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ADMISSION OF DEAF SOLDIERS TO THE MILITARY: RETHINKING THE “UNDIFFERENTIATED SOLDIER” PARADIGM

Michael Schwartz*

ABSTRACT

Keith Nolan, a deaf man with undergraduate and graduate degrees, asked to be admitted to military training to become a uniformed American soldier.¹ The military said no, and the issue was joined. Nolan’s application presents the Department of Defense (DOD) with an opportunity to reconsider its historical bar to people who are deaf.² The Article suggests a new paradigm in thinking about the selection criteria used to screen out deaf applicants for military service, a paradigm rooted in a disability studies framework.

With a few exceptions in the Civil War, the United States armed forces have barred people with disabilities, including those who are deaf, from serving in the military.³ The current recruitment model is based on the “undifferentiated soldier,” which requires an applicant for military service to become

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1. For stylistic reasons, the term “deaf” includes hard of hearing people, particularly since the spectrum of hearing loss ranges from mild to severe to profound. *Degree of Hearing Loss*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/hearing/Degree-of-Hearing-Loss/> [https://perma.cc/Z5SK-FYK8].

2. The military screens out anyone who has a physical or mental disability. The wider question of whether the military should consider people who are blind, use a wheelchair, or have psychiatric disabilities, but are otherwise qualified for military service, is not addressed here. Yet, the arguments raised in the Article ought to apply to them as well.

3. One notable exception was Deaf Smith, a partially deaf man who fought in Sam Houston’s army in the Texas Revolution and went on to serve in the Texas Rangers. *Biography of Smith Deaf Smith*, ACCESS GENEALOGY (Oct. 30, 2012), <https://www.accessgenealogy.com/texas/biography-of-deaf-smith.htm> [https://perma.cc/8KYW-B2DH].

combat-ready, that is, someone who can serve on the front line of fighting even if ultimately the soldier never enters the theater of war in his or her military career. As Keith Nolan's case demonstrates, the military assumes deaf applicants are incapable of military service because they cannot become combat ready. These assumptions underline a DOD report to Congress last year that militates against deaf soldiers in the United States armed forces. It is time to rethink these assumptions.

I. PROLOGUE

Starting in 2001, Cadet Keith Nolan, born deaf, knocked on the Pentagon's door and asked to join the United States Army as a uniformed American soldier in service to his country.⁴ The Pentagon refused, citing military regulations prohibiting deaf people from serving as uniformed service members.⁵ To military brass, an applicant had to possess, *inter alia*, typical hearing in order to enlist in the armed forces.⁶ The media got wind of the story, which put a human face on a military policy and practice that prohibits deaf people from joining the Army.⁷

4. Keith Nolan, *Deaf in the Military*, TED (Apr. 2011), https://www.ted.com/talks/keith_nolan_deaf_in_the_military [https://perma.cc/7W85-ASE3] [hereinafter Nolan Ted Talk]; David Dishneau, *Deaf Teacher's Quest for Armed Service Inspires Students*, WASH. TIMES (June 25, 2016), <https://www.washingtontimes.com/news/2016/jun/25/deaf-teachers-quest-for-armed-service-inspires-stu/> [https://perma.cc/67ZQ-84VV].

5. See Nolan Ted Talk, *supra* note 4. For a list of potentially disqualifying conditions for the U.S. military, see U.S. DEP'T OF DEF., INSTRUCTION NO. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES (Sept. 13, 2011), <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf> [https://perma.cc/6QFK-7J8F] [hereinafter Instruction No. 6130.03].

6. Instruction No. 6130.03, *supra* note 5, at 15, ¶ 7.b.(1)-(3). When Representative Waxman inquired about Keith Nolan's case, the DOD wrote, "[Keith Nolan's] medical condition is disqualifying in accordance with Army Regulation 40-501, Standards of Medical Fitness, Chapter 2, Physical Standards for Enlistment, Appointment, and Induction." Letter from Tony Adams, Congressional Coordinator, Congressional Inquiry Division to Rep. Henry A. Waxman (June 6, 2011) (on file with author); see also U.S. DEP'T OF THE ARMY, ARMY REGULATION 40-501, STANDARDS OF MEDICAL FITNESS ¶¶ 2-2(b), (e), 2-7 (2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3801_AR40-501_Web_FINAL.pdf [https://perma.cc/A5TZ-JRYD] [hereinafter Army Regulation 40-501].

7. See, e.g., Claire Gordon, *Deaf Man at War with Army Policy*, AOL FINANCE (Aug. 29, 2011, 3:53 PM), <https://www.aol.com/2011/08/29/deaf-man-at-war-with-army-policy/> [https://perma.cc/U4HM-C6E9]; Julie Watson, *Deaf Man Battles to Join Army after ROTC Audit*, NBC NEWS (Aug. 21, 2011, 2:04 PM), http://www.nbcnews.com/id/44219316/ns/us_news-life/t/deaf-man-battles-join-army-after-rotc-audit/ [https://perma.cc/QFC2-3FMH]. Other branches of the military have copied

Nolan was born deaf to deaf parents,⁸ and from a young age he dreamed of joining the military after hearing stories of his grandfather's exploits as a naval officer in World War II.⁹ Nolan avers, "I want to do my duty, serve my country and experience that camaraderie, and I can't, owed to the fact that I'm deaf."¹⁰ After graduating from college with a B.A. degree and ultimately a master's degree, Nolan joined the U.S. Army Reserve Officers' Training Corps ("ROTC") program's Bravo Company at the California State University, Northridge campus.¹¹ He quickly became one of the program's top performers, receiving positive reviews from his commanders and fellow cadets and a gold German Armed Forces Proficiency Badge.¹² Nolan performed his duties as a cadet with the assistance of an interpreter, an

Army regulations against allowing deaf soldiers. See U.S. COAST GUARD, COMDTINST M6000.1F, COAST GUARD MEDICAL MANUAL ch. 3, § D(11) (2017), https://media.defense.gov/2017/Mar/16/2001717439/-1/-1/0/CIM_6000_1F.PDF [<https://perma.cc/Q9G6-67SR>]; U.S. DEP'T OF THE AIR FORCE, AFI48-123_AFGM2018-02, GUIDANCE MEMORANDUM—AIR FORCE INSTRUCTION 48-123: MEDICAL EXAMINATIONS AND STANDARDS tbl. A3.2 (2018), http://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-123/afi48-123.pdf [<https://perma.cc/TAQ4-3DS5>]; U.S. DEP'T OF THE NAVY, MANUAL OF THE MEDICAL DEPARTMENT ch. 15, arts. 15-32, -38 (2018), <http://www.med.navy.mil/directives/Pages/NAVMEPD-MANMED.aspx> [<https://perma.cc/CF3Z-TNHL>].

8. Gordon, *supra* note 7. Deaf children born to Deaf parents acquire mastery of English more readily than deaf children born to parents with typical hearing, most of whom do not know sign language. See, e.g., Jenny L. Singleton & Matthew D. Tittle, *Deaf Parents and Their Hearing Children*, 5 J. OF DEAF STUD. & DEAF EDUC. 221, 223 (2000). Keith Nolan's command of English is in no doubt.

9. Watson, *supra* note 7. Nolan's great uncles also served in the Marine Corps and the Army during the Second World War, with stories just as inspiring as Nolan's grandfather. *Id.*; Interview with Keith R. Nolan (Spring 2012) [hereinafter Nolan Interview]; see also Paul Frommelt, *Fighting to Fight*, NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, [https://www.nga.mil/MediaRoom/News/Pages/Fighting tofight.aspx](https://www.nga.mil/MediaRoom/News/Pages/Fighting%20tofight.aspx) [<https://perma.cc/3J7S-ZP3S>].

10. Watson, *supra* note 7.

11. Nolan Ted Talk, *supra* note 4; Nolan Interview, *supra* note 9. When Nolan entered college at the California State University of Northridge, he tried to join the Navy ROTC at the University of California, Los Angeles, but was turned away because of his deafness. Nolan acknowledges that "it was definitely unorthodox for a teacher who'd already graduated with a BA and MA to leave his teaching job and enter an ROTC program," but it was an opportunity to demonstrate his competency to be an active member of the military. Nolan Interview, *supra* note 9. Had he been born with typical hearing, Nolan would have entered the Officer Candidate School rather than an ROTC program. *Id.*

12. See Nolan Ted Talk, *supra* note 4; Ger. Army Liaison Staff, *German Armed Forces Badge for Military Proficiency*, U.S. ARMY MANEUVER CTR. OF EXCELLENCE, http://www.benning.army.mil/mcoe/glnoc/content/pdf/GAFPB_Briefing_HVStab.pdf [<https://perma.cc/P8HP-VTYW>].

accommodation under federal and state law,¹³ and met all the requirements of the training program, including achieving a perfect score in his military science class.¹⁴ However, at the end of the program, Nolan was not commissioned into the Army along with his fellow cadets.¹⁵ Instead, he was forced to return his uniform.¹⁶

Keith Nolan had come up against a barrier: an American citizen does not have a constitutional or statutory right to join the United States armed forces, and the military reserves the right to deny applicants for reasons it deems appropriate.¹⁷ The military's list of disqualifying conditions includes hearing that does not meet acceptable levels in both ears, such as "[p]ure tone at 500, 1000, and 2000 cycles per second for each ear of not more than 30 decibels"¹⁸ Keith Nolan had failed to meet this standard.

13. 29 U.S.C. § 794(a) (2012 & Supp. 2016); CAL. EDUC. CODE §§ 201(g), 220, 66252(g), 66270, 66271.1 (West 2018); CAL. CODE REGS. tit. 5, § 41500 (West 2018); Nolan Ted Talk, *supra* note 4. California State University, Northridge, as a state institution of higher education, is bound by law to provide a qualified sign language interpreter as an accommodation enabling Deaf people to participate in CSUN's programs. *See* CAL. CODE REGS. tit. 5, § 41500 (West 2018). Admission to the military was strictly a different matter. *See Doe v. Garrett*, 903 F.2d 1455, 1461 (11th Cir. 1990).

14. Associated Press, *Deaf ROTC Auditor Fights to Join the Army*, FOX NEWS (Aug. 21, 2011), <http://www.foxnews.com/us/2011/08/21/deaf-rotc-auditor-fights-to-join-army.html> [<https://perma.cc/DYU7-KB3T>]. Nolan also received recognition from the Daughters of the Founders and Patriots of America for his ranking in the top 25% of his class. *See Commission Cadet Nolan Now: About*, CADET NOLAN NOW, <https://cadetnolannow.wordpress.com/about/> [<https://perma.cc/FWR7-HANA>]; UNIV. OF NEB.-LINCOLN ARMY ROTC, BIG RED BATTALION HANDBOOK ch. 7, at 39, <https://www.unl.edu/armyrotc/handbook.shtml> [<https://perma.cc/S9XA-BNK8>] (summarizing the award).

15. Nolan Ted Talk, *supra* note 4.

16. *Id.*

17. The Pentagon maintains standard qualifications for candidates wishing to join the service, with each branch of the armed forces having its own set of particulars. These qualifications include, but are not limited to, holding U.S citizenship or permanent residency status, being of a certain age (typically 17-40 years old), possessing a high school diploma (or a GED in some branches), and passing an aptitude test and a medical exam. *See Join the Military: Requirements for Joining the U.S. Military*, USA.GOV, <https://www.usa.gov/join-military> [<https://perma.cc/D2S8-22E6>]; Stew Smith, *United States Military Enlistment Standards*, THE BALANCE (Mar. 25, 2018), <https://www.thebalance.com/united-states-military-enlistment-standards-3354015> [<https://perma.cc/45XB-8XDF>]; *see also Doe*, 903 F.2d at 1461 (describing exception from the Rehabilitation Act for uniformed military personnel).

18. Instruction No. 6130.03, *supra* note 5, at 15, ¶ 7. The candidate must also be "[m]edically capable of satisfactorily completing required training," and "[m]edically adaptable to the military environment without the necessity of geographical area limitations."

II. THE DEPARTMENT OF DEFENSE'S RESPONSE TO KEITH NOLAN'S PLEA

Keith Nolan's case forced the Department of Defense (DOD) to review the undifferentiated soldier model used by the military to screen applicants, which requires all soldiers to be combat-ready.¹⁹ DOD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," calls for each individual to be "[f]ree of medical conditions or physical defects" that render them medically unfit; instead, trainees need to be medically capable of finishing training, medically adaptable to the environment with no geographical limitation, and medically capable of serving without aggravation of existing conditions or defects.²⁰ This Instruction expresses the foundational organizing principle of the military: every soldier is a "Warrior."²¹ According to the Army Field Manual 3-21.75, "The Warrior Ethos and Soldier Combat Skills," as warriors, "professional Soldiers" must be "trained, ready, and able to enter combat; ready to fight—and win—against *any* enemy, *any* time, *any* place."²² This is the undifferentiated soldier: a fighter armed and trained to enter combat anytime, anywhere.

In an April 26, 2016, letter to Senator John McCain, chairman of the Armed Services Committee, Peter Levine, Acting Under Secretary of Defense, submitted a report "concerning the review of enlistment of individuals with disabilities in the Armed

Id. at 2, ¶ 4(c). But deafness is not an "ear disease," nor is it a disease like immunodeficiency or coronary heart disease. *Id.* at 14, ¶ 6.

19. *Id.* at 2, ¶ 4; *infra* notes 24-45.

20. Instruction No. 6130.03, *supra* note 5, at 2, ¶ 4(c).

21. U.S. DEP'T OF THE ARMY, FM 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS 1-1 (2008), <https://fas.org/irp/doddir/army/fm3-21-75.pdf> [<https://perma.cc/RY37-U9Q9>].

22. *Id.* The other services have the same model. The Navy, the Air Force, and the Marine Corps all evince the idea of the all-around soldier ready to immediately deploy anywhere in the world. See U.S. DEP'T OF THE NAVY, *supra* note 7, arts. 15-30 to -61; U.S. DEP'T OF THE AIR FORCE, *supra* note 7, tpls. A3.1-A3.2; Jeff Schogol, *Every Marine a Rifleman No More?*, MARINE CORPS TIMES (May 7, 2017), <https://www.marinecorpstimes.com/news/your-marine-corps/2017/05/07/every-marine-a-rifleman-no-more/> [<https://perma.cc/6KEU-7H9V>].

Forces.”²³ The report was submitted as a response to a Senate request to the DOD, which asked the DOD “to assess the feasibility of a pilot program to determine whether civilians with certain medical conditions that are currently grounds for rejection for military service may be appointed, enlisted, or inducted in the Military Services.”²⁴

According to Mr. Levine, the Institute for Defense Analyses (IDA) carried out the study, which was a follow-on study to an Air Force study, also requested by the Senate.²⁵ The IDA study evaluated whether there are any military occupational specialties (“MOS”) an individual with a disability could accomplish, and the chances of success in a military environment.²⁶ The study also evaluated “the feasibility of conducting a pilot program with regard to individuals with deafness or hearing impairment”²⁷ Core to this evaluation was “determining the impact of accessing personnel with disabilities on mission effectiveness and the broader Defense strategy.”²⁸

The report, titled “Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces” and prepared by the Office of the Under Secretary of Defense for Personnel and Readiness,²⁹ opens with an Executive Summary that expresses the DOD’s determination that “it is imprudent to proceed with an extensive pilot program”³⁰ Following this summary was a discussion of the IDA’s study, “Force Impact of Expanding the Recruitment of Individuals with Disabilities,” which answered three questions about deaf people entering the military:

23. Letter from Peter Levine, Acting Under Secretary of Defense, to John McCain, Chairman, Committee on Armed Services, at 1 (Apr. 26, 2016) (on file with author) [hereinafter McCain Letter].

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* The report did not cover soldiers disabled as a result of military service.

28. McCain Letter, at 1. The focus of the report was on how individuals with disabilities would perform in the military, as well as the impact to force readiness.

29. OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, FISCAL YEAR 2016 REPORT TO CONGRESS ON THE REVIEW OF ENLISTMENT OF INDIVIDUALS WITH DISABILITIES IN THE ARMED FORCES (on file with author) [hereinafter FY 2016 Report]. The estimated cost to the DOD was \$556,000 for FY 2015—\$550,000 for the IDA contract and under \$6,000 for DOD labor. *Id.*

30. *Id.* at 2-3.

1. What if any, are the barriers that may limit individuals who have hearing impairments from serving in the military?
2. What is the current state of the art in accommodations (assistive technologies and methods) for those with hearing impairments?
3. Are there military occupational specialties that may be appropriate for further investigation (e.g., via fitness-for-duty) for allowing enlistment of individuals with hearing impairment?³¹

The concerns and conclusions of the IDA's study can be summarized as follows.

Barriers: Because the undifferentiated soldier model requires every single soldier to be deployable anywhere, anytime, there are “no non-deployable occupations, MOSs, designators, specialties, or ratings.”³² According to the report, “Service readiness would be significantly impacted if certain MOS/occupations were exempt from deployment.”³³ As for security, two barriers stood out. First, information and communications technology embedded in national security systems are exempt from Section 508 of the Rehabilitation Act of 1973, as amended, which means that military equipment may not be accessible for deaf soldiers, and, second, many assistive technologies that accommodate deaf people may “have a significant adverse effect on the security posture” of military information systems.³⁴

Current state of the art accommodations: Whatever is out there “may not be compatible or appropriate for military use, particularly in deployed environments,” and many of these assistive technologies “contain electronics which may not be compliant with security directives.”³⁵

Lack of appropriate military occupational specialties: Maintaining a military force ready to meet unanticipated needs is a core priority of military strategy.³⁶ This must predominate when

31. *Id.* at 3.

32. *Id.* at 7.

33. FY 2016 Report, *supra* note 29, at 7

34. *Id.* at 7-8.

35. *Id.* at 8.

36. *Id.*

considering if there are any military occupational specialties for deaf people.³⁷ The record, evidenced in Congressional testimony, shows that the services have a significant number of members in positions “outside their primary MOS,” and this is expected to continue because “requirements are outpacing the number of available resources.”³⁸ Examination of personnel data shows that none of the Services have non-deploying MOS.³⁹ Consequently, “This as a matter of policy, and in the interest of military readiness, precludes the designation of certain occupations or specialties for the purpose of establishing pools of personnel exempt from deployment.”⁴⁰

The report concludes from the IDA study that for the following reasons, “significant barriers remain to allowing individuals with disabilities to access into the uniformed Services.”⁴¹ First, military equipment, vehicles, and weapons systems may not be accessible to people with disabilities, and accommodations may not be reasonable.⁴² Moreover, “[a]ssistive technologies with electronics and receiver/transmitter devices may pose significant security risks”⁴³ Second, the absence of any MOS suitable for non-deployable personnel was a problem, as well as the burden placed on deployable personnel to substitute for those staying home.⁴⁴ Third, putting a person with a disability in a combat position would endanger the person and the safety of others.⁴⁵

The report’s conclusion that deaf people cannot qualify for military service is based on a number of assumptions about deafness that call for greater examination. What unfolds now are a number of arguments in response to the military’s conclusion that Deaf people cannot serve as uniformed American soldiers trained for combat. Viewed from the stance of disability rights, the Article raises the possibility that deaf soldiers can be

37. *Id.*

38. FY 2016 Report, *supra* note 29, at 9.

39. *Id.*

40. *Id.*

41. *Id.* at 10.

42. *Id.*

43. FY 2016 Report, *supra* note 29, at 10.

44. *Id.*

45. *Id.*

successfully integrated in the military without having to be combat ready.

III. THE UNDIFFERENTIATED SOLDIER MODEL NEEDS REEXAMINATION

The idea that all soldiers need to be “combat ready” is comparable to the concept of the “undifferentiated graduate” in medical education.⁴⁶ For decades, medical education only accepted students who could meet each and every test required to enter any field in the practice of medicine, including the ability to hear.⁴⁷ This stance stems from the medical establishment’s concept of “undifferentiated graduate” to which all students must conform in order to graduate medical school.⁴⁸ As medical education became more formalized in the early years of the twentieth century, candidates for the M.D. degree had to have somatic sensation and the functional use of the senses of vision and hearing.⁴⁹ These schools employed, and continue to employ, “what are known as technical standards for admission: criteria that an admission committee uses to determine the qualifications of a candidate for the study of medicine.”⁵⁰ One of the technical standards references the ability to communicate, and some medical schools still interpret this standard to require the candidate to hear and speak.⁵¹ According to this view, an “undifferentiated graduate” is expected to possess the ability “to

46. Michael Schwartz, *Technical Standards for Admission to Medical School: Deaf Candidates Don’t Get No Respect*, 28 BUFF. PUB. INTEREST L.J. 31, 37-38 (2009-10).

47. *Id.*

48. *Id.*

49. For medical educators,

Candidates’ diagnostic skills w[ould] . . . be lessened without the functional use of the senses of equilibrium, smell and taste. Additionally, they must have sufficient exteroceptive sense (touch, pain and temperature), sufficient proprioceptive sense (position, pressure, movement, stereognosis and vibratory) and sufficient motor function to permit them to carry out [their function as a doctor]. They must be able consistently, quickly, and accurately to integrate all information received by whatever sense(s) employed, and they must have the intellectual ability to learn, integrate, analyze and synthesize data.

Id. (quoting ASS’N OF AM. MED. COLLEGES, REPORT OF THE SPECIAL ADVISORY PANEL ON TECHNICAL STANDARDS FOR MEDICAL SCHOOL ADMISSION 7 (1979)).

50. Schwartz, *supra* note 46, at 36.

51. *Id.* at 36-37.

listen to a heartbeat through a stethoscope.”⁵² Thus, schools seek a candidate who can speak, hear and observe patients “in order to elicit information, describe changes in mood, activity and posture, and perceive nonverbal communications.”⁵³

Today, technology enables deaf doctors the ability to “hear” a heartbeat and to enjoy access to effective communication in the medical setting.⁵⁴ Videophone technology, computers, and captioning enable deaf people to enter medicine, and the number of deaf doctors is growing.⁵⁵ This undermines the assumption of the “undifferentiated graduate” model that the ability to hear is essential to the performance of a doctor’s work.

Like the undifferentiated graduate of medical education, the military’s “undifferentiated soldier” is expected to be able to hear and speak in order to undergo military training. Past conflicts like the Revolutionary War, the Civil War, World Wars I and II, Korea and Vietnam may have justifiably relied on the undifferentiated soldier model as a rational response to the needs of American military forces, but in today’s world, such a paradigm makes less sense.

A. Specialization and technological advances render the undifferentiated soldier model less relevant in screening applicants for military service

The paradigm of the undifferentiated soldier is not necessary in today’s world of specialization and technological advances. The military has seen dramatic changes over the last century, a primary change being the transition from the foot soldier on a set battlefield to teams or networks of soldiers taking advantage of the latest technological advances in wars with no borders or boundaries.⁵⁶ Although the core mission of military training has

52. *Id.* at 37.

53. *Id.* at 43 (quoting ASS’N OF AM. MED. COLLEGES, REPORT OF THE SPECIAL ADVISORY PANEL ON TECHNICAL STANDARDS FOR MEDICAL SCHOOL ADMISSION 5 (1979)).

54. Schwartz, *supra* note 46, at 60.

55. See *Are Deaf and Hard of Hearing Physicians Getting the Support They Need?*, UC DAVIS HEALTH: NEWSROOM (Feb., 5, 2013), <https://www.ucdmc.ucdavis.edu/publish/news/newsroom/7441> [<https://perma.cc/ZER9-SPFJ>]; ASS’N OF MED. PROF. WITH HEARING LOSS, <https://www.amphl.org/> [<https://perma.cc/5TH6-DP8G>].

56. Alex Roland, *War and Technology*, FOREIGN POL’Y RES. INST. (Feb. 27, 2009), <https://www.fpri.org/article/2009/02/war-and-technology/> [<https://perma.cc/M45A-GHPT>].

not changed—the goal is still to train competent and effective soldiers and officers—the strategies for achieving that mission have dramatically evolved with advances in technology and communication capabilities.⁵⁷ In light of these advances, determining the “essential functions” of the training regimen calls for fresh thinking.⁵⁸

When war was fought with infantry and cavalry units operating on set battlefields, it made sense for a soldier to possess typical hearing in order to survive the physical demands of combat.⁵⁹ During the 18th and early 19th centuries soldiers needed to be physically capable, as they would traverse the terrain of the battlefield and often engage in hand-to-hand combat.⁶⁰ However, as modern warfare has ushered in new technologies like computers and drones, the need to be capable of hand-to-hand combat is less pertinent.

With improved access to education for deaf people, new medical developments such as cochlear implant technology, and better assistive technologies, a person’s hearing loss does not

57. *Organization: Who We Are—Mission*, U.S. ARMY, <https://www.army.mil/info/organization/> [<https://perma.cc/23XP-ZGV4>]; Roland, *supra* note 56.

58. Roland, *supra* note 56. Beyond the advances, a disability rights posture asserts that an overly medicalized approach to disability offends principles of disability rights and human rights. See Theresia Degener, *Disability in a Human Rights Context*, in *LAWS: DISABILITY HUMAN RIGHTS LAW* 1, 3 (Anna Arstein-Kerslake ed., 2017) (describing the effect of the “medical model of disability” on human rights).

59. Ralph Rotte & Christoph M. Schmidt, *On the Production of Victory: Empirical Determinants of Battlefield Success in Modern War* 3-6 (Inst. for the Study of Labor, Discussion Paper No. 491, 2002). There is precedent for using soldiers with disabilities even in times past, however. During the American Civil War, the Union Army reenlisted disabled soldiers due to necessity in fighting the Confederate Army, and Congress created a plan to pay soldiers based on their war-sustained disabilities. Disabled soldiers were members of what was known as the “Invalid Corps,” established in 1863 and later renamed “The Veterans Reserve Corps.” See William Etter, *PERSPECTIVES FROM AFIELD AND AFAR: The Civil War Letters of Colonel Charles F. Johnson, Invalid Corps*, 7 *CIVIL WAR BOOK REV.*, 1 (2005), <https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1947&context=cwbr> [<https://perma.cc/7N7K-FWFQ>]. Disabled soldiers during this era served in various capacities such as the military police, hospital staff, and kitchen preparation; in certain instances, some were sent into combat. *Id.* The war’s end on April 9, 1865, meant an estimated 1.9 million soldiers from all branches of the Union and Confederate armies were now “Veterans,” many of whom would require treatment for injuries or disabilities. Jerome W. Mapp, *The Civil War: The Origins of Veterans’ Health Care*, U.S. DEP’T OF VETERANS AFFAIRS, <https://www.va.gov/health/NewsFeatures/20110413a.asp> [<https://perma.cc/GZ8E-JPWJ>]. Initially, only those soldiers who fought on the Union side were afforded medical care for their injuries and disabilities. *Id.*

60. Rotte & Schmidt, *supra* note 59, at 5.

necessarily prevent him or her from completing a wide range of jobs necessary for military service.⁶¹ For instance, the U.S. Army advertises a variety of career options that likely do not require typical hearing: administrative support, intelligence and media support, arts and media, legal analysis and law enforcement, computers and technology, medical and emergency services, construction and engineering, and transportation and aviation.⁶² The job description for the “arts and media” category “[c]overs the administration, communication and supervision of Army affairs for both military and civilian audiences. Jobs include broadcast technicians, graphic designers, translators, journalists and musicians.”⁶³ Likewise, the description of a career in “computers and technology . . . [i]ncludes technical and informational support for a variety of areas[, with] [p]ositions available in computers, communications, environmental health, intelligence, explosives and unmanned vehicle operations.”⁶⁴ With the advent of cyber warfare, computers, and remote control equipment like drones, the defense mission requires more sophisticated logistical support, including software specialists.⁶⁵ Deaf people are found in all of these career paths in the civilian workforce.⁶⁶ There is no reason to believe they would not succeed in a military environment.

61. See *Knowing Your Disability—The History of Deafness*, KNOW-THE-ADA: ARIZ. OFF. FOR AM. WITH DISABILITIES, <http://www.know-the-ada.com/t4/history-deafness.html> [<https://perma.cc/9NSQ-H6L3>].

62. *Careers & Jobs*, U.S. ARMY, <http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories.html> [<https://perma.cc/VJ23-STPA>].

63. See *Careers & Jobs: Arts & Media*, U.S. Army, <http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/arts-and-media.html> [<https://perma.cc/TXU4-YES6>].

64. See *Careers & Jobs: Computers & Technology*, <http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/computers-and-technology.html> [<https://perma.cc/7RSQ-TG92>].

65. Kenneth Anderson, *Comparing the Strategic and Legal Features of Cyberwar, Drone Warfare, and Autonomous Weapon Systems*, HOOVER INST.: THE BRIEFING—PERSPECTIVES ON NAT’L SECURITY AND LAW (Feb. 27, 2015), <https://www.hoover.org/research/comparing-strategic-and-legal-features-cyberwar-drone-warfare-and-autonomous-weapon-systems> [<https://perma.cc/XP6X-YW4G>].

66. Terri Naylor, *Career Trends for the Deaf*, LIFE PRINT (July 28, 2011), <http://www.lifeprint.com/asl101/topics/career-trends-for-the-deaf.htm> [<https://perma.cc/YTT9-6FGG>].

B. Possession of the faculty of hearing is but one aspect of a soldier's overall ability to serve in the armed forces

The concept of the undifferentiated soldier is a fallacy. The idea is based on the standardization of qualities that are easy to assess.⁶⁷ For example, can one carry a heavy knapsack loaded with weapons and food for several miles? Does one have 20/20 vision with glasses? Does one have tactile feeling in the hands? But just as important are those qualities that are more difficult to assess: social attributes, courage, compassion, empathy, and morality. The difficulty in measuring these qualities does not stop the military from relying on complex and ultimately vague forms of assessment.⁶⁸ The way a person adapts to his or her deafness can be assessed when evaluating a candidate for the armed forces.

Deaf people come with varying degrees of hearing loss ranging from mildly hard of hearing to profoundly deaf.⁶⁹ Even some of those labeled profoundly deaf manage to acquire excellent writing and speech skills, including lip-reading.⁷⁰ Some persons with hearing loss are able to use the telephone, while others use a video relay service that allows them to communicate with hearing people.⁷¹ Some use a traditional hearing aid, while others have a cochlear implant.⁷² Some come with engineering skills, while others come trained in mathematics, science, or

67. See generally Instruction No. 6130.03, *supra* note 5, at 1, 10-50.

68. THE ARMY PROFESSION, ARMY DOCTRINE REFERENCE PUB., ch. 5 (2015), <http://data.cape.army.mil/web/repository/doctrine/adrp1.pdf> [<https://perma.cc/BWS9-Z9YT>].

69. See *Degree of Hearing Loss*, *supra* note 1.

70. Blaine Goss, *Hearing from the Deaf Culture*, 12 INTERCULTURAL COMM'N STUD. 1, 5 (2003).

71. Title IV of the Americans with Disabilities Act of 1990, 47 U.S.C. § 225 (2012), established a nationwide video relay service whereby people can communicate with each other using a sign language interpreter on screen. A deaf caller has a videophone on his or her desk and can call any number in the world (assuming the recipient of the call can speak English). See *Video Relay Services*, FED. COMM. COMM'N, <https://www.fcc.gov/consumers/guides/video-relay-services> [<https://perma.cc/Y2C6-L2JR>]. A sign language interpreter appears on the deaf caller's screen, places the call to a hearing person, and facilitates the call. *Id.* A hearing person can call a deaf person's videophone number, and the process is reversed. *Id.*

72. *Hearing*, DEAF IS: TECHNOLOGY, <http://www.deafis.org/technology/hearing.php> [<https://perma.cc/BE9T-T7WJ>].

technology.⁷³ A striking range of communication ability exists within this community.⁷⁴ Changes in technology and advanced educational opportunities have enabled more and more young deaf adults to master the skills offered in a training program like the military.⁷⁵ Deaf people have succeeded in law, medicine, teaching, administration and the arts.⁷⁶ They have done so because they have had access to improved educational opportunities and programs not available in the past, and because technological adaptations for communication have enabled deaf people to communicate effectively with hearing people.⁷⁷ Thus, the idea that a candidate for military service must have hearing in order to become a soldier or officer holds less validity. An individualized approach to vetting deaf military applicants would not only open the doors of the military to willing and capable patriotic citizens, but would also lead to more effective use of resources and skill-sets.

Diverging specializations, evolving options for military service, and advances in technology call for a redefinition of a soldier's essential skills. What is important is the end result—communicating, whether by texting, using video relay or an interpreter, with other soldiers or officers up and down the chain of command, and using his or her findings and knowledge to serve effectively. Appropriate accommodations allow a qualified deaf candidate to compete along with his or her hearing peers where technologies like captioning, videophones, and text messaging can compensate for hearing loss. It is entirely possible a well-trained, highly qualified deaf soldier armed with these technologies can meet the defense needs of the country.⁷⁸ Using a system that prohibits these deaf candidates from contributing their talents results in the military turning away people who can

73. Carrie Lou Garberoglio et al, *Deaf People and Employment in the United States: 2016*, at 6, 8, NAT. DEAF CTR. ON POSTSECONDARY OUTCOMES (2016), https://www.nationaldeafcenter.org/sites/default/files/resources/Deaf%20Employment%20Report_final.pdf [https://perma.cc/6Q2W-3AS8].

74. *Communication, DEAF IS: TECHNOLOGY*, <http://www.deafis.org/technology/communication.php> [https://perma.cc/Y6FL-4SKF].

75. See Garberoglio et al, *supra* note 73.

76. See *id.*

77. See *Communication*, *supra* note 74; Valerie Henderson Summet, *Facilitating Communication for Deaf Individuals with Mobile Technologies* 13-18 (unpublished Ph. D thesis, Ga. Inst. Tech., 2010); Garberoglio et al, *supra* note 73.

78. See *supra* notes 56-66.

add value.⁷⁹ Thus, the military should eliminate its “undifferentiated soldier” model and instead use admission criteria that analyze the deaf individual’s capabilities and whether he or she is fit for service as a soldier or as an officer.

Because much of what happens in the military involves communication, the Pentagon understandably wonders about the ability of deaf candidates to hear commands and to communicate with other soldiers while deployed.⁸⁰ They wonder how these candidates can obtain information presented in the classroom and in the field.⁸¹ These are valid questions, but the assumption that the deaf applicant can have no satisfactory answers to these questions should not stand. A case-by-case assessment, not a blanket assumption about a class of people, is the wiser and fairer way to assess a deaf candidate for military service.⁸²

For instance, a candidate who is not comfortable making split-second decisions may not want to enter combat. “[L]ess tangible handicaps such as personality traits, may be just as limiting as an obvious physical handicap.”⁸³ So instead of defining “an undifferentiated soldier” as someone who can hear, we could define it as someone who can demonstrate the ability to communicate, with or without accommodations.⁸⁴ In other words, the military should broaden its definition of what it means to “hear”—that is, it should think in terms of a soldier’s ability to

79. As President Irving King Jordan of Gallaudet University once said, “Deaf people can do anything hearing people can, except hear . . .” See *Irving King Jordan*, DEAF IS: CULTURE—CELEBRITIES, <http://www.deafis.org/culture/celebrities/jordan.php> [https://perma.cc/U5XC-5AY8]; Garberoglio et al, *supra* note 73.

80. See Instruction No. 6130.03, *supra* note 5, at 14-15, ¶¶ 6-7.

81. See *id.* at 1, 14-15, ¶¶ 6-7.

82. The failure to make an individualized assessment offends disability discrimination norms—the exclusion is made solely on the basis of disability, and not in the light of whether essential elements of the job or position can be made with or without accommodations. See, e.g., Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012); A/RES/61/106, Convention on the Rights of Persons with Disabilities and Optional Protocol (Dec. 13, 2006), <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [https://perma.cc/92Z7-XSQR] [hereinafter CRPD]. At a minimum, the military ought to engage in this type of particularized assessment, rather than an outright exclusion of deaf persons as uniformed soldiers.

83. David W. Hartman & Cheryl W. Hartman, *Disabled Students and Medical School Admissions*, 62 ARCHIVES PHYSICAL MED. & REHABILITATION 90, 90 (1981).

84. See *id.* at 90-91 (describing a possible alternative to the “undifferentiated physician” rule).

seek, receive and digest information, aided where necessary by reasonable accommodations.

C. By enabling enlisted soldiers disabled by war to remain service members, the military belies the notion that disability is an automatic bar to service

Accommodating soldiers disabled in war supports the idea that deaf candidates can also be accommodated. Service members wounded in combat or combat-related operations can, with the help of medical care and sufficient time to heal, return to service.⁸⁵ Conflicts such as the Korean, Vietnam, Iraq, and Afghanistan wars greatly increased the number of soldiers with permanent disabilities.⁸⁶ In Iraq alone, the number of injured soldiers is believed to be roughly half a million people over a period of nine years in the country.⁸⁷ The difference today is that the military is incorporating new technologies to rehabilitate many of these wounded soldiers so that they can return to service.⁸⁸ The number of soldiers awaiting decision on their ability to serve or receive a medical discharge is said to be roughly 20,000, mostly due to a paucity of medical personnel and an outdated disability rating system.⁸⁹ As newer technologies in rehabilitation emerge, and the standards established in both world wars remain constant for rehabilitating soldiers, it is clear that those who are injured or disabled will be able to return to the armed services with greater frequency.⁹⁰

For those who experience a long-lasting or permanent disability, the Department of Defense and the Department of

85. See Eric Elster et al., *The Laboratory of War: How Military Trauma Care Advances are Benefiting Soldiers and Civilians*, Health Affairs (Dec. 18, 2013), <https://www.healthaffairs.org/doi/10.1377/hblog20131218.035947/full/> (last visited May 16, 2018).

86. U.S. Dep't of Veterans Affairs, *America's Wars Fact Sheet* (May 2017) https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf [<https://perma.cc/VXY3-2NRW>].

87. Dan Froomkin, *How Many U.S. Soldiers Were Wounded in Iraq? Guess Again.*, HUFFINGTON POST (Dec. 30, 2011), http://www.huffingtonpost.com/dan-froomkin/iraq-soldiers-wounded_b_1176276.html [<https://perma.cc/E2D7-A4Q3>].

88. Eric Elster et al., *supra* note 85.

89. See Gregg Zoroya, *Army is Behind in Granting Medical Retirements to 20,000*, USA TODAY (Sept. 29, 2011), <http://www.usatoday.com/news/military/story/2011-09-28/Army-medical-retirements-delays/50594168/1> [<https://perma.cc/87YV-MLVU>].

90. Elster et al., *supra* note 85.

Veterans Affairs have established the Integrated Disability Evaluation System (“IDES”) to evaluate a wounded soldier’s disability in order to determine his or her fitness for continued service in the military.⁹¹ If a wounded or injured soldier is diagnosed with a medical condition that does not appear to meet medical retention standards, a board of physicians makes an individualized recommendation as to whether the soldier’s injury or wound will impede his or her ability to continue service in his or her office, grade, or rank.⁹² Another board then reviews the recommendation and determines whether the soldier is fit for continued military service.⁹³

91. See *Integrated Disability Evaluation System (IDES)*, U.S. DEP’T OF DEF.: WARRIOR CARE, [http:// warriorcare. dodlive. mil/ disability-evaluation/ integrateddes/](http://warriorcare.dodlive.mil/disability-evaluation/integrateddes/) [<https://perma.cc/LX3L-SMX4>].

92. This board is known as the Medical Evaluation Board (“MEB”). *Id.* The MEB, an informal board comprised of at least two doctors who evaluate the soldier’s medical history and injury, makes its recommendation to a Physical Evaluation Board (“PEB”), which reviews all MEB documentation to formally determine if the soldier is fit for continued military service. *Id.* If determined unfit for continued military service, a soldier who receives a disability rating of 30 percent or greater is placed either on the Temporary Disability Retirement List or the Permanent Disability Retired List. See *id.* If the soldier cannot serve, the IDES gives him or her a VA disability rating before discharge from service, and this informs the service member of the amount of compensation and benefits he or she will receive from the VA. *Id.* In November 2007, a pilot program of the IDES was established at three military treatment facilities, and it sought to “simplif[y] the disability evaluation process by eliminating duplicate disability examinations and ratings, and placing VA counselors in [these facilities] to ensure a smooth transition to Veteran status.” *Integrated Disability Evaluation System*, HEALTH.MIL, [https://health.mil/ Military-Health-Topics/ Conditions-and-Treatments/ Physical-Disability/ Disability-Evaluation/ Integrated-Evaluation-System](https://health.mil/Military-Health-Topics/Conditions-and-Treatments/Physical-Disability/Disability-Evaluation/Integrated-Evaluation-System) [<https://perma.cc/MNS3-TYBQ>]. The pilot program was expanded to 27 locations, and based on surveys demonstrating greater satisfaction from service members, the IDES will be available to all military personnel. *Id.*

93. This board is the PEB. See *Integrated Disability Evaluation System (IDES)*, *supra* note 91. In the Army, the Army’s Integrated Disability Evaluation System governs both the MEB and the PEB. See *ARMY Integrated Disability Evaluation System (IDES)*, U.S. ARMY, [https:// www.army.mil/ e2/ rv5_downloads/features /readyandresilient/ ARMY_IDES.pdf](https://www.army.mil/e2/rv5_downloads/features/readyandresilient/ARMY_IDES.pdf) [<https://perma.cc/9MNV-5LVQ>]. All service members undergoing the IDES process have a team of subject-matter experts—the chain of command, doctors, case management specialists, care coordinators, and legal counsel—supporting them throughout the process. See *taniameireles2, Wounded Warriors have a Team Working for Them While Going Through IDES*, U.S. DEP’T OF DEF.: WARRIOR CARE (May 22, 2012), [http:// warriorcare.dodlive.mil/ 2012/ 05/ 22/wounded-warriors-have-a-team-working-for-them-while-going-through-ides/](http://warriorcare.dodlive.mil/2012/05/22/wounded-warriors-have-a-team-working-for-them-while-going-through-ides/) [<https://perma.cc/AWY4-GTG4>]. Each branch of the military also has a “wounded warrior” program to assist its members. *Id.*; see, e.g., *Operation Warfighter*, U.S. DEP’T OF DEF.: WARRIOR CARE, [http:// warriorcare. dodlive. mil/ carecoordination/ operation- warfighter/](http://warriorcare.dodlive.mil/carecoordination/operation-warfighter/) [<https://perma.cc/SZ2E-V78N>] (describing Operation Warfighter, “a Department of Defense internship program that matches qualified wounded [soldiers] with non-funded federal internships in order for them to gain valuable

These case-by-case inquiries are quite unlike the absolute bar to admission of deaf individuals, even though the conditions that may trigger these reviews appear more serious than deafness.⁹⁴ For example, with respect to a soldier's ears, the conditions that may cause a referral include:

Infections of the external auditory canal when chronic and severe, resulting in thickening and excoriation of the canal or chronic secondary infection requiring *frequent and prolonged medical treatment and hospitalization*[;] . . . Malfunction of the acoustic nerve[;] . . . Mastoiditis, chronic, with constant drainage from the mastoid cavity, requiring *frequent and prolonged medical care*[;] . . . Mastoiditis, chronic, following mastoidectomy, with constant drainage from the mastoid cavity, *requiring frequent and prolonged medical care or hospitalization*[;] . . . Ménière's syndrome or any peripheral imbalance, syndrome or labyrinthine disorder with recurrent attacks of sufficient frequency and severity *as to interfere with the satisfactory performance of duty or requiring frequent or prolonged medical care or hospitalization*[;] . . . Otitis media, moderate, chronic, suppurative, resistant to treatment, and necessitating *frequent and prolonged medical care or hospitalization*.⁹⁵

All of these ear conditions have the potential to result in “frequent and prolonged medical care or hospitalization,” something that is not necessarily present when a deaf candidate for military service asks to be considered for admission.⁹⁶ A person's deafness generally does not require that level of attention.⁹⁷

As Cadet Keith Nolan demonstrated, his deafness was no bar to an excellent performance in his ROTC program.⁹⁸ Moreover, some deaf people who wear a hearing aid or have a cochlear implant would be able to perform their military duties with little

work experience during their recovery and rehabilitation”). The branch programs are, *e.g.*, the Marine Corps Wounded Warrior Regiment, the Air Force Wounded Warrior Program Recovery Care Coordinator, the Navy Safe Harbor Non-medical Care Manager, and the Army Wounded Warrior Program Advocate. *See taniameireles2, supra* note 93.

94. *See* Army Regulation 40-501, *supra* note 6, at 23, ¶¶ 3-9.

95. *See id.* (emphasis added).

96. *Id.*

97. *Id.*

98. *See supra* notes 13-15 and accompanying text.

or no accommodation.⁹⁹ If an enlisted soldier or commissioned officer can perform his or her military duties with a hearing aid, the regulations will allow reintegration in the service, but a deaf candidate with a functioning hearing aid is barred from joining the military. Such a policy makes little theoretical or practical sense.

IV. CONCLUSION

“Officer Casey Doane, who grew up in a deaf family and is currently serving as a commissioned Officer in the Air Force, believes hearing impaired Americans are capable of serving” in today’s military:

It is from my direct experience that I can say it is entirely possible for deaf or hard of hearing Americans to serve in the Air Force Obviously, certain accommodations and limitations would have to be made but ultimately no more than for other individuals with unique circumstances who are already serving. Growing up in a deaf family . . . I was able to see the determination and perseverance that is necessary to serve as a leader in the Air Force. In fact, I credit my own determination to those experiences.¹⁰⁰

The military’s refusal to admit Keith Nolan as either an enlisted soldier or a commissioned officer because he is deaf is symptomatic of a larger problem: social assumptions demeaning to deafness that are rooted in language and attitudes.¹⁰¹ This stigma serves to reinforce discrimination against deaf people, something that is outdated and justifiably open to criticism. For generations, deaf people have been referred to as “deaf and dumb” or “deaf mute,” terms now inaccurate and unacceptable to the deaf community.¹⁰² Antiquated attitudes about deafness

99. *See supra* notes 70-77 and accompanying text.

100. Press Release, Rep. Mark Takano Introduces the Keith Nolan Air Force Deaf Demonstration Act (Mar. 26, 2015), <http://takano.house.gov/newsroom/press-releases/rep-mark-takano-introduces-the-keith-nolan-air-force-deaf-demonstration-act> [<https://perma.cc/Q3ZZ-6Q6R>].

101. *See supra* notes 46-56 and accompanying text.

102. *Community and Culture—Frequently Asked Questions*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> [<https://perma.cc/7K35-EWMM>].

regarded deaf people as incompetent or incapable.¹⁰³ But now these marginalizing and patronizing assumptions about deaf people are changing.¹⁰⁴ Thanks to federal and state education laws since the 1970s, several generations of deaf people have acquired a first-rate education enabling them to graduate from college, and to go on to receive masters and doctoral degrees in various disciplines and professions.¹⁰⁵ Many congenitally deaf people have managed to break the code of English, that is, to read and write fluently in the English language without ever having heard it.¹⁰⁶ Consequently there are well-educated, intelligent, articulate, hardworking deaf Americans who have the ability, knowledge, and skills to perform the essential functions of various positions in the United States Armed Forces.¹⁰⁷

The paradigm of “the undifferentiated soldier”—requiring each and every soldier to be combat-ready—does not hold water in the contemporary context where many positions in the armed forces do not involve combat. Technological advances in warfare, including cyber warfare, open possibilities for deaf soldiers. The Keith Nolan case provides the United States military an opportunity to adopt a new paradigm that assesses, on a case-by-case basis, the qualifications of a candidate for military service even though the candidate has a hearing loss. The assumption that

103. See Evelyn Hunter, *Deaf-Mute, Deaf and Dumb, Hard of Hearing, Hearing Impaired, Disabled, Handicapped, Hearing Loss, Deaf*, SIGN LANGUAGE COMPANY (July 17, 2013), <http://signlanguageco.com/deaf-mute-deaf-and-dumb-hard-of-hearing-hearing-impaired-disabled-handicapped-hearing-loss-deaf/> [https://perma.cc/6DE5-PX6T].

104. See *id.*

105. See 20 U.S.C. § 1400(d) (2012); N.Y. EDUC. LAW § 3305 (McKinney 2018); Leslie Seid Margolis, *Education of Children with Disabilities: An Evolving ‘Idea,’* in 4 U.S. SOCIETY & VALUES: TOWARD INCLUSION—MEETING THE NEEDS OF PERSONS WITH DISABILITIES IN THE UNITED STATES 36, 36-39 (1999). For generations of deaf people prior to the passage of the IDEA’s predecessor, the Education of All Handicapped Children Act, acquiring an education that enabled a deaf person to hold down a good job was a rare occurrence. See Margolis, *supra* note 105.

106. Although children appear to master their native language with little effort, learning a language is a complex task, and it is more so for deaf children who do not have the ability to hear speech. See Susan Goldin-Meadow & Rachel I. Mayberry, *How Do Profoundly Deaf Children Learn to Read?*, 16 LEARNING DISABILITIES RES. & PRAC. 222, 222 (2001). Deaf children who master English without having heard it have achieved an extraordinary task. See *id.*

107. The concept of “essential functions,” rooted in disability anti-discrimination law, requires a person with a disability to perform “those functions that bear more than a marginal relationship to the job at issue.” *Guneratne v. St. Mary’s Hosp.*, 943 F. Supp. 771, 774 (S.D. Tex. 1996), *aff’d*, 119 F.3d 3 (5th Cir. 1997)

deaf candidates as a class are disqualified on the basis of an immutable characteristic that varies enormously from person to person should fall by the wayside.¹⁰⁸ After all, there are deaf lawyers, scientists, doctors, writers, teachers, mathematicians and engineers who, by dint of their expertise in these fields, belie the notion that deaf people cannot qualify for military service.¹⁰⁹ In other words, it is time for a case-by-case assessment of each deaf individual who meets all the requirements of military service, with or without reasonable accommodations.¹¹⁰

It is time to presume competence instead of assuming incompetence.¹¹¹

108. As noted, hearing loss ranges from mild to profound, and no one deaf person can stand in for the entire deaf community. *See supra* note 69 and accompanying text.

109. *See* James E. Tucker, *Academic Rigor*, ODYSSEY (2014), <https://files.eric.ed.gov/fulltext/EJ1030874.pdf> [<https://perma.cc/2KQ5-XJMQ>].

110. 42 U.S.C. § 12111(9) (2012).

111. Douglas Biklen & Jamie Burke, *Presuming Competence*, 39 EQUITY & EXCELLENCE IN EDUC. 166, 167-68 (2006). As the Convention on the Rights of Persons with Disabilities makes clear, the assumption of incompetence and incapacity is no longer permissible. *See* CRPD, *supra* note 82.