

Just What are Your Effective Communication Obligations

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We ask you to join us in creating a culture that reflects...

Access and Inclusion

and

Civility and Respect

...this week and in all aspects of our organization.

Session Objectives

- Familiarize participants with the effective communication requirements under Titles II, III, and the Rehabilitation Act of 1973.
- Discuss the importance of the interactive process, especially when it comes to effective communication.
- Learn effective communication requirements vary depending upon whether: an employment relationship exists; accessing a public entity is involved; or accessing a place of public accommodation is involved.
- Engage in an interactive discussion to address your concerns.
- Primary Focus: Legal Compliance and Not Deaf, deaf, HOH cultural sensitivity.
 - Do you know difference between Deaf, deaf, and HOH?

Common Barriers to Providing Access for Individuals with Disabilities

- Effective auxiliary aids and services for individuals with communication disabilities;
- Policies, procedures and practices; and
- Physical access to *and* within buildings for individuals with disabilities.

Applicable Laws

- Title I of the ADA, 42 U.S.C. §12111 et. ff.
 - Must have 15 or more employees.
- Title II of the ADA, 42 U.S.C. §12131 et. ff.
 - 28 C.F.R. §35.160
- Title III of the ADA, 42 U.S.C. §12181 et. ff. (Places of public accommodations).
 - 28 C.F.R. §36.303
- §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.
 - Applicable to any entity taking federal funds, which may or may not include funds under the coronavirus relief legislation.
- Title V (interference and retaliation).

Qualified Individual with a Disability Title II & Rehabilitation Act/§504

An individual is **qualified** if s/he meets the **essential eligibility requirements** of the program, benefit, or activity with or without:

- Reasonable modifications to rules, policies or practices;
- Auxiliary aids and services; **or**
- Removal of architectural, communications or transportation barriers.

28 C.F.R. §35.104

- Must be a person with a disability and qualified to be protected.

Qualified Individual with a Disability Title III

- No such thing as a qualified/otherwise qualified individual when it comes to title III.
- Fundamental alteration defense if used leads to a similar analysis.
- Don't forget about the Rehabilitation Act, which does have an otherwise qualified component.

What Is a Place of Public Accommodation? (Title III)

- Places of lodging
- Establishments serving food and drink
- Places of exhibition and entertainment
- Sales or rental establishments
- Service establishments
- Specified public transportation (terminals and depots)
- Public display or collection
- Places of recreation (parks, etc.)
- Places of education
- Social service centers
- Place of exercise or recreation (athletic in nature)

42 U.S.C. §12181(7)

Equally Effective Communication

- Communication with individuals with disabilities must be as effective as communications with those without disabilities.
 - Not restricted to deaf and hard of hearing individuals.
 - Effective communication obligation may very well extend beyond the interactive process.

Effective Communication Rehabilitation Act, Titles II-III

People with disabilities that affect communication are entitled to **auxiliary aids and services**, unless the result is a **fundamental alteration or undue burden**.

Is the provision of auxiliary aids and services restricted only to those with disabilities affecting communication?

28 C.F.R. 35.160(b)(1)

Auxiliary Aids and Services All Titles

- Auxiliary aids and services are used to achieve effective communication.
- Fees may not be charged for auxiliary aids and services.

Examples of Auxiliary Aids or Services

- Assistive listening systems
- Qualified ASL or other types of interpreters for persons with hearing loss
- Communication access real-time translation/ Real-time transcription services
 - ASR are becoming quite good, though lag can be an issue.
- Streaming on cell phone
- TTY's
- Accessible formats such as large print, Braille, electronic document, or audio tapes
- Qualified readers

Auxiliary Aids and Services/Title II-III

- Title III entity gets to decide (28 C.F.R. §36.303)
 - Interactive process with the individual is strongly encouraged;
 - Don't demand excessive documentation
- Title II: primary consideration rule (28 C.F.R. §35.160)

Auxiliary Aids and Services Case Law

- **Silva v. Baptist Health S. Fla., Inc.**, 856 F.3d 824(11th Cir. 2017), holds that if information is provided in a way that would hinder the Deaf individual from understanding the information necessary to make an informed consent, then that method is not effective communication per the Rehabilitation Act.
 - Case involved the medical context, but arguably applicable to anytime information is complex.
 - ADA and Rehabilitation Act are interpreted in the same way.

Reasonable Modifications Rehabilitation Act/Title II

- Just what is a reasonable modification?
 - Means same thing as reasonable accommodations under title I.
 - Anything that does not constitute an undue burden or a fundamental alteration.
 - Undue burden: think financial.
 - Undue burden goes to entire operations of the public entity and will be very difficult to show.
 - Undue burden (Title II) and undue hardship (Title I) mean same thing.

Reasonable Modifications Rehabilitation Act/Title II (Continued)

- Fundamental alteration: Will the requested accommodation fundamentally alter the nature of the service, program, or activity of the public entity.
 - Will need to know the essential eligibility requirements of the particular program, service, or activity at issue. (See qualified individual slide).
 - A constant issue in disability services.
- Think of reasonable modifications as anything getting the person with a disability to the same starting line as a person without a disability.

Reasonable Modifications/ Title III

- Policy, practices, and procedures must be modified absent a fundamental alteration.
- Auxiliary aids and services must be provided absent an undue burden or a fundamental alteration.

Interactive Process

- A title I construct.
- Once an employer is aware of an accommodation request, employer must engage in the interactive process.
 - Magic words not required.
 - Employee only has to provide the employer with enough information so that the employer can be fairly said to know about the disability and the desire for an accommodation. *EEOC v. Crain Automotive Holdings LLC* (E.D. AR, 4/11/19).
 - FMLA notice by itself may or may not be sufficient.

Interactive Process

- Liability is on whoever breaks down interactive process.
 - But rule may be different for effective communication.
- In title I matters, the employer has the right to obtain a reasonable amount of documentation justifying the accommodation request.
- Interactive process is a title I concept but the ADA scheme, case law, common sense, and preventive law **demand** applicability in title II, III and Rehabilitation Act contexts as well.
 - Many cases have applied the interactive process to title II with respect to educational entities (Eg., Gueckenberger v. BU).

Do's and Do Nots of Interactive Process

- Don't: Fail to act on a reasonable accommodation request unless it is explicit.
 - Magic words are not required.
- Don't: Once getting a reasonable accommodation request, immediately call a vendor or other third party.
- Don't: Make clear to the person with the disability that you don't want to accommodate but you have to.

Do's and Do Nots of Interactive Process (Continued)

- Don't: Make clear that the process will be adversarial and not collaborative.
- Don't: Ignore suggestions from the person with a disability as to what works and/or make it clear you don't care what works.
- Don't: Assume that you know more about the ADA than the person making the request for a reasonable modification/accommodation (Be prepared to defend no or take it or leave it answers).
- Don't pity or feel sorry.
- Do: Value the person with a disability as an individual.
- Do: Make clear and demonstrate that you are interested in a collaborative and not an adversarial process.

Do's and Do Nots of Interactive Process (Continued)

- Do: If you get stuck as to what might work, call the Job Accommodation Network.
- Do empathize and listen.
- Do: Involve the person with a disability in the process immediately and keep him or her posted.
- Do: Remember you will have to make the accommodation unless you can show an undue hardship/burden.
- Do: Know what a reasonable accommodation is.

Case Study: ADA II-III/RA

“I Need an ASL Interpreter.”

- Culturally deaf individual requests an ASL interpreter for a service.
 - Silva (Rehabilitation Act)
 - Hinders communication.
 - Title II: primary consideration.
 - While title III entity gets to decide, presumably after the interactive process, communication must still be effective.

Consequences for Not Providing Effective Communication, RA/Title II

- Attorney fees.
- Injunctive relief.
- To get damages under title II, you must show deliberate indifference.
 - In the 11th Circuit, showing deliberate indifference means showing: a failure to provide the plaintiff with appropriate auxiliary aids necessary to ensure effective communication; a person involved in the failure had the authority to order that auxiliary aids be provided; and that person was deliberately indifferent to the failure to provide the aid. **Liese v. Indian River County Hospital District**, 12 701 F.3d 334 (11th Cir. 2013).
 - Liese is the leading case on this issue.

Consequences Title III for lack of Effective Communication

- Injunctive relief
- Attorney fees
- Loss of contract(s) with a governmental entity.
- If DOJ gets involved, civil penalties and they can seek damages for the aggrieved party.

Consequences Title I for lack of Effective Communication

- Remedies tied into title VII of the Civil Rights Act and includes attorney fees.
- Title I does not have an effective communication rule, but employers do have to make reasonable accommodations to qualified individuals with disabilities.
- Don't forget about the Rehabilitation Act if federal funds are involved.

Videoconferencing platforms: CART R.I.P.?



Vide Conferencing Platforms: Zoom

- Zoom (created 2011)
 - Zoom premium versions have excellent automatic speech recognition (ASR), but absent that Zoom is very difficult for deaf and hard of hearing access. “Live Transcript” (AI captioning, i.e. ASR), available on Pro, Business, Education, and Enterprise tiers. Deaf may prefer Zoom due to its resolution.
 - Must be enabled by the host in settings and on the screen. Settings is a one time situation. However, a button has to be clicked on the screen by the host every time.
 - Using CART means integrating it into the platform and there will probably be a lag that varies in severity, especially when not “pushed,” through Zoom (I’ve seen lag times of anywhere from 10-46 seconds).
 - Zoom ASR highly accurate and no lag time.
 - ASR third party apps also need to be integrated into platform, and you may see a lag of 22-46 seconds between the spoken word and the captioning.
 - Captioning only available if host is a type of paid Zoom user (see above). Lawsuits have been filed. By fall 2021, all users to have access to ASR.
 - Allows for recording.
 - Font size of ASR is now adjustable.
 - Will not work in breakout rooms.

Vide Conferencing Platforms: Zoom

- Has dark mode and high contrast mode.
- Keyboard shortcuts are intuitive (two key).
- Compatible with jaws, voiceover, NVDA.
- Zoom remote control feature allows for control of the screen share by the host.
- Transcript provided at the end of the meeting.
- Can change size and color of font in platform.
- Has spotlighting feature.
- Web-based app has different features than the desktop features.

Videoconferencing Platforms: Google Meets

- Must use paid version to have access to dial in access but ASR access is free.
- ASR is excellent with a high degree of accuracy and no lag time. Visual of ASR easy on eyes.
- Can adjust font size for the captioning.
- Allows for recording.
- Once recording is made, need to use a third-party app to generate a transcript.
- It may be possible (I haven't tried it yet), to generate a transcript simultaneously with the recording with a Google Chrome extension.
- Some companies have security concerns with Google Meets.

Videoconferencing Platforms: Microsoft Teams (2006)

- Do not have to have paid Office 365 subscription to have access to ASR.
- Live transcript appears on right.
- The ASR has a movie credit feel, which some may find very annoying, but the live transcript does not have that feel.
- You can turn off the ASR but keep the live transcript and vice a versa.
- The ASR is bigger in size than the live transcript option.
- Very easy to read (white on black).
- Extremely accurate.
- No lag time.
- User turns it on by using the three dots.
- Host needs to enable External Access and Guest Access features to help ensure captioning is available to the user.

Vide Conferencing Platforms: Microsoft Teams

- Font size of captioning cannot be changed.
- Allows for recording.
- Multiple access just gets one signal. Can be a real problem with Zoom.
- Had a dark and high contrast modes.
- Keyboard shortcuts can be difficult for some persons with disability to manage and are not intuitive (three key).
- Platform not intuitive to a keyboard user.
- Compatible with Jaws and NVDA.
- No option to add a caption is to meetings or calls.
- Indicates to a screen reader whether the camera is on or not.
- Does not indicate when people enter or leave the room.

Resources – Related Blog Posts

The following posts are from Understanding the ADA:

- [Distilling Essential Functions of the Job to its Basics](#)
- [Characterizing Essential Functions of the Job Is a Critical Question](#)
- [Does an ASL Interpreter Mean that Person is Doing the Essential Functions of Another's Job](#)
- [Failure to Accommodate Cases and Workers Compensation Exclusivity](#)
- [Effective Communications and Deliberate Indifference Revisited](#)
- [Effective Communication Guidance: Why can't more guidances be like this one?](#)

Resources – Related Blog Posts (Continued)

- [Why all colleges, universities, and graduate programs need to do the two-step: essential eligibility requirements and direct threat](#)
- [Effective Communication Obligations Reach Beyond any Interactive Process](#)
- [Do's and Don'ts of the Interactive Process](#)
- [Deaf Rights Game Changer: Silva v. Baptist Health South Florida Inc.](#)
- [Deaf Rights Game Changer Blowback](#)

Other Resources

- [Job Accommodation Network \(JAN\): askjan.org](http://askjan.org)
- [OCR: Auxiliary Aids and Services for Postsecondary Students with Disabilities](#)
- [OCR: Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools \(PDF\)](#)
- My book: [Understanding the ADA, fourth edition](#)

Session Evaluation

- Your feedback helps shape future programming.
- Thank you for attending!