

Legal Briefings

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Effective Communication & the ADA¹

Introduction

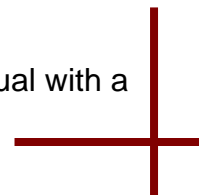
When Congress passed the Americans with Disabilities Act (ADA) in 1990, it recognized that individuals with disabilities “encounter various forms of discrimination” including “communication barriers,” and included a statutory obligation to remove many of these barriers.² For individuals with communication-related disabilities, including people who are deaf or hard of hearing, blind or have low vision, and/or have speech-related disabilities, the ADA’s requirement to provide effective communication has proven to be a crucial way to achieve equal access.

The ADA’s requirement to provide effective communication is broad, and applies in various ways to public entities and to places of public accommodation. This Legal Brief reviews the statutory and regulatory language about effective communication, and examines court cases and settlement agreements applying these principles.

General Requirements

Both Title II (state and local governmental entities) and Title III (places of public accommodation) require effective communication with people with disabilities. Title III has specific prohibitions and defines discrimination to include the “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.”³

Title II, on the other hand, is more general, providing that “no qualified individual with a



Effective Communication & the ADA

disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or *be subjected to discrimination by any such entity.*"⁴

When discussing effective communication, it is also important to remember that Section 504 of the Rehabilitation Act (Section 504 or Rehab Act) has additional protections for entities that receive federal funding. Like Title II, Section 504 has broad anti-discrimination protections without specifically identifying effective communication or auxiliary aids and services.⁵

When it comes to the ADA and Section 504's effective communication requirements, the real substance of the obligations come from the regulations. The U.S. Department of Justice (DOJ), the federal agency charged with enforcing Titles II and III of the ADA, has promulgated regulations providing additional clarification on the meaning of the effective communications requirements. In 2010, the DOJ amended these regulations, which became effective on March 15, 2011.

Regulations promulgated under Title II regarding effective communication state two requirements. First, they provide that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are *as effective* as communications with others."⁶ Second, they specify that public entities must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."⁷

The Title III regulations similarly require places of public accommodation "to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."⁸

Different administrative agencies have promulgated industry-specific regulations under Section 504. For example, regulations promulgated by the U.S. Department of Health and Human Services (HHS) require medical providers that receive federal funds to "establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care."⁹ In addition to this general regulation, hospitals with fifteen or more employees are required to "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."¹⁰ Similarly, the U.S. Department of Education's regulations provide that recipients of federal funding must "take such steps as are necessary to ensure that no [disabled] student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills."¹¹

Effective Communication & the ADA

What Are Auxiliary Aids & Services?

The statute itself defines “auxiliary aids and services” by listing four categories:¹²

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments
- acquisition or modification of equipment or devices
- other similar services and actions

The ADA’s regulations include additional examples of possible auxiliary aids and services. In addition to “qualified interpreters,” the regulations include a host of other possibilities, including “notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.”¹³ Of note, and as discussed in more detail below, the regulations also specify that qualified interpreters may be provided “on-site or through video remote interpreting (VRI) services.”¹⁴

In addition to “qualified readers, and taped texts,” the ADA regulations include a number of other examples of auxiliary aids and services to communicate effectively with individuals who are blind or who have low vision, including “audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; [and] accessible electronic and information technology.”¹⁵

Finally, the regulations continue to specify that auxiliary aids and services include the “acquisition or modification of equipment or devices” and “other similar services and actions.”¹⁶

By and large, the cases regarding effective communication do not spend time determining whether something is an auxiliary aid or service. Perhaps this is because of the long list of examples in the regulations, and the fact that the regulations specify that the list of examples is a non-exclusive list.

Effective Communication & the ADA

Deciding Which Auxiliary Aid/Service to Provide

One of the biggest questions in almost all cases involving effective communication comes down to whether a covered entity was required to provide a particular auxiliary aid or service. Similar to other aspects of the ADA, the ADA's effective communication requirements do not specify which auxiliary aid should be provided in every instance. And the answer to the question is usually the dreaded "it depends." Under the ADA, there is no one-size-fits-all solution when it comes to the provision of auxiliary aids and services. Instead, there must be an assessment of the nature, length, complexity, and context of the communication and the person's typical method of communication.¹⁷

The regulations, case law, and settlement agreements emphasize that covered entities should consult with the individual when deciding which auxiliary aid or service to provide. One reason for this is because the individual with the communication-related disability is the one most informed about her needs.

Notably, public entities arguably have a higher obligation to consult and defer to the individual making the request, as the Title II regulations state that the public entity must give "primary consideration to the requests of the individual with disabilities."¹⁸ This requirement has been applied in the case law as well. In *Chisolm v. McManimon*, a detention center asserted that it did not violate the ADA even though it failed to provide an inmate an ASL interpreter for certain complex communications because it employed alternative but equally effective auxiliary aids.¹⁹ The court rejected this argument, noting that the "most obvious problem" with this argument is that it conflicts with the "regulatory mandate that a public entity honor a disabled person's choice of auxiliary aid or service."²⁰

Moreover, DOJ settlement agreements with public entities regularly require the inclusion of the "primary consideration" language. In DOJ's settlement agreement with *Dekalb Regional Crisis Center*, the Center revised its effective communication policy and now conducts a communication assessment, which includes the relevant facts and circumstances, the individual's communication skills and knowledge, the nature and complexity of the communication at issue, and gives "primary consideration to the expressed preference for a particular auxiliary aid or service by an individual."²¹

Although Title III and the corresponding regulations do not explicitly include this "primary consideration" obligation, Title III entities must still "consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication."²² However, Title III regulations state that places of public accommodation are ultimately the final decision-makers about which auxiliary aid and service to offer "provided that the method chosen results in effective communication."²³

Effective Communication & the ADA

While a place of public accommodation can ultimately decide which auxiliary aid and service to provide, if it decides to provide a service requiring staff involvement (*i.e.*, reading to a customer), it must take affirmative steps to ensure that this alternate method of communication is effective. In ***Camarillo v. Carrols Corporation***, instead of providing a large print menu, a number of fast food restaurants owned and operated by the Carrols Corporation decided to require its employees to read the menu aloud to patrons who are blind or have low vision.²⁴ However, the plaintiff asserted that when she asked the employees to read the menu to her, the employees often responded with annoyance, impatience, or read only part of the menu to her. Though the district court dismissed the patron's ADA claim, finding that her allegations amounted to a complaint about poor or impolite service, on appeal, the Second Circuit agreed with the plaintiff. The Second Circuit concluded that the patron alleged more than "rudeness or insensitivity," but rather raised a reasonable inference that the restaurants "failed to adopt policies or procedures to effectively train their employees how to deal with disabled individuals" which can "constitute a violation of the ADA."²⁵ On remand, the court denied the restaurants' motion for summary judgment, except for on the patron's claim for monetary damages.²⁶ Acknowledging that having a server read the menu is likely sufficient to comply with the ADA, the court found that the plaintiff could still proceed with her claim because she presented evidence that the servers' reading was ineffective, as she was not informed about item prices, was not able to select from the entirety of the menu, and generally received impatient and reluctant service.²⁷

Moreover, though a place of public accommodation is the ultimate decision-maker about which auxiliary aid and service to provide, entities should proceed with caution when rejecting the request made by a person with a disability and be certain that effective communication is achieved. In ***Argenyi v. Creighton University***, a medical school student requested various auxiliary aids, including a cued speech interpreter for labs, computer assisted real-time transcription (CART) for lectures, and an FM system for small learning groups.²⁸ The University denied the student's request, and instead offered an FM system for all settings. The plaintiff attempted to use this FM system, but then explained that he was unable to follow lectures, and was experiencing headaches, stress and fatigue. The University responded by offering enhanced note-taking services only. During the student's second year of classes, the University offered to provide an interpreter, but the student found the interpreter ineffective to convey complex new vocabulary. The student ultimately borrowed over \$100,000 to provide his own accommodations, and brought an action against under Title III and Section 504. The Eighth Circuit found for the student, and held that the "evidence produced in this case created a genuine issue of material fact as to whether Creighton denied Argenyi an equal opportunity to gain the same benefit from medical school as his nondisabled peers by refusing to provide his requested accommodations."²⁹ On remand, a jury found in favor of the student as well.³⁰

Significantly, the Eighth Circuit credited the student's affidavit, and cited the DOJ's

Effective Communication & the ADA

technical assistance manual, which explained that it was “especially important to consider the complainant’s testimony carefully” because the individual with a disability is the one who is most familiar with his disability and therefore in the best position to determine the effectiveness of an particular aid or service.³¹

Meaningful Access Standard

Another lesson learned from the *Argenyi* case is that some courts apply a “meaningful access” standard when determining which auxiliary aids and services to provide. Here, the Eighth Circuit verified that like Section 504, Title III also requires covered entities to provide auxiliary aids and services to ensure participants enjoy “meaningful access” or “an equal opportunity to gain the same benefit as [plaintiff’s] nondisabled peers.”³² In so doing, the Eighth Circuit explicitly rejected the standard that “necessary” means that the plaintiff must show that he was “effectively excluded,” explaining that would be inconsistent with the Congressional purpose of the ADA and Rehabilitation Act.³³ Instead, the Eighth Circuit explained that auxiliary aids and services must afford people with disabilities equal opportunity to gain the same benefit as individuals without disabilities.

The meaningful access standard has been applied recently in Title II cases as well. In *California Council of the Blind v. County of Alameda*, voters who are blind brought a lawsuit asserting that the County failed to provide them with effective communication because it did not ensure that voting machines accessible to voters who are blind or have visual impairments could be activated and operated by poll workers.³⁴ The County argued that there was no ADA violation, because the poll workers provided assistance to voters with disabilities. Finding for the plaintiffs, the court emphasized that voters with disabilities had more than a right to cast a ballot; instead, they had a right to *meaningful access* to the polls, which meant that they had the right to vote privately and independently. See, e.g., *K.M. ex al Bright v. Tustin Unified School Dist.*, 725 F. 3d 1088, 1102 (9th Cir. 2013) (noting that the “meaningful access” standard incorporates ADA’s regulations regarding effective communication).

VRI versus In-Person Interpreters

When the DOJ amended the ADA regulations, it included, as an example of an auxiliary aid or service, a relatively new technology called Video Remote Interpreting (VRI). VRI technology connects an off-site interpreter through the use of a video conferencing system to facilitate communication. Guidance from the DOJ explains that covered entities can choose between VRI or an on-site interpreter “in situations where either would be effective.”³⁵ Like many technologies, VRI can be useful given its cost

Effective Communication & the ADA

advantages, to serve individuals in rural areas where interpreters may not be geographically available, and for emergency situations where an interpreter is not available on site. However, DOJ cautions that VRI is not appropriate in all circumstances, as there are situations where it will not lead to effective communication. Specifically, VRI will not lead to effective communication where the deaf individual cannot access the screen due to his own vision loss, or there may be other reasons the screen might not be able to be properly positioned, including an injury.

Moreover, if VRI is used, DOJ regulations provide for specific performance standards. As one example, the regulations specify the type of high-speed, wide-bandwidth video connection required in an effort to prevent low-quality video images. There is also a regulatory requirement that the covered entity provide adequate staff training to ensure quick set-up and operation of the machine.³⁶

Many individuals in the deaf community are concerned about the overreliance on VRI in situations where it is inappropriate.³⁷ There are also concerns about technological problems when interpretation services are needed, and lack of adequate training.

One example of the potentially problematic nature of VRI can be seen from the allegations in a recently filed lawsuit in Florida. In *Weiss et al v. Bethesda Health, Inc.*, a pregnant woman requested that the hospital provide her and her boyfriend with a sign language interpreter during her labor.³⁸ The Hospital rejected her request and, instead, offered VRI. Plaintiffs filed a motion for preliminary injunction, arguing that VRI would be ineffective during labor/delivery for many reasons, including the fact that she would likely be in various positions and blocked from a clear line of sight. She also argued that there had been technological problems with VRI in the past. The Magistrate Judge issued an opinion recommending that the order be denied, but before the District Judge issued an opinion, the plaintiff delivered her baby so the motion was denied as moot. Instead, the plaintiff amended her complaint to include allegations of the problems experienced with VRI during her labor and delivery, and hospital stay. This case is currently in discovery and set for trial in March 2016.

Other recent cases illustrate the type of technology problems individuals have faced when relying on VRI. In *Shaika v. Gnadon Huetten Memorial Hospital*, because the hospital's VRI did not work, hospital staff used written notes to communicate to the plaintiff that her daughter had passed away.³⁹ The court denied the defendant's motion to dismiss with respect to whether the hospital had acted with deliberate indifference to the plaintiff's rights. In *Zapko et al v. HCA – HealthONE, LLC*, plaintiff asserted that a medical center's use of VRI caused ineffective communication because of technological problems with the VRI, and because staff were inadequately trained on handling the technology.⁴⁰ This case settled in June 2015, as the medical center agreed to provide additional staff education, revise its policies, purchase additional equipment and improve related technology to make it easier for patients who are deaf

or hard of hearing to communicate with the medical professionals.⁴¹ The extent to which VRI can be used to provide effective communication is an issue that is sure to be a litigated further in the future.

Extension to Companions

It is well-settled that the ADA's effective communication obligations extend to *companions* with disabilities. Title II regulations provide that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, *and companions with disabilities* are as effective as communications with others, and Title III regulations state that "this includes an obligation to provide effective communication to *companions* who are individuals with disabilities."⁴³

Companions are defined as "a family member, friend, or associate of an individual" accessing either the public entity or place of public accommodation, "who, along with such individual, is an appropriate person with whom the [public entity or public accommodation] should communicate."⁴⁴

There has not been significant litigation disputing whether an individual qualifies as a companion, perhaps because of the broad definition of the term "companion." Instead, most cases involving companions simply accept that the individual is a companion, and then determine whether the communication provided was effective. See ***Liese v. Indian River County Hosp. Dist.***, 701 F.3d 334 (11th Cir. 2012) (finding that patient and her husband, both of whom are deaf and requested sign language interpreters, could move forward with their claims for ineffective communication under Section 504); ***Loeffler v. Staten Island University Hosp.***, 582 F.3d 268 (2nd Cir. 2009) (involving effective communication of patient and his wife, both of whom are deaf and required sign language interpreters for effective communication); and ***Perez v. Doctors Hosp. at Renaissance, Ltd.***, 2015 WL 5085775 (5th Cir. Aug. 28, 2015) (Parents, both of whom are deaf and required sign language interpreters for effective communication, were entitled to protection of Section 504 at hospital where their son was a patient.)

DOJ recently reached a settlement agreement with **Fairfax Nursing Center** after investigating whether the Nursing Center failed to provide auxiliary aids and services to a resident's companions.⁴⁵ Complainants are the daughter and granddaughter of an 83-year old resident, and both use ASL as their primary means of communication. They alleged that they requested ASL interpreters on multiple occasions, and their requests were denied resulting in ineffective communication. In its investigation, the DOJ concluded that the Nursing Center had an obligation to provide auxiliary aids and services to both Complainants, as they are "legally cognizable companions." In addition to the relationship, DOJ noted that the daughter was listed as the patient's emergency contact and next of kin and thus, should have had an interpreter for various communications, including communications with staff regarding care issues, treatment

Effective Communication & the ADA

options, and discharge planning. The DOJ also noted that the Nursing Center relied on an unqualified staff member who lacked the requisite skills to be an appropriate interpreter. In the settlement agreement, the Nursing Center agreed to provide appropriate auxiliary aids and services to both patients and their companions. These terms are certainly not unique; all DOJ settlement agreements regarding effective communication extend protections to companions with disabilities.⁴⁶

Companions Versus Association Discrimination

An interesting issue presented in the case law is whether a family member—especially a non-disabled family member forced to interpret for a patient with a disability—can bring a claim for discrimination under the ADA on the basis of association discrimination. To bring a claim for association discrimination, courts have explained that non-disabled parties must “provide an independent injury causally related to the denial of the federally required services to the disabled persons with whom the non-disabled plaintiffs are associated.”⁴⁷

A striking example comes from *Loeffler v. Staten Island University Hospital*, where the 13- and 17-year old children of a patient and his wife, both of whom were deaf, were forced to interpret during their father’s hospital stay. The Second Circuit held that these children suffered an injury independent of their parents that was causally related to the Hospital’s failure to provide auxiliary and services to their parents. The court noted that they suffered three injuries due to the Hospital’s failure—they were required to fill the gap left by the Hospital’s failure to honor its obligation under the statute, they were required to miss school because they had to be on-call to provide interpretation, and finally, they were “needlessly and involuntarily exposed to their father’s condition” placing them at risk of emotional trauma due to their young age.⁴⁸

Other courts have been more restrictive in their interpretation of association discrimination, however. In *McCullum v. Orlando Regional Healthcare System, Inc.*, a lawsuit was brought on behalf of a 14-year old patient who is deaf, his sister, who is also deaf, and his parents.⁴⁹ The district court dismissed the claims brought by the patient’s sister and parents, and the Eleventh Circuit affirmed this decision. With respect to the patient’s parents, the Eleventh Circuit concluded that “non-disabled persons are [not] denied benefits when a hospital relies on them to help interpret for a deaf patient,” even though patients with disabilities are entitled to appropriate accommodations.⁵⁰ The court did not analyze whether the patient’s deaf sister had an independent right to an interpreter as a companion. Further, the Eleventh Circuit distinguished the *Loeffler* case, stating that here, the family never requested an interpreter, and that the patient’s family members missed neither work nor school.

Effective Communication & the ADA

Notably, the incident giving rise to the *McCullum* case occurred in 2009 and, arguably, the case might have turned out differently after the revised regulations became effective. DOJ's revised regulations, which became effective in 2011, more clearly restrict covered entities from relying on a deaf individual's associates to interpret in his behalf. The regulations prohibit covered entities from relying on an adult to interpret or facilitate communication except in an "emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available" or where the individual "specifically requests that the accompanying adult" provide the interpretation, the accompanying adult agrees, and the reliance is appropriate.⁵¹

There are even greater protections in the regulations for children. Minor children cannot be relied on to interpret or facilitate communication unless one very specific exception is met: there must be an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.⁵²

Effective Communication & Healthcare

As may be expected, a significant number of cases involving effective communication come from the healthcare context. DOJ has provided guidance about specific circumstances when a sign language interpreter is likely to be the only effective auxiliary aid and service. In the Appendix to the Title III regulations, the DOJ highlights that there are certain medical communications that do not involve substantial conversation, like routine lab tests or regular allergy shots, where the conversation is minimal and an exchange of notes will likely lead to effective communication.⁵³ The DOJ then emphasizes that interpreters should be used during more complex communications regarding medical history, diagnoses, procedures, treatment decisions, and communications for at-home care.

Many courts faced with this question agree that when an individual who is deaf and uses ASL communicates about a complicated medical procedure, especially a surgery, the exchange of written note is an inadequate way to achieve effective communication. In *Liese v. Indian River County Hospital District*, a deaf patient communicated with a hospital about a procedure to remove the patient's gallbladder through emergency laparoscopic surgery.⁵⁴ Instead of providing an ASL interpreter, the hospital's staff communicated with the patient by mouthing words, writing notes, and pantomiming. Under these conditions, the court found sufficient evidence that the limited auxiliary aids provided were ineffective. The Eleventh Circuit explained that "under circumstances in which a patient must decide whether to undergo immediate surgery involving the removal of an organ under a general anesthetic, understanding the necessity, risks, and procedures surrounding the surgery is paramount."⁵⁵ The court continued by stating that "[u]nder these circumstances, auxiliary aids limited to written

Effective Communication & the ADA

notes, body gestures, and lipreading may be ineffective in ensuring that a hearing-impaired patient receives equal opportunity to benefit from the treatment.”⁵⁶ See also *Freydel v. New York Hospital*, 242 F.3d 365 (2nd Cir. 2000) (commenting that a patient who communicated in Russian Sign Language should have been provided with an interpreter for her hospital stay following a heart attack).

On the other hand, when the communications are not complex, even if it involves medical information, some courts have held that interpreters are not necessarily required if the patient is able to read and write. In a recent case, *Martin v. Halifax Healthcare Sys., Inc.*, the Eleventh Circuit affirmed summary judgment finding that the hospital did not violate the ADA by failing to provide an in-person interpreter to three different plaintiffs.⁵⁷ One of the plaintiffs had a brief emergency room visit for a “bump on the head” so an interpreter was not necessary because the plaintiff received typed instructions, which the patient, who is able to read and write English, indicated he understood. (Note that ASL and English are not the same, so some deaf people may be fluent in ASL, but unable to read English, making passing notes ineffective even for communications that are not complex.)

The DOJ has made effective communication in the healthcare setting a priority, and through its Barrier-Free Healthcare initiative, has entered into settlement agreements with a large number of healthcare providers.⁵⁸ In these agreements, providers typically agree to revise their policies to ensure the provision of the appropriate auxiliary aids and services, including sign language interpreters, and materials in alternate formats. Most agreements require the healthcare providers to perform a communication assessment, requiring consulting with the patient and documenting the decision in the patient’s chart. These agreements generally have training requirements as well. See, e.g., Settlement Agreements Between the United States of America and *Srinivas Mukkamala, M.D.*,⁵⁹ *Swedish Edmonds Hospital*,⁶⁰ and *Arshad Pervez, M.D.*⁶¹

Private attorneys have also been involved in negotiating agreements regarding effective communication in the healthcare field. In August 2015, private attorneys reached an agreement with *MinuteClinic*, the walk-in medical clinic of CVS Health.⁶² Under the terms of the settlement, MinuteClinic will, at the request of the patient, take additional steps to ensure that individuals with visual impairments receive treatment and other important information in accessible formats. They will also arrange for live sign language interpreters at the request of individuals who are deaf.

Another important recent agreement in the world of healthcare and effective communication focuses on “talking” prescription containers. As a result of structured negotiations between *CVS/pharmacy*, the American Foundation for the Blind, American Council of the Blind and California Counsel of the Blind, CVS/pharmacy now provides ScripTalk talking prescription labels for prescriptions ordered for home delivery through its online pharmacy.⁶³ These talking prescription containers ensure

Effective Communication & the ADA

that CVS.com customers who are blind or visually impaired receive effective communication. This agreement is a great demonstration of the various types of auxiliary aids and services that can lead to effective communication, especially with the advance of new technologies.

Effective Communication & Emergency Preparedness

There have been significant recent legal developments regarding the responsibilities of public entities to include preparations regarding people with disabilities, including communication access, when developing and implementing their emergency preparedness procedures.

These recent cases and related settlement agreements have come out of New York City and Los Angeles. Following the 9/11, Hurricane Irene, and Hurricane Sandy disasters, a class of 900,000 New York residents with vision, hearing, mobility, and mental disabilities filed suit against the city, in *Brooklyn Center for Independence of the Disabled (BCID), et al. v. Mayor Bloomberg, et al.*, alleging that New York City discriminated against people with disabilities by failing to provide for their needs in emergency preparedness plans.⁶⁴ The court held that the city has discriminated against people with disabilities by failing to provide for their needs in plans for coping with disasters like Hurricane Sandy. The court was certainly swayed by the DOJ, which filed a statement of interest in support of BCID, stating that the evidence provided by BCID established that New York City's emergency plans excluded individuals with disabilities.⁶⁵ The DOJ also stated that federal regulations require the city's communications with individuals with disabilities to be as effective as communications with others, which requires providing auxiliary aids and services, accessible emergency telephone services, and appropriate signage to ensure that those interested can obtain information as to the existence and location of accessible services. In fact, the DOJ's statement contained an entire subsection addressing the City's inability to meet DOJ regulations that emergency plans must provide for effective communications with individuals with disabilities. In that section, the DOJ alleged serious deficiencies in the City's provision of accessible communications and auxiliary aids and services at shelters. There were no provisions in the City's emergency plans requiring that televised warnings and alerts contain audio and captioning components. Ultimately, the court held that the exclusion of the benefits provided by city services and the lack of communication access violates the ADA. The court echoed the DOJ's disappointment at the lack of effective communication in the emergency preparedness plan, and expressed the need for communication access and auxiliary aids and services to be implemented at all stages of disaster preparedness, from televised statements using ASL interpreters in times of disasters to effective communication at emergency shelters.

Effective Communication & the ADA

Following that ruling, the parties entered into a settlement agreement aimed at enacting an adequate emergency plan that accounts for the needs of people with disabilities.⁶⁶ In order to facilitate effective communication at evacuation centers, the settlement requires the City to purchase electronic communication boards. The City also must create an incident management team that will canvass neighborhoods to provide aid to people with disabilities in an emergency. The team will be trained in disability literacy, communications, and accommodations. All city-generated materials at resource centers must be in Braille, large print, and audio tape formats. A procedure for requesting sign language interpreters and certified deaf interpreters via laptop or Skype in emergency situations must be formalized. These measures, to quote the Judge in his final Order in the case, make up a settlement that is “nothing short of remarkable, and that will make New York City a safer place to live for people with disabilities and serve as a model for municipalities nationwide.”⁶⁷

Another recent case regarding emergency preparedness issues comes out of Los Angeles, another city with a long history of natural disasters, where an emergency preparedness program was severely lacking in support for and consideration of people with disabilities. In ***Communities Actively Living Indep. & Free v. City of Los Angeles***, suit was brought to improve the city’s emergency preparedness program in light of its exclusion of any plans for the residents with disabilities.⁶⁸ In 2011, the court ruled in favor of CALIF, holding that Los Angeles violated the ADA by failing to provide emergency services to residents with disabilities. The court found that the city had “not assessed whether [it has] the capacity to respond to the needs of people with disabilities during a disaster or emergency.”⁶⁹ Following that ruling, a settlement was reached, ensuring that the nearly 1.3 million residents of Los Angeles County will be included in the emergency planning procedures of both Los Angeles City and County.⁷⁰ According to the settlement, city and county employees will work with experts, including one expert appointed by the court, to enact a plan that addresses the needs of disabled residents. The settlement also mandated that disability organizations be involved in the creation and implementation of the new emergency preparedness policy.

The settlement plan also addressed communication access, auxiliary aids, and effective communication directly. Under the settlement, the Emergency Survival Program (an awareness campaign that emphasizes personal preparedness and planning strategies for emergencies) must be made available in Braille and in audio format. Emergency hotline operators must be trained to handle TTY and Relay calls. The LA County Emergency Mass Notification System must also be TTY/TTD compatible, and users can register with the system to receive alerts through phone, text, or email messages. All alerts must include a follow-up hotline number and the option to have the message repeated. The settlement also establishes a 711 Relay Service, where specially trained operators can relay telephone conversations between people who are deaf, hard of hearing, or speech-disabled. All door-to-door notifiers

Effective Communication & the ADA

must be familiar with special push button units, trained in communicating with individuals who are deaf, deaf/blind, have speech disabilities, cognitive disabilities, or mental health disabilities, and are trained with procedures to notify deaf/blind individuals of evacuation (drawing an “X” on the individual’s back). Notifiers are also provided with non-text signs, pictograms, and sketchpads. Los Angeles will also provide special-needs weather radios that activate strobe lights and/or shake a pillow or bed to alert those who are deaf or hard of hearing of an emergency. The radio can also be adapted to send messages in large print or Braille for persons who are visually impaired or blind. All evacuation points and care areas must provide real time captioning and alternative means of communication (such as large print signs or signs in Braille). All shelters must provide auxiliary aids and services to individuals with communication needs, including interpreters, captioning services, TTY/video phone access, communication card, facilitated communication assistance, or other services.

Effective Communication & Education

Public schools are public entities subject to Title II of the ADA and Section 504. One of the most recent and important cases about effective communication in education comes from the Ninth Circuit, and serves to inform students and school districts about the interplay between effective communication under the ADA/Section 504, and the school’s obligations to provide a free and appropriate public education under the Individuals with Disabilities Education Act (IDEA). In *K.M. ex al Bright v. Tustin Unified School District*, the Ninth Circuit concluded that in some (but not all) situations, schools may be required under the ADA to provide services to deaf and hard of hearing students that are different than the services required by the IDEA.⁷¹

As background, the *K.M.* case consolidated cases of two hard-of-hearing students who requested CART services, K.M. and D.H. The students’ requests were denied, as the school instead provided alternate accommodations through the students’ individualized education plan (IEP). The district court ruled in favor of the school district, finding that because the school met its IDEA requirements, there was no need for a separate inquiry under the ADA because the laws were so similar. On appeal, the Ninth Circuit held that while the ADA/Section 504 and IDEA are similar, compliance with an IDEA IEP may—but may not—satisfy the requirements under the ADA/Section 504. While the IDEA must consider “the child’s language and communication needs”, “opportunities for direct communications with peers and professional personnel in the child’s language and communication mode,”⁷² and whether the child needs assistive technology devices and services,” the ADA requires public schools, as a part of its effective communication regulation, to communicate with disabled students “as effectively” as with other students and “to provide disabled students the auxiliary aids necessary to afford an equal opportunity to participate in” school programming.⁷³

Effective Communication & the ADA

However, the IDEA does not require schools to provide “equal” opportunities to all students. For this reason, the Court of Appeals ruled that the district court erred when they held that a failure of an IDEA claim also constituted a failure of a Title II claim. Thus, the Ninth Circuit remanded the case to the district court to determine whether the school’s failure to provide CART services constituted an ADA violation. On remand in one of the cases, the court ordered the school to provide CART services.⁷⁴

Following this case, the DOJ and the U.S. Department of Education released a document entitled “Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools” providing further explanation and clarification regarding the provision of effective communication.⁷⁵

Another recent trend in the case law and in settlement agreements has to do with accessible information technology, course materials, accessible distance learning at colleges and universities. More and more educational entities are providing educational information through electronic means, which can be a great benefit to students, but requires consideration of ensuring effective communication to students with disabilities. From a legal standpoint, it is largely undisputed that accessible electronic and information technology is an auxiliary aid and service.

Recent agreements regarding accessible course materials have been reached through various different means, including private litigation, agreements with the U.S. Department of Education, and with DOJ. These agreements generally require the university to ensure that all materials and courses provided via a website or online program (such as Blackboard) be formatted in such a way that they are compatible with screen-reading software.

To highlight a couple of recent cases and/or settlement agreements, in *The National Federation of the Blind et al v. Atlantic Cape Community College*, plaintiffs asserted that the College was violating the ADA by failing to provide educational materials in an accessible manner.⁷⁶ The parties entered into a consent decree, pursuant to which the College will develop a plan to make all student-facing electronic and information technology accessible to students with disabilities within three years. The decree further requires the college to develop and implement a plan to provide accessible instructional materials, course materials, and tactile graphics to students who are blind at the same time that the materials are made available to students without disabilities.

Federal agencies, such as the Office of Civil Rights (OCR) for the U.S. Department of Education and the DOJ have both been involved in ensuring effective communication to educational materials. Recently, OCR entered into a resolution agreement with the *University of Cincinnati*.⁷⁷ As a result, it required the University to create and

Effective Communication & the ADA

implement a policy to ensure that all information communicated through the University's website, online learning environments, and course management systems – all referred to as electronic and information technologies – are accessible to people with disabilities, especially those who use assistive technology to access this information. See also **Settlement Agreement Between the United States of America and EdX, Inc.** (requiring EdX, an entity which contracts with over 60 institutions of higher learning to provide massive open online courses, and operates a website, mobile application, and a Platform, to make modifications to increase the accessibility of its courses).⁷⁸

Effective Communication & Judicial/Criminal Justice

Ensuring effective communication during police encounters and arrests has been an extremely important issue for people with disabilities. The majority of cases addressing effective communication during police encounters have to do with whether police departments must provide ASL interpreters during arrests and interrogations. In one case, **Bahl v. County of Ramsey**, a deaf arrestee whose first language was ASL sued the city arguing that he received ineffective communication at various points of his arrest after a traffic stop. With respect to the traffic stop, the Eighth Circuit declined to consider whether it was a covered service, but found that assuming it is, the officer's decision to communicate through simple communications and gestures (as opposed to in writing, as requested by the plaintiff) was reasonable under the circumstances where the situation "quickly escalated" and was "no longer controlled."⁷⁹ The Eighth Circuit said it would not second-guess judgments of police officers presented with exigent or unexpected circumstances. However, with respect to the plaintiff's post-arrest interview, the Eighth Circuit concluded there was a question of fact about whether the police officer started to engage in a post-arrest interview, and then stopped the interview so that the city did not have to provide an interpreter. Explaining that the post-arrest interview would have given the defendant certain benefits, such as the right to ask questions and give his side of the story, which could have affected the prosecutor's decision to charge him with an offense, the court held that the city bears the burden of showing that providing an interpreter would have resulted in undue financial burden, and thus, reversed the decision to grant summary judgment regarding the communication provided during the post-arrest interview.

Similarly, in **Taylor v. City of Mason**, a deaf man called the police after having a physical altercation with a partially deaf woman at his home.⁸⁰ The police came to the man's house and used the woman—who also alleged that he had sexually assaulted her—as an interpreter, while waiting for the qualified interpreter to arrive. The Court explained that the situation was under control, so the police could have waited for the interpreter to arrive on the scene. It further explained that the woman was not an appropriate person to use because he did not consent to her as an interpreter, and she

Effective Communication & the ADA

was not an appropriate interpreter, given the circumstances. Further, at the police station, the city provided the defendant with an interpreter who was not ASL certified and refused to replace the interpreter upon the man's request. For those reasons, the court denied the city's motion to dismiss, holding that the burden is on law enforcement to ensure that communications with a deaf individual are as effective as communications with hearing individuals when a law enforcement agency does not defer to the deaf individual's requests.

Compare those cases to *Hoffman v. Marion County Texas*, where, after only a cursory analysis, the Fifth Circuit held that the County did not violate the ADA by failing to provide a hard of hearing arrestee with an interpreter because the plaintiff could effectively communicate with the officers, even initiating the conversations so he was not "excluded as a result of not having an interpreter during the investigation or arrest."⁸¹

In just the last few months, the Department of Justice has reached at least three different settlement agreements with police departments regarding effective communication.⁸² Under the terms of these agreements, various police departments agreed to provide auxiliary aids and services, including sign language interpreters, to citizens who are deaf and hard of hearing. To facilitate this communication, the departments created new policies, trained their employees about the policies, and at times, entered into contracts with qualified sign language interpreting agencies.

An older settlement agreement with the *Rochester Police Department* provides helpful detailed guidance, and requires sign language interpreters to be provided as needed during arrests, investigations, or during interrogations, regardless of where they are conducted.⁸³ Additionally, where timeliness is an issue or the police officer is out in the field without immediate access to an interpreter, procedures and guidelines for getting an interpreter must be established. These procedures differ based on the seriousness of the offense being investigated. Only when a criminal investigation involves a serious offense and time is of the essence may an investigator continue an interview with a deaf or hearing impaired individual, and in that case, the investigator must document the investigation as completely as possible and notify designated police personnel. In less serious offenses, the investigator must end the interview until an interpreter is present.

Communication access is also critically important in the prison setting. In *Clarkson v. Coughlin*, the court granted summary judgment to the plaintiffs, deaf and hard of hearing inmates, finding that the defendant violated Section 504 and the ADA by failing to provide interpretive services during reception and classification, through the absence or inadequacy of assistive communication devices for telephone and television, by their failure to provide visual safety alarms and their failure to make reasonable accommodations to participate fully in education, vocational and

Effective Communication & the ADA

rehabilitative contexts.⁸⁴

State correctional centers have seen improved communication access as a result of settlement agreements by private litigants. Two cases from Maryland and Kentucky recently resulted in settlements that aim to remedy some of the barriers to effective communication in the prison system.⁸⁵ Under these settlements, deaf and hard of hearing inmates will have access to videophones to communicate with people outside of prison, adequate visual notification of oral announcements concerning emergencies, access to sign language interpreters and other auxiliary aids and services, and a broad scheme of policy implementation, training, outreach, and monitoring to ensure equal treatment of deaf and hard of hearing individuals by prison officials.

A recent case considered who is a qualified individual entitled to effective communication in an open court proceeding. In *Prakel v. Indiana*, the court considered whether the son of a criminal defendant was entitled to an ASL interpreter to attend his mother's court proceeding.⁸⁶ After noting that Title II applied to members of the public and that there is a clear history of the public's right to attend criminal proceedings, the court concluded that this right is included within Title II's protections. It was undisputed that the plaintiff required an ASL interpreter to communicate effectively and that one was not provided. As a result, the court concluded that the plaintiff was denied effective communication and the opportunity to enjoy the benefits of the state courts' services, programs, and activities.⁸⁷ See also *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (County failed to provide videotext display, which, if County had done any investigation, would have been able to be provided through court reporting service).

Effective Communication & Entertainment

Because of the ADA, there have been significant advancements in the provision of communication access to entertainment venues, such as movie theaters, sporting venues, and museums. While there are a number of important issues when it comes to effective communication in the entertainment world, we are focusing on issues related to audio descriptions and captioning.

In 2014, the DOJ published a Notice of Proposed Rulemaking (NPRM) regarding the provision of audio descriptions and closed captioning at movie theaters.⁸⁸ It did so because despite the ADA's requirement to provide effective communication, theaters have been inconsistent in terms of the access provided. Further, due to changes in technology, providing these auxiliary aids and services is now easier and less costly. It is expected that as a result of the NPRM, there will soon be greater consistency with these issues.

In its NPRM, the DOJ proposes rules requiring theaters that show a movie that is

available with captions and audio description to show the movie with these accessibility features, unless doing so would be an undue hardship or a fundamental alteration.⁸⁹ If a particular movie is not produced with captions or audio description, then the NPRM does not require the theater to add them before showing the movie. To provide captions and audio description, the NPRM requires theaters to obtain and install equipment to transmit captions and descriptions. For closed captions, the rule would require theaters to have a specific number of individual captioning devices to deliver the movie captions to patrons at their seats. This number is based on the number of seats in the theater. For audio descriptions, the rule requires movie theaters to have at least one listening device per screen, but no less than two devices total.

Further, the NPRM clarifies that while open captioning is not required, movie theaters are permitted to use open captions instead of providing closed captioning devices.⁹⁰ Case law on this issue has also concluded that open-captioning in movie theaters is not required per the terms of the ADA, though closed captioning and audio descriptions are required subject to the undue burden/fundamental alteration exceptions. An important case on this issue is ***Arizona v. Harkins Amusement Enterprises, Inc.***⁹¹ In this case, plaintiffs filed a complaint with the Arizona Attorney General's Civil Rights Division, which initiated litigation against Harkins for failing to provide open and closed captioning and audio description. The Ninth Circuit held that Harkins was not required to provide open captioning as a matter of law. It grounded this decision in DOJ's commentary to the effective communication regulations, which stated that movie theaters are not required to provide open captioning films.

However, the court in ***Arizona v. Harkins Amusement Enterprises, Inc.*** found that Harkins will be required to provide both closed captioning and audio descriptions, as both do "clearly" constitute auxiliary aids and services, unless it can avail itself of the ADA's defenses.⁹² Following this opinion, an agreement was reached requiring Harkin's theaters to provide closed captioning and audio descriptions in 50% of the total number of auditoriums in movie theaters in Arizona.⁹³

Other states have also become involved in ensuring equal access to movie theaters for customers with communication disabilities. In 2012, in response to a complaint filed by Equip for Equality, the Illinois Attorney General's office reached an agreement with AMC movie theaters where AMC agreed to provide personal captioning services and audio-description technology for movie-goers at all of its theaters and each of its 460 movie screens.⁹⁴ See also ***Settlement Agreement Between California Council of the Blind, Patrons with Visual Impairments, and Cinemark*** (agreeing to install audio description systems on a rolling basis across its circuit in conjunction with the chain's conversion to an all-digital format).⁹⁵

Similarly, there have been recent cases regarding communication access at sporting venues, and those cases typically seek communication access in the form of open

Effective Communication & the ADA

captioning. In one recent case, the court focused on the scope of the auditory communications that must be captioned. In ***Feldman v. Pro Football Inc.***, the court considered what information broadcast at a football game needed to be captioned in the context of a professional football game at a large stadium (FedEx Field).⁹⁶ Defendants argued that the ADA does not sweep so broadly as to include the aural information of “music with lyrics, play information, advertisements, referee calls, safety/emergency information, and other announcements.”⁹⁷ The court disagreed, and held that effective communication requires the provision of effective auxiliary aids to convey all information requested by the deaf and hard of hearing plaintiffs, including game-related information, such as play information and referee calls, emergency and public address announcements, and words to music and other entertainment. To come to that conclusion, the court considered the goods and services offered by the defendants, and concluded that defendants provide more than a football game—they offer an entertainment experience where aural and visual components play “an important role in generating support for the game and promoting spectator attendance.”⁹⁸ Thus, to have full and equal enjoyment of defendants’ goods, services, privileges and facilities, deaf and hard of hearing participants need access to the lyrics to music broadcast over the stadium’s public address system. See also ***Innes v. The Board of Regents of the University System of Maryland***, 2015 WL 1210484 (D. Md. March 16, 2015) (asserting that all aural information should be captioned through Jumbotrons, and LED ribbon boards, and that handheld devices were insufficient to provide effective communication).⁹⁹

DOJ has been actively working with museums in the D.C. area to ensure communication access. For example, the ***National Museum of Crime and Punishment*** has agreed to provide audio description, audio described museum tours that include tactile experiences, Braille, large print, provide script of exhibit information for deaf and hard of hearing individuals, and ensure that its website is accessible.¹⁰⁰ Likewise, the ***Spy Museum*** now has tactile tours, an audio describer for any museum presentations, captions on their audio elements, and also offers ASL interpreters, oral interpreters, and captioning for public programs.¹⁰¹

Defense: Undue Burden & Fundamental Alteration

Two exceptions exist to the effective communication requirement. Covered entities do need to provide auxiliary aids or services if doing so would either “fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered” or “would result in an undue burden, i.e., significant difficulty or expense.”¹⁰²

Further, if providing one particular auxiliary aid or service would result in a fundamental alteration or undue burden, the covered entity must provide an alternative, if one

Effective Communication & the ADA

exists, so that effective communication is achieved to the maximum extent possible.¹⁰³

Public entities with obligations under Title II have additional requirements before they can rely on the fundamental alteration or undue burden defenses. According to Title II regulations, the “decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.”¹⁰⁴ For instance, in **Chisolm v. McManimon**, the county detention center argued that providing the plaintiff with an ASL interpreter and a TTY would cause either an undue burden or fundamental alteration.¹⁰⁵ Citing the Title II regulations noted above, the court found that MCDC could not demonstrate that they had issued written statements explaining why they denied Chisolm’s requests and therefore rejected this defense.

In general, defendants have a difficult time establishing undue hardship and fundamental alteration in the effective communication context. In **Jordan v. Greater Dayton Premier Management**, a housing authority¹⁰⁶ argued that providing audio tapes of all written correspondence would amount to an undue burden in light of the agency’s recent budget cuts.¹⁰⁷ The agency argued that the responsibility of creating the audio cassettes would fall on housing specialists who are already overworked, that there are as many as 37 different forms each year, and that it would take over a hundred hours to read all of the documents. Put into numbers, the agency argued that it would cost approximately \$1,600 to accommodate the requests, and that this is almost four times the allocation by the federal government for each family’s yearly administrative fees. The court rejected this argument. It first questioned the evidentiary support for these numbers and also explained that accommodations will sometimes result in some administrative and financial burden, but that even with budget cuts, it was unlikely that the burden here is an undue burden. The court also noted that the cost of accommodating a disability does not become an undue burden simply because it exceeds the annual administrative fee. Notably, the housing authority also argued that an audio tape was a device of a personal nature, and thus not required by the ADA. The court rejected this argument, holding that to find otherwise would “render meaningless much of the law concerning effective communications with people with disabilities.”¹⁰⁸

Defendants sometimes use a slippery-slope argument when asserting undue burden, concerned about the potential for having to provide additional auxiliary aids or services in the future. It is important for defendants to remember to analyze the case at hand. In the **Prakel v. Indiana** case discussed above, the defendants argued that they were not obligated to provide an ASL interpreter to the plaintiff because providing interpreters for spectators would unduly burden the court system by straining already limited financial resources.¹⁰⁹ The court rejected this argument, and explained that the

Effective Communication & the ADA

question at issue in this lawsuit was whether interpreting services needed to be provided to this plaintiff on a limited number of occasions, “not whether the statute requires state courts to provide interpreters for the entire deaf population throughout the Indiana court system.” With respect to whether providing interpreting services would be an undue burden to this one plaintiff, the court found that it would not.

A helpful overview of both the undue burden defense and the fundamental alteration defense comes from the case *Innes v. Board of Regents of the University System of Maryland*.¹¹⁰ In that case, the University of Maryland refused to provide captioning services for its football games. The plaintiffs, who were deaf or hard of hearing fans of the University’s sports programming, requested “line of sight captioning” to be displayed on the ribbon boards at the University’s stadium during games. At the time the suit was filed, the University did not have ribbon boards, and was working with an antiquated video system and control room. Because of the age and state of their facilities, the defendants responded by arguing that providing captioning on ribbon boards would be both an undue burden and a fundamental alteration.

With regard to line of sight captioning, the University argued that captioning would “fundamentally alter the University’s athletic department equipment and operations in ways that are exceptionally burdensome, complex[,] and costly.” However, the court held that this argument misconstrued the law. The proper inquiry asks whether the proposed action would fundamentally alter *the service, program, or activity*, not the public entity itself. Here, because the University did not address whether the service itself—that is, the provision of information and programming during football games—would be fundamentally altered, their argument failed. As a result, the court held that providing captioning would not change how the football games are conducted; captioning would merely “provide access to the audio component” of the game.

While the University failed to establish that captioning would fundamentally alter its service and programming, it was able to establish the possibility of undue burden. In a letter to the plaintiffs, the University listed a number of concerns—primarily financial and technological—that would make installing captioning services burdensome to the organization. The plaintiffs responded by providing information that the University’s budget as a whole may be increasing after being added to the Big Ten sports network. However, the court held that this fact does not establish that replacing the University’s video equipment to install ribbon boards would not constitute an undue burden, leaving fact issues to be addressed at trial. Accordingly, summary judgment was denied to both parties on this issue. *See also Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994)* (finding the Florida Department of Health failed to establish that it would be a fundamental alteration to provide mental health counselors fluent in sign language and found there was no difference in the services provided by counselors fluent in English and counselors fluent in ASL, so there was no fundamental alteration).

Effective Communication & the ADA

Remedies: Monetary Damages

Monetary damages are not recoverable from Title III entities who fail to provide effective communication. Compensatory damages are recoverable under Title II and the Rehabilitation Act if the plaintiff demonstrates that the covered entity engaged in intentional discrimination. Punitive damages are not available under Title II nor the Rehab Act.

Courts have analyzed how best to define discriminatory intent in various cases regarding effective communication. When deciding whether to award compensatory damages for intentional discrimination, the majority of courts require a showing of “deliberate indifference.”¹¹¹ This standard does not require “personal animosity or ill will”; instead, “intentional discrimination may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the challenged policy or custom.”¹¹²

Plaintiffs are more likely to establish intentional discrimination when they clearly request an auxiliary aid or service, when the covered entity clearly disregards the request, and when the plaintiffs advise that they cannot understand the communication. In *Loeffler v. Staten Island University Hospital*, the Second Circuit reversed the lower court’s decision, and concluded that a reasonable jury could find the Hospital acted with deliberate indifference.¹¹³ In this case, the patient and his family member had requested an ASL interpreter on numerous occasions, including in the days/weeks before the patient’s surgery, and on multiple occasions after the surgery. There was also evidence that the doctor “laughed off” one of these requests, even though the hospital had a policy in place. As a result, the patient’s children were forced to interpret and had to miss school to do so.

Similarly, in *Liese v. Indian River County Hospital District*, the Eleventh Circuit concluded that a reasonable jury could find that the doctor acted with deliberate indifference to the Lieses’ communication needs.¹¹⁴ The Court found that because the doctor knew that the hospital had failed to provide the plaintiffs with the appropriate aid necessary (interpreting services), and that he had the authority and ability to right this wrong but chose not to, that there was intentional discrimination. Evidence comes from the fact that the plaintiff testified that she told the doctor that her ability to read lips was “limited” and that the doctor “laughed at” her and made exaggerated facial movements. It is further supported by the plaintiffs’ request for an interpreter on two separate occasions, which he allegedly ignored. Further, when the patient asked why her gallbladder was being removed when she was having chest pains, the doctor simply wrote “remove it and you’ll feel better” and on the day following the surgery, she again asked for an interpreter, and again asked why she needed the surgery. Finally, the

Effective Communication & the ADA

court found this failure could be imputed on the hospital, because the hospital's policy gave doctors authority and complete discretion to make the decision about whether to contact an interpreter.

Compare that case to the situation in ***McCullum v. Orlando Regional Healthcare System, Inc.***, where neither the patient nor his family requested a sign language interpreter, or advised the hospital that the communication provided was inadequate.¹¹⁵ In *McCullum*, the hospital staff communicated with D.F., a 14-year old deaf patient through written notes, printed handouts, and at times, through his mother's limited sign language skills.¹¹⁶ D.F. would have had to show that the defendants knew there would be a substantial likelihood that they could not communicate effectively with him without an interpreter and still made the deliberate choice not to provide him with one. In this case, the Court held that the plaintiff did not prove this. As a result, the court held that there was not a substantial likelihood that the hospital knew that the communication was ineffective and, that if it was, that the hospital knew of that fact and acted with deliberate indifference. As additional evidence, the court pointed to the fact that the hospital had signs stating that interpretation services were available for individuals with difficulty communicating, but no one asked for those services.

Likewise, in ***Rylee v. Chapman***, before he was arrested, the plaintiff's wife told the police that Rylee was deaf, but was able to read lips, read, and write. He was arrested in his home, booked in jail, and spent one night in jail.¹¹⁷ Throughout the communications, Rylee presented no evidence that the police officers knew or believed that Rylee could not read lips or that he requested an interpreter. He did ask a police officer to write questions, and the officer agreed to do so. Further, when asked if he could read lips, he said yes and offered that he could also read and write. All of the police procedure was by the book. As a result, the court granted the county's motion for summary judgment, and the Eleventh Circuit affirmed the decision.

Remedies: Injunctive Relief

When analyzing a plaintiff's request for only injunctive (non-monetary) relief, courts consider whether there is evidence that a plaintiff is likely to return in the future such that the plaintiff has standing to seek this type of relief. For instance, in ***Freydel v. New York Hospital***, the plaintiff argued that she had standing because she was likely to return to the hospital because she had a number of chronic health conditions, that the Defendant hospital is part of her medical network so it is likely that she will return there for care, and finally that the Defendant had not sufficiently improved its training and policy so the plaintiff may be denied those services again.¹¹⁸ The Court rejected this argument for standing on the basis that the possibility of returning to the Defendant hospital was speculation and therefore insufficient to satisfy that requirement of standing. It highlighted the fact that the patient's doctor was no longer associated with

the hospital, and that many other hospitals were closer to the patient's home than the Defendant hospital. See also **Davis v. Flexman**, 109 F.Supp.2d 776, 790 (S.D. Ohio 1999) (finding no standing for injunctive relief where there was no evidence that the plaintiff would return); **Ervine v. Desert View Regional Medical Center Holdings, LLC**, 753 F.3d 862 (9th Cir. 2014) (finding the plaintiff's complaint is "jurisdictionally defective" where a deaf husband of a deceased deaf wife lacked standing to challenge the medical providers' failure to provide his wife with an interpreter because he has not shown a real and immediate threat that he will be denied effective communication either as a patient in his own right or as a companion to another patient in light of his wife's death, the fact that he has never been a patient of the medical provider, and because he has no imminent plans to return).

However, some plaintiffs have been successful in arguing they have standing when only seeking injunctive relief. For instance, in **Perez v. Doctors Hosp. at Renaissance, Ltd.**, the parents of a hospitalized child with a brain tumor both used ASL.¹¹⁹ They were at times refused an interpreter, then the child went into remission, then after a recurrence of the cancer they were offered VRI, but it often did not work, or the staff did not about it or did not know how to operate it. The District Court granted summary judgment in favor of the hospital, but the 5th Circuit reversed. The main issue were standing under Title III, and intentional discrimination sufficient to support damages under § 504.

As to standing, the hospital basically argued that during recent visits, it had provided effective communication. The appeals court found sufficient evidence to the contrary, saying: "We conclude that the district court erred in holding there was no genuine dispute of material fact as to whether the plaintiffs faced a real and immediate threat of future harm. Mr. Perez's affidavit is evidence that the plaintiffs have experienced recent problems with DHR's provision of auxiliary services. Furthermore, the evidence of DHR's failure to revise its ADA compliance policy, which it admits needs revision, and its lack of training on addressing the needs of the hearing impaired, creates a possible inference that the plaintiffs' problems with the provision of auxiliary services will continue in the future."¹²⁰

In addition to showing a likelihood of returning, some courts also require plaintiffs to demonstrate that the plaintiff will also likely experience discrimination in the future. In **McCullum v. Orlando Regional Healthcare System, Inc.**, the Eleventh Circuit affirmed the lower court's decision that the plaintiff lacked standing because the hospitals at issue had a written policy providing for the use of sign language interpreters.¹²¹ The court concluded that now that the hospital knows that the patient wants an interpreter, and now that patient knows all he has to do is request one, there is little or no chance that the hospital will refuse to provide the patient with an interpreter. The court noted that the patient's doctor is also providing interpreters now

Effective Communication & the ADA

for his outpatient appointments on the hospital campus. As a result, the court concluded the patient lacked standing to secure injunctive relief.

Statute of Limitations

It is well-settled the plaintiffs cannot bring claims that fall outside the scope of the statute of limitations period. When the alleged violation at issue is the failure to provide effective communication, courts regularly find that the violation accrues each time a discrete and independently wrongful act occurs. For instance, in ***Ervine v. Desert View Regional Medical Center Holdings, LLC***, the medical provider argued that the plaintiff's suit was barred by the two year statute of limitations because it had informed the patient on her initial visit (which had occurred over two years before the lawsuit was filed) that it would not provide her with interpretation services, even though the patient had repeatedly requested interpreters and her request was repeatedly denied.¹²² Though the district court found the plaintiff's claim to be time-barred, the Ninth Circuit held that the plaintiff's claims of discrimination accrued each time a right had been denied, and because the providers had repeatedly denied requests for an interpreter, the statute had not yet run. The Court held that "so long as an alleged violation of Section 504 of the Rehabilitation Act is a discrete and independently wrongful discriminatory act, it causes a new claim to accrue and a new limitations period to run."¹²³

Impact of Remedial Measures

One issue that can arise in lawsuits regarding effective communication is the impact of a defendant's voluntary decision to offer auxiliary aids and services while the litigation is pending. Does that decision make a lawsuit moot? A case is moot when a defendant makes an affirmative showing that the continuation of its alleged ADA violation is "nearly impossible."¹²⁴ For instance, in an ADA case involving an architectural barrier, a defendant may render the case moot by replacing stairs with a ramp, or by widening a doorway. In cases involving effective communication, however, there is a greater likelihood that the defendant may simply decide not to offer auxiliary aids and services in the future and therefore, courts are less likely to dismiss the cases as moot.

For instance, in ***Feldman v. Pro Football Inc.***, after the plaintiffs filed a lawsuit alleging that the Defendant violated the ADA by failing to caption information aural information during the Redskins football games, Defendant voluntarily captioned game and emergency information and stated that it would do so indefinitely. Even with these promises, the court held that the Defendant's actions did not render the case moot

Effective Communication & the ADA

because they have not “discharged their heavy burden of showing no reasonable expectation that they will repeat their alleged wrongs.”¹²⁵ The court explained that Defendants did not provide captioning until after plaintiffs filed their complaint, and that Defendants maintain complete control over the captioning.

Telecommunications

The ADA’s regulations regarding effective communication also discuss telecommunications. While there is limited case law discussing these requirements, they remain a critical part of the ADA’s requirements to ensure that individuals with communication disabilities have equal access to communications systems.

Title III regulations require places of public accommodation to respond to telephone calls from a telecommunications relay service in the same manner that it responds to other telephone calls.¹²⁶ Recent DOJ settlement agreements have addressed this issue. DOJ negotiated a settlement with **Wells Fargo** after receiving complaints that Wells Fargo refused to accept calls made using a relay service, referred callers to telephone number with a dedicated TTY service, and that calls to the dedicated TTY telephone were either not answered with a TTY or went to a voicemail box that was never answered.¹²⁷ Wells Fargo explained that due to concerns regarding fraud, it had stopped accepting calls for a temporary period of time, but had resumed doing so. In the settlement agreement, in addition to other requirements regarding effective communication, Wells Fargo agreed to provide direct access to individuals who called through a relay service operator. To prevent fraud, Wells Fargo employees may take reasonable steps to ensure the validity of the call by including verification of personal information using the same procedures it uses for non-relay calls. Wells Fargo also agreed to assign staff its dedicated TTY line to provide the same level of access to callers and response time to callers who use a non-TTY line.

Title II regulations include a number of requirements for telecommunications access as well, including accessible 911 services. Though the cases addressing this issue are older, they explain the vital importance of equal access to 911 services. In **Chatoff v. City of New York**, in an order granting a preliminary injunction to the plaintiffs, a group of deaf citizens, the court held that the use of seven-digit numbers rather than the use of 911 in order to accommodate hearing impaired callers is specifically prohibited by DOJ regulations. The Court quoted 28 CFR § 35.162: “The requirement for direct access disallows the use of a separate seven digit number where 911 service is available. Separate seven digit emergency call numbers would be unfamiliar to many individuals and also more burdensome to use. A standard emergency 911 number is easier to remember and would save valuable time spent searching in telephone books for a local seven digit emergency number.”¹²⁹

Effective Communication & the ADA

Similarly, in *Ferguson v. City of Phoenix*, deaf and hearing-impaired users of Phoenix's 911 emergency telephone service brought suit under the ADA, alleging that the inadequate 911 system constituted discrimination against deaf and hearing-impaired citizens.¹³⁰ Phoenix's 911 systems required callers to emit an "audible tone" in order to notify dispatchers that the call coming in was a TTY call by pressing the space bar once the call was commenced. However, this practice is incompatible with the standard operating procedures of TTY calls, in which the caller usually waits to receive a "go ahead" message from the person answering the call before hitting any keys. As a result, calls by deaf and hard of hearing callers were frequently interpreted as "hang-ups," resulting in delays and inadequate police responses.

The district court held that public entities must take appropriate steps, including equipping emergency systems with modern technology, to ensure that individuals with communication disabilities have access to emergency dispatch services, citing 28 CFR §§ 35.160–35.162. The court also cited a DOJ technical assistance manual which precluded public entities from requiring deaf or hard of hearing callers to hit the space bar on a TTY to emit an audible tone informing emergency dispatchers that the call was from a TTY. This regulation was held to be reasonable in that not all TTYs emit an audible tone when the space bar is pressed. Ultimately, a consent decree was entered settling injunctive issues and changing Phoenix's policies on TTY 911 calls to conform to the DOJ Manual.

Conclusion

As demonstrated throughout this Legal Brief, the ADA's requirement to provide effective communication is extremely broad and impacts communications in all parts of society. The obligation to ensure communication access applies to important and complex discussions, such as ones about medical diagnoses, to less complex communications, such as what an individual would like to order at a restaurant. Regardless of the complexity of the communication, the ADA's statute, regulations, and implementing case law provide an important framework to consider when determining which auxiliary aid and service to provide to facilitate communication access. Because of the ADA, there has been substantial progress at removing communication barriers. As technology progresses, we are sure to see additional legal questions raised about the scope of the effective communication obligation, so be sure to stay apprised of these critical legal issues moving forward.

Effective Communication & the ADA

Notes

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney, with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Kate Watson Moss, Equip for Equality PILI Fellow, and Holly Sanchez Perry, Equip for Equality Legal Intern, for their valuable assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. 42 U.S.C. § 12101(a)(5).
3. 42 U.S.C. § 12181(b)(2)(A)(iii)(emphasis added).
4. 42 U.S.C. § 12132 (emphasis added).
5. 29 U.S.C. § 794.
6. 28 C.F.R. § 35.160(a)(1) (Emphasis added).
7. 28 C.F.R. § 35.160(b)(1).
8. 28 C.F.R. § 36.303(c).
9. 45 C.F.R. § 84.52(c).
10. *Id.* § 84.52(d)(1).
11. 34 C.F.R. § 104.44(d)(1).
12. 42 U.S.C. § 12103(1).
13. 28 C.F.R. § 36.303(b) (Title III); 28 C.F.R. § 35.104(Title II).
14. *Id.*
15. *Id.*
16. *Id.*
17. 28 C.F.R. § 36.303(c)(1)(ii) (Title III); 28 C.F.R. § 35.160(b)(2)(Title II); U.S. Department of Justice-Effective Communication, available at www.ada.gov/effective-comm.htm (last accessed 8/25/2015).
18. 28 C.F.R. § 35.160(b)(2)(Title II).
19. *Chisolm v. McManimon*, 275 F.3d 315 (3rd Cir. 2001).
20. *Id.* at 327 (citing 28 C.F.R. Pt. 35, App. A).
21. Settlement Agreement between the United States of America and Dekalb Regional Crisis Center, available at http://www.ada.gov/dekalb_crisis_ctr_sa.html (last accessed 8/27/15).

Effective Communication & the ADA

22. 28 C.F.R. § 36.303(c)(1)(ii).
23. *Id.*
24. *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).
25. *Id.* at 157.
26. *Camarillo v. Carrols Corp.*, 2010 WL 2557209 (N.D. N.Y. June 24, 2010).
27. *Id.*
28. *Argenyi v. Creighton University*, 703 F.3d 441 (8th Cir. 2013).
29. *Id.* at 451.
30. U.S. Courts, Case Summary, Highlights and Videos, *Argenyi v. Creighton Univ.*, <http://www.uscourts.gov/cameras-courts/argenyi-v-creighton-university> (last accessed 8/26/2015).
31. *Argenyi*, 703 F.3d at 446.
32. *Id.* at 449.
33. *Id.* at 450-51.
34. *California Council of the Blind v. Cty. of Alameda*, 985 F.Supp.2d 1229 (N.D. Cal. 2013).
35. U.S. Department of Justice-Effective Communication, available at www.ada.gov/effective-comm.htm (last accessed 8/25/2015).
36. 28 C.F.R. § 36.303(f) (Title III); 28 C.F.R. § 35.160(d).
37. See National Association of the Deaf, Position Statement: VRI Services in Hospitals <http://nad.org/issues/technology/vri/position-statement-hospitals>.
38. *Weiss et al v. Bethesda Health, Inc. et al*, No. 15-cv-80831 (S. D. Fla. June 6, 2015).
39. *Shaika v. Gnaden Huetten Memorial Hospital*, 2015 WL 4092390 (M.D. Pa. July 7, 2015).
40. *Zapko et al v. HCA – HealthONE, LLC*, 14-cv-02891 (D. Colo Oct. 23, 2014).
41. Joint Press Release, ROSE MEDICAL CENTER REACHES SETTLEMENT AGREEMENT WITH RONALD ZAPKO, JOHN TOWERY AND THE COLORADO CROSS-DISABILITY COALITION, available at http://www.ccdonline.org/sites/default/files/hca_rose_zapko_joint_press_release_06182015_final_to_post.pdf (last accessed 8/25/2015).
42. 28 C.F.R. § 35.160(a)(1) (emphasis added).
43. 28 C.F.R. § 36.303(c)(1) (emphasis added).
44. 28 C.F.R. § 35.160(a)(1) (Title II); 28 C.F.R. § 36.303(c)(1)(i)(Title III).

Effective Communication & the ADA

45. Settlement Agreement Between the United States of America and Fairfax Nursing Center, Inc., July 10, 2015, available http://www.ada.gov/fairfax_nursing_ctr_sa.html (last accessed 8/27/2015).
46. See, e.g., Settlement Agreement Between the United States of America and the Heart Center of Memphis, PLLC, available at <http://www.ada.gov/heart-center.htm> (last accessed 8/27/15).
47. *Loeffler v. Staten Island University Hosp.*, 582 F.3d 268 (2nd Cir. 2009).
48. *Id.* at 279.
49. *McCullum v. Orlando Regional Healthcare System, Inc.*, 768 F.3d 1135 (11th Cir. 2014).
50. *Id.* at 1144.
51. 28 C.F.R. § 36.303(c)(3) (Title III); 28 C.F.R. § 35.160(c) (Title II).
52. 28 C.F.R. § 36.303(c)(4) (Title III); 28 C.F.R. § 35.160(c) (Title II).
53. 28 C.F.R. Pt. 35, App. A.
54. *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334 (11th Cir.2012).
55. *Id.* at 343.
56. *Id.*
57. *Martin v. Halifax Healthcare Sys., Inc.*, 2015 WL 4591796, at *4 (11th Cir. July 31, 2015).
58. <http://www.ada.gov/usao-agreements.htm>
59. Settlement Agreement Between the United States of America and Srivinas Mukkamala, M.D., P.L.C. Under the Americans with Disabilities Act (June 8, 2015), available at http://www.ada.gov/mukkamala_sa.html.
60. Settlement Agreement Between the United States of America and Swedish Edmonds Hospital (Oct. 10, 2014), available at http://www.ada.gov/swedish_edmonds_sa.htm
61. Settlement Agreement Between the United States of America and Arshad Pervez (July 2, 2015), available at http://www.ada.gov/pervez_sa.html.
62. Press Release: MinuteClinic to Enhance Accessibility for Patients with Disabilities (Aug. 21, 2015), available at <http://www.cvshealth.com/content/minuteclinic-enhance-accessibility-patients-disabilities>
63. CVS Talking Prescription Container Settlement Agreement, Feb. 15, 2014, available at <http://llegal.com/2014/03/cvs-prescription-agreement>
64. *Brooklyn Ctr. for Independence of Disabled v. Bloomberg*, 980 F. Supp. 2d 588 (S.D.N.Y. 2013).

Effective Communication & the ADA

65. Statement of Interest of the United States of America, *Brooklyn Ctr. for Independence of Disabled v. Bloomberg*, available at <http://www.dralegal.org/sites/dralegal.org/files/casefiles/dojstmtinterest.pdf> (last accessed 9/1/2015)
66. Settlement Agreement, *Brooklyn Ctr. for Independence of Disabled v. Bloomberg* (Sept. 24, 2014), available at <http://www.dralegal.org/sites/dralegal.org/files/casefiles/settlementstip.pdf> (last accessed 9/1/2015)
67. <http://www.dralegal.org/bcid-v-bloomberg>
68. *Communities Actively Living Indep. & Free v. City of Los Angeles*, 2011 WL 4595993 (C.D. Cal. Feb. 10, 2011).
69. *Id.* at *2.
70. Class Settlement Agreement, *Communities Actively Living Indep. & Free v. City of Los Angeles*, available at http://www.dralegal.org/sites/dralegal.org/files/casefiles/settlementagreement_6.pdf (last accessed 9/1/2015).
71. *K.M. ex al Bright v. Tustin Unified School Dist.*, 725 F. 3d 1088 (9th Cir. 2013).
72. 20 U.S.C. §1414(d)(3)(B)(iv) & (v).
73. 28 C.F.R. § 35.160(a)(1) & (b)(1).
74. *D.H. ex rel. Harrington v. Poway Unified Sch. Dist.*, 2013 WL 6730163 (S.D. Cal. Dec. 19, 2013) *reconsideration denied*, No. 09-CV-2621-L NLS, 2014 WL 129070 (S.D. Cal. Jan. 14, 2014).
75. U.S. Department of Justice and the U.S. Department of Education released a document entitled "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (Nov 2014)", available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>
76. *The National Federation of the Blind, Anthony Lanzilotti and Mitchell Cossaboon v. Atlantic Cape Community College*, Case No. 1:15-cv-03656 (D. N.J.) (consent decree, July 7, 2015).
77. *University of Cincinnati*, OCR Compliance Review No. 15-13-6001 (Resolution Agreement, 12/8/ 2014), available at <http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf>
78. *Settlement Agreement Between the United States of America and EdX, Inc.* (April 2, 2015) available at http://www.ada.gov/edx_sa.htm
79. *Bahl v. County of Ramsey*, 695 F.3d 778, 785 (8th Cir. 2012).
80. *Taylor v. City of Mason*, 970 F.Supp.2d 776 (S.D. Ohio 2013).
81. *Hoffman v. Marion County Tex.*, 592 Fed.Appx. 256 (5th Cir. 2014).

Effective Communication & the ADA

82. Press Release, Dep't of Justice, Rochester Police Department Reaches Settlement To Ensure Effective Communication for Deaf and Hard of Hearing Individuals (July 29, 2015), *available at* <http://www.justice.gov/usao-edmi/pr/rochester-police-department-reaches-settlement-ensure-effective-communication-deaf-and>; Press Release, Dep't of Justice, Justice Department Settles Effective Communication Case with Wallingford Police Department (May 15, 2015), *available at* <http://www.justice.gov/usao-ct/pr/justice-department-settles-effective-communication-case-wallingford-police-department>; Press Release, Dep't of Justice, Ware Police Department Enters into Agreement to Guarantee Effective Communication for Hearing Impaired (April 28, 2015), *available at* <http://www.justice.gov/usao-ma/pr/ware-police-department-enters-agreement-guarantee-effective-communication-hearing>.
83. http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_settlements/ny/ny10.txt
84. *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995).
85. For an overview of these settlements, see Nat'l Ass'n of the Deaf, *Landmark Settlements Reached in Maryland and Kentucky for Deaf Prisoners*, NAT'L ASS'N OF THE DEAF (June 8, 2015), *available at* <http://nad.org/news/2015/6/landmark-settlements-reached-maryland-and-kentucky-deaf-prisoners>
86. *Prakel v. Indiana*, 2015 WL 1455988 (S.D. Ind. March 30, 2015).
87. *Id.* at *18.
88. **28 CFR Part 36, CRT Docket No. 126; AG Order No. 3449-2014, RIN 1190-AA63, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description**, *available at* http://www.ada.gov/regs2014/movie_nprm.html
89. Department of Justice, Questions and Answers About the Department of Justice's Notice of Proposed Rulemaking Under Title III of the ADA to Require Movie Theaters to Provide Closed Movie Captioning and Audio Description, *available at* http://www.ada.gov/regs2014/qa_movie_nprm.htm
90. **28 CFR Part 36, CRT Docket No. 126; AG Order No. 3449-2014, RIN 1190-AA63, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description**, *available at* http://www.ada.gov/regs2014/movie_nprm.html
91. *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666 (9th Cir. 2010).
92. *Id.* at 671-75.
93. Consent Decree, *Arizona v. Harkins Amusement Enterprises, Inc.*, (11/7/11), *available at* www.azag.gov/sites/default/files/sites/all/docs/civil-rights/lawsuits/disabilities-act/HARKINS%20CONSENT%20DECREE.pdf

Effective Communication & the ADA

94. Equip for Equality, *Press Release*, Attorney General Madigan Reaches Agreement with AMC Theatres – Settlement of Complaint Filed By Equip for Equality Provides Unprecedented Access for People with Disabilities to Go to the Movies, available at www.equipforequality.org/news-item/attorney-general-madigan-reaches-agreement-amc-theatres-settlement-complaint-filed-equip-equality-provides-unprecedented-access-people-disabilities-go-movies/
95. Cinemark Audio Description Settlement Agreement, available at <http://iflegal.com/2012/09/cinemark-agreement>
96. *Feldman v. Pro Football Inc.*, 419 Fed.Appx. 381 (4th Cir. 2011).
97. *Id.* at 390.
98. *Id.* at 391.
99. *Innes v. The Board of Regents of the University System of Maryland*, 2015 WL 1210484 (D. Md. March 16, 2015).
100. Settlement Agreement Between the United States of America and the National Museum of Crime and Punishment Under Title III of the Americans with Disabilities Act (Jan. 13, 2015) available at http://www.ada.gov/crime_punishment_museum/crime_punishment_sa.htm
101. Settlement Agreement Between the United States of America and the International Spy Museum Under Title III of the Americans With Disabilities Act, (June 3, 2008) available at <http://www.ada.gov/spymuseumfctsht.html>
102. 28 C.F.R. § 36.303(a) (Title III); 28 C.F.R. § 35.164 (Title II).
103. 28 C.F.R. § 36.303(g) (Title III); 28 C.F.R. § 35.164 (Title II).
104. 28 C.F.R. § 35.164.
105. *Chisolm v. McManimon*, 275 F.3d 315 (3rd Cir. 2001).
106. Courts have required other housing authorities to provide program participants with notices and other individualized communication in an accessible format. See, e.g., *Robbins v. Connecticut Inst. for the Blind*, 2012 WL 3940133 (D.Conn. Sept. 10, 2012) (holding that blind plaintiff established prima facie case of disability discrimination when defendant failed to send notice via audiotope of need for Section 8 recertification and then denied request for extension of deadline).
107. *Jordan v. Greater Dayton Premier Mgmt.*, 9 F. Supp. 3d 847, 859-61 (S.D. Ohio 2014).
108. *Id.* at 859.
109. *Prakel v. Indiana*, 2015 WL 1455988 (S.D. Ind. March 30, 2015).
110. *Innes v. Board of Regents of the University System of Maryland*, 2015 WL 1210484 (D. Md. March 16, 2015).

Effective Communication & the ADA

111. *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334 (11th Cir.2012) (collecting cases, including cases from the Second, Eighth, Ninth, and Tenth Circuit applying a deliberate indifference standard).
112. *Loeffler v. Staten Island University Hosp.*, 582 F.3d 268, 275 (2nd Cir. 2009).
113. *Loeffler*, 582 F.3d 268.
114. *Liese*, 701 F.3d 334.
115. *McCullum v. Orlando Regional Healthcare System, Inc.*, 768 F.3d 1135 (11th Cir. 2014).
116. Note that there was no discussion in this case about the propriety of using a family member as an interpreter, but further note that the patient's experiences occurred in 2009, before the DOJ clarified these requirements in the amended ADA regulations.
117. *Rylee v. Chapman*, 316 F.App'x. 901 (11th Cir. 2009).
118. *Freydel v. New York Hosp.*, 242 F.3d 365 (2nd Cir. 2000).
119. *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 2015 WL 5085775 (5th Cir. Aug. 28, 2015)
120. *Id.* at *3.
121. *McCullum v. Orlando Regional Healthcare System, Inc.*, 768 F.3d 1135 (11th Cir. 2014).
122. *Ervine v. Desert View Regional Medical Center Holdings, LLC*, 753 F.3d 862 (9th Cir. 2014).
123. *Id.* at 870.
124. *Feldman v. Pro Football Inc.*, 419 Fed.Appx. 381 (4th Cir. 2011).
125. *Id.* at *5.
126. 28 C.F.R. § 36.303(d)(4).
127. *Settlement Agreement Between the United States of America and Wells Fargo & Company Under the Americans with Disabilities Act* (May 31, 2011), available at http://www.ada.gov/wells_fargo/wells_fargo_settle.htm (last accessed 9/3/2015).
128. *Chatoff v. City of New York*, 1992 WL 202441 (S.D.N.Y. 1992).
129. *Id.* at *2.
130. *Ferguson v. City of Phoenix*, 931 F. Supp. 688 (D.Ariz. 1996), *aff'd* 157 F.3d 668 (9th Cir. 1998).