

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

CASE NO: 9: 15-cv- 80831

MARGARET WEISS, and FELIX REYES,

Plaintiffs,

v.

BETHESDA HEALTH, INC. and  
BETHESDA HOSPITAL EAST,

Defendants

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**PLAINTIFFS REPLY TO DEFENDANTS RESPONSE IN OPPOSITION TO THEIR  
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

COMES NOW, Plaintiffs, Margaret Weiss and Felix Reyes, by and through undersigned counsel, and hereby file their reply to defendants' response in opposition to their emergency Motion for Preliminary Injunction, and state as follows:

**I. Introduction**

Under the ADA and the Rehabilitation act, Defendants have an absolute obligation to **ensure** effective communication with deaf patients and their companions. In doing so they are to consult with the person with a disability who is most likely in the best position to determine what is necessary for their individual situation. 28 C.F.R. 303, 55 Fed Reg. 35566-67. Further no person with a disability shall be required to engage in futile gestures if such person has actual notice that a person or an organization does not intend to comply with the ADA. 42 U.S.C. 12188(a)(1). Lastly the ADA specifically provides for injunctive relief to "any person who is being subjected to discrimination on the basis of disability or who has "reasonable ground for believing that such person is about to be subjected to discrimination". 42 U.S.C. 12188(a)(1). Indeed the only remedy available and thus the purpose of enacting Title III of the ADA for private individuals is to obtain

injunctive relief. <sup>1</sup>Defendants cannot ensure effective communication throughout Ms. Weiss' upcoming labor and delivery with a Video Remote Interpreting Machine and thus plaintiff's Motion for Preliminary Injunction requiring Defendants to provide a live interpreter for same should be granted.

In the instant case, Defendants have stated their intention to utilize a Video Remote Interpreting System with Ms. Weiss during her labor and delivery despite all of the Department of Justice regulations, commentary and agreements regarding the technical requirements of the VRI which they have again and again self-admittedly had problems with, and the situational limitations of VRI which would be specifically applicable to a labor and delivery situation. Defendants' contention is that since there is no per se rule that they cannot use VRI during labor and delivery, they are permitted to do so.<sup>2</sup> This however is inaccurate. As stated above, Defendants' have an absolute obligation to ensure effective communication with the appropriate auxiliary aid after consultation with the disabled person and consideration of the situation involved. When they have made a determination as they have here, that they plan to use VRI which their own employees state has had repeated technical problems even during the short interactions Ms. Weiss has had already with them, and have no explanation about how it can possibly be used when Ms. Weiss is lying prone flat on her back connected to monitors surrounded by staff and family members, changing position, walking down the hall, screaming or closing her eyes, they are violating this obligation. Under these circumstances it will be impossible to communicate using a VRI machine, and this inability to effectively communicate will cause irreparable harm to Ms. Weiss and Mr. Reyes. No amount of money will be able to compensate them for the inability to understand, ask questions and participate in their child's birth. See Chalk v. U.S. Dist. Ct. Cent. Dist. of Calif., 840 F.2d

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<sup>1</sup> Under the Rehabilitation Act both monetary and injunctive relief is available to a private individual, however Title III of the ADA sole purpose is to ensure that individuals with disabilities are provided with accommodations to eliminate discrimination. The remedy that is available to private individuals to enforce the ADA under Title III is injunctive relief.

<sup>2</sup> The reason there is not a per se rule that VRI may not be used during a labor and delivery is due to the fact that in some instances there may be no choice such as in a rural location where there are no live interpreters and VRI is the only accommodation available. See Revised Requirements for Effective Communication, an overview of the requirements for same published by the DOJ, Office of Civil Rights, Attached as Exhibit 18. This however is not the situation here in a highly populated area with many many interpreters who reside nearby and can make it to the hospital within twenty five minutes as demonstrated when Bethesda finally called for a live interpreter after struggling with their VRI for one hour and forty minutes.

701(9<sup>th</sup> cir. 1988) “emotional psychological and immediate...injury cannot be adequately compensated for by a monetary award after trial”. The birth of their child cannot be repeated or moments of critical care be delayed while Defendants work to get the VRI back on. This threatened injury certainly outweighs any potential harm to defendants in ordering them to provide a live interpreter as this is their obligation if one is required to ensure effective communication as here. Lastly public interest in this matter demands that the intent and purpose of the ADA and the Rehabilitation Act to provide equal and effective communication access to all regardless of disability, is carried out. See a true copy of Order granting Preliminary Injunction issued in Zachary Featherstone v. Pacific Northwest Univ. Health Sciences1:CV-14-3084-SMU(E.D.Wash.2014) attached as Exhibit 19).

### **I. Effective Communication**

The ADA specifically provides that public accommodations such as Defendants ensure effective communication with its deaf patients through the provision of appropriate auxiliary aids. As defendant correctly states there are different auxiliary aids which may ensure effective communication with a deaf person and among these aids are onsite interpreters, video interpreters, the exchange of written notes, Computer Assisted Real time captioning etc. However just as a sign language interpreter would not be appropriate for a person who is deaf but does not use sign language, or using simple notes for noncritical care such as taking blood pressure may be appropriate, a video interpreter verses an onsite interpreter may not be appropriate for some situations.

Federal Courts have granted preliminary injunctive relief under both the ADA and the Rehabilitation Act to deaf plaintiffs seeking specific accommodations even though defendant may have been providing another accommodation they believed to be effective. In Randolf v. Rogers, 980 F. Supp 1051, 1062 (E.D. Mo. 1997), the court found that defendants violated the ADA as a matter of law, where a deaf inmate was denied qualified interpreters for non-emergency medical care and classification-type interviews, even where the facts demonstrated that he could communicate in writing and there was no evidence of problems with his medical care. The court found that because he had not had a "full" opportunity to communicate, he was not thereby provided with "full" benefits. Id. at 1061. In Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994) the Court granted a preliminary injunction requiring defendant to provide mental health counselors

who were fluent in American Sign Language where even qualified interpreters did not ensure effective communication during therapy. So even though they were providing sign language interpreters in that case, the Court found this was not as effective as providing mental health counselors who themselves were fluent in American Sign Language so they could provide direct services. Also see Clarkson v. Coughlin, 898 F.Supp. 1019(S.D.N.Y. 1995) where the Court granted preliminary injunctive relief to a class of deaf inmates as the Department of Corrections had failed provide interpreters: Crawford v. University of California, 440 F. Supp. 1047 (M.D.N.C. 1977) (granting preliminary injunction compelling provision of qualified sign language interpreter because of balance of hardships even where no clear private right of action had been found), Hernandez v. County of Monterey Case No:5:13CV2354-PSG(N.Dist.Ct.Calif 4/14/15) and Zachary Featherstone v. Pacific Northwest Univ., supra.

As Defendant correctly cites “Whether a particular aid is effective to provide this equal opportunity to benefit from the medical services provided by Bethesda largely depends on context, including principally, the nature, significance, and complexity of treatment, and the ultimate decision as to what measures to take and aids to use rests with the public accommodation, provided that the method chosen results in effective communication. 28 C.F.R. § 36.303(c)(1)(ii). Unfortunately however defendants while quoting this regulation, appear to only pick and choose one part of the regulation while basically ignoring the rest of the regulation. Defendants’ position rests in the section they have underlined which states the “ultimate decision as to what measures to take and use rests with the public accommodation” . They have nevertheless disregarded in total the qualification given with this statement, “**provided that the method chosen results in effective communication.**” In addition they do not consider the first part of the regulation which provides that “**whether a particular aid is effective to provide this equal opportunity to benefit from the medical services provided by Bethesda largely depends on context, including principally, the nature, significance, and complexity of treatment**”.

Few courts have interpreted exactly what effective communication is and how it is determined. However in the case of Borgesser v. Jersey Shore Medical Center, 340 N.J.Super. 369(N.J. App. Div. 2001), in which deaf plaintiffs alleged defendant hospital failed to provide reasonable accommodations during medical treatment, the New Jersey Appellate Division discussed this issue in detail. ( A true copy of Borgesser v. Jersey Shore is attached as Exhibit 20

herein for the Court's convenience ) In the case the hospital alleged it had effectively communicated with plaintiffs through writing notes and using their hearing daughter as an interpreter. The Court stated: "effective communication requires that a patient is able to receive and convey information including the right to share opinions, questions and comments" Borngesser, Id at 383-384 quoting Elizabeth Ellen Chilton , Note Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients, 47 Hastings L.J. 871,882-83(1996)." Further the Court found

**"...effective communication must be determined objectively from the perspective of the plaintiff and Irene. ....the fact that the hospital reasonably may have thought plaintiff and Irene understood the various medical discussions and procedures is not enough, rather the jury must objectively determine whether such understanding did occur through the means of communication employed".** Borngesser, Id at 389. The Court further held that while the charge was legally correct that the "ultimate decision as to what measures to take to ensure effective communications, rest in the hand of the hospital provided that the method chosen results in effective communication, it **must** be made clear to the jury that the **"effectiveness of the method chosen must be viewed from the perspective of plaintiff and Irene[the deceased deaf plaintiff]"**.

Thus while the affidavits submitted by defendants from their employees reveal there have been repeated problems with even getting the VRI to turn on, they have also stated that they viewed no problem once it was operational, making them believe the communication during those limited times was effective just as the hospital staff did with writing notes in Borngesser, Id. The problem is that none of them use sign language and thus cannot perceive how or when a sign is being blurred or pausing and the effect this has on the interpretation.<sup>3</sup> So while their employees may believe effective communication took place once the VRI was working, Margaret Weiss, Felix Weiss and Irena Weiss found from their perspective that it was not. (See Declarations of

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<sup>3</sup> It is also important to note that both Dottie Kerr and Juan Rivera also stated that they believed that it was at most thirty to forty minutes of struggling with the VRI before they called for a live interpreter and that therefore the family was left without communication for only one hour. This is false as is documented in the records in Ex. 23, as Weiss and Reyes waited almost two hours without effective communication as a live interpreter was not called until one hour and forty minutes after they were admitted and only as a result of constant requests by Weiss and Reyes. See Ex. 23.

Margaret Weiss( Initial and Supplemental) , Felix Reyes, David Weiss and Irena Weiss attached as D.E.5-5 and herein as Exs 21, 22, 23 and 24)<sup>4</sup>.

The situation involved here, the labor and delivery of a child with all of its very personal intimate moments is one which demands that we must view whether or not the method chosen is effective from the plaintiff's point of view. Viewing whether or not the accommodations are effective from the disabled person's view is also supported by the regulations. As stated above and in plaintiff's Motion, the regulations do not state that the effectiveness of an aid will be viewed from the perspective of the provider, in fact the opposite is true, the regulations require consultation with the deaf person and that the provider must carefully consider his self-assessed communication needs before acquiring a particular aid or service. 56 Fed. Reg. 35566-67. Again while the regulations state as above that the ultimate choice of what to use is the defendants, the regulations very clearly state that the chosen method **must ensure effective communication**. Defendants' planned use of an auxiliary aid which has proven time and again to be unreliable, in a situation which in and of itself will be fraught with times that it will be impossible to use, does **not** ensure effective communication.

## **II. Defendants' use of Video Remote Interpreting will not ensure effective communication for the birth of Ms. Weiss and Mr. Reyes' child**

Defendants have provided no facts whatsoever to demonstrate how they will **ensure** effective communication during Margaret Weiss' upcoming labor and delivery of her child with their Video Remote Interpreting System. They have not explained how the Video Remote Interpreting ("VRI") machine if it "times out", cannot be connected for various amounts of time, is fuzzy, needs to be moved down a hallway or if there are multiple people talking in different areas of the room as will happen during a delivery, will ensure effective communication during the critical moments of medical care as will occur in childbirth. Yet all of these situations have occurred with Bethesda's "VRI" system on repeated occasions as their own employees have verified. (See Affidavits of Defendant employees attached to Def. Response as Exs. 6 through 15, "during the time we were

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<sup>4</sup> Of course ten other deaf plaintiffs stated two years ago that Bethesda's VRI machine is not effective as it freezes, is blurry, is not clear or the staff does not know how to operate it in Sunderland v. Bethesda, 13-80685-CIV-Hurley/Hopkins pending before this Court as well. In addition David Scot, observed these same problems during a pre-scheduled onsite inspection to Bethesda in April of this year. See D.E. 5-10.

walking to the Labor and Delivery Area, the connection for the interpreter disconnected”, “Ms. Weiss complained that she thought the image was “fuzzy”, “At one point she complained that she wanted to know who in the group had asked a particular question that the interpreter interpreted for her. Thereafter the other people on the tour came over to the computer and asked their question directly in front of Ms. Weiss and the remote interpreter” Def. Ex. 6 (with the chaotic nature of a labor and delivery one cannot expect all medical staff whom will be at different locations around her as well as the deaf family members involved to be able to go to stand next to the VRI machine at all times when they need to communicate), “ The IS person could not get the VRI operational and left to get our back up computer laptop. He returned and was not able to get the laptop to connect to the Lifelinks interpreter. [Nationwide, the live interpreter agency] was finally called after trying to get the VRI to work for thirty to forty minutes” Def. Ex. 9 and Def.Ex. 11 “I asked the family member to ask them if they had any questions. The family member communicated with them and said they did not have any questions ” Def. Ex. 10 (instead of turning the VRI back on or leaving it on, the nurse used a family member presumably because of the cumbersome nature of turning on a VRI machine and getting it to work yet the regulations explicitly state family members and other accompanying adults should not be used as interpreters except in very limited circumstances not present here . 28 C.F.R. 36.303 and 56 Fed. Reg. at 35553) “they were having trouble connecting to the Lifelinks computer remote interpreter...although the computer was working and connected to Lifelinks, it would not connect to an interpreter. I tried reconnecting and rebooting the computer....After rebooting I was able to establish a connection...(Same day after procedure) the same problem occurred again”. Def. Ex. 13). In addition contrary to what both Dottie Kerr and Juan Rivera state they recall on December 31, 2014, which is that they called for a live interpreter after only thirty minutes or forty minutes; **the truth is they made Ms. Weiss and Mr. Reyes wait for medical treatment for their infant daughter who had a head injury for more than two hours as they struggled with the VRI for one hour and forty minutes before even calling for a live interpreter. Yet the live interpreter got there only twenty six minutes after they finally called for one.** (See a true copy of Nationwide Interpreter Referral Services records which reveals Dottie Kerr did not call for a live interpreter until 10:25 p.m. and that she stated both Weiss and Reyes had been “waiting one hour and forty minutes to get medical treatment for their daughter while waiting for interpreter services”, the Nationwide invoice showing arrival time of interpreter as 10:51 p.m., the admission record showing 8:41 p.m. as the time Odelia Reyes

was admitted for treatment for a “closed head injury” and a true copy of a note written by Weiss to Kerr demanding that they call a live interpreter again as the VRI was not working at 10:08 pm all attached herein, as Exhibit 25).

Further Bethesda has not explained how they will ensure effective communication with their “VRI” system when it failed to work effectively during the multiple times it was tried even during the pre-scheduled onsite inspection of same. (See Pltf. Ex. 10, Declaration of David Scott, “The physical specifications of the unit render it inappropriate for use for a patient who is prone, spine, or has torso mobility issues, ...Mr. Neff placed the initial call and the web browser crashed and killed the video session....Mr. Neff rebooted the unit...this call was connected to a Video Interpreter and went to black screen, I observed pixilation, freezing, audio artifacts and bad video, the call was unusable.... We again saw the blanking of the screen...video smear, pixilation....Both of the subsequent calls failed in the same manner consistent with the previous calls, in addition the video interpreter was unable to read our signing during two of the calls....During our last call, the computer failed and required multiple reboots. It subsequently came on but then the interpreter froze on the screen and the connection was once again lost”). Indeed Dave Neff, Bethesda’ Senior Technical Analyst, Information Services who was present during the pre-scheduled onsite inspection never disputed any of this in his Affidavit.(Def. Ex. 15). In fact Mr. Neff verifies that even when he, their chief Technical person, was present during Ms. Weiss’ repeated Labor and Delivery Tour there were problems with the VRI. (See Def.Ex. 15).<sup>5</sup> The fact that a technician and/or communications officer often have to be present to even get the VRI started or to continue to work is a problem in and of itself under the regulations as the privacy of the deaf person is constantly intruded upon. As defendant cited “In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability”. 28 C.F.R. 36.303. There can be a no more private and intimate time than when a woman is giving birth. Ms. Weiss already felt uncomfortable when she had to discuss her generic concerns with the Mr. Neff present, the Hospital Technician, during the tour. (See Supplemental Declaration of Margaret Weiss attached as Exhibit 19 herein). If she is forced to have him present along with a machine, when she will be

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<sup>5</sup> Ms. Weiss actually repeated the Labor and Delivery Tour only because she felt she could not communicate fully and get all the information she needed during her first Labor and Delivery tour due to the VRI. (See Ex.8 Weiss emails and Ex. 21, Supplemental Declaration of M.Weiss)



in various stages of undress, pain and extreme physical and emotional stress, this would clearly be an invasion of her privacy. Bethesda would not be protecting her privacy but in fact invading it.

With this history, it is not difficult to foresee these problems occurring at any time during the upcoming Labor and Delivery of Margaret Weiss' child and causing severe emotional distress to Ms. Weiss and her husband as well as possibly having serious medical implications for both Weiss and her baby. The regulations clearly state that if VRI is to be used, it cannot have connection problems, lags or irregular pauses in communication all of which occurred repeatedly here. Further the regulations state the VRI must be "quickly and efficiently set up" which repeatedly has not happened here. All of these technical problems exhibit that Bethesda's VRI system simply does not meet the technical requirements of 28 C.F.R. 36.303(f).

While defendants' contend their policy is to initially use the VRI and if it does not provide effective communication then a live, on-site interpreter will be provided, this is not the reality.<sup>6</sup> The facts as well as the sign they themselves posted show their true practice.<sup>7</sup> The sign says if you request an interpreter you have to pay for one, it never states if the VRI is ineffective we will get you a live interpreter. If defendants' procedure is not implemented or is not effective, it does not comply with the ADA. In Aikins v. St. Helena Hospital, 843 F. Supp. 1329, 1335 (N.D. Ca. 1994), the defendant had clear and posted policies regarding how deaf individuals could obtain access to sign language interpreters, TDDs, and other services, and argued, on that basis, that it was in compliance with the Act. Where such policies were not effective for plaintiff, however, the court disagreed, and denied defendants' motion. Id. at 1336. The ADA's requirements for procedures and notice are intended to assist in effectuating the mandate of equal participation and equal benefit; they are not shields that defendants can raise to insulate themselves from the law's requirements.

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<sup>6</sup> Ms. Weiss has been repeatedly advised by Bethesda Hospital that she would have to pay for her own interpreter or use VRI only for the tour, labor and delivery. Bethesda has never advised her or anyone on her behalf that they will supply her with a live interpreter if the VRI turns on but is not clear D.E. 5, exhibits 5, 8, 9].

<sup>7</sup> The sign posted basically stated " we use a VRI system to ensure effective communication. If you request or desire a sign language interpreter you will be responsible for the cost". Further contrary to defendants' position that it was for the staff and not posted, the sign is written directly to the deaf patient(if you request) and was posted on the VRI machine! Further it never states if the VRI is ineffective we will provide a live interpreter.

The circumstances of a labor and delivery inherently present obstacles to the effective use of VRI, a pregnant woman in labor should not be required to engage in frustrating, delaying, painful measures before she is permitted to obtain an aid which is effective. Futile gestures are not required under the ADA 42 U.S.C. 12188(a)(1). The right to communicate, understand and participate during all of our medical treatment is one of the most basic rights each of us, disabled or nondisabled, should have and should not be denied to Ms. Weiss just because she is deaf.

**A. When Video Remote Interpreting does not provide effective communication**

**a. When the VRI machinery does not work or persons are not trained**

As stated above, when the VRI machinery does not work or persons are not adequately trained on its use it does not provide effective communication. 28 C.F.R. 36.303. It is not disputed that Margaret Weiss and Felix Reyes have both experienced issues with the VRI connectivity at Bethesda Hospital and observed the staff struggle with operating the device at defendants' facilities. It is not disputed that Bethesda's VRI has connectivity issues and that staff has to move the device around and disconnect and reconnect it to try to get a better connection and that a technician will often have to be called to even get the VRI to turn on. (See Exhs. 5, 21, 22, 23 and 24 as well as Def. Ex. 6-15) If VRI is to be used, it must comply with **all** of the technical requirements in 28 C.F.R. 303(f). See Ex. 18 Pgs 2-3. Bethesda's VRI system does not. Yet Bethesda wants to use this VRI to **ensure** effective communication for Ms. Weiss and Mr. Reyes during the most important life threatening time of their lives.

**b. When the person is required to contort their body or the persons arms or hands cannot be seen or have an inability to sit up and sign**

VRI will be ineffective during Weiss' childbirth for numerous reasons. First, for VRI to be effective it is vital that the illness or injury does not prevent the patient from seeing the VRI monitor and/or from using their hands to communicate with the remote interpreter. The deaf consumer must be in a position so they can clearly view the interpreter and the interpreter can view the deaf consumer's signing space and vice versa. The labor and delivery of a child necessarily will involve Ms. Weiss, who at different points will be walking around, squatting, bending and/or lying in bed flat on her back in severe pain, with limited ability to sit up and sign directly with a stationary machine which cannot adjust to same the way an onsite interpreter can.

Ms. Weiss will be required to contort her body and her arms and hands may be restrained or obscured because of IVs and other monitors and because of the number of other individuals in

the room and at the bedside, resulting in her being unable to have a close, clear line of site with the VRI and unable to see or use VRI as well as the video interpreter also being unable to have a close, clear line of site with Ms. Weiss and being unable to see her face, arms and hands. The Department of Justice has specifically stated in situations such as this that VRI is not effective and not appropriate. 28 C.F.R. 36.303(f), Appendix A to Part 36. Also See Resolution Agreement with St. Francis Hospital.

Defendants provided no facts rebutting Plaintiffs position or showing that VRI is effective in situations including childbirth or how it is effective when the person is required to contort their body or the person arms or hands cannot be seen or have an inability to sit up and sign, which is the case with labor and delivery. Further, despite the obvious difficulties and impossibilities that a video interpreter would present during childbirth due to the prone position of the patient, the multiple individuals in the room and the high pain and stress level, defendants have failed to even acknowledge the inherent limitations with the VRI equipment.

**c. When there is high interactivity, such as multiple participants with less structured turn-taking protocols**

VRI is also ineffective when there is high interactivity, such as when there are multiple speakers or multiple participants. Ms. Weiss will have Mr. Reyes, who is also deaf, and her deaf mother with her in the hospital room who will be communicating as any other nondisabled woman giving birth would have. The law requires that defendants also provide auxiliary aids to ensure effective communication with these companions as well. In addition, there will be several different medical practitioners and support staff that will interact and speak to Ms. Weiss and her deaf family members at the birth, such as labor and delivery nurses, obstetrician, anesthesiologist or nurse anesthetist, or a neonatologist. Defendants own documents provided to expectant parents who take Bethesda Hospital's labor and delivery tour demonstrate the numerous participants who are in and out of the room including the nurse, doctor, anesthesiologist, surgical team used for cesarean section births, neonatologist, nurse or other individual responsible for the initial baby assessment, lactation consultants, individual who helps parents apply for the baby's birth certificate, social security card and emergency Medicaid if needed, a photographer, and as many visitors as you choose. [D.E. 159-6, p. 5-7] When there are multiple speakers or participants it is often impossible for the video interpreter to index each voice/speaker and sign effectively to the deaf person especially when there are also so the consumer knows what each person is saying as

the video interpreter cannot see all persons in the room and/or often cannot hear each person in the room. In a high stress, intense situation such as the delivery of a child, this would be intensified.

Defendants did not provide any facts to show that VRI is effective or will be effective for Ms. Weiss' labor and delivery when there is high interactivity, multiple participants coming in and out and moving around the room and multiple deaf persons in the room as will be the case when Ms. Weiss gives birth.

**d. When the communications are of a sensitive nature or highly painful or emotional**

As Ms. Weiss stated in her declaration, "The birth of our children are the most important times in our lives and we need to be able to participate and understand everything that is going on without constantly worrying that we do not know what is going on with the birth of our child, and that people in the room cannot understand us or us them." [D.E. 5-18, ¶ 10]. While a patient's stress level is often elevated during a medical visit, the labor and delivery process is one of the most stressful, painful times of our lives. As is inevitable, Ms. Weiss has stated she will be screaming and closing her eyes during much of the labor and delivery especially when the pain level is high. Throughout the experience, nurses and doctors will be explaining the labor progress to Margaret and Felix, answering questions and determining if she or the baby has any other needs, discussing any possible complications such as the possible need for an unplanned cesarean section, discussing who will be designated to cut the baby's umbilical cord, communicating with her about her pain level, when to push, when not to push, what is going on with the dilation of her cervix and then going over the initial baby assessment and testing for metabolic disorders, heart conditions and hearing screenings. Later there will be specialists to ensure the baby is developing properly and a course called "Transitioning to Home" will be taught along with newborn and maternal aftercare. [D.E. 19-6, p. 5-7] It must also be noted that Ms. Weiss and Mr. Reyes' first child was born with health complications.

As stated above whether a particular aid is effective to provide this equal opportunity to benefit from the medical services provided by Bethesda largely depends on context, including principally, the nature, significance, and complexity of treatment. 36.303. Just as Bethesda fails to consider the last part of the regulation that regardless of what they select, they must ensure effective communication, they have failed to consider the "nature, significance, and complexity of treatment" involved here. All of these facts, the high pain level, the closing of the eyes, the need

for tactile signing, the quickly changing positions, multiple staff, multiple deaf persons, lying prone with others gathered around represent the “nature and complexity of the treatment” involved. As for “significance of the treatment” there can be very little else that can possibly compare to the significance of bringing a new life into this world. The “nature, significance and complexity” of this situation requires that a live onsite interpreter rather than a machine interpreter be provided so that effective communication can be ensured.

### CONCLUSION

The fact that the regulations do not state specifically that the use of VRI during childbirth is a per se violation is not the issue here. As the guidance states, VRI has its uses and limitations and may be appropriate if it meets the performance standards in 36.303(f) in some situations just as any other auxiliary aid will. The issue is whether or not Defendants can **ensure** effective communication with Weiss and Reyes during the upcoming birth of their second child with their VRI system based upon all of the facts of this case. The overwhelming evidence here shows they cannot and thus this Court should grant Plaintiffs’ Motion enjoining Defendants from failing to provide a live onsite interpreter for the upcoming birth. There will be irreparable harm to plaintiffs if they are not able to understand, participate and engage in meaningful communication during the birth of their child. This is not a situation which can be repeated or delayed as the emergency care of their first daughter was in December of 2014 as well as the Labor and Delivery tour.

The contentious issue is whether the Video Remote Interpreting device works without lagging, freezing or stopping,; however, the overriding issue is that a VRI is inappropriate on any occasion with any of the enumerated facts above which Ms. Weiss, Mr. Reyes and Irena Weiss will face during the labor and delivery. As such, the gravamen of the motion is not whether the device works at all, but that Bethesda’s VRI system cannot ensure effective communication for Weiss’ upcoming labor and delivery when both the technical issues are present and the “nature, complexity and significance” of the communications reveal that it cannot. Defendants’ opposition only addresses whether or not the VRI worked before and in fact verifies that the VRI system has had many problems even during the limited times used by Ms. Weiss and Ms. McMahon which did not involve the serious life threatening issues that may occur in an intense critical labor and delivery. It does not provide any facts which support their position that their VRI would be effective under a labor and delivery circumstance. Although the choice of which auxiliary aid to use is the defendants’, it is still their absolute obligation to consult with the patient and to ensure

effective communication under all circumstances using the appropriate auxiliary aid. Yet defendants have presented no evidence which demonstrates how they will ensure that their VRI system will be effective when the technical factors enumerated by the DOJ in 28 C.F.R. 36.303(f) exist, as they have repeatedly in this hospital, and when there will be situations which unquestionably would render the VRI impossible to use during childbirth as explained by Ms. Weiss. When, as in the instant case, the facts, the regulations, commentary and resolution agreements provided by the United States Department of Justice dictate that VRI would not be appropriate, as Bethesda's VRI system cannot be relied upon to ensure effective communication throughout the labor and delivery and there will be problems with positioning, pain, line of sight, multiple parties and stress, plaintiffs submit that an onsite interpreter is required.

WHEREFORE, Plaintiffs, respectfully request this Honorable Court GRANT their Emergency Motion for a Preliminary Injunction against Defendants, Bethesda Health, Inc. and Bethesda Hospital, Inc. d/b/a Bethesda Memorial Hospital, Bethesda Hospital West (collectively, "Defendants" or "Bethesda"), and enter an Order enjoining Defendants from failing to provide Margaret Weiss and Felix Reyes an Onsite live American Sign Language interpreter when Weiss gives birth at Defendants' facilities.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of July, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served via CM/ECF on this day to: John D. Heffling, Esquire, Sonneborn Rutter & Cooney, P.A. 1400 Centrepark Boulevard, Suite 400, West Palm Beach, Florida 33401.

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