

Listening and Spoken Language Knowledge Center

For children and adults with hearing loss, their families and the professionals who support them



Advancing CART: Equal Opportunity for Communication Access

By Anna Karkovska McGlew

Two ongoing legal cases, supporting the right of students who are deaf and hard of hearing to receive Communication Access Realtime Translation (CART) interpreting in the classroom under federal disability law, are working their way through the court system. In 2012, AG Bell filed amicus briefs in support of the plaintiffs in both cases in federal courts of appeal, written and submitted by Steven R. Rech, former AG Bell board member, with assistance from Mark Merrell, both of Schwartz, Junell, Greenberg & Oathout LLP in Houston, Texas. These cases could have a widespread impact on accessibility for students with hearing loss seeking CART interpreting in secondary and higher education.

Both *K.M. v. Tustin Unified School District* and *Argenyi v. Creighton University* are similar, involving students requesting CART interpreting as a classroom accommodation in a high school and a medical school context respectively. The plaintiffs in the cases have invoked some of the major federal laws governing CART communication access for people who are deaf and hard of hearing. The outcomes of the cases will have far-reaching implications for providing equal opportunity for effective communication access in the classroom for students with hearing loss. AG Bell is closely monitoring the cases, which could be decided in the next few months.

K.M v. Tustin Unified School District

In *K.M. v. Tustin Unified School District* in the 9th U.S. Circuit Court of Appeals, K.M. is a high-school student who is deaf and uses cochlear implants and speechreading to communicate.

K.M was diagnosed at 13 months with bilateral severe to profound hearing loss. Her parents chose a listening and spoken language outcome for her, which they pursued through extensive auditory-verbal

therapy. K.M. received a cochlear implant in her right ear at 3 years 8 months and wore a hearing aid in her left until she was 15, at which time she received her second cochlear implant.

Although a sound field system worked well for K.M. in elementary school, her mother Lynn Bright noticed that things began to change in middle school when K.M. used a personal FM system. Teachers would either hold the microphone too close or too far from their mouth. "They banged their hands and jewelry against the cords, which produced static," Bright said. "She would come home and remove her processor and hearing aid and sit in total silence because the noise had bothered her so much. And she began to 'forget' to even give the system to her teachers, she was so miserable."

After her seventh grade teacher noted that K.M. was "lost" during class discussions, the family requested that her school district provide her with CART interpreting for her classes. The school refused to do so, noting that K.M. could speechread well and was passing her classes. The family initiated a due process complaint with the school district and lost.

"High school was miserable for K.M." Bright said. "The school district placed K.M. in portable classrooms, the worst acoustic environment on campus. The art room was cavernous and the instructor resisted wearing the FM microphone."

According to the school district, as long as the student with a disability is passing her classes, no accommodation is necessary under precedent interpreting the Individuals with Disabilities Education Improvement Act (IDEA).

"K.M. worked hard for her grades, showing up on time and turning in her assignments. Because she is bright, she has been able to earn passing grades despite not having CART. We will never know how much she missed or how much better she could have done if she had been given equal communication access," Bright said.

The major laws affecting CART communication access for a person who is deaf or hard of hearing are Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990, and the Individuals with Disabilities Education Act (IDEA).

K.M. brought suit against the school district in a federal court in California not only under IDEA, but also under the ADA and Section 504 of the Rehabilitation Act of 1973.

Section 504 requires that entities receiving federal funding, including schools, provide persons with disabilities an opportunity to be fully integrated into the mainstream. The ADA establishes the right of persons with disabilities to participate in mainstream environments with any reasonable accommodation needed to provide full access. The IDEA requires states to provide a free, appropriate, public education to children with disabilities in the least restrictive environment.

While the district court was sympathetic to K.M., the court agreed with the school district that as long as K.M. was passing her classes, no further accommodation was necessary.

K.M. appealed to the 9th U.S. Circuit Court of Appeals, at which time AG Bell filed an amicus brief with the court in her support. AG Bell argued the ADA's standard is different from that of IDEA, and that CART interpreting is necessary for students who are deaf to receive full and equal access in the classroom. AG Bell also noted that courts have held that captioning is necessary for access for individuals who are deaf or hard of hearing in a variety of contexts, such as for watching movies and participating in courtroom proceedings. AG Bell argued that access for the classroom was no different. The Department of Justice (DOJ) also filed an amicus brief in the case essentially agreeing with AG Bell's arguments.

High school has been a trying experience for K.M. "Our family saved the school district a lot of money by mainstreaming her..., it is short sighted of them to have not spent the money on CART her last four years," said her mother.

The 1997 amendments stipulate that IDEA funding can be used for providing services to children with disabilities in regular classroom settings even if children without disabilities benefit as well. An example of this would be if the CART transcript in a classroom was projected on a large screen visible to everyone in the room rather than just on the laptop monitor of a student with hearing loss. This can lead to a better learning environment and improved information transfer between the teacher and the students with or without hearing loss, according to Aaron Steinfeld, Ph.D., a researcher at the National Robotics Engineering Consortium at Carnegie Mellon University.

K.M. is set to go to a four year university where she will be provided with CART in all her classes.

K.M. v. Tustin Implications: IDEA ≠ ADA

According to David M. Grey, the attorney representing K.M., this case is important because the special education laws under IDEA do not require equality, but only a low basic floor of opportunity. On the other hand, the ADA requires equality of opportunity and asks public entities, including schools, to ensure that communications with individuals with hearing loss be as effective as communications with individuals with typical hearing.

“Through this entire case, the schools have been successful in arguing that by complying with the special education laws [IDEA], they have also complied with the ADA. Success on this case will make clear that the special education laws and the ADA have different standards and that just because a child is receiving educational benefit does not mean that he/she is being provided with an equal opportunity for communication access,” said Grey.

Grey added that he hopes this case will make clear that students with hearing loss face barriers to spoken language in the classroom and that they are entitled to an equal opportunity to hear what is said in the classroom.

The case is now under submission and the court can take anywhere from 3 months to a year to rule and issue its opinion. There could be a decision on the case by the summer.

Argenyi v. Creighton University

The Argenyi v. Creighton University in the 8th U.S. Circuit Court of Appeals is very similar to the K.M. case, but in the medical school context. Michael Argenyi has been deaf since infancy and grew up using listening and spoken language. He received a cochlear implant while in college at Seattle University where the school provided him with CART and a cued speech interpreter. He excelled academically and had a 3.87 grade-point average to show for it.

In 2009, after being accepted at Creighton University Medical School in Omaha, Neb., Argenyi received a second cochlear implant.

Once at Creighton University, Argenyi requested CART interpreting so he could understand what was being said in classes and during clinical training. Many medical students who are deaf—as well as students with hearing loss pursuing higher education—have been provided with similar accommodations pursuant to relevant federal disability laws, including the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. Despite his use of cochlear implants, Argenyi said that his hearing sounds like "a poorly tuned, crackling radio station," according to Courthouse News Service.

However, Creighton rebuffed Argenyi's request for CART interpreting. Instead, Creighton told Argenyi to sit in the front row of the classroom and speechread professors. Creighton also offered to provide Argenyi with a notetaker and an FM assistive listening device and informed him that its lectures were available on audio podcast on the school's website. Argenyi said that these accommodations were not effective given his profound hearing loss and that he needed CART interpreting to fully understand the lectures. Argenyi ended up spending \$114,000 of his own money to pay for CART interpreting.

Argenyi brought suit against Creighton in federal court in Nebraska alleging violations of the ADA and Section 504. According to *FindLaw*, a Thomson Reuters company, an expert testified on behalf of Argenyi that the accommodations provided by the school ended up decreasing Argenyi's speech perception. However, the district court ruled in the school's favor, holding that Argenyi had not been denied access to the medical school because he was passing his classes—albeit while paying for his own interpreting. The district court also questioned whether CART interpreting was necessary for

Argenyi.

Argenyi appealed to the 8th Circuit, and AG Bell filed an amicus brief in his support.

In the amicus brief, AG Bell argued that the ADA clearly requires universities to provide accommodations to ensure that students with disabilities have equal access to classroom materials, and that Creighton seriously overestimated how much Argenyi could understand in the classroom lectures using his cochlear implant and speechreading. AG Bell further contended that the district court's determination that CART was not "necessary" for Argenyi to attend medical school understated the relevant accessibility standard. Other courts had held that students who are deaf and hard of hearing must be provided with accommodations that are "necessary" to ensure equal opportunity as their peers with typical hearing. The DOJ also filed a brief in this case largely agreeing with AG Bell's arguments.

In a unanimous decision, the 8th Circuit agreed with the plaintiff, AG Bell and the DOJ that there was sufficient evidence that a jury could conclude that Creighton had violated federal accessibility statutes by denying CART to Argenyi. The court stated that accommodations are "necessary" if they "ensure that all people have 'full and equal enjoyment' of public accommodations [i.e., schools] regardless of disability." In essence, according to *FindLaw*, the 8th Circuit ruled that Argenyi had presented enough evidence to file a claim under the ADA by demonstrating three things: he is disabled and academically qualified to attend Creighton; Creighton is a place of public accommodation and receives federal funding; Creighton discriminated against Argenyi based on his disability. Because Argenyi could not fully understand lectures and clinical training without CART, he had stated a viable claim under federal accessibility statutes. The 8th Circuit remanded the case to the district court for a trial under the proper standards.

Although Creighton has not provided CART to Argenyi and the case is expected to go to trial in the next few months, other students have received this accommodation. The University of California Davis, School of Medicine, provided Amanda Mooneyham, a medical student with profound hearing loss who wears hearing aids, with CART during surgery sessions in the operating room. You can watch a video in which she and her professors from UC Davis share the experience:

<http://bit.ly/18Qf1c6>.

Rachel Arfa, an AG Bell board member who is a practicing attorney, used CART in college and law school. "It was an invaluable way to have equal access to my education, and helped to level the playing field. I was fortunate to have excellent captioners who made sure to do the appropriate prep work by reviewing my course materials so that the vocabulary used in my classes was in their CART dictionaries. Having equal access to my education with the use of CART made all the difference in my education— without it, I would not be as successful as I am."

Argenyi v. Creighton Implications: Equal Opportunity to

Participate

With its January 2013 decision to send the case to trial under the proper standards, the U.S. Court of Appeals ruled that institutions of higher education, including medical schools, must provide accommodations such as captioning when necessary to ensure effective communication with the student who is deaf or hard of hearing, unless doing so would result in undue burden or fundamental alteration.

"Notably, the court did not give any deference to the medical school's determination about what was 'appropriate' for a medical student to use as accommodations—universities may not substitute their own judgments for what the law requires. Merely passing classes does not mean access: the student must have an equal opportunity to participate in and benefit from attending classes and other educational activities," commented Michael Stein, the attorney representing Argenyi in the case.

Both cases may set a precedent for advancing access to CART in the classroom. CART is a needed and reasonable accommodation in the classroom, which significantly improves the ability of students with hearing loss to comprehend the teacher and puts them on equal footing with their fellow classmates for participating in and benefiting from classroom discussion and success beyond the classroom.

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