



Providing for the Deaf, Hard of Hearing under the ADA

by Sam Diehl

A New Jersey jury recently awarded a deaf woman \$400,000 in a suit based on her physician's failure to provide a sign language interpreter.¹ While this may have been an unusually large award, health care providers often fail to provide adequate communication services for the deaf and hard of hearing in compliance with Title III of the Americans with Disabilities Act (ADA). And attorneys are not much better. Since 2006, the Department of Justice has settled with 14 medical and law offices over ADA violations related to effective communication with the deaf and hard of hearing.²

Many service providers, particularly smaller organizations, do not understand the ADA's legal requirements. Those who are not aware of the law may have the same reaction as one attorney who confidently documented his ADA violation by writing to a client, "I have never had to pay to converse with my own client."³ Many smaller firms mistakenly believe that because there is a size limitation (15 or more employees) on the ADA's coverage of employers under Title I,⁴ there is a corresponding limitation on the coverage of Title III. However, Title III contains no such limitation.

Communication is critical to both medical and legal services. Under Title III of the ADA, individuals with disabilities are entitled to "full and equal enjoyment" of the services of a "public accommodation."⁵ An "office of an accountant or lawyer...professional office of a health care provider, hospital, or other service establishment" are explicitly listed as a public accommodation under Title III.⁶

The ADA includes both a prohibition and an affirmative duty. Public accommodations providers may not discourage or discriminate against individuals with disabilities seeking their services.⁷ In addition, these organizations have an affirmative duty to "make reasonable modifications in policies, practices, or procedures"⁸ and provide reasonable "auxiliary aids and services" necessary to serve individuals with disabilities.⁹ In this area, the biggest issue that arises for individuals with hearing loss or deafness is determining which measures are necessary to ensure effective communication.

The specific practical changes or auxiliary aids and service required depend on the needs of the individual.¹⁰ Additional costs incurred may not be billed to the client.¹¹ Modifications to policies or auxiliary aids or services, however, are not required if it "would fundamentally alter the nature of [the] services..."¹² Similarly, an auxiliary aid or service is not required if it "would result in an undue burden."¹³ However, the fact that one option would result in an undue burden does not necessarily eliminate the obligation to ensure effective communication. There is likely an alternative auxiliary aid or service

that would not result in an undue burden or fundamental alteration, but would still ensure effective communication to the maximum extent possible.

If an individual does not have a disability, of course, no such changes or aids are required. However, attorneys and medical providers should also remember that their professional obligations require effective communication. It is noteworthy that an important factor in the New Jersey verdict discussed above was the physician's failure to adequately explain the side-effects of treatment.

Meeting Your Communication Obligation: Practical Tips

Determining when accommodation is necessary and what the law requires is not always easy. However, there are a few common mistakes to avoid.

Deaf individuals should not be asked to bring a relative to translate. It is a common misconception that individuals who are deaf or hard of hearing and communicate using American Sign Language (ASL) have ASL-fluent family members. While service providers often use relatives to translate with non-English speakers, where accommodation is not legally required, using a family member to interpret ASL is not advised, except in an emergency.

Similarly, while lip-reading is helpful to many individuals, even skilled lip-readers are not 100% effective. Relying solely on lip-reading can cause significant communication breakdowns and will normally require additional communication aids. And, of course, a pen and paper is not effective communication. While this may be the cheapest means available, effective communication cannot be conducted via handwritten notes.

There are many reasonable and effective means available. These should be chosen based on the needs of the individual and the communication necessary in your transaction. Modern technology is significantly decreasing the cost and increasing the effectiveness of accommodations. Among the options currently available are:

Sign language interpreters are useful for people who are deaf and who communicate with (ASL). Under the ADA, interpreters are required to be "qualified," or fully fluent and able to completely interpret what is being said and being signed—including the correct vocabulary for the situation.¹⁴ This does not require a specific certification but an interpreter must be fluent. Interpreters are available commercially and it is desirable to find an interpreter experienced in interpreting legal or medical issues.

Video Remote Interpreting (VRI) uses a computer with an Internet connection, a webcam and a telephone line to provide services similar to a live interpreter. The deaf person and interpreter communicate via sign language through the webcam. The lawyer or staff person speaks to the interpreter via the telephone. The remote interpreter then interprets as a "live" interpreter would. VRI has disadvantages, however. A poor Internet connection may result in a breakdown of communication and communication is generally better with a live interpreter.

Video Relay Service (VRS) allows deaf individuals to use video phones to connect directly with another deaf person to use live ASL through the video connection as a visual equivalent of a phone call. It can also be used to connect to a relay operator and through that operator to a hearing person over the phone. VRS is free to both parties and is subsidized by the Federal government as a way to ensure deaf access to the hearing phone system. VRS, however, is not intended as a substitute for live interpreting and VRS operators are not allowed to interpret between two people in the same location. Also, under the ADA, individuals with disabilities may not receive less desirable treatment to avoid accommodation costs.

Computer Assisted Realtime Translation (CART) includes a stenographer or CART specialist who uses software and equipment to produce instant speech-to-text translation to a computer monitor or other display, enabling an individual to read the transcript of the proceedings as it occurs. CART can be effective for individuals who are deaf, do not use ASL and use speech to communicate, and for people who are hard of hearing.

Assistive Listening Systems/Devices (ALS/ALD) transmit amplified speech by a variety of methods. Some of these systems are permanent installations, and others are devices that can be used temporarily.

Telecommunication Devices for the Deaf (TTY or TDD), sometimes called teletypewriters, are special telephones with keyboards and LED displays used by people who are deaf and/or speech impaired. Without a dedicated TDD line, TDD callers use a relay service with an operator who reads aloud what is typed by the deaf person and types what is being said by the hearing person. Automated menu systems for telephone access often present difficulties for relay users. To minimize problems, menus should provide an initial option to select an operator or other representative.

Where to Look For Help

Smaller providers may be eligible for a significant tax credit related to additional expenses incurred accommodating individuals with disabilities. The federal “Disabled Access Credit” covers 50% of expenditures over \$250, up to a maximum credit of \$5,000.¹⁵ The credit is available every year and can be used for a variety of accommodation costs including “to provide qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments.”¹⁶ The credit is available to business with gross receipts for the preceding tax year that did not exceed \$1 million or with no more than 30 full-time employees during the preceding tax year.¹⁷

A number of organizations are also available to assist. Many states have organizations that provide legal services and advocacy on behalf of the deaf and hard of hearing. These groups can help an organization plan for accommodation or determine what accommodations are necessary. The National Association of the Deaf also has a number of resources available including information and staff attorneys. There are also a number of online resources available, including the Department of Justice’s ADA Web site.

Ensuring that deaf or hard of hearing individuals have equal opportunity to receive services is the law. It is also reasonably easy.

¹ See, e.g., Mary Pat Gallagher, *Jury Awards \$400,000 to Deaf Patient for Denial of Interpreter Services*, Law.com (Oct. 17, 2008) available at <http://www.law.com/jsp/article.jsp?id=1202425326286&rss=newswire/>

² Various Settlement Agreements are available at <http://www.ada.gov/settlemt.htm>.

³ See Settlement Agreement between the United States and Joseph David Camacho, DJ # 202-49-37 available at <http://www.ada.gov/albuquerque.htm>.

⁴ 42 U.S.C. § 12111(5)(A).

⁵ See 42 U.S.C. §§ 12181-12189.

⁶ 42 U.S.C. § 12181(7)(F).

⁷ 42 U.S.C. § 12182(a).

⁸ 42 U.S.C. § 12182(b)(2)(A)(ii).

⁹ 42 U.S.C. § 12182(b)(2)(A)(ii),

¹⁰ *Title III Technical Assistance Manual* § III-4.3000-3600.

¹¹ See 28 CFR § 36.301(c).

¹² 42 U.S.C. 12182(b)(2)(A)(ii).

¹³ 42 U.S.C. 12182(b)(2)(A)(iii).

¹⁴ *Title III Technical Assistance Manual* § III-4.3200-3400.

¹⁵ See 26 U.S.C. § 44.

¹⁶ IRS Form 8826 available at <http://www.irs.gov/pub/irs-pdf/f8826.pdf>.

¹⁷ See *Id.*



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