

**Testimony of Jennifer Hatton
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**Before the Committee on Government Operations and the Environment and the
Committee on Human Services,
Council of the District of Columbia**

**“Effective Interpretation for Deaf and Hard-of-Hearing Amendment Act of 2011,”
Bill 19-0049**

March 24, 2011 – 11:00 AM

I. Introduction

The Legal Aid Society of the District of Columbia submits this testimony in support of the Council’s efforts to make government services more accessible to deaf and hard-of-hearing individuals. Our community benefits when all persons, regardless of disability or language, enjoy expedient, effective access to government services. Legal Aid’s testimony pertains to the portions of the bill that involve one of our areas of expertise, language access. We certainly support the bill’s goals of expanding the network of qualified sign language interpreters but defer to members of the deaf and hard-of-hearing community and the disability rights advocates on the sign language interpreter certification provisions.

In addition to increasing the pool of certified sign language interpreters, this bill amends the DC Language Access Act of 2004 to extend its protections to deaf and hard-of-hearing individuals. As a member of the DC Language Access Coalition, we have seen how the DC Language Access Act of 2004 has made District government services more accessible to limited English proficient (“LEP”) and no-English proficient (“NEP”) individuals. Extending the protections of the Language Access Act to deaf and hard-of-hearing individuals certainly could go far in making government services more accessible to that community. It could also reinforce the Language Access Act’s goals of equal access to services for all members of the community, including LEP/NEP community members.

This legislation also attempts to address the Language Access Act’s greatest weakness: its lack of individual remedies. A review of the Language Access Act reveals that its emphasis on agency compliance, though valuable, fails to make aggrieved individuals whole. Bill 19-0049 amends § 2-1935(b)(2) of the Language Access Act to emphasize the availability of stronger remedies under the Human Rights Act in the absence of remedies under the Language Access Act. We urge the Council to go even farther than this current legislation in adapting the individual enforcement mechanisms in the Human Rights Act to the language access context, all the while preserving the Language Access Act’s important monitoring and compliance provisions.

¹The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Legal Aid provides assistance in public benefits, housing, family, and consumer law matters.

II. The Language Access Act and Systemic Reform

The Language Access Act is one of the most progressive language access laws in the country. An LEP/NEP person who encounters a language barrier at a District agency may file a public complaint with the DC Office of Human Rights (“OHR”), which leads to an investigation and a determination of whether the respondent agency was in compliance with the Act. If the agency is not found to be in compliance, OHR directs the agency about the steps it must take to come into compliance. OHR also performs ongoing monitoring of agencies’ compliance through testing and reporting.

The Language Access Act’s emphasis on compliance and systemic reform is unique and laudable. While it is important for individuals to assert their rights, no one disputes that it would be best for the agencies to provide linguistically-accessible services in the first instance, to *all* individuals. Indeed, the deaf and hard-of-hearing community, which currently enjoys individual protections and remedies under other District and federal laws, cannot file public complaints that culminate in investigations of systemic compliance.

Similarly, other laws do not place an affirmative obligation on District agencies to create strategic plans and submit reports about the accessibility of their services to the deaf and hard-of-hearing community. For these reasons, the inclusion of this community in the Language Access Act could promote more expansive reform in the delivery of these services. We support their inclusion in the Language Access Act and hope that by so doing, District agency services will be more accessible to their entire community and not only to those who assert individual rights in another forum.

III. The Need For Individual Remedies Under the Language Access Act

a. LEP/NEP individuals may assert individual rights only where the language access violation rises to the level of intentional discrimination.

Currently, there are no individual remedies under the Language Access Act; the only way to get an individual remedy is to allege intentional discrimination under the Human Rights Act. The Language Access Act² and attendant regulations³ make clear that a person or organization filing a public complaint under that Act may also allege intentional discrimination and file a complaint under the DC Human Rights Act of 1977. The requirement of intentional discrimination, however, is not always applicable in the language access context. Certainly, there are times when an LEP/NEP individual is denied access to government services as the result of intentional discrimination based on language or national origin. Given the nature of linguistic barriers, however, proving intentional discrimination is an unreasonably high burden to

² The relevant section of the Language Access Act reads: “. . . this responsibility shall not supersede or preclude the existing individual complaint process under the jurisdiction of the Office of Human Rights.” D.C. Code § 2-1935(b)(2).

³ “The filing of a public complaint does not supersede or preclude the filing of a complaint by any person or organization alleging intentional discrimination under the D.C. Human Rights Act of 1977[.]” 55 D.C. Reg. 6361 (June 6, 2008).

meet. Understanding the motive behind a language access violation is extremely difficult when the parties are unable to communicate effectively. Moreover, the denial of access to services can cause an enormous amount of individual harm, regardless of whether the denied access occurred in the context of discrimination or mere negligence on the agency's part. The harm to the individual and to the entire community is great if LEP/NEP individuals are unable to access, for example, police or medical services.

The conforming amendments to Bill 19-0049 attempt to create a private cause of action under the Language Access Act and affirm the existing mechanism by which LEP/NEP individuals alleging intentional discrimination may pursue the complaint process under the Human Rights Act, a process that is subject to judicial review. The text at page 12, line 5, however, is not clear: "For any violation of this act, this responsibility shall not supersede or preclude a person's right to avail himself of the existing individual complaint process and mechanism under the jurisdiction of the Office of Human Rights, including §§ 314 and 316 of Human Rights Act of 1977[.]" We are concerned that a court may interpret this language to require an individual to allege a violation of the Human Rights Act, which in turn would require alleging intentional discrimination—something that may or may not exist in the context of a Language Access Act violation.⁴ Furthermore, the text does not explicitly create a private cause of action under the Language Access Act.

Based on discussions with Council staff, we do not believe the Council's intent was to require intentional discrimination in order for an LEP/NEP individual to pursue individual remedies. Therefore, we recommend that the Council clarify that LEP/NEP individuals should be able to seek individual remedies under the Language Access Act without the need to allege intentional discrimination, while OHR continues to monitor agencies' compliance and investigate allegations of non-compliance.

b. The Human Rights Act contains strong enforcement mechanisms, including judicial review and a private cause of action.

The Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.*, contains strong enforcement mechanisms and remedies that easily could be adapted to the language access context. First, it allows for a private cause of action for individuals who do not wish to pursue the administrative complaint process; in other words, individuals can choose to go directly to court rather than go through the OHR complaint process. D.C. Code § 2-1403.16. The value of a private cause of action cannot be understated. Not only does it afford individuals relief that is not available through the existing administrative complaint process, but it also motivates respondents to make systemic changes quickly, lest they expose themselves to further litigation.

Second, the Human Rights Act provides for judicial review of unfavorable administrative determinations. D.C. Code § 2-1403.14. If an individual alleging discrimination under the Human Rights Act disagrees, for example, with OHR's probable cause determination or the Human Rights Commission's findings, the individual can seek review of that determination in DC Superior Court. Put simply, judicial review holds administrative agencies accountable.

⁴ For example, a violation of the Language Access Act could have occurred as the result of an agency's failure to train its frontline staff, not discrimination.

Although we believe that OHR is committed to its enforcement role under the Language Access Act, we also believe that OHR should be held accountable for its decision making in language access cases.

- c. The Language Access Act should be further amended to include strong remedies comparable to those available under the Human Rights Act, regardless of whether intentional discrimination was suffered.**

The Council should take this opportunity to strengthen the Language Access Act's enforcement mechanisms by looking to the existing mechanisms in the Human Rights Act. Because the Language Access Act and the Human Rights Act have somewhat different goals, it is not enough to subject language access complaints brought under the Language Access Act to the Human Rights Act's procedures. The Language Access Act, as written, serves an important (albeit underused) role of monitoring government compliance, which should not be lost. OHR's current monitoring role is important and should be supported to the fullest extent possible. As OHR seeks to hold agencies accountable on a systemic level, individuals, meanwhile, should be able to receive compensation for any harm they have suffered. By adapting the Human Rights Act enforcement mechanisms to the language access context, the Council could empower LEP/NEP individuals to assert their rights in more meaningful ways and, in so doing, further compel agencies to come into compliance with the Language Access Act.

IV. A Model for Protecting Individuals While Promoting Systemic Reform

We believe that the Language Access Act should be further amended to explicitly afford LEP/NEP individuals rights and remedies that are comparable to those in the Human Rights Act, without having to allege a Human Rights Act violation. We believe this can be done rather simply and would have the dual effect of strengthening the Language Access Act and preserving the viability of intentional discrimination claims under the Human Rights Act.

First, an LEP/NEP individual should have a private cause of action to seek enforcement of the Language Access Act in court rather than having to go through the administrative complaint process. This option is needed to compensate individuals who have been harmed. Some language access violations may not result in harm for which money damages are appropriate. Some language access violations, though, result in significant harm. Take, for example, the Medicaid beneficiary who cannot access care because of linguistic barriers she faced when recertifying for her benefits at the Income Maintenance Administration. The harm she suffers could be money spent out-of-pocket for critical care or, worse, harm to her health. In either context, she may lack the time to pursue the administrative complaint process, or she may need money damages to pay medical debts that were incurred as a result of the language barriers she faced.

Second, individuals and organizations should still be able to pursue the existing public complaint procedure at OHR in hopes of compelling an investigation of the respondent agency's actions. These investigations are an important part of promoting system-wide reform. Should OHR determine that an agency was in non-compliance with the Language Access Act, OHR can simultaneously order the systemic reforms needed to avoid future non-compliance and proceed

to a probable cause determination about whether the individual suffered harm as a result of the language access violation. If probable cause is found, OHR should refer the case to the Human Rights Commission, where a hearing could be conducted and a decision reached about whether the individual suffered harm and is entitled to individual remedies. As with the Human Rights Act, each of these decisions by OHR and the Commission could be reviewed and enforced by the courts.

Implementation of this proposal would impose few, if any, burdens on OHR. OHR currently employs the same pool of investigators to conduct investigations under the Language Access Act and the Human Rights Act. If anything, stronger individual enforcement mechanisms would support OHR in its monitoring role. If District agencies fail to meet their obligations under the Language Access Act, they will be held accountable by the courts as well as by OHR. The combination of monitoring agencies' compliance and providing individual remedies will make it possible for the Language Access Act to be as effective as the Council envisioned it could be in 2004.

V. Conclusion

We are excited about the Council's efforts to make government services accessible to those who have been denied access for too long. Including deaf and hard-of-hearing individuals in the Language Access Act undoubtedly will promote a culture of equality and fairness in the delivery of government services that benefits the entire community. We appreciate this opportunity to testify and would be happy to answer Council members' questions and collaborate on the drafting of language that would strengthen individuals' rights under the Language Access Act.