

February 2004 Q&A re Health Care Providers and Interpreter Services for Persons who are Deaf

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Q.: What regulatory and licensing requirements apply to the provision of interpreter services by hospitals for patients who are deaf?

A.: As is discussed below, there are multiple requirements and a variety of strategies that advocates may use to ensure compliance with these requirements.

Regulation and Enforcement by the Centers for Medicare and Medicaid Services

Hospitals that receive Medicare and Medicaid reimbursement (basically, all hospitals) must sign a provider agreement with the federal government's Centers for Medicare and Medicaid Services (CMS). This provider agreement contains a number of conditions of participation (known as "COPs"), to which the hospital agrees in order to receive reimbursement for treating patients covered by Medicare or Medicaid.

These conditions of participation include several relating to compliance with federal law, including a specific agreement to comply with various federal civil rights laws, including Section 504 of the Rehabilitation Act.¹ Thus, a hospital's failure to comply with the Rehabilitation Act's requirements regarding the provision of auxiliary aids such as interpreter services to deaf clients is a violation of its provider agreement with CMS. The requirements of the Rehabilitation Act and the ADA are discussed below. In addition, the hospital agrees to comply with federal and state laws relating to the health and safety of patients.² Significantly, the example used in CMS's Interpretive Guidelines for Hospitals and Survey Procedures contained in its State Operations Manual (Appendix A) to illustrate such a federal law is Section 504 of the Rehabilitation Act of 1973.³ The Guidelines and Manual are important because they are used by CMS inspectors to determine whether a hospital is in compliance with the conditions of participation.

¹ 42 C.F.R. 489.10(b)(2) ("provider must meet the applicable civil rights requirements of ... Section 504 of the Rehabilitation Act").

² 42 C.F.R. 482.11(a).

³ The relevant guidelines can be found at www.cms.hhs.gov/manuals/pub07pdf/AP-a.pdf. Note that although the page number in the hard copy of the manual is A-171, in the electronic version this material is found at p. 167.

In addition, hospitals that receive Medicare or Medicaid are subject to conditions of participation relating to patients' rights, found at 42 C.F.R. 482.13. The patients' rights regulations include the requirement that patients and their family members must be given information about their rights. In its Interpretive Guidelines and instructions to inspectors, CMS articulates its understanding that the alternative communication techniques mandated by Section 504 to communicate with deaf and blind patients will also apply to the provision of information about their rights.⁴ In its "Guidance to Surveyors," CMS emphasizes that surveyors must check to ensure that "[t]he hospital informs each patient of his or her rights in language that the patient understands..." If the patient is deaf or blind, the hospital must use "alternative communication techniques or aides...or take other steps as needed to effectively communicate with the patient."⁵ This can include "specialized programs" and "use of interpreters."⁶ Significantly, CMS has designed "Probes" that the inspectors are supposed to use in determining whether the hospital is complying with the condition of participation. One of the Probes associated with the requirement that patients be informed of their rights specifically requires inspectors to determine, "Does the hospital have alternative means of communication such as written materials, signs, or interpreters to communicate with patients when necessary?"

Finally, the Interpretive Guidance notes that when a patient files a grievance or complaint with a hospital, the hospital must communicate the resolution of the complaint in a language and manner that the patient can understand.⁷

Hospital violation of these conditions of participation are subject to investigation and sanction by CMS, including the suspension of the agreement. There are a number of avenues open to complain about hospital violations of conditions of participation relating to effective communication for deaf people. Advocates can contact the State agency responsible for enforcing Medicaid requirements, or, alternatively, the Regional Office of CMS (ask to speak to the manager in charge of Survey and Certification).

Regulation and Enforcement by the Department of Justice

Most P&A advocates and attorneys are aware that Section 504 of the Rehabilitation Act and Titles II and III of the ADA require that hospitals provide interpreters to deaf patients during significant interactions, as well as requiring the provision of TDD phones, and close caption TVs

⁴ See "Hospital Conditions of Participation for Patients' Rights," Interpretive Guidelines for section 482.13(a) (Tag number A 751), p. A-171, *id.*

⁵ *Id.*

⁶ *Id.*

⁷ Interpretive Guidance to section 482.13(a)(2)(iii).

to hospital patients.⁸ The Department of Justice’s regulations implementing Title III specifically provide that a public accommodation such as a hospital “shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”⁹ “Auxiliary aids and services,” in turn, are defined to include

qualified interpreters, computer-aided transcriptions services, written materials, telephone handset amplifiers, assistive listening devices, assisted listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.¹⁰

These entitlements have been vigorously enforced by the Department of Justice in pre-litigation settlements¹¹ and settlements of filed cases, some of which were brought in conjunction with P&A agencies.¹² There have been a number of private lawsuits against hospitals and emergency rooms for failing to provide interpreter services for deaf individuals under the Americans with Disabilities Act as well.¹³ However, private litigation is difficult because under Title III, private

⁸ See, e.g. 45 C.F.R. 84.52(c) (requiring hospitals to have a procedure in place to communicate with people who are deaf or hard of hearing), 45 C.F.R. 84.52(d)(1) and (3) (referring specifically to availability of interpreters).

⁹ 28 C.F.R. 36.303(c)

¹⁰ 28 C.F.R. 36.303(b)(1).

¹¹ Settlement Agreement between the United States and Ravenswood Hospital Center, Complaint No. 202-23-30, see www.hhs.gov/newfreedom/final/doj/full.html, where the Department of Justice refers to this settlement and states that one of its priorities is enforcing effective communication rights of deaf individuals in the mental health arena; www.usdoj.gov/crt/ada ; Settlement Agreement between the United States and St. Luke’s Hospital and Health Center, No. 202-62-70, www.usdoj.gov/crt/ada/slukehos.pdf; Settlement Agreement Between United States and Davis Hospital, www.usdoj.gov/crt/ada/davishos.htm.

¹² *DeVinney v. Maine Medical Center*, consent decree available at www.doj.gov/crt/ada/devin.htm; *Connecticut Association for the Deaf v. Middlesex Memorial Hospital*, consent decree available at www.doj.gov or from the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities. In its New Freedom report, cited in footnote 11, the Department of Justice describes the Middlesex agreement as the template it uses in all cases involving the failure to provide effective communication for deaf clients, so it is worthy of particular attention by advocates and attorneys.

¹³ *Aikins v. St. Helena Hospital*, 843 F.Supp. 1329 (N.D.Ca. 1994); *Schroedel v. New York University Medical Center*, 885 F.Supp. 594 (S.D.N.Y. 1995); *Davison v. Columbia/HCA Healthcare Corp.*, 241 F3d 1131 (9th Cir. 2001)(en banc); *Freydel v. New York Hospital*, 2000 U.S. Dist.LEXIS 9 (S.D.N.Y. Jan. 4, 2000); *Naiman v. NYU*, 1997 U.S. Dist.LEXIS 6616

litigants are limited to injunctive relief, and in the absence of showing a predictable return to the same hospital for services, private litigation has often been dismissed for lack of standing to obtain injunctive relief.¹⁴ However, at least some courts have accepted the argument that if a defendant refuses to provide any interpreter services at all, or refuses to change a policy refusing services to people who are deaf after being asked, a plaintiff can bring an action for injunctive relief.¹⁵

Complaints can be made to the Department of Justice, which, unlike private litigants, has the ability to bring litigation under Title III of the ADA for money damages, and which has (as noted above) extensive experience in pursuing hospitals that fail to provide adequate interpreter services for patients. A complaint can be filed with the Disability Rights Section of the Department of Justice's Civil Rights Division. Its home page, www.usdoj.gov/crt/drs/drshome.htm, has information about how to file a complaint (note: the information regarding personnel on the home page may not be completely up to date).

Accreditation Requirements and Enforcement by the Joint Commission on Accreditation of Health Care Organizations

An additional route to consider is a complaint to the Joint Commission on Accreditation of Health Care Organizations (JCAHO). Many hospitals are JCAHO-accredited. The Joint Commission has accreditation standards for psychiatric hospitals (Behavioral Health Care standards) and general hospitals (hospital standards). Like CMS, JCAHO accepts complaints from patients for violations of accreditation standards and sometimes conducts spot investigations that result in the suspension of accreditation.

JCAHO has promulgated accreditation standards in a number of areas that apply to both behavioral health care and acute care hospitals, including Rights, Responsibilities, and Ethics. Several accreditation standards in Rights, Responsibilities and Ethics apply to communication. The standard that is most directly applicable to the situation of deaf clients is

(S.D.N.Y. 1997); *Constance v. State University of New York Health Sciences Center*, 166 F.Supp.2d 663 (N.D.N.Y. 2001); *Bravin v. Mount Sinai*, 186 F.R.D. 293 (S.D.N.Y. 1999).

¹⁴ In all cases listed in the footnote above, the court found that the plaintiff could not seek injunctive relief because of an inability to show that he, she or they would return to the hospital or the emergency room in question. Note, however, that in *Davis v. Flexman*, 109 F.Supp.2d 776 (S.D. Ohio 1999), when the defendant was a counselling clinic where the plaintiff had regular appointments, an action for injunctive relief was upheld. Furthermore, in *Bravin*, the plaintiff was permitted to proceed in a claim for damages under Sec. 504 of the Rehabilitation Act.

¹⁵ See cases collected in *Majocho v. Turner*, 166 F.Supp.2d 316 (W.D.Pa. 2001).

RI 1.7.4: As appropriate, personnel are available who can effectively communicate with people who have hearing and speech impairments.¹⁶

This standard is found as part of a more global standard on respecting patients' communication needs, which provides:

RI 1.7: The organization respects the communication needs of each individual served, and, when appropriate, the individual's family.

Other standards that elaborate RI 1.7 include

RI 1.7.2: All individuals are informed of their rights in a language they understand

RI 1.7.3: When people who speak various languages make substantial use of the organization, personnel who speak their language(s) are available.

Another standard which applies to the situation of deaf clients is

RI.1.2: Individuals served are involved in all aspects of treatment, care and service, in accordance with approved policies and as appropriate to the setting or service

RI. 1.2.1: Individuals receive adequate information about the staff responsible for their treatment, care and service.

In deciding whether behavioral health care organizations meet these standards, JCAHO surveyors employ checklists called "Elements of Performance" that are similar to the CMS Guidance to Surveyors mentioned above.

Accreditation standards for hospitals are somewhat different. The applicable standard for hospitals is: "The hospital respects the patient's right to and need for effective communication."¹⁷ In meeting the standard, surveyors look to "Elements of Performance." An element of performance for the effective communication standard includes the explicit requirement that "the hospital facilitates provision of interpretation, including translation services as necessary"¹⁸ and "The hospital addresses the needs of those with vision, speech, hearing, language and cognitive impairments"¹⁹

Making a complaint to JCAHO is easy. There are complaint forms readily available online. A complaint can be emailed to complaint@jcaho.org or faxed to 630-792-5636 (the Quality

¹⁶ Joint Commission on Accreditation of Health Care Organizations, Standards for Behavioral Health Care.

¹⁷ Standards of Accreditation for Hospitals, RI.2.100 (2004)

¹⁸ RI 2.100(3).

¹⁹ RI 2.100(4)

Incident Report Form available on line will give you guidance as to how to present the complaint).

Alternative Means of Addressing Interpreter Shortages

New technology exists that allows live video conferencing to be used for emergency interpreting needs before a local interpreter arrives. It is not intended to take the place of such interpreters, but to allow for some communication in the crucial time before an interpreter reaches the hospital. This technology is called “Deaf Talk” and is used by hospitals such as Caritas St. Elizabeths in Cambridge, Massachusetts, and Montefiore Hospital in the Bronx, New York. The hospital pays a monthly fee and a per-minute rate for the interpreters, who are available 24 hours a day, 7 days a week. The Center for Public Representation is in the process of developing a list of hospitals that use DeafTalk and will post the information on its web site when it is complete.

Conclusion

Advocates and attorneys for people who are deaf or hard of hearing should be aware of the panoply of remedies available to them, and take the opportunity to report hospitals which are out of compliance with clear federal law, regulations, and accreditation requirements.