



## ADA Legal Webinar Series May 22, 2019

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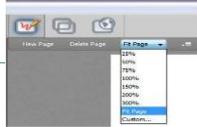
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## Access to Healthcare and the ADA

Presented by Equip for Equality  
Barry C. Taylor, VP for Civil Rights and Systemic Litigation  
Rachel M. Weisberg, Staff Attorney / Employment Rights Helpline Manager

May 22, 2019



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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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### Resource: The ADA in the Healthcare Industry

- Today's presentation does **not** address ADA issues for healthcare workers with disabilities. (Title I of the ADA)
- However, the Great Lakes ADA Center contracted with Equip for Equality to prepare a legal brief entitled "The ADA in the Healthcare Industry."
- In addition to providing legal analysis on access to healthcare under the Titles II and III of the ADA and the Rehab Act, this legal brief also addresses a number of employment-related issues impacting healthcare workers, including essential job functions, reasonable accommodations, undue hardship, direct threat, confidentiality, wellness plans, and doctors as independent contractors.
- The legal brief will be available on [www.ada-legal.org](http://www.ada-legal.org).



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## Outline of Today's Webinar

- Which law applies – Title II, Title III or the Rehab Act?
- Is facility a healthcare provider?
- Legal standing to bring ADA cases against healthcare providers
- Effective communication in healthcare
- Access to healthcare for people with service animals
- Access to healthcare for people living with HIV
- Administration or use of medication
- Accessible medical facilities and equipment
- Insurance and the ADA

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## Which Law Applies?

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## Which Law Applies? Title II, III or Rehab Act?

- Almost all healthcare organizations are covered by either Title II or Title III of the ADA, as well as Section 504 of the Rehabilitation Act.
- Which law applies depends on whether the healthcare provider is public or private, and whether it receives federal funding.
- **Title II** – Applies to *public* healthcare providers
- **Title III** – Applies to *private* healthcare providers (In Title III's listing of public accommodations, "healthcare provider" and "hospital" are specifically listed)
- **Section 504 of the Rehabilitation Act** – Applies to healthcare providers that are *recipients of federal funding*

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## Are Religious Healthcare Providers Subject to the ADA or Rehab Act?

### **Reed v. Columbia St. Mary's Hospital** 915 F.3d 473 (7th Cir. 2019)

- **Background:** Patient with tardive dyskinesia filed Title III suit alleging hospital deliberately withheld from her the device she used to speak and put her in a "seclusion" room as punishment
- **Hospital:** Covered by ADA's religious exemption
- **7<sup>th</sup> Circuit:** Religious exemption is an affirmative defense and hospital waived that defense by not raising it in its Answer
- **But see, Cole v. Saint Francis Medical Center, 2016 WL 7474988 (E.D. Mo. Dec. 29, 2016)** - religious exemption properly raised and hospital was under jurisdiction of the Bishop of the Roman Catholic Dioceses, not ADA
- **Remember** – Even if religious exemption applies, healthcare provider may be liable under Rehab Act if entity receives federal funding

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## ADA v. Rehab Act

- **General Rule:** What is prohibited by Titles II or III of the ADA is also prohibited by the Section 504
- **Differences:**
  - **Regulations:** HHS issues regulations for Section 504, but DOJ issues regulations for Titles II and III of the ADA
  - **Compensatory Damages:**
    - Section 504 - compensatory damages available because healthcare provider waived defense of sovereign immunity when it accepted federal funds.
    - Title III of the ADA – no compensatory damages permitted in statute
    - Title II of the ADA - compensatory damages statutorily permitted and recoverable for intentional discrimination

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## Is Facility a Healthcare Provider?

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## Is facility a place of public accommodation under Title III?

- **General Rule:** Traditional healthcare providers covered by Title III, but less clear with non-traditional healthcare providers

### ***Silguero v. CSL Plasma, Inc.***

907 F.3d 323 (5th Cir. 2018)

- CSL Plasma is a plasma collection center
  - Pays anyone who passes screening test to donate plasma
- 2 people excluded due to mobility disabilities and service animal
- **Issue:** Is CSL Plasma a place of public accommodation?
- **5th Cir:** No. Affirmed MSJ – not a “service establishment”
  - “Service” implies benefit to customers and no benefit here
  - Service establishment doesn’t pay customer for service it provides

**But see, *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016)** (finding plasma center is a “service establishment” under Title III); ***Matheis v. CSL Plasma*, 346 F.Supp. 3d 723 (M.D. Pa. 2018)**



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## Legal Standing to Bring Suit Against Healthcare Provider



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## Legal standing to bring ADA suit against healthcare providers

### **General Standing Requirements - Constitution**

- Plaintiff must suffer a personalized and concrete injury-in-fact of a legally cognizable interest
- The injury must be traceable to the defendant’s conduct
- It must be likely, rather than speculative, that the injury can be redressed through a favorable court decision

### **Standing Requirements – Title III of the ADA**

- Plaintiff must show harm from lack of ADA compliance
- Accessibility issues must relate to the plaintiff’s disability
- Must show a likelihood of future harm – **this is the most common issue in Title III legal standing challenges**



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## Standing to sue – allegation of future harm

- Many courts have adopted the following 4 factors for demonstrating likelihood of future harm:
  - ❖ Proximity of the business to the plaintiff's home,
  - ❖ Plaintiff's past patronage of the defendant's business,
  - ❖ Definiteness of the plaintiff's plans to return, and
  - ❖ Frequency of travel near the business.
- Many people with disabilities unable to pursue healthcare discrimination case because of a finding of lack of standing.
- Criticism of this approach by courts and commentators.  
*See, e.g., Doran v. 7-Eleven*, 524 F.3d 1034 (9th Cir. 2008); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 Berkeley J. Emp. & Lab. L. 377 (2000).

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## Legal standing found in case against healthcare providers

### ***Cutting v. Down East Orthopedic Associates, P.A.*** 278 F.Supp.3d 485 (D. Me. 2017)

- Woman with Tourette's Syndrome filed Title III ADA case after doctor treated rudely and failed to make reasonable modifications during surgery to accommodate disability
- Healthcare provider argued no legal standing to bring ADA claim for one-time ad hoc occurrence – no likelihood of future harm
- **Court:** Plaintiff had standing - a single past incident of discrimination can provide standing, as long as the lack of accommodation continues to exist
- **Factors:** Clinic in the same town that she lived in, she received orthopedic care from a different doctor in the practice previously, and testified she would return to the practice if she was not deterred from doing so by the discrimination – no futile gesture required.

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## Legal standing not found in case against healthcare provider

### ***Biondo v. Kaleida Health***

2018 WL 1726533 (W.D.N.Y. Apr. 10, 2018)

- Deaf patient filed Title III suit after healthcare provider failed to provide interpreter in emergency room
  - **Court:** Plaintiff did not have standing under Title III
  - **Factors:** She had lived in the area for 30 years, but only visited that hospital twice, as opposed to 31 visits to other hospitals; testified she would return to the defendant's ER only if she had "no choice"; and there were other hospitals closer to her home and office
- See also, Giterman v. Pocono Medical Center*, 2019 WL 218957 (M.D. Pa. Jan. 16, 2019) no standing for deaf patient – she presented no evidence she planned to return to hospital for any treatment or test after VRI malfunctioned – and in any event hospital had upgraded VRI equipment so even less likelihood of future harm

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**ADA and Effective Communication in the Healthcare Setting**



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### In-Person American Sign Language Interpreters

By far, the most common access to healthcare ADA cases involve effective communication

- **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:** Most courts have found when deaf individual who uses ASL needs to communicate about a complicated medical procedure, especially a surgery, the exchange of written notes is inadequate way to achieve effective communication



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### In-person American Sign Language interpreters

**Crane v. Lifemark Hospitals**  
898 F.3d 1130 (11th Cir. 2018)

- Patient is deaf and has chronic depressive and anxiety disorders
- Taken to hospital and evaluated under the "Baker Act" to see if he posed a direct threat to himself or others
- Patient asked for interpreter – none provided for evaluation
  - ◊ Doctor used written notes and basic sign language skills
  - ◊ Interpreter provided two days later, after decision made
- **District court:** Found for hospital
  - ◊ Medical records showed that the hospital met its duty to conduct an evaluation – thus, effective communication
- **11th Cir.:** Found for patient (reversed/remanded summary judgment)
  - ◊ Focus is not whether medical personnel met the basic requirements of the Baker Act or made correct decision



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## Effective Communication in Healthcare

Two questions in ADA/Rehab Act case seeking monetary relief: (1) Was communication effective; and (2) If not, was the defendant deliberately indifferent?

- **Effective communication:** Focus is on patient's equal opportunity to communicate medically relevant information
- Here, jury could find patient could not communicate info
  - Patient said in affidavit he could not explain or detail feelings
  - Doctor notes acknowledged communication difficulties
- **Deliberate indifference:** Hospital must know of harm to federally protected right and fail to act
- Here, jury could find deliberate indifference
  - Medical notes acknowledged that the patient "was not able to understand the whole...process" and that "he had difficulty in expressing himself"

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## Case Finding Interpreter Was Not Required

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

- Deaf patient had a brief emergency room visit for a "bump on the head" – not provided with an interpreter
- **11<sup>th</sup> Cir:** Affirmed summary judgment for hospital
  - Interpreter was not necessary because 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 language. Some deaf people may be fluent in ASL, but unable to read English, making passing notes ineffective even for communications that are not complex

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## Recent DOJ Settlement in Effective Communication Case

### **DOJ Settlement: Overlake Medical Center (Jan. 2017)** [www.ada.gov/overlawk\\_sa.html](http://www.ada.gov/overlawk_sa.html)

- Hospital failed to provide ASL interpreter to deaf patient throughout labor and delivery experience, despite request made 10 days in advance
- **Settlement Highlights:**
  - Shall provide appropriate auxiliary aids and services as necessary and in timely manner if un-scheduled (in-person – 2 hours; VRI – 30 minutes)
  - Shall consult with deaf patient when appointment is scheduled or at time of arrival (esp. if someone else schedules the appointment)
  - List of circumstances in which an interpreter is generally required
  - Must designate an Assistive Device Point Person, available 24/7 and who knows where communication aids are and how to use them

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## 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

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## VRI v. In-Person Interpreters

### • Potential problems:

- ❖ DOJ: When individual cannot access screen because of vision loss or because of positioning due to injury - [www.ada.gov/effective-comm.htm](http://www.ada.gov/effective-comm.htm)
  - ❖ NAD: Concerned about overreliance, technological problems, lack of adequate training – [www.nad.org/issues/technology/vri/position-statement-hospitals](http://www.nad.org/issues/technology/vri/position-statement-hospitals)
- Shaika v. Gaden Huettner 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 plaintiff's rights

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## VRI v. In-Person Interpreters – Settlements

### ***Morales v. Saint Barnabas Medical Center (2017)*** [www.equiforequality.org/news-item/health-care-consent-orders](http://www.equiforequality.org/news-item/health-care-consent-orders)

- Hospital agreed to follow DOJ regulatory requirements re: VRI
- VRI equipment only used if projected a clear and high-quality image
- Never use VRI when not effective or appropriate (Ex: patient can't easily see or understand; complex info being conveyed; insufficient internet speed; staff can't activate or operate VRI expeditiously)
- On-site interpreter must be provided whenever VRI is not effective, or when a patient indicates that it is not meeting his or her needs

For another example of DOJ applying its regulatory standards, see DOJ Agreement with Mountain States Health Systems at [www.ada.gov/mountain\\_state\\_sa.html](http://www.ada.gov/mountain_state_sa.html) (2016)

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## VRI v. In-Person Interpreters – Litigation

### *Silva v. Baptist Health South Florida* 856 F.3d 824 (11th Cir. 2017)

- Plaintiffs alleged that Hospital's persistent use of VRI violated the ADA because of technical difficulties or practical limitations
  - ◊ Ex: Machine was inoperable or unusable, picture would be blocked, frozen or degraded, staff don't know how to use it
- **District Court:** Hospital provided effective communication
  - ◊ No evidence of misdiagnosis or improper medical treatment
  - ◊ Plaintiffs failed to identify what they didn't understand
  - ◊ Plaintiffs lacked standing to seek injunctive relief
- **Appeal:** DOJ amicus brief [www.justice.gov/crt/file/870846/download](http://www.justice.gov/crt/file/870846/download)
- **11th Cir:** Found for plaintiffs (reversed/remanded MSJ)

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## VRI v. In-Person Interpreters – Litigation

- ADA/Rehab Act claims are not the same as medical malpractice
  - ◊ Focus is on **communication** itself – not the **consequences** of the failed communication
  - ◊ **Question:** Did patient experience a real hindrance, due to her disability, affecting her ability to exchange material medical information with her health care professionals?
- Here, Plaintiffs provided evidence that they were "hindered" due to issues with VRI and lack of in-person interpreters
- Plaintiffs are not required to identify exactly what information they were unable to understand or convey
- Favorably cites DOJ regulations re: VRI
- Plaintiffs had **standing** to bring case because they regularly used the Hospital, lived nearby and were likely to return

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## Effective communication in healthcare not limited to deaf patients

- Vast majority of ADA effective communication cases in healthcare involve patients who are deaf
- However, requirement to provide effective communication extends to all disabilities
- **Reed v. Columbia Saint Mary's Hospital**  
782 F.3d 331 (7th Cir. 2015)
- Reed has tardive dyskinesia which limits her ability to speak – uses a communication device to communicate
- During a hospital visit for mental health issues, she was denied access to her communication device
- **Court:** Viable ADA claim that healthcare provider failed to provide effective communication

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## Effective Communication and Coverage of Companions

- 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"

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## ADA Claim of Companions Upheld

Most cases accept that the individual is a companion, and then determine whether the communication provided was effective.

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

- Parents, who are deaf and required sign language interpreters for effective communication, were entitled to protection of Section 504, at hospital where their son was a patient.  
**DOJ Settlement: Fairfax Nursing Center, Inc.**
- **Complainants:** 83-year-old resident's daughter and granddaughter requested ASL interpreters, but the request was denied
- **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](http://www.ada.gov/fairfax_nursing_ctr_sa.html)

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## ADA Claim of Companions Denied

***Durand v. Fairview Health Services***  
902 F.3d 836 (8th Cir. 2018)

- Adult patient admitted to hospital for renal failure
- Parents were deaf and hospital provided ASL interpreters for some, but not all communications
- **Court:** No violation of ADA or Rehab Act
- Made a distinction that parents were not "decision makers" (patient's sister was healthcare power of attorney)
- When emergency arose and decisions needed to be made quickly, court found it was permissible for hospital to prioritize conversations with person who had decision making authority even if it meant parents didn't have direct communication with healthcare provider

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## Companion v. Associational 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 of deaf patient and patient's wife forced to interpret during their father's hospital stay
- **Court:** Children suffered an *independent injury* related to hospital's failure to provide interpreter for their parents
- **But see, *McCullum v. Orlando Regional Healthcare System, Inc.*** 768 F.3d 1135 (11th Cir. 2014), no discrimination claim for non-disabled family members who interpreted for deaf patient. Non-disabled persons could show *no independent injury* (distinguished from *Loeffler* where kids missed school to interpret for parents); ***Durand v. Fairview Health Services***, 902 F.3d 836 (8th Cir. 2018), no association claim for sister who interpreted for parents.

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## DOJ Regulations on Family Member Interpreting

**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

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## Effective Communication: Alternate Formats in Healthcare Context

***Figuroa v. Azar (HHS/CMS)***

16-cv-30027 (D. Mass. settlement reached April 2019)

- Alleges HHS/CMS violated Section 504 by denying blind Medicare beneficiaries meaningful/equally effective access to Medicare info
- **Settlement – HHS/CMS will:**
  - Ensure communications/notices from Medicare are available in an accessible format (ex: large print, Braille, audio, electronic)
  - Provide accessible, fill-able forms on [www.Medicare.gov](http://www.Medicare.gov)
  - Issue best practices to Medicare Health/Drug Plans
  - Implement a policy that extends the time a beneficiary must answer time-sensitive communications to account for the time it takes to process requests for alternate formats
  - Promote the availability of accessible materials to beneficiaries

[www.browngold.com/medicare-information-accessible-blind-beneficiaries](http://www.browngold.com/medicare-information-accessible-blind-beneficiaries)

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## Effective Communication: "Talking" Prescription Containers

### Structured Negotiation with Rite Aid (2016)

- Structured negotiations with the American Council of the Blind, California Council of the Blind and several Rite Aid customers
- Rite Aid will provide talking prescription device at no cost to blind and visually impaired customers at 4,600 pharmacies across U.S.
- Demonstrates how advancement of new technologies can lead to effective communication
- Rite Aid also agreed to provide large print prescription info sheets

[www.lflegal.com/2016/02/rite-aid-press/#press](http://www.lflegal.com/2016/02/rite-aid-press/#press)

Other similar talking prescription container settlements can be found at:

[www.lflegal.com/category/settlements/accessible-health-care-settlements/](http://www.lflegal.com/category/settlements/accessible-health-care-settlements/)

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## Effective Communication: Website Accessibility in Healthcare

- Access to healthcare is not limited to physical facilities of healthcare providers and direct personal interactions with their representatives, but also applies to healthcare providers' digital communications
- Although there are numerous cases finding that website access is covered by the ADA, there are thus far, few reported cases regarding healthcare provider websites.
- However, there have been numerous settlements - see:
  - ♦ Massachusetts Eye and Ear Institute Agreement - [www.lflegal.com/2017/01/meei-agt](http://www.lflegal.com/2017/01/meei-agt)
  - ♦ WellPoint Accessible Information Agreement - [www.lflegal.com/2014/02/wellpoint-agreement/](http://www.lflegal.com/2014/02/wellpoint-agreement/)

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## Access to Healthcare for People with Service Animals



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## ADA and service animals in the healthcare context – DOJ Guidance

- **DOJ Guidance on service animals references healthcare facilities:**
  - ◊ in a hospital it would be **inappropriate to exclude** a service animal from areas such as patient rooms, clinics, cafeterias, examination rooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without taking added precautions
  - ◊ may be **appropriate** to exclude a service animal from operating rooms or burn units where the animal's presence may **compromise a sterile environment**
  - ◊ providers **may not impose blanket bans** against service animals without engaging in the **interactive process** in an earnest effort to **identify potential reasonable accommodations**

[www.ada.gov/service\\_animals\\_2010.htm](http://www.ada.gov/service_animals_2010.htm)

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## ADA and service animals in the healthcare context - litigation

### ***Tamara v. El Camino Hospital*** 964 F. Supp. 2d 1077 (N.D. Cal. 2013)

- Psychiatric patient denied service animal while hospitalized
- Hospital argued service animal in a psych unit would pose a direct threat – anticipated harness could be used as a weapon and presence of the animal might upset other patients
- **Court:** Potential risks were merely speculative – no individualized assessment conducted by hospital that showed plaintiff or her service animal actually posed the anticipated risks.
- Even if the hospital's perceived risks were real – no reasonable accommodation analysis was conducted to ameliorate the risks

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## ADA and service animals in the healthcare context – direct threat

### ***Roe v. Providence Health System-Oregon*** 655 F. Supp. 2d 1164 (D. Oregon 2009)

- **Court:** Direct threat for a hospital patient to use a service dog with a "putrid odor" that resulted in patient transfers. The dog's size and growling response also made it difficult for staff to treat patient and a handler was not always available. Dog may have had an infection as well. Court noted that the hospital had a history of accommodating other service animals and made efforts to accommodate this one.

### ***Rousseau v. Adventist Healthcare West*** 4:17-cv-02985 (N.D. Cal. March 13, 2018)

- **Settlement:** After dispute about service animal access, hospital agreed to update its service animal policy to ensure access to all areas of the hospital open to patients, but included right to exclude service animals posing a direct threat to the safety/welfare of hospital's patients or staff.

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## ADA and service animals in the healthcare context - ambulances

### **Hardin County Emergency Medical Services**

- **Complaint filed with DOJ:** Service animal not permitted to accompany man in Hardin County ambulance
- **Settlement :** [www.ada.gov/hardin\\_ems\\_sa.html](http://www.ada.gov/hardin_ems_sa.html) (March 2018)
  - ❖ hire ADA Coordinator
  - ❖ permit service animals to accompany owners in ambulance unless animal out of control or not house broken
  - ❖ no surcharge will be assessed for service animals
  - ❖ only permissible questions about service animals will be asked
  - ❖ ADA training for personnel

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## Service animals – companions and mootness

### **Sheely v. MRI Radiology Network, P.A.** 505 F.3d 1173 (7th Cir. 2007)

- Medical facility violated the ADA by preventing blind mom from bringing service dog into MRI suite during son's appointment
- Court rejected that companions aren't covered by Title III just because they aren't the patient and don't receive a benefit from the public accommodation
- MRI facility modified its no-animal policy soon afterwards
- However, court held that plaintiff's ADA suit was not mooted by new policy – unclear that wrongful behavior wouldn't recur
- **See also, Hurley v. Loma Linda University Medical Center,** 2014 WL 580202 (C.D. Cal. Feb. 12, 2014) – ADA protects companions with service animals at healthcare facilities

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## Access to Healthcare for People Living with HIV/AIDS

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## Direct threat and HIV – Supreme Court sets standard

- Historically, people living with HIV/AIDS have faced significant stigma and discrimination, including in the healthcare context. Discrimination continues today.
  - Bragdon v. Abbott**, 524 U.S. 624 (1998)
- A dentist refused to treat a patient with HIV – alleged patient posed a direct threat to the dentist’s safety
- Supreme Court:** In determining direct threat, healthcare providers must make an individualized inquiry as to the circumstances of the particular plaintiff, and rely only on most recent objective medical evidence, “without deferring to individual subjective judgments”

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## HIV discrimination in healthcare still prevalent

- United States v. Asare**  
2017 WL 6547900 (S.D.N.Y. Dec. 20, 2017)
- Cosmetic surgeon excluded patients with HIV and/or on meds
- Court:** Found for plaintiffs (granted motion for summary judgment)
  - Eligibility criteria screens out people with disabilities and is not necessary
    - Defendant’s burden to show exclusion is necessary – can’t meet burden because he “automatically reject[s]” patients
  - Even if risk, failed to make reasonable modifications
    - Plaintiff proposed adjusting sedative protocol, hiring anesthesiologist to monitor/assist, etc.
    - Fundamental alteration fails – no individualized inquiry

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## HIV discrimination in healthcare still prevalent

- DOJ:** In recent years, DOJ has entered into numerous settlements with healthcare providers who discriminated against people with HIV.
  - For example, see: **Woodlawn Family Dentistry:**  
[www.ada.gov/woodlawn\\_fmly\\_dnst.htm](http://www.ada.gov/woodlawn_fmly_dnst.htm)
  - DOJ’s work in this area can be found at:  
[www.ada.gov/hiv/index.htm](http://www.ada.gov/hiv/index.htm)
- Typical provisions of settlement agreements:**
  - Adopt and implement a non-discrimination policy
  - Ongoing monitoring by DOJ
  - ADA training for staff and administrators
  - Financial settlements for aggrieved parties involved

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## Links to additional DOJ agreements related to HIV and healthcare

- ❖ *Advanced Plastic Surgery Solutions (2017)*  
[www.ada.gov/adv\\_plastic\\_surgery\\_sa.html](http://www.ada.gov/adv_plastic_surgery_sa.html)
- ❖ *Pain Management Care (2016)*  
[www.ada.gov/pmc/pain\\_mgmt\\_care\\_cd.html](http://www.ada.gov/pmc/pain_mgmt_care_cd.html)
- ❖ *North Florida OB/GYN Associates (2016)*  
[www.ada.gov/north\\_florida\\_sa.html](http://www.ada.gov/north_florida_sa.html)
- ❖ *Dentex Dental Mobile (2016)*  
[www.ada.gov/north\\_florida\\_sa.html](http://www.ada.gov/north_florida_sa.html)
- ❖ *Genesis Healthcare System (2015)*  
[www.ada.gov/genesis\\_healthcare\\_sa.htm](http://www.ada.gov/genesis_healthcare_sa.htm)
- ❖ *Glenbeigh Alcohol Treatment Center (2013)*  
[www.ada.gov/glenbeigh.htm](http://www.ada.gov/glenbeigh.htm)
- ❖ *Fayetteville Pain Center (2013)*  
[www.ada.gov/fayetteville\\_pain\\_ctr\\_settle.htm](http://www.ada.gov/fayetteville_pain_ctr_settle.htm)

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## Administration or Use of Medication

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## Administration of Medication

- **DOJ:** undertaken numerous enforcement actions on behalf of children with insulin-dependent diabetes and other disabilities to ensure they enjoy equal access to Title II and III entities
- Children with insulin-dependent diabetes effectively excluded by institutions unwilling to modify policies to provide basic diabetes management care. Needs of children with diabetes differ, but they generally need assistance with blood glucose monitoring and with administration of insulin and emergency medication.

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## Administration of Medication

### **DOJ Agreement with Kindercare** [www.ada.gov/kinder\\_care\\_sa.html](http://www.ada.gov/kinder_care_sa.html) (Sept. 2018)

- Kindercare operates 1,800 facilities for child care and camp and refused to help administer insulin via syringe/pen
- **Settlement Agreement:** Kindercare will:
  - evaluate reasonable modification requests on individualized basis using objective evidence and current medical standards
  - agree that where a parent/guardian & physician/healthcare professional say OK for child to be assisted by a layperson, training child care staff to help with routine care (including insulin by pen, syringe or pump) is generally reasonable
  - contact all families who were denied this request in past year
  - revise/publicize new policy, including sample diabetes plan
  - provide range of training (managers, teachers, child-specific)
  - \$8,000 to each aggrieved family (3 families)

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## Other DOJ Settlements on Diabetes Medication Administration

- **Winnewald Day Camp Settlement Agreement** (2015)  
[www.justice.gov/usao-nj/file/765696/download](http://www.justice.gov/usao-nj/file/765696/download)
- **Arlington-Mansfield Area YMCA** (2016)  
[www.ada.gov/arlington/ymca.html](http://www.ada.gov/arlington/ymca.html)
- **YMCA of the Triangle** (2016)  
[www.ada.gov/ymca\\_triangle\\_sa.html](http://www.ada.gov/ymca_triangle_sa.html)
- **YMCA of Metro Chicago** (2016) [www.justice.gov/usao-ndil/pr/united-states-announces-settlement-ymca-metro-chicago-ensure-compliance-americans](http://www.justice.gov/usao-ndil/pr/united-states-announces-settlement-ymca-metro-chicago-ensure-compliance-americans)
- **See also,** "Summer Camps and the ADA," U.S. Department of Justice Bulletin,  
[www.justice.gov/file/campadaflyerpdf/download](http://www.justice.gov/file/campadaflyerpdf/download)

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## Administration of Medication Beyond Diabetes

### **DOJ Settlement with Camp Bravo** (June 2015)

- Camp refused to admit camper with epilepsy who required emergency medication for seizures
- **Settlement:** Camp will train staff to administer Diastat
  - Adopt Seizure Emergency Action Plan and Physician's Order for the administration of Diastat so that it has individual instructions
  - Provide training to staff responsible for camper with epilepsy
- **DOJ:** "It is the United States' position that it generally will be a reasonable modification by title III of the ADA for certain public accommodations, such as camps and child care service providers, to train laypersons to administer Diastat."  
[www.ada.gov/camp\\_bravo\\_sa.html](http://www.ada.gov/camp_bravo_sa.html)
- **But see, U.S. v. NISRA**, 168 F.Supp.3d 1082 (N.D. Ill. 2016)

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## Emerging Issue in Use of Medication: Opioids

### **DOJ Agreement with Selma Medical Associates** [www.ada.gov/selma\\_medical\\_sa.html](http://www.ada.gov/selma_medical_sa.html)

- Complainant uses Suboxone to treat opioid use disorder (OUD)
- Tried to schedule an appointment at family healthcare practice
- Selma Medical turned him away due to Suboxone use; informed complainant that this was per policy
- **DOJ conclusions:**
  - Complainant is a person with a disability because he has OUD
  - Discriminated against solely due to use of Suboxone
  - Policy imposed eligibility criteria; no policy modifications
- **Settlement (Dec. 2018)**
  - \$30,000 damages; \$10,000 civil penalty
  - Revise policy; publicize on website, in reception, to employees
  - Train its managers and employees who interact with patients

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## Accessible Medical Facilities and Equipment

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## Federal guidance on accessible medical facilities and equipment

- **DOJ Guidance:**
  - 2010 DOJ published guidance for healthcare providers
  - Sets forth responsibilities of healthcare providers to make their services and facilities accessible to people with mobility disabilities and provide reasonable modifications
  - [www.ada.gov/medicare\\_mobility\\_ta/medicare\\_ta.htm](http://www.ada.gov/medicare_mobility_ta/medicare_ta.htm)
- **Access Board Standards:**
  - 2017 Access Board issued Standards for Accessible Medical Diagnostic Equipment
  - Don't have force of law until fed agency adopts in own regs
  - However, important guidance for healthcare providers on how to make equipment accessible
  - [www.adatitleiii.com/2017/01/u-s-access-board-issues-standards-for-medical-diagnostic-equipment/](http://www.adatitleiii.com/2017/01/u-s-access-board-issues-standards-for-medical-diagnostic-equipment/)

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## DOJ settlements on accessible healthcare facilities and equipment

### *Washington Hospital Center*

- **Allegations:**
  - ◊ inaccessible inpatient rooms
  - ◊ inaccessible exam tables requiring manual lifting
  - ◊ patients with disabilities waiting longer than non-disabled patients because of insufficient accessible exam tables
  - ◊ inaccessible equipment, such as call buttons and telephones
- **Settlement – [www.ada.gov/whc.htm](http://www.ada.gov/whc.htm)**
  - ◊ hire ADA compliance officer
  - ◊ enhance patient complaint process and Environment of Care Comm.
  - ◊ hire experts on ADA policies, training and equipment
  - ◊ establish Advisory Resource Group comprised of pwds
  - ◊ increase number of accessible tables, chairs and patient beds

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## DOJ settlements on accessible healthcare facilities and equipment

### *Thomas Jefferson University Hospitals and Outpatient Imaging Affiliates: [www.ada.gov/TJ\\_univ\\_hosp\\_sa.html](http://www.ada.gov/TJ_univ_hosp_sa.html) (April 16, 2019)*

- **Allegations**
  - ◊ Patient has cerebral palsy, osteoporosis and uses a wheelchair
  - ◊ Denied bone density scan because insufficient staff to transfer patient from wheelchair to scanning machine
- **Settlement**
  - ◊ Adopt non-discrimination policy – required to ask patient's preference on how to ensure safe and effective transfer
  - ◊ Staff training on ADA for current and future employees
  - ◊ Ensure sufficient staff and equipment for transfers
- See also similar DOJ settlement agreement with *Charlotte Radiology* [www.ada.gov/charlotte\\_radiology\\_sa.html](http://www.ada.gov/charlotte_radiology_sa.html) (Aug. 13, 2018)

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## Accessible medical facilities and equipment through structured negotiations and private settlements

- **Structured Negotiations:** Non-litigation strategy has been successful in making medical facilities and medical equipment accessible to people with disabilities. For example:
  - ◊ **UCSF Medical Center**  
<http://www.lflegal.com/2008/09/ucsf-settlement-agreement/>
  - ◊ **Massachusetts General Hospital and Brigham and Women's Hospital**  
<http://www.lflegal.com/2009/06/boston-press/>
- **Private Settlement Example:** *Metzler v. Kaiser*, one of the first comprehensive ADA settlements with major healthcare provider, [www.equipforequality.org/wp-content/uploads/2018/09/Kaiser-Settlement.pdf](http://www.equipforequality.org/wp-content/uploads/2018/09/Kaiser-Settlement.pdf)

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## ADA litigation focusing on accessible facilities and equipment

### ***Luna v. America's Best Contacts and Eyeglasses, Inc.***, 1:11-cv-01783 (N.D. Ill. Complaint filed Mar. 15, 2011)

- Class action by wheelchair users unable to receive eye exam due to inaccessible exam rooms and equipment at 337 stores
  - **Settlement Terms:**
    - ◊ Retain ADA Consultant to perform accessibility surveys and monitor remediation efforts
    - ◊ ADA training for all personnel
    - ◊ Updated policies and procedures for treating people with disabilities
    - ◊ Each store must have: a chair glide, accessible eyeglass and contacts fitting locations, and accessible exam room
- [www.equipforequality.org/wp-content/uploads/2018/09/Americas-Best-Stipulation-and-Class-Settlement-Agreement.pdf](http://www.equipforequality.org/wp-content/uploads/2018/09/Americas-Best-Stipulation-and-Class-Settlement-Agreement.pdf)

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## Insurance and the ADA

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## ADA and insurance – most courts reject ADA claims

- Insurance is a critical component for access to healthcare. However, most courts have rejected ADA challenges to discriminatory insurance policies.
- **ARGUMENT #1: Not a place of public accommodation:** Some courts have found "place of public accommodation" requires a physical "place" and therefore Title III of the ADA doesn't apply to insurance policies. **See, *Doe v. Bluecross Blueshield of Tenn., Inc.*, 2018 WL 3625012 (W.D. Tenn. 2018)**, plaintiff with HIV/AIDS brought ADA case asserting his insurance plan classified his medications as specialty medications that must be obtained via mail order. However, court adopted the "place" argument and concluded that the insurance plan was not a place of public accommodation.
- **See also, *James v. GEICO Ins. Co.***, 2016 WL 9776068 (E.D. Pa. Nov. 16, 2016); ***Ross v. Hartford Life & Accident Ins. Co.***, 2015 WL 5680329 (D. Mass. Sept. 25, 2015)

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## ADA and insurance – most courts reject ADA claims

- **ARGUMENT #2: ADA protection limited to access to insurance policies, not the content of the policies:** The vast majority of courts have held that offering or providing long-term disability policies with different benefits for different disabilities does not violate the ADA.
- See *Pudlin v. AXA Equitable Life Ins. Co.*, 2016 WL 3566232 (S.D.N.Y. 2016), plaintiff challenged the different coverage for mental health and physical disabilities. The court dismissed the plaintiff's complaint, concluding that complaints about the administration of policy terms are outside the ADA's prohibition of discrimination.
- See also, *McNeil v. Time Ins. Co.*, 205 F. 3d 179 (5th Cir. 2000); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999); *But see, Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n.*, 37 F.3d 12 (1st Cir. 1994)

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## Case taking a different view of the ADA and insurance

*Reid v. BCBSM, Inc.*,  
984 F. Supp. 2d 949 (D. Minn. 2013)

- Insurance policy excluded coverage of behavioral therapy for people with Autism Spectrum Disorder (ASD)
- **Plaintiff:** Treating one disability differently violated Title III of the ADA
- **Blue Cross:** People with ASD weren't excluded from the policy, and as long as people had access to the policy, there was no ADA violation
- **Court:** Because the exclusion of a specific behavioral treatment only affected people with ASD, it was discriminatory under the ADA. Blue Cross provided intensive behavioral therapy for other conditions. Because of this differential treatment and the singling out of ASD, Blue Cross was deemed in violation of the ADA.
- **Important Note:** This case is definitely in the minority.

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## Does ACA Provide New Chance to Challenge Insurance Policies?

- **Affordable Care Act Regulation** – ACA non-discrimination regulation includes disability, but it has not yet been used successfully in court
- *Schmit v. Kaiser Foundation Health Plan of Washington*  
2018 WL 4385858 (W.D. Wash. 2018)
- Plaintiffs with hearing loss sought to use the ACA to challenge exclusion of hearing treatment from their insurance plans
- **Court:** Patients with disabling hearing loss received same benefits as those with hearing loss and not disabled, so no discrimination
- *Doe One v. CVS Pharmacy, Inc.*  
348 F. Supp. 3d 967 (N.D. Cal. 2018)
- Man with HIV challenged health insurance policy that medications could be filled only by mail order or at CVS to receive in-network pricing
- **Court:** Dismissed complaint - even if it did disparately impact people with HIV, it did not deprive them of meaningful access in violation of ACA

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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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## Questions?



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You will receive an email following the session with a link to an on-line evaluation. Your feedback is important to us!

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Mark your calendars for the **next** ADA Legal Webinar Series session on **July 17, 2019**

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