Fox Rothschild LLP
ATTORNEYS AT LAW

NOVEMBER 2008

HEALTH LAW GROUP

ALERT

PHYSICIANS FACE POTENTIAL LIABILITY FOR FAILURE TO PROVIDE INTERPRETER FOR DEAF PATIENTS

By Jacqueline M. Carolan

Following a three-week trial in Hudson County, New Jersey, a jury awarded a deaf patient $400,000, including $200,000 in punitive damages, against a Jersey City rheumatologist who failed to provide a sign language interpreter at the patient's request. The physician also may be personally liable because his malpractice carrier denied coverage as well as a defense.

The patient, Irma Gerena, sued under the New Jersey Law Against Discrimination, the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The jury found that Dr. Robert Fogari violated the law by failing to provide the patient with an interpreter and by retaliating against her based on the request. Dr. Fogari told Ms. Gerena that he could not afford to pay the $200 per visit charge for the interpreter and instead communicated with Ms. Gerena through family members, including her nine-year-old daughter. It was also alleged that the doctor refused to meet with an interpreter who could have explained the law to him. The patient eventually switched to another doctor who immediately changed her treatment. Dr. Fogari said that as a solo practitioner, the per visit cost of the interpreter was prohibitive, although at the time of trial, his tax return showed earnings in excess of $400,000 per year.

This is a significant verdict for such a case, although this is not the first time this type of case has come before the court. The ADA provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, state and local government services, public accommodations, transportation and telecommunications. Section 504 of the Rehabilitation Act of 1973 protects qualified individuals from discrimination based on disability. The non-discrimination requirements of the law apply to employers and organizations that receive financial assistance from any federal department or agency, including the U.S. Department of Health and Human Services (DHS), which would apply to hospitals and doctors whose patients are covered by Medicaid and Medicare. The Office of Civil Rights (OCR) within the DHS is responsible for enforcing the non-discrimination requirements of Section 504 and Title II of the ADA as they apply to covered entities under the jurisdiction of OCR. The law also gives private individuals the authority to sue professionals directly.

Under these laws, covered entities must provide services and programs in integrated settings appropriate to the needs of the qualified individuals. Additionally, reasonable modifications must be made to policies, practices and procedures to avoid discrimination, unless those modifications would result in a fundamental alteration in their program or activity. Covered entities also must provide "auxiliary aids and services" to individuals with disabilities, at no additional costs, where necessary to ensure "effective communication" with individuals with hearing, vision or speech impediments. These aids can include such services as qualified interpreters, assisted listening headsets, television captioning and decoders, telecommunications devices for the deaf (TDDs), video text displays, readers, taped text, Braille materials and large print materials.

Unfortunately, neither the Rehabilitation Act nor the ADA define the meaning of "effective communication." In the case of *Borngesser v. Shore Medical Center*, 340 N.J. Super. 369 (2001), the court noted that case law provided no real definition of effective communication, recognizing that courts have

held that a question of fact exists. However, the focus in this case was on whether the patient had sufficient communication in order to have understood what was occurring and to fully participate in and benefit from the federally funded services as a non-handicapped person would have. That the actual care and treatment provided were adequate does not mean that it was not discriminatory. The court found that a health care provider complies with the mandate of effective communication only if knowledge, thoughts and opinions are successfully conveyed between patients and medical staff.

Physicians must communicate effectively with patients who have hearing, speech or visual impairments unless an "undue burden," meaning significant difficulty or expense, or a fundamental alteration in the nature of the physician's services would result. If the patient has a hearing impairment and the message that needs to be conveyed between the physician and the patient is straightforward, communication through handwritten notes or family may be appropriate. If the communication is more complex, such as describing a complicated medical procedure, and the patient normally communicates through sign language and requests an interpreter, the physician is required to provide a qualified sign language interpreter so long as it does not cause an undue burden on his/her operating costs. These costs may not be passed on directly to the patient but can be spread to all patients like any other overhead costs.

If providing an interpreter would fundamentally alter the nature of the health professional's practice, he/she may refer the patient to someone else. It is important to note that the mere use of an interpreter for most does not generally fundamentally alter the nature of the health professional's practice. An example of a fundamental alteration would be an action that would require physicians to treat people outside their specialty. Additionally, proving that using an interpreter would impose an undue burden on a practice is a difficult standard to meet because it refers specifically to the overall operating costs of the practice. In Ms. Gerena's case, the fact that an interpreter would cost more than the practitioner receives in payment for service is not, by itself, viewed as an undue burden by the courts. The court would consider the practice's operating income and the frequency of visits that would require an interpreter.

In addressing the needs of a client who is deaf, it is important that the physician and the patient discuss options for providing effective communication, including auxiliary aids. In most cases resulting in complaints and/or litigation, a patient has requested an interpreter that has not been provided. If the patient and the physician decide an interpreter is needed to provide effective communication, then the physician must make arrangements to obtain a qualified interpreter. If the patient has a family member or friend with whom they are comfortable relaying medical information, this arrangement could be considered if the use of this individual would not impede the provision of services or the patient's privacy needs.

Once it is determined that the services of an interpreter are necessary, the practice must absorb the expense. Medicare and other health insurers generally do not cover these costs, although there may be reimbursement for an extended patient session resulting from the use of an interpreter. In certain instances, physicians may want to contact the insurance carrier to see if the patient's policy covers interpreter services or if the payor would be willing to cover the cost of those services. Tax credits may also be available under Section 44 of the IRS Code to offset the cost of a sign language interpreter in compliance with the ADA.

For more information about this topic, contact Jacqueline M. Carolan at 215.299.2863 or jcarolan@foxrothschild.com, or any member of the Health Law Practice on the Web at www.foxrothschild.com.

Check Out Our Health Law Blogs

For those seeking updates on legal issues affecting physicians and non-institutional providers or for information on the handling and exchange of health information, view our health law blogs at http://physicianlaw.foxrothschild.com/ and http://hipaahealthlaw.foxrothschild.com.

Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement