

# TWO WAYS TO AVOID PITFALLS

## When Providing Language Access Services to Individuals under the ADA



By Justin M. Kuettel

**T**he legal and regulatory framework governing language accessibility in medical settings can be complex. Some healthcare providers are surprised to learn the extent to which they may be required to provide language access services—such as medical interpreting—to Limited English Proficiency (“LEP”) patients and to individuals with legally recognized disabilities. This article analyzes the scope of your obligation to provide effective communication to individuals (including non-patient “companions”) under the Americans with Disabilities Act (the “ADA”) and offers two suggestions to avoid pitfalls when providing such services.

### **I. The ADA Requires Private Health Care Providers and Hospitals to Provide Effective Communication to Patients and “Companions” of Patients.**

The ADA prohibits discrimination against an individual with a disability by any places of public accommodation. Private hospitals and healthcare providers’ offices are considered “public accommodations” under the ADA—regardless of the number of employees they have. While some federal nondiscrimination laws governing language accessibility may not apply to providers who do not receive federal funds, the ADA applies to all public accommodations.

# ONE OF THE BEST WAYS TO AVOID ISSUES WITH PROVIDING EFFECTIVE COMMUNICATION UNDER THE ADA IS TO UNDERSTAND WHAT AUXILIARY AIDS AND SERVICES ARE AVAILABLE TO YOU AND HOW TO USE THEM.

The federal rules and regulations that implement the ADA require a public accommodation to take the steps necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services. Among these requirements, all public accommodations are generally required to provide effective communication not only to patients, but also to patients' "companions" who have disabilities. Below are two suggestions for avoiding pitfalls when complying with the ADA's effective communication requirement.

## II. Suggestion #1—Think Generally When Determining the Appropriate People to Communicate With.

The regulations limit the term "companion" to mean "a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate."

Medical providers in many of the recent court cases addressing this issue have escaped liability because they took a cautious approach to determining which individuals needed language access. At the same time, others exposed themselves to liability because their approach was too narrow. Sometimes it is unclear when non-patients are "appropriate persons" to receive language access services; you may need to consult with an attorney or use your best judgment about whether a non-patient should be considered an appropriate person. But at a bare minimum, in situations where a non-patient's consent is necessary to obtain informed consent, that non-patient

28 C.F.R. § 36.303(c).

needs effective communication from the provider. Additionally, if a patient gives an individual with a disability a medical power of attorney, that individual needs effective communication.

## III. Suggestion #2—Make Sure to Effectively Use Auxiliary Aids and Services.

One of the best ways to avoid issues with providing effective communication under the ADA is to understand what auxiliary aids and services are available to you and how to use them. Examples of auxiliary aids and services include:

- qualified interpreters (on-site or through video remote interpreting (VRI) services);
- real-time computer-aided transcription services;
- written materials;
- assistive listening devices;
- text telephones (TTY);
- brailled materials and displays;
- secondary auditory programs (SAP);
- open and closed captioning;
- magnification software; and
- other similar services and actions.

All of these means of communication can be effective, but everyone's situation is different, and some tools are more effective than others.

In a recent decision from an appellate court, the healthcare provider exposed itself to liability not because it failed to provide auxiliary aids and services, but rather because those aids were not used effectively. Primarily, the staff in that case did not know how to use the technology to communicate with HOH parents of an infant patient, but still tried to use it instead of communicating through other means. Remember, you are not required to provide every single auxiliary aid and service ever invented. The regulations recognize that there will be times when

using certain aids could fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or that accommodations being offered would result in an undue burden, i.e., significant difficulty or expense.

To the extent possible, however, I recommend that you determine how you are going to provide effective communication with individuals with disabilities prior to providing medical services. Healthcare providers should work together with patients and companions to ensure the appropriate level of accommodation will be available to provide the best medical care possible. If you cannot make one service feasible, there may be a substitute that will work just as well. Just make sure that you know how to use the aids and services that you settle on.

## IV. Conclusion

Healthcare providers can and should take steps that ensure that they provide the best service possible to individuals with disabilities, while at the same time, shield themselves from liability under the ADA. One way of doing this is to err on the side of caution when withholding language services from individuals. Another way is to make effective use of auxiliary aids and services, including understanding what aids work best for your patients and how to use those aids. ◀



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