ADA Live! Episode 117: ADA and Effective Communication in Health Care Settings with the Department of Justice

Broadcast Date: May 3, 2023
Guests: Steve Gordon and Kara Sweet from the US Department of Justice
Host: Barry Whaley, Project Director of the Southeast ADA Center
Recording: adalive.org/episodes/episode-117

Kara Sweet: Hi, I'm Kara Sweet.

Steve Gordon: Hi, I'm Steve Gordon and you're listening to ADA Live.

4 Wheel City: Yo. All right. Let's roll. Let's go.

Barry Whaley:

Hi everybody. On behalf of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University, and the ADA National Network, welcome to ADA Live. I'm Barry Whaley. I'm the director here at the Southeast ADA Center. Listening audience, if you have questions about the Americans with Disabilities Act, you can use our online form anytime at adalive.org, or you can call the Southeast ADA Center at 404-541-9001. And as always, those calls are free and they're confidential. In the United States, about one in every eight people of all ages has hearing loss. After arthritis, heart disease, hearing loss is the third most common disability. Hearing loss is the most significant among seniors. The National Institute on Deafness and Other Communication Disorders reports that one

in three seniors in the United States who are aged 65 to 74 have a hearing loss and nearly half of seniors over 75 have difficulty hearing.

In this episode, two Assistant United States attorneys talk about the rights of people with hearing loss, deafness or other communication needs in healthcare settings. We'll highlight cases and settlement agreements the Department of Justice has handled [inaudible 00:01:49] deal with these rights under the ADA. So our guests today are Steve Gordon, he is Civil Rights Enforcement Coordinator and Assistant United States Attorney for the US Attorney's Office for the Eastern District of Virginia. And Kara Sweet, she is the ADA and Civil Rights Coordinator and the Assistant United States Attorney for the US Attorney's Office in the Middle District of Tennessee. So first, welcome to both you, glad you're here, and let's begin because some folks may not know what your job is or your role. So Kara and Steve, if you could maybe tell us a little bit about what you do as assistant US attorneys.

Kara Sweet:

Sure. I am an assistant US attorney in the middle district of Tennessee, located in Nashville, and I'm a member of the Affirmative Civil Enforcement or ACE unit, which pursues typically fraud on government programs, often involving healthcare. And we also investigate and resolve complaints concerning civil rights violations, including the Americans with Disabilities Act, ADA. And given the amount of healthcare context, we often have an ability to reach out more proactively when we experience complaints with respect to healthcare violations involving some of the same providers we investigate for [inaudible 00:03:16] and I've been with the office for almost five years.

Steve Gordon:

And I'm in the US Attorney's Office in Alexandria, Virginia, which is a close in suburb of Washington DC And our district has between six and seven million people and it's the eastern half of Virginia. And I coordinate our civil rights enforcement program and I work on civil rights cases full-time. And a large part of my docket involves Americans with Disabilities Act cases. And because Gallaudet University is in Washington DC, we have

one of the largest populations of deaf people in the United States and probably the world, in the Washington metro area, which includes Northern Virginia. So I've seen a lot of cases involving people who are deaf in healthcare settings. And similar to Kara, I previously worked on other types of cases in the office involving healthcare providers, but right now most of my work is involving civil rights and the ADA.

Barry Whaley:

Great. I appreciate that. Thank you. So Kara, we are working with you trying to arrange for some settlement agreements right now at Southeast ADA Center. And we've also worked with other entities across the southeast to provide training to businesses who are in some sort of settlement agreement with the DOJ. And most of those have to do with effective communication or the lack of effective communication and healthcare settings. So the requirements for individuals who are deaf or who have hearing loss or other cognitive issues or other communication needs are covered by the ADA. Right? So when we're talking about effective communication, what exactly do we mean by that?

Steve Gordon:

The Americans with Disabilities Act has a set of regulations that specifically address certain kinds of disabilities and the requirement that covered entities ensure effective communication. And the disabilities include people who are deaf, people who are hard of hearing, people who are blind, people who have speech disabilities, and there's other disabilities that sometimes cause communication disabilities as well. Those are sort of the four main ones. And when we say effective communication, the ADA requires that people with disabilities get the same level of communication and the same information that people who don't have disabilities. So it's about leveling the playing field and ensuring equal communication and equal information.

Barry Whaley:

So when we talk about a few effective communication and you say equal opportunity to communicate with in this case your healthcare provider, who makes that decision, Steve? Is that the healthcare provider? How is that determined?

Steve Gordon:

So it's a really good question. And Title II of the ADA, which applies to state and local governments, has a slightly different rule than Title III, which applies to private entities. And what Title II says is that state and local governments are required to give primary consideration to the request of the individual with a disability. Very important. So if someone asks for something that needs to be given primary consideration. Under Title III, private entities are required to consult with individuals with disabilities and then they can decide the decision they make.

The auxiliary aid or service has to provide effective communication. If they just decide, well, we're going to decide what's easiest for us, and it's not based on the threshold of what's effective, that's not going to come up to the requirements of the ADA. And there are multiple kinds of auxiliary aids or services, I'm sure we'll talk about that in a little bit. But it's very important whether you're a private entity or you're a state or local government to consult with the individual because they're going to know the best auxiliary aid or service that's going to allow them to communicate effectively.

Barry Whaley:

And Kara, this is where we see, where I've seen a lot of these settlements originate, is not giving that preference to the preferred method of communication by that individual. Right?

Kara Sweet:

Yeah, That's correct. What we've seen a lot of is failing to ask the individual what their preferred type of communication is or ignoring it sometimes, particularly when it comes to what will often be claimed to be a cost issue or a difficulty. We often see particularly when someone comes in an emergency setting after hours or on weekends or in the middle of the night, finding alternative ways to communicate with them through a companion written notes and simply not asking or providing the effective communication.

Barry Whaley:

And hold that thought, I want to come back to that because that's a whole piece of this that we need to discuss. I think before we go on though, as Steve has pointed out, effective communication is fundamental, right? It's fundamental right of the ADA. And I guess the question is why communication, especially in healthcare, why is this so important?

Steve Gordon:

So it's so important because it's critical for a person to be able to understand the treatment and to be able to have knowledge of what's going on. And to the extent that does not effective communication, they're misunderstandings, medical decisions are hinging on that. These are very high stakes interactions. People have a lot invested in their health. So it is a really important space where effective communication needs to be provided. And it's not just about providing quality of care, it's also providing the dignity so that people can make decisions that are informed about their own medical care. And the courts have spoken to that and have explained that communication is essential in medical care, not just because it helps with quality of care, but because people have a fundamental right to discuss and understand what kind of medical care is being proposed and have basically informed consent.

Barry Whaley:

Right. So kind of staying with that theme, because we've seen some studies recently, I know there was a study done at Harvard Medical School that essentially in, I'm paraphrasing here, but essentially is said that healthcare providers don't see an equal value of human life or quality of life in people who have disabilities as opposed to other people they treat. And I would imagine that factors into these effective communication decisions, right?

Steve Gordon:

So it is really important that people with disabilities, that their lives be valued. And I know especially during COVID, sometimes people with disabilities were being put to the back of the line and the Office of Civil Rights and HHS and DOJ issued various technical

assistance and decisions explaining that it's very important for healthcare providers to understand that people with disabilities value the quality of their lives, even if it doesn't look like the type of life that a healthcare provider might want to have.

Kara Sweet:

I'll just echo that, with COVID, our office sent a letter to the Tennessee Hospital Association reminding them of the importance of effective communication and that COVID was not a basis to deny anyone treatment.

Barry Whaley:

Well, and tied along with that, Kara sticking with Tennessee is we know that Tennessee, Alabama, there were discussions in Kentucky as well at the height of the pandemic regarding the crisis standards of care and who would get, how do we provide equality in medical settings with rationed equipment and rationed care. And I would imagine that that would be critical for effective communication in that type of situation. Right?

Kara Sweet:

Absolutely. And fortunately, we did not get to a point where we needed to see some of that guidance or proposed guidance regulations played out to make decisions, and a lot of the proposed rules ultimately were cast aside because of the fact that it wouldn't have been, it would be a violation of the ADA and rights of equal protection potentially as well. But that is why effective communication is so important. It's twofold. It's being able to convey the issues and the urgency of the issues that you're having so that the providers could understand. And if you don't have the effective communication, then you cannot have that dialogue for diagnosis and treatment.

Barry Whaley:

Sure, thank you. So I'm wondering, are there some examples or common situations in healthcare settings where we've talked about the importance of effective communication, but what are some examples where we see that in healthcare settings, the need for effective communication, either Kara or Steve?

Steve Gordon:

Well, I'll tell you one that we see all too often, and that is in an emergency room, particularly in the middle of the night. And both patients and also their companions are legally entitled to effective communication. And hospitals are required to ensure that they can provide equal services to people with disabilities all times of day and night. If the emergency room is open 24 hours a day, they need to provide services 24 hours a day. And that includes sign language services, they need to be prepared, have sign language interpreting companies under contract. I've also seen it come up where nursing facilities will not admit someone because they need sign language services and that violates the ADA, it's an eligibility requirement that's based on a disability and that is a violation.

So those are two times that I've seen it come up. Another place that it's come up in my practice is local mental health agencies. And here in Virginia we have 40 local mental health agencies that provide services to people with intellectual developmental disabilities, people with mental health issues, people with substance use disorder. And they also in their services, their counseling services, their emergency services are required to ensure effective communication. And we'll talk about this more later, but I have a settlement agreement with a local mental health agency for failing to do that. So it comes up in a lot [inaudible 00:15:05] different context that I've seen.

Kara Sweet:

To add to that a bit, I think what Steve said is correct. Most of the time we find the issues in the emergency care area as well, but I've also dealt with situations where people have had scheduled appointments knowing that an interpreter was needed and none was provided. So even when you think you're have a situation where there's going to be effective communication, oftentimes it's not for whatever reason. And I think in particular lately with healthcare providers, there's been a lot of turnover in staffing and a lot of temporary staffing. And that really has impacted the knowledge of a lot of the healthcare providers and their staff as to what is required and what the hospital's or healthcare providers policies are about providing effective communication.

Barry Whaley:

That's a very good point, Kara. Yeah, I hadn't considered that. In addition to that, I would think when we think about the modern healthcare industry, healthcare providers are on the clock. Their performance is judged by the number of patients they see within an hour or a day. So I would imagine that effective communication, although a right is often overlooked.

Kara Sweet:

I would say every healthcare provider does it differently. Some are surprisingly better than others and that they have someone on staff to provide interpreting services during, from 8:00 to 5:00 Monday through Friday. Of course, that's not when an emergency happens. Emergencies happen at other times. And so they may not have a great plan in place for after hours. We also see a lot of differences with rural healthcare settings versus the city settings and not having live interpreters available in some of the rural areas. I think there are multifactorial issues to look at and give consideration too, and considering where problems lie and how to address them.

Steve Gordon:

And I'll add in a few other instances that may not come to mind easily or right away. And that is correctional facilities have infirmaries and it's very important that effective communication take place there. And I had a case a while back involving a jail that didn't provide effective communication. And same thing in colleges and universities, they'll have an infirmary as well. So it's very important once a person gets into a skilled nursing facility, they have an ongoing obligation as well. And I had a case where an individual was in a skilled nursing facility for a few months and never, and she's deaf and they never provided a sign language interpreter. And that's a really big problem. So nursing facilities really need to look at this because we've been finding a lot of compliance issues in that space.

Barry Whaley:

Yeah, that's a good point. Steve, a couple of minutes ago you used a term appropriate auxiliary aids or services and the ADA offers guidance on appropriate auxiliary aids and services to provide effective communication. But what do we mean when we talk about auxiliary aids and services?

Steve Gordon:

So it's a great question. There's a lot of different kinds of auxiliary aids or services and appropriate means that it works for that individual. You might have someone who's deaf from birth and they often will be most comfortable with American Sign Language. By contrast, you might have someone who lost their hearing later in life and they're going to be more comfortable with something called CART. And CART is Computer Assisted Realtime Translation, which is a type of transcription service where you have a transcriber who's transcribing the information and they will come into a healthcare setting and transcribe what's going on. For someone who's blind, you might have large print, you might have braille, you might have a screen reader type of thing. So it really varies and that's why it's so important to consult with the individual with the disability. There are agencies in a lot of states here in Virginia, the Virginia Department of the Deaf and Hard of Hearing can provide assistance for people wanting to learn about different kinds of auxiliary aids and services for people who are deaf and hard of hearing.

And the Virginia Department for Blind and Vision Impairment can do the same for that type of disability. So it's really important [inaudible 00:19:38] a variety of them. People in the hard of hearing community have a lot of complaints that sometimes a healthcare provider will just give them a sign language interpreter even though they don't know how to sign. So it's really vital. They might need an amplifying device, they might need captioning. There's other types of auxiliary aids and services and the ADA regulations list a lot of them. But it also explains that as technology advances, new ones are coming online all the time, so it's important to keep abreast of that.

And people who have communication disabilities are going to be the best experts in what's going to help them individually. And I'll also put in at this point that the auto captioning function, which you'll often find on Zoom or WebEx, often has accuracy issues.

And those accuracy issues can create ADA liability. So it's very important, you're often going to need to get someone live to do your CART as opposed to just using auto-generated captions. And I've had cases on this very issue. So for people out there listening know that auto-generated captions are not yet accurate enough in a lot of circumstances, particularly medical circumstances where high stakes type of conversations are going on.

Barry Whaley:

[inaudible 00:21:08] you had mentioned rural healthcare challenges before and I'm wondering what is the role of video remote interpreting or VRI and what are its strengths and weaknesses in those settings?

Kara Sweet:

Great question [inaudible 00:21:24] VRI is often used by rural and urban hospitals in particular and other healthcare providers when a live ASL interpreter might not be available or in the interim before one can come. And sometimes hospitals will defer to that as the auxiliary that's appropriate for the patient. One of the biggest challenges with VRI is making sure that there is bandwidth for it. And if it's a spotty connection, it becomes interrupted. The video is not clear, it's not going to be an effective form of communication. And oftentimes, in particular in emergency departments, there's a lot of background noise and feedback and bandwidth issues that come into play because of all the equipment. So it may not be an effective form of communication depending on the setting, but it is critical for it to work that it be deaf patient to be able to see equipment and the interpreter and that the interpreter be able to see the deaf patient as well.

And so we find often complaints with respect to user errors and individuals who haven't been trained on to how to properly set up and use the VRI equipment and that it is only good in certain types of situations. So for example, as Steve mentioned before, if someone is blind VRI is not going to be an appropriate form of communication with somebody who is deaf and blind because they won't be able to see the interpreter.

Barry Whaley:

Right.

Kara Sweet:

And then there's also the type of communication, what information is being conveyed, which I think we can cover maybe a little bit more later. It's more complicated, but there are some positives to that. In particular in a rural settings, it is often hard to locate a skilled interpreter. So you might have someone who is able to communicate through a qualified interpreter who's able to communicate through ASL, but maybe they don't know all the medical terminology that some of the physicians are using.

And so you may find the VRI to be something that is beneficial to the deaf patient because they might be able to better understand and communicate the specifics of a diagnosis. Because one of the key things is making sure that there is accuracy in the interpreting and the communicating. And I've seen that several times where an interpreter might not know the terminology or understand the words that a physician may be using and cannot communicate that accurately to the patient. And then there is miscommunication. So there are some benefits to using that, and it is also generally immediately available, whereas you might have to wait 15 minutes, a half an hour or longer depending on where you are in a community for a live interpreter to come.

Steve Gordon:

And I'll add in just a couple of things. One is for people who are wondering if you have someone who's deaf and blind, there's something called tactile interpreting. So it's very important to know there is a way to communicate with someone who's deaf and blind. You got to get a tactile interpreter. The other thing I'll mention is there are other medical conditions or issues going on that will make VRI not appropriate. For example, if someone is giving birth, VRI is likely not going to be appropriate under those circumstances. Or if someone has some kind of physical injury like a neck injury and you got to keep moving their head around to look at the VRI and it causes them to bleed out, that would be a problem. Or someone has had a stroke and they're having a hard time moving their body

around on the bed to be able to see the screen or for the person on the screen to see them.

Final example, which is not a good time to use VRIs when there are a lot of people in the room. If you have four or five people in the room, it's going to be difficult for the interpreter on the screen to figure out who's speaking and how to convey information and to basically be the traffic cop for the conversation because the person's on the screen and not in person. So VRI, while it can provide a lot of positives, there's also a lot of caution signs when you're using it. And it's really important to recognize those.

There's a lot of technical issues that can come up as well. People know when you're on a Zoom meeting, occasionally it'll get unstable and people will freeze up. Well, if you're in a doctor's appointment and you're talking about cardiological issues and that happens and it's your heart that's at stake, that's going to be a problem. So it's really important that the VRI be on a network that's robust and it's wideband internet connection so that it really works and it's important to check it. Healthcare providers need to look at the screen and not just make it face the patient to make sure it's actually working. And if it's not, you need to get an onsite interpreter if you're having problems with the VRI.

Barry Whaley:

Those are excellent points, Steve. And especially I would imagine in, well, any setting, whether it's urban or rural, that bandwidth is at a premium in a special aid healthcare setting. I'm curious, Steve, you had mentioned tactile interpreting. I'm wondering if you could describe that a little more in detail for folks.

Steve Gordon:

So tactile interpreting is often done in the hand, but there's also recently been something called pro tactile where I think it's done on a person's back and it's a type of touch. And people are familiar with Helen Keller who was deaf and blind, and she communicated using touch in the hand. And there are interpreters who are trained specifically for tactile interpreting. And as long as they're on this subject, there are people who need other kinds of specialized interpreting. For example, ASL is only one language. There are other sign

languages like English sign language which is very different from ASL. And there's also sign languages in other countries.

You also have people who have other disabilities. I had a case with someone who had cerebral palsy and she had a hard time forming the signs and she needs an interpreter who's really good at discerning the signs of someone who's not good at forming it. And if you have a consumer that you're working with or a patient that you're working with who has other disabilities, you might need to get an interpreter who's good at working with people with those kinds of disabilities. And it's really important to recognize, a person might move away from an interpreter, not because they don't want it, but because the interpreter is not working for them. So it's always important to check in on that issue.

Barry Whaley:

So earlier we were talking about emergency situations and other situations where maybe somebody shows up at a healthcare facility and they want a friend or a family member to act as an interpreter. Is that an appropriate way to provide effective communication?

Steve Gordon:

As a general rule, it is not. The ADA regulations as a general rule say that you should not be relying on accompanying adults. There are two exceptions to the general rule. One is if there's an emergency and it's not, "oh, there's an emergency in an emergency room of a hospital." You're supposed to plan ahead for those.

Barry Whaley:

Right.

Steve Gordon:

For example, if there's a tornado bearing down on a hospital, you can ask an accompanying adult, the deaf person, no, they need to go down to the basement. That's the type of emergency that we're talking about. The second exception, and this is only with adults, it is not with minors. It has three parts and all three parts need to be met.

First, the person with the communication disability has to request that the other person facilitate communication for them. It's not like, "oh, the hospital forgot to order the interpreter, so now we're going to ask the person with a disability, is it okay to use your friend?" That's not how it works. The way it works is they initiate the request.

The second part is the person being asked to facilitate communication has to freely and voluntarily consent to it. And again, it's not like, "oh, the interpreter got a flat tire, now you're being put in this situation." That's not freely and voluntarily consenting. And then the third part is that it has to be appropriate under the circumstances. And there's going to be a lot of situations where it's not appropriate, for example, delivering bad news to a family member about their medical condition. The family member who's being asked to do that has an emotional investment in the situation. So it's likely not going to be an appropriate circumstance to do that. So it's very, you got to look at these very carefully in order to figure out whether or not that exception applies. And it often doesn't. It's often the fallback position, particularly when entities fail to get a sign language interpreter, they fall back and say, "okay, well we're just going to use a friend or family member." And that's very much disfavored under the ADA.

Barry Whaley:

Are there other risks of using a family member? I mean, I'm thinking in terms of bias perhaps when using somebody who's a family member or friend.

Steve Gordon:

There's a lot of risks to using, I'll throw out a few examples. If you have a family member, let's say you have a 17-year-old daughter and she's deaf, and you ask her parent to interpret for her, you're going to be compromising her privacy. And that's a big issue. You might have someone, let's say, who's hearing, and they are in a psychiatric hospital and a family member is coming for a family meeting and the family member is deaf, and the person who's hearing may have their own agenda for what they want to go on in that circumstance. And that's another risk that you run into. So it's a fraught area to have people who have emotional involvement. One of the tests for whether or not a person is a

qualified interpreter under the regulations is are they impartial? And family members are usually not impartial to whatever's going on.

Barry Whaley:

That's the point, yeah. So under the ADA and other federal law, healthcare providers have to provide reasonable modification to policies, practices, and procedures. That might be a visitation policy, and we saw that during the height of COVID pandemic when family members were not allowed to visit people in hospital when necessary to avoid disability discrimination. So could you give us some examples of when reasonable modification would be needed in regard to effective communication?

Steve Gordon:

So COVID is an excellent example. During COVID, a lot of hospitals had a policy that no one was allowed to come into the hospital because they were worried about someone bringing COVID in, and they were required to modify their policies, practices or procedures to allow a sign language interpreter to come in and do their work. So that's very, very important example.

Barry Whaley:

Kara, anything to add?

Kara Sweet:

No. Beyond COVID, I think what you have to understand is that an interpreter, if an interpreter's in the room, they're not a visitor, they're an interpreter. And that is considered one with the patient. And so for example, of the visitation policy is no more than two visitors in the room and there are two family members and an interpreter that's not violating policy. A lot of it is just understanding the language and the appropriate use of the words so much. I think COVID is probably the biggest example though of where you see need to modify policies in that regard, at least most recently.

Barry Whaley:

Yeah. Often we hear Kara that what healthcare providers will say that providing accommodation with people with disabilities, especially in effective communication, that it's too expensive or that it's too difficult. Are there situations where a healthcare provider would not provide a sign language interpreter, for instance, or some other auxiliary aid in service?

Kara Sweet:

Generally speaking, there should not be a time where there is no form of auxiliary provided. The standard is about undue burden, and it is a really high standard. It's not that it's expensive, it's much more limited in a circumstance and very difficult for a healthcare provider to show that they cannot provide any form of auxiliary aid. I think oftentimes you look at it in a limited basis of how quickly can you provide the auxiliary aid. And sometimes by the time a hospital may claim that they could have provided the interpreter, the patient's already been discharged. And so there may be issues that way where they'll try to say that, but you also, you don't want to delay treatment if it's necessary. So you have to give consideration to that. But we come into cost most often when people are in hospitals for long stays, or as Steve had mentioned earlier, in skilled nursing facilities where they're going to need an interpreter or an auxiliary of some sort for an extended period of time.

The cost is not a factor. That should not be the consideration. You don't look at it as a, how much am I going to be making from this patient versus how much is it going to cost me to provide the auxiliary aid? It's a requirement under the ADA, and it's part of the hospital's overhead and what they need to do. But we often see hospitals are not willing to provide extended care for our patients who are in need of an interpreter. And it's a challenge. And that's I think probably one of the main areas that we receive complaints in.

Barry Whaley:

So staying with that, I mean, I would think that in some situation there is just ignorance of the law where a healthcare provider doesn't know who is supposed to provide that interpreter or who is supposed to pay for it.

Kara Sweet:

It's often a case of a lack of knowledge of the law or a lack of knowledge of policies. I think I had touched on this earlier, the hospitals are required to provide training to their staff. The facilities or healthcare providers are required to provide training. It's out there, it's available. And at least hope that once people are trained properly, that they will then comply with the training that they've received and the policies that they've received and provide the effective communication. And so, one of the goals that certainly I've had in working with the Southeast ADA Center, is to engage with healthcare providers to have them provide the training to their staff and employees. And so I hope that that's what it is. I think that the more training that hospitals and healthcare providers are able to provide, the less complaints theoretically we should seek and have to address.

Barry Whaley:

I hope so. Yeah. Thank you Steve and Kara. ADA Live listening audience, if you have questions about this topic or any other ADA Live topic, you can submit your questions online at adalive.org. Or you can call the Southeast ADA Center at 404-541-9001. So welcome back to the show everybody. Our guests today are assistant US attorneys, Kara Sweet and Steve Gordon, and we've been talking about the rights of people with communication disabilities to receive effective communication in healthcare settings. So now let's turn our attention to cases. The Department of Justice is handled on this topic. You both dealt for many years with ADA civil rights cases on behalf of people with disabilities. We know that the Justice Department vigorously enforces a rights of people who are deaf or hard of hearing, as well as those who have blindness, cognitive impairments or other conditions that affect communication. So Steve, I'm wondering if you could tell us from your experience, maybe a couple of DOJ settlement agreements that have dealt with effective communication in healthcare.

Steve Gordon:

Sure. So one case I had involved a durable medical equipment company called Lincare, and they had failed to provide a sign language interpreter for an individual who came in to

rent a device from them. It was a CPAP device and these appointments to rent these last about 90 minutes. I know that because that's what it says in their internal documents, that you should spend about 90 minutes with someone and there are safety issues when you're using a CPAP machine and they just didn't get her a sign language interpreter. And I think some people who made the mistake of magical thinking and thinking that a person could just read lips or that handwriting would be enough. So that is one case that we have. And that case, they operate about between 8, 900 retail outlets throughout the country.

And that was a nationwide settlement that we had with them. And they're now required to comply with the ADA and ensure that their frontline staff understands what they're supposed to do. Second case that I can talk about involved a hospital, Spotsylvania Regional Medical Center. And by the way I'm mentioning them because you can find them on ada.gov, which is the Department of Justice's website. And these are in the archives area. And that case involved emergency admission, late night admission, and it was a companion, not the actual patient who needed the interpreter. And they failed to provide the interpreter, including for some really vital, important high stakes conversations involving end of life care. And it's really important to understand that there was no doubt that they understood the person was deaf. It was very clear the person asked for sign language interpreting services and they simply did not provide it. And they too are now under a settlement agreement where they're required to train their frontline people and have appropriate policies.

Another case that I had involved Goochland Powhatan Community Services, this is a local mental health agency that serves Goochland and Powhatan county, Virginia. And they had a consumer with intellectual and developmental disabilities who's also deaf, and she was receiving services from them. And as a part of their services to people with intellectual developmental disabilities, they have a monthly face-to-face meeting to ensure that the consumer is receiving the services that they need. And they provided services to her for 33 months. And it wasn't until the very end of the 33 months that they finally got her a sign language interpreter. So it's very important to understand people may have

multiple disabilities, but it doesn't mean that they're not entitled to effective communication.

Another case which settled involved Brookside Rehab and Nursing Center, and this was a case where they declined to accept an individual who's being transferred from a hospital because the person needed sign language services. And in that case it's very important to understand that if you're like, "okay, well this whole sign language thing is complicated, the way I'll deal with it is I'll just won't get sign language interpreters and we'll tell people we don't offer that." That's a violation of the ADA in and of itself, so you can't go that route. So those are four cases and I have many others I can talk about, but I'll leave some space for Kara to speak as well.

Kara Sweet:

Well, I had hoped by the time that we had recorded this podcast that I would've had a settlement agreement I've been working on finalized. So it is hopefully by the time this comes out it will be, and we can talk about it then, but I can only talk about other ones that I have not handled. But generally speaking, I think the main areas are situations in particular with long-term stays in hospitals where there's a failure to provide interpreting services and it impacts patient treatment. I mean, we see real harm that comes to patients when they can't communicate their needs. And those are often the cases that result in significant settlements and that certainly has been one of the things that I've seen in a lot of the past settlements that DOJ has done.

Barry Whaley:

So Steve, you touched on something a minute ago, and I don't want to quite let it go yet because our focus throughout our conversation today has been on the patient who may be deaf or hard of hearing or have some other communication difficulty. But in fact, ADA protections for, or obligations I should say for effective communication might also apply to people who are deaf of hard of hearing accompanying the patient, right?

Steve Gordon:

That is correct. And in fact, the ADA effective communication requirements specifically apply to companions, and it includes people who are deaf, hard of hearing, blind have a speech disability. So it's very important for healthcare providers to understand that your responsibilities for communication are not just to the patient, it's also to the companions who are with the patient. And it's not just healthcare proxies. I've had people come in and say, "well, they weren't a healthcare proxy. We didn't have to communicate with them." That's actually not correct. Companions is broadly defined in the ADA regulations and it doesn't just include healthcare proxies.

Barry Whaley:

Good point. Yep. Thank you, Steve. I think the elephant in the room here that we haven't addressed yet, and I'm asking for your opinion now. We keep seeing these types of lawsuits. We keep seeing healthcare providers who continue to discriminate against people who are deaf or hard of hearing or have other communication difficulties. Why do you think that is?

Steve Gordon:

So I think there's a lot of magical thinking, and the magical thinking is that lip-reading is something that people who are deaf or hard of hearing can do. And there have been some scholarly studies done on this that show that the average accuracy rate is pretty low. I think it's somewhere between 10 and 15%. But it's magical thinking. It's magical thinking that handwritten notes is somehow a replacement. And I think lack of training, I know Kara touched on this a bit, but frontline people need to be trained on what they're required to do. And you may have the best policies in the world, but if you're not training your frontline staff, the people who are dealing with folks, the person who does the admission at 3:00 in the morning, then you're not going to get people complying with the ADA. So it's really important. And training is one way to deal with magical thinking.

Barry Whaley:

Yeah.

Kara Sweet:

I'll just add to that. In particular, in the ED setting, if a deaf patient comes in, they go to a front desk, they check in and they communicate with a handwritten note or their phone with a text on it and says, I'm deaf, or a CART to say that they're deaf. And then they're not immediately checked in, taken in, they're going to sit in the waiting room and then what happens, their name is called when it's their time, but they don't know their name is called because there's no one there to tell them. So I think sometimes people are busy, they don't think things through and they don't have proper procedures in place or aren't aware, like I said before, about what the policies and procedures should be for doing that. And so, one of the things we've been trying to do is to make sure there's notations in what's called an EMR, an electronic medical record that says if a patient comes in or their companion is with them that someone is deaf or in need of an auxiliary aid, that that's reflected there.

So it pops up as a flag, not necessarily a red flag, but a flag so that it is addressed and dealt with. But I will say that there are repeat offenders, so to speak, in terms of providers who we see the same complaints every couple of years after there's a settlement that's entered into. And it's the same thing. And I can't speak to why that is in particular. I can only say that the more training and the more policies that we implement, the better.

And also one other thing that I think is helpful is ensuring that there is a way to, for the patients and the companions to file complaints or grievances if there is treatment, because it is not easy to do that oftentimes. It's not easy often to request effective communication or an auxiliary aid when you're going into a hospital or provider for an appointment. And so there are a lot of small changes that can be made that I think could impact it. And that's something that we work on certainly as we work to look at what provisions are implemented in our settlement agreements and what changes can be made to policies [inaudible 00:48:45]

Steve Gordon:

And I think I would just add one thing on that the training needs to be sustained.

Barry Whaley:

Yes.

Steve Gordon:

Training is not a one and done kind of thing, and especially if you have staff turnover, but even if you don't have staff turnover, people need reminders because they may get the training and it may be 18 months or two years before they see the situation. So you need to have sustained training that's done on a regular basis as opposed to one and done.

Barry Whaley:

Sure. I think that would apply to onboarding too, wouldn't it, Steve? I mean new employees need that information as well.

Steve Gordon:

Absolutely. And as a part of our settlement agreements that I reach usually within the first 30 days or so, we require that personnel be trained in the ADA effective communication requirement.

Barry Whaley:

Yep. Well, Kara and Steve, I'm going to give you the last word. This has been a great conversation. What are some final thoughts you might have regarding this topic? And I'll let Kara go first and then Steve, you can bring it home.

Kara Sweet:

Oh, thank you, Barry. We really appreciate the opportunity to speak with your listeners today and talk about this important subject matter. I think that really getting the information out to the public and getting it out to the providers is the most important factor in making sure that these issues are addressed and dealt with knowledge, that there is an ADA, that there is required, that there are requirements to comply with the ADA. And what is effective communication is something that needs to be out there. Oftentimes I think

people don't think about it because they may not be deaf or they may think they don't know anyone deaf, but almost everyone certainly knows somebody who is hard of hearing and it can happen to them in the future. And I think really understanding that this impacts all of us is really a step one to understanding how to ensure effective communication going forward. And I'll turn it to Steve because I'm sure he has far greater thoughts on it than I do.

Steve Gordon:

Well, I want to actually just echo and amplify something that you said, Kara, which is that small things can make a really big difference. One of the small things that we require in our settlement agreements is that people develop a form. So when a person arrives, they can let people know and they're automatically asked, do you have a communication disability that requires some kind of auxiliary service? And it's being proactive like that can make a really big difference. And it's having structure in place, it's having a sign language interpreting service under contract, and probably more than one.

So when your staff calls for an interpreter and that service doesn't have someone available, they have a secondary place to go. And it is really important. It's also important to be vigilant in this area. So if you're a healthcare provider, it's very important that you carefully ensure that interpreters are ordered, that they're going to the right address, they have the right time. I've had cases before where literally they've ordered an interpreter, but for the wrong day or for the wrong address because they have multiple locations. So it's an area where you need to be careful, proactive, thoughtful, and you need to train people over multiple times. So those are the things that I'd like to emphasize, and I really appreciate the Southeast ADA Center putting on this podcast. I think it's a very important area.

Barry Whaley:

Thank you, Steve. Our guests today have been Steve Gordon and Kara Sweet from the US Department of Justice. Thank you again for joining us. Listeners, you can access all ADA Live episodes with archived audio, accessible transcripts and resources on our

website at adalive.org. You can listen to the SoundCloud ADA Live channel at soundcloud.com/adalive. You can download ADA Live to your mobile device, search in your podcast app for ADA Live. If you have questions about the Americans with Disabilities Act, you can use our online form anytime at adalive.org, or you can contact your regional ADA center at 1-800-949-4232. And those calls are free and they're confidential. ADA Live is a program of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University, and a collaboration with the Disability Inclusive Employment Policy, Rehabilitation Research and Training Center. Our producer is Celestia Ohrazda, with Cheri Hoffman, Mary Morder, Marsha Schwanke, Chase Coleman, and me, I'm Barry Whaley. Our music is from 4 Wheel City, the Movement 4 Improvement.

4 Wheel City:

They watching. They don't want us be part of the city, man. They put all these steps, man. All these curbs we can't get over. All these inaccessible stores. 4 Wheel City. They don't want us here. We'll survive and we're going to make our own place. Our own world. The 4 Wheel City-

[End of Transcript]

Disclaimer: The contents of this publication are developed under a grant from the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant #90DP0090-01-00). NIDILRR is a Center within the Administration for Community Living (ACL), Department of Health and Human Services (HHS). The contents of this publication do not necessarily represent the policy of NIDILRR, ACL, HHS, and you should not assume endorsement by the Federal Government.

Any links to non-Southeast ADA Center information are provided as a courtesy, and are neither intended to, nor do they constitute, an endorsement of the linked materials. The Southeast ADA Center provides these links as a courtesy and does not endorse, take responsibility, or exercise control of the organization nor vouch for the accuracy or accessibility of the contents of the link destination. The information is intended solely as informal guidance and is neither a determination of legal rights or responsibilities under the ADA, nor binding on any agency with enforcement responsibility under the ADA.

Contact for More Information or Assistance:
Southeast ADA Center
Email: ADAsoutheast@syr.edu
Phone: 404-541-9001