Federal law requires physicians to accommodate hearing-impaired patients

Brian L. Buchanan, JD

The federal Americans with Disabilities Act (ADA) of 1990 prohibits discrimination based on disability in a number of settings, including private establishments that cater to the public, which includes physician offices and hospitals. As a result, physicians cannot refuse to provide treatment to a disabled person because of disability, and they must provide, free of charge, any auxiliary aids and services that are necessary to communicate effectively with patients who have disabilities that affect vision, speech or—most commonly—hearing.

The federal regulations that implement the ADA define “auxiliary aids and services” related to the hearing impaired to include qualified interpreters, note taking, written materials, and telecommunications devices for deaf persons or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

Physicians must determine, in consultation with the patient, the appropriateness of providing an interpreter or other auxiliary aid or service to a hearing impaired patient. The ADA does not require that an interpreter be provided during every contact with a hearing impaired patient, but rather requires that communication between the physician and the patient be as effective as communication with patients who are not hearing impaired. In some instances, passing notes to the patient may satisfy the requirements of the ADA, while in other instances an interpreter may be necessary based on the complexity of the communication or the literacy of the patient.

While physicians should consult with their patients when determining what, if any, auxiliary aid is necessary to ensure effective communication, the responsibility for making the decision rests with the place of public accommodation (the physician), not the patient. A hearing-impaired patient’s demand for an interpreter is not the decisive factor if effective communication can be achieved through other means. The following example comes from the ADA Title III Technical Assistance Manual:

ILLUSTRATION: A patient who is deaf brings his own sign language interpreter for an office visit without prior consultation and 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. If the 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.

If it is determined that an interpreter is necessary, it is not required that a
“certified” interpreter be used, but rather the interpreter must be only a “qualified” interpreter, which is defined as “an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.” Physicians may contract with interpreters from outside interpreter services, hire staff members capable of interpreting for hearing impaired patients, or use friends and family of the patient, but only when using a friend or family member is requested by the patient and when the person can serve in that capacity effectively. When hiring an interpreter, the physician should make sure that the interpreter and the patient use the same system of sign language. American Sign Language and signed English are most common, but not the only types of sign language.

Public accommodations are not required to provide auxiliary aids or services under the ADA if they would fundamentally alter the nature of the goods or services or would result in an undue burden. Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include (1) the nature and cost of the action needed; (2) the overall financial resources of the site or sites involved in the action, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation including crime prevention measures, or the impact otherwise of the action on the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees, the number, type, and location of its facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Provision of auxiliary aids or services is not considered an undue burden just because the cost of the auxiliary aid or service exceeds the amount the physician will receive for treating the patient. As a practical matter, it may be difficult to show that use of an interpreter would fundamentally alter the nature of the services provided or constitute an undue burden (both of which may be difficult to prove in a court action), the physician may refer the patient to another physician if alternatives are not viable. Physicians who believe that they are unable to provide an auxiliary aid or service because of undue burden or fundamental alteration of the nature of the services provided should contact their attorney to obtain a legal opinion to ensure that such a decision does not violate the ADA.

Physicians may not pass along the cost of auxiliary aids or services to the disabled individual because the intent of the ADA is to prohibit discrimination based on disability, and charging a disabled person more in order to receive the same services as someone who is not disabled is viewed as discrimination. Most insurers will only reimburse for actual medical services provided and not for interpreters. However, physicians who provide auxiliary aids or services may be eligible for a tax credit. Physicians should consult their tax professional, and can also visit http://www.ada.gov/tax-pack.htm for more information.

The ADA is enforced through private lawsuits by individuals and by lawsuits by the US Department of Justice. Remedies can include injunctive relief such as compelling the provision of an auxiliary aid or service, as well as monetary damages and civil monetary penalties.

An example of this issue, a recent New Jersey court case, Gerena vs Fogari, resulted in a $400,000 verdict against a physician for failing to provide an interpreter, when the hearing impaired patient sued under the ADA and New Jersey law. The physician would sometimes exchange written words with the patient’s civil union partner, who had better English skills than the patient, or communicate with the patient through her 9-year-old daughter. The patient repeatedly asked the physician for an American Sign Language interpreter, but the physician said he could not afford the estimated $150 to $200 an interpreter would cost when he was reimbursed only $49 per visit by the patient’s insurer. Evidence in the case included the physician’s tax returns which showed he earned over $400,000 per year. The patient claimed that she was deprived of the opportunity to participate in and understand her medical situation and the treatment the physician provided, including the attendant risks and alternative approaches. The jury decided the physician must pay $400,000, half of which was for punitive damages. As is typical in these types of cases, the physician’s malpractice insurer did not defend the case and will not cover the liability because quality of care was not an issue. Appropriate care is not a defense to an ADA claim.

References
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