Americans with Disabilities Act (ADA) Requirements Concerning the Provision of Interpreters by Hospitals and Doctors

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Summary

The Americans with Disabilities Act (ADA) is a broad civil rights act prohibiting discrimination against individuals with disabilities. Title III of the Americans with Disabilities Act (ADA) prohibits places of public accommodation, including hospitals and doctors' offices, from discriminating against individuals with disabilities. The Department of Justice (DOJ) promulgated regulations under title III requiring the use of auxiliary aids, unless they would fundamentally alter the nature of the service or result in an undue burden. Auxiliary aids may include qualified interpreters as well as note takers, video remote interpreting (VRI) services, or real-time computer-aided transcription services. The new regulations issued under title III on July 26, 2010, address several issues including the application of rights to effective communication by companions who are individuals with disabilities, the use of video remote interpreting (VRI) services, and when an accompanying adult or child may be used as an interpreter.

Attempting to address the myriad of disabilities and public accommodations, the ADA purposely adopted a flexible standard concerning when its nondiscrimination requirements are met. The law and DOJ regulations, then, do not explicitly state when hospitals or doctors are required to provide interpreter services to patients with disabilities and, as is illustrated by the judicial decisions in the area, this issue is largely fact dependent.

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Introduction

The Americans with Disabilities Act (ADA) is a broad civil rights act prohibiting discrimination against individuals with disabilities.[1] Under title III of the ADA, discrimination against individuals with disabilities in public accommodations, including hospitals and doctor's offices, is prohibited.[2] The Department of Justice (DOJ) promulgated regulations under title III requiring places of public accommodation to provide "auxiliary aids and services" to individuals with disabilities unless they are able to prove such services would be unduly burdensome.[3] Auxiliary aids may include qualified interpreters as well as note takers, video remote interpreting (VRI) services, or real-time computer-aided transcription services.[4] The new regulations issued under title III on July 26, 2010, address several issues including the application of rights to effective communication by companions who are individuals with disabilities, the use of video remote interpreting (VRI) services, and when an accompanying adult or child may be used as an interpreter.

The auxiliary aid requirement articulated by the DOJ interprets the broad nondiscrimination language of the ADA and requires effective communication, but neither the statute nor the regulations explicitly state when doctors or hospitals must provide hearing impaired patients with interpreters. As a result, the answer as to whether doctors or hospitals must provide interpreters for hearing impaired individuals is dependent on the particular circumstances surrounding the patient's case. Judicial decisions give some guidance on when an interpreter must be provided in particular factual situations.

Statutory Language

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[5] Discrimination is further described as including "a failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."[6] Public accommodations are exempted from providing these special provisions when they "can demonstrate that making such modification would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or

[1] 42 U.S.C. §§12101 et seq. For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by (name redacted).

[2] 42 U.S.C. §12182.

[3] 28 C.F.R. §36.303.

[4] 28 C.F.R. §36.303(b).

[5] 42 U.S.C. §12182. Section 504 of the Rehabilitation Act, 29 U.S.C. §794, prohibits discrimination against individuals with disabilities in any program or activity that receives federal financial assistance, and the requirements of the ADA and Section 504 are generally interpreted in the same manner. For a more detailed discussion of Section 504 see CRS Report RL34041, *Section 504 of the Rehabilitation Act of 1973: Prohibiting Discrimination Against Individuals with Disabilities in Programs or Activities Receiving Federal Assistance*, by (name redacted).

[6] 42 U.S.C. §12182.

accommodations."[7] The definition of public accommodation specifically includes the "professional office of a health care professional" and hospitals.[8]

Regulatory Interpretation and Guidance

On July 26, 2010, the 20th anniversary of the passage of the ADA, the Department of Justice (DOJ) issued final rules amending the existing regulations under ADA title II (prohibiting discrimination against individuals with disabilities by state and local governments) and ADA title III (prohibiting discrimination against individuals with disabilities by places of public accommodations).[9] These new regulations contain detailed sections on communications. Like the previous regulations, the new regulations require that public entities and public accommodations furnish appropriate aids and services when necessary to ensure effective communication with an exception regarding fundamental alterations or undue burdens. More specifically, the title III regulations state that public accommodations do not have to provide auxiliary aids if such measures would "fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."[10] In determining whether an action poses an undue burden, the regulations require the consideration of several factors, including the nature and cost of the action, the overall financial resources of the site, the geographic separateness and the administrative or fiscal relationship of the site or sites in question to a parent corporation, the overall financial resources of the parent corporation, and the type of operation or operations of any parent corporation or entity.[11] When a particular auxiliary aid would cause an undue burden, the public accommodation must provide alternative assistance so that the individual can take full advantage of the services and goods offered.[12]

Unlike the previous regulations, the new regulations specifically extend the requirement for effective communication to companions who are individuals with disabilities. DOJ noted in its comments on the new regulations that this was a particularly important issue.

> Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion is necessary in a variety of circumstances. For example, a companion may be authorized to make health care decision on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. A

[7] *Id.*

[8] 42 U.S.C. §12181(7)(F).

[9] http://www.ada.gov/regs2010/ADAregs2010.htm. The following discussion centers on the title III regulations since they are most applicable to hospitals and doctors' offices. For a discussion of the major changes made to both title II and title III regulations see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by (name redacted).

[10] 28 C.F.R. §36.303(a).

[11] 28 C.F.R. §36.104.

[12] 28 C.F.R. §36.303(g).

> companion may be the patient's next-of-kin or health care surrogate with whom the hospital must communicate about the patient's medical condition.[13]

The new regulations also indicate that the type of auxiliary aid or service necessary for effective communication varies depending on the circumstance.[14] The new title III regulations specifically state that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measure to take rests with the public accommodation, provided that the method chosen results in effective communication."[15]

The term "auxiliary aid" is defined to include "qualified interpreters on site or through video remote interpreting (VRI) services, notetakers, real-time computer-aided transcription services, written materials; exchange of written notes ... or other effective methods of making aurally delivered materials available to individuals who are deaf or hard of hearing."[16] The new regulations added video remote services (VRI) as an example of an auxiliary aid that may provide effective communication.[17] The new regulations specifically state that when VRI is used it must provide

- real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video or wireless connection that does not produce lags, choppy, blurry or grainy images or irregular pauses in communications;
- a sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers and the participating individual's face, arms, hands, and fingers; and
- a clear, audible transmission of voices.

In addition, a public accommodation that uses VRI must provide adequate training to users of the technology and other involved individuals.[18]

The new regulations also discuss when a family member or a friend may be used as an interpreter. Generally, a public accommodation is not to rely on an adult who accompanies an individual with a disability to interpret for the individual.[19] However, there are some exceptions including an emergency involving an imminent threat to safety or welfare, and where the individual with a disability specifically requests that the accompanying adult interpret and the accompanying adult agrees.[20] A minor child may not be used to interpret except in an emergency situation.[21]

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[13] 28 C.F.R. §35.160(a)(2)(title II); 28 C.F.R. §36.303 (title III).

[14] 28 C.F.R. §35.160(b)(2)(title II); 28 C.F.R. §36.303(c) (title III).

[15] 28 C.F.R. §36.303(c)(1)(ii).

[16] 28 C.F.R. §36.303(b)(1).

[17] VRI is defined in the regulations as "an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection or wireless connections that delivers high-quality video images…." 28 C.F.R. §36.104.

[18] 28 C.F.R. §36.303(f).

[19] 28 C.F.R. §36.303(c)(2).

[20] 28 C.F.R. §36.303(c)(3).

[21] 28 C.F.R. §36.303(c)(4).

Judicial Interpretation

Effective Communication

As the regulations indicate, there is no absolute requirement that an interpreter be provided in a particular situation. However, in order to comply with the ADA, auxiliary aids must provide effective doctor-patient communication. In *Mayberry v. Van Valtier*, the court held that a deaf Medicare patient was entitled to a trial on her claim that her doctor violated the ADA.[22] In this case, the doctor had communicated with the patient for several years mostly by exchanging notes or using the patient's children as sign interpreters and on one occasion had noted in the patient's file that her back pain was higher than she had originally thought and that this misunderstanding was "probably due to poor communication." The patient, Mrs. Mayberry, requested that the doctor provide an interpreter for a physical examination. The doctor complied but following the examination wrote a letter to the interpreter, with a copy to the patient, stating that she would not be able to use the interpreter's services again and that "I really can't afford to take care of Mrs. Mayberry at all." The doctor characterized the letter as a protest against what was perceived as an unfair law. The court found that the allegations made by the patient were sufficient to reject a motion for summary judgment and ordered the case to proceed to trial. Subsequently, a judgment was rendered in favor of the doctor but there is no record of a written opinion.[23]

In *Aikins v. St. Helena Hospital*, another district court examined arguments concerning effective communication and denied summary judgment to the hospital and doctor.[24] Elaine Aikins, a hearing impaired individual, and the California Association of the Deaf (CAD) alleged that St. Helena Hospital and Dr. James Lies failed to communicate effectively with Mrs. Aikins during her now deceased husband's medical treatment. Instead of an interpreter, the hospital provided Mrs. Aikins with an ineffective finger speller. Allegedly Mrs. Aikins was unable to effectively communicate with Dr. Lies or other hospital staff until her daughter became available to interpret, an argument that was supported by the doctor's mistaken impression concerning how long the patient had been without CPR. Mrs. Aikins and the CAD alleged that Dr. Lies and St. Helena Hospital violated both the ADA and the Rehabilitation Act. Dr. Lies maintained that the Rehabilitation Act was inapplicable and St. Helena asserted that it complied with both the ADA and Rehabilitation Act. Although the ADA claims were dismissed due to lack of standing, the court noted that adequate medical treatment is not a defense to a claim that a defendant failed to provide effective communication under the Rehabilitation Act of 1973.[25] "Mrs. Aikins's claims relate to her exclusion from meaningful participation in the decisions affecting her husband's treatment, not to the appropriateness of the treatment itself."[26]

Citing *Aikins*, the court in *Naiman v. New York University* found that a physician's effectiveness in providing medical treatment to a hearing impaired patient does not negate an ineffective communication claim under the ADA.[27] Mr. Alec Naiman, who is hearing impaired, was admitted

[22] 843 F.Supp. 1160 (E.D. Mich. 1994).

[23] Eastern District, Michigan, Docket # 114 (May 22, 1995).

[24] 843 F.Supp. 1329 (N.D. Calif. 1994).

[25] The Rehabilitation Act of 1973 prohibits entities receiving federal funds from discriminating against individuals on the basis of a disability and is generally interpreted in the same manner as the ADA. 29 U.S.C. § 794(a).

[26] 843 F.Supp. 1329, 1338 (N.D. Calif. 1994).

[27] *Naiman v. New York University*, 1997 U.S. Dist LEXIS 6616 (S.D.N.Y. May 13, 1997).

on several occasions to New York University Medical Center, one of many medical facilities operated by New York University. On each occasion Mr. Naiman requested an interpreter in order to "effectively participate in his treatment" and communicate with hospital staff. With the exception of one visit, the center failed to provide one in a timely manner or did not provide an interpreter at all. New York University argued that Mr. Naiman failed to state a claim under the ADA because he received adequate medical care from the medical center. The court disagreed and ruled in favor of the plaintiff. The court noted that an effective communication claim under the ADA relates to the patient's exclusion from participation in his treatment rather than the treatment itself. Therefore, the effectiveness of the treatment is an insufficient defense to the general purpose and scope of the ADA.[28]

As DOJ discussed in its appendix to the ADA Title III regulations, although physicians and hospitals are strongly encouraged to confer with patients with disabilities about the type of auxiliary aid they prefer when communicating, deference to the patient's preferred method is not necessarily required. In *Majocha v. Turner*, the district court denied a motion for summary judgment in a case involving the lack of an interpreter for the father of a 15-month-old patient.[29] The defendant doctors argued that they had offered to use note taking to communicate. The district court observed that an individual with a disability cannot insist on a particular auxiliary aid if the aid offered ensures effective communication. However, the court, relying on lay and expert testimony concerning the lack of effectiveness of note taking in this case, found that there was a genuine dispute regarding whether the note taking was an acceptable auxiliary aid and denied the doctors' motion for summary judgment.[30]

Undue Burden

The law provides that an interpreter, or any suggested auxiliary aid, is not required if the doctor can demonstrate that doing so would "fundamentally alter the nature of the good, services, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."[31] This issue was discussed in *Bravin v. Mount Sinai Medical Center,* where the plaintiff sued a hospital for failure to provide a sign language interpreter during a Lamaze class.[32] The court there found that while the hospital alluded to undue hardship, it did not address the issue explicitly. Therefore, because there was no issue of fact as to whether the hospital violated the ADA, the court awarded summary judgment to the plaintiff.[33]

The Senate report on the ADA noted that "technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with

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[28] See Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling A Conversation about Communication*, 35 Fla. St. L. Rev. 947, 970 (2008). Schwartz notes that the ADA is intended to ensure equal access to services rather than effective treatment. *Id.*

[29] 166 F.Supp.2d 316 (W.D. Pa. 2001).

[30] See also Naiman v. New York University, 1997 U.S. Dist. LEXIS 6616 (S.D.N.Y. May 13, 1997), where the court noted that it agreed with the hospital "that its obligation was to provide effective communication under the circumstances, and not necessarily a qualified interpreter as Naiman claims."

[31] 42 U.S.C. §12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

[32] 186 F.R.D. 293 (S.D. N.Y. 1999).

[33] The court granted a motion for reconsideration and vacated the summary judgment regarding the finding of intentional discrimination because genuine issues of fact existed as to whether the hospital acted with deliberate indifference. *Bravin v. Mount Sinai Medical Center,* 58 F.Supp. 2d 269 (S.D. N.Y. 1999).

disabilities. Such advances may enable covered entities to provide auxiliary aids and services which today might be considered to impose undue burdens on such entities."[34] Recently, videoconferencing technology, combined with high-speed internet connections, has been used to provide around-the-clock interpreting services for businesses.[35] Additionally, the use of CART technology has been employed as a means to efficiently communicate with hearing impaired individuals.[36] This may render successful undue burden arguments increasingly difficult. However, the use of technology must result in effective communication.[37]

Deliberate Indifference

Several cases have held that to establish a claim for damages, a plaintiff must show that a defendant is guilty of intentional discrimination or deliberate indifference. In *Loeffler v. Staten Island University Hospital,*[38] a case brought under Section 504 of the Rehabilitation Act,[39] the Second Circuit Court of Appeals held the factual situation could support a finding of deliberate indifference. Robert Loeffler and his wife were deaf but their two children, ages 13 and 17, had normal hearing. The Loefflers stated that prior to Mr. Loeffler's heart surgery, they requested an interpreter but one was never furnished and their children served as translators, even in the surgery recovery room and the critical care unit.

Several plaintiffs have argued that defendant hospitals have shown deliberate indifference when a sign language interpreter was requested but not provided. In *Freydel v. New York Hospital*, the court of appeals found that the hospital had a policy to provide interpreter services and had attempted to secure an interpreter for a 78-year-old deaf woman who communicated in Russian sign language.[40] The second circuit held that proving that staff members failed to respond to repeated requests for a Russian sign language interpreter "cannot by itself suffice to maintain a claim of deliberate indifference." Similarly, in *Constance v. State University of New York Health Science Center,* the court denied the plaintiffs' motion for damages finding that the hospital responded quickly to a request for an interpreter.[41] Although the failure to follow up on the request may have been negligent, the court found it did not amount to deliberate indifference. In *Alvarez v. New York City Health & Hospitals Corporation*,[42] the district court reached a similar conclusion, finding that the plaintiff did not make the required showing of deliberate indifference

[34] S. Rep. No. 101-116, 101st Cong., 1st Sess. (1989), reprinted in 1 Legislative History of P.L. 101-336, The Americans with Disabilities Act, Prepared for the House Committee on Education and Labor, Serial No. 102-A, pp. 162-163 (December 1990).

[35] See, e.g., http://www.deaf-talk.com/.

[36] CART technology, or "computer-aided real-time transcription," is a system where spoken word is instantly translated into text on a computer. For more information see http://www.cartinfo.org.

[37] See e.g., Gillespie v. Dimensions Health Corporation, 369 F.Supp.2d 636 (D. Md. 2005), where the Plaintiffs alleged that the video conferencing device was "wholly ineffective, either because the staff was inadequately trained and unable to operate the VRI device, because Plaintiffs were unable to understand the video interpreter due to the poor quality of the video transmission, or both."

[38] 582 F.3d 268 (2d Cir. 2009).

[39] 29 U.S.C. §794. Section 504 prohibits discrimination against individuals with disabilities in any program or activity that receives federal funds. Since the ADA was modeled on Section 504 of the Rehabilitation Act, courts generally interpret the requirements in the same manner.

[40] Freydel v. New York Hospital, 2000 U.S. App. LEXIS 31862 (2d Cir. 2000).

[41] Constance v. State University of New York Health Science Center, 166 F.Supp.2d 663 (N.D. N.Y. 2001).

[42] 2002 U.S. Dist LEXIS 12986 (S.D.N.Y. 2002).

since the hospital has a policy of providing interpreters and provided an interpreter within a day of the request.

Standing

One of the threshold issues a plaintiff must overcome before the merits of a case can be examined is whether the plaintiff has standing to bring an ADA claim.[43] Several decisions have found that a plaintiff who alleges discrimination under the ADA due to lack of a sign language interpreter does not have standing because there is not a real and immediate threat of harm.[44] However, other decisions have found standing. For example, in *Gillespie v. Dimensions Health Corporation*, the district court found standing for plaintiffs alleging "the existing and on-going policy and practice [of not providing interpreters] itself violates their rights under the ADA."[45] In addition, because the plaintiffs had sought, and would likely continue to seek, medical care from the hospital, there was a sufficient threat of future ADA violations to grant the plaintiffs standing under the ADA.[46]

Analysis and Conclusion

The ADA purposely adopted a flexible standard regarding nondiscrimination requirements. This flexibility was seen as a means to balance the rights of the patients with disabilities the interests of treating physicians and hospitals. Because of this flexibility, precise requirements are not readily enunciated. Therefore, whether or not a doctor or hospital must provide an interpreter for a hearing impaired individual depends on the particular circumstances surrounding the patient's care.[47]

Exactly when a sign language interpreter may be required has been discussed in several judicial decisions. However, the majority of the claims regarding the failure of a doctor to provide a hearing impaired patient with an interpreter appear to have been resolved through either an informal or formal settlement process. The DOJ has obtained a number of settlement agreements with hospitals in recent years.[48] In addition, the new regulations promulgated under title III address several issues including the application of rights to effective communication by

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[43] For a more detailed discussion of standing and the use of interpreters by hospitals and doctors see Michael A. Schwartz, "Limits on Injunctive Relief Under the ADA: Rethinking the Standing Rule for Deaf Patients in the Medical Setting," 11 J. of Health Care L. & Policy 163 (2008).

[44] See e.g., Aikins v. St. Helena Hospital, 843 F.Supp. 1329 (N.D. Cal. 1994); Proctor v. Prince George's Hosp. Ctr., 32 F.Supp.2d 820 (D. Md. 1998); Davis v. Flexman,109 F.Supp.2d 776 (S.D. Ohio 1999). See also Loeffler v. Staten Island University Hospital, 2007 U.S. Dist. LEXIS 22038 (E.D.N.Y. 2007),where the court found that the "mere fact that Josephine visited the Hospital a few times since 1995 does not constitute a 'real and immediate threat of repeated injury.'" *Id.* The *Loeffler* court also noted that the hospital had sufficiently amended its policy concerning interpreters to ensure that interpreters would be available when needed. *Id.*

[45] Gillespie v. Dimensions Health Corporation, 369 F.Supp.2d 636 (D.Md. 2005).

[46] See also Benavides v. Laredo Medical Center, 2009 U.S. Dist. LEXIS 51353 (S.D. Texas June 18, 2009), where the court found standing under Title III of the ADA since the plaintiff had stated that he suffered from conditions that are likely to require attention, the defendant's hospital was the closest to his home, and the hospital had denied requests for an interpreter three separate times.

[47] See, Department of Justice, Disability Rights Section of the Civil Rights Division, "Communicating with People who are Deaf or Hard of Hearing in Hospital Settings," http://www.ada.gov/hospcombr.htm.

[48] See e.g., http://www.usdoj.gov/crt/ada/devin.htm, http://www.usdoj.gov/crt/ada/davishos.htm, http://www.usdoj.gov/crt/ada/stluke.htm, and http://www.usdoj.gov/crt/ada/shillhos.htm.

companions who are individuals with disabilities, a specific discussion of the use of video remote interpreting (VRI) services, and when an accompanying adult or child may be used as an interpreter.[49]

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[49] http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html, 28 C.F.R. §36.303 (title III).