

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

KATHLEEN AUDIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 17 CV 6618
	)	
BRIAR PLACE, LTD., an Illinois	)	Judge Manish S. Shah
Corporation,	)	
	)	
Defendant.	)	

**DEFENDANT, BRIAR PLACE, LTD.’S ANSWER AND AFFIRMATIVE DEFENSES TO  
PLAINTIFF’S AMENDED COMPLAINT AT LAW**

Defendant, BRIAR PLACE, LTD. (hereinafter, “Defendant” and/or “Briar Place”), by and through its attorneys, Omar Fayeze and Anthony Cavallo of Huston, May & Fayeze, LLC, respectfully submits its Answer and Affirmative Defenses to Plaintiff’s Amended Complaint at Law as follows:

**JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction over Counts I and II of this action pursuant to 28 U.S.C. § 1331 as the Plaintiff’s claims alleged herein arise under the Rehabilitation Act of 1973 (the “Rehabilitation Act”), 29 U.S.C. § 794, *et seq.*; and Section 1557 of the Patient Protection and Affordable Care Act (“Section 1557”), 42 U.S.C. 18116. This Court has supplemental jurisdiction over Counts III and IV of this action pursuant to 28 U.S.C. § 1367.

**ANSWER: Defendant admits only that this Court has subject matter jurisdiction as to Counts I and II and supplemental jurisdiction as to Count IV. Defendant denies that any liability under the statutes cited. Defendant denies the allegations contained in**

**paragraph 1 of Plaintiff's Amended Complaint regarding Count III as this Court dismissed Count III on April 24, 2018.**

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b). Defendant resides in this district and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district.

**ANSWER: Defendant admits the allegations contained in paragraph 2 of Plaintiff's Amended Complaint.**

### **THE PARTIES**

3. Plaintiff is a 63-year old female who is profoundly deaf. Plaintiff has a very limited ability to verbalize speech and read lips. Plaintiff's primary means of communication is through American Sign Language ("ASL"). Plaintiff is a person with a disability within the meaning of all applicable statutes. Plaintiff resides in a supportive living facility in Aurora, Illinois.

**ANSWER: Defendant admits only that Plaintiff is a 63-year old female with some degree of hearing impairment. Defendant denies the remaining allegations contained in sentences one through three of paragraph 3 of Plaintiff's Amended Complaint. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in the last sentence of paragraph 3 of Plaintiff's Amended Complaint.**

4. Defendant is an Illinois corporation, and a skilled nursing and intermediate care facility, that owns and operates a nursing and rehabilitation facility, Briar Place Nursing and Rehabilitation (the "Facility"), in Indian Head Park, Cook County, Illinois. The Facility offers and advertises its comprehensive spectrum of rehabilitative, clinical and psychiatric services.

**ANSWER: Defendant admits only that it is a corporation formed under the laws of the State of Illinois, that it was the licensee of the Facility, and the Facility is located in Indian**

**Head Park, Cook County, Illinois. Defendant denies the remaining allegations contained in the first sentence of paragraph 5 of Plaintiff's Amended Complaint as it is no longer the licensee of the Facility. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in the second sentence of paragraph 4 of Plaintiff's Amended Complaint.**

**DEFENDANT'S CONDUCT**

5. "Effective communication" is critical in virtually all medical contexts. Without it, a caregiver cannot obtain complete medical histories; assess symptoms; provide for patient rights, including informed consent; develop accurate diagnoses and prognoses; develop, explain and administer procedures, medication and treatment generally; provide counseling; or otherwise ensure that residents' needs are appropriately met. Failure to ensure that deaf and hard of hearing patients can effectively communicate threatens the quality of care and, even when treatment ultimately is successful, violates legally protected rights. In enacting the ADA, Congress found that individuals with disabilities continually encounter discrimination in critical areas such as health services, including, *inter alia*, outright intentional exclusion, communication barriers, and the failure to make modifications to existing practices. 42 U.S.C. § 12101(a)(3), (a)(5).

**ANSWER: Defendant admits only the existence of the statutes cited in paragraph 5 of Plaintiff's Amended Complaint. To the extent that Plaintiff misstates the law, and an answer is deemed required, the remaining allegations, including Plaintiff's commentary, interpretations, and conclusions of the applicable law, are denied.**

6. Defendant has failed to provide Plaintiff, a person with a disability, the same quality of care as other residents and deprived her of the opportunity to participate in her care and rehabilitation on the basis of her disability. This unequal treatment occurred because, among other

things, Defendant relied upon the exchange of written notes or required Plaintiff to lip read during numerous complex and sufficiently lengthy conversations, even though Plaintiff required and requested the availability of an ASL interpreter. In a nursing and rehabilitation facility, examples of circumstances when the communication may be sufficiently lengthy or complex so as to require an ASL interpreter include (collectively, “Vital Encounters”):

- A. When conducting a comprehensive assessment of a resident’s needs, strengths, goals, life history and preferences;
- B. Developing and implementing the resident’s patient-centered plan of care, including establishing expect goals and outcomes of care;
- C. Informing the resident of his or her rights to participate in his or her plan of care, rights and responsibilities;
- D. Discussing a resident’s symptoms and medical condition, medications, and medical history;
- E. When conducting periodic assessments of a resident;
- F. Providing a diagnosis and recommendation for treatment;
- G. Communicating with a resident during treatment, including physical and occupational therapies, testing procedures, and during physician’s rounds;
- H. Obtaining informed consent for treatment and therapies;
- I. Providing instructions for medications, post-treatment activities and follow-up, treatments;
- J. Providing mental health services, including group or individual counseling for residents and family members;
- K. Discussing powers of attorney, living wills and/or complex billing and insurance matters;
- L. During educational presentations;
- M. Discussing discharge planning and discharge instructions; and
- N. When providing religious services and spiritual counseling.

**ANSWER: Defendant denies the allegations contained in paragraph 6, including subparts A through N, of Plaintiff's Amended Complaint.**

7. Defendant acted intentionally and with deliberate indifference when it failed to provide the benefit of its services, programs, and activities to Plaintiff and failed to provide appropriate auxiliary aids and services to Plaintiff to effectively communicate with her during nearly all Vital Encounters.

**ANSWER: Defendant denies the allegations contained in paragraph 7 of Plaintiff's Amended Complaint.**

8. Defendant acted intentionally and with deliberate indifference when it failed to provide appropriate auxiliary aids and services to Plaintiff to allow for effective communication between her and its doctors, nurses, counselors, social workers, therapists, and others (collectively, the "Facility's Personnel").

**ANSWER: Defendant denies the allegations contained in paragraph 8 of Plaintiff's Amended Complaint.**

9. Defendant has denied Plaintiff full and equal access to its services and denied Plaintiff the equal opportunity to participate in her own healthcare and rehabilitation in violation of the ADA, the Rehabilitation Act and Section 1557 by:

- A. Failing to provide adequate and effective means of communication with the Facility's Personnel;
- B. Failing to adequately train the Facility's staff on the differences in methods of communication for simple and short conversations versus for Vital Encounters;
- C. Failing to provide her equal access to its programs and services; and
- D. Failing to establish comprehensive policies and procedures to meet its legal mandates to achieve effective communications.

**ANSWER: Defendant denies the allegations contained in paragraph 9, including subparts A through D, of Plaintiff's Amended Complaint.**

**PLAINTIFF'S EXPERIENCE**

10. Plaintiff is profoundly deaf. She used hearing aids since the age of 3 and lost total hearing at the age of 55. Plaintiff relies on ASL as her primary means to communicate. She has a very limited capacity to lip read. Plaintiff can verbalize some words with slight slur. Absent a sign language interpreter, she cannot communicate fluently or engage in substantive conversation with someone who does not know sign language. When she uses lip reading or exchanging written notes to communicate, she is only able to comprehend a small percentage of the conversations. Plaintiff suffers from Type 2 diabetes and is insulin dependent.

**ANSWER: Defendant denies the allegations contained in paragraph 10 of Plaintiff's Amended Complaint. Defendant, however, admits only that Plaintiff had Type II diabetes and was insulin dependent while she was at the Facility, and further avers that it lacks knowledge or information sufficient to form a belief about the truth of Plaintiff's current condition.**

11. Plaintiff became a resident of the Facility on March 17, 2015, and remained at the Facility for 866 days, until July 31, 2017. She was transferred to the Facility from Wheaton Care Center in Wheaton, Illinois, where she was recovering for four days after being discharged from Advocate Good Samaritan Hospital where she was treated for a laceration to her head from a fall. Upon being admitted to the Facility, she was diagnosed as having a major depressive disorder, single episode (primary admission); balance and gait issues (requiring the use of a walker), osteoarthritis, low back pain, and other conditions.

**ANSWER: Defendant admits the allegations contained in the first sentence of paragraph 11 of Plaintiff's Amended Complaint. Defendant admits that Wheaton Care Center transferred the resident to the Facility, but lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in the second sentence of paragraph 11 of Plaintiff's Amended Complaint. Defendant denies the allegations contained in the third sentence of paragraph 11 of Plaintiff's Amended Complaint to the extent they are inconsistent with Plaintiff's medical records from the Facility.**

12. At the time of her admission Brandie Weininger, a friend of Plaintiff, acted as Plaintiff's attorney-in-fact under a general power of attorney.

**ANSWER: Defendant admits the allegations contained in paragraph 12 of Plaintiff's Amended Complaint.**

13. Throughout Plaintiff's 866 day stay at Defendant's Facility, Plaintiff was required to lip read or exchange written notes with the Facility's Personnel during numerous Vital Encounters, including, *inter alia*, the following:

- A. During initial physical, nursing, social services, recreation, dietary assessments upon admission;
- B. During the development of its legally required patient-centered plan of care with its interdisciplinary team;
- C. During approximately 298 one-on-one periodic social services, nursing, dietary and recreation assessments;
- D. During approximately 28 one-on-one nursing and restorative nursing evaluations;
- E. During approximately 38 one-on-one nursing evaluations discussing Plaintiff's medical condition and symptoms; and explaining results of tests;
- F. When participating in approximately 11 nursing and social services counseling and educational presentations;

- G. During approximately 38 one-on-one physician and nurse practitioner evaluations providing diagnosis and/or recommendations for treatment;
- H. During approximately 21 one-on-one mental health evaluations and services with a physician and/or social worker; and
- I. During approximately 8 of 11 discharge planning conferences with social services personnel.

**ANSWER: Defendant denies the allegations contained in paragraph 13, including subparts A through I, of Plaintiff's Amended Complaint.**

14. Throughout the 866 days that she stayed at the Facility, Plaintiff was consistently denied the ability to independently walk outside of the Facility because she repeatedly failed the Defendant's evaluation process as she could not understand questions asked of her. When conducting those evaluations no ASL interpreter was provided, despite repeated requests by the Plaintiff, and Defendant required Plaintiff to lip read or exchange written notes. As a result, Plaintiff only left the Facility during those 866 days for medical appointments.

**ANSWER: Defendant denies the allegations contained in paragraph 14 of Plaintiff's Amended Complaint.**

15. Because Defendant denied Plaintiff effective communication with the Facility's Personnel, Plaintiff's discharge from the Facility was unnecessarily, significantly delayed. Denial of effective communication resulted in Plaintiff's inability to understand her rights to request to be discharged, her rehabilitation goals, corrective actions required to meet those goals, and the demonstrated behaviors required to satisfy the Defendant's discharge criteria.

**ANSWER: Defendant denies the allegations contained in paragraph 15 of Plaintiff's Amended Complaint.**

16. Defendant's failure to provide appropriate auxiliary aids or services to enable its Facility's Personnel to effectively communicate with Plaintiff created significant emotional

problems for Plaintiff. Plaintiff experienced frustration, fear, and emotional distress due to her extremely limited ability to communicate with the Facility's Personnel about her health and well-being, rehabilitation and lack of understanding of the reasons for her prolonged stay at the Facility.

**ANSWER: Defendant denies the allegations contained in paragraph 16 of Plaintiff's Amended Complaint.**

**COUNT I**  
**VIOLATION OF THE REHABILITATION ACT, 29 U.S.C. § 704**

17. Plaintiff incorporates by reference paragraphs 1 to 16 above.

**ANSWER: Defendant adopts and incorporates by reference its answers to paragraphs 1 through 16 of Plaintiff's Amended Complaint as if fully set forth herein as its answers to paragraph 17, Count I of Plaintiff's Amended Complaint.**

18. Plaintiff bring this action under Section 504 of the Rehabilitation Act, 29 U.S.C. §794. Plaintiff was intentionally and deliberately denied full and equal enjoyment of Defendant's healthcare and rehabilitation services through Defendant's failure to comply with the Rehabilitation Act.

**ANSWER: Defendant admits only the existence of the Rehabilitation Act and denies the remaining allegations contained in paragraph 18, Count I of Plaintiff's Amended Complaint.**

19. Defendant receives federal financial assistance in the form of reimbursement from federal Medicare and Medicaid programs and is therefore subject to the antidiscrimination provisions of the Rehabilitation Act, as described herein.

**ANSWER: Defendant denies the allegations contained in paragraph 19, Count I of Plaintiff's Amended Complaint.**

20. At all times relevant herein, there was in full force and effect a statute known as the Rehabilitation Act, 29 U.S.C. §701 *et seq.*, and its implementing regulations, 45 C.F.R. § 84.4(a), which provides in pertinent part as follows:

- A. “No otherwise qualified individual with a disability...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....” 29 U.S.C. §794(a);
- B. An individual with a disability is “otherwise qualified” to participate in covered programs and activities if that individual “meets the essential eligibility requirements for the receipt of such services.” 45 C.F.R. § 84.3(l)(4);
- C. “Program or activity” means all of the operations of an entire corporation if assistance is extended to such corporation as a whole or the corporation is principally engaged in the business of providing health care services and any part of the corporation receives federal financial assistance. 29 U.S.C. §794(b)(3)(A)(i) and (ii); 45 C.F.R. §84.3(k)(3)(i)(A) and (ii);
- D. “Federal financial assistance” means “any grant, loan, contract...or any other arrangement by which the Department [of Health and Human Services] provides or otherwise makes available assistance in the form of... [f]unds.” 45 C.F.R. §84.3(h);
- E. “No qualified handicapped person shall, because a recipient’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.” 45 C.F.R. §84.21; and
- F. “In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap: (1) Deny a qualified handicapped person these benefits or services... (3) Provide a qualified handicapped person with benefits or services that are not as effective as the benefits or services provided to others... (4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons.” 45 C.F.R. § 84.52(a).

**ANSWER: Defendant admits only the existence of the statute and regulations contained in paragraph 20, including subparagraphs A through F, Count I of Plaintiff’s Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

21. The Defendant's intentional and deliberate acts and omissions alleged herein violated the Rehabilitation Act and its implementing regulations in one or more of the following respects:

- A. Defendant discriminated against Plaintiff by denying her the opportunity for the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations at its Facility;
- B. Defendant discriminated against Plaintiff by denying her the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of its Facility;
- C. Defendant discriminated against Plaintiff by offering or affording her services that are not equal to those services afforded to other individuals without hearing impairments;
- D. Defendant discriminated against Plaintiff by failing to make reasonable modifications in policies, practices, or procedures, which are necessary to afford its goods, services and facilities to Plaintiff where such modifications would not fundamentally alter the nature of the goods, services or facilities; and
- E. Defendant discriminated against Plaintiff by deliberately and intentionally failing to provide appropriate auxiliary aids and services, such as sign language interpreters, or other means to effectively communicate with Plaintiff, where the taking of such steps would not fundamentally alter the nature of its offered services or would not result in an undue burden, despite knowing the failure to do so would likely result in harm to the Plaintiff's federally protected right and failed to act upon that likelihood.

**ANSWER: Defendant denies the allegations contained in paragraph 21, including subparagraphs A through E, Count I of Plaintiff's Amended Complaint.**

22. Section 505(a)(2) of the Rehabilitation Act, 29 U.S.C. §794(a)(2), states that the "remedies, procedures and that the rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. §2000(d) *et seq.*] shall be available" for violations of section 504 of the Rehabilitation Act. By law, such remedies include compensatory monetary damages. *Barnes v. Gorman*, 536 U.S. 181 (2002).

**ANSWER: Defendant admits only the existence of the statutes cited in paragraph 22, Count I of Plaintiff's Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

23. Plaintiff is entitled to reasonable attorneys' fees and costs, pursuant to section 505(b) of the Rehabilitation Act, 29 U.S.C. §794(a), as Defendant's conduct has inflicted injury and damages upon Plaintiff, including loss of a civil right, mental anguish, humiliation and mental pain and suffering.

**ANSWER: Defendant denies the allegations contained in paragraph 23, Count I of Plaintiff's Amended Complaint.**

WHEREFORE, Defendant BRIAR PLACE, LTD., having answered Count I of Plaintiff's Amended Complaint at Law, denies Plaintiff is entitled to judgment in the amount of any sum whatsoever and prays this matter be dismissed with costs and fees assessed against the Plaintiff and for such other and further relief as this Court deems just and proper.

**Defendant hereby demands trial by 12-person jury.**

**COUNT II**  
**Violation of Section 1557 of the Patient Protection and Affordable Care Act,**  
**42 U.S.C. § 18116**

24. Plaintiff incorporates by reference paragraphs 1 to 16.

**ANSWER: Defendant adopts and incorporates by reference its answers to paragraphs 1 through 16 of Plaintiff's Amended Complaint as if fully set forth herein as its answers to paragraph 24, Count II of Plaintiff's Amended Complaint.**

25. Since March 2010, there was in full force and effect a statute known as the Patient Protection and Affordable Care Act (the "Affordable Care Act"), 42 U.S.C. § 18001, *et seq.*, Pub.L. 111-148. Section 1557 of the Affordable Care Act prohibits discrimination on the basis of race,

color, national origin, sex, age, or disability in certain health programs and activities. 42 U.S.C. § 18116. Section 1557's implementing regulations, 45 C.F.R. §§ 92.1 – 92.203, effective as of July 18, 2016, apply to health programs or activities administered by recipients of Federal financial assistance from the Department of Health and Human Services.

**ANSWER: Defendant admits only the existence of the statutes and regulations contained in paragraph 25, Count II of Plaintiff's Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

26. As Defendant participates in Medicare and Medicaid, it is a covered entity subject to compliance with Section 1557.

**ANSWER: Defendant admits only that it was participating in Medicare and Medicaid. Defendant denies the remaining allegations contained in paragraph 26, Count II of Plaintiff's Amended Complaint regarding Plaintiff's legal conclusions.**

27. The implementing regulations of Section 1557, prohibit discrimination of an individual on the basis of disability, *inter alia*, and prohibit an individual from being excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any health program or activity. *See* 45 C.F.R. § 92.101(a)(1). Those regulations, in pertinent part, require covered entities to:

- A. Take appropriate initial and continuing steps to notify beneficiaries, enrollees, applicants and members of the public:
  - (1) that the covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its healthcare programs or activities. 45 C.F.R. §92.8 (a)(1);
  - (2) that the covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities. 45 C.F.R. §92.8 (a)(2);

- (3) how to obtain aids and services. 45 C.F.R. §92.8 (a)(4);
  - (4) the identification of, and contact information for, the responsible employee designated to be responsible for adoption of grievance procedures. 45 C.F.R. §92.8 (a)(5);
  - (5) the availability of grievance procedures and how to file a grievance pursuant to §92.7(b). 45 C.F.R. §92.8 (a)(6); and
  - (6) how to file a discrimination complaint with the Department of Health and Human Services Office of Civil Rights. 45 C.F.R. §92.8 (a)(7).
- B. That a covered entity shall take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others in health programs and activities, in accordance with the standards found at 28 C.F.R. §§ 35.160 through 35.164. 45 C.F.R. § 92.202(a).

**ANSWER: Defendant admits only the existence of the statute and regulations contained in paragraph 27, including subparagraphs A (1-6) and B, Count II of Plaintiff's Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

28. C.F.R. §§ 35.160 through 35.164 are the communication access standards required of public entities under Title II of the ADA. Where those regulatory provisions use the term “public entity,” the term “covered entity” shall apply in its place. *See* 45 C.F.R. § 92.202(a). As applied to Section 1557 covered entities, the Title II regulations require them to “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). In addition, a covered entity “shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, ... companions, ... an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity of a [covered] entity,” 28 C.F.R. § 35.160(b)(1); and “[i]n determining what types of auxiliary aids and services are necessary, a

[covered] entity shall give *primary consideration* to the requests of individuals with disabilities ...” 28 C.F.R. § 35.160(b)(2) (emphasis added).

**ANSWER: Defendant admits only the existence of the statutes and regulations contained in paragraph 27, Count II of Plaintiff’s Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

28.<sup>1</sup> As of July 18, 2016 -- 378 out of the 866 days that Plaintiff was confined at Defendant’s Facility -- Defendant had a duty under Section 1557 to give primary consideration to Plaintiff’s communication preference and provide her with an ASL interpreter, either on-site or via VRI.

**ANSWER: Defendant denies the allegations contained in paragraph 28, Count II of Plaintiff’s Amended Complaint.**

29. Defendant’s acts and omissions violated Section 1557 and its implementing regulations as Defendant did not take appropriate steps to ensure that communications with Plaintiff were as effective as communications with others in its healthcare and rehabilitation programs and activities, and Defendant failed to give any consideration, primary or otherwise, to Plaintiff’s communication preferences, as Defendant was legally required to do under Section 1557 and the standards found at 28 C.F.R. §§ 35.160 through 35.164. 45 C.F.R. § 92.202(a).

**ANSWER: Defendant denies the allegations contained in paragraph 29, Count II of Plaintiff’s Amended Complaint.**

30. Section 1557’s implementing regulations provide that the enforcement mechanisms available for and provided under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, *inter alia*, shall be available for purposes of Section 1557 as implemented by

---

<sup>1</sup> Plaintiff incorrectly numbered two paragraphs as number 28. The numbering is maintained in Defendant’s answer.

this part, and “compensatory damages for violations of Section 1557 are available in appropriate administrative and judicial actions brought under this rule.” *See* 45 C.F.R. § 92.301.

**ANSWER: Defendant admits only the existence of the statutes and regulations contained in paragraph 30, Count II of Plaintiff’s Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

31. Defendant’s conduct constituted violations of Section 1557.

**ANSWER: Defendant denies the allegations contained in paragraph 31, Count II of Plaintiff’s Amended Complaint.**

32. Section 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794(a)(2), states that the “remedies, procedures and that the rights set forth in title VI of the Civil Rights Act of 1964 [being 42 U.S.C. § 2000(d) *et sequitur*] shall be available” for violations of section 504 of the Rehabilitation Act. By law, such remedies include compensatory monetary damages. *Barnes v. Gorman*, 536 U.S. 181 (2002).

**ANSWER: Defendant admits only the existence of the statutes contained in paragraph 32, Count II of Plaintiff’s Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

33. Plaintiff is entitled to reasonable attorneys’ fees and costs, pursuant to section 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a.

**ANSWER: Defendant denies the allegations contained in paragraph 33, Count II of Plaintiff’s Amended Complaint.**

WHEREFORE, Defendant BRIAR PLACE, LTD., having answered Count II of Plaintiff’s Amended Complaint at Law, denies Plaintiff is entitled to judgment in the amount of any sum

whatsoever and prays this matter be dismissed with costs and fees assessed against the Plaintiff and for such other and further relief as this Court deems just and proper.

**Defendant hereby demands trial by 12-person jury.**

**COUNT III**  
**NEGLIGENCE**

Defendant makes no answer to Count III (Negligence) of Plaintiff's Amended Complaint as the Court dismissed this cause of action on April 24, 2018.

**COUNT IV**  
**VIOLATION OF THE ILLINOIS NURSING HOME CARE ACT & SKILLED**  
**NURSING AND INTERMEDIATE CARE FACILITIES CODE**  
**210 ILCS 45/1-101, et seq; 77 IL. ADMIN CODE 300.110 et seq.**

41. Plaintiff incorporates by reference paragraphs 1 to 16 above.

**ANSWER: Defendant adopts and incorporates by reference its answers to paragraphs 1 through 16 of Plaintiff's Amended Complaint as if fully set forth herein as its answers to paragraph 41, Count IV of Plaintiff's Amended Complaint.**

42. Plaintiff brings this action under the Illinois Nursing Home Care Act (the "Act"), 210 ILCS 45/1-101, *et seq.*, and its implementing regulations, Ill. Admin Code tit. 77, pt. 300, which existed at all relevant times herein.

**ANSWER: Defendant admits only the existence of the statute and regulations contained in paragraph 42, Count IV of Plaintiff's Amended Complaint, but denies any liability thereunder. To the extent the allegations misstate the law, the same are denied.**

43. Plaintiff's private right of action against Defendant, a skilled nursing and intermediate care facility, licensed in the state of Illinois, arises under 77 Ill. Admin. Code, Section 300.3290(a).

**ANSWER: Defendant admits only the existence of the regulation contained in paragraph 43, Count IV of Plaintiffs' Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

44. Section 300.3290(e) of Title 77 allows recovery of damages against the nursing home facility, "in addition to and cumulative with any other legal remedies available to a resident" without exhaustion of administrative remedies. Section 3-604 of the Act.

**ANSWER: Defendant admits only the existence of the statute and regulation contained in paragraph 44, Count IV of Plaintiffs' Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

45. Section 300.3290(c) provides that the licensee shall pay three times the actual damages or \$500, whichever is greater, and costs and attorneys' fees to a facility resident whose rights as specified in Part 1 of Article II of the Act are violated. Section 3-602 of the Act.

**ANSWER: Defendant admits only the existence of the statute and regulation contained in paragraph 45, Count IV of Plaintiffs' Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

46. At all relevant times herein the Act contained residents' bill of rights, which, guarantees residents, *inter alia*, the right to refuse treatment, the right to not be subjected to abuse or neglect by nursing home personnel and the right to not be subjected to unlawful discriminated as defined in Section 1-103 of the Illinois Human Rights Act. Sections 2-104(c), 2-

107 & 2-114 of the Act. Section 1-103 of the Illinois Human Rights Act defines disability-based discrimination as unlawful discrimination. 775 ILCS 5/1-103.

**ANSWER: Defendant admits only the existence of the statutes contained in paragraph 46, Count IV of Plaintiffs' Amended Complaint. To the extent the allegations misstate the law, the same are denied.**

47. Defendant violated the Act, and its duty to Plaintiff in several respects, among other actions, including but not limited to those duties specified under the Act as follows:

- A. Failed to develop or implement a Comprehensive Resident Care Plan to adequately communicate with the "active participation" of the Plaintiff concerning her needs, as required by Section 3-202a;
- B. Failed to provide a care plan that would attain or maintain the highest practicable level of independent functioning, as required by Section 3-202a-b;
- C. Failed to provide the necessary care to prevent diminution of the resident's abilities in activities of daily living, including hygiene, nutrition, rooming, ambulation and functional communication systems, as required by Sections 3-202b(4)-(5) and 3-202d(3)-(4); and
- D. Failed to ensure effective communication with Plaintiff to permit her to understand treatment options and refuse treatment, to participate in her own rehabilitation, to remain free from neglect and not be subjected to disability-based discrimination, as required by Sections 2-104 (c), 2-107 and 2-114.

**ANSWER: Defendant denies the allegations contained in paragraph 47, including subparagraphs A through D, Count IV of Plaintiff's Amended Complaint.**

48. As a result of Defendant's acts and or omissions, Plaintiff suffered the following damages:

- A. Mental anguish and emotional distress due to the Plaintiff's inability to communicate with the Facility's Personnel and the unnecessary prolonged stay at the Facility;

- B. Lack of adequate medical care, lack of informed consent and lack of participation in her healthcare and rehabilitation causing additional stress, frustration and adding to her depression; and
- C. Plaintiff's loss of association, inability to participate in social services, activities and programs at the Facility;

**ANSWER: Defendant denies the allegations contained in paragraph 48, including subparagraphs A through C, Count IV of Plaintiff's Amended Complaint.**

49. Defendant's withholding of appropriate auxiliary aids and services to ensure effective communication, to permit her to participate in her own rehabilitation, to remain free from neglect and not be subjected to disability business communication, as required by Sections 2-104 (c), 2-107 and 2-114 of the Act was willful and wanton.

**ANSWER: Defendant denies the allegations contained in paragraph 49, Count IV of Plaintiff's Amended Complaint.**

50. The harm suffered by Plaintiff was a direct and proximate result of the Defendant's failure to meet its duties of care owed to Plaintiff under the standard of care required of skilled nursing and intermediate care facilities under the Act and the Illinois Administrative Code, in addition to other applicable standards of care.

**ANSWER: Defendant denies the allegations contained in paragraph 50, Count IV of Plaintiff's Amended Complaint.**

WHEREFORE, Defendant BRIAR PLACE, LTD., having answered Count I of Plaintiff's Amended Complaint at Law, denies Plaintiff is entitled to judgment in the amount of any sum whatsoever and prays this matter be dismissed with costs and fees assessed against the Plaintiff and for such other and further relief as this Court deems just and proper.

**Defendant hereby demands trial by 12-person jury.**

### **AFFIRMATIVE DEFENSES**

Defendant BRIAR PLACE, LTD. (hereinafter, Defendant and/or Briar Place), by and through its attorneys, Omar Fayeze and Anthony A. Cavallo of HUSTON, MAY & FAYEZ LLC, and pleading in the alternative and without prejudice to its denials that Plaintiff is entitled to any recovery, respectfully submits its Affirmative Defenses to Counts I, II, and IV of Plaintiff's Amended Complaint at Law as follows:

#### **First Affirmative Defense (Statute of Limitations as to Count I)**

1. The statute of limitations for Rehabilitation Act claims is governed by the limitations period for personal injury claims in the forum state, which is Illinois.
2. The statute of limitations for personal injury claims in Illinois is two years. 735 ILCS 5/13-202.
3. Plaintiff alleges that she became a resident at Defendant's Facility on March 17, 2015. (Dkt. No. 15 at p.5, para. 11.)
4. Plaintiff filed her Complaint on September 13, 2017.
5. Plaintiff alleges that Defendant failed to provide her with an American Sign Language ("ASL") interpreter or other auxiliary aids.
6. Defendant's failure to provide an ASL interpreter or other auxiliary aids was a discrete act.
7. On or before September 13, 2015, Plaintiff knew, or with the exercise of reasonable diligence, would have known that Defendant's failure to provide an ASL interpreter or other auxiliary aids was discriminatory and had harmed her.
8. Plaintiff's cause of action accrued prior to September 13, 2015.

9. Plaintiff's cause of action is barred by the statute of limitations.

10. Pleading in the alternative, and without prejudice to the foregoing allegations, to the extent that Defendant's failure to provide Plaintiff with an ASL interpreter or other auxiliary aids constitute a series of wrongful acts, then Plaintiff should be permitted to pursue her claims under the Rehabilitation Act only to the extent that after September 13, 2015, Defendant made explicit and intentional decisions not to accommodate Plaintiff's request to provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids or took other explicit and intentional actions that violated her rights under the Rehabilitation Act.

11. The statute of limitations serves as a bar to Plaintiff's claims in Count I of her Amended Complaint.

**Second Affirmative Defense (Statute of Limitations as to Count II)**

1. The statute of limitations for the Affordable Care Act claims is governed by the limitations period for personal injury claims in the forum state, which is Illinois.

2. The statute of limitations for personal injury claims in Illinois is two years. 735 ILCS 5/13-202.

3. Plaintiff alleges that she became a resident at Defendant's Facility on March 17, 2015. (Dkt. No. 15 at p.5, para. 11.)

4. Plaintiff filed her Complaint on September 13, 2017.

5. Plaintiff alleges that Defendant failed to provide her with an American Sign Language ("ASL") interpreter or other auxiliary aids.

6. Defendant's failure to provide an ASL interpreter or other auxiliary aids was a discrete act.

7. On or before September 13, 2015, Plaintiff knew, or with the exercise of reasonable diligence, would have known that Defendant's failure to provide an ASL interpreter or other auxiliary aids was discriminatory and had harmed her.

8. Plaintiff's cause of action accrued prior to September 13, 2015.

9. Plaintiff's cause of action is barred by the statute of limitations.

10. Pleading in the alternative, and without prejudice to the foregoing allegations, to the extent that Defendant's failure to provide Plaintiff with an ASL interpreter or other auxiliary aids constitute a series of wrongful acts, then Plaintiff should be permitted to pursue her claims under the Affordable Care Act only to the extent that after September 13, 2015, Defendant made explicit and intentional decisions not to accommodate Plaintiff's request to provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids or took other explicit and intentional actions that violated her rights under the Affordable Care Act.

11. The statute of limitations serves as a bar to Plaintiff's claims in Count II of her Amended Complaint.

**Third Affirmative Defense (Statute of Limitations as to Count IV)**

1. The statute of limitations for the Nursing Home Care Act claims is governed by the limitations period for personal injury claims in the forum state, which is Illinois.

2. The statute of limitations for personal injury claims in Illinois is two years. 735 ILCS 5/13-202.

3. Plaintiff alleges that she became a resident at Defendant's Facility on March 17, 2015. (Dkt. No. 15 at p.5, para. 11.)

4. Plaintiff filed her Complaint on September 13, 2017.

5. Plaintiff alleges that Defendant failed to provide her with an American Sign Language (“ASL”) interpreter or other auxiliary aids.

6. Defendant’s failure to provide an ASL interpreter or other auxiliary aids was a discrete act.

7. On or before September 13, 2015, Plaintiff knew, or with the exercise of reasonable diligence, would have known that Defendant’s failure to provide an ASL interpreter or other auxiliary aids was discriminatory and had harmed her.

8. Plaintiff’s cause of action accrued prior to September 13, 2015.

9. Plaintiff’s cause of action is barred by the statute of limitations.

10. Pleading in the alternative, and without prejudice to the foregoing allegations, to the extent that Defendant’s failure to provide Plaintiff with an ASL interpreter or other auxiliary aids constitute a series of wrongful acts, then Plaintiff should be permitted to pursue her claims under the Nursing Home Care Act only to the extent that after September 13, 2015, Defendant made explicit and intentional decisions not to accommodate Plaintiff’s request to provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids or took other explicit and intentional actions that violated her rights under the Nursing Home Care Act.

11. The statute of limitations serves as a bar to Plaintiff’s claims in Count IV of her Amended Complaint.

**Fourth Affirmative Defense (No Private Right of Action)(Count II)**

1. The Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (Affordable Care Act), was passed pursuant to the Spending Clause of the United States Constitution (Art. I, Section 8, Clause 1).

2. The Affordable Care Act does not confer a private right of action.

3. The lack of a private right of action serves as a bar to Plaintiff's claims in Count II of her Amended Complaint.

**Fifth Affirmative Defense (Waiver)(Counts I, II, and IV)**

1. Plaintiff alleges that when she came to the Facility, Defendant's alleged discriminatory conduct began. Plaintiff and/or her Power of Attorney, Brandee Wineinger, had actual knowledge of the services which were lacking at the Facility. That is, Plaintiff and/or her Power of Attorney knew or should have known that Defendant did not provide an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

2. Plaintiff and/or her Power of Attorney failed to make Defendant aware that Plaintiff required an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

3. Plaintiff and/or her Power of Attorney failed to request that Defendant provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

4. Defendant's staff and/or employees asked Plaintiff and/or her Power of Attorney if Plaintiff's communications needs were being met. In response to these inquiries, Plaintiff and/or her Power of Attorney did not indicate that Plaintiff's communication needs were not being met by Defendant.

5. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

6. Plaintiff did not notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages.

7. Plaintiff elected to not use a communications board to communicate with Defendant's staff and employees.

8. Pleading in the alternative, Plaintiff's Power of Attorney, had the ability to transfer Plaintiff from Defendant's Facility to another skilled nursing facility, assisted living facility, supportive living facility, or apartment if Plaintiff's needs were not being met at Defendant's Facility.

9. On or about June 5, 2015, Plaintiff's Power of Attorney, informed one of Defendant's employees or agents that Plaintiff was looking for an apartment and should be approved soon.

10. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility. Thereafter, Defendant, through its staff and employees, attempted to secure alternate living arrangements for Plaintiff at skilled nursing facilities, assisted living facilities, supportive living facilities, and apartments. Plaintiff, however, subsequently relied on the services of an outside agency, Thresholds, to assist her in securing living arrangements other than at Defendant's Facility. In doing so, Plaintiff intentionally relinquished her right to have Defendant secure alternative living arrangements for Plaintiff.

11. Waiver bars Plaintiff's claims in Counts I, II, and IV of her Amended Complaint.

**Sixth Affirmative Defense (Lack of Discriminatory Intent)(Count I)**

1. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility.

2. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

3. Plaintiff did not notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages.

4. Plaintiff elected to not use a communications board to communicate with Defendant's staff and employees.

5. Defendant reasonably relied on Plaintiff's speaking, reading lips, or writing messages as her primary method of communicating with Defendant's staff and employees to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

6. Defendant reasonably relied on Plaintiff's failure to notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

7. Defendant reasonably relied on Plaintiff's decision to no longer use a communications board to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

8. Defendant, through its employees, staff, and agents did not intentionally impede or impair Plaintiff's access to the same quality of care as other residents at the Facility.

9. Defendant, through its employees, staff, and agents did not intentionally impede or impair Plaintiff's ability to participate in her care and treatment at the Facility based on any alleged disability.

10. Defendant, through its employees, staff, and agents did not intentionally discriminate against Plaintiff.

11. Defendant, through its employees, staff, and agents was not deliberately indifferent to Plaintiff.

12. Defendant, through its employees, staff, and agents did not demonstrate a discriminatory animus toward Plaintiff.

13. Defendant, through its employees, staff, and agents did not know that any of Plaintiff's federally protected rights were being harmed.

14. Absent the requisite element of intentional discrimination, Plaintiff is not entitled to compensatory damages under the Rehabilitation Act.

15. Absent a finding of intentional discrimination, Plaintiff's claims in Count I of her Amended Complaint are barred.

**Seventh Affirmative Defense (Contributory Negligence) (Counts I, II, and IV)**

1. Plaintiff failed to request from Defendant, through its staff and employees, the services of an American Sign Language interpreter or other assistive communication devices.

2. Plaintiff refused to use a communications board.

3. Plaintiff refused to wear hearing aids.

4. Plaintiff refused to receive cochlear implants.

5. Plaintiff refused to take her medications.

6. Plaintiff rejected and refused medical advice.

7. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

8. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility.

9. Plaintiff failed to advise Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees.

10. Plaintiff's claims in Counts I, II, and IV of her Amended Complaint are barred by her own contributory negligence. Pursuant to 735 ILCS 5/2-1116, Plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of Plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought.

**Eighth Affirmative Defense (Comparative Negligence)(Counts I, II, and IV)**

1. Plaintiff failed to request from Defendant, through its staff and employees, the services of an American Sign Language interpreter or other assistive communication devices.

2. Plaintiff refused to use a communications board.

3. Plaintiff refused to wear hearing aids.

4. Plaintiff refused to receive cochlear implants.

5. Plaintiff refused to take her medications.

6. Plaintiff rejected and refused medical advice.

7. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

8. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility.

9. Plaintiff failed to advise Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees.

10. Plaintiff's claims in Counts I, II, and IV of her Amended Complaint are reduced by her own contributory negligence. Pursuant to 735 ILCS 5/2-1116, if the trier of fact finds that the contributory fault on the part of Plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought, any damages allowed shall be diminished in the proportion to the amount of fault attributable to Plaintiff's decedent.

**Ninth Affirmative Defense (Doctrine of Unclean Hands)(Counts I, II, and IV)**

1. Plaintiff possessed the ability to transfer from Defendant's Facility to another skilled nursing facility, assisted living facility, supportive living facility, or apartment if Plaintiff's needs were not being met at Defendant's Facility.

2. Pleading in the alternative, Plaintiff's Power of Attorney, possessed the ability to transfer Plaintiff from Defendant's Facility to another skilled nursing facility, assisted living facility, supportive living facility, or apartment if Plaintiff's needs were not being met at Defendant's Facility.

3. On or about June 5, 2015, Plaintiff's Power of Attorney, Brandee Wineinger, informed one of Defendant's employees or agents that Plaintiff is looking for an apartment and should be approved soon.

4. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility.

5. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

6. Plaintiff did not notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages.

7. Plaintiff elected to not use a communications board to communicate with Defendant's staff and employees.

8. Defendant reasonably relied on Plaintiff's speaking, reading lips, or writing messages as her primary method of communicating with Defendant's staff and employees to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

9. Defendant reasonably relied on Plaintiff's failure to notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

10. Defendant reasonably relied on Plaintiff's decision to no longer use a communications board to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

11. Defendant reasonably relied on Plaintiff's conduct to Defendant's detriment and changed its position by concluding that Plaintiff did not require an American Sign Language interpreter to communicate effectively with Defendant's staff and employees.

12. Plaintiff's conduct is unfair, deceitful, or in bad faith.

13. Plaintiff's conduct taints her with inequity or bad faith relative to the matter in which she seeks relief.

14. The doctrine of unclean hands bars Plaintiff's claims in Counts I, II, and IV of her Amended Complaint, to the extent she is seeking equitable relief.

**Tenth Affirmative Defense (Failure to State a Claim)(Count I)**

1. Plaintiff fails to sufficiently allege that Defendant intentionally discriminated against, or in the alternative, was deliberately indifferent to Plaintiff, thereby defeating her Rehabilitation Act claim in Count I of the Amended Complaint.

2. Plaintiff fails to sufficiently allege that Defendant subjected Plaintiff to discrimination solely by reason of her handicap, thereby defeating her Rehabilitation Act claim in Count I of the Amended Complaint.

3. Damages for emotional distress are not permitted under the Rehabilitation Act.

4. Plaintiff fails to allege facts to support non-economic compensatory damages.

5. Plaintiff's failure to state a claim upon which relief can be granted serves as a bar to her claims in Count I of her Amended Complaint.

**Eleventh Affirmative Defense (Failure to State a Claim)(Count II)**

1. There is no private right of action under the Affordable Care Act, thereby defeating her claim in Count II of the Amended Complaint.

2. Damages for emotional distress are not permitted under the Affordable Care Act.

3. Plaintiff fails to allege facts to support non-economic compensatory damages.

4. Plaintiff's failure to state a claim upon which relief can be granted serves as a bar to her claims in Count II of her Amended Complaint.

**Twelfth Affirmative Defense (Failure to State a Claim)(Count IV)**

1. Plaintiff fails to sufficiently allege facts to support punitive damages in Count IV (Nursing Home Care Act) of her Amended Complaint.

2. Plaintiff fails to allege facts to support non-economic compensatory damages.

3. Plaintiff's failure to state a claim upon which relief can be granted serves as a bar to her claims in Count IV of her Amended Complaint.

**Thirteenth Affirmative Defense (Plaintiff Suffered No Actual Injury)(Counts I, II, and IV)**

1. Plaintiff was permitted to leave Defendant's Facility for medical appointments and to go out on pass with friends.

2. Plaintiff's medical care and treatment at Defendant's Facility was not adversely affected by any alleged disability.

3. After being evaluated, Plaintiff was not allowed to leave Defendant's Facility alone due to safety concerns.

4. Plaintiff did not qualify for assisted living under her health insurance due to her age.

5. Plaintiff's applications at other skilled nursing facilities were rejected due to her diagnoses unrelated to hearing impairment.

6. Plaintiff suffered no actual injury.

7. Damages for emotional distress are not permitted under the Rehabilitation Act or Affordable Care Act.

8. Plaintiff fails to allege facts to support non-economic compensatory damages.

9. Plaintiff's lack of actual injury serves as a bar to her claims in Counts I, II, and IV of her Amended Complaint.

**Fourteenth Affirmative Defense (Estoppel)(Counts I, II, and IV)**

1. Plaintiff alleges that when she came to the Facility, Defendant's alleged discriminatory conduct began. Plaintiff and/or her Power of Attorney, Brandee Wineinger, had actual knowledge of the services which were lacking at the Facility. That is, Plaintiff and/or her

Power of Attorney knew or should have known that Defendant did not provide an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

2. Plaintiff and/or her Power of Attorney failed to make Defendant aware that Plaintiff required an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

3. Plaintiff and/or her Power of Attorney failed to request that Defendant provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

4. Defendant's staff and/or employees asked Plaintiff and/or her Power of Attorney if Plaintiff's communications needs were being met. In response to these inquiries, Plaintiff and/or her Power of Attorney did not indicate that Plaintiff's communication needs were not being met by Defendant.

5. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

6. Plaintiff did not notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages.

7. Plaintiff elected to not use a communications board to communicate with Defendant's staff and employees.

8. Pleading in the alternative, Plaintiff's Power of Attorney, had the ability to transfer Plaintiff from Defendant's Facility to another skilled nursing facility, assisted living facility,

supportive living facility, or apartment if Plaintiff's needs were not being met at Defendant's Facility.

9. On or about June 5, 2015, Plaintiff's Power of Attorney, informed one of Defendant's employees or agents that Plaintiff was looking for an apartment and should be approved soon.

10. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility. Thereafter, Defendant, through its staff and employees, attempted to secure alternate living arrangements for Plaintiff at skilled nursing facilities, assisted living facilities, supportive living facilities, and apartments. Plaintiff, however, subsequently relied on the services of an outside agency, Thresholds, to assist her in securing living arrangements other than at Defendant's Facility. In doing so, Plaintiff intentionally relinquished her right to have Defendant secure alternative living arrangements for Plaintiff.

11. Defendant reasonably relied on Plaintiff's speaking, reading lips, or writing messages as her primary method of communicating with Defendant's staff and employees to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

12. Defendant reasonably relied on Plaintiff's failure to notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

13. Defendant reasonably relied on Plaintiff's decision to no longer use a communications board to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

14. At the time of Plaintiff's representations, Defendant did not know that Plaintiff's representations were untrue. Plaintiff reasonably expected that Defendant would act upon her representations. Plaintiff is now claiming that she could not effectively communicate with Defendant's staff and employees, notwithstanding her representations. As a result, Defendant is prejudiced.

15. Defendant reasonably relied on Plaintiff's conduct to Defendant's detriment and changed its position by concluding that Plaintiff did not require an American Sign Language interpreter to communicate effectively with Defendant's staff and employees.

16. Estoppel serves as a bar to her claims in Counts I, II, and IV of her Amended Complaint.

**Fifteenth Affirmative Defense (Laches)(Counts I, II, and IV)**

1. Plaintiff alleges that when she came to the Facility, Defendant's alleged discriminatory conduct began. Plaintiff and/or her Power of Attorney, Brandee Wineinger, had actual knowledge of the services which were lacking at the Facility. That is, Plaintiff and/or her Power of Attorney knew or should have known that Defendant did not provide an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

2. Plaintiff and/or her Power of Attorney failed to make Defendant aware that Plaintiff required an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

3. Plaintiff and/or her Power of Attorney failed to request that Defendant provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

4. Defendant's staff and/or employees asked Plaintiff and/or her Power of Attorney if Plaintiff's communications needs were being met. In response to these inquiries, Plaintiff and/or her Power of Attorney did not indicate that Plaintiff's communication needs were not being met by Defendant.

5. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

6. Plaintiff did not notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages.

7. Plaintiff elected to not use a communications board to communicate with Defendant's staff and employees.

8. Pleading in the alternative, Plaintiff's Power of Attorney, had the ability to transfer Plaintiff from Defendant's Facility to another skilled nursing facility, assisted living facility, supportive living facility, or apartment if Plaintiff's needs were not being met at Defendant's Facility.

9. On or about June 5, 2015, Plaintiff's Power of Attorney, informed one of Defendant's employees or agents that Plaintiff was looking for an apartment and should be approved soon.

10. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility. Thereafter, Defendant, through its staff and employees, attempted to secure alternate living arrangements for Plaintiff at skilled nursing facilities, assisted living facilities, supportive living facilities, and apartments. Plaintiff, however, subsequently relied on the services of an outside agency, Thresholds, to assist her in securing living arrangements other than at

Defendant's Facility. In doing so, Plaintiff intentionally relinquished her right to have Defendant secure alternative living arrangements for Plaintiff.

11. Defendant reasonably relied on Plaintiff's speaking, reading lips, or writing messages as her primary method of communicating with Defendant's staff and employees to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

12. Defendant reasonably relied on Plaintiff's failure to notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

13. Defendant reasonably relied on Plaintiff's decision to no longer use a communications board to indicate that Plaintiff was effectively communicating with Defendant's staff and employees.

14. At the time of Plaintiff's representations, Defendant did not know that Plaintiff's representations were untrue. Plaintiff reasonably expected that Defendant would act upon her representations. Plaintiff is now claiming that she could not effectively communicate with Defendant's staff and employees, notwithstanding her representations. As a result, Defendant is prejudiced.

15. Defendant reasonably relied on Plaintiff's conduct to Defendant's detriment and changed its position by concluding that Plaintiff did not require an American Sign Language interpreter to communicate effectively with Defendant's staff and employees.

16. Plaintiff unreasonably delayed in attempting to seek redress for the alleged infringement of her rights.

17. The doctrine of laches bars Plaintiff's claims in Counts I, II, and IV of her Amended Complaint.

**Sixteenth Affirmative Defense (Failure to Mitigate Damages)(Counts I, II, and IV)**

1. Plaintiff alleges that when she came to the Facility, Defendant's alleged discriminatory conduct began. Plaintiff and/or her Power of Attorney, Brandee Wineinger, had actual knowledge of the services which were lacking at the Facility. That is, Plaintiff and/or her Power of Attorney knew or should have known that Defendant did not provide an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

2. Plaintiff and/or her Power of Attorney failed to make Defendant aware that Plaintiff required an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

3. Plaintiff and/or her Power of Attorney failed to request that Defendant provide Plaintiff with an ASL interpreter or other appropriate auxiliary aids to assist Plaintiff in communicating with Defendant's staff and employees at the Facility.

4. Defendant's staff and/or employees asked Plaintiff and/or her Power of Attorney if Plaintiff's communications needs were being met. In response to these inquiries, Plaintiff and/or her Power of Attorney did not indicate that Plaintiff's communication needs were not being met by Defendant.

5. Plaintiff communicated with Defendant's staff and employees by speaking, reading lips, or writing messages.

6. Plaintiff did not notify Defendant's staff and employees that she could not effectively communicate with Defendant's staff and employees by speaking, reading lips, or writing messages.

7. Plaintiff elected to not use a communications board to communicate with Defendant's staff and employees.

8. Pleading in the alternative, Plaintiff's Power of Attorney, had the ability to transfer Plaintiff from Defendant's Facility to another skilled nursing facility, assisted living facility, supportive living facility, or apartment if Plaintiff's needs were not being met at Defendant's Facility.

9. On or about June 5, 2015, Plaintiff's Power of Attorney, informed one of Defendant's employees or agents that Plaintiff was looking for an apartment and should be approved soon.

10. Plaintiff, individually and/or through her Power of Attorney, elected to remain at Defendant's Facility.

11. By remaining at Defendant's Facility, Plaintiff failed to mitigate her damages and serves as a bar to her claims in Counts I, II, and IV of her Amended Complaint.

WHEREFORE, Defendant BRIAR PLACE, LTD., denies Plaintiff is entitled to judgment in the amount of any sum whatsoever and prays this matter be dismissed with costs and fees assessed against the Plaintiff and for such other and further relief as this Court deems just and proper.

**CONCLUSION**

WHEREFORE, Defendant BRIAR PLACE, LTD., LLC, having fully answered Plaintiff's Amended Complaint at Law, denies Plaintiff is entitled to judgment in the amount of any sum whatsoever. Defendant further respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiff with costs and fees assessed against the Plaintiff and for any and all other relief this Court deems just and appropriate.

Respectfully submitted  
HUSTON, MAY & FAYEZ, LLC

By: /s/ Anthony A. Cavallo  
One Attorneys for Defendant BRIAR PLACE,  
LTD.

Omar Fayez (6255913)  
Anthony Cavallo (6203951)  
Huston, May & Fayez LLC  
205 W. Randolph St., Suite 950  
Chicago, Illinois 60606  
Phone: (312) 837-3346  
Fax: (312) 600-6971  
ofayez@hustonmay.com  
acavallo@hustonmay.com

4820-6306-3652, v. 1