
Section 4

Auxiliary Aids and Services: Common Challenges

Irene Bowen

Overview

Understanding how to ensure effective communication for deaf or hard of hearing students can be challenging if practitioners are not knowledgeable in this specialized area. As well, even practitioners with specialized experience in working with students who are deaf or hard of hearing may struggle with some challenging situations, such as complaints about interpreting services. It is important to develop and apply a consistent process when students feel their auxiliary aid or service is not effective. This section outlines some of the more common areas of concern for many practitioners and provides examples and tips for an improved process.

Qualified interpreters

To provide effective communication, an interpreter must be “qualified” to provide services in a particular context for the particular student.¹ The Department of Justice (DOJ) has defined a “qualified interpreter” as one that is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.² For example, an interpreter would need familiarity with legal terminology for a paralegal class.³ Although the ADA does not require that sign language interpreters be certified, some states may require that they be certified and/or hold a license to work as an interpreter in the state.

It is helpful to have a systematic process in place for obtaining, recording, and responding to student feedback on interpreter quality.^{4,5} In determining whether communication is effective, the institution should:

- use objective and reliable measures for evaluating the quality of an individual’s interpreting and his or her understanding of ethical obligations,⁶ and
- take into account the student’s subjective experience.⁷

Real-life example: Santa Ana College⁸

Shortly before the decision in the Argenyi case (discussed in From Law to Practice and Auxiliary Aids and Services: The Basics), the Office for Civil Rights (OCR) of the Department of Education investigated a complaint by a student that she was not provided effective communication for a biology class. The student, who considered American Sign Language her primary language, had complained to Santa Ana College that one of two interpreters used a combination of Pidgin Sign English and Signed Exact English, finger-spelled many words, made up her own signs, and frequently requested assistance from the second interpreter – all resulting in an incomplete and less detailed rendition of the teacher’s lecture. But the college determined that the communication had been

effective, due to the student's passing grade and the opinion of the senior interpreter who, based on observation of the interpreters in the class, said that the team as a whole was conveying the message accurately and completely.

In its letter of finding, OCR noted that often an interpreter coordinator will be qualified to determine the effectiveness of a particular interpreter's services, and that Santa Ana had experienced budget cuts.⁹ However, OCR found that:

- The college violated the ADA and Section 504 by failing (1) to give primary consideration to the student's request and (2) to take into adequate consideration the student's subjective experience with the interpreter, especially in light of the significance of the message.
- Prevailing law¹⁰ grants deference to the student, not the institution, as to the adequacy of auxiliary aids.
- The student is in the best position to determine what type will be effective.

OCR closed its investigation when the college entered a resolution agreement to develop a plan to change an interpreter or provide an independent evaluation of effective communication if a student complains.

Substituting auxiliary aids and services

A post-secondary institution can substitute another auxiliary aid, but only if it is effective. As explained in *Auxiliary Services: The Basics*, there are two exceptions for undue burdens or a fundamental alteration.

Effectiveness

If a post-secondary institution seeks to provide an auxiliary aid or service that is different from the type requested, by a person who is deaf or hard of hearing, that substitute aid or service must be effective.

Cost and difficulty

A post-secondary institution may seek to substitute an auxiliary aid or service because of cost or difficulty. But it can only claim these exceptions if the difficulties rise to the level of an undue burden. Institutions are almost never successful in claiming these exceptions because of the high legal threshold for them and the inherent flexibility of the overall requirement for effective communication. The institution must show that the service that would otherwise be provided would impose an undue financial or administrative burden ("significant difficulty or expense")¹¹ or cause a fundamental alteration to a college's program.¹² It must consider all the resources available to pay for the accommodation (not just the resources of the disability services office), for example,¹³ and in some cases the entire budget of the institution. In addition, if the institution is a public one, the decision that a particular aid or service would result in an undue burden must be made by a high level official, no lower than a department head, and must include a written statement of the reasons for reaching that conclusion. The college must still provide "effective" communication up to the point of the burden. In addition, covered entities are not required to provide any particular aid or service in those rare circumstances where it would fundamentally alter the nature of the goods or services they provide to

the public. While there is very little case law on undue burdens,¹⁴ OCR has clearly indicated that it will not respond favorably to these claims.¹⁵

One example of a substitution, which may or may not be effective in a given setting or context, is video remote interpreting (VRI). Because of expense, short notice, or a local shortage of interpreters, some institutions have recently turned to VRI rather than on-site interpreters. Through VRI, a sign language interpreter at another location appears via video conferencing technology on a computer screen or videophone. VRI is effective only when properly configured and supported by a high-speed internet connection, and it must meet specific DOJ standards:

- Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
- A sharply delineated image that is large enough to display the interpreter’s face, arms, hands, and fingers, and the face, arms, hands, and fingers of the person using sign language, regardless of his or her body position;
- A clear, audible transmission of voices; and
- Adequate staff training to ensure quick set-up and proper operation.¹⁶

Even then, VRI may not be useful in highly interactive courses where there are multiple speakers and group discussions.

Real-life example: Bakersfield College¹⁷

One college recently responded to a shortage of interpreters by videotaping class sessions without interpreters, but still mandating that students with hearing loss attend class and set up appointments to view the videotapes with an interpreter at a later time. OCR found that although the college had taken well-intended and creative steps to mitigate the impact of the shortage, it had not provided other effective means of communication. Under the substitute approach, students with hearing loss were not able to participate in classroom activities and were under an additional burden because they had to sit through each class twice.¹⁸ OCR required the institution to take effective steps to acquire additional resources.¹⁹

Real-life example: Thomas M. Cooley Law School²⁰

In another investigation (discussed in greater detail in “Beyond the Classroom”), OCR found that a law school and the Student Bar Association (SBA) denied a student who was hard of hearing an equal opportunity to participate in a tutorial program sponsored by the SBA, by failing to provide services that were as effective as those provided to other students. The student had requested Communication Access Real-time Translation (CART) for the free, highly-interactive tutorials, which covered the law school’s required courses. The SBA provided the services for a few weeks but then, based on the expense of CART, discontinued them. It offered other alternatives such as Dragon Naturally Speaking software at the student’s expense or a volunteer interpreter. OCR found that these alternatives did not allow the student (who did not use sign language) access to the tutorials.

Charging fees for students who repeatedly skip class

Imposing fees on a student for missing classes that are interpreted may violate the ban on surcharges for necessary accommodations. But in one letter of finding, OCR said that a university's particular no-show policy did not violate the ADA or Section 504. The policy allowed for imposition of fees under carefully limited circumstances to which the student agreed in advance, provided for emergency situations, and permitted waivers with explanation. Although other post-secondary institutions could use this decision as guidance in developing their own policies, they should do so with caution, making sure that the fees do not result in a surcharge and are not used as a source of revenue. The letter is discussed below (Utah Valley University).

Real-life example: Utah Valley University²¹

In a detailed letter responding to a complaint about fees imposed by a university for no-shows for interpreted classes, OCR found no violation of the ADA and Section 504 with respect to the specific policy.

A student complained to OCR that Utah Valley University penalized him when he missed classes without providing two hours' notice so that the university could cancel his sign language interpreters. The university's published "no-show" procedure imposed charges for excessive absences for interpreted classes.

OCR based its analysis on the principle that the university cannot convert the right to necessary auxiliary aids into a revocable privilege or a service for which it charges a fee. OCR emphasized that surcharges for services required by Section 504 and the ADA are prohibited but acknowledged that delivering interpreters on a cost-effective basis requires advance planning and the cooperation of students. It explained that the policy

- was agreed to by students prior to the assignment of interpreters;
- counted a "no-show" when a student failed to provide at least two hours' notice of an absence, which could be given in six possible ways;
- imposed charges for subsequent no-shows after three no-shows in one course;
- allowed for emergencies; and
- allowed for waiver of charges if the students later cured or explained the no-shows.

Essentially, OCR found that the policy as implemented was acceptable, because the services for which the fee was imposed were not serving any purpose; in other words (not OCR's), they were not "necessary" auxiliary aids because they were not being used. OCR found no indication that the policy violated Section 504 or the ADA.

Practitioner's pointers

Jamie Axelrod and Lauren Kinast

Responding to complaints about interpreter quality

A thorough new student meeting is an important first step in managing possible complaints about interpreting services. It is important to recognize that interpreters are not a not a one-size-fits-

all accommodation. To gain an understanding of what type of interpreting will result in effective communication, coordinators should discuss with the student their language background and preferences. This is also the time to share with the student the process for submitting feedback or concerns about their interpreting services. Some important steps in resolving concerns are:

- Meet with the student to discuss their concerns.
- For simple issues that do not involve communication specifically, notify the interpreter directly of the concern and offer some easy solutions. It can be small changes, such as attire or seating arrangements, which are easy to remedy.
- For more significant issues which involve effective communication, work with the student to develop specific feedback for the interpreter. Encourage the student to be specific and provide examples.
- Encourage the student to address what they can directly with the interpreter. If they don't feel comfortable doing so, discuss the concerns with the interpreter. Occasionally, additional preparation time with class materials or meetings to discuss sign choice between the student and interpreter may help.
- Follow up with the student quickly to see if their initial concerns have been rectified. Check to see if things have improved by the next one or two class sessions. If the student continues to complain about the quality and can give specific examples about how their communication is impacted, a replacement may be necessary.
- Consider conducting a classroom observation to determine if there is a solution to the ongoing problem. For coordinators who do not have the relevant training and experience to conduct an evaluation, seek external evaluators, as appropriate.
- Consider the importance of the student's subjective experience. Defer to the student's assessment of their communication needs and the quality of the accommodation. There are times when a change of interpreter is necessary.

Will another less expensive accommodation suffice?

If a less expensive alternative exists that will meet a student's communication needs, be sure to communicate with the student and confirm whether s/he agrees it will be effective for the given course or situation. The new student appointment process should include questions about what forms of communication are effective for the individual student. The same method of communication will not necessarily be effective for all deaf or hard of hearing students. Focus on the type of service that is most effective in providing communication access for the student. Expense should not be taken into consideration when determining accommodations.

Recruiting qualified interpreters

Generally interpreters with several years of professional interpreting experience, college-level interpreting experience, and more than minimum level credentials are needed to provide quality interpreting services in the higher education arena.

- Institutions can develop creative strategies for recruiting qualified personnel. Offering competitive pay rates in their geographic areas, covering travel costs, offering paid preparation

time, and providing funds for professional development are a few examples to help recruit quality interpreters.

- If working with outside agencies, institutions should be sure that the business contract outlines credentials and qualifications required of service providers to meet the institution's needs.

Endnotes

¹ See Hayden v. Redwoods Community College District, No. 05-01785, 2007 WL 61886 (N.D. Cal. Jan. 8, 2007), 33 Nat'l Disability L. Rep. ¶ 250 (inadequate interpreter claim), to be found at http://www.galvin-group.com/media/54528/hayden_vs_college_of_redwoods_deaf_meaningful_access.pdf.

² 28 C.F.R. 36.104, 28 C.F.R. 35.104, definitions, "qualified interpreter."

³ Letter to Highline Community College, No. 10052007 (OCR 5/17/2005).

⁴ Of course it is important to seek feedback and implement monitoring for Communication Access Real-time Translation (CART) and other accommodations as well.

⁵ For an example of a response to complaints about quality that OCR found appropriate, see Letter to Idaho State University, No. 10-03-2030 (OCR, Western Division, Seattle (Idaho)) 08/29/2003). Also see Letter to Yuba Community College, No. 09-02-2173 (OCR, Western Division, San Francisco (California) 05/30/2003), Letter to Atlanta Christian College, No. 04-09-2100 (OCR 05/26/2011).

⁶ See Yuba letter, endnote 5, above.

⁷ See letter to Santa Ana College, discussed in Common Questions and Challenges.

⁸ Santa Ana College, letter of finding of violation by OCR and resolution agreement, No. 09-12-2114 (12/20/2012)

⁹ The letter noted that severe funding cuts have often fallen in a disproportionate way on services for students with disabilities but that, because the obligation to comply with the laws falls on the college as a whole, additional expenses to achieve compliance may have to come out of a college's non-categorical budget.

¹⁰ Wong v. Regents of Univ. of Cal., 192 F.3d 807 (9th Cir. 1999), found at <https://law.resource.org/pub/us/case/reporter/F3/192/192.F3d.807.98-15757.html>.

¹¹ See the definition of and factors related to "undue burden," set out in the DOJ regulation for title III, 28 C.F.R. 36.104, Definitions, "Undue burden." See Hayden v. Redwoods Community College District, endnote 1.

- ¹² A fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, or accommodations offered. DOJ's ADA Title III Technical Assistance Manual, Supplement, 3-4.3600, found at <http://www.ada.gov/taman3.html>.
- ¹³ See Letter to Dr. T. Benjamin Massey, President, University of Maryland, University College, College Park, 1 NDLR 36 (OCR LOF), MD 20742-1668 Office for Civil Rights, Region III 03-89-2039 May 17, 1990: "Because a recipient's average cost of accommodating each of its handicapped student enrollees is not likely to be unreasonably large, compliance with 34 C.F.R. Section 104.44(d) does not impose undue burdens on recipients, especially when one takes into account all resources available to recipients, including their capacity to pass on costs of operation to the larger population they serve through tuition charges or other means." See also the Hayden case, endnote 1, which went to trial on undue administrative burden issues and whether spending 50% of the disability services office's annual budget for personal interpreters for eight deaf students would be an undue financial hardship.
- ¹⁴ The primary case law discussion of the cost of accommodations in higher education is in U.S. v. Board of Trustees of the University of Alabama, 908 F. 2d 740 (11th Cir. 1990) (expenditure of \$15,000 for accessible vehicle not likely to cause undue financial burden in light of annual transportation budget of \$1.2 million).
- ¹⁵ See OCR letter to New College of California, 4 NDLR 264 (July 1993), "Financial considerations do not relieve [a college] ... from its obligations under Section 504." But see OCR's statement about adaptive technology: "The larger and more financially endowed the entity is, the higher the expectation for the availability of adaptive technology." California State University, 11 NDLR 71 (April 1997).
- ¹⁶ 28 C.F.R. 35.160(d) and 36.303(f) (DOJ regulations).
- ¹⁷ Bakersfield College, letter of finding of violation by OCR, No. 09-10-2048 (OCR 11/14/2011)
- ¹⁸ Letter to Bakersfield College, No. 09-10-2048 (OCR 11/14/2011).
- ¹⁹ See Letter to Thomas M. Cooley Law School, No. 15-08-2067 (OCR 11/03/2010), discussed in further sections.
- ²⁰ Thomas M. Cooley Law School, finding of violation by OCR as to "significant assistance" to student organization and failure to provide auxiliary aids, No. 15-08-2067 (OCR 11/03/2010)
- ²¹ Letter of finding to Utah Valley University, No. 08102026 (7/16/2010).

