

demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately presented by the parties. On April 11, 1997 the plaintiff was arrested by Scarborough police officers pursuant to a warrant issued by the Maine Superior Court (York County), on a charge of domestic violence assault. Defendant Barbara Guimond's Statement of Material Facts ("Guimond SMF") (Docket No. 13) ¶ 1; Plaintiff James Levier's Opposing Statement of Material Facts ("Plaintiff's Responsive Guimond SMF") (Docket No. 24)¹ ¶ 1. The plaintiff is deaf; however, he is able to communicate in some circumstances through writing and lip reading. Guimond SMF ¶ 2; Deposition of James R. Levier ("Plaintiff's Dep."), filed with Defendant Scarborough Police Department's Motion for Summary Judgment, etc. ("Scarborough Motion") (Docket No. 18), at 10-12, 20. The plaintiff was arrested at his home and transported to the

¹ Each of the three defendants has filed a motion for summary judgment and an accompanying statement of material facts which that party contends are undisputed. The plaintiff's separate responses to those statements of material facts, which were filed on the same day, all bear identical titles.

Scarborough police department by Officer John² O'Malley. Scarborough SMF ¶¶ 1, 5; Plaintiff James Levier's Opposing Statement of Material Facts ("Plaintiff's Responsive Scarborough SMF") (Docket No. 23A) ¶¶ 1, 5.³ Marla St. Pierre was the lieutenant on duty when the plaintiff was brought to the police department following his arrest. Guimond SMF ¶ 3; Plaintiff's Responsive Guimond SMF ¶ 3.

St. Pierre was familiar with American Sign Language ("ASL") and was asked by the arresting officer to assist in communicating with the plaintiff. *Id.* St. Pierre had attended five semesters of ASL classes, joined in various activities with groups of deaf persons and worked as a substitute teacher at the Governor Baxter School for the Deaf. Scarborough SMF ¶ 3; Plaintiff's Responsive Scarborough SMF ¶ 3. She was not a certified ASL interpreter. *Id.* She had previously had contact with the plaintiff at the Scarborough town office, when she had been asked by the town clerk to assist in communicating with the plaintiff. *Id.* ¶ 9; Affidavit of Marla St. Pierre ("St. Pierre Aff."), Exh. B to Scarborough SMF, ¶ 4.

At the police station, the plaintiff spoke, gestured, and wrote as O'Malley engaged him in conversation. Scarborough SMF ¶ 6; Plaintiff's Responsive Scarborough SMF ¶ 6. The plaintiff

² The officer is identified as "James" O'Malley in Scarborough's statement of material facts. Defendant Scarborough Police Department's Statement of Uncontroverted Facts in Support of Its Summary Judgment Motion ("Scarborough SMF") (Docket No. 19) ¶ 1. However, the officer's affidavit gives his first name as "John" and is so signed. Affidavit of John O'Malley ("O'Malley Aff."), Exh. A to Scarborough SMF, at [1], [5].

³ Paragraph 1 of the plaintiff's statement of material facts submitted in opposition to Scarborough's motion for summary judgment states "Plaintiff has insufficient information within which [sic] to either deny or admit the assertions in Paragraph 1." Plaintiff's Responsive Scarborough SMF ¶ 1. This statement is repeated in response to several paragraphs in Scarborough's statement of material facts and to paragraphs in the other defendants' statements of material facts. It is an insufficient response under this court's Local Rule 56, which requires a party opposing a motion for summary judgment to submit an opposing statement of material facts in which he "shall admit, deny or qualify the facts" asserted in the moving party's statement of material facts. Local Rule 56(c). Accordingly, any facts asserted by the moving parties to which such a response had been made by the plaintiff will be deemed admitted if properly supported by citations to the record. Local Rule 56(e). The plaintiff's statements were filed well after the close of discovery in this case, *see* Scheduling Order (Docket No. 8), and many of the statements to which the plaintiff makes this response seem to involve information clearly within the plaintiff's own personal knowledge, but to the extent that he feels additional time was necessary to allow him to respond as required by the local rule, Fed. R. Civ. P. 56(f) provides the appropriate procedural avenue. Under that rule, the plaintiff may apply by affidavit for a continuance or denial of the motion for summary judgment. Further, the plaintiff has added paragraphs to each of his responsive statements of material facts, numbered sequentially, in which he makes additional factual assertions. Local Rule 56(c) requires such material to be presented in a separate section set forth in separate numbered paragraphs.

advised the officers about the circumstances involved in the filing of the assault charge that had apparently given rise to the warrant. *Id.* The warrant had been obtained by the Biddeford police. St. Pierre Aff. ¶ 3. Scarborough's role was to serve the warrant on the plaintiff and to have a bail commissioner set bail as necessary to ensure the plaintiff's attendance in court. *Id.* This process is normally handled in a short period of time and the arrestee is usually bailed right from the police station. *Id.* O'Malley informed the plaintiff orally and in writing⁴ that there was nothing he could do about the underlying charge of assault and that his only role was to serve the warrant. O'Malley Aff. ¶ 5. St. Pierre informed the plaintiff that, in order to be released, he would have to post bail in the amount of \$100 in cash and pay a bail commissioner a fee of \$25. Guimond SMF ¶ 4; Plaintiff's Responsive Guimond SMF ¶ 4; St. Pierre Aff. ¶ 6. The plaintiff did not have that much money with him. St. Pierre Aff. ¶ 6. St. Pierre repeatedly asked the plaintiff for the name and telephone number of a family member or friend who could be contacted to bring in the bail money, but he refused. *Id.*

The plaintiff eventually gave O'Malley the name and telephone number of his daughter. Scarborough SMF ¶ 15; Plaintiff's Responsive Scarborough SMF ¶ 15. O'Malley waited with the plaintiff for his daughter to arrive. O'Malley Aff. ¶ 6. The plaintiff estimates that his daughter arrived between a half hour and an hour after the telephone call. Plaintiff's Dep. at 50. William Gorham, a bail commissioner, had set the bail for the plaintiff. Affidavit of Barbara Guimond ("Guimond Aff.") (Docket No. 15) ¶ 4. The Scarborough police department asked another bail commissioner, defendant Barbara Guimond, to come to the department to bail the plaintiff. *Id.* Guimond used written and oral communication with the plaintiff.⁵ *Id.* He did not ask her for an interpreter or any other auxiliary aid.

⁴ The plaintiff took all written notes that were exchanged between him and others at the Scarborough police department that day with him when he left and destroyed them. Scarborough SMF ¶ 33; Plaintiff's Responsive Scarborough SMF ¶ 33.

⁵ St. Pierre states in her affidavit that she "used American Sign Language to facilitate [Guimond's] communications with Mr. Levier," St. Pierre Aff. ¶ 8, but she testified at her deposition that, although she "was still in the room" when Guimond arrived, she did not "interpret for the bail commissioner," Deposition of Marla St. Pierre, Exh. A to Defendant Barbara Guimond's Reply Statement of (continued...)

Id. He never indicated to Guimond that he could not understand her. *Id.* The plaintiff signed the bail document and was released upon payment of the bail. St. Pierre Aff. ¶ 8. He left with the woman who had come to the police station in response to O'Malley's telephone call. *Id.* The plaintiff was at the police station from 11:35 a.m. to 2:14 p.m. *Id.* ¶ 9.

No member of the Biddeford police department accompanied the Scarborough police officers during the arrest of the plaintiff on April 11, 1997. Defendant Biddeford Police Department's Statement of Material Facts (Docket No. 21) ¶ 1; Plaintiff James Levier's Opposing Statement of Material Facts ("Plaintiff's Responsive Biddeford SMF") (Docket No. 29) ¶ 1. No member of the Biddeford police department was present during the booking process at the Scarborough police department. *Id.* ¶ 2. The only law enforcement personnel encountered by the plaintiff on April 11, 1997 were members of the Scarborough police department. *Id.* ¶ 4.

III. Discussion

The complaint alleges that all three defendants violated the Rehabilitation Act (Count I) and the ADA (Count II) and seeks injunctive relief, compensatory and punitive damages, and attorney

Material Facts (Docket No. 30), at 7. Under the circumstances, I assume for purposes of the pending motion that St. Pierre did not provide interpretation services during Guimond's communication with the plaintiff.

fees. Complaint (Docket No. 1) at 5-8. The relevant portion of the Rehabilitation Act provides:

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

* * *

For the purposes of this section, the term “program or activity” means all of the operations of —

(1)(A) a department, agency, special purpose district, or other instrumentality of a State

29 U.S.C. § 794(a) & (b). The relevant portions of the ADA provide:

[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.

As used in this subchapter:

(1) Public entity

The term “public entity” means —

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government

42 U.S.C. § 12131.

A. Defendant Guimond

The complaint states that defendant Guimond is sued “in her official capacity” as “an agent of the State of Maine Judicial Branch.” Complaint at 1, 3. Guimond offers several arguments to support her motion for summary judgment: (i) she is not a “public entity” under either applicable statute; (ii) she is not an agent of the state judiciary; (iii) she is entitled to judicial immunity;⁶ (iv) she did not discriminate against the plaintiff on the basis of his disability; (v) the plaintiff’s action is barred by the

⁶ The plaintiff’s contention that Guimond “cannot have it both ways,” by arguing first that as a bail commissioner she is not part of the judicial system and then that she is entitled to judicial immunity, Plaintiff James Levier’s Objection to Defendant Barbara Guimond’s Motion for Summary Judgment (“Plaintiff’s Guimond Objection”) (Docket No. 25) at 4, ignores the longstanding practice in the (continued...)

Eleventh Amendment, and, if the ADA applies to the states, it is unconstitutional; and (vi) the plaintiff lacks standing to seek injunctive relief. Defendant Barbara Guimond’s Memorandum in Support of Motion for Summary Judgment (“Guimond Mem.”), attached to Defendant Barbara Guimond’s Motion for Summary Judgment (Docket No. 12), at 4-19. The plaintiff chooses to address only the second, third and fifth of these arguments. Plaintiff’s Guimond Objection at 4-13.

The majority of courts that have addressed the issue have held that neither the Rehabilitation Act nor the ADA permits claims against persons in their individual capacities. *E.g.*, *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (ADA); *Hiler v. Brown*, 177 F.3d 542, 546-47 (6th Cir. 1999) (Rehabilitation Act); *Hallett v. New York State Dep’t of Correctional Servs.*, 109 F.Supp.2d 190, 199 (S.D.N.Y. 2000) (both); *Montez v. Romer*, 32 F.Supp.2d 1235, 1240-41 (D. Colo. 1999) (both). Presumably for this reason, the plaintiff asserts his claim against Guimond only in her official capacity.⁷

Guimond first argues that a bail commissioner cannot be a public entity because a bail commissioner does not come within the applicable statutory definitions of that term. She contends that she does not receive federal financial assistance, but that factual contention is not included in her statement of material facts and accordingly may not be considered by the court. She also contends that a bail commissioner is not an “instrumentality of a State” or an “operation[] of . . . [an]

American court system of arguing in the alternative, which every party is entitled to do.

⁷ Guimond does not contend that she may not be held liable in her official capacity. *See Hallett*, 109 F.Supp.2d at 199-200.

instrumentality of a state.” Guimond Mem. at 4-5. The plaintiff apparently believes that a bail commissioner is included within these definitions because her work is “judicial business.” Plaintiff’s Guimond Opposition at 4. It is not necessary to resolve this issue, for which neither party cites any authority in support, because, assuming that a bail commissioner is an agent of the Maine judiciary, she is entitled to judicial immunity in that capacity from the claims brought by the plaintiff.

Guimond contends that an individual is entitled to the protection of the doctrine of judicial immunity when the act in question is a judicial act. Judges are immune from claims for damages under the ADA that arise out of judicial acts. *E.g., Badillo-Santiago v. Andreu-Garcia*, 70 F.Supp.2d 84, 91 (D.P.R. 1999); *Turgeon v. Brock*, 1994 WL 529919 (D.N.H. Sept. 29, 1994), at *2. The setting of bail is a judicial act. *Tucker v. Outwater*, 118 F.3d 930, 933 (2d Cir. 1997); *Edwards v. Hare*, 682 F.Supp. 1528, 1531 (D.Utah 1988) (justice of the peace). The same is true of claims under the Rehabilitation Act. *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982) (jury administrator). Nor is the plaintiff entitled to injunctive relief against Guimond in any event, because he fails to allege that he is likely to encounter her again under any circumstances. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (injunctive relief available only upon showing of irreparable injury, with showing of real or immediate threat that plaintiff will be wronged again in similar fashion). Under Maine law, a bail commissioner is a judicial officer, 15 M.R.S.A. § 1003(8), and is immune from any civil liability for acts performed within the scope of his or her duties, 15 M.R.S.A. § 1023(3).

Defendant Guimond is entitled to summary judgment on both claims brought against her by the plaintiff.

B. Defendant Biddeford Police Department

Defendant Biddeford Police Department moved for summary judgment on the ground that there is no evidence to tie it to the events of April 11, 1997, which appear to form the entire basis of the plaintiff's complaint. Memorandum in Support of Defendant Biddeford Police Department's Motion for Summary Judgment, attached to Defendant Biddeford Police Department's Motion for Summary Judgment (Docket No. 20), at 2-4. In response, the plaintiff does not attempt to argue that Biddeford has any liability for the events of April 11, 1997, but rather contends that his claim against this defendant is based on four other incidents. Plaintiff's Objection to Biddeford Police Department's Motion for Summary Judgment ("Plaintiff's Biddeford Objection") (Docket No. 26) at 10. To support this contention, the plaintiff adds two relevant paragraphs to his response to Biddeford's statement of material facts which provide in their entirety as follows:

6. On four occasions the Biddeford Police came to the apartment Mr. Levier shared with his wife. They brought interpreters with them on none of those occasions.

7. The Biddeford Police Department took Mr. Levier to the hospital without obtaining the services of a qualified interpreter. They were involved with Mr. Levier on numerous occasions and never used the services of a qualified sign language interpreter.

Plaintiff's Responsive Biddeford SMF ¶¶ 6-7 (citations omitted). The only allegation in the complaint that could possibly be interpreted to refer to events other than those alleged in great detail to have occurred on April 11, 1997 involving the Scarborough police is a single paragraph, stating in its entirety as follows:

Through a continuing course of conduct, the Biddeford Police Department violated Plaintiff's rights by not providing sign language interpreters from February 1997 through June 1997.

Complaint ¶ 18. The Scarborough incident took place within this time frame. The plaintiff does not seek leave in his opposition, or by any other means, to amend his complaint with respect to the claim

against Biddeford. Indeed, the plaintiff's necessarily implied position that paragraph 18 of the complaint refers to four incidents other than the April 11, 1997 incident is contradicted by the language of the first paragraph of the complaint, which states that all of the defendants discriminated against the plaintiff on the basis of his disability when they "failed to provide sign language interpreters, telecommunications equipment, and other appropriate auxiliary aids and services . . . on April 11, 1997," with no mention of any other date or time period. Complaint, ¶ 1.

Understandably surprised by this response, Biddeford contends that the record citations provided by the plaintiff for paragraphs 6 and 7 of his responsive statement of material facts do not support the assertions they present, Defendant Biddeford Police Department's Response to Plaintiff's Opposing Statement of Material Facts (Docket No. 33) ¶¶ 3-4, and that the plaintiff has impermissibly attempted to use his opposition to the motion for summary judgment effectively to amend the complaint to add entirely new factual allegations, Defendant Biddeford Police Department's Reply to Plaintiff's Objections to Defendant's Motion for Summary Judgment (Docket No. 35) at 3-4. Acting with commendable caution, Biddeford also addresses the merits of the plaintiff's new contentions, asserting that it is entitled to summary judgment on those claims as well. *Id.* at 6-20.

First, to the extent that the complaint may be construed to raise claims against Biddeford arising out of the events of April 11, 1997, it is clear that Biddeford is entitled to summary judgment on any such claims.

Next, Biddeford's contention that the complaint does not fairly allege the claims now pressed by the plaintiff has merit. A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Modern notions of 'notice pleading' notwithstanding, a plaintiff . . . is nonetheless required to set forth factual allegations, either direct or inferential, respecting each element necessary to sustain recovery under some actionable legal theory."

Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988). “[I]f the facts narrated by the plaintiff do not at least outline or adumbrate a viable claim, his complaint cannot pass Rule 12(b)(6) muster.” *Id.* (citation and internal quotation marks omitted). Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of an action or claim for failure to state a claim upon which relief can be granted.

Here, the factual allegations in paragraph 18 of the complaint are insufficient under Rule 8(a). “[I]n many contexts . . . , First Circuit decisions have required at least a minimal level of factual particularity rather than mere allegations of conclusions.” *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 863 (1st Cir. 1993) (listing cases). At a minimum, the complaint must give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. *Id.* at 865. In deciding whether a complaint states a claim upon which relief can be granted, the court “need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). A plaintiff may not “rest on ‘subjective characterizations’ or conclusory descriptions of ‘a general scenario which could be dominated by unpleaded facts.’” *Id.* at 53 (citation omitted). In addition, when a civil rights violation is alleged, the complaint must “outline facts sufficient to convey specific instances of unlawful discrimination.” *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). “The alleged facts must specifically identify the particular instance(s) of discriminatory treatment and, as a logical exercise, adequately support the thesis that the discrimination was unlawful.” *Correa-Martinez*, 903 F.2d at 53. Paragraph 18 of the complaint fails utterly to comply with these basic pleading requirements. Ordinarily, dismissal of the complaint against Biddeford would be in order.

However, the First Circuit has recently reiterated the principle that courts must move cautiously when dismissing a complaint *sua sponte*. *Clorox Co. Puerto Rico v. Proctor & Gamble*

Commercial Co., 2000 WL 1449255 (1st Cir. Oct. 3, 2000), at [6]. A court may not dismiss a complaint on its own initiative without giving the plaintiff notice of the proposed action and an opportunity to address the issue. *Id.* While it would be reasonable to conclude under the circumstances that the plaintiff has been given notice of the insufficiency of his complaint on this point,⁸ and that his response to the motion for summary judgment addresses the issue, it is not necessary to decide whether dismissal is appropriate at this time. The plaintiff has chosen to present factual allegations in support of his claim against Biddeford as he now defines it — not involving the April 11, 1997 incident — and to oppose summary judgment on that basis. Under these circumstances, the court can proceed to decide whether summary judgment is in order on the unpleaded claim.

Assuming *arguendo* that the paragraphs in the plaintiff’s applicable statement of material facts with respect to incidents involving the Biddeford police are appropriately supported by the citations to his deposition given by the plaintiff in that document,⁹ they are so conclusory and devoid of detail that they are insufficient to avoid the entry of summary judgment on any claims that could reasonably be inferred to have been asserted against Biddeford thereby. A party opposing summary judgment “may not rely on conclusory allegations and unsupported speculation.” *Burns v. State Police Ass’n of Massachusetts*, 2000 WL 1552922 (1st Cir. Oct. 24, 2000), at [1]. The opposing party “must offer definite, competent evidence to defeat a properly supported motion for summary judgment.” *Id.* (citation and internal quotation marks omitted). *See also Medina-Munoz v. R. J. Reynolds Tobacco*

⁸ At the plaintiff’s deposition on August 29, 2000, he began to talk about events other than the April 11, 1997 arrest and the attorney for Scarborough, who was questioning him at the time, said, “Because the only thing that’s a part of this lawsuit is the Scarborough arrest, I would just ask that when you give me answers, try to keep those other incidents out of it so that we’re not talking — you’re not confusing me about which police department or which time or which event, okay?” Plaintiff’s Dep. at 28. Neither the plaintiff nor his attorney objected to or corrected this characterization of the case. As noted above, the deficiency in the complaint was obvious at least from the time that Biddeford filed and served its motion for summary judgment, addressing only the April 11, 1997 incident. The plaintiff has not moved for leave to amend his complaint but rather has chosen to oppose summary judgment on the merits of his claim against Biddeford as he now presents it.

⁹ In fact, most of the factual allegations in paragraphs 5-8 of Docket No. 29 are not adequately supported by the citations to the record stated therein.

Co., 896 F.2d 5, 8 (1st Cir. 1990). Here, the plaintiff's factual allegations are conclusory at best. At this late date, well after the close of discovery, the dates of the four occasions are not specified, and the circumstances of each contact, when they are mentioned at all, are sketchy at best. Essentially, all that is alleged is that Biddeford police officers were involved with the plaintiff on several occasions and did not use the services of a qualified sign language interpreter on any of those occasions. That is not enough to show that there is a trialworthy issue on a claim under either the ADA or the Rehabilitation Act.

Biddeford is entitled to summary judgment on both counts of the complaint.

C. Defendant Scarborough Police Department

Scarborough makes two arguments in support of its motion for summary judgment with respect to the substance of the plaintiff's claims: that the plaintiff cannot establish a *prima facie* case and that an interpreter was not necessary for effective communication under the circumstances present at the Scarborough police station on April 11, 1997. Scarborough Motion at 8-15. The former argument, to which the plaintiff does not respond directly, is dispositive.

The parties agree that the substantive standards for determining liability under the ADA and the Rehabilitation Act are the same and that case law interpreting either is applicable to both. Scarborough Motion at 9; Plaintiff's Objection to Defendant Scarborough Police Department's Motion for Summary Judgment ("Plaintiff's Scarborough Objection") (Docket No. 23) at 10. *See Parker v. Universidad de Puerto Rico*, 225 F.3d 1,*4 (1st Cir. 2000). Accordingly, the following discussion addresses both counts of the complaint.

In order to establish a claim of violation of Title II of the ADA, like that at issue here, a plaintiff must show

- (1) that he is a qualified individual with a disability;
- (2) that he was either excluded from participation in or denied the benefits of some public entity's

services, programs or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability.

Badillo-Santiago, 70 F.Supp.2d at 89. For purposes of its motion, Scarborough does not contend that that plaintiff cannot meet the first element of this standard.

To prove a violation of the Rehabilitation Act . . . a plaintiff must prove that: (1) she is a "handicapped individual"; (2) she is "otherwise qualified" for participation in the program; (3) the program receives "federal financial assistance"; and, (4) she was "denied the benefits of" or "subject to discrimination" under the program.

Darian v. University of Massachusetts Boston, 980 F. Supp. 77, 84-85 (D. Mass. 1997) (citations omitted). Again, Scarborough's argument is focused on only the last of these elements. For purposes of the Rehabilitation Act, the complaint alleges that each of the defendants is a "program." Complaint, ¶ 24. The complaint does not identify the programs and services of which the plaintiff was allegedly denied the benefit or in which he was not allowed to participate, for purposes of his ADA claim. *Id.* ¶¶ 33-34, 39. The plaintiff's memorandum in opposition to Scarborough's motion for summary judgment does not clarify this point.

Federal courts have generally recognized two distinct types of disability discrimination claims arising out of arrests:

The first is that police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity. The second is that, while police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

Gohier v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999) (citations omitted). This court has some experience with both types, *see Jackson v. Inhabitants of the Town of Sanford*, 3 A.D. Cases 1366, 1994 WL 589617 (D. Me. Sept. 23, 1994), at *1, *6 (plaintiff arrested because of his disability); and

Barber v. Guay, 910 F. Supp. 790, 796, 802 (D. Me. 1995) (plaintiff arrested in course of dispute with landlord and charged with theft alleged disability based on psychological and alcohol problems and use of excessive force in carrying out arrest), although it is not possible to tell from the opinion in the latter case whether the argument made here by Scarborough was made in that case. It is clear that the plaintiff's claims against Scarborough can only be one of the second type, because the Scarborough police arrested the plaintiff on a warrant, the validity of which he does not contest, based on an assault charge.

Scarborough contends that an arrest is not a covered service, program or activity under the ADA and the Rehabilitation Act. The small number of federal courts that have considered this question in the context of the second type of arrest have differed somewhat in their conclusions. In *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), a paraplegic injured while being transported after his arrest alleged violations of the ADA and the Rehabilitation Act; the court held that “[t]ransportation of an arrestee to the station house is . . . a service of the police within the meaning of the ADA.” *Id.* at 909, 912. In *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (4th Cir. 1997), the hearing-impaired plaintiff was stopped for erratic driving, failed field sobriety tests, was arrested and was taken to the station house where he signed a consent form and was given a chemical test. *Id.* at 155-56. He brought claims under the ADA and the Rehabilitation Act alleging that the police made no attempt to communicate with him in writing and denied his requests for an interpreter and a TTY telephone so that he could call a lawyer. *Id.* at 156. The court held that a drunk driving arrest was not a program or activity of the defendant county, of which the police department involved was apparently an agency, and that arrests did not come “within the ADA’s ambit.” *Id.* at 157. In *Calloway v. Boro of Glassboro Dep’t of Police*, 89 F.Supp.2d 543 (D.N.J. 2000), the deaf plaintiff brought claims under the ADA and the Rehabilitation Act after she was questioned at the police

station, where she had gone to file a complaint for assault against her neighbor, about the neighbor's claim that the plaintiff had assaulted her. *Id.* at 547-48.¹⁰ The police tried without success to locate a certified sign language interpreter to aid in the questioning and ultimately relied on an uncertified interpreter. *Id.* After the police's attempts to convey *Miranda* warnings through the interpreter proved unsuccessful, an attorney notified the officers that he represented the plaintiff and the plaintiff indicated that she no longer wished to speak with the officers without her attorney present. *Id.* at 548. The plaintiff was then arrested. *Id.* The court, noting that its holding was "limited to investigative questioning at the police station," held that the plaintiff had stated a cause of action under the ADA and the Rehabilitation Act. *Id.* at 556.

Finally, in *Patrice v. Murphy*, 43 F.Supp.2d 1156 (W.D.Wash. 1999), the deaf plaintiff alleged a violation of the ADA arising out of her arrest following the arrival of police at her home in response to her daughter's 911 call, made at the plaintiff's request, during a dispute between the plaintiff and her husband. *Id.* at 1157-58. The court held

that an arrest is not the type of service, program, or activity from which a disabled person could be excluded or denied the benefits, although an ADA claim may exist where the claimant asserts that he has been arrested because of his disability (*i.e.*, he has been subjected to discrimination). In the case at hand, . . . plaintiff's claim is that defendants failed to make reasonable accommodation to allow plaintiff to enjoy the benefits of police services. Plaintiff's claim fails to state a viable cause of action under § 12132 of the ADA.

Id. at 1160. I find the *Patrice* court's reasoning to be persuasive. Particularly in the circumstances of this case, where the Scarborough police were merely executing an existing arrest warrant, and the processing of such an arrest and release on \$100 bail requires the exchange of a minimal amount of

¹⁰ The district court in *Calloway* rejected *Rosen* on the grounds that the Fourth Circuit's decision was based on the lack of voluntariness on the part of the arrestee, *id.* at 556, a position that the New Jersey court finds to be incompatible with the Supreme Court's subsequent opinion in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), a case involving a prisoner's claim that he had been denied access to certain prison programs due to his medical condition. In fact, the *Rosen* court did not rely on (continued...)

information and could have been handled “in a matter of minutes,” St. Pierre Aff. ¶ 3, both *Calloway* and *Gorman* are distinguishable. *Calloway*’s holding is limited to investigative questioning by the police, which did not take place in this case. In *Gorman*, the plaintiff sustained physical injuries. Here, the plaintiff has presented no evidence of any injury in his statement of material facts submitted in opposition to Scarborough’s motion. He does allege in his complaint that his damages consisted of “emotional distress, and feelings of isolation, humiliation, anxiety and fear,” Complaint ¶ 21, but makes no attempt to show how these feelings differed from those that would be experienced by a hearing person convinced that the underlying charge upon which he was being arrested was without merit. See *Rosen*, 121 F.3d at 158 (humiliation and embarrassment are emotions experienced by almost every person arrested for drunk driving; no injury sufficient to invoke ADA’s protection). Even if the allegation in the complaint had been supported by evidence in the summary judgment record, therefore, for all that appears, the plaintiff would not be entitled to relief under the statutes he has invoked.¹¹

The plaintiff seeks summary judgment on his claim that Scarborough “failed to provide notice to Mr. Levier of his rights under” the ADA, citing 28 C.F.R. §§ 35.106 and 35.163.¹² Plaintiff’s Scarborough Opposition at 9. It is not clear how a failure to provide information about his rights under the ADA harmed the plaintiff, since he claims that he requested a certified interpreter and was

such a rationale, but merely cited (using the signal “cf.”) a previous decision so holding.

¹¹ Should the plaintiff’s alleged injury be the length of time he was detained at the Scarborough police station, a possibility not supported by his summary judgment submissions, it appears from the plaintiff’s own testimony that the delay in his release was primarily due to his refusal to provide the name and telephone number of someone who could bring the necessary cash to the station to pay his bail until he was provided with a certified interpreter, Plaintiff’s Dep. at 43, 47, and the length of time it took for the plaintiff’s daughter to arrive after he provided her name and telephone number and the police were able to contact her, O’Malley Aff. ¶ 6.

¹² Section 35.106 provides: “A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.” Section 35.163 provides, in pertinent part: “(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.”

waiting for one to arrive. Plaintiff's Dep. at 41, 47-49. In any event, even if the plaintiff's claims were to survive a motion for summary judgment, he would not be entitled to summary judgment on this aspect of his complaint. Assuming *arguendo* that these regulations alone provide the basis for a private cause of action, the plaintiff's only factual allegation in his statement of material facts in support of this claim does not include any citation to the record. Plaintiff's Responsive Scarborough SMF ¶ 36. Scarborough has objected to the response on this basis, Defendant Scarborough Police Department's Reply Memorandum in Support of Its Motion for Summary Judgment (Docket No. 31) at 4, and, accordingly, the court will not consider the factual allegation. Local Rule 56(e). In the absence of any factual support in the summary judgment record, the plaintiff is not entitled to summary judgment on this portion of his claim under any circumstances.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for summary judgment be **GRANTED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 31st day of October, 2000.

David M. Cohen
United States Magistrate Judge

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plaintiff

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