Obligations of Hospitals and Nursing Homes to Provide Interpreters and Auxiliary Aids for Deaf and Hard of Hearing Patients

Inpatient health care facilities have important responsibilities under federal law to be accessible to deaf and hard of hearing individuals. Failing to provide interpreters and adapted equipment may be discrimination on the basis of disability. In addition, failure to establish effective communication with a deaf patient may expose a health care provider to liability for medical malpractice.

This memorandum addresses the obligations of a hospital to provide qualified interpreters to its deaf and hard of hearing patients. This right is established under two federal laws.

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Š 794, requires federal financial recipients' programs to be equally accessible to handicapped persons. The U.S. Department of Health and Human Services (HHS) regulations to Section 504 require pro vision of necessary auxiliary aids, such as sign language interpreters, to ensure equal access to federal financial recipients' programs. These regulations specify that:

A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question. * * * For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision. 45 C.F.R. Š 84.52(d)

Provision of qualified sign language interpreters is critical to ensure that deaf persons are able to benefit from and participate equally in the program. The Office for Civil Rights of HHS has consistently required hospitals to provide qualified interpreters and TDDs to deaf clients, and has stated:

. . . it would be extremely difficult for the health care provider to demonstrate in certain service settings, that effective communication is being provided in the absence of . . . interpreters.

Section 504, Effective Communications, and Health Care Providers, U.S. Department of Health and Human Services, Region III, Regional Technical Assistance Staff (January, 1982), page 5.

The Department of Health and Human Services, Office for Civil Rights (OCR) has determined that effective communication must be provided at "critical points" during hospitalization. OCR has defined "critical points" as follows:

These would include those points during which critical medical information is communicated, such as at admission, when explaining medical procedures, when an informed consent is required for treatment and at discharge.

U.S. Department of Health and Human Services, Office for Civil Rights, Region III, Letter of Findings, Ref. No. 03913037 (December 12, 1991), at 5.

Moreover, HHS has repeatedly stated that the deaf patient's assessment of his or her communication needs must be given great deference:

In most circumstances, we believe that the hearing impaired person is in the best position to determine what means of communication is necessary to insure an equal opportunity to benefit from health care services. Therefore, the patient's judgment regarding what means of communication is necessary to insure effective communication must be accorded great weight. * * * The presumption favoring the hearing impaired patient's self assessed need is not overcome merely by a showing that the hearing impaired patient suffered no harm. Rather, the recipient must demonstrate that the hearing impaired patient actually understood what was being communicated through the alternative communication option.

Stewart, Roma, (Director, HEW Office for Civil Rights), "Memorandum: OCR's Position on the Provision of Auxiliary Aids for Hearing Impaired Patients in Inpatient, Outpatient and Emergency Treatment Settings", (April 21, 1980), page two.

Many physicians wonder why the exchange of written notes will not suffice with a deaf patient. The Department of Health and Human Services recognizes that there is a distinction between English and American Sign Language, and that written communications , or interpreters not skilled in American Sign Language (ASL), will not suffice as effective communication for deaf persons who utilize ASL: ". . . American Sign Language (ASL) [is] a manually communicated language distinct from English and whose idioms and concepts are not directly translatable into English. It uses different sentence structure, grammar and syntax than English, and is as much a foreign language to English speaking persons as is French or German. Conversely, English is equally foreign to most deaf persons who rely on ASL for communication. It is a common misconception that "sign language" is merely a pantomime of the English language and is therefore easily understandable in print if not auditorily. ASL sentences do not follow English sequential patterns. As a result, direct translation of English, as with written notes, into ASL will not necessarily convey the intended message. Similarly, much of

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English idiomatic speech would be lost on the ASL user whose frame of reference for idiom is significantly different from the hearing person. U.S. Department of Health and Human Services, Office for Civil Rights, Region III, Letter of Findings, Ref. No. 03913037 (December 12, 1991) at 4.

Please note that there is no distinction between in-patient and out-patient treatment. All services provided by health care facilities must be accessible.

Americans with Disabilities Act (ADA)

In addition to hospitals' Section 504 obligations, hospitals, physicians and nursing homes have an federal obligation to provide auxiliary aids and services to disabled patients under Title II (public hospitals) or Title III (private facilities) of the Americans with Disabilities Act, 42 U.S.C. 12181 et seq. The ADA covers places of public accommodation and public entities, regardless of whether that entity receives federal financial assistance. The U.S. Department of Justice regulation to Title III of the ADA, 28 C.F.R. Part 36, and the Analysis thereto, 56 Fed. Reg. 35544 (July 26, 1991), provide information on the exact nature of what will be required under the ADA. Public accommodations are required to provide auxiliary aids when necessary to enable a person with disabilities to benefit from their services:

A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

28 C.F.R. Š36.303(c). The definition of auxiliary aids and services includes,for deaf and hard of hearing individuals, "qualified interpreters." 28 C.F.R. 36.303(b)(1). The definition of what constitutes a qualified interpreter is also set forth in this regulation. The U.S. Department of Justice has defined "qualified interpreter" to mean: ". . . an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary. "28 C.F.R. 36.104; 28 C.F.R. 35.104.

While the Departments of Health and Human Services, and Justice, have not required certification for interpreters under these federal laws, due to the difficulty in some areas of the nation to secure a certified interpreter, it is doubtful that any individual who has not been formally trained as an interpreter can perform the functions of a medical interpreter. Hospitals are strongly advised to use adequately trained interpreters, in order to avoid the possibility of misdiagnosis or improper treatment as a result of inadequate communication.

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The Department of Justice specifically cautions against the use of family members or friends as interpreters:

In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially." 56 Fed. Reg. at 35553.

The problems that may arise with having a family member or friend interpreting in a medical setting are considerable. There may be necessary information that the family member fails to communicate, in a misguided effort to shield the deaf patient. There may be questions the deaf person will not ask in the presence of the family member or friend. The family member or friend may be too emotionally upset by the medical situation to interpret correctly. Finally, the family member or friend will seldom meet the qualification requirements of the law.

The Department of Justice does not permit a public accommodation to charge a person with a disability for the cost of the auxiliary aid provided. The Title III regulation states: " A public accommodation may not impose a surcharge on a particular individual with a disability . . . to cover the costs of measures, such as the provision of auxiliary aids . . that are required to provide that individual . . . with the nondiscriminatory treatment required by the Act or this part. " 28 C.F.R. 36.301(c).

Inpatient facilities also have responsibilities under the ADA to assure that their telephone services, television services, and other services are accessible and usable by deaf individuals. For information about the responsibility to provide TTYs, captioned televisions, flashing light warning systems and alarms, contact the NAD Law Center.

There are tax credits available for expenses incurred in the course of accommodating patients with disabilities. The Access Credit, created by the Revenue Reconciliation Act of 1990, provides a tax credit of one half of the cost of interpreters and similar measures that exceed $250.00. This credit, available only to businesses which have either thirty of fewer full time employees or gross receipts of under one million dollars annually, will greatly reduce the cost of such accommodations for most physicians.

Courtesy of the NAD at: http://www.nad.org/infocenter.html