

Equal Access To Health Care Services
For Individuals With Disabilities



Steven E. Gordon
Assistant United States Attorney
Civil Rights Enforcement Coordinator
USAO Eastern District of Virginia

Disclaimer

Opinions Expressed Herein or Otherwise are those of the Speaker and do not Necessarily Reflect the Views of the United States Department of Justice.

Overview

1. Background on ADA and Rehab Act
2. Barrier-Free Health Care Initiative
3. Effective communication for individuals who are deaf or hard of hearing
4. Equal access for individuals with HIV/AIDS
5. Physical access for individuals who have a mobility impairment
6. Ignorance of the ADA's and Rehab Act's requirements is not a valid defense
7. Remedies available in enforcement Actions
8. Elements of an effective ADA compliance program

Most Important ADA Resource: ADA.gov

Congressional Findings Supporting Passage of ADA

When the ADA was passed in 1990, Congress found, among other things:

- (1) That "43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."
- (2) "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . health services."

42 U.S.C. § 12101

Federal Government Statistics

- ▶ The Census Bureau reports that "Approximately 56.7 million people living in the US had some kind of disability in 2010." Americans with Disabilities: 2010.
- ▶ 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.

What Is Covered By 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)

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Title III Covers Private Sector Hospitals, Nursing Homes and Other Health Care Providers

Title III covers "public accommodations," which include a wide range of entities, such as:

- (1) Hospitals;
- (2) Nursing homes; and
- (3) Professional office of a health care provider.

42 U.S.C. § 12181(7)(K); ADA Technical Assistance Manual, § III-1.2000.C. (1994 Supplement) ("nursing homes are expressly covered in Title III regulations as social service establishments").

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Definition of Disability

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

42 U.S.C. § 12102

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Conditions that May Be A "Disability"

- ▶ **Hearing impairments**
- ▶ **Mobility impairments**
- ▶ **HIV/AIDS**
- ▶ Vision impairments
- ▶ Cognitive impairments
- ▶ Mental Illness
- ▶ Disorders of various organs

42 U.S.C. § 12102. This is not an all-inclusive list. This presentation will focus on the first three.

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Barrier-Free Health Care Initiative

Through the Barrier-Free Health Care Initiative, U.S. Attorneys' offices and DOJ's Civil Rights Division are targeting their enforcement efforts on access to medical services and facilities:

- (1) Effective communication for people who are deaf or have hearing loss;
- (2) Physical access to medical care for people with mobility disabilities; and
- (3) Equal access to treatment for people who have HIV/AIDS.

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ADA Requires Public Accommodations, Including Health Care Providers To Provide Equal Services

The general principle underlying the ADA is 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." 42 U.S.C. § 12182(a).

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Section 504 of the Rehabilitation Act of 1973 Provides A Similar Prohibition

Similarly, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* prohibits recipients of federal funds from discriminating against individuals on the basis of disability. The Rehabilitation Act requirements apply to **all patients and companions** that receive medical services from a Medicare or Medicaid provider not just those whose payor is Medicare or Medicaid. 45 C.F.R. § 84.2.

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Pursuant to the ADA and Rehab Act, Health Care Providers Must Furnish Auxiliary Aids

- ▶ No individual can be excluded, denied services, or otherwise treated differently because of the absence of auxiliary aids or services. 42 U.S.C. § 12182(a) (ADA); 29 U.S.C. § 794(a) (section 504 of Rehab Act); 28 C.F.R. 36.303(a) (ADA regulations)
- ▶ Covered entities must furnish appropriate auxiliary aids and services where necessary for effective communication. 28 C.F.R. 36.303(c)

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Effective Communication

- Entities must ensure that communication with people with disabilities is as effective as communication with others.
- The type of auxiliary aid needed to provide effective communication will **vary by context and depends on many factors.**

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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, signed English, oral interpreter)
- (2) How lengthy is the communication?
- (3) How complex is the communication?
- (4) What is the nature of the communication?

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Individual Assessment Is Important

The ADA regulations state that a health care provider should conduct an assessment of each individual with a communication related disability to determine the type of auxiliary aid that is appropriate. 28 C.F.R. § 36.303(c)(1)(ii).

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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

You ask this information so that we can communicate effectively with patients and/or caregivers 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): _____

Reason of Disability: _____

Relationship to Patient: _____

Q: Deaf Q: Hard of Hearing Q: Speech Impairment Q: Other: _____

Q: Self Q: Family member Q: Friend Q: Other: _____

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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 (VRI/AVI)	<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 computer			
<input type="checkbox"/> Telephone compatible with hearing aid			
<input type="checkbox"/> Pusher for incoming calls (in person's room)			
<input type="checkbox"/> Other: English			

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The Auxiliary Aid Must Work For the Individual

There are many types of auxiliary aids and services, including:
 Real-time captioning (a.k.a., CART);
 CapTel Phone;
 Cued-speech interpreter;
 Assistive listening systems and devices;
 Telephone relay service;
 Hearing-aid compatible telephones;
 Videophones; and
 Sign language interpreting (ASL, signed English, etc.).
 28 C.F.R. § 35.103; 28 C.F.R. § 36.303 (b).

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Communication Access Realtime Translation (CART)



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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

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Many Kinds of Assistive Listening Devices

- ▶ PockeTalker
- ▶ Hearing aid compatible telephones
- ▶ TTY
- ▶ New technology, including Captel phones

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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)



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Captioning & Telecommunications

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



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Hearing Aid Compatible Telephones And Amplified Telephones



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Captel Phone



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Sign Language Is An Auxiliary Aid Or Service



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

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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.

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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).

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Technical Assistance Manual Example

- "ILLUSTRATION 2a: H goes to his doctor for a bi-weekly checkup, during which the nurse records H's blood pressure and weight. Exchanging notes and using gestures are likely to provide an effective means of communication at this type of check-up.
- BUT: Upon experiencing symptoms of a mild stroke, H returns to his doctor for a thorough examination and battery of tests and requests that an interpreter be provided. H's doctor should arrange for the services of a qualified interpreter, as an interpreter is likely to be necessary for effective communication with H, given the length and complexity of the communication involved."

Dep't of Justice, Technical Assistance Manual, § III-4.3200 (1994 Supplement).

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Two DOJ Publications Provide Very Helpful Guidance

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

- › Situations where an interpreter may be required for effective communication:
- › Discussing a patient's symptoms and medical condition, medications, and medical history
- › Explaining and describing medical conditions, tests, treatment options, medications, surgery and other procedures
- › Providing a diagnosis, prognosis, and recommendation for treatment
- › Obtaining informed consent for treatment
- › Communicating with a patient during treatment, testing procedures, and during physician's rounds

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

- › Situations where an interpreter may be required for effective communication (continued):
- › Providing instructions for medications, post-treatment activities, and follow-up treatments
- › Providing mental health services, including group or individual therapy, or counseling for patients and family members
- › Providing information about blood or organ donations
- › Explaining living wills and powers of attorney
- › Discussing complex billing or insurance matters
- › Making education presentations, such as birthing and new parent classes, nutrition and weight management counseling, and CPR and first aid training

Requirements for a "Qualified Interpreter"

Able to interpret:

1. **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.)
2. **Accurately**
3. **Impartially**
4. 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.

In Addition, In Order to be Effective...

- Accessible formats
- Timely manner -- delays mean that service is not equal.
- Protect privacy and independence
28 CFR 36.303(c)(1)(ii)

Use of Staff Who Signs "Pretty Well"

Can a public accommodation use a staff member who signs "pretty well" as an interpreter for meetings with individuals who use sign language to communicate?

Signing and interpreting are not the same thing. Being able to sign does not mean that a person can process spoken communication into the proper signs, nor does it mean that he or she possesses the proper skills to observe someone signing and change their signed or fingerspelled communication into spoken words. **The interpreter must be able to interpret both receptively and expressively.**

Americans with Disabilities Act, Technical Assistance Manual, § III-4.3100.

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Is Certification Necessary?

If a sign language interpreter is required for effective communication, must only a certified interpreter be provided? No. The key question in determining whether effective communication will result is whether the interpreter is "**qualified**," not whether he or she has been actually certified by an official licensing body. A qualified interpreter is one "who is able to interpret **effectively, accurately and impartially, both receptively and expressively, using necessary specialized vocabulary.**" An individual does not have to be certified in order to meet this standard. A certified interpreter may not meet this standard in all situations, *e.g.*, where the interpreter is not familiar with the specialized vocabulary involved in the communication at issue. Americans with Disabilities Act, Technical Assistance Manual, § III-4.3100 (emphasis added).

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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).

Presented pursuant to Fed.R.Civ.P. 408

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).

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Companions Have Need for Effective Communication

A patient's companion who is deaf often has his or her own independent need for effective communication. For example, a parent who is deaf bringing a child to the hospital may need to communicate with staff.

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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).

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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).

Public Accommodation Must Absorb Costs Associated With ADA Compliance

“Although compliance [with the ADA] may result in some additional cost, a public accommodation may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses.”

“ILLUSTRATION 2: In order to ensure effective communication with a deaf patient during an office visit, a doctor arranges for the services of a sign language interpreter. **The cost of the interpreter’s services must be absorbed by the doctor.**”

Technical Assistance Manual, § III-4.1400 (Emphasis added).

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 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 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).

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).

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

- (1) If many people are talking in a room
- (2) Physical conditions (room layout)
- (3) Poor eyesight
- (4) Physical limitations of the individual needing the interpreting services, such as medically unable to focus on a video screen.

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Hearing Loss Later in Life

Sign language interpreters are effective only for people who use sign language.

Other methods of communication, such as the use of a transcriber may be necessary for those who lose hearing later in life and do not use sign language.

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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).

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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.

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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

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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).

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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).

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Recent 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

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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.

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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.

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The ADA Covers Individuals With HIV or AIDS

The ADA covers impairments to major bodily functions such as the immune system. 42 U.S.C. § 12102 (2)(B). The ADA protects individual with HIV or AIDS, whether they are symptomatic or asymptomatic.

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ADA Mandates Equal Treatment By Health Care Providers For Individuals With HIV or AIDS

Individuals with HIV or AIDS are entitled to **equal treatment** by health care providers. As with other disabilities, the ADA prohibits public accommodations from excluding, denying services, or otherwise treating an individual differently due to a disability. 42 U.S.C. § 12182(a) (ADA); 28 C.F.R. 36.303(a) (ADA regulations)

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ADA Prohibits A Health Care Provider From Refusing To Treat A Patient
Simply Because She Has HIV

First, there are little to no circumstances in which a person with HIV would pose a direct threat to the health or safety of others. Health care providers are required to treat all persons as if they have blood-borne pathogens, and must use universal precautions (gloves, mask, and/or gown where appropriate, etc.). Failure to treat a person who discloses that she has HIV out of a fear of contracting HIV would be a violation of the ADA.

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ADA Prohibits A Health Care Provider From Refusing To Treat A Patient
Simply Because She Has HIV

Second, a health care provider cannot refer a patient with HIV or AIDS to another provider simply because the patient has HIV or AIDS. The referral must be based on the fact that the treatment the patient is seeking is outside the expertise of the provider, not the patient's HIV status alone. For example, a person who goes to a dentist for a teeth cleaning cannot be referred away because the dentist claims she is "not equipped" to treat people with HIV.


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Other Restrictions Are Impermissible

Other restrictions are also impermissible, including charging additional fees or limiting an individual with HIV or AIDS to certain time blocks, such as the last appointment of the day.

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ADA.gov Includes A Section on HIV/AIDS:
<http://www.ada.gov/aids/>



Fighting Discrimination Against People with HIV/AIDS

The Americans with Disabilities Act (ADA) gives Federal civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Persons with HIV disease, either symptomatic or asymptomatic, have physical impairments that substantially limit one or more major life activities and thus are protected by the ADA.

Persons who are discriminated against because they are regarded as being HIV positive are also protected. For example, the ADA would protect a person who is denied an occupational license or admission to a school on the basis of a rumor or assumption that he has HIV or AIDS, even if he does not.

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ADA Enforcement Actions: HIV

Castlewood Treatment Center
 A facility that provides treatment for eating disorders refused to treat a woman with a serious eating disorder because she has HIV.
 \$115,000 in compensatory damages & \$25,000 civil penalty

United States v. Asare, 291 F.Supp.3d 476 (S.D.N.Y. 2017)
 Plastic surgeon refused to perform surgery on three individuals who are HIV positive. The Court held: (1) that the practice's eligibility criteria, which screened out individuals with HIV was not necessary; and (2) practice could not meet its burden to show that modification to accommodate patients would fundamentally alter the nature of the surgery.

Rite Aid of Michigan
 Pharmacist refused to administer a flu shot to individual with HIV.
 \$10,000 in compensatory damages & \$5,000 civil penalty.

Privileged and Confidential DRAFT - Attorney Work Product

ADA Enforcement Actions: HIV

Mercy Medical Group & CHW Medical Foundation
 A podiatrist at a medical clinic declined to offer surgery as a treatment option to a patient, explaining incorrectly that there was a risk that the doctor would contract HIV.
 \$60,000 in compensatory damages & \$25,000 civil penalty

Knoxville Chiropractic Clinic
 Chiropractor declined to treat a patient following a car accident, applying a blanket policy of refusing treatment to persons with HIV. \$10,000 civil penalty.

Valley Hope Association
 Addiction treatment center required individuals who are HIV positive to either have not roommate or inform their roommate that they were HIV positive and the center would not allow individuals who are HIV positive to work in the kitchen. \$20,000 in compensatory damages & \$5,000 Civil penalty.

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Access To Medical Care For Individuals With Mobility Disabilities

Physical accessibility of doctors' offices, clinics, and other health care providers is essential in providing medical care to people with disabilities.

Due to physical barriers, individuals with disabilities are less likely to get routine preventative medical care than people without disabilities.

Accessibility is not only legally required by the ADA and Rehab Act, it is important medically so that minor problems can be detected and treated before turning into major and possibly life-threatening problems.

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Very Helpful DOJ Publication

Access To Medical Care For Individuals With Mobility Disabilities



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Common Questions

- ▶ Is it OK to examine a patient who uses a wheelchair in the wheelchair, because the patient cannot get onto the exam table independently?
- ▶ **Generally no.** Examining a patient in their wheelchair usually is less thorough than on the exam table, and does not provide the patient equal medical services. What is important is that a person with a disability receives equal medical services to those received by a person without a disability. If the examination does not require that a person lie down (for example, an examination of the face), then the exam table is not important to the medical care and the patient may remain seated.

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Common Questions

- › Can I tell a patient that I cannot treat her because I don't have accessible medical equipment?
- › **Generally no.** You cannot deny service to a patient whom you would otherwise serve because she has a disability. You must examine the patient as you would any patient. In order to do so, you may need to provide an accessible exam table, an accessible stretcher or gurney, or a patient lift, or have enough trained staff available who can assist the patient to transfer.

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Common Questions

- › Is it OK to tell a patient who has a disability to bring along someone who can help at the exam?
- › **No.** If a patient chooses to bring along a friend or family member to the appointment, they may. However, a patient with a disability, just like other individuals, may come to an appointment alone, and the provider must provide reasonable assistance to enable the individual to receive the medical care. This assistance may include helping the patient to undress and dress, get on and off the exam table or other equipment, and lie back and be positioned on the examination table or other equipment.

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Common Questions

- › If the patient does bring an assistant or a family member, do I talk to the patient or the companion? Should the companion remain in the room while I examine the patient and while discussing the medical problem or results?
- › **You should always address the patient directly, not the companion, as you would with any other patient.** Just because the patient has a disability does not mean that he or she cannot speak for him or herself or understand the exam results. It is up to the patient to decide whether a companion remains in the room during your exam or discussion with the patient. The patient may have brought a companion to assist in getting to the exam, but would prefer to ask the companion to leave the room before the doctor begins a substantive discussion. Before beginning your examination or discussion, you should ask the patient if he or she wishes the companion to remain in the room.

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Common Questions

- ▶ Can I decide not to treat a patient with a disability because it takes me longer to examine them, and insurance won't reimburse me for the additional time?
- ▶ **No, you cannot refuse to treat a patient who has a disability just because the exam might take more of your or your staff's time.** Some examinations take longer than others, for all sorts of reasons, in the normal course of a medical practice.

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ADA Enforcement Actions: Accessible Medical Equipment

Marin Magnetic Imaging

Technicians refused to transfer a patient, who is a quadriplegic and uses a wheelchair, to the MRI table.

Equitable relief, including the purchase of a MRI compatible adjustable gurney, and \$2,000 in compensatory damages.

Valley Radiologists Medical Group, Inc.

Radiology practice did not have lift or adjustable height table to lift patient with multiple sclerosis onto bone density x-ray machine.

Equitable relief, including purchase of hooyer lifts and transfer boards.

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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).

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

As one court recently noted: "[t]he ADA seeks to prevent not only intentional discrimination against people with disabilities but also - indeed primarily - discrimination that results from 'thoughtlessness and indifference,' that is, from 'benign neglect.'" *Brooklyn Cntr for Independence of the Disabled v. Bloomberg*, 980F. Supp.2d 588, 640 (S.D.N.Y. 2013) (quoting, H.R.Rep. No. 101-485(II), at 29 (1990)).

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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).

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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.

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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.

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Elements for Successful ADA Compliance

- › 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.

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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.

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Sources of Legal Requirements

1. The Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101, *et. seq.*
2. The ADA regulations. 28 C.F.R. Parts 35 (Title II) & 36 (Title III).
3. The section by section analysis of the ADA regulations.
4. The ADA Technical Manuals for Title II and Title III.
5. DOJ Business briefings on ADA.gov.
6. Section 504 of Rehabilitation Act of 1973. 29 U.S.C. § 794(a).
7. Rehabilitation Act of 1973 regulations. 45 C.F.R. § 84.
8. Case law interpreting these legal authorities.

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Reminder: ADA.gov Is Great Resource

ADA.gov Information and Technical Assistance on the Americans with Disabilities Act

United States Department of Justice
Civil Rights Division

Search ADA.gov [input] [button]

More Search Options

Law/Regulations | Design Standards | Technical Assistance Materials | Enforcement

View all ADA.gov

Hess v. New York State
Florida Bar v. New York and Florida Plastic Surgery Center
Sellefjord Agreement (posted 4/25/14)
Tate III - Civil Penalties Inflation Adjustment
First Run (posted 4/15/14)
New v. Lucky Brand
Sellefjord Agreement (posted 4/11/14)
Bun Brink v. L.L. Bean (New York)
Sellefjord Agreement (posted 4/10/14)
Prevalence and Public Health Implications of State Laws that Discriminate Prohibited HIV Exposures in the United States
See ADA.gov/CDC TECHNICAL ASSISTANCE Publication (posted 4/10/14)
U.S. v. Rhode Island
Clement Center (posted 4/8/14)
Tape 101 and Conference Center (Tulsa, OK)
CCLC Complaint (posted 3/28/14)

INTRODUCTION TO THE ADA
Publications and videos that answer these questions and more: What is the ADA? Who is a person with a disability? Who is not covered with the ADA? Who are you able to sue? Learn more about the ADA!

ADA REQUIREMENTS AND TECHNICAL ASSISTANCE
Regulations, design standards, publications, guides and other materials that provide information about compliance with the ADA.

U.S. Attorney Program for ADA Enforcement
Barbara Fine
Health Care Initiative

ADA ENFORCEMENT ACTIVITIES

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My Contact Information

Steven Gordon
Civil Rights Enforcement Coordinator
Assistant United States Attorney
Eastern District of Virginia
Steve.gordon@usdoj.gov
(703) 299-3817

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