



Maine Human Rights Commission

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Amy M. Sneirson
EXECUTIVE DIRECTOR

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COMMISSION COUNSEL

INVESTIGATOR'S REPORT

MHRC Case No. PA16-0537

November 7, 2018

Gordon Boerner (Farmingdale)

v.

Bureau of Motor Vehicles¹ (Augusta)

I. Summary of Case:

Complainant, who tested with Respondent in an attempt to obtain a Commercial Driver's License ("CDL"), alleged that Respondent discriminated against him due to his disability by failing to provide an American Sign Language ("ASL") interpreter for an exam, which effectively denied him access to the CDL test. Respondent, a state agency tasked with qualifying and licensing drivers, denied discrimination and asserted that federal regulations preclude the use of an interpreter and it could not otherwise provide the exam in ASL. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Respondent discriminated against Complainant due to his disability.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: December 27, 2016.²
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 29, 2016.
- 3) Respondent is a public accommodation and public entity, and subject to the Maine Human Rights Act ("MHRA").
- 4) Complainant is not represented by counsel. Respondent is represented by Kelly L. Morrell, Esq.

¹ Complainant named Respondent as "Bureau of Motor Vehicles"; Respondent provided that its legal name is State of Maine, Department of Secretary of State, Bureau of Motor Vehicles. As Complainant did not amend his complaint, the name he used has been retained.

² Complainant also alleged that Respondent denied his requests for reasonable modifications on January 11, 2016 and February 12, 2016. However, the Maine Human Rights Act provides that discrimination complaints must be filed with the Commission "not more than 300 days after the alleged act of unlawful discrimination." See 5 Maine Revised Statutes ("M.R.S.") § 4611. Therefore, these two alleged actions are untimely.

III. Development of Facts:

1) Complainant provided the following in support of his claims:

Complainant is [REDACTED] and ASL is his first language. He took a CDL course and later tested at the Bureau of Motor Vehicles (“BMV”) in order to obtain a CDL. Complainant requested BMV provide him an ASL interpreter for the test, but BMV would not allow it.³ Complainant passed all of the written portions of the test except for the air-brake section on his first try. Complainant then retake the air-brake section and again did not pass. The questions in the air-brake section had longer sentences and more complex grammar. On December 27, 2017, Complainant emailed BMV and again requested to retake the air-brake section with an ASL interpreter. BMV replied that interpreters were prohibited for CDL testing.

2) Respondent provided the following in support of its position:

Respondent denied Complainant’s request for an ASL interpreter because federal regulations do not allow it. Respondent’s contracted testing vendor does not provide an ASL version of the CDL test because of the cost of implementation. Respondent was unaware of any alternative modification.

3) The Investigator made the following findings of fact:

- a) Complainant is [REDACTED].⁴ ASL is his first language; English is his second. Complainant asserted that he can understand highway traffic signs and signals in English but has difficulty with long or complicated sentences.
- b) Complainant completed a CDL course in January 2016; an ASL interpreter was present during the course.
- c) Complainant scheduled the CDL licensing test⁵ with BMV for January 11, 2016 and requested an ASL interpreter. BMV provided an ASL interpreter for the test instructions but would not allow the interpreter to translate the test questions. Complainant passed three of the four sections of the knowledge test. He did not pass the air-brake section.
- d) Complainant scheduled a retest of the air-brake section for February 12, 2016 and again requested an ASL interpreter. BMV provided the ASL interpreter again for the test instructions but not for translating test questions. Complainant did not pass the retest. He asserted that the air-brake section had longer sentences and more complex grammar causing him more difficulty understanding the questions in that section.
- e) On December 27, 2016, Complainant emailed BMV requesting another retest with an ASL interpreter to “facilitate communication during the test.” BMV responded, “Unfortunately interpreters are prohibited for CDL testing, per federal regulation [49 Code of Federal Regulations (“CFR”)] § 383.133(b)(3).

³ Respondent provided an ASL interpreter for the instructions of the test in January and February but would not allow the interpreter to translate the test questions.

⁴ [REDACTED] is a disability without regard to severity under the MHRA. 5 M.R.S. § 4553-A.

⁵ The CDL test is comprised of two parts; a written test referred to as a “knowledge test” and a driving test referred to as a “skills test.” Applicants are required to pass the knowledge test before scheduling the skills test.

Should you have questions/concerns regarding this regulation, they should be directed toward Federal Motor Carrier Safety Administration”. (Exhibit A) Complainant did not retake the test. Complainant did not request an alternative modification nor did BMV suggest one.

- f) CDL “knowledge tests may be administered in written form, verbally, or in automated format and can be administered in a foreign language, provided no interpreter is used in administering the test.” 49 CFR § 383.133(b)(3).⁶
- g) BMV contracts with a testing vendor (“Contractor”) to provide its tests. BMV purchased the CDL test in an automated format for English, French, Russian, Spanish, and Serbo-Croatian.
- h) A brochure on Contractor’s website states that it is “capable of implementing virtually every written language” and “capable of implementing American Sign Language in either standardized hand fonts or through the use of video playback signing.” (Exhibit B)
- i) On July 2, 2018, BMV asked Contractor if it offered the CDL knowledge tests in ASL format. Contractor’s Sales & Account Manager replied that she did not believe it did; they have had inquiries, but the costs were “quite high.” She requested that Contractor’s “Pool Specialist” respond. He stated that Contractor does not currently offer the CDL tests in ASL and that the costs would be “very high.” He further stated that Contractor only had “a couple of customers currently using ASL, with one using it for their motorcycle exam, and another with their general knowledge test.” (Exhibit C)

IV. Analysis:

- 1) The MHRA requires the Commission to “determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA prohibits discrimination on the basis of disability by any public accommodation. Unlawful discrimination includes a “failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities”. 5 M.R.S. § 4592(1)(B). Unlawful discrimination also includes “[a] failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services”. *Id.* at § 4592(1)(C). Auxiliary aids include “[q]ualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed captioning, decoders, open and closed captioning, telecommunications devices for deaf persons (TDD’s), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments”. Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.17(B).
- 3) “Any public or private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall

⁶ The knowledge test portion of the regulation is silent as to why interpreters are not allowed. However, the skills test portion states in relevant part, “Interpreters are prohibited during the administration of skills tests. Applicants must be able to understand and respond to verbal commands and instructions in English by a skills test examiner. Neither the applicant nor the examiner may communicate in a language other than English during the skills test.” 49 CFR § 383.133(c)(5). As the knowledge test is allowed in foreign languages, it may be inferred that the reasoning for the skills test’s prohibition on interpreters does not apply to the knowledge test.

offer such examinations or courses in a place and manner accessible to persons with physical or mental disabilities or offer alternative accessible arrangements for such individuals.” Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.23(A). “Any public or private entity offering an examination ... must assure that the [e]xamination is selected and administered so as to best ensure that when the examination is administered to an individual with a physical or mental disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).” Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.23(B)(1)(i).

- 4) To establish a denial of reasonable modification, including the denial of an auxiliary aid, by a public accommodation, Complainant must show that:
- (1) He comes within the protections of the MHRA as a person with a disability;
 - (2) Respondent operates a public accommodation under the MHRA;
 - (3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant’s disability, results in Complainant’s inability to access Respondent’s goods, services, facilities, privileges, advantages or accommodations;
 - (4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded him access to the desired goods, services, facilities, privileges, advantages or accommodations;
 - (5) The requested modification—or a modification like it—was necessary to afford that access; and
 - (6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

See 5 M.R.S. § 4592(1); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003). In proving that a modification is “reasonable,” Complainant must show that, at least on the face of things, it is feasible for the public accommodation under the circumstances. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (employment case). Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.

- 5) The Commission’s regulations further explain that “[i]f provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, service, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with physical or mental disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.” Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.17(G). Notably, if the public accommodation is also a public entity (as is the case here), it cannot claim that the provision of an auxiliary aid is an undue burden. See 5 M.R.S. §§ 4592(1)(B)&(C) (providing for undue burden defense only when the public accommodation is a private entity).
- 6) The process for identifying alternative aids and services is parallel to that for identifying an alternative accommodation in the employment context. Accordingly, failure by the public accommodation to engage with the individual requesting an auxiliary aid or modification to identify an alternative may be a significant factor when considering whether the public accommodation failed to provide a reasonable accommodation. See *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 515 (1st Cir. 1996). In determining responsibility for a breakdown in the interactive process, courts consider good faith and reasonable efforts in light of all the circumstances. *Goonan v. Federal Reserve Bank of N.Y.*, 12-CV-3859, Opinion and Order (SDNY 2014); citing *Beck v. University of Wisc. Bd. Of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996). Liability requires a

“finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation”. *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012); *see also Kvorjak v. State of Maine*, 259 F.3d 48, 52 (1st Cir. 2001).

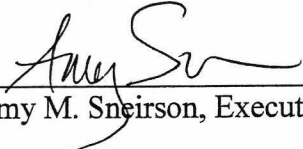
- 7) Complainant has established that Respondent discriminated against him on the basis of disability by denying him a reasonable modification/auxiliary aid, which resulted in his inability to access its CDL testing services, with reasoning as follows:
- a) Complainant established that he is disabled, and he requested a reasonable modification of Respondent’s policy of denying the use of an interpreter during its CDL examinations. He further established that the modification was necessary to allow him full and fair access to the CDL licensing procedure.
 - b) Respondent took the position that Complainant’s request was unreasonable, because providing an ASL interpreter would violate applicable federal regulations, which specifically prohibit the use of interpreters during the test.⁷ While this position may appear reasonable at first look, ultimately this reasoning is flawed.
 - c) First, Respondent took no further steps to try to identify an alternate modification or auxiliary aid it could provide that would allow Complainant to access the CDL examination. The MHRA places an affirmative burden on public accommodations to provide an alternative auxiliary aid “if one exists”. Here, Respondent did not explore whether one existed at all until July 2018, well after this complaint was filed. Upon learning that its testing vendor provided automated ASL testing to at least a couple of its other clients, it opted not to pursue this option due to unspecified “high” costs.
 - d) Most telling, though, is the position taken by the federal agency which promulgated the rule prohibiting interpreters for CDL testing. This agency (“Agency”) began providing waivers of its hearing requirements to D/deaf and hard-of-hearing drivers in February 2013. On December 29, 2017, it published responses to the most recent public comments on its continued practice of allowing such waivers. With regard to the prohibition on interpreters, Agency noted that its testing and training organizations were bound to follow the ADA, and pointed out several possible options for providing the test to applicants without use of an interpreter, including “[u]se of a skills test examiner who is capable of communicating via American Sign Language”. *Fed. Reg.*, Vol. 82, No. 249 at 61811. Agency went on to state that “[t]he question of reasonable accommodation for a deaf or hard of hearing applicant is highly fact specific, for both the applicant and the examining entity.” *Id.* at 61812. Notably, this guidance from Agency was published several months before Respondent contacted its testing vendor about producing an automated ASL test.
 - e) Because Respondent made no effort to provide an alternative auxiliary aid or reasonable modification, and because the record shows that it would have been possible to identify and provide a modification that would have allowed Complainant full access to the CDL test, it is more likely than not that Complainant can establish his claim in court.
- 8) Discrimination on the basis of disability is found.

⁷ Respondent also posited that offering the test in ASL in some format other than via simultaneous interpretation, would be an undue burden because it would be costly. Respondent is a public entity, and accordingly, as noted above, it cannot refuse to provide a reasonable modification or an auxiliary aid because doing so would be an undue burden. Even if this defense were available, Respondent did not establish an undue burden, since it offered only its bare assertion that its test provider said that the cost for generating an ASL test would be “very high”.


V. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Bureau of Motor Vehicles discriminated against Gordon Boerner based on his disability by denying him a reasonable modification/auxiliary aid necessary to allow him to fully access its services; and
- 2) The complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).



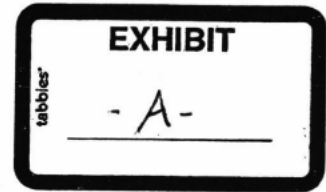
Amy M. Spencer, Executive Director



Joseph H. Hensley, Investigator

[REDACTED]

From: Gordon Boerner [REDACTED]@gmail.com>
Sent: Tuesday, December 27, 2016 4:26 PM
To: [REDACTED]
Subject: Fwd: CDL Request
Attachments: image001.png; CDL App.pdf



----- Forwarded message -----

From: [REDACTED] <[REDACTED]>
Date: Tue, Dec 27, 2016 at 4:15 PM
Subject: CDL Request
To: [REDACTED]

Good Afternoon Gordon,

Your inquiry has been forwarded to me for review.

According to our records, your class B Commercial Learner's Permit (CLP) expired on July 9, 2016. In order to obtain a new CLP, a new application and \$35 fee are required. I have attached a blank application to this e-mail for convenience.

Unfortunately, interpreters are prohibited for CDL testing, per federal regulation §383.133(b)(3). Should you have questions/concerns regarding this regulation, they should be directed toward Federal Motor Carrier Safety Administration

(FMCSA). They can be reached at (207) 622-8358.

Thank you,

■■■■■■■■■■

Customer Rep. Associate II - Supervisor

CDL Exams/Compliance

Bureau of Motor Vehicles

(207) 624-9000 ext. 52122

From: Gordon Boerner [mailto: [REDACTED]@gmail.com]

Sent: Tuesday, December 27, 2016 9:53 AM

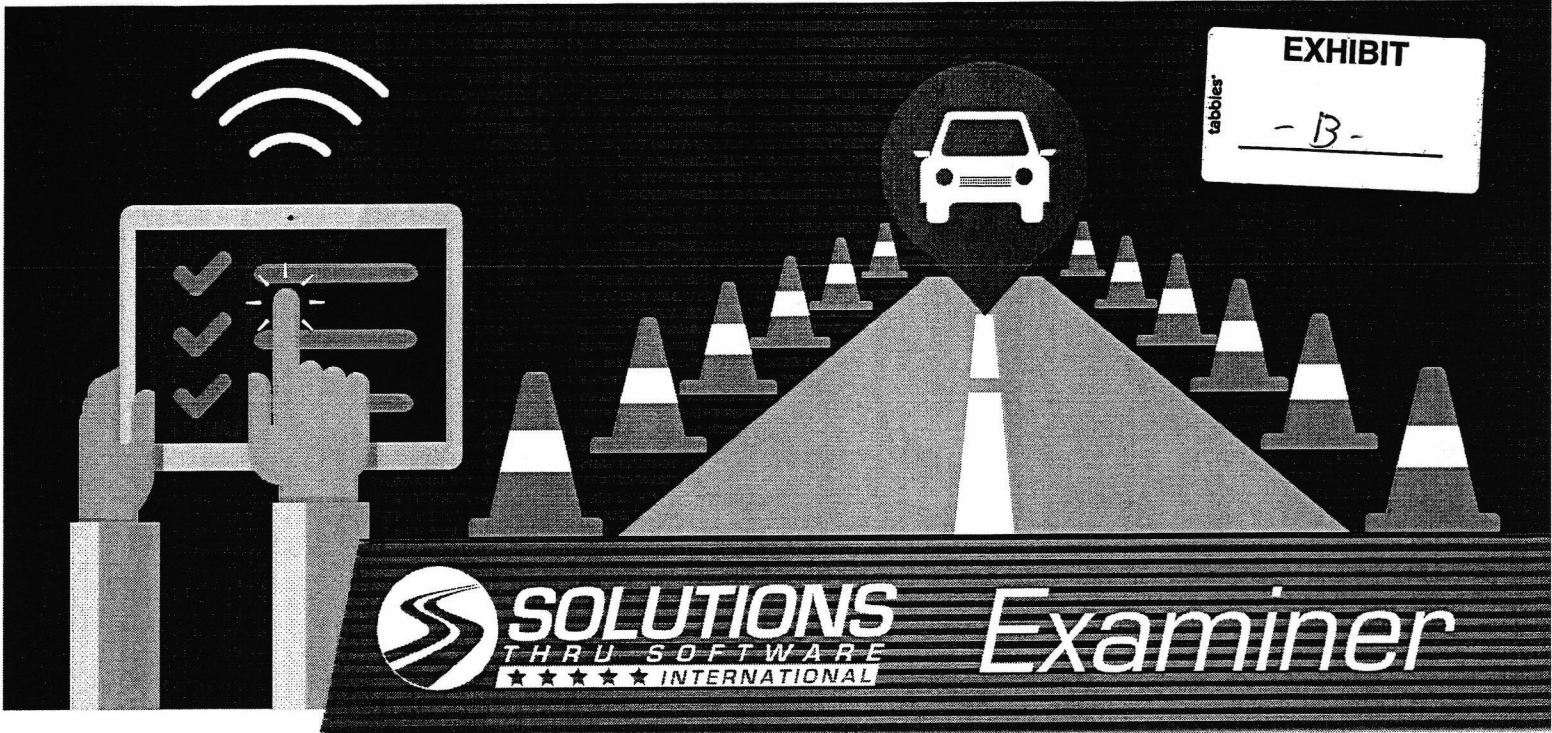
To: BMV, MCSAdmin

Subject: Cdl request

Hi

My name is Gordon Boerner. I want to re-take the AirBrake component of CDL-B test.

I require ASL interpreter to facilitate communication during the test.



Solutions Thru Software is your trusted partner in learning, productivity, and testing. Our learning, productivity, and testing systems provide integrity in examinations, lower costs, and increase office efficiency.

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With *Examiner's* quick pass and quick fail capabilities, your clients have immediate feedback as they progress through the exam. They answer as many questions as you determine necessary to indicate a pass, and they're done. Clients also know as soon as they've failed and with computer based grading, there is far less debate about accuracy.

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Vermont Dept. of Motor Vehicles

Examiner

features

Solutions Thru Software's *Examiner* system is an extremely feature-rich product. Exams are fully randomized. Applicants sitting at adjacent kiosks will find themselves completing different exams with questions and answers in different orders. System capabilities include:

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Solutions Thru Software has discovered that no two jurisdictions implement the *Examiner* system in exactly the same manner. Our clients have different networks, security concerns, databases, business models, language needs and financial resources. STS works with you to ensure your operational requirements are met while remaining within budget.

Languages

The *Examiner* system is capable of implementing virtually every written language on record. To date STS has implemented over 35 languages. It can be noted that this includes the pictorial font languages of Chinese and Japanese, as well as the very difficult to implement right to left languages of Arabic and Farsi. The *Examiner* system is also capable of implementing American Sign Language in either standardized hand fonts or through the use of video playback signing.

Multiple Platforms

- Distributed Software Solutions
- Web (browser-based) Solutions
- Hybrid Solutions

Test Methods

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- Oral (all languages)
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- Full Motion Video
- Multiple Languages (all languages, including: pictorial fonts, right to left and American Sign Language)
- Oral Exams (all languages)

Efficiency Modes

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- Quick Pass
- Quick Fail

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- Sound Formats
- Video Formats
- Database Interfaces
- Network Interfaces

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- Bar Code Readers
- Magnetic Stripe Readers
- High Quality and High Capacity Printers
- Digital Imaging Systems
- Biometric Readers
- Scheduling Systems
- Zip Code Verification Systems
- Queuing

Reporting

- Full reporting features are included
- Sophisticated Automatic Question Pool Validation & Analysis
- Office and Equipment Efficiency Reporting
- Graphic and Color-coded Reports for Quick Interpretation
- Ad-hoc Reporting

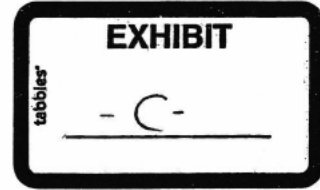
Administration

- Active Directory Integration
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- System Security Policy and Password Control
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- Image Creation or Addition
- Sound File Recording
- Distribution of New Question Pools or Software Releases

Open Control Interface

Solutions Thru Software's Open Control Interface (OCI) provides a comprehensive suite, which makes it easy to connect to other systems and interface with other modules and third party software.

Morrell, Kelly L



From: [REDACTED]
Sent: Tuesday, July 03, 2018 12:10 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: ASL

Good morning [REDACTED]

No, we don't currently offer the CDL tests in ASL. We only have a couple of customers currently using ASL, with one using it for their motorcycle exam, and another with their general knowledge test. As [REDACTED] mentioned below, yes the cost to implement ASL for CDL would be very high.

Hope that helps, but please let us know if you have any questions.

Thanks!

[REDACTED]
Solutions Analyst / Help Desk Supervisor

Solutions Thru Software
An Intellectual Technology, Inc. Company

P: 1-877-926-4637 EXT 4111
F: 1-877-526-0155

[REDACTED]
www.solutionsthrusoftware.com

Please be advised that as of June 6, Solutions Thru Software will be combining our Help Desk Support resources with that of Intellectual Technology, Inc. (ITI), our new parent company. This will enhance our help desk intake process and provide extended hours of support, ensuring that issues are tracked immediately and resolved quickly.

The new Help Desk Support hours will be:
Mon – Sat, 8 a.m. to 12 a.m. EST
Sun, 10 a.m. – 8 p.m. EST

Please contact us at 1-866-955-5258 or email itcallcenter@iti4dmv.com for Help Desk assistance. For more information on ITI, please visit: www1.iti4dmv.com

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From: [REDACTED]
Sent: Tuesday, July 03, 2018 10:54 AM
To: [REDACTED]

Cc: [REDACTED]
Subject: RE: ASL

[REDACTED]
Good Morning [REDACTED]

Sorry for the delay in responding to you, it was the Canada Day holiday yesterday. I don't believe we have the CDL knowledge in ASL but I want [REDACTED] our Item Pool Specialist to chime in here, I know we have had inquiries regarding ASL but the costs are quite high.

Stay tuned for [REDACTED] input. Thank you.

[REDACTED]
Driver Testing Solutions
Sales & Account Manager

ph: 1-877-926-4637 EXT 4104
fx: 1-877-526-0155
[REDACTED]
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An Intellectual Technology, Inc. Company

Please be advised that as of June 6, Solutions Thru Software will be combining our Help Desk Support resources with that of Intellectual Technology, Inc. (ITI), our new parent company. This will enhance our help desk intake process and provide extended hours of support, ensuring that issues are tracked immediately and resolved quickly.

The new Help Desk Support hours will be:
Mon – Sat, 8 a.m. to 12 a.m. EST
Sun, 10 a.m. – 8 p.m. EST

Please contact us at 1-866-955-5258 or email iticalcenter@iti4dmv.com for Help Desk assistance. For more information on ITI, please visit: www1.iti4dmv.com

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From: [REDACTED] >
Sent: July-02-18 2:01 PM
To: [REDACTED]
Subject: ASL

[REDACTED]
Does STS offer the CDL knowledge tests in ASL format? We have an ongoing Maine Human rights cases involving a [REDACTED] applicant, thus, my inquiry.