

# Compliance - TODAY

December 2013

A PUBLICATION OF THE HEALTH CARE COMPLIANCE ASSOCIATION

WWW.HCCA-INFO.ORG



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# Compliance 101: Recent settlements should compel provider review of ADA auxiliary aid compliance

- » The Americans with Disabilities Act (ADA) applies to the vast majority of healthcare providers in the U.S.
- » Auxiliary aids must be provided to patients and/or their companions at no charge.
- » Family members should not be requested to serve as qualified interpreters.
- » Discussions regarding non-clinical matters (e.g., billing or legal issues) may also require the provision of auxiliary aids.
- » Top-down staff training on ADA compliance should be performed regularly.

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A string of enforcement actions and public settlements in recent months have given health care providers across the country fair warning—Americans with Disabilities Act (ADA) enforcement is on its way.<sup>1</sup> Since the July 2012 ADA Barrier-Free Health Care Initiative (Initiative) was announced, there have been a total of 14 publicly disclosed enforcement actions against healthcare providers, with the largest settlement to date reaching \$140,000.<sup>2</sup>



Bachman

The Initiative was pursued by the federal government as a mechanism for putting enforcement muscle behind ADA requirements, and it allowed two federal bodies (i.e., the U.S. Attorneys' Office and the Civil Rights Division of the Department of Justice) to leverage their respective resources in pursuing non-compliance among providers. Specifically, the collaboration between

these two agencies has allowed them to target their enforcement efforts on a critical area for individuals who have disabilities—access to medical services and facilities. In the 12 months since the announcement, the Initiative seems to have achieved desired traction and healthcare providers, from physician practices to large health systems, are scrambling to ensure that their current policies and procedures reflect the ADA's requirements. In announcing settlements, Eve L. Hill, Senior Counselor to the Assistant Attorney General for the Civil Rights Division was quoted as saying:

All types of healthcare providers—from hospitals to nursing homes, from surgeons to general practitioners—all across the country—need to provide equal access to people with disabilities, including people who are deaf. More than 20 years after passage of the ADA, the time for compliance is now.<sup>3</sup>

The widespread exposure of these recent settlements may leave providers of every

shape and size fielding compliance-related questions from attentive patients. As such, this article is meant to provide a brief overview of the ADA requirements related to visually and hearing impaired people and, based on recent settlements, focus on some of the most important aspects of the regulation for healthcare providers.

### **Healthcare providers as public accommodations**

The ADA is a federal civil rights law that prohibits discrimination against individuals by private entities that fall under the definition of “public accommodations,” including, but not limited to, lodging, food and drink service, theaters, retail outlets, amusement parks and, of course, healthcare providers.<sup>4</sup> The ADA estimates that there are more than five million public accommodations currently operating in the U.S. today, with a sizeable percentage of those constituting healthcare providers. The ADA also applies to public entities, including public hospitals and clinics. As a result, the vast majority of healthcare providers, regardless of size, status, or number of employees, are required to make their services available to the public in an accessible manner and in compliance with the ADA.

Specifically, both Title II, which is applicable to public entities, and Title III, which is applicable to public accommodations, generally require the following of healthcare providers, including hospitals:

- ▶ Provide goods and services in the most integrated setting appropriate to the needs of the individual;
- ▶ Remove unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to participate in the goods and services offered by the public accommodation;
- ▶ Provide reasonable modifications in policies, practices, and procedures may

have the effect of denying equal access to disabled individuals;

- ▶ Furnish individuals with auxiliary aids when necessary to ensure effective communication;
- ▶ Remove architectural and structural communication barriers in existing facilities; and
- ▶ Provide equivalent transportation services and purchase accessible vehicles in certain circumstances.

### **Auxiliary aids**

Nine of the settlements entered into since July 2013 have focused on the provision of auxiliary aids and services to deaf or hearing impaired individuals. Auxiliary aids and services may include the provision of qualified interpreters, assistive listening headsets, television captioning, brailled and large print materials, among other things, and these are to be provided to certain individuals at no charge.<sup>5</sup> In requiring healthcare providers to provide auxiliary aids, the government reasoned that such aids are often needed in order to provide safe and effective medical treatment to the hearing and visually impaired. Without the use of these aids, both providers and consumers run grave risks, such as misdiagnosis or misunderstandings regarding symptoms. Similarly, patients may not understand specific medical instructions or adhere to prescription limitations or warnings. Such results can have a serious impact on an individual’s health or well-being. Public accommodations may be exempt from the requirement to provide auxiliary aids, provided that they can demonstrate that taking the required steps would fundamentally alter the nature of the goods, services, or facilities or would result in an undue burden.

In making determinations as to whether and to what extent auxiliary aids are necessary in treating the hearing and visually impaired, providers should take into account

all relevant facts and circumstances, including without limitation the following:

- ▶ the nature, length, complexity, and importance of the communication at issue;
- ▶ the individual's communication skills and knowledge;
- ▶ the patient's health status or changes thereto; and
- ▶ the patient's and/or companion's request for or statement of need for an interpreter.<sup>6</sup>

Although there are certain situations in healthcare settings where written forms and informational sheets may be ADA compliant, providers must train their staff in connection with potential circumstances where more substantial auxiliary aids should be used. An interpreter may be required for effective communication, for example, when discussing a patient's symptoms and medical condition or when obtaining informed consent for treatment. Additionally, non-clinical matters (e.g., complex billing or insurance matters, the explanation of living wills or powers of attorney) may also call for the use of a more significant auxiliary aid to promote effective communication between the parties.

Healthcare providers should never assume that a family member or friend accompanying a patient will act as a "qualified interpreter" as set forth in the ADA. The U.S. Department of Justice has defined "qualified interpreter" to mean: "an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary."<sup>7</sup> In many cases, family members are unable to act as an effective communicator, because emotional and/or physical stress may

be present in medical care situations of a loved one.<sup>8</sup> Patient confidentiality issues might also be triggered when family members or friends are used in an interpreter role. A family member or friend may provide interpretive assistance only if the patient or companion agrees in writing to the use of that person in that role and the use of that person is appropriate under the circumstances when also considering the patient's privacy issues. Additionally, ADA regulations *do* allow for interpreting by family members and friends in time-sensitive, life-threatening, or medically urgent situations. It is recommended

...providers must train their staff in connection with potential circumstances where more substantial auxiliary aids should be used.

that any discussions involving the provision of auxiliary aids be documented in the patient's chart. It is a best practice for the provider to specifically ask a visually or hearing impaired customer, client, or patient which accommodation

they prefer, and document the assessment and decision clearly and precisely.

Providers may also need to provide ADA-compliant aids or other assistive services in situations where a companion, and not the patient, is visually or hearing impaired. The ADA requires that a healthcare provider must communicate effectively with customers, clients, and other individuals who are deaf or hard of hearing who are seeking or receiving its services and, in many cases, these individuals will not necessarily be patients.<sup>9</sup> An auxiliary aid may be provided to someone other than a patient in certain situations (e.g., facilitating communications between a provider and a healthcare surrogate of an incapacitated patient where the surrogate is deaf or hearing impaired, allowing meaningful participation in a birthing class for a prospective new father). Training sessions, health

education seminars, support groups, and other activities that are open to the public must also be accessible to visually and hearing impaired participants in compliance with the ADA.<sup>10</sup>

### Enforcement mechanisms and recent settlements

Because the ADA is a civil rights regulation, enforcement is primarily driven by private party complaints. However, in these instances, injunctive relief is the sole remedy and awards of monetary damages are not permitted. State Attorneys General may authorize a lawsuit where a “pattern of practice” is alleged. Penalties may not exceed \$55,000 for a first violation or \$110,000 for any subsequent violation.<sup>11</sup>

Providers who are investigated and who ultimately enter into settlement agreements are typically subject to an ongoing monitoring process whereby the provider may be required to:

- ▶ report to the U.S. Attorney on a periodic basis regarding specific signage requirements;
- ▶ provide ongoing training to staff members;
- ▶ designate an ADA administrator to answer questions regarding ADA compliance;
- ▶ update and review policies; and/or
- ▶ maintain a detailed log of requests for auxiliary aids.


The agreement may also require the payment of monetary damages both to the complainant and the government. Similar to many other complaint-driven regulations, the ADA prohibits retaliation or coercion in any way against any person who made, or is making, a complaint.

### Preparing your providers

Healthcare providers should continually monitor their practices, policies, and procedures related to persons with disabilities and place a special emphasis on those for the visually or hearing impaired. Providers are typically compliant

with respect to their ADA policies, but ensuring compliance by staff from the top down and instituting monitoring and enforcement mechanisms remains a challenge for most—especially for larger entities which experience an increased volume of patients and speed of operations. A provider’s workforce must be well versed in all aspects of ADA compliance and able to appropriately identify situations that trigger additional responsibilities on the part of the provider. It is clear that no one-size-fits-all policy can be effective. As such, case study or demonstration-based learning may be beneficial. Each and every member of the provider’s workforce, from the receptionist greeting patients, to volunteers at a hospital facility, to the licensed professionals providing direct patient care, must be on the alert for potential ADA compliance issues—especially when confronted with a visually or hearing impaired individual.

Recent government enforcement has focused mostly on the availability of auxiliary aids and HIV discrimination, but it is likely that more robust physical plant review is on its way. As a result, now is the time for providers to review building and site elements (e.g., parking, accessible routes, ramps, stairs, elevators, and doors) and audit ADA compliance in this regard.

As a public service, the government has published a number of resources to assist healthcare providers in their compliance efforts specifically with regard to documentation measures. These materials can be accessed at [www.ada.gov](http://www.ada.gov). 

1. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2012).
2. United States Department of Justice Civil Rights Division: Castlewood Treatment Center Settlement, 2013. Available at <http://1.usa.gov/1gCuimi>
3. The United States Department of Justice press release: Justice Department Reaches Multiple Settlements with Health Care Providers to Stop Discrimination Against Persons with Hearing Disabilities. April 4, 2013. Available at <http://1.usa.gov/1gCulhQ>
4. 28 C.F.R. §36.104.
5. 28 C.F.R. §36.303(b)(1).
6. 28 C.F.R. §36.303(c)(1)(iii).
7. 28 C.F.R. 36.104; 28 C.F.R. 35.104.
8. 56 Fed. Reg. at 35553.
9. 56 Fed. Reg. at 35565.
10. 28 C.F.R. §36.201 - §36.202.
11. 28 C.F.R. §36.504.