

Ensuring Effective Communication: Obligations for Title I and Title II Entities



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773-301-3009

wgoren@williamgoren.com
www.williamgoren.com/blog

Session Objectives

- Familiarize participants with the effective communication requirements under Title I and Title II.
- 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.

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.

Qualified/Otherwise Qualified Title I (Employment)

- A qualified person under title I of the ADA is a person satisfying the requisite skill, experience, and education requirements of the position and can, with or without reasonable accommodation, perform the essential functions of the job. 29 C.F.R. §1630.2(m).
 - Up to plaintiff to show he/she has requisite skill, experience, and education requirements of position. *Kilcrease v. Domenico Transportation Company*, 828 F.3d 1214 (10th Cir. 2016).
 - *See also* 29 C.F.R. 1630.2(m)

Qualified Individual with a Disability

Title II

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

28 C.F.R. §35.104

Equally Effective Communication under Title II of the ADA

- 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

Title II

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

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
- Streaming on cell phone
- Accessible formats such as large print, Braille, electronic document, or audio tapes
- Qualified readers

Auxiliary Aids and Services

DOJ Title II but Not Title III regulations mandate that Primary consideration be given to an individual's choice of auxiliary aid or service. 28 C.F.R. 35.160(b)(2);

- Interactive process with the individual is strongly encouraged;
- Don't demand excessive documentation.
- If can't go with the primary consideration, better have a darn good reason (fundamental alteration/undue burden)

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 law has informed consent requirements as well.
 - ADA and Rehabilitation Act are interpreted in the same way.
- Not all jurisdictions following Silva. Eg. Seventh Circuit.

Reasonable Accommodations Title I

- **Just what is a reasonable accommodation?**
 - Anything that does not constitute an undue hardship.
 - Undue hardship can either be logistical or financial.
 - Think Title II and Title III concept of fundamental alteration for logistical undue hardship.
 - Financial undue hardship goes to entire operations of employer and will be very difficult to show.
 - Think of reasonable accommodations as anything that gets the person with a disability to the same starting line as a person without a disability.

Reasonable Modifications 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

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).
- Think of reasonable modifications as anything getting the person with a disability to the same starting line as a person without a disability.

Interactive Process

- 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).

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 contexts as well.

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 pity or feel sorry.
- Do: Value the person with a disability as an individual.
- Do: Make clear 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. (See following slides).
- Do: Know what a reasonable accommodation is.

Case Study: Title II

“I Need an ASL Interpreter.”

- Culturally deaf individual needs to meet with his or her case manager for an appointment and requests an ASL interpreter.
 - As mentioned previously, Title II final implementing regulations demand that primary consideration be given to the person's preferred mode of communications. Title II entity would have to show an undue burden or a fundamental alteration to deny the request.

Case study: Title II

Expressive Communication

- Person can't communicate expressively without technological or in person assistance.
 - Typical accommodation would be allowing that individual to be accompanied by the person he or she brings along who has been trained and is capable of helping that individual use whatever technology or systems he or she uses for communicating and for helping that individual with other disability related support needs.
 - Access to an iPad with their preferred communications/speech generating app.
 - Interactive process critical.

Case study Title I: ASL Interpreter/CART for Meetings

- Utilize normal HR processes for addressing reasonable accommodation requests.
- Interactive process is critical.
- Key is getting the employee to the same starting line.
- If stuck, call JAN.
- Silva v. Baptist Health South, Florida (11th Cir. 2018).

Case Study: Website of public entity not accessible

- Title II of ADA applies to everything a public entity does.
- A website might not be accessible to a person with a disability due to: a lack of captioning for audio; incompatibility with voice dictation technology; or incompatibility with screen reading technology.
 - WCAG 2.0 et. ff. as a guide.
 - The legal standard is meaningful accessibility.

Consequences for Not Providing Effective Communication

- Compensatory damages but not punitive damages. *Barnes v. Gorman*, 536 U.S. 181 (2002).
- Attorney Fees

Consequences for Not Providing Effective Communication

- 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 F.3d 334 (11th Cir. 2013).

Questions

- Do you have an ADA Coordinator and an ADA grievance procedure?
 - Required for title II entities of 50 or more employees.
 - Required per Rehabilitation Act regulations for any entity with 15 or more employees taking federal funds.
- Have you done a self-evaluation and developed a transition plan (Should have been completed by 1992).
 - Importance of self-evaluation plans and transition plans in litigation.

Considerations

- Evaluate cases and circumstances on an individualized, case-by-case basis.
- Expect the unexpected. Over time you might encounter people with a variety of disabilities who require innovative accommodations.
- Regular Training.
- Keep in mind, the Title II and III effective communication rules apply to any disability for which effective communication is problematic without auxiliary aids or services.

For Administrative Personnel

- Familiarize yourself with the facility's accessibility features and accommodation protocol.
- Know your §504/ADA coordinator.
- Have an ADA grievance procedure.
- Respond courteously and respectfully to all accommodation requests and be sure to promptly direct the request to appropriate personnel who can assist.

Thank you!

Comments and/or Questions?

Resources

- Understanding the ADA blog:
<http://www.williamgoren.com/blog/>
- <https://www.williamgoren.com/blog/2019/08/05/effective-communication-obligations-reach-beyond-any-interactive-process/>
- <https://www.williamgoren.com/blog/2019/04/04/dos-and-donts-interactive-process/>
- <https://www.williamgoren.com/blog/2018/11/30/deaf-rights-silva-seventh-circuit-effective-communication-hospital/>
- <https://www.williamgoren.com/blog/2018/11/08/deaf-rights-effective-communication-silva-v-baptist-health-south-florida-inc/>

Resources

- <https://www.williamgoren.com/blog/2018/07/05/essential-functions-of-the-job-basics/>
- <https://www.williamgoren.com/blog/2016/03/21/categorizing-characterizing-essential-functions-of-the-job-critical-question/>
- <https://www.williamgoren.com/blog/2016/01/26/asl-interpreter-essential-functions-reasonable-accommodations-direct-threat/>

Resources

- Job Accommodation Network (JAN):
<https://askjan.org/>

- My book: Understanding the ADA, fourth edition:

<https://www.americanbar.org/products/inv/book/214495/>