DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: February 11, 2023 2:31 PM CASE NUMBER: 2022CV32599
Plaintiffs: SPENCER KONTNIK, and COLORADO CROSS-DISABLITY COALITION, a Colorado Corporation, **v.** **Defendant:** DENVER COUNTY COURT	▲ COURT USE ONLY▲ _____ Case Number: 2022CV32599 Courtroom: 466

ORDER ON DEFENDANT'S MOTION TO DISMISS PURSUANT TO C.R.C.P 12(b)(5)

This matter comes before the Court on Defendant Denver County Court's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5). Having reviewed the Motion, Response, Reply, and applicable legal authorities, and having heard argument from the parties, the Court finds, concludes, and orders as follows:

BACKGROUND

Plaintiffs Spencer Kontnik and the Colorado Cross-Disability Coalition ("Plaintiffs" or Mr. Kontnik") brought this action on September 9, 2022 after Mr. Kontnik, an individual with a hearing disability, was dismissed from jury service by a judge on the Denver County Court ("DCC"). Mr. Kontnik says the DCC failed to ensure compliance with the laws and rules that govern the determination of whether a disability disqualifies an individual from jury service.

Mr. Kontnik brings this action under §§ 24-34-801 to 802 of the Colorado Anti-Discrimination Act ("CADA"), seeking a declaratory judgment, injunction, and damages against the DCC.

Mr. Kontnik's factual allegations include:

- The DCC is organized and administered by the City and County of Denver through the Colorado Constitution, Colo. Const. art. XX, § 6; Denver's charter and municipal code control the DCC's administration, powers, and procedures. Denver, Colo. Charter art. IV; Denver Revised Municipal Code ch. 14.

- The City and County of Denver has created the Agency for Human Rights and Community Partnerships, Denver Revised Municipal Code § 28-16, and a Commission for People with Disabilities. *Id.* § 28-20. Also, within the Agency for Human Rights and Community Partnerships is the Division of Disability Rights, which oversees the Office of Sign Language Services.

- One duty of the Office of Sign Language Services is to work in conjunction with the DCC's Interpreter Coordinator and the DCC's Americans with Disabilities Act (ADA) Coordinator to schedule a legally qualified Communication Access Realtime Translation ("CART") interpreters for Denver City and County Courts.

- Mr. Kontnik was called for jury duty on July 15, 2021, for a criminal trial in Courtroom 3C. Prior to entering the courtroom, Mr. Kontnik was randomly selected as Juror No. 1. So, if he had not been dismissed, he would have been seated in the jury box rather than the gallery for the next stage of jury selection. Mr. Kontnik, a practicing attorney with extensive knowledge of the DCC's accommodation procedures, had arranged for a CART interpreter to be present to assist him as a potential juror.

- While Mr. Kontnik and the other jurors were still outside the courtroom, the judge and counsel discussed Mr. Knotnik's status as a person with a hearing impairment. The record reflects the following statement by the judge:

> THE COURT: All right. So, an issue's come up with a juror who is hearing impaired and under the ADA we have a Court Interpreter who's here and present and all set up to help him.
>
> But the parties have approached and stipulated to allowing him to be excused just on the grounds that things might be tough for him and also the court would be required to have alternate just in the event there's -- there's issues with the interpretation or with the juror's ability to serve. So, just based on that and given that this will likely be a one-day trial I'll agree with the stipulation and allow for that juror to be excused. And I want to say thank you so much to the Interpreter for being here. But it would have been a cool experience but.

- The judge did not interview Mr. Kontnik to determine his qualifications to serve as a juror and whether he could perform satisfactory jury service.

- On information and belief, the CART interpreter also informed Mr. Kontnik that the judge made a comment to the CART interpreter regarding the judge's granting of the stipulation to exclude Mr. Kontnik based on counsels' belief that Mr. Kontnik's participation would slow down the proceedings. On information and belief, the CART interpreter explained to Mr. Kontnik he had been excluded because the district attorney and the defense attorney stipulated to dismiss him because they wanted to finish the trial as quickly as possible.

- There is no court record of the judge's evaluation of the juror's qualifications in response to a challenge or stipulation on this ground.

- Based on the information provided by the CART interpreter, Mr. Kontnik, who knew both the applicable law regarding discrimination against individuals with disabilities under the circumstances and also that he was able to meet all of the qualifications to serve as a juror, was very confused regarding the reasons provided as to why the court excluded him as a juror.

- Mr. Kontnik is very accustomed to using CART interpreters in court proceedings and other legal settings.

- Mr. Kontnik could have had a one-on-one discussion with the judge on the record to establish there was no need to exclude or disqualify him as a juror. Instead of having this conversation, the judge had an off-the-record communication with the CART interpreter, and requested that she inform Mr. Kontnik that he was excluded from the jury.

- Because the jurors were lined up in a single-file line behind Mr. Kontnik, on information and belief, some or all of the other jurors overheard the CART interpreter's comments to Mr. Kontnik.

- Because the CART interpreter told Mr. Kontnik that he had been excluded and the CART interpreter had been discharged, Mr. Kontnik left the courthouse without having the opportunity to have participated as a juror.

- Mr. Kontnik was insulted by the notion that his use of a CART interpreter would somehow slow down the proceedings. Mr. Kontnik disagrees with the statement because he has used CART interpreters in his legal practice before without having any aspect of the proceedings delayed due to his use of this particular accommodation.

- Mr. Kontnik was further insulted because the district attorney, the public defender and the Denver County Court judge made the determination that somehow the use of a CART interpreter would slow down the proceedings without even discussing the issue with Mr. Kontnik. He could have explained that he is an attorney who uses the specific accommodation on a regular basis without it slowing down any proceedings whatsoever if he had been questioned as required before dismissing him for cause.

- Mr. Kontnik was extremely frustrated by the apparent lack of knowledge on the part of the district attorney, the public defender and the Denver County Court regarding CADA's legal requirements as well as the fact that it is unlawful to discriminate against individuals with disabilities under CADA.

- The other jurors stared at Mr. Kontnik as he walked away from the courtroom.

- Although Mr. Kontnik is a confident individual and accustomed to being treated as a professional attorney, Mr. Kontnik felt embarrassed and ashamed.

- Mr. Kontnik was humiliated by this experience. Mr. Kontnik takes the civic duty and opportunity to participate in jury service seriously. Mr. Kontnik is aware that some people may view jury service as a burden, but Mr. Kontnik has always believed it would be both interesting and meaningful to have an opportunity to participate in the jury selection process with the possibility of serving on a jury because his legal practice involves litigation.

- Mr. Kontnik was frustrated because the City and County of Denver expected him to show up to do his civic duty, but the DCC did not follow the law and allow him to proceed through the jury selection process like his nondisabled counterparts.

- After the CART interpreter informed Mr. Kontnik that the judge had excluded him for the reasons given, Mr. Kontnik was angry because what the DCC did undermines the purposes of the ADA, CADA and similar laws protecting the civil rights of people with disabilities, the very laws he himself enforces as part of his law practice.

- Mr. Kontnik was very upset because it was obvious that people waiting as prospective jurors were sent a message by the DCC that it is acceptable to discriminate against someone by reason of disability and any related need for accommodations.

- Mr. Kontnik was frustrated even further by the apparent lack of training given the need for practicing attorneys and judges to be aware of the requirements of the ADA and the CADA with respect to nondiscrimination against people with disabilities and the requirements regarding necessity to provide accommodations or auxiliary aids and services.

- The DCC's response to Mr. Kontnik's complaint to the Colorado Civil Rights Division indicate that the DCC was either not familiar with or unwilling to comply with Section 802(1)(b) of Part 8 of the CADA and its specific provisions related to the unlawful exclusion of individuals with disabilities by reason of their disabilities from participation in the honor and privilege of jury duty as well as the unlawful denial of an individual with a disability by reason of his disability from the benefits of services, programs and activities provided by the DCC.

STANDARD ON RULE 12(b)(5) MOTION TO DISMISS

A motion to dismiss under Colorado Rule of Civil Procedure 12(b)(5) for failure to state a claim upon which relief may be granted should be viewed by the trial court with disfavor. *Qwest Corp. v. Colorado Div. of Prop. Taxation*, 2013 CO 39, ¶ 12 ("Trial courts do not view motions to dismiss favorably. . .."), *abrogated on other grounds*, *Warne v. Hall*, 2016 CO 50, ¶¶ 10-11. In considering a motion to dismiss under Rule 12(b)(5) for failure to state a claim upon which relief may be granted, the Court must accept as true all factual allegations in the Complaint and view

them in a light most favorable to the nonmoving party. *Bewley v. Hellerstein*, 2018 CO 79, ¶ 14. To survive a motion to dismiss, the Plaintiff must allege a plausible claim for relief. *Scott v. Scott*, 2018 COA 25, ¶ 19. "The plausibility standard emphasizes that facts pleaded as legal conclusions (i.e., conclusory statements) are not entitled to the assumption that they are true." *Id.* Under the plausibility standard, a party must assert sufficient factual allegations "to raise a right to relief 'above the speculative level'" and "provide 'plausible grounds'" for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

LEGAL BACKGROUND

The statutory basis for Mr. Kontnik's claims is found in CADA and the Colorado Uniform Jury Selection and Service Act, C.R.S. §§ 13-71-101, *et seq.* ("Jury Selection and Service Act").

Pursuant to CADA, it is the policy of the State of Colorado:

> (a) To encourage and enable individuals who are visually or hearing impaired or individuals with a disability to participate fully in social, employment, and educational opportunities, as well as other activities in our state on the same terms and conditions as individuals without a disability;
>
> . . . .
>
> (d) That individuals who are visually or hearing impaired or individuals with a disability must not be excluded, by reason of his or her disability, from participation in or be denied the benefits of the services, programs, or activities of any public entity or be subject to discrimination by any public entity.

C.R.S. § 24-34-801(1). As relevant here, CADA prohibits public entities discriminating against individuals with disabilities or excluding any individual with a disability from participating in and receiving the benefits of services, programs, or activities provided by the public entity. *Id.* § 24-34-802(1)(b).

The Jury Selection and Service Act starts with the presumption that "[a]ny person who is a United States citizen and resides in a county or lives in such county more than fifty percent of the time, whether or not registered to vote, shall be qualified to serve as a trial or grand juror in such county." *Id.* § 13-71-105(1). Accordingly:

> Jury service is both a duty and a privilege of citizenship. . . . Broad participation in the justice system is desirable because it reinforces public confidence in the system's fairness. *See Balzac v. People*, 258 U.S. 298, 310 (1922) ("The jury system postulates a conscious duty of participation in the machinery of justice . . .. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse."). In addition, jury service provides individuals with an opportunity to participate in the civic life of our nation. *See Powers v. Ohio*, 499

> U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."). Discrimination during jury selection undermines these important values. Moreover, discrimination deprives individual defendants of a central right in our system of justice, the right to be judged by a jury of their peers.

Cerrone v. People, 900 P.2d 45, 51-52 (Colo. 1995) (internal citations omitted/modified).

The Jury Selection and Service Act prohibits discrimination in the selection of jurors in certain circumstances. As relevant here:

> (b) A person with a disability shall serve except:
> (I) As otherwise provided in section 13-71-105 or 13-71-119.5; or
> (II) Where the court finds that such persons disability prevents the person from performing the duties and responsibilities of a juror.
> (c) Before dismissing a person with a disability pursuant to paragraph (b) of this subsection (3), the court shall interview the person to determine the reasonable accommodations, if any, consistent with federal and state law, that the court may make available to permit the person to perform the duties of a juror.

C.R.S. § 13-71-104(3)(b)-(c). "Court," as used in Article 71 of Title 13, means "a district or county court of this state and includes any judge of the court." *Id.* § 13-71-102(2). Municipal Court Rule of Procedure 224 provides additional rules governing jury selection in the DCC.

On June 18, 2014, the Colorado Supreme Court issued Chief Justice Directive 04-07, in order "to ensure equal access to and full participation in court and probation services and programs by people with disabilities, including . . . potential jurors . . . ." The Directive begins: "Qualified people with disabilities shall not, by reason of their disability, be discriminated against, or be excluded from participation in or denied the benefits of services and programs conducted by the courts, including probation." *Id.*

ANALYSIS

The DCC offers four reasons why this case should be dismissed under Rule 12(b)(5). The Court addresses each in turn.

1. Judicial immunity

The DCC first argues that this case should be dismissed under the doctrine of judicial immunity.

a. The doctrine of judicial immunity and its rationale

"Judges traditionally have been immune from suit for their judicial acts because of the importance of an independent judiciary in which a judge may act without apprehension of the

personal consequences." *State v. Mason*, 724 P.2d 1289, 1290-91 (Colo. 1986). This immunity, by its nature, applies equally to government agencies that judges work for—*i.e.*, the DCC. *See id.* at 1292 ("It is this judicial immunity of the state and its governmental agencies that may be extended to governmental officers performing quasi-judicial functions.").

Courts have articulated many reasons for judicial immunity. These include:

- Judges should be able to do their jobs without fear of personal consequences, *Mason*, 724 P.2d at 1290-91;

- Requiring judges "to answer to every one who might feel himself aggrieved by the action of the judge" would undermine judicial independence, *Higgs v. Dist. Ct. In & For Douglas Cnty.*, 713 P.2d 840, 850 (Colo. 1985), quoting *Bradley v. Fischer*, 80 U.S. 335, 347 (1871);

- Immunity serves "to prevent unfounded litigation," *Mason*, 724 P.2d at 1291; and

- Responding to legal actions would distract from the judge's official public duties, *State Bd. of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 968 (Colo. 1997).

These bases for judicial immunity are summarized aptly (if not succinctly, by modern standards), in *Bradley v. Fisher*, 80 U.S. 335, 348 (1871):

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away.

b. The scope of judicial immunity

While judicial immunity is firmly established in United States and Colorado law, it does not preclude prospective injunctive relief. *See Stjernholm*, 935 P.2d at 969 ("Neither qualified *nor absolute* immunity precludes prospective *injunctive relief*) (emphasis in original) (internal quotations omitted); *Hoffler v. Colorado Dep't of Corr.*, 27 P.3d 371, 374 (Colo. 2001) ("Thus, absolute immunity shields officials who engage in judicial or quasi-judicial functions from damages liability.") (emphasis added). *See also Pulliam*, 466 U.S. 522, 537-38 (1984) ("For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards. The limitations already imposed by the requirements for obtaining equitable relief against any defendant . . . severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants.").

Without addressing *Stjernholm* and *Hoffler*, the DCC argues that judicial immunity is an absolute bar to all legal actions, including those for prospective injunctive relief. In support, the DCC quotes *Mason*'s statement that judges have "traditionally been *immune from suit*" (undersigned's emphasis) and the United State Supreme Court's statement that "judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Motion* at 5.

The Court disagrees. *Mason* did not address the question of whether judicial immunity precludes suits for injunctive relief. Later Colorado Supreme Court cases did address this question, holding that judicial immunity does not preclude suits for injunctive relief. *See Stjernholm*, 935 P.2d at 969.

Similarly, *Mireless* did not address injunctive relief. *See Mireless*, 502 U.S. at 9 ("A long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit *for money damages*.") (emphasis added). In fact, at the time *Mireless* was decided, the United States Supreme Court had clearly held, based on the federal common law, that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam v. Allen*, 466 U.S. at 541-42. While the national legislature abrogated *Pulliam* and expanded judicial immunity to include injunctive relief in actions under C.R.S. 42 U.S.C. 1983, *see Churchill v. Univ. of Colorado at Boulder*, 2012 CO 54, ¶ 40, the DCC points to no comparable change in law that would apply to Mr. Kontnik's claims in this case.

For the above reasons, judicial immunity protects the DCC from an award of damages in this case, but not from Mr. Kontnik's claims for injunctive and declaratory relief.

2. Compliance with CADA

The DCC also argues that it has complied with CADA as a matter of law. According to the DCC, the judge complied with C.R.S. § 13-71-104(3)(b), and even if she didn't, the statute does not provide "mandatory definitions of what it means to provide access under CADA." *Motion* at 11. The DCC also argues that Mr. Kontnik was provided access to the jury system as required by CADA.

The Court first addresses compliance with C.R.S. § 13-71-104(3)(b). The DCC says that no interview was required under C.R.S. § 104(3)(b) because there is no dispute that a CART interpreter—*i.e.*, an accommodation—was provided. Specifically, the DCC argues:

> [P]er the clear wording of the statute, the reason for the interview would have been to determine whether reasonable accommodations were available. Here, it was readily apparent that Mr. Kontnik's hearing loss had already been accommodated because it was the interpreter setting up her interpreting equipment in the courtroom that triggered the parties' concern and caused them to bring their joint stipulation to the judge. [Amended Complaint, Ex. 1, pp. 5-6]. The concern was not whether accommodation was available, but whether the provided accommodation would slow down the one-day jury trial.

Motion at 11. The Court disagrees. The purpose of the interview was not to determine whether an accommodation was present in the courtroom—clearly, it was. The purpose of the interview was to determine whether the judge could make the accommodation available to Mr. Kontnik and thus permit him to perform the duties of a juror. C.R.S. § 13-71-104(3)(c) ("the court shall interview the person to determine the reasonable accommodations, if any, consistent with federal and state law, that the court may make available to permit the person to perform the duties of a juror") (emphasis added). Under the plain language of the statute, an interview was required.

Next, the DCC contends that the interview requirement of § 13-71-104(3)(b) is "optimal, but not mandatory," citing *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001). *Motion* at 11. Again, the Court disagrees. *Pineda* did not involve a discrimination claim by a potential juror, and it did not analyze or decide the question of whether § 104(3)(c)'s interview requirement is mandatory. Its holding was that there was no abuse of discretion requiring reversal based on the specific facts of that case. *Id.* at 63. Indeed, a year after *Pineda*, the Court of Appeals characterized § 104(3)(b) as conferring a "right" upon potential jurors with disabilities. *See Donelson v. Fritz*, 70 P.3d 539, 545 (Colo. App. 2002). To the extent either case ruled on the issue presented here, the Court finds the later-decided *Donelson* to be controlling.

In any event, this Court is bound by the "presumption that the word 'shall' when used in a statute is mandatory." *People v. Rice*, 2015 COA 168, ¶ 13. "Unless the context indicates otherwise, the word 'shall' shows the General Assembly's intent that the statutory provision be mandatory." *Id.* And "whenever possible, each word should be given effect and each provision construed in harmony with the overall statutory scheme." *City of Florence v. Board of Waterworks of Pueblo*, 793 P.2d 148, 151 (Colo.1990).

Here, subsections (3)(b), (3)(c), and (4) each use the word "shall": First, the statute says a person with a disability "shall serve" unless an exception in present. Second, it says the court "shall interview" the person to determine whether the exception applies. C.R.S. § 13-71-104(3)(b)-(c). And subsection (4) provides that "[t]he court shall strictly enforce the provisions" of Article 71. There is every reason to conclude the General Assembly meant the interview to be mandatory, and no reason to conclude otherwise.

Finally, the DCC argues that the Court should not read the requirements of § 13-71-104(3)(c) into CADA. But it seems eminently reasonable to consider the requirements of § 13-71-104(3)(c) when construing CADA. Both statutes are aimed ensuring full access to public services and activities—here, jury service. CADA prohibits discrimination; as the heading of § 13-71-104 states, it contains a "prohibition of discrimination." CADA prohibits excluding people with disabilities where a reasonable accommodation is possible. Section 13-71-104 does the same for jury duty, while spelling out mandatory procedural steps to determine whether an accommodation is workable. If this Court must determine what "access" to jury service means under CADA, it only makes sense to look to what the General Assembly has specified in Title 13.

Setting aside the somewhat ethereal question of whether § 13-71-104 is "made a part of or to be read in conjunction with CADA," *Motion* at 12, the Court returns to the facts of this case and the question before the Court. Mr. Kontnik alleges that he received a jury summons, he took the steps necessary to secure a CART interpreter, he took time out of his life to appear at the DCC pursuant to his summons, he was prepared and even eager to complete his civic duty—and then he was turned away because of an unfounded assumption that his hearing impairment would delay the proceedings. The DCC responds, essentially, that its obligations to Mr. Kontnik ended when it let the CART interpreter into the courtroom.

On these facts, the DCC fails to meet its burden on a motion to dismiss, both because the judge failed to follow the mandatory requirements of § 13-71-104(3)(c) and under the case law defining what it means to provide "access" under CADA and the ADA. *See Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007) ("The ADA requires more than physical access to public entities: it requires public entities to provide 'meaningful access' to their programs and services."); C.R.S. § 24-34-802(4) ("A court that hears civil suits pursuant to this section shall apply the same standards and defenses that are available under the federal "Americans with Disabilities Act of 1990", 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations.").

3. DCC liability for judges' judicial acts

Next, the DCC argues that Mr. Kontnik has not pled, nor can he establish, that the DCC is legally responsible for a judge's discretionary ruling. Mr. Kontnik responds that the DCC, as a public entity, is forbidden from excluding people with disabilities from jury duty. *See* C.R.S. § 24-34-802(1)(b). Neither side appears to contest each other's arguments thus framed. The DCC admits that it is covered by CADA, and Mr. Kontnik is not pursuing a theory of derivative liability—*i.e.*, that the DCC is liable for the judge's ruling.

The difficulty of this case arises from the fact that the judge—who is generally not answerable to her employer for her judicial acts—plays a role in granting or denying access Colorado's public jury system. As such, it is hard to pinpoint where—if anywhere—liability lies when a judge fails to follow the law governing access to jury duty. There is very limited precedent to guide the Court on this issue. *See, e.g. Commonwealth v. Heywood*, 484 Mass. 43, 48 (2020) ("[W]e are not aware of any cases clarifying how Title II of the ADA and its implementing regulations apply to individualized determinations of juror competency."); *Green v. N. Arundel Hosp. Ass'n, Inc*., 366 Md. 597, 615-16 (Md. 2001) ("Whether the exclusion of a disabled person from a civil court trial, not by reason of some physical barrier but in order to avoid disruption or prejudice, would constitute a violation of the ADA is as yet unclear. No case deciding that issue has been cited to us by any of the parties or *amici*, and, like the Court of Special Appeals, we have been unable to find one."); *but see DeLong v. Brumbaugh*, 703 F. Supp. 399, 401-02 (W.D. Pa. 1989) (recognizing hearing-impaired juror's claim under Pennsylvania law where trial judge dismissed her, *sua sponte*, and without providing her an opportunity to demonstrate that she was qualified in spite of her hearing impairment).

The Court's review is limited to "those matters stated within the four corners of the complaint." *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007). Many of the Complaint's factual allegations are focused on the acts of a single judge, in a single jury selection. As noted above, however, Mr. Kontnik does not make these allegations to hold the DCC liable for the judge's actions. Rather, these allegations provide support for a different assertion: that the DCC has failed to take steps that it could and should take to ensure that people with disabilities are provided access to the jury system as required by Colorado law.

Assuming Mr. Kontnik's factual allegations are true and viewing them in the light most favorable to him, Mr. Kontnik has alleged a plausible basis for relief on this claim. *See Bewley*, ¶ 14. According to the Complaint, the DCC is responsible for ensuring compliance with CADA. The DCC works closely with the Office of Sign Language services to ensure compliance with CADA. The DCC has specific employees designated to do this work. However, court personnel, including the judge, labored under a misunderstanding of how CART interpreters work. Had he been consulted, Mr. Kontnik, a practicing lawyer, would have explained that the CART interpreter would not have slowed down the proceedings or required the seating of an alternate juror.

The DCC has policies and protocols for ADA compliance. The DCC attached some of these policies and protocols to its response to Mr. Kontnik's complaint with the CCRD. Mr. Kontnik attached the policies and protocols to his Complaint in this action, and both sides discussed them in their briefs. Therefore, the Court may consider them in ruling on the DCC's Motion to Dismiss. *See Pena v. Am. Fam. Mut. Ins. Co.*, 2018 COA 56, ¶ 14.

One of the DCC's policies, the "In-Person Hearings with Virtual Sign Language Interpreters/CART" policy is notable, for a couple of reasons. First, it provides detailed step-by-step directions for how the judge and law clerk accommodate defendants, witnesses, and gallery members with hearing impairment during in-person hearings. Ex. 1 to Amended Complaint, at 14-15. This shows that the DCC can and does provide guidance and direction to judges on CADA

compliance. Second, while the policy specifically addresses compliance with respect to defendants, witnesses, and spectators, it is conspicuously silent as to jurors. This, coupled with the DCC's responses to Mr. Kontnik's complaint at the CCRD, sufficiently support his allegation that the DCC needs to "engage in training and to change their policies, practices and procedures to ensure that they do not discriminate against individuals who are deaf or who have significant hearing loss." Amended Complaint at ¶ 117.

4. Mr. Kontnik's rights vs. the Defendant's rights

Finally, the DCC argues that the judge's decision had "constitutional implications to the criminal defendant." The Court agrees and recognizes the importance of those implications in this case.[1] But as Mr. Kontnik notes, he does not claim he was necessarily entitled to be seated on the jury. Rather, Mr. Kontnik's complaint is that the judge did not follow the statutorily mandated procedures for assessing his ability to serve. The constitutional rights of the defendant in the case do not bar Mr. Kontnik's claims under CADA.

CONCLUSION

For these reasons, the DCC's motion to dismiss is DENIED. Mr. Kontnik may proceed with his claims for injunctive and declaratory relief.

SO ORDERED this February 11, 2023.

Mark T. Bailey
Denver District Court Judge

[1] The Court wishes to emphasize that this Order is not meant as a criticism of the lawyers and judge who were involved in this case. I recognize the multitude of legal and factual issues that the lawyers and the judge must address during jury selection. The point is that, among these many issues, the statutory mandate to make jury service open to all people cannot be overlooked.