

# Americans with Disabilities Act and the Hearing Impaired

TMA Office of the General Counsel

## History and Background

On January 26, 1992, the Americans with Disabilities Act (the "Act") came into effect. The Act is a civil rights law that, generally, prohibits discrimination against persons based upon their disability, perceived disability, or for advocating for a person with a disability. The Act is divided into several Titles. Title I of the Act prohibits discrimination by public employers. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities. It applies to all State and local governments, their departments and agencies, and any other instrumentalities or special purpose districts of State or local governments.<sup>1</sup> Title III of the Act prohibits discrimination on the basis of disability in "places of public accommodation" (businesses and non-profit agencies that serve the public) and "commercial facilities" (other businesses).<sup>2</sup> It is Title III that applies to most physician practices, although some physicians may practice in state facilities subject to Title II.

## Statutory and Regulatory Provisions

### *General Provisions*

The Act contains a general prohibition against discrimination providing that "[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."<sup>3</sup> The Act then defines discrimination in further detail to include, in part, "a failure to take such steps as may be 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, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden. . . ."<sup>4</sup>

### *What kind of auxiliary aid is required?*

The executive branch of the federal government has further interpreted the Act through regulation in regard to auxiliary aids and effective communication. Simply the government requires "appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."<sup>5</sup> The question most often facing physician practices is what is an appropriate auxiliary aid or service. The Department of Justice ("DOJ"), which is the agency charged with enforcing the Act, is required by the Act to issue technical assistance to physicians and others to guide them in compliance. According to the DOJ technical assistance manual for Title III "The type of auxiliary aid or service necessary to ensure effective commu-

nication will vary in accordance with the length and complexity of the communication involved."<sup>6</sup> The DOJ regulations state that auxiliary aids, in regard to effective communication, include "Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments. . . ."<sup>7</sup>

### *Is an interpreter the only kind of auxiliary aid I may use?*

This means that there are a wide range of possible aids, short of a qualified interpreter, that may be utilized by a practice to ensure effective communications. In the Title III technical assistance manual the government provides the following example of an appropriate accommodation, "H [who is a hearing impaired patient] goes to his doctor for a bi-weekly check-up, during which the nurse records H's blood pressure and weight. Exchanging notes and using gestures are likely to provide an effective means of communication at this type of check-up."<sup>8</sup> However, circumstances will exist where the ailment is of sufficient complexity that a qualified interpreter will be necessary to ensure effective communications. Also, if a patient is illiterate or has some other difficulty regarding reading comprehension, a qualified interpreter should be considered. Consider the following government scenario:

**"Upon experiencing symptoms of a mild stroke, He returns to his doctor for a thorough examination and battery of tests and requests that an interpreter be provided. H's doctor should arrange for the services of a qualified interpreter, as an interpreter is likely to be necessary for effective communication with H, given the length and complexity of the communication involved."**

If an interpreter is necessary, then the physician must provide a *qualified interpreter*. The DOJ technical assistance manual states that there are several issues to consider when providing a qualified interpreter. "There are a number of sign language systems in use by persons who use sign language. (The most common systems of sign language are American Sign Language and signed English.) Individuals who use a particular system may not communicate effectively through an interpreter who uses another system. When an interpreter is required, the public accommodation should provide a qualified interpreter, that is, an interpreter who is able to sign

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to the individual who is deaf what is being said by the hearing person and who can voice to the hearing person what is being signed by the individual who is deaf. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.<sup>10</sup> Also, one should be aware that the government does not consider the *ability* to sign to be the same as the ability to *interpret* sign language. Thus, an office worker who has the ability to sign, but lacks the skill to process spoken communication into the proper signs, and vice versa, will not meet the qualified interpreter mandate.<sup>11</sup> However, **certified interpreters need NOT be provided** and are not required by the ADA – the ADA requires only qualified interpreters.<sup>12</sup> This is potentially a cost saving distinction.

*Can I use a family member?*

Some legal scholars opine that the utilization of family members as qualified interpreters entails risk because the lack of impartiality may cause the disabled to refrain from sharing important, but very personal, facts.<sup>13</sup> Indeed, the federal government has imposed requirements upon medical care providers to refrain utilizing “a family member, companion, case manager, advocate or friend” of a deaf individual as an interpreter.<sup>14</sup> Also, one should keep in mind that impartiality is one of the elements necessary for an interpreter to be considered “qualified.”

*Who pays?*

The physician responsible for the care must pay for the cost of an interpreter and may not impose a surcharge on an individual with a disability directly or indirectly to offset the cost of the interpreter. Under certain circumstances, Texas Medicaid will pay reimburse the physician for some of the costs (this is explained below). The cost of the interpreter should be treated as part of overhead expenses for accounting and tax purposes.<sup>15</sup> Tax relief is available for expenditures made toward interpreters. The Internal Revenue Service may allow a credit of up to 50% of cumulative eligible access expenditures made within the taxable year that exceed \$250 but do not exceed \$10,250.<sup>16</sup> This tax credit may be applied to reasonable and necessary business expenditures made in compliance with ADA standards in order to provide qualified interpreters or other accessible tools for individuals with hearing impairments.<sup>17</sup>

It is important to note that where “it takes longer to perform a service for an individual who is deaf due to the need to communicate via a sign language interpreter, the practitioner is free to charge the deaf individual for the additional time expended.”<sup>18</sup>

Even if a qualified interpreter is necessary to ensure effective communications an interpreter need not be provided where providing the interpreter would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.<sup>19</sup> However, a physician attempting to justify foregoing the use of an interpreter because it is an undue burden

or fundamentally alters the nature of physician services will find it *extremely* difficult to meet the standards set by courts and will face legal risks. Indeed, the United States Congress intended to make “the undue burden standard especially difficult for public entities to satisfy” to ensure persons with disabilities remain free from discrimination.<sup>20</sup>

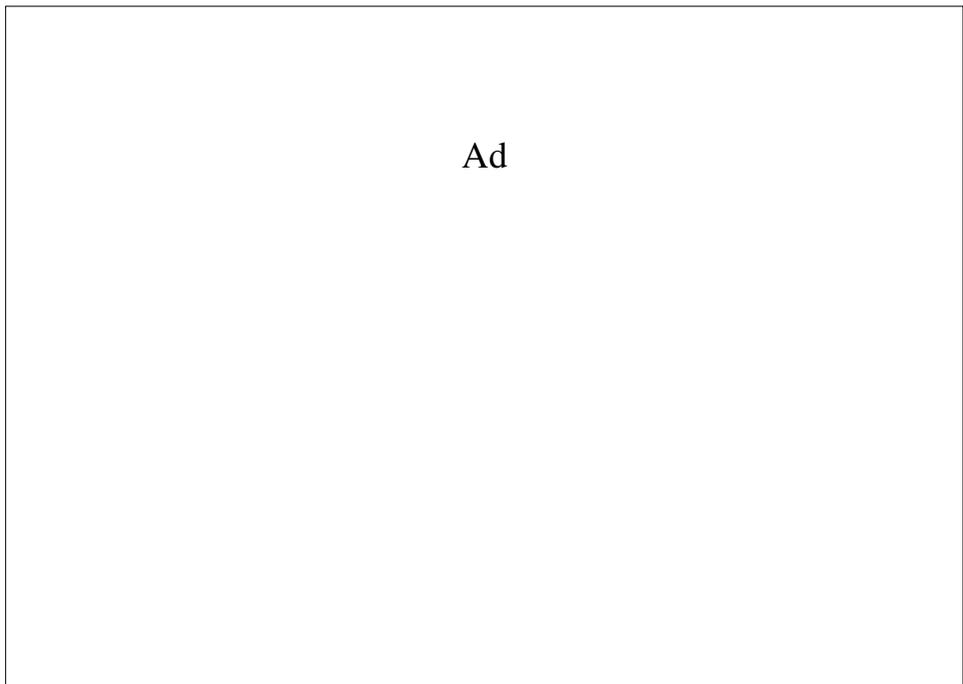
*Texas Medicaid Sometimes Pays for Interpretation*

Effective for dates of service on and after September 1, 2007, sign language interpreting services are a benefit of the Texas Medicaid Program.<sup>21</sup> However Texas Medicaid has imposed requirements that are above and beyond those required by the ADA.

First, such reimbursement is available only for physicians or physician groups employing fewer than fifteen employees.<sup>22</sup> Also, a *qualified* interpreter is not sufficient. Under the regulations, to be paid by Medicaid for the interpreter services, the physician must use an interpreter who:

- possesses one of the following certification levels (i.e., levels A-H) issued by either the Department of Assistive and Rehabilitative Services, Office for Deaf and Hard of Hearing Services, Board for Evaluation of Interpreters (BEI) or the National Registry of Interpreters for the Deaf (RID):
- (A) Certification Level A:
  - (i) Level I/II; and
  - (ii) OC:B (Oral Certificate: Basic).
- (B) Certification Level B:
  - (i) BEI Basic; and
  - (ii) RID NIC (National Interpreter Certificate) Certified.
- (C) Certification Level C:
  - (i) BEI Level II/IIi;
  - (ii) RID CI (Certificate of Interpretation);
  - (iii) RID CT (Certificate of Transliteration);
  - (iv) RID IC, (Interpretation Certificate); and

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- (v) RID TC (Transliteration Certificate).
- (D) Certification Level D:
  - (i) BEI Level III/IIIi;
  - (ii) BEI OC: C (Oral Certificate: Comprehensive);
  - (iii) BEI OC: V (Oral Certificate: Visible); 22 Id.
  - (iv) RID CSC (Comprehensive Skills Certificate);
  - (v) RID IC/TC (Interpretation Certificate/Transliteration Certificate);
  - (vi) RID CI/CT (Certificate of Interpretation/Certificate of Transliteration);
  - (vii) RID RSC (Reverse Skills Certificate); and
  - (viii) RID CDI (Certified Deaf Interpreter).
- (E) Certification Level E:
  - (i) BEI Advanced; and
  - (ii) RID NIC Advanced.
- (F) Certification Level F:
  - (i) BEI IV/IVi;
  - (ii) RID MCSC (Master Comprehensive Skills Certificate); and
  - (iii) RID SC: L (Specialist Certificate: Legal).
- (G) Certification Level G is BEI V/VI.
- (H) Certification Level H:
  - (i) BEI Master; and
  - (ii) RID NIC Master.<sup>23</sup>

Just as under the ADA, interpreting services must be requested by a physician (not the patient) and the needs of the individual who is

deaf or hard of hearing (not the request of the patient, *see the next section of this whitepaper*) are given primary consideration in the determination of whether the interpreter is necessary.<sup>24</sup>

The physician must document the service in the patient's medical record and include the name of the sign language interpreter along with the interpreter's certification level.<sup>25</sup>

Modifier U1 should be used for the first hour of service, and modifier UA should be used for each additional 15 minutes of service. Procedure code 1-T1013 billed with modifier U1 is limited to once per day, per provider, and procedure code 1-T1013 billed with modifier UA is limited to a quantity of 28 per day.<sup>26</sup> Procedure code 1-T1013 is reimbursed at \$70.00 with modifier U1 and \$8.75 with modifier UA.<sup>27</sup>

**Who Gets to Choose the Appropriate Accommodation?**

For Title III physicians, the physician, not the hearing impaired person, chooses the appropriate accommodation and, if an interpreter is needed, the physician chooses the interpreter. A physician "need not 'accept and pay for the services of a sign-language interpreter who is unilaterally retained by the family of a deaf patient, when the doctor has had no opportunity to make his own arrangements.'"<sup>28</sup>

The DOJ illustrates this point as follows:

**A patient who is deaf brings his own sign language interpreter for an office visit without prior consultation and**

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**bills the physician for the cost of the interpreter. The physician is not obligated to comply with the unilateral determination by the patient that an interpreter is necessary. The physician must be given an opportunity to consult with the patient and make an independent assessment of what type of auxiliary aid, if any, is necessary to ensure effective communication.<sup>29</sup>**

However, physicians who practice medicine in governmental institutions, governed by Title II, must give the request of a hearing impaired patient primary consideration in determining the accommodation to be utilized to ensure effective communications.<sup>30</sup>

**Referrals**

It is not considered discriminatory for a physician with a specialty in a particular area to refer an individual with a disability to a different public accommodation if the individual is seeking a service or treatment outside the physician's expertise and the physician would make a similar referral for a patient who does not have a disability.<sup>31</sup>

**Penalties**

According to the DOJ if a hearing impaired patient believes that the physician's decision will not lead to effective communication, then the patient may challenge that decision under Title III by initiating litigation or filing a complaint with the Department of Justice.<sup>32</sup> The patient's remedy does not include hiring an interpreter and then billing the physician for the interpreter's services. A patient may, however, seek damages in court against a physician who has allegedly violated ADA Title III if the physician participates in a federal program.<sup>33</sup> If the physician does not receive money via a federal program, the monetary relief provisions do not apply and the patient will not be able to bring a private cause of action against the physician.<sup>34</sup>

**Policy**

**AMA House of Delegates**

H-65.989 Unfounded Bias Against Some Medical Patients The AMA (1) affirms its support for the dignity and self-respect of all patients; and (2) opposes all acts of medically unfounded categorical discrimination against patients because of their medical condition. (Sub. Res. 137, A-87; Reaffirmed: Sunset Report, I-97)

**Further Information**

**DOJ ADA Assistance Website**

<http://www.usdoj.gov/crt/ada/publicat.htm>

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**FOOTNOTES**

1. *United States Department of Justice, U.S. Equal Employment Opportunity Commission U.S. Department of Justice Civil Rights Division Americans with Disabilities Act Questions and Answers*
2. *42 USC §12181.*
3. *42 USC §12182(a).*
4. *42 USC §12182(b)(2)(A)(iii).*
5. *28 CFR §36.303(c).*
6. *Dep't of Justice, The Americans with Disabilities Act: Title III Technical Assistance Manual 27, III-4.320 (1993).*
7. *28 CFR §36.303(b)(1).*
8. *Dep't of Justice, The Americans with Disabilities Act: Title III Technical Assistance Manual 27, III-4.3200, Illustration 2a (1994 Supplement).*
9. *Id.*
10. *Dep't of Justice, The Americans with Disabilities Act: Title III Technical Assistance Manual 27, III-4.3200 (1993).*
11. *Id.*
12. *Id.*
13. *JoAnne Simon, The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A., 8 J.L. & Health 155, 171 (1993-94).*
14. *Consent Decree between United States and Middlesex Memorial Hospital <http://www.usdoj.gov/crt/ada/cthosp.htm> (last accessed 6/22/06).*
15. *AMA publication entitled "Americans with Disabilities Act and Hearing Interpreters"*
16. *Id.*
17. *Id.*
18. *See, Tucker, Bonnie Access to Health Care for Individuals with Hearing Impairments, 37 Hous. L. Rev. 1101, 1115-1116 (2000).*
19. *42 USC §12182(b)(2)(A)(iii).*
20. *See, Tucker, citing, Gould, Keri And Equal Participation For All... The Americans with Disabilities Act in the Courtroom, 8 J.L. & Health 123, 137 (1993-94).*
21. *1 TAC § 354.1069.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Texas Medicaid Provider Procedures Manual, Paragraph 36.4.44. Sign Language Interpreting Services, page 36-128 (2008).*
27. *Id.*
28. *See, Tucker, citing No. 202-41-20 (settlement agreement), <http://www.usdoj.gov/crt/foia/ctlmisssm.htm> (last accessed 6/22/06).*
29. *Dep't of Justice, The Americans with Disabilities Act: Title III Technical Assistance Manual 27, III-4.3200 (1993).*
30. *Tucker, supra.*
31. *Dep't of Justice, The Americans with Disabilities Act: Title III Technical Assistance Manual 27, III-4.2200 (1993).*
32. *Dep't of Justice, The Americans with Disabilities Act: Title III Technical Assistance Manual 27, III-4.3200 (1993).*
33. *Tucker, supra at 1121.*
34. *Id.*

**Texas Medical Association of the General Counsel.**