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Effective Communication & the ADA

Presented by Equip for Equality
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September 16, 2015


Information, Guidance and Training on the Americans with Disabilities Act

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Continuing Legal Education Credit for Illinois Attorneys


- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys
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Outline of Today's Webinar

<ul style="list-style-type: none"> • Overview • Statutes/Regulations • What are auxiliary aids and services? • Which auxiliary aids and services to provide? • Deference to people with disabilities • VRI vs. in-person interpreting • Extension to companions <ul style="list-style-type: none"> ◊ Companions vs. association discrimination 	<ul style="list-style-type: none"> • Effective communication in different settings <ul style="list-style-type: none"> ◊ Healthcare ◊ Emergency preparedness ◊ Education ◊ Criminal justice ◊ Entertainment • Defenses • Remedies <ul style="list-style-type: none"> ◊ Monetary damages ◊ Injunctive relief • Statute of limitations • Telecommunications • Conclusion
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Overview & Statutory Requirements

- Congress recognized that individuals with disabilities “encounter various forms of discrimination,” including “communication barriers”
42 U.S.C. § 12101(a)(5)
- Effective communication: Crucial way to achieve equal access
- Language in the ADA and Section 504
 - ◊ Title II/Section 504: General requirements
 - ◊ Title III: Specific language re: auxiliary aids/services
42 U.S.C. § 12181(b)(2)(A)(iii)

Regulatory Requirements

- DOJ's regulations provide greater clarification
 - ◊ Revised regulations became effective on March 15, 2011
- **Title II regulations:**
 - ◊ “A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are *as effective* as communications with others.” **28 C.F.R. § 35.160(a)(1)**
 - ◊ Public entities must “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.” **28 C.F.R. § 35.160(b)(1)**.

Regulatory Requirements

- **Title III regulations:** **28 C.F.R. § 36.303(c)**
- Places of public accommodation must “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”
- **Section 504:** Industry-specific regulations (examples)
 - **HHS:** Medical providers that receive federal funds must establish an effective communication procedure for “purpose of providing emergency health care.” **45 C.F.R. § 84.52(c)**
 - **Dept. of Ed.:** Recipients of federal funding must “ensure that no [disabled] student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.” **34 C.F.R. § 104.44(d)(1)**

What are Auxiliary Aids and Services?

Statute: Lists four categories:

- qualified interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments
- acquisition or modification of equipment or devices
- other similar services and actions

42 U.S.C. § 12103(1)

What are Auxiliary Aids and Services?

(For people who are deaf/hard of hearing)

Regulations: Add many examples

- note takers
- real-time computer-aided transcription services
- written materials / exchange of written notes
- telephone handset amplifiers
- assistive listening devices / assistive listening systems
- telephones compatible w/ hearing aids
- closed caption decoders
- voice, text, and video-based telecommunications products and systems

- open and closed captioning, including real-time captioning
- videotext displays
- accessible electronic and information technology
- other effective methods of making orally delivered information available to individuals who are deaf or hard of hearing.

Note: Regulations specify that qualified interpreters may be provided "on-site or through video remote interpreting (VRI) services."

28 C.F.R. § 36.303(b) (Title III)
28 C.F.R. § 35.104 (Title II)

What are Auxiliary Aids and Services?

(For people who are blind/have low vision)

Regulations: Add many examples

- audio recordings
- materials and displays in Braille
- screen reader software
- magnification software
- optical readers
- secondary auditory programs (SAP)
- large print materials
- accessible electronic and information technology

28 C.F.R. § 36.303(b) (Title III); 28 C.F.R. § 35.104 (Title II)

Query: Courts do not engage in a significant analysis about whether something is an auxiliary aid or service. Why?

Which Auxiliary Aids/Services To Provide?

Deciding which auxiliary aid/service to provide

- Assessment of the nature, length, complexity, context of the communication and the person's typical method of communication

Deference to people with disabilities

- **Title II:** Public entity must give "primary consideration to the requests of the individual with disabilities" **28 C.F.R. § 35.160(b)(2)**
- **Chisolm v. McManimon, 275 F.3d 315 (3rd Cir. 2001)**
 - Detention center argued that it did not violate the ADA by failing to provide an interpreter for complex communications because it used alternative auxiliary aids
 - **Court:** Rejected this argument, noting that the "most obvious problem" is that it conflicts with the "regulatory mandate that a public entity honor a disabled person's choice of auxiliary aid or service"

Deference to People with Disabilities

DOJ settlement agreements include "primary consideration" language

Dekalb Regional Crisis Center

- Center revised its effective communication policy
- Now conduct a communication assessment that includes the relevant facts and circumstances, the individual's communication skills and knowledge, the nature and complexity of the communication at issue
- Requires Center to give "primary consideration to the expressed preference for a particular auxiliary aid or service by an individual"

http://www.ada.gov/dekalb_crisis_ctr_sa.html

Deference to People with Disabilities

Title III: 28 C.F.R. § 36.303(c)(1)(ii)

- Entities should "consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication"
- However, places of public accommodation are ultimately the final decision makers about which auxiliary aid or service to offer "provided that the method chosen results in effective communication"

Note: If places of public accommodation reject requests by people with disabilities, they must be certain that communication is effective and take steps necessary (such as training) to make that happen

Title III: Must Ensure Training To Provide Effective Communication

Camarillo v. Carrols Corp.

518 F.3d 153, 156 (2d Cir. 2008); 2010 WL 2557209 (N.D.N.Y. June 24, 2010)

- Fast-food restaurants required employees to read menu instead of providing a large print menu
- Plaintiff asserted that employees responded with annoyance, impatience, or read only part of the menu to her
- **2nd Cir:** Patron alleged more than "rudeness or insensitivity"
 - Failure to adopt policies/procedures to effectively train employees can "constitute a violation of the ADA"
- **District ct. on remand:** Acknowledged that having a server read the menu is likely sufficient to comply with the ADA, but patron presented evidence that the servers' reading was ineffective
 - Not informed about item prices, was not able to select from the entirety of the menu, and generally received impatient service

Title III: Proceed with Caution When Rejecting Requests from People with Disabilities

Argenyi v. Creighton University

703 F.3d 441 (8th Cir. 2013)

- Medical school student requested auxiliary aids, including a cued speech interpreter for labs, computer assisted real-time transcription (CART) for lectures, and a FM system for small learning groups
- University instead offered a FM system for all settings
- Plaintiff attempted to use FM system, but explained that he was unable to follow lectures, was experiencing headaches, stress, and fatigue
- University responded by offering enhanced note-taking services
- During the student's second year of classes, the University offered to provide an interpreter, but the student found the interpreter ineffective to convey complex new vocabulary

Argenyi v. Creighton University

Deference to people with disabilities & meaningful access standard

Eighth Circuit

- Credited the student's affidavit
- Cited the DOJ's technical assistance manual—it was "especially important to consider the complainant's testimony carefully" because the individual with a disability is the one who is most familiar with his disability and therefore in the best position to determine the effectiveness of a particular aid or service

Important: Applied "Meaningful Access Standard"

- "Necessary" does not mean that the plaintiff must show that he was "effectively excluded"
- Auxiliary aids and services must afford people with disabilities equal opportunity to gain the same benefit as individuals without disabilities

Meaningful Access in Title II Cases

California Council of the Blind v. Cty. of Alameda 985 F.Supp.2d 1229 (N.D. Cal. 2013)

- **Facts:** Voters who are blind argued that the County violated the ADA by failing to ensure that accessible voting machines could be activated and operated by poll workers
- **County:** No ADA violation because poll workers provided assistance to voters with disabilities
- **Court:** Voters with disabilities had more than a right to cast a ballot; instead, voters had a right to **meaningful access** to the polls, which meant that they had the right to vote privately and independently

See also *K.M. ex al Bright v. Tustin Unified School Dist.*, 725 F.3d 1088 (9th Cir. 2013) (noting that the "meaningful access" standard incorporates the ADA's regulations regarding effective communication)

VRI v. In-Person Interpreters



DOJ Regulations include Video Remote Interpreting (VRI)

- **VRI:** Connects an off-site interpreter through the use of a video conferencing system to facilitate communication
- **Performance standards:** 28 C.F.R. § 36.303(f); 28 C.F.R. § 35.160(d)
 - ◊ Must have high-speed, wide-bandwidth video connection required to prevent low-quality video images
 - ◊ Must provide adequate staff training to ensure quick set-up and operation of the machine
- **Advantages:** Cost; serving individuals in rural areas where interpreters may not be geographically available; emergency situations where an interpreter is not available on site

VRI v. In-Person Interpreters

• **Potential problems:**

- ◊ DOJ: When individual cannot access screen because of vision loss or because of positioning due to injury
- ◊ NAD: Concerned about overreliance, technological problems, lack of adequate training

www.ada.gov/effective-comm.htm
<http://nad.org/issues/technology/vri/position-statement-hospitals>

Shaika v. Gaden Huetten Memorial Hospital 2015 WL 4092390 (M.D. Pa. July 7, 2015)

- The Hospital's VRI did not work, so staff used written notes to communicate to the plaintiff that her daughter had passed away
- **Court:** Denied motion to dismiss with respect to whether the hospital had acted with deliberate indifference to the plaintiff's rights

VRI v. In-Person Interpreters

Weiss et al v. Bethesda Health, Inc

No. 15-cv-80831 (S. D. Fla. June 6, 2015)

- Hospital refused to provide in-person interpreter for labor/delivery
- Plaintiff filed a motion for a preliminary judgment, arguing that VRI was ineffective for many reasons, including the fact that she would likely be in various positions and blocked from a clear line of sight
- She also argued that there had been technological problems with VRI in the past
- Before court ruled (after magistrate issued recommended opinion), plaintiff delivered her baby so the motion was denied as moot
- Instead, the plaintiff amended her complaint to include allegations of the problems experienced with VRI during her labor and delivery, and hospital stay
- **Status:** In discovery; set for trial in March 2016

Extension to Companions

- It is well settled that the ADA's effective communication obligations extend to *companions* with disabilities
- **Definition of companion:**
 - "[A] family member, friend, or associate of an individual" accessing either the public entity or place of public accommodation, "who, along with such individual, is an appropriate person with whom the [public entity or public accommodation] should communicate"

28 C.F.R. § 35.160(a)(1) (Title II)
28 C.F.R. § 36.303(c)(1)(i)(Title III)
- **Note:** There has not been significant litigation disputing whether an individual qualifies as a companion, perhaps because of the broad definition of the term "companion"

Companion Cases

Instead, most cases involving companions simply accept that the individual is a companion, and then determine whether the communication provided was effective.

Liese v. Indian River County Hosp. Dist.

701 F.3d 334 (11th Cir. 2012)

- Patient and her husband, both of whom are deaf and requested sign language interpreters, could move forward with their claims for ineffective communication under Section 504

Perez v. Doctors Hosp. at Renaissance, Ltd.,

2015 WL 5085775 (5th Cir. Aug. 28, 2015)

- Parents, both of whom are deaf and required sign language interpreters for effective communication, were entitled to protection of Section 504, at hospital where their daughter was a patient.

DOJ Settlement re: Companions

DOJ Settlement: Fairfax Nursing Center, Inc

- Complainants: 83-year-old resident's daughter/granddaughter who requested ASL interpreters, but the request was denied
- DOJ: Nursing Center had an obligation to provide auxiliary aids/services to both Complainants as "legally cognizable companions."
 - Noted that the daughter was listed as the patient's emergency contact and next of kin and thus should have had an interpreter for various communications, including communications with staff regarding care issues, treatment options, and discharge planning
 - Relied on unqualified staff member who lacked the requisite skills
- **Settlement:** Nursing Center agreed to provide appropriate auxiliary aids and services to both patients and their companions
http://www.ada.gov/fairfax_nursing_ctr_sa.html

Companions v. Association Discrimination

Issue: Can a non-disabled family member bring a claim for discrimination under the ADA for association discrimination?

Loeffler v. Staten Island University Hospital

582 F.3d 268 (2d Cir. 2009)

- Hearing children (13, 17) of a deaf patient and patient's wife were forced to interpret during their father's hospital stay
- **2nd Cir:** Children suffered an independent injury causally related to Hospital's failure to provide auxiliary aids & services to their parents
 - Required to fill the gap left by the Hospital's ADA violation
 - Required to miss school because they had to be on call to provide interpretation
 - "needlessly and involuntarily exposed to their father's condition," placing them at risk of emotional trauma due to their young age

Companions v. Association Discrimination

McCullum v. Orlando Regional Healthcare System, Inc.

768 F.3d 1135 (11th Cir. 2014)

- Lawsuit on behalf of a 14-year old deaf patient, sister and parents
- **11th Cir:** Affirmed court's decision to dismiss claims brought by patient's sister and parents
 - "[N]on-disabled persons are [not] denied benefits when a hospital relies on them to help interpret for a deaf patient," even though patients with disabilities are entitled to appropriate accommodations
 - Distinguished the *Loeffler* case, stating that here, the family never requested an interpreter, and that the patient's family members did not miss work or school

DOJ Regs: Using Friends/Family To Interpret

Query: Would this case have turned out differently if it occurred today?

DOJ regs (effective 2011): 28 C.F.R. § 36.303(c)(4); 28 C.F.R. § 35.160(c)

- Cannot use an **adult** to interpret/facilitate communication except
 - "emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available" OR
 - Individual specifically requests that accompanying adult provide the interpretation, adult agrees, and reliance is appropriate
- Cannot use a **minor child** to interpret/facilitate communication except
 - emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available

Effective Communication in Different Settings: Healthcare

Significant number of cases involving effective communication come from the healthcare context

- **DOJ guidance:** Interpreters v. exchange of written notes - 28 C.F.R. Pt. 35, App. A.
 - Written notes may be OK when conversation is minimal (routine lab tests or regular allergy shots)
 - Interpreters should be used when communication is more complex (medical history, diagnoses, procedures, treatment decisions, and communications regarding at-home care)
- **Courts:** Many courts agree that when an individual who is deaf and uses ASL needs to communicate about a complicated medical procedure, especially a surgery, the exchange of written note is an inadequate way to achieve effective communication

Importance of Interpreters for Complex Medical Communications

Liese v. Indian River County Hospital District
701 F.3d 334 (11th Cir. 2012)

- Communications about procedure to remove patient's gallbladder through emergency laparoscopic surgery done by mouthing words, writing notes, and pantomiming
- **11th Cir:** Sufficient evidence that limited auxiliary aids provided were ineffective; reversed decision granting summary judgment
 - "[U]nder circumstances in which a patient must decide whether to undergo immediate surgery involving the removal of an organ under a general anesthetic, understanding the necessity, risks, and procedures surrounding the surgery is **paramount**"
 - "Under these circumstances, auxiliary aids limited to written notes, body gestures, and lipreading may be ineffective in ensuring that a hearing-impaired patient receives equal opportunity to benefit from the treatment"

Case Finding Interpreter Not Required

Martin v. Halifax Healthcare Sys., Inc. 2015 WL 4591796 (11th Cir. July 31, 2015)

- One of the plaintiffs had a brief emergency room visit for a "bump on the head" – Not provided with an interpreter
- **11th Cir:** Affirmed summary judgment for hospital
 - Interpreter was not necessary because the plaintiff received typed instructions, which the patient, who is able to read and write English, indicated he understood

Note: ASL and English are not the same, so some deaf people may be fluent in ASL but unable to read English, making passing notes ineffective even for communications that are not complex

Tip: Educate the Judge to show why communications are ineffective

DOJ: Barrier-Free Healthcare Initiative

- **Common elements of DOJ settlement agreements:**
 - Policy revisions to ensure the provision of the appropriate auxiliary aids and services, including sign language interpreters and materials in alternate formats
 - Perform communication assessment, requiring consulting with the patient and documenting the decision in the patient's chart
 - Signage of available auxiliary aids/services
 - Training requirements
- **Examples:**
 - Srivinas Mukkamala: www.ada.gov/mukkamala_sa.html
 - Swedish Edmonds Hospital: www.ada.gov/swedish_edmonds_sa.htm
 - Arshad Pervez: www.ada.gov/pervez_sa.html

"Talking" Prescription Containers

Structured Negotiation with CVS/Pharmacy

- Structured negotiations with the American Foundation for the Blind, American Council of the Blind, and California Counsel
- CVS/pharmacy provides ScripTalk talking prescription labels for Rx
- Great demonstration of the various types of auxiliary aids and services that can lead to effective communication, especially with the advance of new technologies

<http://flegal.com/2014/03/cvs-prescription-agreement>

See also settlement with CVS MinuteClinic (agreeing to take additional steps to ensure that individuals with visual impairments receive treatment and other important information in accessible formats and to arrange for sign language interpreters at the request of individuals who are deaf)

www.cvshealth.com/content/minuteclinic-enhance-accessibility-patients-disabilities

Emergency Preparedness

Brooklyn Ctr. for Independence of Disabled v. Bloomberg 980 F. Supp. 2d 588 (S.D.N.Y. 2013)

- **DOJ:** Statement of interest – communications must be “as effective”
www.dralegal.org/sites/dralegal.org/files/casefiles/dojstmtinterest.pdf
 - ◊ City failed to provide accessible communications and auxiliary aids and services at shelters
 - ◊ City’s emergency plans don’t require TV warnings and alerts to contain audio and captioning components
- **Court:** City violated ADA by failing to consider PWD in plans
 - ◊ Need for communication access and auxiliary aids and services to be implemented at all stages of disaster preparedness, from televised statements using ASL interpreters in times of disasters to effective communication at emergency shelters

NYC Emergency Preparedness: Settlement Agreement

Select settlement terms re: communication

City will:

- Purchase electronic communication boards
- Create an incident management team that will canvass neighborhoods to provide aid to people with disabilities in an emergency trained in disability literacy, communications, and accommodations
- Provide materials in Braille, large print, and audio tape formats
- Formalize procedure for requesting sign language interpreters and certified deaf interpreters via laptop or Skype in emergency situations

<http://www.dralegal.org/bcid-v-bloomberg>

LA Emergency Preparedness: Settlement Agreement

Communities Actively Living Indep. & Free v. City of Los Angeles 2011 WL 4595993 (C.D. Cal. Feb. 10, 2011)

- Settlement reached after court opinion regarding inadequacies of emergency preparedness plan for people with disabilities
- **Select settlement terms related to effective communication:**
 - ◊ Emergency Survival Program available in alternate formats
 - ◊ Emergency hotline operators trained in TTY and Relay calls
 - ◊ Emergency Mass Notification System must be TTY compatible, and users can register to receive alerts through phone, text, email
 - ◊ Door-to-door notifiers trained in communicating with individuals with communication disabilities, including procedures to notify deaf/blind individuals of evacuation (drawing an “X” on the individual’s back)

LA Emergency Preparedness: Settlement Agreement

- Notifiers provided with non-text signs, pictograms, and sketchpads
- LA will provide accessible weather radios that activate strobe lights and/or shake a pillow or bed
 - Radio can also be adapted to send messages in large print or Braille for persons who are visually impaired or blind
- Evacuation points and care areas must provide real time captioning and alternative means of communication (signs in large print/Braille)
- All shelters must provide auxiliary aids and services to individuals with communication needs, including interpreters, captioning services, TTY/video phone access, communication cards, facilitated communication assistance, or other services

www.dralegal.org/sites/dralegal.org/files/casefiles/settlementagreement_6.pdf

Effective Communication & Education

K.M. ex al Bright v. Tustin Unified School Dist. 725 F. 3d 1088 (9th Cir. 2013)

- **Issue:** Interplay between Title II/Section 504/IDEA
- Consolidated cases of two hard of hearing students who requested CART
- **District court:** School met IDEA requirements so no need to look at ADA
- **9th Cir:** In some (but not all) situations, schools may be required under the ADA to provide services to deaf and hard of hearing students that are different than the services required by the IDEA
 - IDEA requires consideration of communication needs, opportunities for direct communication in child's language/communication mode and consideration of AT/services
 - ADA requires public schools to communicate "as effectively" as students without disabilities
 - IDEA does not require "equal" opportunities

IDEA v. ADA/Section 504

D.H. ex rel. Harrington v. Poway Unified Sch. Dist.

2013 WL 6730163 (S.D. Cal. Dec. 19, 2013) *reconsideration denied*, No. 09-CV-2621-L NLS, 2014 WL 129070 (S.D. Cal. Jan. 14, 2014)

- **On remand:** Court ordered the school to provide CART services
- DOJ and the U.S. Department of Education released a document entitled "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools" providing further explanation and clarification regarding the provision of effective communication

www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf

Accessible Electronic/Information Technology in Higher Education

Trend in case law/settlements: Accessible IT, course materials, accessible distance learning at colleges and universities

- Accessible electronic and IT is an auxiliary aid and service
- Many agreements – require materials and courses provided via a website or online program (such as Blackboard) to be accessible

National Fed'n of the Blind et al v. Atlantic Cape Comm. College
Case No. 1:15-cv-03656 (D.N.J.) (consent decree, July 7, 2015)

- College to develop plan to make all student-facing electronic and IT accessible to students with disabilities within 3 years
- College to develop and implement a plan to provide accessible instructional materials, course materials, and tactile graphics to students who are blind at the same time that the materials are made available to students without disabilities

Federal Agency Agreements: Effective Communication in Higher Education

University of Cincinnati – OCR Resolution Agreement

- University to create and implement a policy to ensure all information communicated through the University's website, online learning environments, and course management systems is accessible to people with disabilities, especially those who use assistive technology to access this information

www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf

DOJ Settlement Agreement with EdX, Inc.

- EdX, an entity which contracts with over 60 institutions of higher learning to provide massive open online courses, and operates a website, mobile application, and a Platform, to make modifications to increase the accessibility of its courses

www.ada.gov/edx_sa.htm

Effective Communication & Criminal Justice

Bahl v. County of Ramsey
695 F.3d 778 (8th Cir. 2012)

- Deaf arrestee sued city after he was refused written communication during his arrest during a traffic stop and denied a post-arrest interview after requesting an interpreter
- **Court:** Reversed grant of summary judgment to County in part
 - ◊ Traffic stop: Due to circumstances, communications through gestures was reasonable
 - ◊ Post-arrest interview: Question of fact as to whether police officer stopped post-arrest interview so that the city did not have to provide an interpreter
 - If so, city bears burden of establishing undue burden

Interactions with Police

Taylor v. City of Mason

970 F.Supp.2d 776 (S.D. Ohio 2013)

- Man who is deaf called the police after having a physical altercation with a partially deaf woman at his home.
- Police called interpreter but then used the woman as an interpreter.
- At police station: City provided interpreter who was not ASL certified and refused to replace the interpreter upon the man's request
- **Court:** Denied the city's MTD
 - ◊ Man did not consent to using woman; she was not appropriate under the circumstances; and not an emergency situation
 - ◊ When law enforcement agency does not defer to person with a disability, the burden is it to demonstrate that communications were "as effective" or otherwise not required

DOJ Settlement Agreements with Police Departments

DOJ has reached a number of settlements with police departments, requiring terms:

- Provide auxiliary aids and services, including sign language interpreters, to citizens who are deaf and hard of hearing
- Create new policies and provide training
- Entering into contracts with qualified sign language interpreting agencies to provide on-call interpreting services

DOJ guidance documents:

- www.ada.gov/q%26a_law.htm
- www.ada.gov/lawenfcomm.htm
- **Model policy:** www.ada.gov/lawenfmodpolicy.pdf

Older DOJ Settlement Agreement

DOJ Settlement Agreement with Rochester Police Department

- Interpreters provided as needed during arrests, investigations, or during interrogations, regardless of where they are conducted
- Procedures and guidelines for getting an interpreter must be established where offer is in field and/or timeliness is an issue
 - ◊ Serious offense/time is of the essence: Investigator may continue an interview with a deaf or hearing impaired individual but must document the investigation as completely as possible and notify designated police personnel
 - ◊ Less serious offenses, the investigator must end the interview until an interpreter is present

www.justice.gov/crt/foia/readingroom/frequent_requests/ada_settlements/ny/ny10.txt

ADA & Correctional Centers

Clarkson v. Coughlin

898 F. Supp. 1019 (S.D.N.Y. 1995)

- Court granted summary judgment to the plaintiffs, deaf and hard of hearing inmates, finding that the defendant violated Section 504 and the ADA by:
 - ◊ Failing to provide interpretive services during reception and classification
 - ◊ Absence or inadequacy of assistive communication devices for telephone and television
 - ◊ Failure to provide visual safety alarms and their failure to make reasonable accommodations to participate fully in education, vocational and rehabilitative contexts

Settlement Agreements re: Correctional Centers

Recent agreements out of Maryland and Kentucky

- Select settlement terms:
 - ◊ Deaf and hard of hearing inmates will have access to videophones to communicate with people outside of prison
 - ◊ Adequate visual notification of oral announcements concerning emergencies
 - ◊ Access to sign language interpreters and other auxiliary aids and services
 - ◊ Broad scheme of policy implementation, training, outreach, and monitoring to ensure equal treatment of deaf and hard of hearing individuals by prison officials

<http://nad.org/news/2015/6/landmark-settlements-reached-maryland-and-kentucky-deaf-prisoners>

Effective Communication in Judicial Proceedings

Prakel v. Indiana

2015 WL 1455988 (S.D. Ind. March 30, 2015)

- **Issue:** Whether the son of a criminal defendant was entitled to an ASL interpreter to attend his mother's court proceeding
- **Court:** Clear history of the public's right to attend criminal proceedings, and this is included within Title II's protections
- Undisputed that the plaintiff required an ASL interpreter to communicate effectively and that one was not provided
- Plaintiff was denied effective communication and the opportunity to enjoy the benefits of the courts' services, programs, and activities

See also *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (County failed to provide videotext display, which, if County had done any investigation, would have been able to be provided through court reporting service)

Effective Communication & Entertainment

Audio Descriptions / Closed Captioning at Movie Theaters

- **2014:** DOJ published NPRM www.ada.gov/regs2014/movie_nprm.html
 - ◊ Requires theaters that show a movie that is available with captions and audio description to show the movie with these accessibility features, unless doing so would be an undue hardship or a fundamental alteration
 - ◊ Not required if movie is not produced with CC or AD
 - ◊ Theaters must obtain and install equipment to transmit captions and descriptions
 - ◊ Closed captions: Specific number of individual captioning devices based on number of seats
 - ◊ Audio descriptions: One listening device per screen
 - ◊ Open captioning: Permissible but not required
- www.ada.gov/regs2014/qa_movie_nprm.htm

Open v. Closed Captioning In Movie Theaters

Arizona v. Harkins Amusement Enterprises, Inc. 603 F.3d 666 (9th Cir. 2010)

- Suit against movie theaters for failing to provide open and closed captioning and audio description
 - **Open captioning:** Not required as a matter of law
 - ◊ Cited DOJ's commentary to effective communication regs - movie theaters are not required to provide open captioned films
 - **Closed captioning/audio description:** Both "clearly" constitute auxiliary aids and services, so must be provided unless it can avail itself of the ADA's defenses
 - **Consent decree:** Agreed to provide closed captioning and audio descriptions in 50% of auditoriums in AZ movie theaters
- www.azag.gov/sites/default/files/sites/all/docs/civil-rights/lawsuits/disabilities-act/HARKINS%20CONSENT%20DECREE.pdf

More Movie Theater Access

Settlement with AMC Theaters

- In 2012, the Illinois Attorney General's office reached an agreement with AMC (in response to complaint from Equip for Equality)
- AMC agreed to provide personal captioning services and audio-description technology for moviegoers at all of its theaters and each of its 460 movie screens in Illinois
 - ◊ www.equipforequality.org/news-item/attorney-general-madigan-reaches-agreement-amc-theatres-settlement-complaint-filed-equip-equality-provides-unprecedented-access-people-disabilities-go-movies/

See also *Settlement Agreement Between California Council of the Blind, Patrons with Visual Impairments and Cinemark* (agreeing to install audio description systems on a rolling basis across its circuit as chain converts to all-digital format).

<http://iflegal.com/2012/09/cinemark-agreement>

Other Laws/Regulations Regarding Website Accessibility

Feldman v. Pro Football Inc. 419 Fed.Appx. 381 (4th Cir. 2011)

- **Issue:** What information broadcast at a professional football game at FedEx Field needs to be captioned?
- **Defendants:** ADA does not sweep so broadly as to include "music with lyrics, play information, advertisements, referee calls, safety/emergency information, and other announcements."
- **Court:** Disagreed - effective communication & full/equal enjoyment requires effective auxiliary aids to convey all information requested by the deaf and hard of hearing plaintiffs
 - Including game-related information, such as play information and referee calls, emergency and public address announcements, and words to music and other entertainment

Access to Cultural Institutions: Museums

DOJ has been working with museums in the D.C. area to ensure communication access

National Museum of Crime and Punishment

- Agreed to provide audio description, audio described museum tours that include tactile experiences, Braille, large print, provide script of exhibit information for deaf and hard of hearing, and ensure that its website is accessible

www.ada.gov/crime_punishment_museum/crime_punishment_sa.htm

Spy Museum

- Now has tactile tours, an audio describer for any museum presentations, captions on their audio elements, and also offers ASL interpreters, oral interpreters, and captioning for public programs

www.ada.gov/spymuseumfctsh.html

Defenses

Undue Burden & Fundamental Alteration

Two exceptions:

- Fundamental alteration
- Undue burden

Caution:

- If providing one particular auxiliary aid or service would result in a fundamental alteration or undue burden, the covered entity must provide an alternative, if one exists, so that effective communication is achieved to the maximum extent possible

28 C.F.R. § 36.303(g) (Title III); 28 C.F.R. § 35.164 (Title II)

Title II: Before Using Defenses

Title II entities: Decision to deny an auxiliary aid/service must be:

- Made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity
- Accompanied by a written statement of the reasons for reaching that conclusion. **28 C.F.R. § 35.164**

Chisolm v. McManimon - 275 F.3d 315 (3rd Cir. 2001)

- County detention center argued that providing the plaintiff with an ASL interpreter and a TTY would cause either an undue burden or fundamental alteration
- **Court:** Cited Title II regs – Defendant failed to demonstrate that they had issued written statements explaining why they denied Chisolm’s requests and therefore rejected this defense

Undue Burden Defense

Jordan v. Greater Dayton Premier Mgmt.
9 F. Supp. 3d 847 (S.D. Ohio 2014)

- Housing authority argued that providing audio tapes of all written correspondence would be an undue burden in light of budget cuts
 - **Argued:** Responsibility of creating the audio cassettes would fall on overworked housing specialists; there are as many as 37 different forms each year; would take over a hundred hours to read all of the documents, or would cost approximately \$1,600 (4x allocation for each family’s yearly admin fees)
- **Court:** Even with budget cuts, unlikely that the burden here is undue
 - Cost of accommodating a disability does not become an undue burden simply because it exceeds the annual administrative fee
 - Rejected argument that audio tape was a personal device

Undue Burden Defense

Tip: Undue burden analysis requires considering facts of specific case; avoid “slippery slope” arguments

Prakel v. Indiana

2015 WL 1455988 (S.D. Ind. March 30, 2015)

- **Defendants:** No obligation to provide an ASL interpreter to plaintiff because providing interpreters for spectators would unduly burden the court system by straining already limited financial resources
- **Court:** Question at issue was whether interpreting services needed to be provided to this plaintiff on a limited number of occasions - “not whether the statute requires state courts to provide interpreters for the entire deaf population throughout the Indiana court system.”
 - Not an undue burden to provide interpreting services to this one plaintiff

Defenses: Fundamental Alteration

Innes v. Board of Regents of the University System of Maryland
2015 WL 1210484 (D. Md. March 16, 2015)

- Deaf and hard of hearing fans requested "line of sight captioning" to be displayed on ribbon boards at stadium during games
- **Defendants:** Fundamental alteration
 - ◊ Captioning would "fundamentally alter the University's athletic department equipment and operations in ways that are exceptionally burdensome, complex[,] and costly"
- **Court:** Misconstrued law. Proper inquiry = whether proposed action would fundamentally alter *the service, program, or activity*, not the public entity itself. Here, captioning would not change how the football games are conducted; captioning would merely "provide access to the audio component" of the game

Defenses: Undue Burden

Innes (Continued)

- **Defendants:** Undue burden
 - ◊ University listed a number of concerns—primarily financial and technological—that would make installing captioning services burdensome to the organization
 - ◊ Cost of installing ribbon boards in a single stadium was \$400,000 - \$700,000; cost for both stadiums and replacing all video equipment was approximately \$3.75 million
 - ◊ Plaintiffs responded by providing information that the University's budget as a whole may be increasing after being added to the Big Ten sports network
 - ◊ **Court:** Issue of fact as to whether installing ribbon boards would be an undue burden

Remedies: Monetary Damages

General rule:

- Title III = no monetary damages
- Title II / Rehabilitation Act = Compensatory damages are recoverable if the plaintiff demonstrates that the covered entity engaged in intentional discrimination. No punitive damages

Standard:

- Majority of courts require a showing of "deliberate indifference."
- Does not require "personal animosity or ill will"
- Intentional discrimination inferred when a policymaker acted with "at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the challenged policy or custom." See, e.g., *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334 (11th Cir.2012)

Intentional Discrimination

Plaintiffs more likely to establish intentional discrimination when they clearly request an auxiliary aid or service, when the covered entity clearly disregards the request, and when the plaintiffs advise that they cannot understand the communication.

Loeffler v. Staten Island University Hosp.
582 F.3d 268 (2d Cir. 2009)

- 2nd Cir: Reasonable jury could find deliberate indifference
- Patient/family member requested interpreter on numerous occasions
- Doctor “laughed off” requests, even though hospital had a policy in place, forcing patient’s children to miss school to act as interpreters

See also *Liese v. Indian River County Hospital District*, 701 F.3d 334 (11th Cir. 2012)
(reasonable jury could find deliberate indifference in light of the evidence that plaintiff told doctor her ability to read lips was limited and doctor laughed at her; had the ability to provide interpreter but did not; asked questions demonstrating her lack of understanding about her medical condition and procedures)

Compare *McCullum*

McCullum v. Orlando Regional Healthcare System, Inc.
768 F.3d 1135 (11th Cir. 2014)

- Neither patient nor his family requested an interpreter, or advised the hospital that the communication provided was inadequate
- **Court:** D.F. failed to show that defendants knew there would be a substantial likelihood that they could not communicate effectively with him without an interpreter and still made the deliberate choice not to provide him with one
 - Hospital had signs stating that interpretation services were available for individuals but no one asked for those services

See also *Rylee v. Chapman*, 316 F.App’x. 901 (11th Cir. 2009) (finding plaintiff presented no evidence that police officers knew/believed that he could not read lips or needed an interpreter; asked officer to write questions; stated that he could read/write)

Remedies: Injunctive Relief

Case finding plaintiff had standing

Standing to seek injunctive relief: Plaintiffs have to prove they have standing to sue when just seeking injunctive (non-monetary relief). One consideration is whether the plaintiff is likely to return to the place where the alleged discrimination took place.

Perez v. Doctors Hosp. at Renaissance, Ltd.
2015 WL 5085775 (5th Cir. Aug. 28, 2015)

- ❖ Ineffective communication for deaf parents whose child was a patient
- ❖ **Hospital:** no standing - insufficient evidence of future harm.
- ❖ **5th Circuit:** Parents have standing under Title III.
 - Parents experienced recent problems with effective communication
 - Hospital failed to revise ADA policy or provide training after discrimination allegations, which raises inference that plaintiffs’ problems with provision of auxiliary services will continue in future.

Injunctive Relief

Case finding plaintiff lacked standing

Freydel v. New York Hospital 242 F.3d 365 (2d Cir. 2000)

- Plaintiff argued that she had standing:
 - Likely to return to the hospital because she had a number of chronic health conditions and hospital was part of medical network
 - Likely to experience problems because hospital did not improve training/policy
- **Court:** No standing – possibility of returning was speculative
 - Patient's doctor was no longer associated with the hospital
 - Other hospitals were closer to the patient's home

See also *Ervine v. Desert View Regional Medical Center Holdings, LLC*, 753 F.3d 862 (9th Cir. 2014) (finding plaintiff lacked standing where he had never been a patient of the medical provider and because he has no imminent plans to return because underlying case was about communications provided to his wife, who passed away)

Statute of Limitations

When does a claim accrue?

Ervine v. Desert View Regional Medical Center Holdings, LLC 753 F.3d 862 (9th Cir. 2014)

- Medical provider argued that plaintiff's suit was barred by the two year statute of limitations
- It had informed the patient on her initial visit that it would not provide her with interpretation services – initial visit was over 2 years before lawsuit was filed
- However, patient had repeatedly requested interpreters and provider had repeatedly denied requests
- **9th Cir:** Reversed district court - Claims accrued each time a right had been denied
 - Because provider repeatedly denied requests for an interpreter, the plaintiff's claim was not barred by the statute of limitations

Impact of Remedial Measures

Query: If a defendant voluntarily offers auxiliary aids and services while the litigation is pending, does that decision make a lawsuit moot?

Feldman v. Pro Football Inc. 419 Fed.Appx. 381 (4th Cir. 2011)

- After plaintiffs filed a lawsuit, Defendant voluntarily provided some captioning at Redskins games and stated that it would do so indefinitely
- **Court:** Defendant's actions did not render the case moot because they have not "discharged their heavy burden of showing no reasonable expectation that they will repeat their alleged wrongs"
 - Defendants did not provide captioning until after plaintiffs filed their complaint
 - Defendants maintain complete control over the captioning

Telecommunications

Responding to relay/TTY calls

DOJ Settlement Agreement with Wells Fargo

- **Complaints:** Wells Fargo refused to accept calls made using a relay service, referred callers to telephone number with a dedicated TTY service, and that calls to the dedicated TTY telephone were either not answered with a TTY or went to a voicemail box that was never answered
- **Agreement:** Wells Fargo agreed to provide direct access to individuals who called through a relay service operator
 - To prevent fraud, employees may take reasonable steps to ensure the validity of the call by including verification of personal information using same procedures it uses for non-relay calls
 - Assign staff to dedicated TTY line to provide same level of access to callers and response time to callers who use non-TTY line

www.ada.gov/wells_fargo/wells_fargo_settle.htm

Title II: Accessible 9-1-1

Chatoff v. City of New York 1992 WL 202441 (S.D.N.Y. 1992)

- **Court:** Granted preliminary injunction
 - Use of seven-digit numbers rather than 9-1-1 to accommodate deaf/hard of hearing callers is specifically prohibited by regs
- Quoted DOJ regulations:
 - The requirement for direct access disallows the use of a separate seven digit number where 911 service is available
 - Separate 7 digit emergency call numbers would be unfamiliar to many individuals and also more burdensome to use
 - A standard emergency 911 number is easier to remember and would save valuable time spent searching in telephone books for a local seven digit emergency number

Conclusion

- Effective communication requirements are extremely broad and impact all parts of society
- Obligation applies to important and complex discussions, such as ones about medical diagnoses, to less complex communications, such as what an individual would like to order at a restaurant
- ADA's statute, regulations, and implementing case law provide an important framework to consider when determining which auxiliary aid and service to provide to facilitate communication access
- Because of the ADA, there has been substantial progress at removing communication barriers
- As technology progresses, we are sure to see additional legal questions raised about the scope of the effective communication obligation – stay tuned to these critical legal issues moving forward

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- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact 877-232-1990 (V/TTY) or webinars@ada-audio.org

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Next ADA Legal Webinar Session

November 18, 2015

Topic and Speaker: TBD
