing and Public

¹ Latonia Congress was convicted of second-degree murder in 2011 after a jury trial. See *State v. Congress*, 198 Vt. 241 (2014). She initially received a sentence of 20 years-to-life, however in 2015, Judge Michael Kupersmith reduced that sentence to 10 years. See Joel Banner Baird, "Prison term reduced for Essex killer," Burlington Free Press (Feb. 6, 2015). Ms. Congress had already served five years of the reduced 10-year sentence and is now due to be paroled in October 2019.

² An inspection of Ms. Congress's history of disciplinary infractions showed that she had very few disciplinary reports - "DRs" - over the period of her incarceration.

³ Interview with Latonia Congress, 5/18/18.

Accommodations Act (VFHPAA)⁴ by failing to provide her with auxiliary aids (bilateral hearing aids) for 18 months - from at least April of 2016 through the last date in the complaint (November 2017) - as an accommodation for her disability so she could have equal access to all the services, benefits, programs, etc. at CRCF.⁵ It should be noted that although this report covers the 18-month time period contained within the complaint and responses, Centurion and DOC did not provide Ms. Congress a new audiology exam until March 21, 2018,⁶ nearly two years after she first complained her hearing aids were not working. The new audiology exam she received on March 21, 2018 showed her hearing had deteriorated from mild to moderately severe hearing loss, to moderate to severe “high frequency hearing loss” in both ears, slightly more in the left ear and reiterated her issues with speech discrimination.⁷ Despite increased hearing loss in both ears, Centurion and DOC agreed to provide her with only a single hearing aid for her left ear, and she was not actually fitted for that hearing aid until April 11, 2018. Thus, by that point almost two years had elapsed since she first reported issues with her hearing aids in 2016.⁸ The central question for this investigation is whether Centurion and DOC’s assessment that Ms. Congress is not a person with a disability and that she functioned in the facility without hearing aids is accurate and the appropriate standard to use in evaluating whether to provide her with access to auxiliary aids. This report concludes that it is not.

II. MS. CONGRESS’S REQUESTS FOR FUNCTIONING HEARING AIDS OR A NEW HEARING EXAM

Available medical records show that Ms. Congress’s first complaints about her hearing surfaced in July of 2014,⁹ although the trauma to her eardrum reportedly occurred several years prior to her incarceration as a result of a blow to the head by her husband, who, by his own admission at her trial, emotionally and physically abused her for the entirety of their relationship, which began when Ms. Congress was 15 years old.¹⁰ Medical records provided to this

⁴ 9 V.S.A. §4502(c)(6).

⁵ While VFHPAA is the statute over which the Commission has jurisdiction, the federal ADA on which it is modeled, and its implementing rules provide substantial guidance with respect to the legal obligations of providers and statutory interpretation. *See* 42 U.S.C. § 12101 et seq.

⁶ Note from Mary Marino, Audiologist, March 21, 2018.

⁷ *Id.*

⁸ Note to medical file of Latonia Congress by Mary Marino, 4/11/18.

⁹ Correct Care Solutions (CCS) medical records – 7/22/14.

¹⁰ Ms. Congress stated to this investigation that her hearing impairment was the result of a blow to the head by her husband. *Interview with Latonia Congress*, 5/18/18. Trial testimony included in the appellate brief filed after her conviction confirms that her husband, Demetris Reeves, admitted during trial to “hitting her when she was pregnant, beating her with a belt, and punching her in the head” “so hard that her eardrum burst.” *Brief of the Appellant*, 2012 WL 2936064 at 246-47 (Appeal from the Superior Court of Vermont -- Criminal Division Chittenden County Docket No. 4097-10-09 Cncr): “Defendant confirmed that her husband had physically and emotionally abused her for many years, and described various incidents including one in which he hit her on the side of the head and broke her eardrum, more than one when he hit her while she was pregnant, and one in which he sliced her dress open with a razor blade to prevent her from going to a wedding reception.”). This investigator did not see any medical records specific to the assault and damage to the eardrum.

investigation mention “trauma” as the cause of her hearing loss only once in the July 2014 medical note, and this investigation saw no other DOC records or assessments related to the cause of her hearing loss.

In January of 2015, Ms. Congress was diagnosed with mild to moderate hearing loss and was approved for and received bilateral hearing aids from the DOC and Correct Care Solutions (CCS), DOC’s medical provider at the time.¹¹ One year later, in April 2016, Ms. Congress reported to staff of the new medical provider - Centurion - that her hearing aids were not working and she requested new batteries or a new hearing assessment.¹² Centurion denied both requests because medical staff found her to be “functional within the facility” without hearing aids. Ms. Congress finally stopped wearing the hearing aids reporting that the echo caused discomfort and pain when she wore them.

On December 30, 2016, the Centurion Medical Director, Dr. Steven Fisher evaluated her sixth documented complaint about her hearing for that year. He wrote: “She states she received the hearing aids while incarcerated here about 18 months ago, and even when functioning normally, she finds the amplification unpleasant. For ‘some time’ she finds they have not been working well even with new batteries. They have not been checked by Audiologist for proper functioning.”¹³ He assessed the situation as “possible hearing aid failure” and recommended sending them to audiology to check functioning.¹⁴

On January 13, 2017, Ms. Congress left her hearing aids with medical staff. The medical note stated: “Patient brought her hearing aids to visit with her and gave them to this writer to give to AA [Adirondack Audiology] to send out for functioning test. Patient reports that they are echoing when she wears them and they are painful.”¹⁵ According to Centurion, a nurse gave them to Gail McCallister, an administrator at CRCF, who contacted Centurion to figure out where they should be sent so they could be examined. She was told to send them to Northern State Correctional Facility (NSCF) because “at that time there was an audiologist working at Northern State Correctional Facility. The hearing aids were given to another nurse who was headed to Northern State Correctional Facility.”¹⁶ According to Centurion, “At some point from January to October, the audiologist at Northern left [records were unclear when or who that person worked for]. Ms. Congress’s hearing aids were returned to the Chittenden facility in October. The hearing

¹¹ A CCS medical consult note showed on 2/16/15 that Ms. Congress was to be fitted for bilateral hearing aids.

¹² Centurion took over from CCS in the first quarter of 2015, according to a Centurion press release:

<https://www.centurionmanagedcare.com/newsroom/centurion-healthcare-vermont-112114.html>. Available medical records showed that Ms. Congress complained three times in April of 2016 (4/16, 4/18, 4/26), then again in December of 2016 (12/1, 12/22, 12/30).

¹³ PROVIDER GENERAL SOAPE NOTE, 12/30/16.

¹⁴ *Id.*

¹⁵ Centurion Nurse Progress Note, 1/13/17.

¹⁶ Correspondence from Pamela Eaton, 3/11/2019, in response to request for clarification from Nelson Campbell, 2/24/19.

aids were then sent out twice more to two different locations for functionality tests in the fall of 2017. Centurion's response suggested that both times the hearing aids were returned after the inspection revealed there was nothing functionally wrong with the hearing aids."¹⁷ It should be clear that there is no evidence that the audiologist at NSCF inspected them or made any finding about their functionality, or that they were sent to any other audiologist or outside of a DOC facility to be inspected. If they were, this was not conveyed to Ms. Congress and there is no record of it.

Available records show that Ms. Congress asked where the hearing aids were in March¹⁸ and May of 2017,¹⁹ but Centurion records do not reflect a response from Centurion staff. Further inquiries by this investigation revealed that CRCF administrator Gail McAllister recalled telephoning a nurse at NSCF after Ms. Congress's May inquiry to ask about the hearing aids although the number of phone calls or specific dates of any calls is not known.²⁰

The hearing aids were still missing as of August 2017, so Ms. Congress contacted Disability Rights Vermont (DRVT) for assistance. On August 28, 2017, DRVT contacted DOC Chief Correctional Health Services Administrator Ben Watts and Central Office Director of Nursing Heidi Fox to ask where her hearing aids were. On August 30, 2017, Ms. Fox responded that the hearing aids would be returned and that Ms. Congress would have to request a referral from Centurion to get an appointment with an audiologist for an updated exam.²¹

On September 13, 2017, DRVT again contacted DOC at which point, Mr. Watts responded to DRVT by stating that according to Dr. Steven Fisher of Centurion, Ms. Congress did not have a disability which required an accommodation and that her request for a new assessment had therefore been denied.²² Finally, on October 10, 2017, the hearing aids were returned, in the same condition they had been in nine months earlier, thus they were of no functional use to Ms. Congress. DRVT contacted Mr. Watts and Ms. Fox again and Mr. Watts responded by email that: "Ms. Congress has been seen numerous times by the MD who I believed [sic] determined that there is no medical need for hearing aids. I also believe (and will confirm) that there are no indications that Ms. Congress has a disability which requires accommodation."²³

¹⁷ *Id.*

¹⁸ Medical records dated 3/29/17.

¹⁹ Medical records dated 5/21/17 and 5/22/17.

²⁰ Correspondence from Centurion Counsel, Pamela Eaton, Esq., 3/11/2019, in response to request for clarification from Nelson Campbell, 2/24/19.

²¹ Parties do not dispute this fact as reflected in DOC and Centurion's responses to the complaint.

²² Admission by DOC in its response to the complaint on 12/22/18.

²³ Email from Ben Watts to DRVT, 10/10/2017, incorporated by DOC and Centurion Responses.

On October 23, 2017, DRVT contacted Kurt Kuehl, General Counsel for DOC, and requested an accommodation for an audiology appointment and appropriate hearing aids.²⁴ On October 30, 2017, Mr. Watts contacted DRVT by email, stating that:

Audiology assessments are approved by the Statewide Medical Director through the UM process. The previous referral for audiology was denied because the patient is functional in the facility and does not meet the guidelines for hearing aids. The Statewide MD has re-reviewed the request and has come to the same conclusion (that Ms. Congress does not meet the criteria for hearing aids). My understanding of the ADA is that auxiliary aids shall be furnished to afford individuals with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity within DOC. Does DRVT have any indication that LC is unable to participate in a service, program, or activity? We have reviewed Ms. Congress' case several times...and DOC-HSD has not received info to indicate that Ms. Congress is unable to participate.²⁵

DRVT continued to make requests of DOC and Centurion for the hearing aids to be checked or for Ms. Congress to have an updated test, but these requests continued to be denied or ignored by Centurion on the grounds that she was “functional in the facility” without hearing aids. On November 28, 2017, Ms. Congress again requested her hearing aids be checked or that she be given an exam.²⁶ Dr. Fisher finally gave an instruction for a referral for an on-site exam. In early December 2017, an entry into Ms. Congress’s medical record by CRCF administrative assistant Gail McCallister noted that the hearing aids were sent to two separate audiologists who could find nothing wrong with them.²⁷ However Ms. McCallister’s notes indicated that the second audiologist stated that, “some reasons she may be having issues is over time if she has had these for a long time she may need to have them adjusted because over time and age your hearing changes. He said she would need to be tested and the best way is to have her tested along with the hearing aids. Additionally, he said maybe she has a wax build up. If someone is taking medications that could also interfere with hearing. I told him to hold on to them until I could get directions from Management [sic].”

On December 19, 2017, the referral for an on-site audiologist was finalized.²⁸ However it took another three months to perform the test and another month after that to fit

²⁴ Complaint paragraph 14, and as admitted by DOC Response, 12/22/17.

²⁵ October 30, 2017 email from Ben Watts to DRVT as incorporated in DOC response of 12/22/17.

²⁶ Provider note 11/28/17.

²⁷ Medical record entry from Gail McCallister 12/7/17.

²⁸ Provider note 12/19/17.

Ms. Congress with one hearing aid.²⁹ A medical note from February 2018 that stated that “DOC reports pt [sic] cant [sic] hear commands and communications on her unit”³⁰ may have sped up the process because it seemed to include feedback from other facility staff. In sum, Ms. Congress had no functional assistive device(s) from April of 2016 to April of 2018, during which time her hearing deteriorated.³¹

III. LEGAL ANALYSIS

I. Prima Facie Case – Elements

The Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A §4502(c) states:

(c) No individual with a disability shall be excluded from participation in or be denied the benefit of the services, facilities, goods, privileges, advantages, benefits, or accommodations, or be subjected to discrimination by any place of public accommodation on the basis of his or her disability.

The VFHPAA sets forth the obligations that a place of public accommodation has to persons with disabilities in 9 V.S.A. §4502(6):

(6) A public accommodation ***shall take whatever steps may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids*** and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden on the public accommodation.³²

²⁹ This legal analysis does not include an analysis of whether Centurion and DOC violated the VFHPAA by providing Ms. Congress with a single hearing aid instead of two hearing aids since that issue is not included in the complaint and responses. It does note that Mary Marino, the hearing aid specialist, objected to this decision and filed the objection with her employer. Interview with Mary Marino.

³⁰ Provider note 2/14/18.

³¹ As noted from her March 2018 hearing test which showed increased hearing loss.

³² See *Ryan v. Vermont State Police*, 667 F.Supp.2d 378, 389 (D. Vt. 2009)(“The ADA requires police officers to take appropriate steps to ensure that communication between deaf arrestees and the police is at least as effective as communication that would occur between the police and hearing arrestees.”).

In order to prove that Centurion and DOC treated her in a discriminatory manner, Ms. Congress must provide the following:

- 1) She is an individual with a disability; and,
- 2) DOC is a place of public accommodation and its contracted medical provider, Centurion, is subject to the VFHPAA public accommodation provision; and,
- 3) She was excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.³³

A. Is Ms. Congress a person with a disability?

In order to demonstrate that she was entitled to auxiliary aids, Ms. Congress must demonstrate that she is a person with a disability as defined by statute. As noted above, while neither the DOC nor Centurion explicitly challenged this element in their response, their decisions and statements, particularly those of Mr. Watts and Dr. Fisher noted above, reflect a belief that her hearing loss does not qualify a bona fide disability.

An individual with a disability is defined in 9 V.S.A. §4501, as a person who has a “physical or mental impairment which limits one or more major life activities,” or has a “history or record of such an impairment;” or someone who is “regarded as having such an impairment.”³⁴ The term “physical impairment” includes speech and hearing impairments.³⁵ A “major life activity” is not defined in Vermont’s public accommodations statute, however it is defined in its federal precursor, the American with Disabilities Act, (ADA), to include, but not be limited to “caring for oneself, performing manual tasks, seeing, *hearing*, eating, sleeping, walking, standing, lifting, bending, *speaking*, breathing, learning, reading, concentrating, thinking, *communicating*, and working.”³⁶ Ms. Congress has indicated that without her hearing aids, she has difficulty with hearing and communicating in certain situations. She also appeared to have somewhat of a speech impediment and had to incline her head towards this investigator during her interview. Her audiology exams over time have confirmed hearing loss and she was originally provided with bilateral hearing aids for mild to moderately severe hearing loss.

³³ 28 C.F.R. § 36.303: “A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.”

³⁴ 9 V.S.A. §4501(2)(A)-(C).

³⁵ 9 V.S.A. §4501(3)(C).

³⁶ 42 U.S.C. § 12102(2)(A). “Major life activities” are also defined in the Vermont Fair Employment Practices Act. 21 V.S.A. § 495d(9).

Furthermore, the 2008 amendments to the ADA made it clear that the definition of “disability” was to be “construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”³⁷ The ADA also makes it clear that an impairment need not limit all major life activities; it may be sufficient under the ADA if it limits one major life activity.³⁸ Furthermore, the ADA states that “The determination of whether an impairment substantially limits a major life activity shall be made *without regard to* the ameliorative effects of mitigating measures such ashearing aids.”³⁹ The language and purpose of the VFHPAA adopt this standard.

FINDING: Ms. Congress is a person with a disability pursuant to the VFHPAA.

B. Are CRCF (DOC) and Centurion, DOC’s medical contractor, “places of public accommodations?”

In 2006, the Vermont Supreme Court held that prisons are in fact places of public accommodations:

In short, the general scheme of the public accommodations statute, viewed in light of its underlying purpose and history, demonstrates that the Legislature intended to make all governmental entities subject to the public accommodations law. The dissent asserts that “[t]here is nothing unclear or unreasonable about the Legislature distinguishing state prisons from other governmental entities.” That is a debatable, but ultimately irrelevant, point, given that the Legislature has not exempted state prisons—or any other public entity for that matter—from a law that was intended to apply to governmental entities in general.⁴⁰

Centurion is DOC’s contracted medical provider, and its manual states, “CENTURION OF VT has entered into an agreement with the Vermont Department of Corrections (VDOC) to provide comprehensive healthcare services to inmates throughout the state’s correctional system,” and “Complaints about adverse decisions for medical services and or procedures will be reviewed by the CENTURION OF VT Statewide Medical Director or the appropriate qualified medical professional(s).”⁴¹ Its contractual relationship, delivery of services within a place of public accommodation subject it to the VFHPAA. Both South Carolina⁴² and Kentucky⁴³ have instituted settlement agreements in prisons that ensure effective communication and access to auxiliary aids.

³⁷ 42 U.S.C. §12102(4)(A).

³⁸ 42 U.S.C. §12102(4)(C).

³⁹ Emphasis added.

⁴⁰ *Department of Corrections v. Human Rights Com'n*, 181 Vt. 225, 236 (2006).

⁴¹ Centurion of Vermont, LLC, “Provider Manual,” November 2015.

⁴² SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND SOUTH CAROLINA DEPARTMENT OF CORRECTIONS UNDER THE AMERICANS WITH DISABILITIES ACT DJ# 204-67-174, 3/19/18.

⁴³ SETTLEMENT AGREEMENT BETWEEN DEFENDANTS THE COMMONWEALTH OF KENTUCKY ET AL. AND PLAINTIFFS OSCAR ADAMS AND MICHAEL KNIGHTS, Case: 3:14-cv-00001-GFVT-EBA Doc #: 81-1 Filed: 06/24/15.

FINDING: Both the Department of Corrections and Centurion are places of public accommodations.

C. Was Ms. Congress excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services?

A person with a disability must be provided with auxiliary aids so that they have an “*equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity*”⁴⁴

VFHPAA defines “auxiliary aids” at 9 V.S.A. §4502(7):

(7) "Auxiliary aids and services" mean the following:

(A) Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, *assistive listening devices and systems*, hearing aid compatible telephones, closed caption decoders, open and closed captioning telecommunications devices for deaf persons, videotext displays or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

While a place of public accommodation has some discretion with respect to what measures to take, the auxiliary aid must result in effective communication.⁴⁵

A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities...⁴⁶

The type of auxiliary aid or service necessary to ensure effective communication *will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.*

In addition to its punitive and rehabilitative goals, prisons offer a wider variety of services and programs from educational to religious. Prisons are also complex settings fraught with potential conflict and danger. The importance of making clear statements to others as well as being able to clearly understand what someone else is saying is of paramount importance. In addition to being entitled to a safe environment, Ms. Congress is entitled access to the same services and

⁴⁴ 28 C.F.R. § 35.160(b)(1).

⁴⁵ *Id.*

⁴⁶ 28 C.F.R. § 36.303(c)(1).

benefits other inmates receive in prison, including equal access to education, communication with other inmates, staff and family and friends.⁴⁷

Effective communication includes receiving equal opportunity to gain the same benefits and services that non hearing-impaired prisoners have access to.⁴⁸ While it may be DOC's contention that Ms. Congress received the same services as other inmates despite her lack of hearing aids, the fact is that without her hearing aids - which were deemed appropriate by medical experts and the DOC at one point - Ms. Congress had to exert more effort, more focus, compensate for her hearing loss and devise more strategies than her non-disabled peers to access the same benefits and services.

The regulations are also very clear that the public accommodation should consult with the individual "whenever possible" to determine what type of auxiliary aid is needed:

A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, ***provided that the method chosen results in effective communication.*** In order to be effective, ***auxiliary aids and services must be provided in accessible formats, in a timely manner,*** and in such a way as to protect the privacy and independence of the individual with a disability.⁴⁹

Importantly in this case, the auxiliary aids must be provided in a "timely manner."⁵⁰

Ms. Congress made multiple, obvious, unambiguous requests for hearing aids and/or a new hearing exam. Rather than engaging her in a process that sought to understand her issues and challenges, or have an audiologist determine if her issues were genuine, Centurion and DOC simply decided from a distance that she was functional within the facility without any hearing aids and denied all her requests up until March of 2018.

⁴⁷ *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995) (found that the prison officials had violated inmates' rights under the ADA. Prison officials distributed an ADA manual to the staff, but manual did not provide information to inmates about available accommodations, or procedures for handling inmate requests for accommodation. The court found that the prison officials excluded qualified individuals from participation in programs such as academic and vocational programs and rehabilitative counseling. The officials placed those inmates in settings without accommodation, thus the benefits were unequal to benefits of nondisabled inmates).

⁴⁸ *McBride v. Michigan Department of Corrections*, 294 F.Supp.3d 695, 718 (E.D. MI. 2018) (holding that with respect to religious services, the Michigan Department of Corrections "must therefore 'furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of' that service. 28 C.F.R. § 35.160(b)(1). Because the MDOC admits it does not do this with respect to religious services, summary judgment in Plaintiffs' favor on this issue is appropriate.'"). In the MDOC, this applied specifically to interpreters, which are one type of auxiliary aid.

⁴⁹ 28 C.F.R. § 36.303(1)(ii).

⁵⁰ *Id.*

FINDING: Ms. Congress was excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and service.

II. *Legal Defenses to Ms. Congress's Complaint*

Once a *prima facie* case of discrimination is established in an effective communication case, the statute calls upon a Respondent to demonstrate that providing the auxiliary aid or service would “fundamentally alter” the goods, services, facilities, privileges, advantage or accommodations being offered,” or place an “undue burden” on the public accommodation.⁵¹ In general, these are fact-specific determinations based on data and concrete showings as to the financial and/or administrative impact on the public accommodation of providing the auxiliary aid or service.

DOC and Centurion have not produced evidence of a fundamental alteration or an undue burden argument. While it is likely that the decision to deny her auxiliary aids represented a cost-cutting measure, this was not set forth or tied to the statutory defense. It is unlikely that DOC would be able to raise a fundamental alteration or undue burden as a defense since it provided Ms. Congress two hearing aids at one point without any known impact on its programs or services with respect to cost. If anything, DOC had an opportunity to overrule Centurion, but it did not. Respondents essentially relied on subjective and selective judgments and other undefined calculations to make their determinations about Ms. Congress's ability to hear without consulting with her or medical experts.

This investigation closely examined Respondents' assertion about Ms. Congress's ability to function in the facility without hearing aids. It interviewed three of her teachers, two other program coordinators and her Case Manager. There was no common agreement about her ability to hear or the effect of her hearing loss or speech discrimination on her ability to communicate or perform in classes. One teacher was essentially unaware she had a hearing deficit. He stated he had provided assistance with rephrasing questions on tests in particular subjects for her because the questions were very technically written, but made no connection to hearing loss. He also stated she had some difficulty with pronunciation, but did not associate it with hearing loss and speech discrimination.⁵² A Voc-Rehab employee who, while not her instructor, had discussed hearing loss and issues with speech discrimination with her, and connected with her due to his own hearing loss.⁵³ Another program coordinator who facilitated her phone calls and meetings with family said Ms. Congress would state that she had trouble hearing phone calls with family, and that staff

⁵¹ *Id.*

⁵² Interview with Instructor John Howe, 1/23/19.

⁵³ Interview with Instructor John Long, 1/23/19.

persons sometimes used a particular phone with a louder speaker for those calls.⁵⁴ Records from Centurion show that Ms. Congress communicated frequently with medical staff about a number of medical issues. She has also participated in much of what CRCF has offered, and has received numerous completion certifications and recognitions in Bible study, Safety Awareness,⁵⁵ Pre-Employment Skills,⁵⁶ Legal Studies, Domestic Violence Awareness Issues, and Parenting From Prison Issues.⁵⁷ She has been trained as a Flagger and a Barber.

These varying responses and the conundrum they represented re-focused this investigation and required a closer look at the overarching purpose of the VFHPAA (and ADA). The role of these statutory provisions is to remove much of the subjective, outsider assessment in order to fairly determine: 1) whether someone has a disability, and 2) whether they need assistive devices to participate equally in what the place of public accommodation offers.⁵⁸ The statutes' role is to try and remove biases and other objections – usually monetary ones. A determination about whether someone is entitled to equal access cannot not be derived from a poll or average of opinions. The question of whether the person has a disability is a determination which involves great deference to the person claiming the disability. The Respondents in this complaint did not view Ms. Congress's claims from the statutory perspective.

Centurion's guidelines, even though updated in 2018, fail to request information from the inmate about their own ability to function in the facility. The guideline is based solely upon "confirmation of hearing loss symptoms from correctional staff and/or patient's medical history/providers and other DOC staff."⁵⁹ This investigation submits that this is an incorrect approach that does not conform to the requirements of the VFHPAA or recognize the import of the 2008 amendments to the ADA.

IV. CONCLUSION

This case is peculiar in that CCS, the former health care provider, and DOC, gave Ms. Congress bilateral hearing aids at a time when her hearing loss was less severe. By the time her hearing aids began to fail in 2016, Centurion had taken over and it essentially disregarded her hearing loss and determined she did not have a disability. DOC then pivoted from its original position of supporting the provision of auxiliary aids and recognizing she had a disability. Centurion and DOC assessments of Ms. Congress's hearing have not been coordinated or broadly contextual, and medical staff have drawn conclusions about her ability to hear without the

⁵⁴ Interview with Jess Kell, DIVAS Coordinator, 1/31/19.

⁵⁵ 2/17/11.

⁵⁶ 4/4/13.

⁵⁷ Several certificates was provided to this investigator ranging in dates from 2009 to 2018.

⁵⁸ See, e.g., *McElwee v. County of Orange*, 700 F.3d 635, 640 (2012): "...[A] defendant discriminates when it fails to make a reasonable accommodation that would permit a qualified disabled individual "to have access to and take a meaningful part in public services."

⁵⁹ Centurion Clinical Guidelines – effective 2/25/18.

expertise of an audiologist or an understanding of what of the impacts of impaired speech discrimination. Dr. Fisher and his staff repeatedly denied requests for batteries or new tests, and recommended an “alternative treatment” which was never defined and never materialized. Indeed, it is hard to imagine what an alternative treatment for hearing loss might be. After one such visit by Ms. Congress, along with a denial for hearing aids or exam, Centurion prescribed “alternative treatment,” Dr. Fisher wrote, “Please reassure patient.”⁶⁰

Final recommendations from the HRC typically do not reflect a judgment on whether a particular action by a respondent is indicative of “deliberate indifference” since it arises outside of an administrative setting in the context of litigation. However, this case certainly presents an argument for “deliberate indifference” by both DOC and Centurion. Both Respondents allowed for a person who had been given bilateral hearing aids to go without them for a two-year period. They denied her requests for new batteries or a new exam. They sent out her hearing aids then did not return them for nine months. When they did return them, they were still inadequate for her needs. There is no record of responses to her questions about where her hearing aids were or when they would be fixed. Even when she enlisted the help of counsel, DOC and Centurion pushed back – it took repeated efforts to get Centurion to schedule a hearing exam. By the time she was finally tested, her hearing had worsened, which was the most obvious reason that nothing could be found to be wrong with her hearing aids. In sum, both Respondents violated the VFHPAA by not recognizing Ms. Congress as a person with a disability and by depriving her of auxiliary aids in a timely manner so she could be afforded equal access to all of the services and privileges for which she was eligible.

PRELIMINARY RECOMMENDATIONS

- 1) This investigation makes a preliminary recommendation that the Human Rights Commission find there are **reasonable grounds** to believe that the Respondent, Centurion Health Care discriminated against Latonia Congress based on disability in violation of 9 V.S.A. §4502.
- 2) This investigation makes a preliminary recommendation that the Human Rights Commission find there are **reasonable grounds** to believe that the Respondent, Department of Corrections discriminated against Latonia Congress based on disability in violation of 9 V.S.A. §4502.

⁶⁰ Provider note from 8/29/17.



Nelson M. Campbell
Supervising Attorney

3/28/19
Date

Approved by:



Bor Yang, Executive Director
& Legal Counsel

3/28/19
Date