95 Civ. 8591 (RWS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CIVIC ASSOCIATION OF THE DEAF OF NEW YORK CITY, INC., *et ano.*,

Plaintiffs,

-against-

MICHAEL R. BLOOMBERG, *et al.*,

Defendants.

CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO MODIFY OR VACATE PERMANENT INJUNCTION

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Jonathan L. Pines, Toni Gantz
Tel: (212) 788-0933
Matter #: 95GL000659

TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CIVIC ASSOCIATION OF THE DEAF OF NEW YORK CITY, *et ano.*,

Plaintiffs,

95 Civ. 8591 (RWS)

- against -

MICHAEL R. BLOOMBERG, *et al.*,

Defendants.

----------x

CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO MODIFY OR VACATE PERMANENT INJUNCTION

PRELIMINARY STATEMENT

Defendants New York City Mayor Michael R. Bloomberg, New York City Fire Department Commissioner Salvatore J. Cassano, and the City of New York (collectively, "Defendants")[1] bring this motion for an order modifying or vacating a permanent injunction ("Injunction") issued by this Court in its Opinion and Judgment dated February 9, 1996, reported

[1] The individually named defendants identified above, along with City Clerk and Clerk of the New York City Council Michael M. McSweeney; Speaker of the New York City Council Christine C. Quinn; Majority Leader of the New York City Council Joel Rivera; and Minority Leader of the New York City Council James S. Oddo, all of whom are sued in their official capacities only, are all successors to the individuals originally named when this action was commenced in 1995 and have been automatically substituted by operation of Rule 25(d) of the Federal Rules of Civil Procedure. (The originally named defendants were Mayor Rudolph Giuliani, Fire Commissioner Howard Safir, City Clerk Carlos Cuevas, Council Speaker and Majority Leader Peter Vallone, and Minority Leader Thomas Ognibene.) Because the City Council is currently considering a proposed local law lifting prior local law restrictions on the deactivation of the street alarm box system as part of the New York City Fire Department's efforts to achieve necessary budget reductions, Defendants McSweeney, Quinn, Rivera, and Oddo take no position on this motion.

at Civic Association of the Deaf v. Giuliani, 915 F. Supp. 622 (S.D.N.Y. 1996) ("CAD I"). Defendants seek modification or vacatur of the Injunction in order to deactivate the remaining street alarm boxes in New York City.

As set forth in detail below, in the more than fourteen years since the Injunction issued, street alarm boxes have become a disfavored and extremely unreliable means of reporting emergencies from the streets of New York City. Use of the street alarm box system has declined by approximately 90%. Simultaneously, street alarm boxes generate a vastly disproportionate percentage of the emergency reporting system's false alarms: though accounting for less than 3% of all calls received by the New York City Fire Department ("FDNY") through any reporting source (alarm box calls, telephone calls, personal reporting), street alarm boxes generate more than 43% of the false alarms that the FDNY receives—more than sixteen times their proportion of total call volume. In addition, currently only 0.4% of reports to the FDNY of actual emergencies (that is, reports that are not malicious false alarms) originate from street alarm boxes.

At the same time, the street alarm box system places a significant burden on critical and limited FDNY resources. Each year, street alarm boxes cost the FDNY $6.3 million in maintenance costs, wholly apart from any capital costs associated with system improvements. Since 1996, FDNY Communications network capital costs, which were predominantly alarm-box-related, totaled approximately $140 million. Over the next ten years, the FDNY estimates that capital costs associated with the street alarm box system will approach another $25 million. These figures do not take into account the costs associated with responding to the many malicious false alarms that street alarm boxes generate.

Finally, and perhaps most significantly, street alarm boxes are no longer the only means available to deaf and hard of hearing persons for reporting emergencies from the street. In issuing the Injunction in 1996, this Court made clear that the City could return to seek its modification or dissolution upon a showing that "E-911 is in operation and effective throughout the City and that a protocol has been developed providing the deaf and hearing-impaired with the ability to report a fire." CAD I, 915 F. Supp. at 639. With both of those conditions now met, Defendants return to this Court seeking the relief so offered by the Court.

STATEMENT OF FACTS

A. Procedural History

Plaintiffs, on behalf of a then-proposed, and later certified, class of deaf and hard of hearing residents and visitors to New York City, commenced this action in 1995, seeking declaratory and injunctive relief pursuant to Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Equal Protection Clause of the Fifth and Fourteenth Amendments. Specifically, Plaintiffs sought to enjoin the FDNY from proceeding with a planned citywide deactivation of the street alarm box system. See id. at 625. Plaintiffs alleged that deactivation of the street alarm box system, leaving public pay telephones as the only means of communicating emergencies from the street, would leave them without adequate access to emergency services in violation of their federal rights. See id. at 630-31.

Prior to the commencement of the suit, there were approximately 16,300 street alarm boxes. These consisted of approximately 5,800 older electro-mechanical pull-lever boxes called Box Alarm Read-Out System ("BARS") boxes, which simply sent a signal to the dispatch center with location information but lacked any voice capability, and approximately 10,500

newer two-way-intercom Emergency Response System ("ERS") boxes, which provided direct voice communication between the caller and the dispatcher, along with the box's location. Callers could report emergencies from the streets of New York City either via a BARS or ERS alarm box, or by calling 911, a telephone-based emergency reporting system operated by the New York City Police Department ("NYPD"), from public payphones. See id. at 626.

Plaintiffs commenced suit after the FDNY removed 4,039 street alarm boxes in various "pilot study areas" in neighborhoods in Manhattan, Queens, Brooklyn, and the Bronx, consistent with a plan approved by the City Council that had contemplated a larger proposed deactivation. See id. at 628.

Simultaneously, the NYPD was in the process of transitioning to an "Enhanced 911" system ("E-911"), which embodied a then-recent innovation in digital telephony by which a caller's telephone number and location were digitally conveyed along with a caller's voice.[2] See id. at 629. At the time that the action was commenced in 1995, the 911 system had lacked that capability, and callers had to provide their location verbally to 911 call-takers.

After consolidating Plaintiffs' application for preliminary and permanent declaratory and injunctive relief, this Court held a hearing on the merits and, by decision dated February 9, 1996, certified a class of deaf and hard of hearing residents and visitors to New York City; declared that the planned deactivation of the street alarm box system would violate the rights of the plaintiff class under the ADA and the Rehabilitation Act; and enjoined Defendants from "carrying out any shutdown, deactivation, removal, elimination, obstruction, or interference

---

[2] These pieces of digital information are known as Automatic Location Information and Automatic Number Information (the latter now more commonly known as "Caller ID"), or, collectively, "ALI/ANI."

with the existing street alarm box system, and from acting to replace the existing accessible street alarm box system with notification alternatives which are not accessible to the deaf." Id. at 639.

In issuing the 1996 Injunction, this Court held that the 911 system, as constituted at the time of decision, was a "notification alternative[] to the existing street alarm box system [that violated] the ADA, because public telephones [did] not enable the deaf and hearing-impaired to request fire assistance directly from the street." Id. Key to this Court's conclusion were two factual findings: (1) "the evidence to date has not established that E-911 is in place and effective," or that telephone location information was reliable in establishing the location of the public pay telephones; and (2) there was "no evidence" that Defendants had effected a proposed tapping protocol by which deaf and hard of hearing users of 911 and the ERS boxes could indicate their need for Police or Fire/EMS services. Id. at 638.

Significantly, this Court invited Defendants to return "at any time" to seek modification or dissolution of the Injunction:

> Defendants may apply at any time to dissolve or modify the injunction by demonstrating that an accessible notification alternative exists. Among the means by which Defendants can meet this burden will be by demonstrating that E-911 is in operation and effective throughout the City and that a protocol has been developed providing the deaf and hearing-impaired with the ability to report a fire.

Id. at 639.

Subsequent to the Court's decision in CAD I, the FDNY restored street alarm boxes within the pilot areas, placing them approximately every 1,000 feet (four City blocks) instead of the 500-foot (two City block) distribution pattern used elsewhere in the City. Civic Association of the Deaf v. Giuliani, 970 F. Supp. 352, 357 (S.D.N.Y. 1997) ("CAD II"). In addition, in the restored pilot areas, the FDNY used a modified ERS box that had only a single button for requesting both Police and Fire/EMS emergency services, unlike the two-button ERS

boxes through which Fire/EMS emergency services could be requested by pressing a red button, and Police emergency services could be requested by pressing a blue button. Id. at 355-57. Plaintiffs thereupon returned to this Court, seeking further injunctive relief mandating the re-conversion of the one-button boxes to two-button boxes, and the restoration of the distribution of boxes from every 1,000 feet to every 500 feet. See id. at 354. The Court granted the first request, mandating the re-conversion to two-button boxes after finding the one-button boxes left Plaintiffs without an accessible alternative for requesting emergency assistance from the street, but denied the second request for the 500-foot distribution pattern in the restored pilot areas. See id. at 363.

In ruling as it did, this Court made the following findings of fact and law:

- At the time of the original 1996 injunction, E-911 was not fully operational, and there was no evidence that the City had developed or disseminated a protocol to permit deaf and hard of hearing callers access to the system. See id. at 356.

- The E-911 system had since been fully implemented, and "provide[d] automatic location and telephone number identification ('ALI/ANI'), permitting a more efficient response to calls received, including silent calls." Id.

- Defendants had developed a tapping protocol that could be used to signal a need for either Police or Fire/EMS response: a repeated single tap on an ERS box or a payphone mouthpiece would signify a request for a Police response, and a repeated double tap would signal the need for a Fire/EMS response. See id.

- While the tapping protocol may be "less natural" than pushing a button on an ERS box as a means of conveying the nature of an emergency, id. at 361, Plaintiffs had failed to establish that "the proposed protocol for E-911 reporting will be unduly difficult for the hearing-impaired to learn and to use," id. at 362. Moreover, "[t]he existing two-button alarm box system, which is not challenged, already requires a deaf caller to use a tapping

protocol to request fire assistance between the hours of 8:00 A.M. and 11:00 P.M." Id. at 362.[3]

- The Court noted, but did not resolve, a dispute between the parties regarding dispatcher training in the tapping protocol and dissemination of the protocol within the deaf and hard of hearing community. See id. at 356.

B. The Current Street Emergency Reporting System

In the fourteen years since this Court issued its decision in CAD II, the E-911 system has remained operational and effective, the ALI/ANI database is now virtually 100% accurate, the tapping protocol continues to be a means for deaf and hard of hearing persons to signal a request for Police and Fire/EMS services, the tapping protocol remains a component of both FDNY dispatcher and NYPD communication technician procedures, and the NYPD and FDNY have consistently trained and continue to train call-takers on the tapping protocol. See Dingman Decl. at ¶¶ 9-11 & Ex. "A" (FDNY Dispatchers Directive 97-18); Declaration of Deputy Inspector Vincent Guerriera, Commanding Officer of the NYPD Communications Section, dated June 22, 2010 ("Guerriera Decl.") at ¶¶ 6-8, 10-13.[4] City residents and visitors

---

[3] In order to minimize malicious false alarms during the peak hours of their occurrence, the FDNY established a "fall-back period" between the hours of 8:00 a.m. and 11:00 p.m., during which a response to a call from an ERS alarm box is only sent if an FDNY dispatcher hears tapping or a voice, indicating a possibly legitimate call for assistance. CAD I, 915 F. Supp. at 626-27. This "fall-back period" is still in effect. See Declaration of Michael Vecchi, FDNY Associate Commissioner of Management Initiatives, dated June 22, 2010 ("Vecchi Decl."), at ¶ 16; Declaration of Henry Dingman, FDNY Deputy Director of Fire Dispatch Operations, dated June 22, 2010 ("Dingman Decl.") at ¶ 12. Notwithstanding the hours of the "fall-back period," the tapping protocols may be used at any time of day by the emergency caller.

[4] FDNY Alarm Receipt Dispatchers handle all calls originating from the red button of an ERS alarm box, which signals a request for a Fire or EMS response. See Dingman Decl. at ¶ 5. NYPD Police Communication Technicians ("PCTs," also referred to as "Unified Call Takers" or "UCTs") handle calls to 911 as well as calls from the blue-button side of the ERS boxes, which signals requests for Police assistance. See Guerriera Decl. at ¶ 3. For a more detailed description of the call-taking process, Defendants respectfully refer the Court to the Dingman

can still access emergency assistance via the street alarm box system, which continues to include both BARS boxes and two-button ERS boxes, and also by calling 911 via public payphones. See Dingman Decl. at ¶¶ 3-4; Guerriera Decl. at ¶ 12.

Information about how deaf and hard of hearing persons can access emergency services through street alarm boxes and public payphones with use of the tapping protocol also continues to be disseminated to the deaf and hard of hearing community. The New York City Mayor's Office for People with Disabilities ("MOPD") produced a video instructing deaf and hard of hearing callers in how to use the tapping protocol when requesting Police and Fire/EMS services from the street. The video, which was produced in both closed captioning and American Sign Language, includes different simulations of Police, Fire, and EMS emergencies, and demonstrates the use of the tapping protocol to report such emergencies. This video, along with an "Information Sheet for Emergency Reporting by the Deaf and Hard of Hearing Community" in PDF format, are available on the MOPD Web site. See Mayor's Office for People with Disabilities, Disability-Specific Resources: Deaf and Hard of Hearing: Getting Emergency Assistance from Pay Phones / Emergency Call Boxes, http://www.nyc.gov/html/mopd/html/specific/dhh_emerg.shtml (last visited June 23, 2010). In addition, the NYPD and FDNY Web sites both include links to these MOPD online resources. See New York City Police Department Home Page, http://nyc.gov/html/nypd; New York City Fire Department Home Page, http://www.nyc.gov/html/fdny.

Declaration at ¶¶ 12-14; the Vecchi Declaration at ¶¶ 13, 14, 16-17; and the Guerriera Declaration at ¶¶ 3-4.

LEGAL STANDARDS

A. Standard for Vacating an Injunction

An injunction is an equitable and "ambulatory remedy that marches along according to the nature of a proceeding." Sierra Club v. U.S. Army Corps of Eng'rs, 732 F.2d 253, 256 (2d Cir. 1984). As such, it is "subject always to adaptation as events may shape the need." United States v. Swift & Co., 286 U.S. 106, 114 (1932). Accordingly, a court may modify an injunction to accommodate changed circumstances, Davis v. N.Y. City Hous. Auth., 278 F.3d 64, 88 (2d Cir. 2002), or upon a showing that a continuation of the injunction would be inequitable, N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 967 (2d Cir. 1983); see also Fed. R. Civ. P. 60(b) (listing the grounds for relief from a final judgment or order, which include when applying the judgment "prospectively is no longer equitable" or "any other reason that justifies relief"). The district court's power to modify or vacate an injunction "is long-established, broad, and flexible." Carey, 706 F.2d at 967.

B. The ADA and the Rehabilitation Act

Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., provides in relevant part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, similarly provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a).

The ADA and the Rehabilitation Act prohibit discrimination against the disabled in the provision of public services, but the statutes neither guarantee "any particular level of [services] for disabled persons, nor assure maintenance of service previously provided." Lincoln CERCPAC v. Health and Hosps. Corp., 147 F.3d 165, 168 (2d Cir. 1998). In addition, the statutes do not guarantee disabled persons "equal results" from the provision of a public service or benefit. Alexander v. Choate, 469 U.S. 287, 304 (1985) ("The [Rehabilitation] Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed."); see also Henrietta D. v. Bloomberg, 331 F.3d 261, 274 (2d Cir. 2003) (stating that Second Circuit cases applying the Rehabilitation Act "speak simply in terms of helping individuals with disabilities access public benefits to which both they and those without disabilities are legally entitled. . . ; the cases do not invite comparisons to the results obtained by individuals without disabilities").[5]

The "relevant inquiry" instead focuses on meaningful access, asking "not whether the benefits available to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled." Henrietta D., 331 F.3d at 273. "Meaningful access" is not measured or defined in relation to the access that persons without disabilities have to a particular service, nor does it relate to the adequacy of services provided. See id. at 275 (noting that the relevant measure is "whether the plaintiffs with disabilities could achieve meaningful access, and not whether the access the plaintiffs had (absent a remedy) was *less* meaningful than what was enjoyed by

[5] Standards under and requirements imposed by the Rehabilitation Act and the ADA are effectively the same, and claims under the two statutes are generally treated identically and in tandem. See, e.g., Henrietta D., 331 F.3d at 272.

others"); Wright v. Giuliani, 230 F.3d 543, 548 (2d Cir. 2000) (explaining that the disabilities statutes require that government entities enable "'meaningful access' to such services as may be provided, whether such services are adequate or not"). Rather, persons with disabilities must be able to "benefit meaningfully" from the specific service or benefit that a government entity provides. See Alexander, 469 U.S. at 302.

As discussed further below, dissolution of the present injunction to permit deactivation and removal of the alarm boxes will not contravene these statutes.

ARGUMENT

POINT ONE

THE TAPPING PROTOCOL AND E-911 SYSTEM COMPLY WITH THE ADA, THE REHABILITATION ACT, AND THIS COURT'S HOLDINGS.

A. Defendants Have Satisfied This Court's Requirements for Removal of the Street Alarm Boxes and Dissolution of the Injunction

In 1996, when this Court enjoined Defendants "from carrying out any shutdown, deactivation, removal, elimination, obstruction, or interference with the existing street alarm box system, and from acting to replace the existing accessible street alarm box system with notification alternatives which are not accessible to the deaf," CAD I, 915 F. Supp. at 639, the Court determined that street alarm boxes were at that time "the only means by which the deaf and hearing impaired [could] report emergencies from the street," id. at 637. The Court therefore found that the Rehabilitation Act and Title II of the ADA, and certain regulations promulgated under the ADA, would be violated if Defendants "were to remove the street alarm boxes *without replacing them with a notification alternative*." Id. at 635 (emphasis added); see id. at 638 ("The Rehabilitation Act would be violated by removal of the street alarm boxes without provision of

an accessible notification alternative."). Thus, it was the provision of "a means of reporting emergencies from the street"—as opposed to street alarm boxes specifically—that the Court determined was required under the disabilities statutes. Id. at 636; see id. at 638 ("Plaintiffs would be excluded from participation in and denied the benefit of reporting fires from the street if street alarm boxes were removed and no notification alternative put in place."). Accordingly, the Court instructed that Defendants could apply to dissolve the injunction "by demonstrating that an accessible notification alternative exists." Id. at 639.

The Court stated that a notification alternative would comply with the ADA so long as it "provide[d] the hearing-impaired with a means of identifying not only their location, but also the type of emergency being reported." Id. at 638. In addition, the Court noted that deactivation of the alarm boxes would not violate the ADA if "the City provided means of telephone reporting usable by the deaf." CAD II, 970 F. Supp. at 361.

Since this Court's decisions in this action, the City has effected such a means of telephone reporting: the E-911 system, which was implemented between the Court's 1996 and 1997 decisions, see CAD I, 915 F. Supp. at 638; CAD II, 970 F. Supp. at 361, along with a tapping protocol that allows deaf and hard of hearing callers to indicate the type of emergency they are requesting (a repeated single tap for Police assistance, and a repeated double tap for Fire response), see CAD II, 970 F. Supp. at 356. See also Guerriera Decl. at ¶¶ 6-8 & Exs. "E-1" (NYPD Communications Section Memo # 3/32.1, dated March 20, 1996), "E-2" (NYPD Communications Section Memo # 3/7.8, dated June 30, 1999), & "E-3" (NYPD Communications Section Memo # 3/32.1, Revised & Reissued, dated August 17, 2000); Dingman Decl. at ¶ 10 & Ex. A. E-911 provides automatic location information of callers who contact 911 via public payphones, and the tapping protocol permits deaf and hard of hearing

callers to indicate whether they are requesting Fire or Police assistance. Guerriera Decl. at ¶¶ 7, 12 & Exs. E-1–E-3; Dingman Decl. at ¶ 10 & Ex. A. As this Court has explicitly recognized, this system meets the requirements of the ADA and permits dissolution of the present injunction:

> Defendants may apply at any time to dissolve or modify the injunction by demonstrating that an accessible notification alternative exists. Among the means by which Defendants can meet this burden will be by demonstrating that E-911 is in operation and effective throughout the City and that a protocol has been developed providing the deaf and hearing-impaired with the ability to report a fire.

915 F. Supp. at 639; see 970 F. Supp. at 355 ("[A]n E-911 telephone system that actually identified the location of the caller, along with the implementation of a protocol to permit the hearing-impaired to indicate the type of emergency being reported, would be sufficiently accessible under the ADA.").

The tapping protocol and E-911 system now have been in place and operative for well over a decade. A tapping call to 911 activates the Police or Fire response corresponding to the tapping pattern the caller uses. See Guerriera Decl. Exs. E-1–E-3. FDNY dispatchers and NYPD call-takers are familiar with and regularly trained on the tapping protocol. See Guerriera Decl. ¶¶ 6-10; Dingman Decl. ¶ 11 & Ex. A. In addition, information about the system continues to be disseminated to the deaf and hard of hearing community. For example, as noted above, the New York City Mayor's Office for People with Disabilities disseminates on its Web site an information sheet and an instructional video on how deaf and hard of hearing persons can access emergency services, which both explain how to request assistance from public pay phones using the tapping protocol. In addition, the NYPD and FDNY maintain links to these resources on their respective Web sites.

In short, because the tapping protocol and E-911 system effectively allow deaf and hard of hearing callers to identify their location and the type of emergency they are reporting, they together provide an accessible notification alternative to alarm boxes. As a result, deactivation and removal of the alarm boxes is permissible under this Court's prior directives.

B. The E-911 System and Tapping Protocol Provide Meaningful Access to the Street Emergency Reporting System

As discussed above, where a government entity provides a benefit or service, it must ensure that persons with disabilities have "meaningful access" to that benefit or service. In formulating this standard, the Supreme Court explicitly rejected the position that all conduct that had a disparate impact on disabled persons violated the Rehabilitation Act, noting "two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." Alexander, 469 U.S. at 299. The "meaningful access" standard thus struck a balance between these two legitimate goals. See id. at 299-301.

At issue in Alexander was Tennessee's proposed reduction, from twenty to fourteen, of the number of days its state Medicaid program would cover inpatient hospital care. Id. at 289. It was undisputed that Medicaid recipients with disabilities who used hospital services were more than three times as likely to require more than fourteen days of care than were their non-disabled counterparts. See id. at 289-90. A class of Tennessee Medicaid recipients with disabilities challenged the proposed reduction, arguing, *inter alia*, that the reduction would have a disproportionate effect on them and was thus discriminatory. See id. at 290.

The Supreme Court rejected the challenge, finding that Tennessee Medicaid recipients with disabilities would still be able "to benefit meaningfully from the coverage they will receive under the 14-day rule," notwithstanding "their greater need for prolonged inpatient

care." Id. at 302. The Court explained that Section 504 of the Rehabilitation Act did not require the State to alter the fourteen-day coverage benefit being offered "simply to meet the reality that the handicapped have greater medical needs," id. at 303, but that the statute instead "seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance," id. at 304. Thus, although the proposed reduction fell more heavily on individuals with disabilities than it did on others, because the reduction "is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide," it did not violate the Rehabilitation Act. Id. at 309.

Applying the principles set forth in Alexander, to the extent that Defendants' proposed removal of the street alarm boxes would be a reduction in the service being offered—namely, the street emergency reporting system—the remaining E-911 system when used with the tapping protocol will continue to provide deaf and hard of hearing New York City residents "meaningful access" to emergency services. Deaf and hard of hearing individuals will still have an effective and accessible means of directly reporting emergencies to 911 from the street via public payphones, and the removal of the street alarm boxes will therefore not "deny [them] access to or exclude them from the particular [service the City of New York] has chosen to provide." Alexander, 469 U.S. at 309. In other words, because Plaintiffs will be able to "benefit meaningfully" from the E-911 system that will remain available, removal of the street alarm boxes will not violate the Rehabilitation Act or the ADA. See id. at 302, 309; see also, e.g., Wright, 230 F.3d at 548 (stating that the disabilities statutes require government entities "to enable 'meaningful access' to such services as may be provided").

Indeed, this Court has previously held that a "thinned out" street emergency reporting system would not in itself run afoul of the ADA. See CAD II, 970 F. Supp. at 362-63. In assessing whether Defendants' reduction of the system in the 1990s violated the ADA, the Court explained that the relevant legal question was whether the thinning of the system resulted in an emergency reporting system that was "readily accessible" to the deaf and hard of hearing, and not, as Plaintiffs had argued, whether the system was "less accessible to the deaf than the non-deaf." See id. at 361. The Court observed that even if "hearing individuals have a broader range of methods to report emergencies from the street than do the deaf," it would be "irrational" to only permit modifications that made the emergency reporting system equally convenient for the deaf and the non-deaf. Id. at 362. Like the Alexander Court, this Court's reasoning focused on access and usability, as opposed to "equal results." See id.; see generally Alexander, 469 U.S. at 304.

In sum, because Plaintiffs will have meaningful access to the emergency reporting system through E-911 and the tapping protocol, Defendants' proposed deactivation and removal of the street alarm boxes is permissible under the ADA and the Rehabilitation Act.

POINT TWO

DISSOLUTION OF THE INJUNCTION IS NECESSARY TO ACCOMMODATE CHANGED CIRCUMSTANCES AND TO AVOID INEQUITABLE RESULTS

Among the reasons a court may modify an injunction is when its application "is no longer equitable" or to accommodate changed circumstances. Fed. R. Civ. P. 60(b)(5); see, e.g., Davis, 278 F.3d at 88. As set forth below, dissolution of the present injunction is warranted for both of these reasons.

As a threshold matter, factual circumstances have changed since the Court issued the injunction. Most significantly, at the time of this Court's 1996 decision and order, street alarm boxes were the only means available to deaf and hard of hearing persons for reporting emergencies from the street, because public telephones at that time were accessible only to hearing individuals. See CAD I, 915 F. Supp. at 636-38. Without a notification alternative, the removal of the alarm boxes would have resulted in a street emergency reporting system completely inaccessible to deaf and hard of hearing individuals in violation of the ADA and the Rehabilitation Act. See, e.g., id. at 639. As discussed above, Defendants have since implemented an accessible notification alternative—the E-911 system and tapping protocol. Because the key circumstance underlying the Court's original decision has changed, and as this Court has already specifically instructed, Defendants' provision of this notification alternative permits dissolution of the present injunction. See, e.g., id.

In addition, the most recent statistics available from the FDNY demonstrate that the street alarm box system generates only a relative handful of legitimate calls for assistance, while burdening the City's emergency response system with a tremendously disproportionate number of false alarms. Calls made through street alarm boxes now represent a mere 2.7% of all calls to the FDNY's emergency dispatch system, but 43.3% of its malicious false alarms ("MFAs") – sixteen times the proportion of the alarm box system's total call volume. Vecchi Decl. at ¶ 18 & Ex. "D" ("FDNY Incidents by Alarm Box and Other Sources for CY 2009").

A comparison of the role of the street alarm box system today with its role in the mid-1990s, when this Court last surveyed the system, shows how considerably the alarm box system has declined as a significant and reliable source for reporting emergencies. In 1993, 15,380 calls received from street alarm boxes provided the only alarm for a fire or other

emergency; by 1994, the figure had dropped to 13,013. CAD I, 915 F. Supp. at 627. By contrast, in 2009, the most recent year for which statistics are available, only 1,935 such incidents were reported via street alarm boxes, and for many of these incidents, street alarm boxes did not provide the only alarm. Vecchi Decl. at ¶ 10 & Ex. D. This represents an 87.4% decline in the use of the street alarm boxes for the reporting of actual emergencies (as opposed to malicious fire alarms) between 1993 and 2009. Id. at ¶ 10. Moreover, given that the 1,935 figure in 2009 includes incidents for which street alarm boxes were redundant sources, the drop in the volume of unique calls generated from street alarm boxes since 1993 is even greater than 87.4%. Id. at ¶ 10 & n.4 & Ex. D.

Additional data further confirm the marginalization of street alarm boxes as a means of reporting emergencies and effecting rescues. For example, in 2009, the FDNY responded to 447,639 calls for actual Fire/EMS emergencies (that is, all calls that were not malicious false alarms) from all reporting sources, among which 911 was by far the largest.[6] See Vecchi Decl. Ex. D. Of these calls, only 0.4% (1,935 of 447,639) originated from street alarm boxes, and as noted, many of those calls were redundant reports. See id. at ¶ 10 & n.4 & Ex. D. In short, while in the early 1990s, "a significant number of rescues [were] effected as a result of street reporting [from alarm boxes]," this is simply no longer true. 915 F. Supp. at 635.

---

[6] The FDNY receives emergency notifications from a variety of sources. In addition to 911, sources include direct calls to Borough-specific FDNY "Fire Lines" or to other administrative numbers within the FDNY; ERS and BARS street alarm boxes; private fire alarm companies (which typically contact the FDNY by one of the above-referenced telephone numbers); and verbal reports by civilians appearing at firehouses or flagging down passing fire-trucks. See Dingman Decl. at ¶ 3.

The declining trend in the use of the street alarm box system compared with 911 and other sources has not merely been steady since this Court's decisions, but has escalated over the past decade, highlighting the ever-diminishing significance of the street alarm box system.

Between 1999 and 2009, BARS and ERS red-button alarm box reports of structural fires steadily decreased, from 1,188 in 1999, to a mere 140 reports of structural fires in 2009—an 88.2% drop. See Vecchi Decl. Ex. B ("Alarm Box Source – Structural Fires, Calendar Years 1999 to 2009"). While telephone calls (from 911 and through direct calls to FDNY telephone numbers) reporting structural fires also declined, the rate of decline was approximately one-third as steep (30.7%). See Vecchi Decl. at ¶ 9. Simultaneously, the volume of telephone calls reporting structural fires during this period consistently dwarfed such calls from street alarm boxes calls, by a factor of 30 in 1999 (27,171 telephone calls vs. 1,188 alarm box calls), and growing to a factor of 135 in 2009 (18,836 telephone calls vs. 140 alarm box calls). See id.

The same decline is apparent when tracking all categories of incidents reported to the FDNY emergency communication system. In 1999, the FDNY recorded 42,497 incidents reported via the alarm box system. Vecchi Decl. at ¶ 8. By 2009, that number had fallen to 12,931, a 69.6% drop. By contrast, incidents reported via 911 and other telephone sources grew from 353,519 in 1999 to 401,056 by 2009—an increase of 13.4%. See id. at ¶ 8 & Ex. C ("Alarm Box Source – All Incidents, Calendar Years 1999 to 2009").

Simultaneously, malicious false alarms now comprise the vast majority of calls made via street alarm boxes: in 2009, 85% of total street alarm box calls were malicious false alarms. Vecchi Decl. Ex. D. In total, nearly 11,000 malicious false alarms came in from street alarm boxes alone that year. See id. By comparison, only about 3% of the total calls from non-alarm-box sources in 2009 were malicious false alarms. Id. The MFA rate for the street alarm

box system was thus over 27 times greater than the MFA rate from other reporting sources in 2009. Vecchi Decl. at ¶ 20. In other words, each call received from a street alarm box for Fire/EMS services is 27 times more likely to be a malicious false alarm than is a similar call from any other source. Street alarm boxes are thus significantly less reliable than other sources of requests for Fire/EMS services. Id.

There are few benefits to balance against the substantial burdens street alarm boxes place upon the FDNY's emergency dispatch system. While generating 43.3% of all malicious false alarms reported, street alarm boxes consistently report legitimate incidents at rates far below their 2.7% proportion of the total call volume. Vecchi Decl. Ex. D. Notably, the alarm box system generates only 0.5% of all reports of structural fires—the most serious fire events to which the FDNY responds; only 1.4% of all non-structural fire reports; only 0.6% of all non-medical emergency reports; and, at most, no more than 0.2% of all medical emergency reports.[7] Id.

The available data further suggest that the ERS system fails to effectively serve not only the emergency response system, but also the deaf and hard of hearing community. A review made by the FDNY of the extremely few calls in which some form of tapping was heard suggests that ERS boxes are not deaf and hard of hearing callers' preferred method for accessing the City's emergency response system. Additionally, that review demonstrates that a "tapping" call conveyed to the FDNY dispatch system from ERS boxes is no more likely to be a reliable

[7] The FDNY does not break out separate statistics for true medical emergencies as opposed to incidents that are called in as medical emergencies but have resolved by the time assistance arrives, or turn out to be non-emergencies for other reasons.

request for emergency services than any other call originating in the street alarm box system. Vecchi Decl. at ¶ 23.

For example, in 2007, the FDNY received 25 ERS calls in which a dispatcher perceived possible tapping.[8] Of that number, 21 "tapping" calls turned out to be malicious false alarms (84.0%, just 1% shy of the 85% MFA rate for the alarm box system as a whole), and only one call was, in fact, a fire. However, with respect to that single fire, the ERS call was the seventeenth call received by Fire Alarm Receipt Dispatchers, the first having been received by telephone. Id. at ¶ 24.

In 2008, 12 transmissions were initially classified as tapping calls, again because a dispatcher perceived possible tapping. Of those calls, 10 (83.3%) were classified malicious false alarms; one "unwarranted" (the term used when an alarm box, usually inside a building, is being tested and the tester neglects to inform the FDNY, or when an electrical problem causes an unintended alarm), and, the last, "unnecessary" (the term used when the FDNY responds to an incident only to find that the incident did not require a response, but was not a malicious false alarm). Id. at ¶ 25.

In 2009, dispatchers initially characterized 6 calls as tapping calls, all of which were determined, upon FDNY response, to have been malicious false alarms. Id. at ¶ 26. In none of the above cases did FDNY personnel responding to the incident ever encounter a deaf or hard of hearing person at the alarm box or in the surrounding area. Id.

Thus, in the past three years, the FDNY has received 43 calls in which some form of tapping was perceived, of which 37 (86% of all such calls) were determined to be malicious

---

[8] For a description of the FDNY's policies and training programs addressed to the tapping protocol, see the Dingman Declaration at ¶¶ 9-11 & Ex. A.

false alarms. Only one tapping call reported an actual fire, and that call was the seventeenth report received. Id. at ¶ 27.

All of these statistics reflect not only changed circumstances, but also why continuation of the injunction is no longer equitable. Specifically, these data paint a picture of a system that has, by comparison with other sources of emergency requests, fallen largely into disuse; that generates only a small fraction – 0.4% – of the total number of legitimate calls (and an even smaller fraction of unique calls) for FDNY assistance; that is over 27 times less reliable than all other incident sources; that introduces fully 16 times its proportional share of malicious false alarms into the system, nearly doubling that number system-wide, compelling FDNY dispatchers and responders to squander valuable time as well as firefighting and life-saving efforts, and potentially delaying response times to legitimate emergencies.

Moreover, the minimal benefits and disproportionately large burdens imposed by the street alarm box system come at substantial cost. At an annual maintenance cost of $6.3 million, and with only 1,953 non-MFA incidents reported from street alarm boxes, the system last year cost the City's taxpayers approximately $3,226 per call. See Declaration of Stephen Rush, FDNY Assistant Commissioner for Budget, dated June 22, 2010 ("Rush Decl.") at ¶ 3.

These costs are particularly significant in light of the current fiscal constraints facing the City and its agencies, including the FDNY. The City's Preliminary Budget for fiscal year 2011 currently calls for the closing of 20 FDNY fire engine companies and the loss of 505 firefighting positions. Id. at ¶ 8. The average annual cost of a fire engine company is currently $1.7 million. Id. As stated, the annual maintenance cost of the street alarm boxes is currently $6.3 million, much of which consists of personnel costs; in fiscal year 2014, this annual cost is expected to increase to $7 million. Id. at ¶ 6. Since 1996, FDNY Communications network

capital costs, which were predominantly alarm-box-related, totaled approximately $140 million, and alarm box capital costs over the next ten years are estimated at $24.8 million. Id. at ¶ 7. Averaging the projected ten-year cost of the street alarm box system, the total cost of the street alarm box system is approximately $8.8 million annually. Id. at ¶ 9. Significantly, this figure does not account for or include the costs associated with responding to the malicious false alarms street alarm boxes generate. The annual cost of the street alarm box system is thus greater than the annual cost of five fire engine companies. Id.

With even fewer fire companies and firefighters, the disproportionately high number of malicious false alarms produced by street alarm boxes will place an even greater burden on FDNY's critical and limited resources. This burden involves not only the costs associated with diverting personnel, but also the risks and dangers that arise as a result of responding to the alarms. First, malicious false alarms may result in a slower response time to actual emergencies (units responding to false alarms are not available to respond to real emergencies), jeopardizing the safety of the people experiencing those emergencies. Second, every malicious false alarm results in an urgent "lights and sirens" FDNY response, requiring emergency responders to speed through streets to arrive as quickly as possible to what they believe is a life-threatening emergency. Vecchi Decl. at ¶ 21. This type of response places FDNY personnel, as well as the public, at heightened risk of accident, injury, and even death. See id. Indeed, in 2009, there were 532 accidents involving Fire apparatus, resulting in injuries to 48 Firefighters and 70 civilians. Id. While this greater risk is justifiable where there are real emergencies, it is unnecessary and dangerous where there are no such emergencies. In short, the effects of the burden that street alarm boxes place on FDNY's resources are heavily borne by both the FDNY and the public at large.

Given the extremely low use of street alarm boxes for reporting actual fire emergencies, the disproportionately high use of street alarm boxes for reporting malicious false alarms, and the costs associated with maintaining a system that primarily serves to divert necessary and scarce resources from the City's emergency response network, continuation of the injunction is no longer equitable. Moreover, dissolution of the injunction is appropriate in light of changed circumstances, namely, the implementation of the E-911 system and tapping protocol. Defendants thus ask this Court to vacate the present injunction and permit them to allocate scarce resources in a manner that accords with changing times, technologies, and needs.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that their motion to vacate the permanent injunction issued by this Court in its Opinion and Judgment dated February 9, 1996 be granted, and that Defendants be awarded such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 23, 2010

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street, Room 2-178
New York, N.Y. 10007
(212) 788-0933
Fax: (212) 788-0940
jpines@law.nyc.gov

By:_____
Jonathan Pines
Toni Gantz
Assistant Corporation Counsel