

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN COUNCIL OF THE BLIND, et al.,)	
)	
Plaintiffs,)	
)	CIVIL ACTION NO.
v.)	1:02CV00864 JR
)	
JOHN W. SNOW, Secretary of the Treasury,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S SUPPLEMENTAL MEMORANDUM

During oral argument, counsel for Plaintiff stated that Defendant would be obligated to pay for external devices which could be used by the blind in denominating banknotes. The Court requested a supplemental memorandum from Plaintiff supporting this statement.

The Treasury Department regulations implementing Section 504 require the agency to “...*furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.*” See 31 C.F.R. §17.160(a)(1). The term “*auxiliary aids*” is defined as devices which provide the disabled with “*equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency.*” 31 C.F.R. §17.103(c). The regulations state that auxiliary aids for individuals with visual disabilities include such items as “*readers, Brailed materials, audio recordings and other similar services and devices.*” Id.

The Department of Treasury provided a section-by-section analysis of these regulations upon their promulgation on August 16, 1991. This analysis states as follows:

“Unless not required by § 17.160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.” Emphasis added. See 56 FR 40781, August 16, 1991, Analysis of Section 17.160. The Department’s analysis further notes that the “*items listed at § 17.103(c) are intended as examples and are not to be treated as an exhaustive list.*” See 56 FR 40781, August 16, 1991, Analysis of Section 17.103.

Under Executive Order 12250, the Department of Justice has primary responsibility for the coordination and approval of regulations implementing Section 504. See 45 FR 72995, Nov. 4, 1980. The Department of Treasury regulations were merely an adaptation of the regulations prepared by the Department of Justice under Executive Order 12250. See 56 FR 40781, August 16, 1991 (Background Statement). The Department of Justice regulations also provide that auxiliary aids must be furnished at no costs to disabled individuals, unless doing so would result in an undue burden or fundamental alteration. See 49 FR 35724, September 11, 1984, Analysis of Section 39.160 (“Unless not required by §39.160(d), the agency shall provide auxiliary aids at no cost to the handicapped person.” See also United States v. Board of Trustees for University of Alabama, 908 F.2d 740, 745 (11th Cir. 1990) (upholding HEW’s interpretation of Rehabilitation Act regulations as precluding consideration of financial means in determining whether disabled person entitled to auxiliary aids).

Both the Department of Justice and the Department of Treasury regulations contain the following provision: “*The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.*” See 28 C.F.R § 39.160(a)(1)(ii); 31 C.F.R. §17.160(a)(1)(ii). The section-by-section analysis

accompanying the Department of Justice regulations contained the following discussion of this exclusion:

“Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§ 39.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.....For example, a federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.”

See 49 FR 35724, September 11, 1984, Analysis of Section 39.160.

There is information in the record pertaining to two separate portable devices, which may be used by the blind to denominate currency. In August 2004, the BEP issued Request for Quotations (“RFQ”) 04-0687 to industry seeking the development of a pocket sized device with a target retail price of \$35 or less, which could be used to denominate U.S. currency. See Exhibit P-13, RFQ Specifications (Docket #35). The working prototype was required to be delivered to the Bureau not later than September 30, 2005. See Declaration of Thomas Ferguson, August 30, 2005, Para 15, Docket #33. The record also contains information pertaining to the Note Teller 2 device, manufactured by Brytech, Inc. See Exhibit P-11, Description of Note Teller 2 (Docket #35).

Plaintiff respectfully submits that there is a fundamental difference between portable currency denomination devices, and eyeglasses or hearing aids. Eyeglasses or hearing aids may be used for both program and non-program related activities. For example, eyeglasses may be used for the purpose of seeing a movie, as well as for the purpose of reading a banknote. Similarly, hearing aids may be used for the purpose of communicating in a social occasion, as well as for federal program related

communications. Accordingly, eyeglasses and hearing aids are items of a personal nature, which the agency has no obligation to provide.

On the other hand, both the Note Teller 2 and the recently developed prototype unit may be used solely for the purpose of reading banknotes. The Note Teller 2 measures approximately 6 x 3 x 1 inches. See Exhibit P-11, Declaration of Ms. Julia Wilson, Para. 2, (Docket #35). The prototype unit measures 75mm x 75mm x 15mm, which is approximately 3 x 3 x .59 inches. See Exhibit P-13, RFQ Specifications (Docket #35). Based on the programming and the dimensions of these devices, they simply cannot be used for the purpose of reading any other type of paper, such as utility bills, bank statements, etc. Accordingly, neither the Note Teller 2 nor the prototype unit would fall within the exclusion for devices of a personal nature.

Defendant may also assert that furnishing these devices would constitute an undue burden. See 28 C.F.R § 39.160(d); 31 C.F.R. §17.160(d). Resolution of this issue would largely depend upon the scope of any order to be issued by this Court.

Obviously, there would be no undue burden if the Court were to limit its order to furnishing devices only to the two individual Plaintiffs in this action. Defendant has no plausible argument that furnishing two such devices would constitute an undue burden. However, a different issue arises if the Court were to extend any such order to encompass other legally blind persons. Legal blindness for social security disability purposes is defined as having corrected visual acuity no better than 20/200 in the better seeing eye. See 42 U.S.C. § 416(i)(1)(B); 20 C.F.R. § 404.1581.

Plaintiff's Rule 7.1 Statement of Material Facts Not in Dispute contained the following undisputed allegations:

33. *There are 937,000 legally blind adults 40 years and older in the United States, of whom 648,000 are over the age of 80. See Exhibit P-37, NIH Statistics on Visual Impairments. In the highly improbable event that each of these individuals requested a device, the total cost to the U.S. government would be approximately \$33 million (assuming a unit cost of \$35). More likely, only a fraction of the blind would request the device.*
34. *The likelihood of achieving the target retail price of \$35 or less for the note teller being developed with federal funds would be significantly enhanced if the government purchased a significant quantity, thereby resulting in economies of scale. Other governments provide such devices to their visually disabled citizens at no charge. See Exhibit P-20, Bank of Canada, Description of Accessibility Features.*

See Docket # 35. Both of these allegations were admitted by Defendant. See Defendant's Response to Plaintiff's Rule 7.1 Statement of Material Facts Not in Dispute, Docket # 43.

Plaintiff respectfully asserts that costs in the range of \$33 million would not constitute an undue burden. This is less than the estimated costs of putting a single tactile feature on all denominations, which range from \$45 million to \$75 million in initial costs, depending on the feature selected, and from \$8 million to \$15 million in additional annual costs.¹ See Exhibits P-26 – P-28. See also Pl. Mem. at 31-35, Docket # 35; Pl. Mem. 15-17, Docket # 67. These costs are substantially less than the \$245 million to \$320 million in initial costs, and \$143 million to \$174 million in increased annual costs, which would be required to change the size of currency. See Exhibit P-21, Declaration of Thomas Ferguson, August 28, 2002, Para. 52 (Docket #35).

The amended complaint did not seek an order requiring Defendant to furnish external devices to visually disabled individuals. These devices tend to be unreliable, and

¹ Defendant has not contended that initial costs in the \$45 million to \$75 million range, and increased annual costs in the \$8 million to \$15 million range, are unduly burdensome.

are relatively slow. See Pl. Motion for Leave to Amend Complaint, Docket #47. See also Exhibit P-2, NAS Study, pp. 24-25 (Docket #35). However, Plaintiff respectfully asserts that Defendant would be financially obligated to furnish portable electronic currency readers to disabled individuals, if a reliable version of such a device existed.

Lastly, Plaintiff wishes to bring to the attention of the court the case of Redd v. Rubin, 34 F. Supp. 2d 1, (D.D.C. 1998), remanded by Redd v. Summers, 232 F.3d 933 (D.C. Cir. 2000). This case involved alleged discrimination against a tour guide at the BEP facility in Washington D.C., where she was working as a contractor employee. Redd, who is 5'7" tall and weighed approximately 348 pounds, alleged that the Bureau ordered her dismissal by her employer, Aspen Personnel Services. Citing to the Department of Treasury regulations implementing Section 504, Redd alleged that the BEP engaged in discriminatory administrative methods, as opposed to discriminatory employment practices. While the issue of sovereign immunity was not discussed, the Court of Appeals specifically allowed her non-employment claim under Section 504 to proceed against the BEP. See Redd v. Summers, 232 F.3d at 941; See also Redd v. Rubin, 34 F. Supp. 2d. at 8 (noting that Lane v. Pena bars recovery of monetary damages, but nonetheless allowing Redd's Section 504 claim for equitable relief to proceed).

Respectfully submitted,

/s/
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