



NATIONAL ASSOCIATION OF THE DEAF

8630 FENTON STREET, SUITE 820 • SILVER SPRING, MARYLAND • 20910-3819
301-587-1788 VOICE • 301-587-1789 TTY • 301-587-1791 FAX

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

**Comments of the National Association of the Deaf on
Notice of Proposed Rulemaking on Title II of the
Americans with Disabilities Act, 28 C.F.R. Part 35
CRT Docket No. 105; AG Order No. 2967-2008**

The National Association of the Deaf (NAD) submits these comments in response to the notice of proposed rulemaking (NPRM), 73 Fed. Reg. 34466 (June 17, 2008), released by the U.S. Department of Justice (the “Department”) to amend regulations implementing Title II of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability in state and local government services.

The NAD was established in 1880 by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to them, and to have its interests represented at the national level. These beliefs remain true to this day, with American Sign Language as a core value. As a nonprofit federation, the mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of deaf and hard of hearing individuals in the United States of America. The advocacy scope of the NAD is broad, covering the breadth of a lifetime and impacting future generations in the areas of early intervention, education, employment, health care, technology, telecommunications, youth leadership, and more. For more information, please visit www.nad.org.

The NAD appreciates the opportunity to submit comments on the Department’s proposed changes to the Title II rules. For each section of the Title II rules for which comments were sought and are provided, the language proposed by the Department appears first in *italicized print*, followed by our comments on that section. Similarly, for each question posed in the NPRM for which comments were sought and are provided, the question(s) appears first in *italicized print*, followed by our response. Additional comments are provided in the final section.

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28 C.F.R. § 35.160: Communications

The Department's proposed changes to its "general" provisions on Communications raises a number of issues concerning: (1) the need to provide auxiliary aids and services for companions with disabilities, (2) the need for a public entity to give primary consideration to the request of an individual with a disability in the provision of an auxiliary aid or service, (3) clarification of when it is permissible to rely on a companion to interpret or facilitate communication, and (4) guidance on the provision of qualified interpreters through video interpreting services. Each of these is discussed below.

28 C.F.R. § 35.160(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public with disabilities, and companions thereof are as effective as communications with others.

In its general mandate for public entities to take appropriate steps to ensure effective communication, the Department has proposed to include "companions" of people with disabilities – along with applicants, participants, members of the public with disabilities. NAD agrees that it may not be clear to public entities that the obligation extends to "companions with disabilities," especially when the companion is accompanying or associated with an individual *without* a disability. The Department notes that there are times when a public entity needs to communicate with a family member, friend, or associate of the program participant in order to effectively provide its services to that participant. As the Department notes in its preamble to this section, these situations can involve parents of public school children or relatives of persons needing immediate medical care when the parents or relatives are deaf or hard of hearing. The Department states, "In such situations, if the companion is deaf or hard of hearing . . . it is the public entity's responsibility to provide an appropriate auxiliary aid or service to communicate effectively with the companion."¹ The NAD strongly agrees.

There are often times when a public entity needs to or would otherwise communicate with a companion with a disability in order to effectively provide its services: to the program applicant or participant; or to the companion. The NAD strongly agrees that where a public entity would otherwise communicate with a companion *without* a disability, the public entity must provide appropriate auxiliary aids and services when necessary to ensure effective communication with a companion *with* a disability.

However, as written, the proposed change suggests that the term "companions" is limited to companions of individuals with disabilities, which we believe was not intended. Companions with disabilities may be companions of individuals with or without disabilities.

¹ 73. Fed. Reg. at 34497.

For this reason, the NAD recommends that the placement of the term “companions thereof” in section (a)(1) should be changed as follows:

28 C.F.R. § 35.160 (a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, companions, and members of the public with disabilities, ~~and companions thereof~~ are as effective as communications with others.

28 C.F.R. § 35.160(a)(2) For purposes of this section, companion means a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public entity should communicate.

First, the scope of a public entity’s obligation is not limited to “program participants.” As such, the NAD recommends that the rule use the term “individual.” Second, the inclusion of the phrase “along with” the participant or individual is troubling because there may be times when it is not appropriate to communicate with a particular individual, such as in the case of communicating with minors. However, more importantly, a place of public entity is obligated to provide auxiliary aids and services to an individual *with a disability*, even when a companion is present. As such, the NAD requests that the Department clarify that, under this section, public entities are not to seek out, limit, or restrict communication with or to companions *instead* of and when it would otherwise be appropriate to communicate with the individual with a disability.

To fulfill what appears to be the Department’s intent under this section, NAD recommends that the Department further clarify that effective communication must be provided to the companion with a disability, even if (1) the participant does not have any disability (such as in the case of a deaf parent with a hearing school child) and (2) the participant is not physically present with the companion (such as in the case of a deaf parent attending a parent-teacher conference without the hearing child.)

To prevent such a misinterpretation and make clear that the rules are intended to apply to companions with disabilities in the situations described above, NAD recommends the following changes:

28 C.F.R. § 35.160(a)(2) For purposes of this section, companion with a disability means a family member, friend, or associate of a ~~program participant~~ an individual with or without a disability, who, along with the ~~participant~~ individual, is an appropriate person with whom the public entity ~~should~~ would otherwise communicate, whether or not the individual is in the same physical location as the companion.

28 C.F.R. § 35.160(b) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities and their companions, who are individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

The NAD notes the addition of the phrase “and their companions, who are individuals with disabilities,” to the current regulation, 28 C.F.R. § 35.160(b)(1).

As noted above, a companion with a disability may be a companion of an individual with *or without* a disability. For example, a private hospital may need to provide appropriate auxiliary aids and services to communicate with a patient’s parent or spouse who is deaf or hard of hearing. In this instance, the patient may be an individual with or without a disability. For this reason, the NAD recommends the deletion of the word “their” from this general mandate.

More importantly, the NAD notes that this provision has been renumbered to reflect the deletion of current regulation 28 C.F.R. § 35.160(b)(2). The NAD strongly opposes the deletion of that provision, as discussed further below.

For these reasons, the NAD recommends the following changes:

28 C.F.R. § 35.160(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities and companions with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

In its preamble, the Department states:

The Department is proposing to amend Sec. 35.160(b)(2) to recognize that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. This addition is a codification of the Department's longstanding position, which is included in the Department of Justice's The Americans with Disabilities Act, Title II Technical Assistance Manual . . . For example, an individual who is deaf or hard of hearing may need a qualified interpreter to discuss with municipal hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (e.g., dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. For example, an individual who is seeking local tax forms may only need an exchange of written notes to achieve effective communication.²

The NAD recognizes the Department’s intent to codify earlier guidance. The NAD appreciates that the Department recognizes that the “type of auxiliary aid or service necessary to ensure effective communication” will depend on the circumstances of each case. Individuals who are deaf or hard of hearing have a wide range of communication abilities. What may work for one individual may not ensure effective communication for another individual who is deaf or hard of hearing. Similarly, a particular auxiliary aid or

² 73 Fed. Reg. at 34497-98

service may work for an individual in a particular communication context, but may not ensure effective communication in a different context.

A similar change was proposed in the Department's NPRM for Title III.³ See proposed regulation 28 C.F.R. § 36.303(c)(1)(ii).⁴

However, instead of *amending* 28 C.F.R. § 35.160(b)(2), as described above in the preamble, the Department appears to have *deleted* 28 C.F.R. § 35.160(b)(2) entirely. The NAD strongly opposes this deletion.

For the past 18 years, the Department has required public entities to defer to the request of a person with a disability when determining the type of auxiliary aid or service that must be provided. This mandate, at 28 C.F.R. §35.160(b)(2), states:

In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

The NAD has grave concerns about the deletion of this section. There are approximately 31 million Americans with varying degree of hearing loss and consequently, a wide range of communication needs. In 1991, the Department recognized the importance of giving primary consideration to the expressed choice of the individual, and honoring that choice unless the public entity could “demonstrate that another effective means of communication exists or that use of the means chosen would not be required.”⁵ Nothing has changed since that time to make the need for such deference to an individual's selected auxiliary aid or service any less important. To the contrary, if anything, the proliferation of new technologies now available to accommodate varied communication needs have made deference to their expressed choices even more vital.

Further, the Department should provide additional guidance about what “effective communication” means. Too often, the determination of whether communication or an auxiliary aid or service is effective is made unilaterally from the perspective of the public entity only, and often without consideration of the perspective of the individual with a disability. Communication is a “two-way street.” As such, communication assessments should be informed by dialogue between the public entity and the individual with a disability, whenever possible. Communication assessments should also be conducted initially, regularly, and as needed. When a public entity decides not to provide a requested auxiliary aid or service, the public entity should provide the individual with a disability with the basis for the determination in accordance with 28 C.F.R. § 35.164.

In order to avoid misunderstandings about how to achieve effective communication on the part of the public entities covered by this Title, it is critical for the

³ 73 Fed. Reg. at 34529.

⁴ 73 Fed. Reg. at 34554-55.

⁵ 56 Fed. Reg. 35712 (July 26, 1991).

Department to keep in place its rule requiring a public entity to give primary consideration to the requested auxiliary aid or service of each individual with a disability.

For these reasons, the NAD opposes deletion of and urges the Department to reinstate 28 C.F.R. §35.160(b)(2), with the changes articulated in the preamble to the rules, as follows:

28 C.F.R. §35.160(b)(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

28 C.F.R. § 35.160(c)(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

This regulation codifies existing law. As the Department has observed in Appendix A to the current Title II regulations, “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.’”

The Department’s preamble should make absolutely clear that children are not to be used for interpreting purposes. Very often interpreters are needed in settings where it would be inappropriate for children to be involved – such as those involving medical issues, domestic violence or other situations involving the exchange of confidential or adult-related material. Children are often hesitant to turn down requests to interpret, as this often involves putting them in the difficult position of having to turn down a request for assistance from a parent, family member, or an adult with apparent authority. But using a child as an interpreter, especially for inappropriate communications – a common practice even to this day – can result in irreparable harm to the child.

28 C.F.R. § 35.160(c)(2) A public entity shall not rely on an individual accompanying an individual with a disability to interpret or facilitate communication, except in an emergency involving a threat to public safety or welfare, or unless the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

The NAD has serious concerns about the exception that permits a public entity to rely on an individual accompanying an individual with a disability to interpret or “facilitate communication” in an emergency involving a threat to public safety or welfare.

As proposed, the Department’s new rule may be interpreted to mean that a public entity may not only “rely on” but may also request, require, or coerce such action, when only acceptance of a voluntary offer should be permitted. While this may be appropriate in situations where interpreters are not otherwise immediately available, in the past, public entities, in particular hospitals, law enforcement, and courts, have frequently sought to rely on individuals accompanying individuals who are deaf or hard of hearing to interpret for those persons without making any efforts to secure qualified interpreter services. The Department should not condone such practices. Public entities, especially entities that are expected to encounter and handle emergency situations, should not be relieved of their obligations to provide auxiliary aids and services at any time, even in the event of an emergency. There are at least two compelling reasons for this.

First, the provision of an interpreter will often be quite feasible (and not constitute an undue burden) in an emergency – if the entity makes the necessary pre-arrangements. Many hospitals, law enforcement agencies, courts, and other entities have contractual arrangements with interpreter agencies that ensure the provision of qualified interpreters on very short notice.⁶ For example, in pending childbirth situations, interpreting agencies often assign one of their interpreters to a mom-to-be and that interpreter remains “on call” with a pager at all time; when the birth is imminent, the interpreter is immediately notified and can arrive at a hospital within minutes. Additionally, video remote interpreting (VRI) services makes qualified interpreter services available within minutes and can be provided until a qualified interpreter can arrive on site. It would be unfortunate if this section, read incorrectly, prompted hospitals, law enforcement agencies, courts, or other entities to discontinue such pre-arrangements, under the mistaken belief that they are no longer required to provide interpreters in childbirth and other emergency situations.

Second, even where it is difficult to secure interpreter services initially during an emergency, under the ADA, public entities are under an obligation to continue efforts to secure these services when the emergency begins to subside. For example, although it may be difficult to find interpreter services during and immediately after a major hurricane, once individuals are moved to protected areas and the situation stabilizes, public entities handling such an emergency must attempt to secure interpreters even if this was not possible while the situation was out of control.

Additionally, it is critical for the Department to acknowledge that the need for interpreters and other forms of effective communication escalates in the event of an emergency or threat to public safety. During the aftermath of Hurricane Katrina, for example, the need for effective communication was at a premium, to provide displaced persons with the information they needed to find food, shelter, and safety. Rather than allow the existence of an emergency to be an excuse *not* to provide auxiliary aids and services, it is precisely at this time when these auxiliary aids and services may be *most* needed. The Department should have a separate rule that unequivocally establishes a

⁶ The NAD has prepared an advocacy statement on communication access in state and local courts. This statement is available online at www.nad.org/2008communicationaccessadvocacystatement.

public entity's obligation to provide timely and effective communication in the event of public emergencies – through interpreters, computer-aided real time transcription services (if computers are available), captioning, alternate formatted materials, and other methods, as needed for the situation at hand.⁷

As for the remainder of § 35.160(c)(2), the NAD agrees that it would be appropriate for companions to interpret when “the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.” The NAD requests the Department to make clear, however, that it is equally important for the public entity to notify the individual with a disability, in advance, that the individual has a right to request and receive auxiliary aids and services from the public entity, and the estimated time when they can be provided if requested. In addition, the public entity should also notify the companion, in advance, that he or she may decline to interpret or facilitate communication. An individual who is unaware of his or her ADA rights may decide to use a companion just because he or she believes that is the only way to facilitate communication with the public entity. Yet, often companions – even if they have some signing skills – are not expert enough to handle complicated interpreting situations, such as those involving the exchange of information with medical personnel, for example. Improper communication in these settings can result in dangerous outcomes and should be avoided.

Finally, the Department's rules should make absolutely clear that children are not to be used for interpreting purposes. Very often interpreters are needed in settings where it would be inappropriate for children to be involved – such as those involving medical issues, domestic violence or other situations involving the exchange of confidential or adult-related material. Children are often hesitant to turn down requests to interpret, as this involves putting them in the difficult position of having to turn down a request for assistance from a parent, family member, or an adult with apparent authority. But using a child as an interpreter, especially for inappropriate communications – a common practice even to this day – can result in irreparable harm to the child.

⁷ A number of public entities already have begun using text alerts to reach individuals who are unable to hear in times of emergency. This is but one example of how public entities can plan in advance for emergencies.