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MYTHS & MISCONCEPTIONS: REQUIREMENTS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)

Question: I began treating a deaf patient recently, and so far, we have been able to communicate through her daughter, who attends the sessions with her and is able to translate for her. The patient has not had any complaints and I believe the sessions have been progressing well. However, the patient recently expressed that she would like to have a sign-language interpreter, and believes she has the right to be provided one under the Americans with Disabilities Act (ADA) [1]. Am I required to provide such an interpreter at my own expense, even though sessions have been going well with her daughter as translator?

Answer: Under the ADA, physicians are required to ensure effective communication with patients through reasonable accommodations, and this may require the provision of an interpreter, unless the physician can demonstrate that this would result in significant difficulty or expense for the physician.

The ADA is a federal law, enforced by the Department of Justice, prohibiting discrimination[2] on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications[3]. The definition of "public accommodations" includes doctors' offices[4]. Pursuant to this law, physicians are required to ensure, among other things, effective communication with people with hearing, vision, or speech disabilities. Achieving effective communication with deaf people can, in some situations, require the use of a sign language interpreter. Judicial decisions illustrate that the requirement of providing an interpreter depends heavily on the specific circumstances of each case.

Achieving Effective Communication

Though undefined in the various statutes, effective communication between physicians and patients is the basic requirement. In supplemental regulations, effective communication is defined as, "whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people who do not have disabilities."[5] While physicians are not required to make unduly burdensome and fundamental alterations in their practices to accommodate patients who have hearing, speech or visual impairments, they must make reasonable modifications or otherwise provide auxiliary aids and services[6] at no additional costs to the patient in order to comply with the statutes. Physicians must also take adequate steps to ensure the privacy of the patient's health information.

Using family members as interpreters may impede both effective communication and physician/patient confidentiality. Psychiatrists should keep the following points in mind when working with hearing impaired patients: 1) family members may not be able to accurately and meaningfully express complicated psychiatric issues; 2) family members may be part of the patient's

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clinical concerns; and 3) confidentiality issues. Moreover, deaf patients' attempts at lip reading may not be successful, and exchanging written notes may not be sufficient for patients with limited written English proficiency. At least one court has found

that while an individual with a disability cannot insist on a particular auxiliary aid, there can be genuine disputes regarding whether the aid is effective based on the specific circumstances of the case.[7]

Undue Burden

Under the ADA, a physician would not be required to provide such accommodations if it was demonstrated that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an "undue burden, i.e. significant difficulty or expense."[8] The regulations state that in determining whether an action is an undue burden various factors should be considered, including the nature and cost of the action, the overall financial resources of the site, the geographic separateness and the administrative or fiscal relationship of the site or sites in question to a parent corporation, the overall financial resources of the parent corporation, and the type of operation or operations of any parent corporation or entity.[9]

With rapid advancements in technology, particularly in the field of video-conferencing, combined with the ubiquitous nature of high-speed internet connections that are easily available, it may be increasingly difficult to uphold successful undue burden arguments. In fact, legislators perceived this to be the case at the time of enactment, with the Senate report on the ADA noting that "technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may enable covered entities to provide auxiliary aids and services which today might be considered to impose undue burdens on such entities."[10]

Discrimination is separate from negligence

Physicians should also recognize that even if a deaf patient receives effective medical treatment, the doctor may still violate the ADA if the doctor did not "effectively communicate" with that patient. In Aikins v. St. Helena Hospital[11] the court found that adequate medical treatment does not preclude claims of failure to provide effective communication under the ADA. Mrs. Aikins, a hearing impaired individual and the California Association of the Deaf (CAD) alleged that St. Helena Hospital and Dr. Lies failed to communicate effectively with Mrs. Aikins during her now deceased husband's medical treatment. Mrs. Aikins requested an interpreter to facilitate communication with Dr. Lies. Instead of an interpreter the hospital provided Mrs. Aikins with an ineffective finger speller. Allegedly Mrs. Aikins was unable to effectively communicate with Dr. Lies or other hospital staff until her daughter became available to interpret. Mrs. Aikins alleged that Dr. Lies and St. Helena Hospital violated the ADA, and St. Helena asserted that it complied with the ADA with the provision of the finger speller and provision of adequate medical care. The court noted that adequate medical treatment is not a defense to a claim that a physician failed to provide effective communication.

Citing Aikins, the court in Naiman v. New York University[12], also found that a physician's effectiveness in providing medical treatment to a hearing impaired patient does not preclude an ineffective communication claim under the ADA. Mr. Alec Naiman,

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hearing impaired individual, was admitted on several occasions to New York University Medical Center, and requested an interpreter on each occasion. On one occasion the Center provided Mr. Naiman with a person minimally capable of communicating sign language, and on other visits Mr. Naiman alleged that the Center did not either provide an interpreter in a timely manner or did not provide an interpreter at all. New York University

argued that Mr. Naiman failed to state a claim under the ADA because he received adequate medical care from the Medical Center. The court ruled in favor of Mr. Naiman, holding that a claim under ADA alleging ineffective communication relates to the patients exclusion from participation in their treatment, not the adequacy of the treatment itself.

Informed Consent

Failure to achieve effective communication with a patient can additionally result in a violation of the requirement of obtaining informed consent for treatment. Informed consent is an on-going communication process involving the physician and the patient, requiring the patient to be instructed in the proposed treatment options, demonstrate an understanding of the options, and either consenting to or refusing a specific treatment option. Miscommunication and a lack of informed consent can lead to inadequate patient care and damaging claims for physicians.

In a New Jersey case, a deaf patient was awarded compensatory and punitive damages in the amount of $400,000 for a doctor's failure to provide an interpreter.[13] The physician had treated the patient for lupus for about a year and a half, communicating through the patient's civil union partner and their nine-year-old daughter or through written notes. The patient, after repeatedly requesting a sign language interpreter, eventually selected another doctor and began a new treatment regimen. The new physician discontinued the previously prescribed steroid, and the patient noticed that the swelling in her face had resolved. The patient then alleged that because no sign language interpreter had been provided, she had misunderstood that the swelling was a side effect of the medication, but rather had believed it to be a symptom of her illness. She further claimed that she was deprived of the opportunity to fully participate in her treatment.

While the patient in this case apparently received adequate care, the misunderstanding regarding the medication side effect verses the symptoms of the illness is what prompted the suit and speaks directly to the need for adequate informed consent for all treatment.

Proactive Steps

Physicians should consult with private counsel and/or an accountant to explore means of compliance and legal ways in which a medical practice may absorb the costs of auxiliary equipment and services required, in order to ensure effective communication with disabled patients.

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References

[1] 42 U.S.C. § 12101.
[2] “a failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modification would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”
[3] “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” Title III of the ADA, section 302, 42 U.S.C. §12182.
[4] The definition of public accommodation specifically includes the “professional office of a health care professional” and hospitals. 42 U.S.C. §12181(7)(F).
[5] Chapter 3: General Effective Communication Requirements under Title II of the ADA. The ADA Best Practices Tool Kit for State and Local Governments. February 27, 2007. www.ada.gov.
[6] (1) The term “auxiliary aids and services” includes--
(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions. 42 U.S.C.A. § 12103.
[7] in this particular case, the physician’s motion for summary judgment was denied and the patient was allowed to present evidence on whether note taking was an acceptable auxiliary aid for the hearing-impaired father of a fifteen month old boy with chronic ear infections. Majocha v. Turner, 166 F.Supp.2d 316 (W.D. Pa. 2001).
[8] 28 C.F.R. §36.303(a).
[9] 28 C.F.R. §36.104.
[10] S. Rep. No. 101-116, 101st Cong., 1st Sess. (1989), reprinted in 1 Legislative History of P.L. 101-336, The Americans with Disabilities Act, Prepared for the House Committee on Education and Labor, Serial No. 102-A, pp. 162-163 (Dec. 1990).
[11] 843 F.Supp. 1329 (N.D. Cal. 1994).
[12] 1997 WL 249970 (S.D.N.Y.), 1997 U.S. Dist. 6 A.D. Cases 1345 (10 NDLR 39)
[13] Doctor liable for not providing sign language interpreter. American Medical Association News. January 5, 2009. http://www.ama-assn.org/amednews/2009/01/05/prca0105.htm

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RMM-141 (Revised 02/2014)
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