



# 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

August 18, 2008

By electronic filing:

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 III of the  
Americans with Disabilities Act, 28 C.F.R. Part 36  
CRT Docket No. 106; AG Order No. 2968-2008**

The National Association of the Deaf (NAD) submits these comments in response to the notice of proposed rulemaking (NPRM), 73 Fed. Reg. 34508 (June 17, 2008), released by the U.S. Department of Justice (the “Department”) to amend regulations implementing Title III of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability by public accommodations and in commercial facilities.

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](http://www.nad.org).

The NAD appreciates the opportunity to submit comments on the Department’s proposed changes to the Title III rules. For each section of the Title III 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.

## Table of Contents

Movies and Multimedia .....	3
Question 24	
28 C.F.R. § 36.303(g): Stadiums .....	8
Question 26, Question 27, Question 28, and Question 29	
28 C.F.R. § 36.104: Definitions .....	14
Qualified Interpreter.....	14
Video Interpreting Services .....	16
28 C.F.R. § 36.302(c): Service Animals .....	18
Question 11	
28 C.F.R. § 36.303(b): Auxiliary Aids and Services .....	19
28 C.F.R. § 36.303(c): Effective Communication .....	22
28 C.F.R. § 36.303(d): Telecommunications.....	28
28 C.F.R. § 36.303(f): Video Interpreting Services (VIS).....	38
28 C.F.R. § 36.304: Removal of Barriers .....	39
Question 46	
Assistive Listening Systems .....	41
Question 1, Question 2, and Question 5	
Support Service Providers for Individuals who are Deaf-Blind .....	45
Supplemental Comments .....	47
Conclusion .....	53

## 28 C.F.R. § 36.303(c): Effective Communication

*28 C.F.R. § 36.303(c)(1): A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities and their companions who are individuals with disabilities.*

The Department has proposed that “companions who are individuals with disabilities” be included in the general mandate for places of public accommodation to furnish appropriate auxiliary aids and services to ensure effective communication. While “companions with disabilities” is a subset of the class of “individuals with disabilities,” the NAD agrees with this rule change. It may not be clear to public accommodations that the obligation extends to “companions with disabilities,” especially when the companion is accompanying or associated with an individual *without* a disability. There are often times when a place of public accommodation needs to or would otherwise communicate with a companion with a disability in order to effectively provide its services. The NAD strongly agrees that where a public accommodation would otherwise communicate with a companion without a disability, the public accommodation must provide appropriate auxiliary aids and services when necessary to ensure effective communication with companions with disabilities. 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. 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.

In light of the above comments, the Department should revise the proposed regulations as follows:

28 C.F.R. § 36.303(c)(1): A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities and ~~their~~ companions who are individuals with disabilities.

*28 C.F.R. § 36.303(c)(1)(i): 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 accommodation should communicate.*

First, the scope of a public accommodation’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 accommodation 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, places of public

accommodation 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.

Further, to fulfill what appears to be the Department's intent under this section, the 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 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).

In light of the above comments, the Department should revise the proposed regulations as follows:

28 C.F.R. § 36.303(c)(1)(i): 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 accommodation ~~should~~ would otherwise communicate, whether or not the individual is in the same physical location as the companion.

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

The NAD recognizes that the Department's proposed regulation would codify earlier guidance. The NAD appreciates that this proposed regulation 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 service may work for an individual in a particular communication context, but may not ensure effective communication in a different context.

Experience shows, however, that some of the proposed language goes too far, and some does not go far enough. In our experience, public accommodations rely almost exclusively on the first phrase ("the ultimate decision as to what measures to take rests with the public accommodation"), and completely overlook or ignore the last phrase ("provided that the method chosen results in effective communication"). This provision, in practice, puts the person with a disability in the unenviable, unintended, and untenable

position of “fail first.” Public accommodations interpret this provision to mean that the individual must first try the proffered accommodation and that accommodation must fail before the covered entity will provide the accommodation that the individual believes will result in effective communication. In many instances, there is no “second chance” to get the information and communication intended to be conveyed, or the consequences of ineffective communication cannot be undone. Including this provision, as it is written, makes it possible for covered entities to provide any accommodation, regardless of the likelihood of effective communication, and comply with the law. This was never the intent of the ADA. As such, the NAD recommends that the last two phrases of this provision (“but the ultimate decision . . . results in effective communication”) be removed.

Public accommodations typically have the least information and understanding regarding the abilities of a particular individual to communicate, along with the range of auxiliary aids and services available, and how to ensure effective communication. As a result, places of public accommodation have provided and continue to provide auxiliary aids and services that do not result in effective communication. For example, many places of public accommodation insist that providing assistive listening devices satisfies their obligations under Title III even with respect to individuals who are deaf or hard of hearing who do not benefit from assistive listening devices.

To address this issue, the Department should require that places of public accommodation, like public entities, give primary consideration to the requests of individuals who are deaf or hard of hearing. Giving such primary consideration does not and will not result in undue burden or fundamental alteration; 28 C.F.R. § 36.303(f) permits places of public accommodation to provide a different auxiliary aid or service if the requested auxiliary aid or service would result in undue burden or fundamental alteration.

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 accommodation 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 accommodation and the individual with a disability, whenever possible. Communication assessments should also be conducted initially, regularly, and as needed. When a public accommodation decides not to provide a requested auxiliary aid or service, the public accommodation should provide the individual with a disability with the basis for the determination.

In light of the above comments, the Department should revise the proposed regulations as follows:

28 C.F.R. § 36.303(c)(1)(ii): 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. ~~A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication.~~ A public accommodation shall give primary consideration to the requests of the individual with a disability.

*28 C.F.R. § 36.303(c)(2): A public accommodation 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 B to the current Title III 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. § 36.303(c)(3): A public accommodation 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 place of public accommodation 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 accommodation 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, places of public accommodation, in particular hospitals, 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.

Places of public accommodation, 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 have contractual arrangements with interpreter agencies that ensure the provision of qualified interpreters on very short notice. 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 times; 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 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 when it is difficult to secure interpreter services initially during an emergency, the ADA requires places of public accommodation 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, places of public accommodation 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. Rather than allow the existence of an emergency to be an excuse not to provide auxiliary aids and services, it is precisely during this time when auxiliary aids and services may be most needed. The Department should have a separate rule that unequivocally establishes a place of public accommodation’s obligation to provide timely and effective communication in the event of 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.

As for the remainder of the proposed regulation, 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 place of public accommodation 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 accommodation, as well as the estimated time such aids and services can be provided if

requested. In addition, the place of public accommodation should 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 place of public accommodation. 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, as stated above, the Department’s rules should make absolutely clear that children are not to be used for interpreting purposes. To reiterate, 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.