National Association of the Deaf
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March 14, 2019

FMCSA Administrator Raymond P. Martinez
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

CC: Jim Mullen, Chief Counsel, Federal Motor Carrier Safety Administration
[email: jim.mullen@dot.gov]
Loren A. Smith, Senior Advisor, Office of the Under Secretary for Policy
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Dear FMCSA Administrator Raymond P. Martinez:

The National Association of the Deaf hereby requests, pursuant to 49 C.F.R. §389.31, that the U.S. Department of Transportation (DOT) and its Federal Motor Carrier Safety Administration (FMCSA) proceed with rulemaking to remove the hearing test requirement for Commercial Drivers Licenses (CDLs) codified in 49 C.F.R. §391.41(b)(11), pursuant to the petition that was submitted to Secretary Elaine L. Chao on July 17, 2017 (attached for your convenience), as well as a petition that was submitted to Secretary Ray LaHood in 2012. On September 19, 2018, FMCSA finalized new rules (Docket: FMCSA-2005-23151) allowing individuals with diabetes to qualify for CDLs. The NAD applauds FMCSA's progress with this rulemaking on behalf of individuals with diabetes, and ask that FMCSA engage in the same process on behalf of individuals who are deaf and hard of hearing at this time.

In addition, the NAD requests that the DOT and FMCSA repeal the following regulatory language or, in the alternative, obtain clarification on non-discriminatory intent, with particular emphasis on the specific words that are discriminatory:

- 49 C.F.R. §391.11. General qualifications of drivers
  - (b)(2) Can read and *speak* the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.
- 49 C.F.R. § 383.133. Testing Methods
  - (5) Interpreters are prohibited during the administration of skills tests. Applicants must be able to understand and respond to *verbal* commands and instructions in English by a skills test examiner. Neither the applicant nor the examiner may communicate in a language other than English during the skills test.

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The NAD requests that your office seriously review the two above referenced regulations, both of which violate the Administrative Procedure Act as they are not in accordance with federal law (5 U.S.C. § 706(1)(A)), specifically Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.*).

Section 504 has a clear mandate requiring all Executive agencies to ensure equal access for all people with disabilities, including the provision of effective communication with deaf and hard of hearing individuals. Specifically, this federal law mandates that "[n]o otherwise qualified individual with a disability . . . 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). As a program conducted by the Executive agency that is the Department of Transportation, Section 504 applies to the operations of the Federal Motor Carrier Safety Administration (FMCSA). A qualified individual with a disability is one who meets the essential eligibility requirements for the services in question. 28 C.F.R. § 41.32. Deaf and hard of hearing drivers who have met all of the skill requirements for the commercial driver's license (CDL) have been denied opportunities due to these misguided regulations.

The Department of Transportation has, pursuant to Section 504, implemented regulations at 49 C.F.R Part 28 for the enforcement of nondiscrimination on the basis of handicap in programs or activities it conducts. These regulations include requirements governing effective communication at 49 C.F.R. §28.160. This provision requires that "the Department shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public" by "furnish[ing] appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Department." 49 C.F.R. § 28.160(a); (a)(1). "In determining what type of auxiliary aid is necessary, the Department shall give primary consideration to the requests of the individual with handicaps." 49 C.F.R. § 28.160(a)(1)(i). The DOT's insistence that 49 C.F.R. § 383.133 includes prohibiting American Sign Language (ASL) interpreters in the administration of the CDL skills test runs contrary to such requirements.

It is not enough, under Section 504, for a governmental program to provide *some* access to individuals with disabilities. Individuals with disabilities must be provided with "meaningful access" to the programs and services that are offered. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985). FMCSA has a duty to afford deaf applicants "meaningful access" to its programs and activities, including the opportunity to pass the CDL test in the pursuit of an interstate CDL. The regulations require that FMCSA do more than simply provide deaf applicants with some auxiliary aid to allow them access to the test. FMCSA is required to allow for an auxiliary aid that is "as effective in affording equal opportunity to obtain the same result [or] to gain the same benefit as that provided to" hearing test takers.

Further, the ten-minute pre-trip inspection test (*see* 49 C.F.R. 392.7, 49 C.F.R. § 391.31(c)(1)) involves interactive communications between the driver and the test administrator, making sign language interpreters essential and critical for them to be able to understand each other. Presently, FMCSA's rules bar the provision of interpreters without any rational basis for making it more difficult for the deaf people and test administrators to communicate, in contravention of federal law and regulations barring discrimination. Pursuant to its own regulations, "the Department may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would: (i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or (ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps. 49 C.F.R. § 28.130(b)(3).

Furthermore, 49 C.F.R. § 28.130(b)(6) mandates that "the Department may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Department establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap."

In fact, the regulations state that "where personnel of a DOT element believe that the proposed action would fundamentally alter the program or activity or would result in an undue financial and administrative burden, the DOT element has the burden of proving that compliance with § 28.160 would result in such alteration or burden. The decision that compliance would result in such alteration or burden must be made

by the Secretary or his or her designee, after considering all resources available for use in the funding and operation of the program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Department shall take any other action that would not result in such an alteration or such a burden but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity."

Consequently, the DOT must provide deaf and hard of hearing applicants with the same access to the CDL process including with the auxiliary aid and service of interpreters, because the DOT cannot show that doing so would be a fundamental alteration.

FMCSA personnel have in the past argued that the restriction in 49 C.F.R. § 383.133 is allegedly necessary to guard against interpreters helping their clients pass the skills test. The Rehabilitation Act, as well as the Americans with Disabilities Act, mandate that sign language interpreters be provided to deaf individuals who seek to study in colleges and universities as medical doctors, attorneys, psychologists, social workers, scientists, and much more without concern for the passing of information. Further, these federal laws require the provision of interpreters during a wide variety of testing procedures. These federal laws mandate this provision of interpreters because interpreters are typically not trained in the subject areas and as a result have no knowledge of the subject matter, which is trucking in this instance. Furthermore, certified/licensed interpreters are strictly bound by their code of ethics which prohibit any conduct that falls outside the narrow scope of sign language interpreting.

Simple measures could be taken to reassure the DOT out of an abundance of caution that deaf and hard of hearing applicants could only take the requisite testing with certified/licensed sign language interpreters, as well as such use of interpreters being video recorded or otherwise monitored to ensure there is no improper communication.

On September 6, 2017, the NAD discussed the matter with FMCSA personnel and was advised that in-house counsel would look into the issue. On November 7, 2017, in response to follow-up inquiries from the NAD, the DOT advised that "the Agency stands by its prohibition for now." We urge the DOT to reconsider in light of the fact that the Rehabilitation Act and the DOT's own regulations mandate the provision of interpreters and the more recent prohibition of interpreters run afoul of the statute and are therefore illegal.

Pursuant to the publications from the Federal Register, from 2013 to 2018, FMCSA has granted 615 exemptions and there are 6 exemption applications currently pending. These individuals and future applicants deserve full accessibility to the testing process. The aforementioned restrictions should be repealed, in compliance with Executive Order 13771[1], which requires all federal agencies to reduce regulations. The Executive Order directs that "for every one new regulation issued, at least two prior regulations be identified for elimination."[2] If the aforementioned two restrictions are repealed, it would achieve the goal of Executive Order 13771 and also ensure that the Department remains in compliance with the tenets of Section 504. Please work with us to eliminate these regulations and safeguard full, equal access for deaf and hard of hearing applicants.

Given that there is an extreme shortage of qualified CDL drivers and significant unemployment within the deaf community, we request a formal follow-up meeting with you and any other officers at DOT to discuss the matter at your earliest convenience and look forward to your response.

Sincerely,

Howard A. Rosenblum, Esq.
Chief Executive Officer & Director of Legal Services

[1] Exec. Order No. 13771, 82 Fed. Reg. 9339 (February 3, 2017).
[2] *Id.*