

# Deaf Patients: US Appeals Court Expands Patients' Rights, Hospitals' Exposure.

The US Court of Appeals for the Eleventh Circuit (Florida) has thrown out two lower Federal court rulings we reported in March and June 2016.

See *Deaf Patients, No Live ASL Interpreter: Court Turns Down Patients' Discrimination Case*. Legal Eagle Eye Newsletter for the Nursing Profession (24)3 Mar. '16 p. 2.; *Deaf Patients: Court Turns Down Disability Discrimination Suit*. Legal Eagle Eye Newsletter for the Nursing Profession (24)6 Jun. '16 p.2.

## Patients' Rights

### Hospitals' Exposures

The Court of Appeals lowered the bar for a deaf patient or visitor to sue a hospital for compensation for discrimination in the past or for a court injunction to alter hospital practices to prevent discrimination in the future.

### Nurses' Involvement In the Process

The Court of Appeals also answered the question squarely in the affirmative whether the decisions and actions and inaction of nursing supervisors and staff nurses can lead to exposure for the hospital for disability discrimination.

The lower Federal District Court had restricted responsibility only to hospital management for decisions involving auxiliary aids to communication, but that restriction is now out the window.

### Nurses Can Be Hospital Officials

Under Federal antidiscrimination law, a hospital can be liable to pay damages for failing to provide necessary auxiliary aids to a deaf patient or visitor only if the hospital has been deliberately indifferent to the patient's or visitor's needs.

Further, deliberate indifference must have been committed by someone fitting the definition of a hospital official.

A hospital official in this context is someone in a position of authority who decides whether and what sort of auxiliary aids to communication will or will not be provided in response to a particular patient's or visitor's request.

The lower Federal District Court deemed only the hospital's risk manager as having that authority, since any request by a nurse or physician had to be routed through the risk manager for approval.

***A deaf patient or visitor can sue a healthcare facility for disability discrimination only if the facility has been deliberately indifferent to the deaf patient's or visitor's need for an auxiliary aid to effective communication.***

***Deliberate indifference to a deaf patient's or visitor's communication needs must be committed by a hospital official for the hospital to be liable in a lawsuit.***

***The definition of a hospital official in this context is not restricted to upper management at the hospital.***

***Bedside nurses, nursing supervisors and physicians can be considered hospital officials who can commit deliberate indifference to a disabled patient's or visitor's needs.***

***If a nursing supervisor or a nurse is the person who, in effect, decides on behalf of the hospital whether or not or how a deaf patient's or visitor's communication needs will or will not be met, the nursing supervisor's or nurse's actions or failure to act can lead to liability for the hospital.***

***The nursing supervisors in these cases ignored some of the patients' needs.***

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

April 27, 2017

May 8, 2017

Since no request for auxiliary aids to communication was actually forwarded for approval by a hospital official, the risk manager, the lower Federal District Court dismissed the patients' cases.

The Court of Appeals ruled, however, that nursing supervisors, staff nurses and physicians can fall under the technical legal definition of a hospital official in this context.

The Court of Appeals believed their acts and failures to act amounted to deliberate indifference to these deaf patients' and visitors' communication needs.

Thus their decisions and actions and inactions relative to patients' and visitors' requests for auxiliary aids to communication can be the bases for lawsuits, if they rise to the level of deliberate indifference, regardless of higher management's involvement or lack of involvement.

The nursing supervisors and nurses in these cases knew the Video Remote Interpreting equipment was not working right. They did nothing to get it working right or to obtain live American Sign Language (ASL) interpreters.

With at least one other patient the nurses flat-out did nothing at all in response to a deaf patient's request for an ASL interpreter so that her questions could be answered before surgery.

### Definition of Effective Communication

Federal antidiscrimination laws as they apply to deaf individuals receiving healthcare do not focus on the quality of medical care or the ultimate treatment outcome.

Instead, the laws place emphasis on an equal opportunity for disabled deaf individuals to participate in obtaining and utilizing healthcare services.

Opportunity and participation for deaf individuals must be afforded on an equal basis as that afforded to hearing individuals.

Equality of opportunity and participation is to be provided through appropriate auxiliary aids when such aids are necessary to provide the deaf individual an equal opportunity to participate in or benefit from the services that are afforded others.

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# Deaf Patients: US Appeals Court Expands Patients' Rights (Continued).

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The Court of Appeals ruled there is no question that the exchange of information between healthcare provider and patient is an essential element of healthcare services.

Thus, regardless of whether the patient ultimately gets a correct diagnosis or acceptable treatment, the patient is denied the all-important equal opportunity to participate in healthcare services any time the patient cannot communicate medically relevant information effectively with the facility's care-giving personnel.

It is not relevant whether the deaf patient got the same care and treatment that would have been rendered if the patient was not deaf.

It is relevant whether the deaf patient was afforded auxiliary aids sufficient to ensure a level of communication about medically relevant information substantially equal to that afforded to patients not affected with a disability.

Federal antidiscrimination laws focus on the quality of communication itself, not on the downstream consequences, if any, of communication difficulties.

Proof of a specific consequence actually stemming from a specific communication barrier could be very difficult to prove in any particular deaf patient's case.

**A deaf patient or family member can sue for a court order to change a health-care facility's discriminatory practices, if the deaf patient or family member can demonstrate:**

**That they will likely return to the same facility in the future for treatment or to accompany a family member; and**

**They likely will experience discrimination as a result of the facility's practices if a court has not intervened to change things.**

**These deaf patients or family members had ongoing health issues, lived conveniently near this hospital and their doctors and records were at the hospital.**

**These deaf patients and family members had experienced discrimination in the past.**

## Court Order to Change Hospital's Discriminatory Practices

The Court of Appeals believed it should be easier for a deaf individual who has experienced discrimination to get a court order against future discrimination.

Federal law gives a disabled individual the right to sue for a court order for a specific healthcare facility to alter its discriminatory practices.

However that right exists only if the disabled patient or family member is likely to return to that same healthcare facility for future treatment and is likely to experience further discrimination as in the past.

These deaf patients had often been treated at the hospital and their deaf family members had accompanied them.

Their customary physician providers practiced at the hospital and their medical charts were located there. The particular hospital was conveniently located near the patients' homes and other facilities were not so convenient.

The patients' medical histories made it more likely than not that they would require episodic visits to the hospital on an ongoing basis for the indefinite future.

They had been discriminated against in the past, which made it likely that would happen again if a court did not intervene.

The Court of Appeals ruled the Federal District Court had jurisdiction on these patients' and family members' behalf to order the hospital to change. **Silva v. Baptist**, \_\_ F. 3d \_\_, 2017 WL 1830158 (11th Cir., May 8, 2017); **Sunderland v. Bethesda**, \_\_ Fed. Appx. \_\_, 2017 WL 1505306 (11th Cir., April 27, 2017).

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