


ADA Effective Communication Requirements In Healthcare Settings



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Views of the United States
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The ADA's Effective Communication Requirements

- ▶ My presentation provides an introduction to the ADA's effective communication provisions.
- ▶ If you work for a healthcare provider, you should seek out additional ADA training and you should include your frontline staff in such training.
- ▶ ADA training is not a one and done proposition. In order to ensure that your organization is complying with the ADA, you will need continuing training and to train your new employees. Additionally, the ADA includes provisions related to people with other types of disabilities that apply to healthcare providers. During this informational meeting, we will provide information on additional training sources.

Dear Colleague Letters From USAO/EDVA

- ▶ Letter reminding healthcare providers of the ADA Effective Communication Requirements.
- ▶ Letter reminding state and local government entities that they are required to have an ADA Coordinator, who is knowledgeable of the ADA and is available to respond to internal questions and those from the public. Private entities will also find it very helpful to have an in-house person on staff who can address ADA questions when they arise.
- ▶ Letter reminding services providers who are assisting in the COVID-19 response of their ADA obligations. This letter provides information that healthcare providers will find helpful regarding the wide range of ADA issues that arise in healthcare settings.

Question

Who is Here?

- A. Works for large private healthcare provider, such as a hospital or nursing facility.
- B. Works for a government run healthcare provider.
- C. Works in a private practice that is not part of a large healthcare provider.
- D. Works for an entity that has a healthcare provider, such as a correctional facility or educational institution.
- E. Advocate for people with disabilities.
- F. People with disabilities.
- G. Other.

The ADA's Effective Communication Requirements in Healthcare Settings

- Background on ADA
- Effective communication for individuals who are deaf, hard of hearing, blind, low vision, or have a speech disability.
- Other ADA issues in healthcare settings
- Ignorance of the ADA's and Rehab Act's requirements is not a valid defense
- Remedies available in enforcement Actions
- Elements of an effective ADA compliance program

Most Important ADA Resource: ADA.gov

Statutory Language

Regulations

Technical Assistance

Settlement Agreements



The screenshot shows the ADA.gov website homepage. At the top left is the ADA.gov logo with the text "U.S. Department of Justice Civil Rights Division". At the top right is a dark blue box for the "ADA Information Line" with contact numbers and hours. Below the header is a navigation menu with links: Home, Featured Topics, Guidance & Resource Materials, Laws, Regulations & Standards, Enforcement, and File a Complaint. A search bar is on the right. A yellow banner below the navigation contains a warning icon and the text "The new ADA.gov has launched!" with a link "Learn more about the new site here.". The main content area features a large image of five diverse people sitting on a balcony, with the text "The Americans with Disabilities Act (ADA) protects people with disabilities from discrimination." overlaid on the left side of the image.

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Information and Technical Assistance on the Americans with Disabilities Act

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Law / Regulations

Design Standards

Technical Assistance Materials

Enforcement

New on ADA.gov

U.S. v. the Massachusetts Parole Board
Settlement Agreement (posted 11/17/22)

NYC Transit Authority Access-A-Ride Program
Findings Letter (posted 11/17/22)

Fayette County Detention Center
Settlement Agreement (posted 11/17/22)

Contra Costa County Kids at Work
Settlement Agreement (posted 11/17/22)

U.S. v. LA Nail Spa
Settlement Agreement (posted 11/17/22)

Town of Limerick, Maine
Settlement Agreement (posted 11/17/22)

City of Hudson, New York
Settlement Agreement (posted 11/17/22)

ADA Information Line

The U.S. Department of Justice provides information about the ADA through a toll-free ADA Information Line. 800-514-0301 (voice) 833-610-1264 (TTY)

Introduction to the ADA

File an ADA Complaint on
www.ada.gov

Featured Topic: Guidance on Nondiscrimination in Telehealth



Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons

Telehealth is an increasingly important way of delivering health care. Many health care providers and patients have turned to telehealth during the COVID-19 public health emergency to reduce unnecessary spread of the virus and to ease access to care. It is important to ensure that telehealth services are accessible to people with disabilities and limited English proficiency.

With this guidance, the HHS Office for Civil Rights (OCR) and DOJ's Civil Rights Division (CRD) provide information about how to ensure that telehealth services are accessible to people with disabilities and limited English proficient persons. This guidance includes information about the Department of Justice's (DOJ) Title II of the Americans with Disabilities Act (ADA) and the Department of Health and Human Services' (HHS) Title VI of the Civil Rights Act of 1964 (CRA) and Section 1557 of the Patient Protection and Affordable Care Act (ACA) (2010) (collectively, "Federal anti-discrimination laws"). Section 1557 regulations specifically prohibit that covered health programs or activities provided by covered entities through electronic or information technology.

1
Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101-12117.
Title VI of the Civil Rights Act of 1964 (CRA), 42 U.S.C. 2000e-1-2000e-6.
Section 1557 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18118. This guidance focuses on the requirements of the ADA, CRA, and ACA, and does not address other applicable laws, including but not limited to the Health Information Privacy Rule (HIPAA) and the Genetic Information Nondiscrimination Act (GINA).
This guidance is provided for informational purposes only and does not constitute an offer of legal advice. For more information, please contact the DOJ's Office of Civil Rights at 202-452-3000 or the HHS's Office for Civil Rights at 202-452-3000.



COVID-19 & the ADA

Congressional Findings Supporting Passage of ADA

When the ADA was passed in 1990,
Congress found, among other things:
**“[D]iscrimination against individuals with
disabilities persists in such critical areas
as . . . health services.”**

42 U.S.C. § 12101

We are still seeing this problem today.

What Is Covered By The ADA?

The ADA prohibits discrimination and ensures equal opportunities for persons with disabilities in:

- Employment (Title I)
- **State and local government services (Title II)**
- **Public accommodations (Title III)**
- **Telecommunications (Title IV)**

Federal Government Statistics

- ▶ Based on a hearing loss prevalence study, the National Institute on Deafness and Other Communication Disorders (NIDCD) reports that one in eight people in the United States (13 percent, or 30 million) aged 12 or older has hearing loss in both ears, based on standard hearing examinations.
- ▶ NIDCD reports that an estimated 17.9 million U.S. adults ages 18 or older, or 7.6%, report having had a problem with their voice in the past 12 months.
- ▶ Print disabilities
 - CDC reports that Approximately 12 million people 40 years and over in the United States have vision impairment, including 1 million who are blind, 3 million who have vision impairment after correction, and 8 million who have vision impairment due to uncorrected refractive error.
 - Dyslexia statistics—multiple federal agencies explain that approximately 20 percent of the population has dyslexia.

Title II Covers Public Entities

All state and local governmental entities are covered by Title II, including the following entities operated by state and local governments that have a healthcare mission:

- Hospitals operated by state or local governments, including psychiatric hospitals and state university hospitals.
- State and local mental health agencies, including the Virginia Department of Behavioral Health & Developmental Services, Community Service Boards and social service agencies.
- Infirmaries at state universities.
- Jails and correctional facilities, including their infirmaries.
- Emergency Medical Services.

Title III Covers Private Sector Health Care & Service Providers

Title III covers “public accommodations,” which include a wide range of entities, including but not limited to:

- Hospitals;
- Nursing homes;
- Professional office of a health care provider, including urgent care centers, internist, dentist, optometrist, mental health professionals, and all other healthcare specialists (e.g., pediatricians, chiropractors, cardiologist & orthopedist);
- Pharmacies;
- Funeral parlors; and
- Veterinary offices and animal hospitals.

42 U.S.C. § 12181(7)(K).

Question

A skilled nursing facility operated by a private entity provides a variety of services to its residents, including healthcare, medication administration, assistance with activities of daily life, and providing meals. Is it covered by the ADA?

- A. No.
- B. Yes, only if it is the recipient of federal money.
- C. Yes, only if it is run on behalf of a state or local government.
- D. Yes.

Answer

Both privately operated and state operated skilled nursing facilities are covered by the ADA regardless of whether they receive federal funds.

Discrimination Under the ADA Not Limited To Affirmative Animus

“The ADA . . . Specifically prohibits discrimination against [individuals with disabilities], not just based on invidious ‘affirmative animus,’ but also based on thoughtlessness, apathy, and stereotypes about disabled persons.”

Examples of Prohibited Practices Under the ADA

- Failing to provide auxiliary aids or services to individuals who have communication disabilities. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. §§ 35.160 & 36.303.
- Imposing “eligibility criteria that screen out or tend to screen out individuals with disabilities. . .” 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a).
- Imposing a surcharge on an individual with a disability to cover the cost of compliance with the ADA. 28 C.F.R. § 36.301(c).

Examples of Prohibited Practices under the ADA

- Failing to ensure that individuals with disabilities are able to benefit from the “full and equal enjoyment of the . . . services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. § 12182(a).
- Failing to “make reasonable modifications to policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 42 U.S.C. § 12182(b)(2)(A)(ii).
- Using methods of administration of a program that “have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.” 42 U.S.C. § 12182(b)(2)(D).

Definition of Disability

- ▶ A physical or mental impairment that substantially limits one or more major life activities (*e.g.*, hearing, seeing, speaking, or learning).
- ▶ A record of such an impairment.
- ▶ Being regarded as having such an impairment.

42 U.S.C. § 12102

Communication Disabilities


- ▶ Deaf, hard of hearing and DeafBlind.
- ▶ Speech disabilities (caused by, among other things, aphasia, autism, apraxia, ALS, cerebral palsy, traumatic brain injury, and multiple sclerosis)
- ▶ Print disabilities (Blindness, vision loss and dyslexia)

42 U.S.C. § 12102. This is not an all-inclusive list.

Dyslexia

According to the NIH,

“Dyslexia is a brain-based type of learning disability that specifically impairs a person's ability to read. These individuals typically read at levels significantly lower than expected despite having normal intelligence. Although the disorder varies from person to person, common characteristics among people with dyslexia are difficulty with phonological processing (the manipulation of sounds), spelling, and/or rapid visual-verbal responding.”



Question

A skilled nursing facility does not accept individuals who are deaf and communicate using sign language because it does not offer sign language services. Is this a potential violation of the ADA?

- A. No. Nursing facilities may decide what services it provides.
- B. Yes.
- C. Yes, only if the nursing facility offers foreign language interpreting.

Refusal To Admit Individual Who Needed Sign Language Interpreting Services

Brookside Rehab & Health Center

Refused admission to an individual who need sign language interpreting services. Equitable relief, \$40,000 in compensatory damages, and \$50,000 in civil penalty.

https://www.ada.gov/brookside_rehab_sa.html

Effective Communication

- Entities must ensure that communication with people with disabilities is as effective as communication with others.
- Covered communication takes place throughout a healthcare providers' interactions with a patient and companion.
- Both receptive and expressive communication must be effective.

Effective Communication, Continued

- Effective communication is recognized by the ADA as a fundamental human right. The ADA requires healthcare providers to ensure that a patient can meaningfully understand and participate in the management of their health care. A satisfactory medical outcome does not preclude an effective communication claim under the ADA.
- Communication in healthcare settings is high stakes. Failure to ensure effective communication in healthcare settings may lead to misunderstandings of a patient's symptoms and thus an inappropriate diagnosis. It may also result in miscommunication regarding important medical instructions or warnings or medication information. Informed consent requires effective communication.

Discriminatory Myths

- Communication disabilities are a sign of low intelligence. False.
- People who cannot hear, speak or see due to a disability cannot understand language. False.
- A healthcare provider should interact with the companion of a patient with a disability instead of the patient. False.
- Merely because a Deaf person can understand one gesture, they are capable of all communication using lip reading. False.

Question

A new patient who has a communication disability comes for services. How do you determine what auxiliary aid or service is necessary?

- A. You figure out what auxiliary aids and services you have readily available and use one of those.
- B. You ask the new patient what method of communication they use.
- C. You use the auxiliary aid or service that you used for the last patient who had a communication disability.

Answer

The type of auxiliary aid needed to provide effective communication will vary by patient (or companion) and depends on many factors.

Inappropriate And Ineffective Auxiliary Aids Are Not Sufficient

“The Department wishes to emphasize that public accommodations must take steps necessary to ensure that an individual with a disability will not be excluded, denied services, segregated or otherwise treated differently from other individuals because of the use of inappropriate or ineffective auxiliary aids.”

Section-by-Section Analysis of the ADA Regulations



Factors to Consider To Determine the Type of Auxiliary Aid for Effective Communication

- (1) What is the method of communication used by the individual? (e.g., ASL, CART, oral interpreter, Braille, audio materials)**
- (2) How lengthy is the communication?**
- (3) How complex is the communication?**
- (4) What is the nature of the communication?**
- (5) What is the context of the communication?**

State and Local Government Entities Must Give Primary Consideration To The Request of The Individual With A Disability

The regulations that apply to state and local government entities explain: “[i]n determining what types of auxiliary aids and services are necessary, a public entity shall give **primary consideration** to the requests of individuals with disabilities.”
28 C.F.R. § 35.160(b)(2).

Private Entities Must Consult With The Individual With A Disability And Must Provide An Effective Method of Communicating

The ADA regulations explain that public accommodations “**should consult with individuals with disabilities whenever possible to determine the type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication**” 28 C.F.R. § 36.303(c)(1)(ii).

Communication Request Form in DOJ ADA Settlements Are A Useful Tool To Obtain Individualized Information

Exhibit A

Deaf or Hard of Hearing Communication Request Form

We ask this information so that we can communicate effectively with patients and/or companions who are deaf or hard of hearing. All communication aids and services are provided FREE OF CHARGE. Each person requesting communication aids should complete a separate form. If you need further assistance, please contact _____.

Patient's Name

Medical Record #

Name of Person with Disability (if different than patient)

Nature of Disability:

Deaf Hard of Hearing Speech Impairment Other: _____

Relationship to Patient:

Self Family member Friend Other: _____

Communication Request Form in ADA Settlements Are A Useful Form To Obtain Individualized Information

Please select the communication aid(s) you would like to assist you in communicating with CHRC staff.

Your requests will be carefully addressed by CHRC staff.

<input type="checkbox"/> Interpreter on-site		<input type="checkbox"/> American Sign Language (ASL)	<input type="checkbox"/> Signed English	<input type="checkbox"/> Oral interpreter
<input type="checkbox"/> Video Remote Interpreter (NexTalk)		<input type="checkbox"/> American Sign Language (ASL)		
<input type="checkbox"/> TTY/TDD (text telephone)				
<input type="checkbox"/> Assistive listening device (sound amplifier)				
<input type="checkbox"/> Telephone handset amplifier				
<input type="checkbox"/> Telephone compatible with hearing aid				
<input type="checkbox"/> Flasher for incoming calls (in patient's room)				
<input type="checkbox"/> Other. Explain:				

Auxiliary Aids & Services For Print Disabilities

There are many types of auxiliary aids and services used by people who have print disabilities, including being blind, having low vision or dyslexia:

- Qualified readers.
- Taped texts.
- Audio recordings.
- Brailled materials and displays.
- Screen reader software.
- Magnification software.
- Optical readers.
- Secondary auditory programs (SAP).
- Large print materials.
- Accessible electronic and information technology.
- Other effective methods of making visually delivered materials available to individuals with visual impairments.

42 U.S.C. § 12103(1); 28 C.F.R. § 36.303(b)(2).

Screen Reader

A “screen reader” is a generic term used for software that helps a person with a vision disability use a computer. As the name implies, screen readers “read” content on the computer’s screen and web browsers like text, images, and links, or content on the computer’s operating system such as icons, menus, files, applications, and folders. The software will then translate that content or data into a format the user is able to consume and interact with such as audible speech and Braille.

Braille

Braille is a tactile reading and writing system used by people who are visually impaired, including people who are blind, deafblind or who have low vision. It can be read either on embossed paper or by using refreshable braille displays that connect to computers and smartphone devices. Braille can be written using a slate and stylus, a braille writer, an electronic braille notetaker or with the use of a computer connected to a braille embosser.

Braille, Continued

The braille alphabet

a	b	c	d	e	f	g	h	i
•	• •	••	•• •	• •	•• •	•• ••	• ••	• •
j	k	l	m	n	o	p	q	r
•• •	• •	• •	•• •	•• •	• •	•• •	•• •	• ••
s	t	u	v	x	y	z		w
• • •	• ••	• ••	• ••	•• ••	•• ••	• ••		• •• •

Braille, Continued

“Braille is effective only for people who read Braille. Other methods are needed for people with vision disabilities who do not read Braille, such as providing accessible electronic text documents, forms, etc., that can be accessed by the person’s screen reader program.”

Likewise, screen readers only work for people who have access to computers and know how to use them.

Auxiliary Aids & Services For People with Speech Disabilities

- ▶ Augmentative and Alternative Communication (AAC).
- ▶ AAC means all of the ways that someone communicates besides talking. People can use AAC if they have trouble with speech or language skills. AAC includes:
 - Using technology, such as, a device that allows a user to type or pointing or blinking at pictures and it creates a voice.
 - Low tech options, such as, drawing, pointing to pictures, gestures and body language.
 - Speech-to-speech interpreters.

[Department of Justice's & Department of Education's FAQ on Effective Communication for Students with Hearing, Vision, or Speech Disabilities, at 8.](#)

Augmentative and Alternative Communication Device



Auxiliary Aid & Services for People Who Are Deaf or Hard of Hearing

There are many types of auxiliary aids and services for people who are deaf or hard of hearing, including:

Sign language interpreting (ASL, signed English, etc.).

Computer assisted real-time captioning (a.k.a., CART).

Captioned phone.

Cued speech transliterator.

Assistive listening systems and devices.

Telephone relay service.

Hearing-aid compatible telephones.

Videophones.

28 C.F.R. § 35.103; 28 C.F.R. § 36.303 (b).

Sign Language Interpreting



A doctor uses sign language interpreter to communicate with a patient who is deaf.

Communication Access Realtime Translation (CART)



CART

“Computer Assisted Real-Time Transcription (“CART”)

Many people who are deaf or hard of hearing are not trained in either sign language or speech reading. CART is a service in which an operator types what is said into a computer that displays the typed words on a screen.”

DOJ ADA Business Brief: Communicating with People who are Deaf or Hard of Hearing in Hospital Settings

Many Kinds of Assistive Listening Devices

- ▶ Personal amplifier
- ▶ Hearing aid compatible telephones
- ▶ TTY
- ▶ New technology, including Captioned phones phones

PockeTalker (Used for hard of hearing patients who do not wear hearing aids or do not want to bring their hearing aids to the hospital. Additionally, hearing aid wearers with t-coils in their hearing aids if they use a neckloop)



Captioning & Telecommunications

- Information provided by video should be captioned
- Televisions for patients in hospitals
- TDD, if telephone is offered to others



Hearing Aid Compatible Telephones And Amplified Telephones



Captioned Phone



Method of Communication Used By The Individual: ASL

“ASL is not derived from English; ASL has its own syntax and grammar and utilizes signs made by hand motions, facial expressions, eye gazes, and body postures. Therefore, [some] **deaf people–[plaintiff] included– lack the ability to communicate effectively in English, whether by writing notes or reading lips.**” *Pierce v. District of Columbia*, 128 F.Supp.3d 250, 275 (D.D.C. 2015) (cites to record omitted) (emphasis added).

Attempting to communicate with an individual who does not understand written English with written English would obviously not be effective communication.

Nature of the Communication?

- ▶ Simple communication such as a purchase at a gift shop will probably not require extensive auxiliary aids and services such as an interpreter. Hand written notes may be enough.
- ▶ More complex communication such as discussing a patient's symptoms, medical condition, medications, and medical history will likely require an interpreter or other appropriate auxiliary aid or service.

Communication in Healthcare Settings

Do a walk through of your last outpatient appointment with a healthcare provider and consider how someone who is blind, has low vision or dyslexia would navigate these interactions:

- ▶ Making an appointment on a website, including a healthcare portal, or using a telephone.
- ▶ Checking into an appointment, including completing paperwork, possibly using a tablet.
- ▶ Interactions with healthcare providers
- ▶ Receiving test results, including through healthcare portals.
- ▶ Billing documentation.

Making An Appointment

On a website, including a healthcare portal.

Is the website or portal accessible to people with disabilities? [DOJ Settlement Agreement with Kroger](#). A grocery chain's pharmacy's vaccine registration portal was not accessible to some individuals with disabilities who use screen reader software.

By telephone

Make sure your office accept calls from a telephone relay service, which deaf people often use to make calls. 28 C.F.R. § 36.303(d)(4).

Telephone calls are going to be problematic for many people with speech disabilities.

Checking In To An Appointment

Is the Check-in process accessible to people with disabilities?

- ▶ Does your office use paperwork, a self-service kiosk or a tablet for the check in process?
 - Does the kiosk or tablet permit screen reader technology? Because individuals with visual impairment often cannot independently navigate a kiosks or tablet, they are not accessible and people with disabilities are not able to gain “full and equal enjoyment” of services. [DOJ Statement of Interest in *Vargas v. Quest Diagnostics*](#).
- ▶ If someone is blind or has low vision, do you offer an alternative? If yes, do you provide privacy or simply read the material out loud in the waiting room? Pursuant to the ADA regulations, you must consider privacy concerns when communicating about private information.
 - “In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.” 28 C.F.R. § 36.303(c)(1)(ii).

Interactions with Healthcare Providers

- Taking history
- Discussing symptoms
- Obtaining informed consent for treatments (if a patient must provide a signature, is it accessible?)
- Treatments
- Home instructions

Receiving Test Results

How do patients receive test results?

Is your healthcare portal accessible?

Are documents posted on your healthcare portal accessible?

“People with disabilities navigate the web in a variety of ways. People who are blind may use screen readers, which are devices that speak the text that appears on a screen. People who are deaf or hard of hearing may use captioning. And people whose disabilities affect their ability to grasp and use a mouse may use voice recognition software to control their computers and other devices with verbal commands.” [DOJ Guidance on Web Accessibility and the ADA.](#)

Billing documentation

- ▶ If a patient requests that billing documents be provided in Braille, do you have a method to put the documents in that format?
- ▶ Are your billing documents in a format that works for screen readers?
- ▶ Do you have a process in place if an individual with a print disability requests billing documentation in an accessible format?

Question

Are Telemedicine Appointments Covered By The ADA?

- A. No.
- B. Yes, only if we have the equipment to make it accessible.
- C. Yes.

Joint Guidance From DOJ & HHS



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Guidance on Nondiscrimination in
Telehealth: Federal Protections to Ensure
Accessibility to People with Disabilities and
Limited English Proficient Persons

—

Telehealth

- Telehealth has become a more widespread method to provide and receive health care services, especially during the COVID-19 Public Health Emergency.
- Telehealth can take a number of forms, including communication between a patient and a health care provider via video, phone, or other electronic means.
- While telehealth may be a convenient and effective way for patients to receive health care, telehealth that is inaccessible to individuals with disabilities results in barriers that may violate Federal civil rights laws.

Examples of Inaccessible Telehealth

- A person who is blind or has limited vision may find that the web-based platform their doctor uses for telehealth appointments does not support screen reader software.
- A person who is deaf and communicates with a sign language interpreter may find that the video conferencing program their provider uses does not allow an interpreter to join the appointment from a separate location.
- For ADA purposes, it is imperative that your telehealth platform be accessible to people with the disabilities of your patients. You may need to be flexible in the platform that you use.

Congregate Residential Facilities Provide Communication Intensive Services

Settlement agreements provide examples of communication between healthcare providers and service recipients that use ASL that require sign language interpreter:

- When a service recipient is entitled to a meaningful opportunity to participate in discussions regarding their services.
- Admission tours.
- Orientation.
- Discussion of symptoms, diagnosis, medical condition, medication and medical history.
- Physical and occupational therapy.
- Mental health services.
- Notices of legal, civil and human rights.
- Meetings to discuss care planning.
- Incident investigations.
- Discharge planning.

Settlement agreements with [Brookside Rehab & Nursing Center](#) (¶ 29) and [Good Neighbor Homes, Inc.](#) (¶ 30).

Communication Of, Among Other Things, Medical History Requires Interpreter

DOJ's section-by-section analysis of the ADA regulations provides guidance on the limited types of communication for which the exchange of notes will constitute effective communication and discusses DOJ's policy, which is reflected in settlement agreements that have been entered over the years:

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, when blood is drawn for routine lab tests or regular allergy shots are administered. However, interpreters should be used when the matter involves more complexity, such as in communication of medical history or diagnosis, in conversations about medical procedures and treatment decisions, or in communication of instructions for care at home or elsewhere. The Department discussed in the NPRM the kinds of situations in which use of interpreters or captioning is necessary. Additional guidance on this issue can be found in a number of agreements entered into with health care providers and hospitals that are available on the Department's Web site *at* <http://www.ada.gov>.

28 C.F.R. Pt. 36, App. A, § 36.303 (emphasis added).

Qualified Interpreter

If an interpreter is required, a covered entity must furnish a “qualified interpreter.” 28 C.F.R. §§ 35.104 & 36.104.

Requirements for a “Qualified Interpreter”

Able to interpret:

- **Effectively** – interprets both receptively (i.e., understanding what the person with the disability is saying) and expressively (i.e., having the skill needed to convey information back to that person) **using the sign language of the individual needing the interpreter** (e.g., ASL, Signed English, etc.)
- **Accurately**
- **Impartially**
- Understanding the necessary **specialized vocabulary** that is used for the particular setting (*e.g.*, not all interpreters are qualified for medical settings).

28 C.F.R. § 36.104 (definition of “qualified interpreter”); *see also* Technical Assistance Manual, § III-4.3200.

Question

A patient whose first and most effective method of communication is American Sign Language, is moving into a skilled nursing facility for long-term care. Is it sufficient to provide the SNF's staff with an eight-week course on basic sign language to meet the ADA's effective communication requirement?

- A. Yes.
- B. No.
- C. Yes, only if the person with a disability has limited ASL skills.

Rudimentary Familiarity With ASL Is Not Sufficient To Be A Qualified Sign Language Interpreter

“[S]omeone with only a rudimentary familiarity with sign language or finger spelling is **not** qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.”

Section-by-Section Analysis of ADA Regulations

VDDHH's Discussion of "Qualified Interpreter"

Perhaps the biggest misconception concerning interpreting for people who are deaf or hard of hearing is the generally-held assumption that a beginning course in sign language or fingerspelling is a sufficient qualification to work as an interpreter. **A person who knows conversational sign language does not necessarily possess the expertise required to perform well in the role of an interpreter.** Professional interpreting requires intense training and experience before proficient levels of skill are attained.

VDDHH, Directory of Qualified Interpreters for the Deaf and Hard of Hearing, at 3 (emphasis in original).

Examples Of Failing To Retain A “Qualified Interpreter”

In *Fairfax Nursing Center* and *Arlington Sherriff*, these entities enlisted personnel, who did not have the requisite skills to be a “qualified interpreter,” to facilitate communication for important meetings without first having the employees evaluated to determine whether they had the requisite ASL skills to perform as an interpreter. My office arranged to have these employees’ ASL skills evaluated, which revealed that they did not have the requisite skills to be “qualified interpreters.”

https://www.ada.gov/fairfax_nursing_ctr_sa.html

https://www.ada.gov/arlington_co_sheriff_sa.html

Question

If an individual who needs a sign language interpreter also has another disability, such as paralysis due to a stroke, what type of interpreter services should you look for?

- A. Any sign language interpreter will be sufficient.
- B. A sign language interpreter who has skill working with people who have difficulty with sign production.
- C. People who are deaf and have had a stroke do not need interpreter services.

Interpreters Must Be Effective

In order for an interpreter to be a “qualified interpreter,” s/he must be able to interpret “effectively” for the individual needing the interpreting services.

28 C.F.R. § 35.104 & 36.104.

Effective Communication Is Key

When selecting an interpreter for individuals who require one, “[t]he guiding criterion is that [covered] entities must provide appropriate auxiliary aids and services to ensure effective communication with the individual.” Section by Section Analysis of the ADA Regulations.

A certified Deaf Interpreter may also be necessary to establish effective communication with individuals who are deaf and have additional disabilities or are not fluent in ASL.

Certified Deaf Interpreters

“Certified Deaf Interpreters are deaf or hard of hearing interpreters **who work with hearing sign language interpreters** to meet the specific communication needs of deaf individuals.”

Section-by-Section Analysis of the ADA regulations

“A CDI can facilitate communication with patients who have limited language skills or severe language deficits, neurologic and/or cognitive deficits, or a major mental illness.”

“More than signing: Communicating with the Deaf,” Nursing Management (March 2014), at 20–27.

CDIs are particularly important for consumers with language dysfluency.

Question

You have a patient who is both deaf and blind. What kind of auxiliary aid or service might work for that patient?

- A. There is no way to communication with someone who is deaf and blind.
- B. Tactile interpreting.
- C. Braille.
- D. B & C.

There are specialized interpreters for individuals who are both deaf and blind that use tactile or pro-tactile interpreting.

Question

A skilled nursing facility sets up a care planning meeting for a resident. The resident wants his son, who is deaf, to participate in the care planning meeting. Is the SNF required to provide a sign language interpreter for his son?

- A. Yes, if the son is the healthcare proxy.
- B. No. The son is not the resident.
- C. Yes, the son is a companion and has a right to a sign language interpreter.

ADA's Effective Communication Requirement Covers Patients and "Companions"

The ADA regulations require public accommodations to furnish auxiliary aids and services to "individuals with disabilities" and "companions who are individuals with disabilities." 28 C.F.R. § 36.303(c).

The Preamble To The ADA Regulations Recognize The Special Significance Of Providing Companions In The Health Care Setting With Effective Communication

The Section-by-Section analysis of the ADA regulations further explains that effective communication with companions is especially important in health care settings:

“Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment.”

28 C.F.R. part 36, Appendix A (emphasis added).

Companion is Broadly Defined

“[C]ompanion’ means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.” 28 C.F.R. § 36.303(c)(1)(ii).

Spotsylvania Regional Medical Center

Spotsylvania Regional Medical Center

Failure to provide ASL services to the daughter, who is deaf, of a patient during critical interactions, including a late night emergency admission and discussions regarding end of life issues. Equitable relief and \$121,000 in compensatory damages.

The ADA Prohibits Reliance
Upon Adult Companions To
Facilitate Communication,
With Very Limited Exceptions

ADA Regulations Address A Known Problem: Relying On Accompanying Adults

“Historically, many covered entities have expected a person who uses sign language to bring a family member or friend to interpret for him or her. **These people often lacked the impartiality and specialized vocabulary needed to interpret effectively and accurately.**”

Effective Communication Technical Assistance (2010).

ADA Prohibition On Relying Upon Adult Companions To Facilitate Communication

- ▶ A public accommodation shall not rely on an adult accompanying an individual with a disability to interpreter or facilitate communication except –
- ▶ In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is not interpreter available; or
- ▶ Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.
- ▶ 28 C.F.R. § 36.303(c)(3).

Consent Must Be Freely And Voluntarily Given

“The Department [of Justice] states unequivocally that consent of, and for, the accompanying adult to facilitate communication must be provided freely and voluntarily both by the individual with the disability and the accompanying adult”

28 C.F.R. part 35, App. B (emphasis added).

ADA Prohibition On Relying Upon Child Companions To Facilitate Communication

“A public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.”

28 C.F.R. § 36.303(c)(4).

Problems With Family Members And Friends Facilitating Communication

The preamble to the original ADA regulations explains the problems with public accommodations requesting family members or friends to facilitate communication for a relative who is deaf:

- ▶ “Public comment also revealed that public accommodations have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, *the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret “effectively, accurately, and impartially.”*”

28 C.F.R. Pt. 36, App. C (discussion of the definition of “qualified interpreter”) (emphasis added).

Good Neighbor Homes Inc.

In Good Neighbor Homes, Inc., staff members relied upon a family member to facilitate communication.

\$40,000 in compensatory damages for the family member.

Settlement Agreement

Question

An individual is brought to the emergency department of a hospital at 2:30 a.m. because she is throwing up blood and is in respiratory distress. Her daughter, who is deaf, is with the patient. Is the hospital required to furnish a sign language interpreter to the daughter at that hour?

- A. No. It is out of business hours.
- B. Yes. If the ER is open to people without disabilities, it must be open to people with disabilities.
- C. Yes, but only if the hospital has a contact with a sign language interpreting company that requires coverage for emergencies.

The ADA Requires Hospitals To Ensure That Interpreters are Available For After-Hours Emergencies

Hospitals are required to ensure that qualified interpreters are readily available for after-hours emergencies. A Department of Justice publication, entitled, "*ADA Business Brief: Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings*," explains that:

“Hospitals should have arrangements in place to ensure that qualified interpreters are readily available on a scheduled basis and on an **unscheduled basis with minimal delay, including on-call arrangements for after-hours emergencies. Larger facilities may choose to have interpreters on staff.”**

(Emphasis added).

Video Remote Interpreting -- VRI

- Real-time video and audio with high-quality images (no lags, blurriness, chops or irregular pauses in communication)
- Sufficient dedicated wide-bandwidth connection
- Large enough screen
- Clear voices
- Training to staff for quick set-up and proper operation

28 C.F.R. 36.303(f)



Some Limitations of VRI

- If many people are talking in a room
- Physical conditions (room layout)
- Poor eyesight
- Physical limitations of the individual needing the interpreting services, such as medically unable to focus on a video screen.
- Human error, such as not using VRI for all interactions not just those with a physician.

Public Accommodations Must Ensure Effective Communication During Each Specific Interaction

Health care provider is responsible for providing appropriate auxiliary aids including an interpreter for each interaction with the individual who needs one.

Courts have focused upon each interaction when an interpreter was necessary and not the interactions as a whole in order to determine whether there has been a violation of the ADA.

Proctor v. Prince George's Hosp. Cntr, 32 F.Supp.2d 820, 827–28 (D.Md. 1998).

Lip Reading Has Many Limitations

- Can have high error rate
- Facial hair or accents obscure
- Don't assume that just because someone can lip read a few words, they understand everything.

Lip Reading Is Not A Reliable Method Of Communicating

One study found that the “[m]ean-word-recognition accuracy scores [in a lip reading recognition test] were barely greater than 10% correct.” J Acoust Soc Am. 2011 Jul; 130(1): 1-4.

25% of the Message

-----removed ----- a ----- is -----
laboratory, -----into ----- for --
-----, ----- known -----
----- and ----- best ----- to tell ---
- cancer is ----- also -----
----- (cell) material. ----- is -----
urine, ----- (----- around -----
-- cord), ----- (mucus -----), ----- (-----
-----cavity) -----, ----- (chest -----), -----
-/-----, and ----- during --
-----.

50% of the Message

▶ -----removed during a ----- is -----
-- -----laboratory, where -----
into thin ----- for viewing -----
-----, ----- known as -----
(tissue) ----- and --- usually ---- best -
----- to tell ---- cancer is -----, The ---
----- also examine ----- (cell)
material. -----material is -----in
urine, -----fluid (----- around ---- --
----- and ----- cord), ----- (mucus ----
the ----), ----- (-----cavity)
fluid, ----- (chest -----) fluid, -----/-
-----, and ---- fluid -----
during a -----.

Actual Message

- ▶ Tissue removed during a biopsy is sent to a pathology laboratory, where it is sliced into thin sections for viewing under a microscope. This is known as histologic (tissue) examination and is usually the best way to tell if cancer is present. The pathologist may also examine cytologic (cell) material. Cytologic material is present in urine, cerebrospinal fluid (the fluid around the brain and spinal cord), sputum (mucus from the lungs), peritoneal (abdominal cavity) fluid, pleural (chest cavity) fluid, cervical/vaginal smears, and in fluid removed during a biopsy.

Telecommunication Services

Question

A skilled nursing facility resident uses sign language for communication and needs a device capable of video telephone calls so that she can communicate using sign language, what responsibilities does a covered entity have to ensure such a device is available?

Answer

The ADA regulations define “auxiliary aids and services,” to include “video-based telecommunication products and systems.” 28 C.F.R. § 35.104 & 36.303(b)

“A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls using the public accommodation’s equipment on more than an incidental convenience basis shall make available public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.” 28 C.F.R. § 36.303(d)(2).

Devices Capable Of Video Telephone Calls

“GNHI agrees to provide appropriate accessible telecommunication equipment in each group home in which a Resident who is deaf or hard of hearing resides, including devices capable of video telephone calls, hearing aid compatible telephones, volume control telephones, and/or Video Relay Services for use by Residents and members of the public at the GNHI’s group homes.”

https://www.ada.gov/gnhi_sa.html

Calls Through Relay Service

Covered entities “shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.” 28 C.F.R. § 35.161(c) & 36.160(d)(4).

Common Issues That Have Arisen in BFHCI cases: Effective Communication

- ▶ Failure to obtain interpreter for late night emergency admissions to hospital
- ▶ Enlisting family members, friends and/or unqualified staff members to facilitate communication
- ▶ VRI issues: (1) staff does not know to set up VRI and/or (2) the VRI system is not working properly
- ▶ Inappropriate reliance on hand-written notes for individuals whose primary means of communication is ASL
- ▶ Erroneously assuming that an individual who is deaf or hard of hearing can read lips and does not need an auxiliary aid or service
- ▶ Refusal to provide auxiliary aids and services due to cost
- ▶ Failure to train staff on the ADA's requirements and the services available to individuals who are deaf or hard of hearing

Legal Principles Addressing Common Issues

- ▶ Generally, health care providers are required to furnish auxiliary aids and services including interpreters and may not require the person with a disability to bring their own. 28 C.F.R. § 36.303(c)(2).
- ▶ Health care providers may **not** enlist companions to interpret. 28 C.F.R. § 36.303(c)(3).
- ▶ ADA regulations define “qualified interpreter” to be someone who can interpret effectively, accurately, impartially and understands the necessary specialized vocabulary. 28 C.F.R. § 36.104.
- ▶ A patient’s companion, who is deaf or hard of hearing, is also entitled to effective communication. 28 C.F.R. § 36.303(c)(1).
- ▶ In order for VRI to be effective communication, users must be trained to quickly and efficiently set up and operate the VRI. 28 C.F.R. § 36.303(f)(4).

ADA Enforcement Actions: Failure to Provide Effective Communication (Skilled Nursing Facilities)

Fairfax Nursing Center

Failure to provide a qualified ASL interpreter to the daughter and granddaughter of a resident at FNC during a six week physical rehabilitation stay. Equitable relief, \$80,000 in compensatory damages, \$12,500 to train other skilled nursing facilities in Virginia on the ADA effective communication requirements, and \$5,000 to effectuate the public interest.

Commonwealth Health & Rehab Center

Failure to provide ASL Interpreter to rehab patient, who is deaf, and his Mother and Sister, who are also deaf, during 27-day physical rehabilitation stay at the facility. Equitable relief, \$160,000 in compensatory damages & \$2,500 civil penalty

Recent ADA Enforcement Actions: Failure to Provide Effective Communication (Hospitals)

Spotsylvania Regional Medical Center

Failure to provide ASL services to the daughter, who is deaf, of a patient during critical interactions, including a late night emergency admission and discussions regarding end of life issues. Equitable relief and \$121,000 in compensatory damages.

Virginia Psychiatric Company, Inc. d/b/a Dominion Hospital

Failure to provide ASL interpreters to Mother and Godmother of patient, who are both deaf, during critical interactions, including late night emergency admission, visiting hours and a family meeting. Equitable relief and \$55,000 in compensatory damages.

INOVA Health System

Failure to provide an ASL interpreter for multiple critical interactions with parents who are deaf after the birth of a baby who had a serious heart condition. Interactions with no interpreter included discussion of complex cardiac surgery, discussion of prognosis and subsequent emergency room visits. Equitable relief, \$95,000 in compensatory damages & \$25,000 penalty.

Recent ADA Enforcement Actions: Failure to Provide Effective Communication (Physician's Offices)

Associated Foot and Ankle Centers

Failure to provide ASL interpreter to deaf patient during some medical appointments. During other medical appointments, the person retained to interpret was not a qualified interpreter.

Equitable relief, \$14,000 in compensatory damages, & \$1,000 civil penalty.

Center for Orthopaedic and Sports Medicine, Inc.

Failure to provide ASL interpreter to deaf patient during multiple medical appointments. Orthopedic practice incorrectly informed patient that she needed to obtain her own interpreter.

Equitable relief and \$15,000 in compensatory damages.

Other Civil Rights Issues, including ADA Issues, Arising In Healthcare Settings

- ▶ Ensuring access to people with mobility disabilities.
- ▶ Not discriminating against people who are HIV positive.
- ▶ Not discriminating against people who have substance use disorder.
- ▶ Ensuring language access to individuals who have limited English proficiency.

Very Helpful DOJ Publication

Americans with Disabilities Act

Access To Medical Care For Individuals With Mobility Disabilities



Ignorance of the ADA's Legal Requirements Is Not a Valid Defense

A covered entity's subjective belief that it is complying with the ADA -- when in fact it is not in compliance -- is not a valid defense. The plain language of the ADA places liability upon a public accommodation for simply failing to comply with the ADA's requirements. Thus, "discrimination" under the ADA is broadly defined to include: "the failure to take such steps as may be necessary to ensure that no individual with a disability is excluded [or], denied services. . ." 42 U.S.C. § 12182(b)(2)(A)(iii).

Medicare & Medicaid Providers Have An Affirmative Obligation To Inform Themselves and Comply with the ADA and Rehab Act

The courts have long-held that those impacted by a legal requirement, particularly those who seek funds from the Federal fisc, are presumed to have knowledge of the applicable laws, including statutes and regulations. In this regard, the Supreme Court has written that:

- ▶ [p]rotection of the public fisc requires that those who seek public funds act with **scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law . . .** [?]
- ▶ *Heckler v. Community Health Serv.*, 467 U.S. 63 (1984) (emphasis added).

ADA Enforcement & Remedies

- ▶ Injunctive Relief (e.g., establishing new policies and procedures, and training).
- ▶ Compensatory Damages (actual damages and pain and suffering).
- ▶ Civil Penalty

42 U.S.C. § 12188.

Elements for Successful ADA Compliance

- ▶ Understand the ADA and how it relates to health care providers.
- ▶ Designate an ADA Coordinator for the provider, who has sufficient authority within the organization to ensure compliance.
- ▶ Train staff who have direct contact with the public on the requirements of the ADA and on how to use equipment that supports individuals with disabilities.
- ▶ Develop a process within the organization to handle ADA Accommodation requests that include communication with individuals with disabilities to ascertain their needs.

Elements for Successful ADA Compliance, Continued

- ▶ Easy access to auxiliary aids, including sign language interpreters, for staff.
- ▶ ADA compliant architectural access and accessible examination equipment.
- ▶ Proper documenting/charting when dealing with ADA issues.
- ▶ Effective grievance procedure for ADA issues.
- ▶ Develop a procedure to assess and monitor ADA compliance.

Staff Training is Critical

A critical and often overlooked component of ensuring success is comprehensive and ongoing staff training. Covered entities may have established good policies, but if front line staff are not aware of them or do not know how to implement them, problems can arise. Covered entities should teach staff about the ADA's requirements for effective communication, HIV and accessible equipment. Many disability organizations can provide ADA trainings.

Two DOJ Publications Provide Very Helpful Guidance

ADA Business Brief: Communication with People Who are Deaf or Hard of Hearing in Hospital Settings.

ADA Requirements: Effective Communication

Two DOJ Publications Provide Very Helpful Guidance, Continued

U.S. Department of Justice
Civil Rights Division
Disability Rights Section



Americans with Disabilities Act

ADA Business BRIEF: Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings



Effective Communication

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