A Matter of Law: Providing an Interpreter for the Deaf under ADA

by Legal and Regulatory Affairs Staff

February 14, 2008—Psychologists are occasionally approached by a potential client who is deaf and says that the law requires the psychologist to treat the patient and pay for an interpreter. Several of our members have called staff attorneys in the APA Practice Directorate to find out if they are obligated to obtain and pay for an interpreter, even when the expense would exceed the payment for psychological services.

In most cases, the answer is yes: Psychologists are required to obtain and pay for the cost of interpreters for the deaf.

For the past 16 years, the Americans with Disabilities Act (ADA) has prohibited discrimination against persons with disabilities by the "professional office of a health care provider." That means in essence that a psychologist or other health professional subject to the law may not refuse to accept a potential client simply because he or she is deaf.

The law further requires that health care practitioners provide "auxiliary aids and services" to ensure "effective communication" with persons with disabilities. Auxiliary aids and services include, among other things, qualified interpreters, note takers, computer-aided transcription services, written materials, assistive listening devices and telecommunications devices.

The only limits to this requirement are when the auxiliary aid would "fundamentally alter" the nature of the services being provided or result in an "undue burden" to the health care practitioner.

The ADA is enforced by the Department of Justice (DOJ), though the law also gives private individuals the authority to sue health care professionals directly. DOJ investigates complaints and tries to resolve them through informal or formal settlements. If not resolved, the Attorney General may impose penalties of $55,000 for a first violation.

When evaluating whether they have to obtain and pay for an interpreter under ADA rules, psychologists should be mindful that the law purposely adopted a flexible standard as to when the requirement would apply and what services need to be furnished. This flexibility is intended to allow the law to apply to a variety of situations and in a way that fits each individual situation.

However, the flexibility sometimes makes it difficult to know exactly what the law requires in a given instance. To figure that out, it is helpful to look at guidance issued by DOJ along with court decisions.

Guidance from DOJ

We are unaware of any DOJ guidance that pertains specifically to psychologists. However, guidance issued to hospitals and physicians is instructive for psychologists as well.

With respect to mental health services, DOJ advises hospitals that an interpreter may be needed when "providing mental health services, including group or individual therapy, or counseling for patients and family members." The DOJ also advises that an interpreter may be needed when "communicating with a patient during treatment, testing procedures, and during physicians' rounds" as well as when obtaining informed consent for treatment and providing a diagnosis, prognosis and recommendation for treatment.

The DOJ explained in a letter to Congress about how the requirement to use an interpreter in lieu of other auxiliary aids affects physicians. According to the letter, "a note pad and written materials" may be enough for "some routine appointments or when discussing uncomplicated symptoms resulting from minor injuries," but an interpreter would be the only effective communication if the "information to be conveyed is lengthy or complex" or involves "a discussion of whether to undergo surgery or to decide on treatment options for cancer."
This example by DOJ suggests that psychologists often may be required to use an interpreter, since the information discussed with their clients – during psychotherapy or testing, for example – is usually involved or lengthy.

**Limits on the requirement**

As mentioned above, there are two limits on the requirement that a health care practitioner provide an interpreter or other auxiliary aid.

If providing an interpreter would "fundamentally alter" the nature of the health professional’s practice, he or she may refer the patient to someone else. The DOJ's example of how a practice would be fundamentally altered relates to an action that would require physicians to treat people outside their specialty. For example, a burn specialist does not have to treat someone with a broken limb.

Applying this example to practicing psychologists, it is clear that ADA does not require psychologists to furnish services that they are not trained to furnish. However, the mere use of an interpreter does not obligate psychologists to provide services outside their training, so DOJ is unlikely to view it as fundamentally altering a practice.

With regard to the second limit, proving that using an interpreter would impose an "undue burden" on a practice is also a difficult standard to meet. An undue burden is a significant expense or difficulty in operating the practice.

The fact that an interpreter would cost more than the practitioner receives in payment for the service is not, by itself, viewed as an undue burden by the courts. Congress intended that businesses would absorb the expense of using an interpreter as overhead and treat it as a cost of doing business. Factors that DOJ and courts consider for establishing undue burden include: the practice's operating income; eligibility for tax credits; and the frequency of visits that would require an interpreter.

If you are presented with a client who is deaf, you should discuss the options for providing effective communication, including the auxiliary aids listed above. If you both decide that an interpreter is the only way to provide effective communication, then you must make sure that you obtain the services of a qualified interpreter. The law defines this as an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.

The DOJ advises that it is inappropriate to ask family members or other companions to interpret for someone who is deaf. If the client suggests the services of the family member, you may want to consider, among other things, whether using that individual could impede the provision of services, given the client’s privacy needs.

**Paying for the Interpreter**

Once you have decided to obtain the services of an interpreter, your next question may be how to cover the cost of the interpreter. Unfortunately, it is most likely that your practice will have to absorb the expense. Medicare and other health insurers generally do not cover the cost of an interpreter, though they may reimburse for an extended session needed as a result of having an interpreter.

We encourage you to contact the payer involved to see if the client’s policy covers interpreter services or if the payer would be willing to cover the cost of those services in this instance. There are anecdotal reports of psychologists who have successfully convinced an insurer to cover the cost of an interpreter. In addition, the federal government encourages state Medicaid programs to cover this cost, though most states are not doing so at this time.

Finally, there are tax credits available to help cover the cost of complying with the ADA. Information on these tax benefits is provided on the DOJ website.

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