

HON. RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NOEL NIGHTINGALE,

Plaintiff,

v.

SEATTLE SCHOOL DISTRICT NO. 1, d/b/a
Seattle Public Schools,

Defendant.

No. C14-1286 RAJ

**PLAINTIFF'S AMENDED MOTION FOR
PRELIMINARY INJUNCTION**

NOTE ON MOTION CALENDAR:
FRIDAY, OCTOBER 24, 2014

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Noel Nightingale is blind and the mother of three children who attend schools in the Seattle School District. She seeks the same opportunity to access information regarding her children’s education that is afforded a sighted parent, but has been denied that opportunity because Seattle Public Schools (“SPS”) has created an inaccessible website and included an inaccessible program, ST Math, in its curriculum. When websites and software programs are designed to be fully accessible—and many of them are—the blind have equal access. But because SPS has selected gratuitously inaccessible technology, the blind, including Ms. Nightingale, are denied access and isolated from all of the benefits that flow to sighted persons from the District’s adoption of that technology. Consequently, Ms. Nightingale has been and remains unable to participate fully in her children’s education, a benefit provided to all sighted parents and to which she is entitled under Title II of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act of 1973.

1 Plaintiff Noel Nightingale respectfully moves for an order preliminarily enjoining SPS
 2 from further violating Title II of the ADA and Section 504 of the Rehabilitation Act and to
 3 (1) modify its website to ensure compliance with Web Content Accessibility Guidelines 2.0,
 4 Success Criteria AA (“WCAG 2.0 AA”) by January 5, 2015 to afford her an equal opportunity to
 5 access its content, and (2) provide Ms. Nightingale the necessary aids and services to afford her
 6 an equal opportunity to access ST Math, or in the alternative, stop using ST Math by January 5,
 7 2015, unless or until it offers Ms. Nightingale an equal opportunity to access the content
 8 available to sighted parents.

9 **II. STATEMENT OF FACTS**

10 **A. MS. NIGHTINGALE’S FAMILY, HER DISABILITY AND HOW SHE** 11 **ACCESSES INFORMATION.**

12 Ms. Nightingale’s children have attended SPS schools since 2005. Nightingale Dec. ¶ 4.
 13 L.P. is fourteen and in the ninth grade at Garfield High School, C.P. is eleven and in the sixth
 14 grade at Washington Middle School, and D.P. is nine and in the fourth grade at John Muir
 15 Elementary School. *Id.* ¶¶ 3-4. During the time referred to in the Complaint, D.P. and C.P.
 16 attended John Muir Elementary School, and L.P., Washington Middle School. *Id.* ¶ 4.

17 Ms. Nightingale is blind. *Id.* ¶ 5. She accesses digital information on her computer with
 18 a well-known screen access software called Job Access with Speech (“JAWS”) that makes
 19 digital text available as synthesized speech or on a refreshable Braille display. *Id.* ¶ 6. JAWS
 20 enables Ms. Nightingale, using keystrokes to move through the text, to change the speed of
 21 presentation, receive audible cues concerning paragraphing, punctuation, and other
 22 organizational information, and to navigate back and forth through the information with
 23 automaticity and independence. *Id.*

24 For the blind to use screen access software to access information presented by a software
 25 program or website, the application must, among other things, (1) be susceptible to manipulation
 26 with keyboard commands (as opposed to mouse only); (2) have headings in the coding that offer
 27 nonvisual organization of complex pages as an alternative to a visual layout; (3) label links, edit

1 boxes, and dropdown boxes accurately, and (4) describe images. Taylor Dec. ¶ 11. Recognized
 2 standards exist for the preparation and presentation of universally designed mainstream digital
 3 content. Taylor Dec. ¶ 13. Because following the Web Content Accessibility Guidelines 2.0,
 4 Success Criteria AA (hereinafter, "WCAG 2.0 AA"), promulgated by the World Wide Web
 5 Consortium, ensures that all of the same information, transactions, and interactions available to
 6 sighted users are available nonvisually with a substantially equivalent ease of use, a public
 7 entity's website should meet that standard to conform with the requirements of Title II of the
 8 ADA and Section 504 of the Rehabilitation Act of 1973. *Id.* SPS's website does not.
 9 Compliance with this standard and accessibility, *vel non*, of educational technology are the
 10 product of design decisions by the developer and market decisions by school districts such as
 11 SPS.

12 **B. SPS DENIES MS. NIGHTINGALE AN OPPORTUNITY TO ACCESS**
 13 **EDUCATIONAL INFORMATION EQUAL TO THAT AFFORDED**
 14 **SIGHTED PARENTS.**

15 1. The Website

16 For seven years, Ms. Nightingale accessed www.seattleschools.org (the Website) without
 17 difficulty to obtain information on topics such as news and announcements, events, budget,
 18 transportation, school meals, school reports, and district scorecards. Nightingale Dec. ¶ 8-9.
 19 Beginning in July 2012, however, Ms. Nightingale was unable to access information through the
 20 Website because of new significant access barriers, such as unlabeled or mislabeled buttons,
 21 headings, fields, text boxes and lists, links that could not be activated with keyboard commands,
 22 information, controls, and elements that are not detected by screen access software, and a lack of
 23 alt-tags (descriptive information) for images. *Id.* ¶ 10. For example, the links that appear at the
 24 top of the Website home page for "Schools", "Students", "Family and Communities", and
 25 "District" can only be activated by a mouse click, rather than by a keyboard command, and,
 26 accordingly, are inaccessible to users of screen access software. Taylor Dec. ¶ 18. Because
 27 these links are the primary way to get to most of the content on the Website, Ms. Nightingale is
 unable to access the majority of the information she seeks. *Id.*

1 After discovering that the SPS website was no longer accessible, Ms. Nightingale so
2 advised its Webmaster. Nightingale Dec. ¶ 11. She since has engaged in an extended dialogue
3 with SPS representatives, in which she has repeatedly renewed her requests for access and has
4 been met with promises, all broken, again and again that SPS would restore access. *Id.* ¶¶ 11-17.
5 Despite her efforts, SPS's Website remains inaccessible. *Id.* ¶ 18; Taylor Dec. ¶ 34.

6 2. ST Math

7 For the last school year (2013-2014), SPS required that Ms. Nightingale's son C.P. and
8 his classmates use a software program, ST Math, to complete math assignments both in class and
9 at home. Nightingale Dec. ¶ 21. Midway through the school year, Ms. Nightingale learned from
10 C.P.'s teacher that he had fallen behind on his assignments. *Id.* She also learned that a parent
11 could monitor her child's progress by logging into ST Math and accessing a graph showing how
12 much work he had completed. *Id.* When she attempted to access the graph, however, she found
13 that she could not even log into the program, much less view any of the assignments or the
14 graph, because ST Math was not designed to be compatible with screen reading software and is
15 totally inaccessible to the blind. *Id.* ¶ 22; Noble Dec. ¶¶ 16, 26. Consequently, Ms. Nightingale
16 was completely unable to monitor C.P.'s progress or assist him with his homework. *Id.*

17 This school year (2014-2015) has started, and SPS continues to use the inaccessible
18 Website to convey important educational information to parents and ST Math in the classroom
19 and at home. Nightingale Dec. ¶¶ 18, 25. While C.P. has moved on to middle school, SPS is
20 using ST Math this year to teach Ms. Nightingale's youngest child, D.P., and like last year, she
21 cannot monitor his progress or assist him with his homework. Nightingale Dec. ¶ 25. By
22 continuing to convey important information through inaccessible educational technology, SPS
23 continues to deny Ms. Nightingale her right to equal opportunity to access information about her
24 children's educations. Her children will be in school only once, and she will not have the chance
25 to repeat the experience of parenting them in these crucial years. Immediate action is required in
26 order to prevent further harm.

III. ARGUMENT

A. Preliminary Injunction Standard

When asked to grant a preliminary injunction, a court must consider whether: (1) the plaintiff is likely to succeed on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1160 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Ninth Circuit has held that this standard is satisfied where the plaintiff raises “serious questions going to the merits” and a balance of hardships that tips sharply towards the plaintiff, as well as a likelihood of irreparable injury and that the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). “This standard applies regardless of whether the movant seeks to maintain the status quo or to halt an ongoing deprivation of rights.” *Klein v. City of Laguna Beach*, 381 F. App'x 723, 725 (9th Cir. 2010). *See also Enyart*, 630 F.3d at 1160 (applying the *Winter* standard to uphold an injunction permitting applicant to take licensing examinations using a computer equipped with assistive technology software).

B. Ms. Nightingale is likely to succeed on the merits.

Title II of the ADA provides that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Public entities include “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1)(B). These entities must “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” 28 C.F.R. § 35.160(a)(1). A “‘companion’ includes a family member of an individual seeking access to a service, program, or activity of a public entity, who,

1 along with such individual, is an appropriate person with whom the public entity should
2 communicate.” *Id.* § 35.160(a)(2).

3 Similarly, under Section 504 of the Rehabilitation Act of 1973, “[n]o otherwise qualified
4 individual with a disability . . . shall, solely by reason of her or his disability, be excluded from
5 the participation in, be denied the benefits of, or be subjected to discrimination under any
6 program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). Moreover, a
7 recipient of federal financial assistance, “in providing any aid, benefit, or service, may not . . .
8 [a]fford a qualified handicapped person an opportunity to participate in or benefit from the aid,
9 benefit, or service that is not equal to that afforded others.” 34 C.F.R. § 104.4(b)(1)(ii).

10 Therefore, under both laws, SPS is obligated to provide Ms. Nightingale with an equal
11 opportunity to access the information it provides to nondisabled parents.

12 To prove a violation of either the ADA or Section 504, Ms. Nightingale must show
13 “(1) [s]he is a ‘qualified individual with a disability’; (2) [s]he was either excluded from
14 participation in or denied the benefits of a public entity's services, programs or activities, or was
15 otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or
16 discrimination was by reason of [her] disability.” *Rodde v. Bonta*, 357 F.3d 988, 995 (9th Cir.
17 2004) (citing *Weinreich v. Los Angeles County MTA*, 114 F.3d 976, 978 (9th Cir.1997)). *See*
18 *also Vinson v. Thomas*, 288 F.3d 1145, 1152 n. 7 (9th Cir. 2002) (“We examine cases construing
19 claims under the ADA, as well as section 504 of the Rehabilitation Act, because there is no
20 significant difference in the analysis of rights and obligations created by the two Acts.”). In
21 addition, to prove a violation of Section 504, Ms. Nightingale must and can show that SPS
22 receives federal funds.¹

23 1. Ms. Nightingale is a qualified individual with a disability.

24 First, Ms. Nightingale is a qualified individual with a disability. This term refers to “an
25 individual with a disability who . . . meets the essential eligibility requirements for the receipt of
26 services or the participation in programs or activities provided by a public entity.” 42 U.S.C.

27 ¹ It is beyond dispute that SPS receives federal financial assistance.

1 § 12131(2). There is no doubt that Ms. Nightingale, as a blind parent of three children enrolled
2 in SPS institutions, is a qualified individual with a disability.

3 Regarding her status as a parent, the 2008 amendments to Subpart E (“Communications”)
4 of the regulations for compliance with Title II in 28 C.F.R. § 35.160(a) clarified that “a public
5 entity's obligation to ensure effective communication extends not just to applicants, participants,
6 and members of the public with disabilities, but to their companions as well.” 73 Fed. Reg.
7 34466–01. A “companion” is defined “as a person who is a family member, friend, or associate
8 of a program participant who, along with the participant, is an appropriate person with whom the
9 public entity should communicate.” *Id.* at 34497. With the amendments, the Attorney General
10 explained that when a school communicates with the blind parent of a child during a parent-
11 teacher meeting, it is the school’s responsibility to provide an appropriate auxiliary aid or service
12 to communicate effectively with the parent: “Where communication with a companion is
13 necessary to serve the interests of a person who is participating in a public entity’s services,
14 programs, or activities, effective communication must be assured.” *Id. See also Tyner v.*
15 *Brunswick Cnty. Dep’t of Soc. Servs.*, 776 F. Supp.2d 133, 152 (E.D.N.C. 2011). Because
16 Ms. Nightingale is without doubt a companion with whom communication is necessary to serve
17 the interests of her children who participate in SPS’s programs, she is a qualified individual with
18 whom effective communication must be assured.

19 2. Ms. Nightingale is excluded from participation in and denied the benefits of a
20 public entity's services, programs or activities.

21 Second, Ms. Nightingale is excluded from participation in or denied the benefits of SPS’s
22 services, programs or activities. By maintaining and distributing information on the Website,
23 SPS is providing a service to parents of children enrolled in SPS schools. But because SPS has
24 made the Website inaccessible, it has chosen to provide this service only to sighted parents. This
25 choice has excluded Ms. Nightingale from participating in and receiving the benefits of the
26 Website. Similarly, by selecting ST Math for use in the classroom and at home, SPS is providing
27 a service or program through which sighted parents may enjoy the benefit of participating in

1 their children's education. But because ST Math is inaccessible, Ms. Nightingale once again is
 2 excluded from receiving this benefit.

3 3. This exclusion and denial of benefits is by reason of Ms. Nightingale's disability.

4 As to the third prong, Ms. Nightingale's exclusion from full participation in her
 5 children's educations is by reason of her blindness. SPS is providing sighted parents with the
 6 opportunity to participate in and receive all of the benefits of the Website and ST Math. But
 7 because neither the Website nor ST Math is accessible with screen access software, they are
 8 completely inaccessible to the blind. Taylor Dec. ¶ 34; Noble Dec. ¶ 26. Because
 9 Ms. Nightingale is blind, she is excluded from participating in and receiving the benefits of these
 10 services and programs.

11 SPS has long been on notice that the law requires them to forego the acquisition of
 12 technology that excludes the blind. The Departments of Justice and Education wrote the
 13 presidents of all American post-secondary institutions in June 2010 advising them that

14 Requiring use of an emerging technology in a classroom environment when the
 15 technology is inaccessible to an entire population of individuals with disabilities-
 16 individuals with visual disabilities- is discrimination prohibited by the Americans
 17 with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of
 18 1973 (Section 504) unless those individuals are provided accommodations or
 modifications that permit them to receive all the educational benefits provided by
 the technology in an equally effective and equally integrated manner.

19 Exhibit 1 to Goldstein Dec. In May 2011, the Department of Education re-issued this letter to all
 20 educational systems, including public K-12 school systems such as SPS, along with clarification
 21 that the letter applied with equal force to elementary and secondary schools. Goldstein Dec.
 22 ¶¶ 3-4; Exhibit 2 to Goldstein Dec. Unfortunately, SPS did not heed this advice. Instead, it
 23 discarded its accessible website, created a new Website that is inaccessible and selected software
 24 that gratuitously excludes the blind in violation of Section 504 and the ADA.

25 Because Ms. Nightingale meets all three elements of a claim under Title II of the ADA
 26 and Section 504 of the Rehabilitation Act, she is likely to succeed on the merits of her claims.

1 **C. Ms. Nightingale continues to suffer irreparable harm.**

2 Irreparable harm may be presumed to flow from discriminatory practices that violate the
3 ADA. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir.
4 2001). The Ninth Circuit has held that “where a defendant has violated a civil rights statute, we
5 will presume that the plaintiff has suffered irreparable injury from the fact of the defendant’s
6 violation.” *Id. See also Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1175 (9th
7 Cir. 2010) (declining to decide “whether the Disabilities Act authorizes a district court to deny
8 injunctive relief after finding a violation of the Act” after reversing the district court’s denial of
9 injunctive relief).

10 Even if not presumed, Ms. Nightingale has shown it is inevitable that irreparable harm
11 will continue to occur here absent preliminary relief. Because Ms. Nightingale’s children
12 advance to the next grade level each year, preliminary relief is necessary to prevent
13 Ms. Nightingale from forever losing the chance to participate through use of the Website and ST
14 Math in L.P.’s ninth grade year, C.P.’s sixth grade year, and D.P.’s fourth grade year. In this
15 new school year, Ms. Nightingale is currently losing this opportunity because she is without
16 access to the important information conveyed on the Website and unable to monitor her child’s
17 progress with his homework or assist him. Nightingale Dec. ¶ 27. The only way for this Court
18 to prevent further irreparable injury is to order SPS to both modify its Website to achieve
19 compliance with WCAG 2.0 AA and stop using ST Math unless or until Ms. Nightingale and
20 other blind parents are provided an equal opportunity to access its content, by January 5, 2015.

21 **D. The equities weigh heavily in favor of granting the requested relief.**

22 In the absence of preliminary relief, Ms. Nightingale faces a lost opportunity to
23 participate in her children’s education, and with it, emotional harm and loss of independence.
24 Her children also suffer from not having their mother participate fully in their education. D.P.
25 will suffer because his mother is unable to assist with his math homework or monitor his
26 progress. By contrast, the harm that an injunction would cause SPS is negligible.

1 If, on the other hand, the preliminary relief is granted, Ms. Nightingale and her children
2 will benefit from her full involvement as a parent. Relief for Ms. Nightingale would also
3 redound to the benefit of all of the blind parents and students in Seattle public schools, by
4 making nonvisual access possible for all who use screen reader software.

5 Technology exists to make the Website accessible without undue cost or burden to SPS.
6 Taylor Dec. ¶ 36. Indeed, the WCAG 2.0 AA guidelines provide a clear standard for website
7 accessibility. Taylor Dec. ¶ 13. Numerous school districts around the country have used such
8 technology and methods to make their websites compliant with WCAG 2.0 AA. Taylor Dec.
9 ¶ 35. It is eminently reasonable to require SPS to comply with these widely accepted guidelines.
10 Taylor Dec. ¶ 36.

11 Regarding ST Math, SPS made the decision to select and utilize an inaccessible software
12 program in its curriculum. Noble Dec. ¶¶ 16, 26. While this decision continues to significantly
13 harm Ms. Nightingale, SPS can easily remedy this by selecting and using an accessible program
14 in place of ST Math.

15 Regarding both the Website and ST Math, it is reasonable to order SPS to provide
16 Ms. Nightingale access to the technology that sighted parents use. Indeed, Ms. Nightingale
17 requests nothing more than that which is guaranteed by the ADA: an equal opportunity to access
18 the information that SPS conveys to sighted parents. Accordingly, the balance of equities tips
19 decidedly in Ms. Nightingale's favor.

20 **E. Granting the preliminary injunction advances the public interest.**

21 Congress has made clear in enacting the ADA and Section 504 that the public interest lies
22 in the eradication of discrimination against persons with disabilities, declaring that the ADA's
23 purpose is "to provide a clear and comprehensive national mandate for the elimination of
24 discrimination against individuals with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516
25 (2004) (quoting 42 U.S.C. § 12101(b)(1)). *See also Vinson*, 288 F.3d at 1152 n. 7 (construing
26 the ADA and 504 *in pari materia*).

1 This Circuit has firmly held that “[i]n enacting the ADA, Congress demonstrated its view
2 that the public has an interest in ensuring the eradication of discrimination on the basis of
3 disabilities.” *Enyart*, 630 F.3d at 1167 (citing 42 U.S.C. § 12101(a)(9) (finding that “the
4 continuing existence of unfair and unnecessary discrimination and prejudice ... costs the United
5 States billions of dollars in unnecessary expenses resulting from dependency and
6 nonproductivity”)). In so holding, the Ninth Circuit found that “[t]his public interest is served by
7 requiring entities to take steps to ‘assure equality of opportunity’ for people with disabilities.”
8 *Id.* See also *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1088 (N.D. Cal. 2013) (“[T]he
9 public has a strong interest in promoting the equality of all persons.”).

10 Accordingly, granting the preliminary injunctive relief requested by Ms. Nightingale is
11 consistent with the anti-discrimination mandate of the ADA and Section 504 and therefore serves
12 the public interest.

13 **F. Ms. Nightingale requests this Court not to require a bond.**

14 The Ninth Circuit has interpreted Federal Rule of Civil Procedure 65(c) to provide the
15 district judge discretion to determine whether a bond is required for security. See *Save Our
16 Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (“The district court has discretion
17 to dispense with the security requirement, or to request mere nominal security, where requiring
18 security would effectively deny access to judicial review.”). See also *Cupolo v. Bay Area Rapid
19 Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997) (finding that “courts should consider the
20 hardship a bond requirement would impose on the party seeking the injunction in addition to the
21 expenses the enjoined party may incur as a result of the injunction” and may waive the bond
22 requirement “when the balance of the equities weighs overwhelmingly in favor of the party
23 seeking the injunction”). Ms. Nightingale is an individual with limited financial resources, and
24 the balance of equities tips decidedly in her favor. She asks that this Court determine that such a
25 bond is not required, or in the alternative, require only a nominal bond.

IV. CONCLUSION

Each of the four factors for issuing a preliminary injunction strongly favor Ms. Nightingale. For the foregoing reasons, Ms. Nightingale respectfully requests that her motion for a preliminary injunction be granted and that the Court order SPS to provide the requested relief.

Respectfully submitted this 1st day of October, 2014.

MACDONALD HOAGUE & BAYLESS

/s/Jesse Wing

Jesse Wing, WSBA # 27751

jessew@mhb.com

Joseph Shaeffer

josephs@mhb.com

1500 Hoge Building

705 Second Avenue

Seattle, Washington 98104

Phone: (206) 622-1604

BROWN, GOLDSTEIN & LEVY LLP

/s/David F. Goldstein

Daniel F. Goldstein, *Pro Hac Vice*

dfg@browngold.com

Emily L. Levenson, *Pro Hac Vice*

elevenson@browngold.com

120 E. Baltimore Street Suite 1700

Baltimore, Maryland 21202

Phone: (410) 962-1030

Attorneys for Plaintiff Noel Nightingale