UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSIY VIERA,

Plaintiff,

-against-

THE CITY OF NEW YORK and RICHMOND UNIVERSITY MEDICAL CENTER,

Defendants.

MEMORANDUM OPINION & ORDER

15 Civ. 5430 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

On July 13, 2015, Josiy Viera – who is deaf – and James Gosselin, her fiancé and live-in boyfriend, brought this action against Richmond University Medical Center ("RUMC") and the City of New York (the "City") alleging that Defendants' failure to provide an American Sign Language ("ASL") interpreter to Viera in connection with (1) her December 1, 2014 visit to RUMC, and (2) New York City Administration for Children's Services ("ACS") home visits, violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the New York State Human Rights Law, N.Y. Exec. Law §§ 290 et seq.; and the New York City Human Rights Law, N.Y. Admin. Code §§ 8-101 et seq. (Cmplt. (Dkt. No. 1) ¶¶ 6, 58-114)[1] The Complaint seeks money damages.[2] (Id. ¶ 6)

[1] Unless otherwise indicated, the page numbers of documents referenced in this Order correspond to the page numbers designated by this District's Electronic Case Filing system.
[2] Although the Complaint contains a request for injunctive relief, Viera no longer seeks such relief. (Pltf. Opp. Br. (Dkt. No. 84) at 9)

On March 15, 2017, this Court dismissed Gosselin's claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2).[3] (Order (Dkt. No. 116))

RUMC has moved for summary judgment on Viera's deliberate indifference claim against it. (RUMC Br. (Dkt. No. 81) at 5, 23-24)

Viera has moved for partial summary judgment on her claims against the City, contending that this Court should find as a matter of law that ACS employees acted with deliberate indifference on each occasion that they conducted a home visit without an ASL interpreter. (Pltf. Br. (Dkt. No. 76) at 6, 16-17)

The City has cross-moved for partial summary judgment as to ACS's December 2, 2014 home visit, contending that the evidence demonstrates that ACS personnel did not act with deliberate indifference on that occasion. (City Br. (Dkt. No. 93) at 6, 28-29)

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[3] Gosselin's claims were dismissed after he falsely testified at his deposition that he served in the United States Army for ten years; that he had been assigned to Echo Company of the 75th U.S. Army Rangers Special Forces unit headquartered in Fort Benning, Georgia; that he had served three tours of duty in Iraq, two tours of duty in Afghanistan, and one tour of duty in Egypt; that he served as a combat medic and backup scout sniper; that he received a Silver Star for "bravery and heroism" in Fallujah, Iraq, in connection with saving another soldier's life; that he received the Purple Heart for wounds he sustained while on active duty; that he was shot 14 times in both legs while on active duty; and that he received other wounds in combat. (See R & R (Dkt. No. 106) at 3-5; Gosselin Dep. at 11-14, 20-23) After Defendant RUMC proffered personnel records showing that Gosselin had never been on active duty – other than for training – (see May 13, 2016 RUMC Ltr. (Dkt. No. 50) at 7), Plaintiffs sought to voluntarily dismiss Gosselin's claims. (Notice of Motion (Dkt. No. 63)) "In connection with Gosselin's motion, Viera agreed that she would not call Gosselin as a witness or rely on Gosselin's testimony, either at trial or in connection with any motion." (Order (Dkt. No. 116) at 4 (citing R & R (Dkt. No. 106) at 5; June 14, 2016 Pltf. Ltr. (Dkt. No. 59) at 1)) This Court granted Plaintiffs' motion to voluntarily dismiss Gosselin's claims on the condition that "Viera will not offer any deposition testimony, affidavit, or other evidence from Plaintiff Gosselin to support her claims, whether in motion practice or at trial." (Id. at 14)

BACKGROUND[4]

I. FACTS

A. Viera's Communication Abilities

Viera is a "profoundly deaf individual" who communicates primarily in ASL. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 2-3) In connection with the parties' motions, Viera contends that she "does not read English comfortably and has trouble comprehending more than simple information"; that "[s]he reads between a first and second grade level and has a third grade vocabulary"; "is not proficient in English"; and "comprehends ASL best." (Id. ¶ 5) (citations omitted) At her deposition, however, Viera testified that she is able to read and write English, and that she communicates with her fiancé, James Gosselin, through text messages:

> Q. When you met Mr. Gosselin, how did you communicate with him?
>
> A. We texted each other.
>
> Q. Are you able to read and write in English?
>
> . . . .
>
> A. Yes, I can.
>
> Q. When you text Mr. Gosselin, is that in English?
>
> A. Yes.

(June 27, 2016 Weiderhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 17:20-18:3)

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[4] To the extent that this Court relies on facts drawn from a party's Local Rule 56.1 statement, it has done so because the opposing party has either not disputed those facts or has not done so with citations to admissible evidence. See Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003) ("If the opposing party . . . fails to controvert a fact so set forth in the moving party's Rule 56.1 statement, that fact will be deemed admitted.") (citations omitted). Where a party opposing a motion disputes the movant's characterization of cited evidence, and has presented an evidentiary basis for doing so, the Court relies on the adversary's characterization of the evidence. See Cifra v. Gen. Elec. Co., 252 F.3d 205, 216 (2d Cir. 2001) (court must draw all rational factual inferences in non-movant's favor in deciding summary judgment motion). Unless otherwise indicated, the facts cited by the Court are undisputed.

Gosselin is not fluent in ASL, and he relies on texting and writing to supplement his signing communication with Viera. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 15) At the time of the events at issue here, Gosselin's communications with Viera were evenly split between signing and texting. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 493)

Charito Pacheco, Viera's stepmother (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 16), testified that she communicates with Viera through a "sign language [she] and [Viera] made [up]," or through sign language that she learned from a sign language book. (June 27, 2016 Wiederhorn Decl., Ex. E (Pacheco Dep.) (Dkt. No. 78-5) at 10:11-21, 11:16-18)

Dr. Judy Shepard Kegl – a certified ASL interpreter – assessed Viera's communication needs and abilities in connection with this litigation. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 18 (citing June 27, 2016 Wiederhorn Decl., Ex. S (Kegl Report) (Dkt. No. 78-18))) Kegl testified that Viera needs a sign language interpreter in order to communicate. (June 27, 2016 Wiederhorn Decl., Ex. A (Kegl Dep.) (Dkt. No. 78-1) at 80:20-22) Kegl also assessed Gosselin's sign language skills, and concluded that "he doesn't really know that much" ASL. (Id. at 100:25-101:3, 206:12-19, 208:16-17) Kegl observed Viera's sign language communication with Gosselin, and noted that Viera simplified and slowed down her signing when communicating with Gosselin. (RUMC R. 56.1 Resp. (Dkt. No. 91) ¶ 334) As to Viera's ability to understand and communicate in written English, Kegl testified that

> if you were writing back and forth with Ms. Viera [in English], you would have to take into account the fact that there are certain things about her writing that are going to be atypical. [] [Y]ou can't just write in English and assume she's going to understand it all. In fact, [] sometimes you're going to write certain things and she may understand exactly the opposite.

(June 27, 2016 Wiederhorn Decl., Ex. A (Kegl. Dep.) (Dkt. No. 78-1) at 113:12-18)

B. Viera and Gosselin's December 1, 2014 Visit to RUMC

In December 2014, Josiy Viera and James Gosselin lived together with their seven children in Staten Island, New York.[5] (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 383; see June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 49:1-5) On December 1, 2014, at about 9:00 p.m., Gosselin fell while holding their four-month-old son, A.G. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 253) After the fall, "A.G.'s leg appeared limp and made a crackling noise" (id. ¶ 257), so the couple took A.G. to RUMC for treatment. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 384) Viera drove A.G. and Gosselin to the hospital – which is located at 355 Bard Avenue, Staten Island, New York – between 10:00 and 10:30 p.m. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 258; Cmplt. (Dkt. No. 1) ¶ 11)

Marilyn Mora – an RUMC triage nurse – completed her assessment of A.G. at 10:59 p.m. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 271) Mora's notes indicate that, "as per dad, he fell on baby, brother took dad off baby, baby cried instantly, baby continues to cry." (Id. ¶ 261; see Lenza Decl., Ex. 16 (RUMC Physician Notes) (Dkt. No. 82-15) at 10; August 10, 2016 Wiederhorn Decl., Ex. V (Mora Dep.) (Dkt. No. 87-3) at 43:4-21) Mora scored A.G.'s pain level as an 8 out of 10, and assigned him a priority level of 2. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶¶ 266-67) "A Level 2 trauma is a medical emergency involving a high probability of imminent or life threatening deterioration in a patient's medical condition." (Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶ 15) Once triage was completed, Gosselin informed Mora that Viera is deaf, and Mora passed on that information to Esther Rose, the emergency department nurse. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶¶ 272-73)

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[5] Viera and Gosselin have "been together [for] four years." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 10:3-5)

It is undisputed that Rose did not request an ASL interpreter for Viera (id. ¶ 314), and that RUMC never provided an ASL interpreter to Viera during the four-and-a-half hours Viera spent at RUMC that evening. (RUMC R. 56.1 Resp. (Dkt. No. 91) ¶ 369) Nurse Rose has submitted a declaration stating, however, that "neither Mr. Gosselin nor Ms. Viera requested an ASL interpreter," and there is no contrary admissible evidence.[6] (Lenza Decl., Ex. 18 (Rose Decl.) (Dkt. No. 82-17) ¶¶ 7-8) Rose observed Gosselin "communicate with Ms. Viera by concurrently speaking to her and moving his hands. I understood Mr. Gosselin was repeating to Ms. Viera what the hospital staff said to him because I heard Mr. Gosselin repeat the information aloud when he communicated with Ms. Viera."[7] (Id. ¶¶ 6-7) Based on the interaction between Gosselin and Viera, Nurse Rose concluded that no sign language interpreter was necessary:

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[6] Although Viera testified at her deposition that Gosselin told her that he had requested a sign language interpreter, and that RUMC personnel had told him that "there were no interpreters overnight" (June 26, 2017 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 65:6-13, 66:20-67:23), this evidence is hearsay.

Fed. R. Evid. 801(a) defines a "statement" as, inter alia, "a person's oral assertion . . . if the person intended it as an assertion." Fed. R. Evid. 801(a). Here, Gosselin's statement to Viera about his alleged exchange with an unidentified RUMC employee was an "oral assertion." Moreover, Viera is offering Gosselin's statement "to prove the truth of the matter asserted in the statement" – that is, that Gosselin had in fact asked an RUMC employee for an ASL interpreter, and had been told that no ASL interpreter was available at RUMC. See Fed. R. Evid. 801(c)(2). Because this Court may only consider admissible evidence at summary judgment, see Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997), Viera may not rely on her hearsay account of what Gosselin told her he had said to an unidentified RUMC employee, and what the RUMC employee said in response.

[7] Although Viera asserts in her Rule 56.1 Statement that she "does not have the ability to read lips" (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 362), Viera's testimony on this point was contradictory and evasive. Early in her deposition, she gave the following testimony concerning this point:

> Q. Other than signing and using hand gestures and texting with Mr. Gosselin, are there any other forms of communication that you use with him?
>
> . . . .
>
> A. No. What else is there?

Q. Do you have the ability to read lips in any form or fashion?

. . . .

A. No, it depends.

Q. What does it depend on?

A. How they speak.

Q. Why does that make a difference?

A. Most of the time I do not understand.

Q. Is there anyone you are able to communicate with where you are able to read lips for that specific person?

. . . .

A. I don't know, no.

Q. Are you able to read Mr. Gosselin's lips and understand what he is speaking?

. . . .

A. Again, it depends.

Q. Based on your answer, are there times you are able to lip read what is being said by Mr. Gosselin?

. . . .

A. I don't know.

Q. Have you ever been able to understand Mr. Gosselin's speech by way of lip reading?

. . . .

A. Again, I tell you it depends.

Q. My question is have you ever understood anything spoken by Mr. Gosselin by way of lip reading?

A. If he's talking very fast, absolutely not. Sometimes if he speaks very – I can catch some of it but it really depends.

Q. If Mr. Gosselin says a single word to you, are you able to understand that single word by way of lip reading?

. . . .

A. Again, it all depends.

. . . .

Q. What does it depend on?

A. Like I just told you, I already answered that.

> My observation of Ms. Viera's non-verbal communication and demeanor did not indicate that she did not understand the medical care involving A.G. I did not request an interpreter for Ms. Viera as I believed she understood the hospital staff's communications through Mr. Gosselin based on her non-verbal communication and demeanor. Ms. Viera appeared less anxious after receiving communication from Mr. Gosselin.

(Id. ¶ 10)

The notes of an RUMC emergency room physician indicate that A.G. was "seen immediately upon arrival [at RUMC] because of [a] high probability of imminent or life threatening deterioration in [his] condition." (Lenza Decl., Ex. 16 (RUMC Physician Notes) (Dkt. No. 82-15) at 9) Rose's notes state that the "infant cries loudly in discomfort when touched/re-positioned," and that Gosselin, Viera, and A.G.'s older siblings were present in the treatment room. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 275) Dr. Matthew Kaufman, an RUMC emergency room physician and Associate Director of the RUMC Emergency Department, examined A.G. at about 11:19 p.m. (id. ¶¶ 275, 277), and at 11:27 p.m., a Level 2

> Q. Please answer again.
>
> . . . .
>
> A. It depends.
>
> Q. What does it depend on?
>
> A. I don't know.

(June 26, 2017 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 28:6-30:10)

Later in the same deposition, when asked if she could understand what RUMC personnel were saying in a treatment room, through lip reading, Viera said she could not understand, because "[s]ome of them had clipboards over their faces." (Id. at 71:21-22)

Moreover, when Viera was admitted to RUMC four months earlier to give birth to A.G., she signed a Refusal of Language Assistance Services, thereby rejecting sign language interpreter services offered by RUMC. (Lenza Decl., Ex. 12 (RUMC Refusal of Language Assistance Services form) (Dkt. No. 82-11) at 3-4) The record indicates that Viera told RUMC personnel at that time that she preferred to use her "husband" (Gosselin) as her interpreter, and further explained that she can read lips. (Id.; Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 246)

Pediatric Trauma code was initiated, which mobilized trauma surgeons to evaluate A.G.[8] (Id. ¶¶ 278-79) At 11:30 p.m., Rose's notes reflect that A.G. was still crying loudly, that Viera was trying to console the baby, and that Gosselin was "also present & signs to mother to keep her informed of status." (Id. ¶ 282) At this same time, Gosselin executed consents for treatment of both himself and A.G. (Id. ¶ 284)

A chest x-ray and leg x-ray were performed on A.G. between 11:38 p.m. and 12:16 a.m., and the leg x-ray revealed that A.G.'s leg was fractured. (Id. ¶¶ 286-87; see Lenza Decl., Ex. 16 (RUMC Nurse Notes) (Dkt. No. 82-15) at 13) An orthopedic attending physician informed Dr. Kaufman that A.G.'s leg fracture could not be treated at RUMC because A.G. was an infant. Dr. Kaufman informed Gosselin that A.G.'s leg was broken, that RUMC could not treat him, and that it would be necessary to transfer him to another hospital for treatment.[9] (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶¶ 289-90; Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶¶ 24-25) It is undisputed that Gosselin relayed all of this information to Viera by typing it into Notepad on his cell phone.[10] (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 291-92) Viera has not argued, or proffered evidence specifically demonstrating, that she did not understand what Gosselin typed into his phone and showed to her.[11] Nor has she argued, or

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[8] Dr. Kaufman testified that A.G. was assigned a Level 2 trauma code based "[m]ostly [on] the risk factor and the story. So, the risk factor is a four-month old baby has a lot of vulnerabilities in terms of traumatic injury. . . . So, that, coupled with the description of the injury, which is – a grown man falling on the baby, more a level 2 trauma." (August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 105:4-23) Dr. Kaufman further testified that a level 2 trauma is considered an emergency. (Id. at 105:24-106:2)

[9] At her deposition, Viera claimed that RUMC doctors "broke my son's leg" during the examination in the emergency room. (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 74:19-75:2)

[10] Notepad is a smart-phone application.

[11] Viera testified that she commonly "communicated [with Gosselin] through FaceTime and text," and also through hand gestures and ASL. (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 82:21-23, 106:7-10)

proffered evidence, that she told or indicated in any fashion to RUMC personnel that she did not understand what Gosselin had typed into his phone and shown to her.

In addition to the communication through Notepad, Dr. Kaufman observed Viera signing to Gosselin, and Gosselin signing to her after Dr. Kaufman relayed information about A.G.'s condition to Gosselin. Dr. Kaufman did not sign to Viera, and he does not understand sign language. But based on the circumstances, he concluded that Gosselin was signing to Viera what Dr. Kaufman had reported to Gosselin about A.G.'s condition. (Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶¶ 26-27; August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 82:5-18) For her part, Viera concedes that she communicated with Gosselin at RUMC "about how the baby was doing and he was doing okay." Viera "do[esn't] remember the details," however. (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 80:21-22)

It is also undisputed that Dr. Kaufman held up an x-ray of A.G.'s leg to the light, and that Viera observed the x-ray showing the fracture in A.G.'s leg. Gosselin explained to Viera that A.G. had a broken leg, and would be transferred to a different hospital for treatment, because "RUMC could not take care of A.G." (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶¶ 291-93) After viewing the x-ray, Viera "noticed" that "[t]he leg bone . . . looked like it was disconnected," and she signed "Wow" to Gosselin." (Id. ¶ 294; June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 73:5)

Consistent with this undisputed interaction between Viera and Gosselin, Dr. Kaufman testified that Viera was not a passive observer of events in the exam room: "[B]ased on my observation of her non-verbal reactions . . . [I] believe[d] that she understood A.G.'s leg was broken and [he] needed to be transferred to another hospital for treatment." (Lenza Decl., Ex. 3

(Kaufman Decl.) (Dkt. No. 82-3) ¶ 28) Dr. Kaufman further testified – based on his observation of her non-verbal conduct – that Viera "was very active. I mean, she was, she was not sitting there not interacting. She was very active and aware and involved in the situation. . . . [S]he was very involved in the next steps in the decision-making process, and she was not a passive observer of what was happening. She was very concerned about her son and very . . . very interested in what the plan was." (August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 82:15-83:3)

At no point during Dr. Kaufman's interactions with Viera and Gosselin did either request an ASL interpreter. (Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶ 34) Moreover, there is no evidence that Gosselin or Viera ever asked any RUMC employee for a sign language interpreter during the entire four and a half hours they were at RUMC on December 1-2, 2014.

It took only a few minutes for Dr. Kaufman to explain to Gosselin and Viera that A.G. had a broken leg and would need to be transferred to another hospital. (Id. ¶ 29) Indeed, Dr. Kaufman billed only 35 minutes of "total critical care time" to his treatment of A.G.[12] (August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 83:10-13)

At 3:19 a.m. on December 2, 2014, A.G. was transferred from RUMC to New York Presbyterian-Weill Cornell Medical Center ("Weill Cornell"). (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 328)

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[12] Dr. Kaufman explained that "there are certain criteria a patient has to meet for critical care time, so that we can bill for it. [Thirty-five minutes is] an estimated amount of time that was spent doing critical care procedures, which include telephone calls to, and consulting, in addition to assessing [A.G.]." (August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 83:15-22)

On December 2, 2014, an RUMC employee reported A.G.'s injury to the New York Statewide Central Register of Child Abuse and Maltreatment as a potential case of child abuse. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 391)

1. RUMC Policy Concerning the Provision of Sign Language Interpreters

RUMC does not maintain ASL interpreters on staff. Instead, it contracts with ASL interpreters to provide services on demand. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 222) RUMC's "policy and practice" is to "provide an onsite interpreter when a deaf or hard of hearing patient or companion requests an onsite interpreter." (Id. ¶ 231) Although RUMC asserts that signs are posted throughout the hospital stating that sign language interpreters are available (id. ¶ 234), Mora testified that she could not recall whether any such signs are posted. (August 10, 2016 Wiederhorn Decl., Ex. V (Mora Dep.) (Dkt. No. 87-3) at 57:5-9)

RUMC also claims that it provides ongoing ADA compliance training to its staff, and that this training includes information concerning available language services, such as ASL interpreters for deaf or hard of hearing patients or companions. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 235) Kaufman and Rose testified, however, that they do not recall having received such training. (August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 21:7-11; August 10, 2016 Wiederhorn Decl., Ex. U (Rose Dep.) (Dkt. No. 87-2) at 149:16-25)

According to Dr. Kaufman, "sign language interpreters are frequently utilized in RUMC's Emergency Department and are readily available after they are contacted." (Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶ 6) Indeed, Dr. Kaufman "use[s] [sign language interpreters] all the time" at RUMC. (August 10, 2016 Wiederhorn Decl., Ex. X (Kaufman Dep.) (Dkt. No. 87-5) at 31:24-32:8) Rose has also "personally requested and utilized a sign language

interpreter for deaf patients at RUMC's Emergency Department," and is "aware of RUMC's policy regarding providing interpreters for non-English speaking patients[,] . . . which includes deaf or hard of hearing patients." (Lenza Decl., Ex. 18 (Rose Decl.) (Dkt. No. 82-17) ¶¶ 13-14)

D. ACS Home Visits to Viera's Residence

Based on the referral from RUMC, on December 2, 2014, ACS opened an investigation into whether A.G. had been the victim of child abuse. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 1) Because A.G. had suffered a serious injury, ACS designated the matter an "instant response" case. (Id. ¶ 392)

1. Gayle-Curtis' December 2, 2014 Home Visit

At 12:58 p.m., Child Protective Specialist Supervisor ("CPSS") Sophia Gayle-Curtis contacted Weill Cornell, where A.G. was being treated. (City R. 56.1 Resp. (Dkt. No. 97) ¶ 521) Gayle-Curtis' Investigation Progress Notes state that the Weill Cornell "medical team did not have any [child abuse] concerns regarding [A.G.'s] injury." (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000008)[13] Moreover, when Gayle-Curtis met with Dr. Nina Mbadiwe – A.G.'s treating physician at Weill Cornell – Dr. Mbadiwe told Gayle-Curtis that Gosselin's explanation of how A.G.'s injury had occurred was consistent with A.G.'s injury. (City R. 56.1 Resp. (Dkt. No. 97) ¶¶ 525-26) In her Progress Notes, Gayle-Curtis wrote that the medical staff "expressed no concerns regarding the injury being non accidental. The father's story was consistent with the injury as per medical staff." (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000026)

At 4:15 p.m., Gayle-Curtis met with Gosselin at Weill Cornell. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶¶ 399-400; City R. 56.1 Resp. (Dkt. No. 97) ¶ 523) During her interview of

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[13] The page numbers for Exhibit F are located at the bottom right-hand corner of the exhibit.

Gosselin, he informed her that Viera is deaf. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 401) Gayle-Curtis told Gosselin that she would need to conduct a home visit to ensure the safety of the other children. (Id. ¶ 403)

At 6:30 p.m., Gayle-Curtis conducted a home visit at Viera and Gosselin's residence. Viera and her six other children were present at the residence during Gayle-Curtis' visit. (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000011) Although she had learned during her 4:15 p.m. interview of Gosselin that Viera is deaf, Gayle-Curtis – who does not know sign language – did not arrange for an ASL interpreter to be present for the home visit. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 55, 57, 62; Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 407) Gayle-Curtis testified that she did not believe that it was possible to arrange for an ASL interpreter to be present in time for the home visit. (Lively Decl., Ex. 9 (Gayle-Curtis Dep.) (Dkt. No. 95-9) at 92:16-20) According to Gayle-Curtis, at ACS, "three or so hours" advance notice is necessary to arrange for an ASL interpreter. (Id. at 86:20-22)

Viera testified that when Gayle-Curtis arrived for the home visit, Viera communicated through one of her children that she needed a sign language interpreter: "I signed that I needed somebody to sign." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 112:16-25; City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 44) According to Viera, during that visit, Gayle-Curtis tried to ask her questions, but Viera "couldn't understand what she was saying," and did not know what was being asked. (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 119:2-12; City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 45) Gayle-Curtis maintains, however, that during the December 2, 2014 home visit, she communicated with Viera in writing, through one of her children, and through Gosselin by cell

phone via FaceTime.[14] (Lively Decl., Ex. 9 (Gayle-Curtis Dep.) (Dkt. No. 95-9) at 28:18-25, 36:23-37:16; City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 63; June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000011)

When asked at her deposition whether she was able to explain to Viera why she was conducting a home visit, Gayle-Curtis testified that she did so "[t]hrough Mr. Gosselin, because . . . he called at a certain period during my home visit and he was on a cell phone, Face[]Time, and communicated with Miss Viera . . . . He assisted with some explanation." (Lively Decl., Ex. 9 (Gayle-Curtis Dep.) (Dkt. No. 95-9) at 36:23-36:7); see also id. at 80:12-20 (Gayle-Curtis testimony that Gosselin "was using sign language, he was using his hands" while on FaceTime)) Viera confirmed that Gosselin spoke with Gayle-Curtis through FaceTime, and also signed to Viera over FaceTime during Gayle-Curtis' visit. (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 115:16-17, 116:17-22) Gayle-Curtis' Progress Notes state that Viera's daughter, N.G., helped Gayle-Curtis "obtain[] from Ms. Viera the [dates of birth] and names of household members." (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000011) Gayle-Curtis also communicated in writing with Viera about the names and ages of some of her children. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 409) Gayle-Curtis' Progress Notes state, however, that she "did not speak with Ms. Viera and the children, [N.G.] and [J.G.,] regarding the [child abuse] allegations due to not having a sign language interpreter present to translate." (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 89 (quoting June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000011))

[14] "FaceTime" is a smartphone application that allows callers to communicate through video calling.

During this visit, Gayle-Curtis told Gosselin via FaceTime that another Child Protective Specialist ("CPS") would return to the couple's home the next day with an ASL interpreter. (Id. ¶ 63) Gosselin communicated to Viera over FaceTime that Gayle-Curtis "was going to be back the next day." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 116:17)

Gayle-Curtis does not recall whether ACS provided her with training concerning compliance with the ADA. Moreover, although she was aware that caseworkers are supposed to bring a "Language Identification Tool" – a document that lists language services that ACS offers to parents – with them on home visits, she did not have this document with her when she made the initial home visit to Viera's residence. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 183-184 (citing June 27, 2016 Wiederhorn Decl., Ex. M (Gayle-Curtis Dep.) (Dkt. No. 78-12) at 51:25-54:2))

2. Jones' December 3, 2014 Home Visit

The next day – December 3, 2014 – CPS Tanya Jones conducted a home visit at Viera and Gosselin's residence. Jones was accompanied by an ASL interpreter. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 66) Viera and her six other children were present for this visit. (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000022) While the City contends that Jones explained ACS's investigation protocol at length to Viera during this visit (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 424), Viera disputes Jones' account. (Id.; June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 119:25-120:2 ("Q: Did Ms. Jones explain what would happen as part of the investigation? A: She did not."))

Viera testified that she told Jones – through the ASL interpreter – that she was upset that there had been no ASL interpreter for Gayle-Curtis' visit the previous day. (June 27,

2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 122:14-20) Viera told Jones that she thought her children were going to be removed, that she did not have a full understanding of what was happening, and that she believed that it was unfair for anyone to speak with her children without an ASL interpreter present. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 46, 67 (citing June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000023))

3. Jones' December 22, 2014 Home Visit

On December 5, 2014, Jones wrote in her Progress Notes that Weill Cornell had concluded that A.G.'s injury was "accidental[,] as they believe the child's injury is consistent with the parent's explanation." (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 447) Jones nonetheless conducted three additional home visits, and did not bring an ASL interpreter with her on any of these occasions.

The City argues that Viera did not tell Jones that she wanted an ASL interpreter for any of these three home visits. (Id. ¶ 480) Viera points out, however, that she requested an ASL interpreter during the December 2, 2014 home visit, and that she told Jones – during the December 3, 2014 home visit and through the ASL interpreter – that she was upset that there had been no interpreter for Gayle-Curtis' initial home visit. (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 122:18-20) Viera further testified that she "ask[ed] Mr. Gosselin to ask Ms. Jones for an interpreter every time Ms. Jones made a home visit." (Id. at 135:18-136:8, 138:15-139:3)

On December 22, 2014, Jones conducted a home visit at Viera and Gosselin's residence. Jones did not bring an ASL interpreter. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 73) According to the City, Jones attempted to obtain an ASL interpreter for this visit, but was unsuccessful. (Id. ¶ 457) There is no written evidence that Jones attempted to schedule an ASL

interpreter, however, even though ACS policy requires that such requests be documented. (June 27, 2016 Weiderhorn Decl., Ex. G (ACS Memorandum) at City 000179)[15]

The City further contends that the December 22, 2014 home visit lasted no more than ten minutes. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 456) Viera disputes this assertion, however, and argues that Jones' Progress Notes for that day – which contain a substantial amount of information – corroborate her claim that the visit was longer than ten minutes. (Id. ¶ 456)

During the December 22, 2014 home visit, Jones met with Viera, Gosselin, and Viera's stepmother – Charito Pacheco – in the kitchen of the residence. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 74, 78) "[A]ll [of Viera's] children were home." (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000029) Jones asked Pacheco to perform sign language interpretation for Viera during the December 22, 2014 home visit. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 47, 74) Jones testified that, during this visit, Pacheco was signing to Viera while Jones and Gosselin were speaking, and that Viera "nodded in agreement to the things that Mr. Gosselin was saying." (June 27, 2016 Wiederhorn Decl., Ex. K (Jones Dep.) (Dkt. No. 78-10) at 112:10-113:2) According to Jones, most of the information she obtained came directly from Gosselin. (Id. at 112:17-20; City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 78)

Pacheco testified that although Jones "asked [her] to interpret. . . . I didn't know half of the words she was telling me. . . . Like, 'Does she know why we came over, and we want to know if this was like a, like an abuse,' and I said, no, 'Josiy, they want to know if you did it for real.' I didn't know how to say 'on purpose.' . . . Things like that." (June 27, 2016 Wiederhorn Decl., Ex. E (Pacheco Dep.) (Dkt. No. 78-5) at 24:8-22) Viera testified that Pacheco

[15] The page numbers for Exhibit G are located at the bottom right-hand corner of the exhibit.

"couldn't interpret, [because] she's not fluent in sign language." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 132:18-25) Viera's deaf child, J.G., testified that when Pacheco attempts to interpret for her, J.G. does not understand the interpretation, because Pacheco does not sign correctly. (Lively Decl., Ex. 16 (J.G. Dep.) (Dkt. No. 95-16) at 14:1-6)

Jones' Progress Notes state that Pacheco "interpreted while [Jones] spoke with both parents about the status of the case and inquired about [A.G.'s] progress." (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000029) Jones' Progress Notes indicate that the following matters were discussed during the December 22, 2014 home visit:

> the status of the parents' drug tests;
>
> conditions at home;
>
> A.G.'s medical condition;
>
> Gosselin's medical condition, and tendency to become dizzy when he neglects to eat;
>
> status of the ACS investigation (which Viera inquired about);
>
> status of Jones' inquiries to "collateral contacts" – pediatricians, service providers, teachers, guidance counselors, and other people who have contact with the family – and the need for Jones to obtain a response from A.G.'s pediatrician and the school staff for A.G.'s siblings, and Gosselin's medical records;
>
> the need for another home visit, with an interpreter, in the event that negative information is obtained from the collateral contacts, and both parents' willingness to have Jones return at "any time";
>
> safe sleeping practices for infants;
>
> whether the parents needed any services; and
>
> Gosselin's plan to register the children for Medicaid and his plans to marry Viera.

(Id.)

Jones also spoke with each of A.G.'s six siblings about school and the upcoming Christmas holiday, and observed A.G. sleeping in his crib. Jones discussed with Gosselin safe

sleeping practices for infants. (Id.) Jones also spoke with Pacheco, who reported that she visited the home regularly to help Viera and Gosselin with the children, that the parents were "'doing a great job,'" that the children were doing well in school, and that "'they all get along.'" (Id.) Jones also made observations concerning the cleanliness of the residence, whether it was stocked with food, and whether the children had any visible marks or bruises. (Id.)

When asked at deposition why she would "follow up with an interpreter" if "unfavorable" information was received, Jones stated that it would not be appropriate to proceed without an interpreter for that "type of conversation." (June 27, 2016 Wiederhorn Decl., Ex. K (Jones Dep.) (Dkt. No. 78-10) at 113:22-114:8)

4. Jones' January 13 and 29, 2015 Home Visits

On January 13, 2015 and January 29, 2015, Jones made unannounced home visits to Viera and Gosselin's home. Jones did not bring an ASL interpreter, and it is undisputed that she did not request an interpreter for these home visits. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 81-84) According to Jones' Progress Notes, Viera, Gosselin, and all of their children were present during the two January 2015 home visits. (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000031-32)

The parties dispute the length of the January visits, with the City contending that they lasted five minutes, while Viera states that they lasted longer. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶¶ 470, 474; June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 139:13-17) The City asserts that – during the January visits – Jones spoke only with Gosselin, and only about his outstanding medical records. (City Br. (Dkt. No. 93) at 19) Jones' Progress Notes for January 13, 2015 indicate that the following subjects were discussed during this home visit:

RUMC's failure to send Gosselin's medical records to ACS;

> Gosselin's belief that RUMC doctors had "broken" A.G.'s leg, and medical records that Gosselin believed supported his claim;
>
> Gosselin's belief that RUMC was "trying to put the blame on him";
>
> Jones' concern that Gosselin may suffer from seizures;
>
> Gosselin's representation that he does not suffer from seizures but does become "hyperglycemic"; and
>
> Jones' assurance, given to both parents, that the case would be closed once Gosselin's medical records were provided.

(June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000032) Jones' Progress Notes also contain her observations regarding A.G. and each of his six siblings, as well as her observations concerning the condition of the residence. (Id.)

In her Progress Notes for the January 29, 2015 home visit, Jones states that

> [Gosselin] said that he thought his case was "closed", appeared annoyed, however, allowed CPS entry. CPS explained to [Gosselin] that while his case is awaiting approval,[] CPS is still required to make face to face with the family every 14 days. [Gosselin] said "ok" and inquired about the medical records. CPS told [Gosselin] that to date, RUMC has not sent any records to ACS, only a letter that noted "no authorization" was received. [Gosselin] said he suspects this is due to his lawsuit against them. . . .

(Id.) Jones informed Gosselin that in about four to six weeks he and Viera would receive notification that the suspicion of child abuse had proven to be unfounded. (Id.) Jones' Progress Notes also contain her observations regarding A.G. and each of his six siblings, as well as her observations concerning the condition of the residence. (Id.)

Although the City contends that neither Viera nor any member of her family requested an ASL interpreter during the January visits (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 481), as noted above, Viera testified that she "would ask Mr. Gosselin to ask Ms. Jones for an interpreter every time Ms. Jones made a home visit." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 135:18-136:8, 138:15-139:10)

5. ACS Policy Concerning the Provision of Sign Language Interpreters

ACS policy requires staff to arrange for and provide sign language interpreters "for children and/or family members who are deaf or hearing impaired during all conferences, meetings . . . family visits and all casework contacts." (June 27, 2016 Weiderhorn Decl., Ex. G (ACS Memorandum) at City 000177) Caseworkers are required to "assess each case so that appropriate accommodations are being provided. Such assessments shall occur during each interview, meeting, conference, or discussion, and shall be ongoing throughout the life of a case." (Id.)

It is ACS policy to inform a deaf client of her right to receive the services of an ASL interpreter (June 27, 2016 Wiederhorn Decl., Ex. N (Hinds Dep.) (Dkt. No. 78-13) at 41:24-42:4), and ACS Division for Child Protection ("DCP") staff are required to "make arrangements for sign language interpretation services for all interviews, home visits and family meetings." (June 27, 2016 Weiderhorn Decl., Ex. G (ACS Memorandum) at City 000178) Under this policy, DCP staff must "exercise all reasonable efforts to secure sign language interpretation services, even in a situation that is deemed to require an immediate home visit (or which requires DCP to take immediate action[.)]" (Id. at City 000179)

According to Derrick Hinds – the Assistant Commissioner of the DCP – "reasonable efforts would include contacting the sign language interpretation services and requesting an interpreter." (June 27, 2016 Wiederhorn Decl., Ex. N (Hinds Dep.) (Dkt. No. 78-13) at 66:13-16) The process for requesting a sign language interpreter "should take no more than ten minutes at most" and consists of "getting the voucher from the office manager, filling it out, signing it, faxing it, or calling [] the interpretation services" office. (Id. at 67:10-14; see also City R. 56.1 Counterstatement (Dkt. No. 94) ¶ 165) Moreover, CPS caseworkers can access and

request sign language interpreters 24 hours a day (June 27, 2016 Wiederhorn Decl., Ex. N (Hinds Dep.) (Dkt. No. 78-13) at 80:16-81:19), and ACS policy requires a CPS to request an interpreter once she determines that an interpreter is needed. (Id. at 23:5-9) At most, "there is a three hour lag between [ACS] requesting [the interpreter] and being able to get [the interpreter] to the location." (Id. at 25:4-9) ACS policy prohibits caseworkers from using family members as interpreters. (Id. at 42:13-19)

Jones testified that even when the ACS management office is closed for the evening, it is still possible to obtain a voucher for an ASL interpreter, because "[t]he managers keep extra vouchers after hours . . . between 5:00 and 8:00. If something happens, they are able to get a voucher for translation services." (June 27, 2016 Wiederhorn Decl., Ex. K (Jones Dep.) (Dkt. No. 78-10) at 212:17-25)

DISCUSSION

Three motions for summary judgment are pending before the Court.

RUMC has moved for summary judgment, arguing that there is no evidence that RUMC personnel acted with deliberate indifference to a violation of Viera's rights under federal, state, and city disability discrimination laws during her time in RUMC's Emergency Department. (RUMC Br. (Dkt. No. 81) at 23-24)

Viera has moved for partial summary judgment against the City, arguing that she is entitled to judgment as a matter of law as to claims that arise from home visits conducted without an ASL interpreter. (Pltf. Br. (Dkt. No. 76) at 16-17)

The City has cross-moved for partial summary judgment concerning Gayle-Curtis' December 2, 2014 home visit, arguing that there is no evidence that she acted with deliberate indifference to Viera's rights. (City Br. (Dkt. No. 93) at 28)

I. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is warranted where the moving party shows that "there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." Beyer v. County of Nassau, 524 F.3d 160, 163 (2d Cir. 2008) (quoting Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)). "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994) (citing Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1114 (2d Cir. 1988)). "'[T]hat opposing parties assert competing versions of the same event is not in itself sufficient to preclude summary judgment,' in that contradictory testimony only establishes a 'genuine' issue for trial if it 'lead[s] to a different legal outcome.'" Yi Fu Chen v. Spring Tailor, LLC, No. 14 Civ. 218 (PAE), 2015 WL 3953532, at *4 (S.D.N.Y. June 29, 2015) (quoting Krynski v. Chase, 707 F. Supp. 2d 318, 322 (E.D.N.Y. 2009)).

In deciding a summary judgment motion, the Court "'resolve[s] all ambiguities, and credit[s] all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.'" Spinelli v. City of New York, 579 F.3d 160, 166 (2d Cir. 2009) (quoting Brown v. Henderson, 257 F.3d 246, 251 (2d Cir. 2001) (internal quotation marks and citation omitted)). However, a "'party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . [M]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where

none would otherwise exist.'" Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (alterations in original) (quoting Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)).

"The same standard[s] appl[y] where, as here, the parties file[] cross-motions for summary judgment. . . ." Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001). "[W]hen both parties move for summary judgment, asserting the absence of any genuine issues of material fact, a court need not enter judgment for either party. Rather, each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." Id. (internal citations omitted).

B. Deliberate Indifference

"Under § 504 of the [Rehabilitation Act ("RA")], '[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 [f]ederal financial assistance.'" Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 274-75 (2d Cir. 2009) (quoting 29 U.S.C. § 794(a)). "The requirements for stating a claim under [Title II] of the ADA are virtually identical to those under § 504 of the Rehabilitation Act." Clarkson v. Coughlin, 898 F. Supp. 1019, 1037 (S.D.N.Y. 1995).

The New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") likewise prohibit disability discrimination. N.Y. Exec. L. § 296(2); N.Y.C. Admin. Code § 8-107. The NYSHRL is construed coextensively with Title II and Section 504. See Williams v. City of New York, 121 F. Supp. 3d 354, 364, n. 10 (S.D.N.Y. Aug. 5, 2015). However, "claims under the [NYCHRL] must be reviewed independently from and more liberally than their federal and state counterparts." Loeffler, 582 F.3d at 278 (internal

quotations omitted). "Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of New York City Human Rights Law, [however,] [with] similarly worded provisions of federal and state civil rights laws [being viewed] as a floor below which the City's Human Rights law cannot fall." Id. (quoting Restoration Act § 1).

"Under the RA's implementing regulations, a hospital that receives federal funds 'shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.'" Id. at 275 (quoting 45 C.F.R. § 84.52(c)). "Additionally, a recipient hospital with fifteen or more employees is required to 'provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.'" Id. (citing 45 C.F.R. § 84.52(d)(1)). "[T]he RA does not ensure equal medical treatment, but does require equal access to and equal participation in a patient's own treatment." Id. (citing Alexander v. Choate, 469 U.S. 287, 301 (1985) (the RA requires that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers"); Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1338 (N.D. Cal. 1994) (adequate medical treatment is not a defense to a claim that defendant failed to provide effective communication under the RA)).

To prevail under the ADA or RA, Viera must show that she is a "qualified individual [who suffers from] a disability[,]. . . [and that] by reason of such disability, [was] excluded from participation in or [was] denied the benefits of, the services, programs or activities of a public entity, or [was] subjected to discrimination by any such entity." 42 U.S.C. § 12132; see also 29 U.S.C. § 794(a) ("No 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. . . ."). "To establish a prima facie violation of the RA [or the ADA[16]], a plaintiff must show that [he or she] is: (1) a 'handicapped person' as defined in the RA; (2) 'otherwise qualified' to participate in the offered activity or to enjoy its benefits; (3) excluded from such participation or enjoyment solely by reason of his or her handicap; and (4) being denied participation in a program that receives federal financial assistance." Loeffler, 582 F.3d at 275 (quoting Rothschild v. Grottenthaler, 907 F.2d 286, 289-90 (2d Cir. 1990)).

"A plaintiff aggrieved by a violation of the RA may seek all remedies available under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), including monetary damages." Id. (citing 29 U.S.C. § 794a(a)(2)). "However, monetary damages are recoverable only upon a showing of an intentional violation." Id. (emphasis in original) (citing Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998) ("The law is well settled that intentional violations of Title VI, and thus the ADA and the Rehabilitation Act, can call for an award of money damages.")). "The standard for intentional violations is 'deliberate indifference to the strong likelihood [of] a violation:' '[i]n the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will." Id. (quoting Bartlett, 156 F.3d at 331) (internal citations omitted). "When the plaintiff has alerted the public

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[16] The RA and the ADA are similar in substance and generally are construed to impose the same requirements. See Baird ex rel. Baird v. Rose, 192 F.3d 462, 468-69 (4th Cir. 1999) (noting that the standards to be applied are generally the same). "Although the statutes' causation requirements differ in that the ADA proscribes discrimination by reason of disability whereas the RA premises liability only in discrimination that was solely by reason of a person's disability, '[w]here a claim is based on the failure to provide reasonable accommodations, the ADA and RA are identical in scope.'" Godbey v. Iredell Mem'l Hosp., Inc., No. 5:12 Civ. 00004 (RLV), 2013 WL 4494708, at *3 n. 7 (W.D.N.C. Aug. 19, 2013), aff'd, 578 F. App'x 317 (4th Cir. 2014) (quoting McCoy v. Tex. Dep't of Criminal Justice, No. 05–370, 2006 WL 2331055, at *5 (S.D. Tex. Aug. 9, 2006)).

entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test." Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001), as amended on denial of reh'g (Oct. 11, 2001). "[I]n order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness." Id. (citing Bartlett, 156 F.3d at 331).

The U.S. Department of Justice ("DOJ") has promulgated regulations for interpreting and implementing the ADA and Rehabilitation Act. Under the DOJ's regulations, public entities are required to "take appropriate steps to ensure that communications with [individuals with disabilities] are as effective as communications with others," 28 C.F.R. § 35.160(a), and "to furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1).

As to the nature of the aid or service that must be provided, the regulations state that

> [t]he 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 determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.

28 C.F.R. § 35.160(b)(2) (emphasis added).

> Parents or guardians, including foster parents, who are individuals with disabilities, may need to interact with child services agencies on behalf of their children; in such a circumstance, the child services agencies would need to provide appropriate auxiliary aids and services to those parents or guardians.

28 C.F.R. Pt. 35, App. A, Subpart E § 35.160.

The DOJ regulations counsel that an exchange of notes

> likely will be effective in situations that do not involve substantial conversation, for example, when blood is drawn for routine lab tests or regular allergy shots are administered. However, interpreters should be used when the matter involves more complexity, such as in communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or in communication of instructions for care at home or elsewhere.

28 C.F.R. Pt. 36, App. A, Subpart C § 36.303.

In Loeffler, the Second Circuit considered whether a defendant hospital acted with "deliberate indifference" in failing to secure an ASL interpreter for Robert Loeffler, a deaf patient. Loeffler, 582 F.3d at 274-75. Loeffler was admitted to Staten Island University Hospital in 1991 for heart surgery. He requested an ASL interpreter, but none was provided, and his 12 and 9 year old children interpreted for their father. Id. at 271. In 1995, Loeffler was admitted to Staten Island University Hospital again, this time for an operation on his right carotid artery. "In the days and weeks leading up to the surgery, the Loefflers made numerous attempts to secure an interpreter from the Hospital," but none was provided, even though it was the Hospital's written policy to provide a sign language interpreter when a patient deemed an interpreter necessary for effective communication. Id. at 271-73.

In reversing the district court's grant of summary judgment to the Hospital, the Circuit found that disputed issues of material fact existed that precluded summary judgment on plaintiffs' deliberate indifference claim. In reaching this conclusion, the Circuit noted that plaintiffs had repeatedly requested an interpreter and that hospital staff had not responded to those requests. Id. at 276-77. The court noted that while "[t]he Hospital may have had a general policy of providing [ASL] interpreters, [the hospital employee who interacted with plaintiffs] was unaware of any practice of scheduling an interpreter in advance, and her conduct may

amount to indifference in the face of knowledge of [Loeffler's] need for an interpreter." Id. at 276.

II. ANALYSIS

A. RUMC's Motion for Summary Judgment on Viera's Deliberate Indifference Claim

1. Plaintiff's Claims Against RUMC Under the Rehabilitation Act, the ADA, and the NYSHRL

RUMC contends that it is entitled to summary judgment on Viera's deliberate indifference claim because, inter alia, RUMC personnel had "effective communication" with her concerning A.G.'s condition on the evening of December 1, 2014, and RUMC personnel had no reason to believe that she needed or desired a sign language interpreter. (RUMC Br. (Dkt. No. 81) at 13-14, 20-22; RUMC Reply Br. (Dkt. No. 85) at 6-9)

Because Viera seeks money damages (Cmplt. (Dkt. No. 1) ¶ 6), she must show "an intentional violation [of the RA and the ADA]." Loeffler, 582 F.3d at 275 (emphasis in original), meaning that RUMC personnel acted with "deliberate indifference to the strong likelihood that [her] federally protected rights [would be violated by the failure to provide an ASL interpreter.]" Id.

As discussed above, it is undisputed that RUMC personnel – although made aware that Viera is deaf – did not provide an ASL interpreter for Viera during the time she and her family spent at RUMC. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 314; RUMC R. 56.1 Resp. (Dkt. No. 91) ¶ 369) There is no evidence, however, that either Gosselin or Viera requested an ASL interpreter while at RUMC. To the contrary, the emergency room nurse, Esther Rose, has submitted a declaration stating that "neither Mr. Gosselin nor Ms. Viera requested an ASL interpreter." (Lenza Decl., Ex. 18 (Rose Decl.) (Dkt. No. 82-17) ¶ 8)

Moreover, Dr. Kaufman – the emergency room physician who treated A.G. and explained his condition to Gosselin and Viera – states in his declaration that he is "confident that neither Mr. Gosselin nor Ms. Viera requested a sign language interpreter." (Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶ 34) There is no contrary admissible evidence. Acknowledging that the federal regulations provide that, "[i]n determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities," 28 C.F.R. § 35.160(b)(2), here, neither Viera nor her fiancé requested an ASL interpreter.

Taking into account Viera and Gosselin's failure to request an ASL interpreter, this Court must determine whether Viera nonetheless has presented sufficient evidence to raise a material issue of fact as to whether RUMC personnel "acted with at least deliberate indifference to the strong likelihood that a violation of [Viera's] federally protected rights [would] result from the [failure to obtain an ASL interpreter for Viera]." Loeffler, 582 F.3d at 275. Acknowledging that RUMC had an obligation to ensure that a deaf person such as Viera was provided with a "procedure for effective communication," 45 C.F.R. § 84.52(c), the Court concludes that Plaintiff has not produced sufficient evidence to create a material issue of fact as to whether RUMC personnel acted with deliberate indifference.

As an initial matter, Dr. Kaufman and Nurse Rose – the primary RUMC employees who interacted with Viera and Gosselin – testified that they believed that they were effectively communicating with Viera. (See Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶ 27 (Dr. Kaufman "observed Mr. Gosselin signing to Ms. Viera after [Dr. Kaufman] spoke[,] which [Dr. Kaufman] understood was Mr. Gosselin advising Ms. Viera what [Kaufman] said"); Lenza Decl., Ex. 18 (Rose Decl.) (Dkt. No. 82-17) ¶¶ 6, 10 (Rose "understood Mr. Gosselin was

repeating to Ms. Viera what the hospital staff said to him," and Rose "believed [that Viera] understood the hospital staff's communications through Mr. Gosselin based on her non-verbal communication and demeanor. Ms. Viera appeared less anxious after receiving communication from Mr. Gosselin.")) There is no evidence to the contrary.

Nurse Rose testified that she observed Gosselin "communicate with Ms. Viera by concurrently speaking to her and moving his hands. I understood Mr. Gosselin was repeating to Ms. Viera what the hospital staff said to him because I heard Mr. Gosselin repeat the information aloud when he communicated with Ms. Viera." (Lenza Decl., Ex. 18 (Rose Decl.) (Dkt. No. 82-17) ¶¶ 6-7) Given that Gosselin and Viera appeared at the hospital as husband and wife – and had together brought their four-month-old son to RUMC for treatment, along with his older siblings – Rose had no reason to believe that Gosselin's communication with Viera – whether based on sign language or lip-reading – would be ineffective, and the interaction between the two indicated otherwise. Indeed, it would have been reasonable for Rose to assume – under the circumstances – that Gosselin was the best equipped to understand the most effective means of communicating with Viera. Moreover, Viera never indicated to Rose in any fashion that she could not understand Gosselin, or that she required or desired the services of an ASL interpreter.[17] As the Godbey court stated, a public entity defendant such as RUMC is "not required as a matter of course to provide ASL interpreters, and such defendants are not required 'to guess' a plaintiff's need for reasonable accommodations." Godbey, 2013 WL 4494708, at *7 (W.D.N.C. 2013).

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[17] Viera was, of course, aware of her right to request the services of an ASL interpreter at RUMC, having waived that right in writing when she was at RUMC four months earlier for the delivery of A.G. (Lenza Decl., Ex. 12 (RUMC Refusal of Language Assistance Services form) (Dkt. No. 82-11) at 3-4) On that occasion, Viera opted to proceed with Gosselin as her interpreter. (Id. at 4)

Similarly, after Dr. Kaufman relayed information about A.G.'s condition to Gosselin, he observed Gosselin sign to Viera and Viera sign to Gosselin. Given these circumstances, Dr. Kaufman reasonably concluded that Gosselin had conveyed to Viera the simple facts that Dr. Kaufman had told to Gosselin: that A.G. had a broken leg and would have to be transferred to another hospital for treatment. It was also reasonable for Dr. Kaufman to conclude – given that Gosselin was signing to his wife, and Viera was signing to her husband – that effective communication was taking place. Finally, it is undisputed here that the information Dr. Kaufman had communicated to Gosselin was in fact communicated to Viera, and that she understood it.

The parties agree that Dr. Kaufman informed Gosselin that A.G.'s leg was broken, that RUMC could not treat him, and that it would be necessary to transfer him to another hospital for treatment. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶¶ 289-90; Lenza Decl., Ex. 3 (Kaufman Decl.) (Dkt. No. 82-3) ¶¶ 24-25) It is likewise undisputed that Gosselin relayed all of this information to Viera by typing it into Notepad on his cell phone and showing her the screen. (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶ 291-92) Although Viera has proffered general statements that "[s]ometimes [she] "struggle[s]" with English, (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 99:7), she has not argued, or proffered evidence specifically demonstrating, that she did not understand what Gosselin typed into his phone and showed to her at RUMC that evening. Viera has also not argued, or proffered evidence, that she told or indicated in any fashion to RUMC personnel that she did not understand what Gosselin had typed into his phone and shown to her.

It is also undisputed that Dr. Kaufman held up an x-ray of A.G.'s leg to the light and showed the location of the fracture, and that Viera saw the break and understood its

significance. She observed to Gosselin that A.G.'s leg appeared "disconnected," and she signed "Wow" to Gosselin to communicate her reaction and surprise. It is also undisputed that Gosselin communicated to Viera that A.G. had a broken leg, and would be transferred to a different hospital for treatment, because "RUMC could not take care of A.G." (Pltf. R. 56.1 Counterstatement (Dkt. No. 88) ¶¶ 291-94) In sum, Dr. Kaufman had no reason to believe that his communication with Viera was not effective, and it is undisputed that Viera was informed of and understood the two key facts: A.G. had a broken leg, and he would be have to be transferred to another hospital for treatment.

Acknowledging that the DOJ regulations advise that for matters that "involve[] more complexity," ASL "interpreters should be used," 28 C.F.R. § 36.303, App. A, Dr. Kaufman had nothing of complexity to explain to Gosselin and Viera. A.G. had a broken leg and would have to be treated at another hospital. It took Dr. Kaufman no more than a few minutes to explain these facts and circumstances to Gosselin, and the evidence demonstrates that Gosselin advised Viera of these simple facts and circumstances both in writing and through sign language. While Viera now attempts to demonstrate that she was confused or uncertain about A.G.'s condition, she has not proffered sufficient evidence to create a material issue of fact as to whether Dr. Kaufman and Nurse Rose realized or should have realized that they were not effectively communicating with her. The insufficiency of Viera's showing is confirmed by the grant of summary judgment to defendants in cases involving far more egregious facts.

In McCullum v. Orlando Reg'l Healthcare Sys., Inc., 768 F.3d 1135, 1149 (11th Cir. 2014), for example, the Eleventh Circuit concluded that the district court properly granted defendant hospitals summary judgment on Rehabilitation Act and ADA claims, where the hospitals had not provided a sign language interpreter to a deaf and mute fourteen-year-old.

Although the child had been hospitalized for twenty days at one hospital and eleven days at another, there was no evidence "that [the child] or his family members ever requested an interpreter or that his family members told the staff that they were struggling to translate the doctors' and nurses' questions and statements for their son." McCullum, 768 F.3d at 1148. While the child claimed – during the litigation – "that he did not fully understand what was happening to him while he was at [the first hospital], there is no evidence that he or his parents informed the [hospital] doctors or nurses that some of their statements were being lost in translation. To the contrary, [the child's] attending physician believed that he was effectively communicating with [the child] through the mother's translations." Id. at 1139. The child's medical records also indicated that he "nod[ded] understanding" when nurses communicated with him about his treatment. Id. "Because there is no evidence to support a conclusion that the [hospital] staff knew that their accommodations were ineffective in enabling [the child] to communicate with his nurses and doctors, a reasonable jury could not find that the [hospital] staff acted with deliberate indifference." Id. at 1148.

As to the second hospital – where the child underwent a colonoscopy – the court found that there was no evidence that the child or his family asked for an interpreter, or informed the hospital that the child was having difficulty understanding a book he was given about his procedure. Id. at 1149. Therefore, summary judgment for the hospitals was affirmed. Id.

Here, of course, there was likewise no request for an interpreter, and no indication by Viera or Gosselin to RUMC personnel that effective communication was not taking place. Moreover, Viera's claim is predicated on a conversation that lasted no longer than a few minutes – as opposed to the twenty-day and eleven-day periods at issue in McCullum. RUMC also rendered no treatment, whereas the hospital defendants in McCullum had conducted serious

surgical procedures on plaintiff's deaf fourteen-year-old child, including the removal of his colon.

Similarly, in Godbey v. Iredell Mem'l Hosp., Inc., No. 5:12 Civ. 00004 (RLV), 2013 WL 4494708 (W.D.N.C. Aug. 19, 2013), aff'd, 578 F. App'x 317 (4th Cir. 2014), a deaf plaintiff brought a discrimination action under the Rehabilitation Act and the ADA against a defendant hospital for failing to provide an ASL interpreter over the course of four hospital visits, during which he received shoulder and knee surgery. Plaintiff claimed that the hospital had not ensured that he received "effective communication," and complained that the written notes used for communication – and the signing by nursing staff and plaintiff's mother – had been inadequate. Godbey, 2013 WL 4494708, at *1. During his first two hospital visits, Plaintiff did not request an ASL interpreter, nor did he communicate to hospital staff that he was having difficulty communicating with them. During his last two visits, Plaintiff and/or his mother requested an ASL interpreter. Id. at *2-3. The defendant hospital did not provide an ASL interpreter on either occasion; instead, a nurse "fingerspelled" words in English for plaintiff. Plaintiff never indicated to hospital staff that he was dissatisfied with that mode of communication.[18] Id.

The court granted the hospital summary judgment on plaintiff's claims, noting that "in evaluating Defendant's efforts to ensure effective communication, qualifying defendants are not required as a matter of course to provide ASL interpreters, and such defendants are not required 'to guess' a plaintiff's need for reasonable accommodations." Id. at *7 (citing O'Neil v. Tex. Dep't of Criminal Justice, 804 F. Supp. 2d 532, 538 (N.D. Tex. 2011); see Proctor v. Prince

[18] Plaintiff asserted that, during his last visit, hospital staff should have understood from his facial expressions that he did not understand what was being discussed. Id. at *3.

George's Hosp. Ctr., 32 F. Supp. 2d 820, 827 (D. Md. 1998) (noting that neither case law nor regulation establishes a per se rule that sign language interpreters are necessary in hospital settings). The court went on to hold that

> Defendant's failure to provide ASL-fluent interpreters . . . does not by itself suffice to maintain Plaintiff's claim of intentional discrimination. Although a qualifying defendant may readily be shown as deliberately indifferent to the likely violation of protected rights by not responding to a patient's known disability and apparent need for an accommodation, even without the asking, where reasonable accommodations were made and in the absence of information indicating that such accommodations would fall short in ensuring effective communication, there is no intentional discrimination.

Godbey, 2013 WL 4494708, at *7 (internal citations omitted). The same logic applies with equal force here.

RUMC's motion for summary judgment on Plaintiff's claims under the Rehabilitation Act, the ADA, and the NYSHRL will be granted.

2. Plaintiff's Claims Against RUMC Under the NYCHRL

Under the NYCHRL, N.Y.C. Admin. Code, § 8-107, it is

> an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:
>
> > 1. Because of any person's actual or perceived . . . disability . . . directly or indirectly:
> >
> > > (a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation . . . .

N.Y.C. Admin. Code, § 8-107(4)(a)(1)(a). Moreover,

> any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

Id. at 15(a). RUMC does not dispute that it is a covered entity under the NYCHRL.

As noted above, while liability for disability discrimination under the Rehabilitation Act, the ADA, and the NYSHRL may be considered together, the NYCHRL imposes a higher standard that requires courts to construe its provisions "liberally for the accomplishment of the uniquely broad and remedial purposes [of the City Human Rights Law]." N.Y.C. Admin. Code § 8-130. The Second Circuit has noted that while cases applying similar federal and state anti-discrimination statutes may be considered in determining liability under the NYCHRL, related federal and state law provisions merely set "a floor below which the City's Human Rights law cannot fall." Loeffler, 582 F.3d at 278 (emphasis in original). Accordingly,

> courts must analyze NYCHRL claims separately and independently from any federal and state law claims, see Restoration Act § 1 [N.Y.C. Local L. No. 85]; Hernandez v. Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53, 58 (1st Dep't 2012); [Gurian, A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law, 33 FORDHAM URB. L. J. 225, at 275-77 (2006)], construing the NYCHRL's provisions "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible," Albunio v. City of New York, 16 N.Y.3d 472, 477-78, 922 N.Y.S.2d 244, 947 N.E.2d 135 (2011). Thus, even if the challenged conduct is not actionable under federal and state law, federal courts must consider separately whether it is actionable under the broader New York City standards.

Mihalik v. Credit Agricole Cheuvreux, 715 F.3d 102, 109 (2d Cir. 2013).

Acknowledging this obligation, "the Court has not found – and the parties have not identified – any relevant difference between the analysis required by the NYCHRL and the analysis required by the federal laws of the question at issue here." Brooklyn Ctr. for Independence of Disabled v. Bloomberg, 980 F. Supp. 2d 588, 643 (S.D.N.Y. 2013).

Applying the liberal interpretation required by the law, and giving the NYCHRL disability discrimination provisions the broadest construction "reasonably possible," this Court concludes that the conduct of RUMC personnel did not "directly or indirectly" deprive Viera of "the full and equal enjoyment, on equal

terms and conditions, of any of the . . . services . . . [provided by RUMC]." N.Y.C. Admin. Code § 8-107(4)(a)(1)(a). For all the reasons discussed above, Dr. Kaufman and Nurse Rose – through Gosselin – did in fact have "effective communication" with Viera. Even if this Court were to conclude that there are fact issues about whether effective communication took place, Viera has proffered no evidence suggesting that Dr. Kaufman and Nurse Rose realized or should have realized that effective communication with her was not taking place. Imposing liability in such circumstances would essentially convert the NYCHRL to a strict liability statute, requiring the imposition of liability whenever an ASL interpreter is not provided to a deaf person, regardless of the surrounding circumstances. Plaintiff has cited no authority suggesting that the City Council intended that a strict liability standard would govern, and this Court is aware of no case suggesting that such a standard would be appropriately applied here.

RUMC will be granted summary judgment on Plaintiff's NYCHRL claim.

B. Viera's Motion for Partial Summary Judgment Against the City, and the City's Motion for Partial Summary Judgment Against Viera

In moving for partial summary judgment against the City, Viera claims that she requested an interpreter for the ACS home visits, but that ACS employees ignored her requests. (Pltf. Br. (Dkt. No. 76) at 16) Viera argues that "the conduct of ACS's staff amounted to deliberate indifference," because ACS "fail[ed] to perform an assessment [of her hearing capabilities], fail[ed] to provide the auxiliary aids and services necessary to ensure effective communication, and fail[ed] to give primary consideration to [her] preferred method of communication." (Id. at 16-17)

The City has cross-moved for partial summary judgment, claiming that – as to the first home visit on December 2, 2014 – there is no evidence that Gayle-Curtis acted with deliberate indifference. (City Br. (Dkt. No. 93) at 28)

For the reasons discussed below, material issues of fact preclude a grant of summary judgment as to either side.

1. The City's Cross-Motion for Partial Summary Judgment

The City contends that it is entitled to summary judgment on the issue of whether Gayle-Curtis acted with deliberate indifference in connection with the first visit to Viera and Gosselin's home, on December 2, 2014. In essence, the City contends that it was required to act quickly, given the possibility that child abuse was taking place at the Viera/Gosselin household, and asserts that there was not sufficient time to arrange for an ASL interpreter to accompany Gayle-Curtis on this visit. The City further contends that Gayle-Curtis "did not attempt to have a substantive conversation with Plaintiff about the injury to A.G. during her home visit." (City Br. (Dkt. No. 93) at 16-17)

In support of its motion, the City asserts that the following facts and circumstances are undisputed:

> (1) RUMC reported that A.G.'s injury was not consistent with the explanation offered by Gosselin and Viera;
>
> (2) the investigation of A.G.'s injury was designated by ACS as an "instant response";
>
> (3) instant response cases involve serious injuries to children and require ACS employees to take immediate action;
>
> (4) the safety and well-being of children is ACS's primary obligation, and this duty extends to all children in a home, not just an injured child;
>
> (5) Gayle-Curtis only learned that Viera is deaf on the afternoon of December 2, 2014, when she interviewed Gosselin at Weill Cornell;

(6) Gosselin informed Gayle-Curtis that Viera could read and write;

(7) Gayle-Curtis' home visit took place immediately after her interview of Gosselin;

(8) Viera was able to communicate in writing with Gayle-Curtis concerning the identities and birth dates of her children;

(9) Gayle-Curtis did not otherwise interview Viera; and

(10) Jones visited the home the next day -- with an ASL interpreter – and performed the full initial home visit at that time.

(Id. at 28) According to the City, "[t]hese facts[, taken] together[,] establish that the way in which Ms. Gayle-Curtis conducted the emergency visit was entirely appropriate and did not violate [Viera's] rights." (Id.)

Contrary to the City's assertion, however, a number of the facts and circumstances cited above are in dispute. While the City contends that "RUMC reported that the severe spiral fracture of three-month-old A.G. was not consistent with the explanation offered" – and that accordingly there was no time to secure an ASL interpreter, given the risk that Viera's other children might be suffering abuse – Dr. Kaufman, the treating physician at RUMC, considered and rejected the notion that A.G.'s injury had been caused by child abuse. RUMC's Physician Notes concerning A.G. state that "[t]hough this fracture type is typically suspicious for child abuse, [Dr. Kaufman] interviewed the parents at length about [the] incident and [found] their story to be credible. Moreover, the other son witness[ed] the incident and gave [a] consistent d[e]scription as well." (Lenza Decl., Ex. 16 (RUMC Physician Notes) (Dkt. No. 82-15) at 9; see also id. at 14 (RUMC Nurse Notes) ("Dr. Kaufman, [the Emergency Department] attending physician documented that though this type of fracture is typically suspicious with child abuse, he finds history given by parents credible. In addition he finds that on interviewing the pt's male sibling correlates with parents' account.")) Moreover, Dr. Nina Mbadiwe – A.G.'s treating

physician at Weill Cornell – told Gayle-Curtis prior to her home visit that Gosselin's explanation of how A.G.'s injury had occurred was consistent with A.G.'s injury. (City R. 56.1 Resp. (Dkt. No. 97) ¶¶ 525-26)

The City's assertion that A.G.'s injury was suggestive of child abuse appears to be based on a tip from an unidentified RUMC employee who read A.G.'s chart after he had been transferred to Weill Cornell. Gayle-Curtis' Progress Note for December 2, 2014 states the following:

> Source stated that she didn't meet the family. She began her shift this morning after the child was already transferred to Weill Cornell Medical Center. Source read the chart notes as documented by the medical team, physician assistant, Ifeanyl Nwobi.
>
> Source said as per notes, the child was brought into the Richmond University Hospital ER last night accompanied by his parents. Father reported that he became dizzy, passed out while baby in his arms. Father fell on top of the baby. There was an older child who was also in the ER with the parents. The older child apparently took the father off the baby. Upon arrival to the ER, baby was crying and unconsolable. Baby was examined and found to have a spiral, femur fracture of left leg.
>
> Source said that Physician assistant further noted that "Most spiral fractures of the femur in a child this age is suspicious for a child abuse incident. The mechanism of injury given in this case is not consistent with the injury seen. Will recommend Child Protective Services to rule out any case of child abuse."

(June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000007) ACS's source accurately quoted an "Assessment/Recommendation" prepared by Physician Assistant Ifeanyi Nwobi concerning A.G. (Lenza Decl., Ex. 16 (RUMC Physician Assistant Notes) (Dkt. No. 82-15) at 17)

Given the conflicting medical opinions offered by the treating physicians at RUMC and Weill Cornell on the one hand, and RUMC Physician Assistant Nwobi on the other, there is a material issue of fact as to whether the risk of child abuse to Viera's other children

mandated Gayle-Curtis' visit on the evening of December 2, 2014, as opposed to the morning of December 3, 2014.

The significance of the "instant response" designation is also called into question by the fact that Gayle-Curtis waited approximately three hours and twenty-five minutes after she was assigned the case before interviewing Gosselin at Weill Cornell. (City R. 56.1 Resp. (Dkt. No. 97) ¶¶ 521, 523; Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 394)

Assuming arguendo that the information available to ACS required a home visit on the evening of December 2, 2014, the testimony of Derrick Hinds – ACS's Assistant Commissioner for the Division of Child Protection – undermines the City's assertion that no ASL interpreter could be obtained for the December 2, 2014 home visit. Hinds testified that it is ACS policy to inform a deaf client of her right to receive an interpreter (June 27, 2016 Wiederhorn Decl., Ex. N (Hinds Dep.) (Dkt. No. 78-13) at 41:24-42:4); that caseworkers can access and request sign language interpreters 24 hours a day (id. at 80:16-81:17); that ACS policy requires a caseworker to request an interpreter once she determines that there is a need for an interpreter (id. at 23:5-9); and that at most, "there is a three hour lag between [ACS] requesting [the interpreter] and being able to get [the interpreter] to the location." (Id. at 25:4-9)

Gayle-Curtis met with Gosselin at Weill Cornell at 4:15 p.m. on December 2, 2014 (City R. 56.1 Resp. (Dkt. No. 97) ¶¶ 521, 523; Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 394), and he told her at that time that Viera is deaf. (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 401) Accepting Hinds' testimony as true, if Gayle-Curtis had immediately sought an ASL interpreter, one would have been available to attend a home visit at Viera's residence by 7:15 p.m. Gayle-Curtis made no effort to obtain an ASL interpreter, however, even though she knew that Viera is deaf. (City R. 56.1 Counterstatement (Dkt. No. 94) ¶¶ 57, 62; see Lively Decl., Ex. 9 (Gayle-Curtis Dep.)

(Dkt. No. 95-9) at 92:16-20) The Court concludes that the evidence presents a material issue of fact as to whether Gayle-Curtis could have obtained an ASL interpreter for her December 2, 2014 home visit.

There is also a factual dispute about whether Gayle-Curtis attempted to conduct a substantive interview of Viera. Although the City argues that Gayle-Curtis did not seek to conduct a substantive interview of Viera, Viera contends that Gayle-Curtis tried to interview her, but that she "couldn't understand what [Gayle-Curtis] was saying." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 119:2-12) It is clear from Gayle-Curtis' Progress Notes that, at a minimum, she questioned Viera about the names and ages of her children. (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000011; Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 409)

Considering the evidence in the light most favorable to Viera, a reasonable jury could find that Gayle-Curtis' conduct on December 2, 2014 amounts to deliberate indifference to Viera's rights. See Loeffler, 582 F.3d at 276. The City's motion for partial summary judgment will be denied.

2. Viera's Motion for Partial Summary Judgment

Viera contends that she is entitled to summary judgment on her claims to the extent they are premised on ACS home visits that were conducted without an ASL interpreter. (Pltf. Br. (Dkt. No. 76) at 12, 24) It is undisputed that no ASL interpreter was present for Gayle-Curtis' December 2, 2014 home visit, or for Jones' December 22, 2014, January 13, 2015, and January 29, 2015 home visits.

As an initial matter, there is a factual dispute about whether Viera requested an ASL interpreter for these home visits. Jones has submitted a declaration stating that

> Plaintiff did not convey to me through any means during my home visits that she sought the assistance of an ASL interpreter. . . . None of Ms. Viera's family members, including Mr. Gosselin, Ms. Viera's stepmother, or Ms. Viera's and Mr. Gosselin's children, requested that I bring an interpreter.

(Lively Decl., Ex. 2 (Jones Decl.) (Dkt. No. 95-2) ¶¶ 26, 27) Jones also maintains that she never asked "Ms. Viera's stepmother or any other family members to interpret," and that on December 22, 2014, Viera's stepmother – Pacheco – "offered to interpret and informed [Jones] that she could sign."[19] (Id. ¶¶ 18-19) Jones also testified that neither Viera nor Gosselin ever "indicated that they were unhappy with the way in which I conducted the investigation." (Id. ¶ 28)

By contrast, Viera testified that she "clearly told Ms. Jones, through an ASL interpreter during the December 3, 2014 home visit[,] that she was very upset that ACS came to her home on December 2, 2014 without an interpreter and that she did not have a full understanding of what was happening." (Pltf. R. 56.1 Resp. (Dkt. No. 99) ¶ 480 (citing June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 122:14-20)) Viera further testified that she "always ask[ed]" for an interpreter during home visits, and that she "would tell Mr. Gosselin to ask them that we need an interpreter present." (June 27, 2016 Wiederhorn Decl., Ex. B (Viera Dep.) (Dkt. No. 78-2) at 135:22-25, 136:1) Finally, Pacheco testified that Jones asked her to perform sign language interpretation for Viera during the December 22, 2014 home visit. (June 27, 2016 Weiderhorn Decl., Ex. E (Pacheco Dep.) (Dkt. No. 78-5) at 24:8-22)

There are also factual disputes about the contact Jones had with Viera during these home visits, and about the length of these visits. Jones contends that the December 22, 2014 and January 2015 home visits were quite short – ranging from five to ten minutes – and involved almost exclusively contact with Gosselin. (Lively Decl., Ex. 2 (Jones Decl.) (Dkt. No. 95-2) ¶¶

[19] Jones also states that she attempted to secure an ASL interpreter prior to the December 22, 2014 home visit, but was unsuccessful. (Lively Decl., Ex. 2 (Jones Decl.) (Dkt. No. 95-2) ¶ 17)

15, 17, 20, 23-25) Jones explains that most of her contact was with Gosselin, because – after the doctors at Weill Cornell concluded that "the injury to A.G. was consistent with Mr. Gosselin's explanation" – her "investigation became focused on Mr. Gosselin's health and the reason for which he had fallen while holding A.G." (Id. ¶ 13) According to Jones, during the December 22 visit, she "spoke primarily with Mr. Gosselin," and conducted a "short visit of no more than ten minutes." (Id. ¶¶ 17, 20) Similarly, Jones asserts that during the January 13 and January 29 home visits – each of which lasted no more than five minutes – she "spoke exclusively with Mr. Gosselin." (Id. ¶¶ 23, 25) Jones emphasizes that Viera did not "evidence any desire to speak with [Jones] during [her] two visits in January 2015 or to participate in [her] conversation with Mr. Gosselin." (Id. ¶ 26)

Viera has offered evidence that conflicts with much of Jones' testimony. For example, the evidence cited by Viera suggests that the December 22, 2014 home visit was much longer than Jones asserts (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000029) (indicating that numerous topics were discussed during the December 22, 2014 home visit), and included questions to Viera about whether A.G. had been abused (June 27, 2016 Weiderhorn Decl., Ex. E (Pacheco Dep.) (Dkt. No. 78-5) at 24:8-22), as well as questions from Viera about the status of the ACS investigation. (June 27, 2016 Weiderhorn Decl., Ex. F (Investigation Progress Notes) at City 000029) Viera has also proffered evidence suggesting that the January visits were much longer than five minutes, and included statements made to both Viera and Gosselin about when the ACS investigation would end. (Id. at City 000032)

There is also evidence that Jones brought an ASL interpreter with her to the December 3, 2014 home visit, and that she made an effort to secure an ASL interpreter for the December 22, 2014 home visit. The record also shows that ACS has a policy of providing ASL

interpreters for children and/or family members who are deaf. In Loeffler, the Second Circuit observed that an unsuccessful effort to secure an ASL interpreter, and the existence of "a policy in place to provide [ASL] interpreters," "might lead a reasonable jury to conclude that [a hospital defendant] was not deliberately indifferent." Loeffler, 582 F.3d at 276-77.

This Court concludes that the City has proffered sufficient evidence to demonstrate material issues of fact as to Plaintiff's claims regarding the home visits at which no ASL interpreter was provided. Accordingly, Plaintiff's motion for partial summary judgment on her claims against the City will be denied.

CONCLUSION

For the reasons stated above, RUMC's motion for summary judgment (Dkt. No. 80) is granted. Plaintiff's motion for partial summary judgment (Dkt. No. 75), and the City's cross-motion for partial summary judgment (Dkt. No. 92), are denied. The Clerk of Court is directed to terminate the motions (Dkt. Nos. 75, 80, 92).

Plaintiff and the City are directed to comply with this Court's Individual Rules concerning the preparation of a pre-trial order. The joint pre-trial order will be filed on November 6, 2017. Motions in limine, voir dire requests, and requests to charge are likewise due on November 6, 2017. Responsive papers, if any, are due on November 22, 2017. Trial will commence on December 11, 2017, at 9:00 a.m., in Courtroom 705 of the Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, New York.

Dated: New York, New York
July 20, 2017

SO ORDERED.

Paul G. Gardephe
United States District Judge