IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

CASE NO. 15-cv-80831

MARGARET WEISS, and FELIX REYES,

Plaintiffs,

v.

BETHESDA HEALTH, INC. and BETHESDA HOSPITAL EAST,

Defendants

PLAINTIFFS MARGARET WEISS'S AND FELIX REYES'S MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Plaintiffs, Margaret Weiss ("Weiss" or "Plaintiff") and Felix Reyes ("Reyes" or Plaintiff"), by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 65(a) and 42 U.S.C. § 12188(a)(2) hereby file this Motion for a Preliminary Injunction against Defendants, Bethesda Health, Inc. and Bethesda Hospital East (collectively, "Defendants" or "Bethesda"), requesting that Defendants be enjoined from failing to provide plaintiffs with a live on site certified American Sign Language ("ASL") interpreter when she gives birth at Defendants' facilities. In support thereof, Plaintiffs state as follows:

INTRODUCTION

Weiss and Reyes, who are profoundly deaf and communicate primarily in American Sign Language, filed the instant lawsuit alleging that Defendants illegally discriminated against them by refusing to provide appropriate auxiliary aids and services, namely on-site American Sign

Language (hereinafter referred to as "ASL") interpreting services for the tour and labor and delivery of their first child in 2014. Ms. Weiss is again pregnant with her second child and has again requested that Defendants, Bethesda Hospital East, the closest hospital to her home, provide on-site interpreters for the labor and delivery tour as well as the pending birth of her second child due July 22, 2015. Defendants have refused plaintiffs' requests without consideration of same and have stated that they will only use a Video Remote Interpreting system (hereinafter referred to as "VRI") despite the laws which require that they consult with the disabled person and ensure effective communication by providing the proper auxiliary aid, which will differ depending on the situation involved. 28 C.F.R. 36.303(c)(ii). In Sunderland v. Bethesda (CASE NO. 13-80685-CIV-HURLEY/HOPKINS), the FAD, one of the plaintiffs filed a pending Motion for an Emergency preliminary injunction on Ms. Weiss's behalf on May 12, 2015. Pursuant to Court Order of the Honorable Daniel T.K. Hurley the Motion was referred to the Honorable James M. Hopkins for a Report and Recommendation. The Report and Recommendation filed by Judge Hopkins on June 4, 2015 recommended that plaintiff FAD's Motion be denied due to lack of standing as the Court determined individualized proof is necessary to determine whether VRI will provide effective communication and thus Ms. Weiss' participation was required.

The choice of which aid will be provided is that of the medical provider however it **must ensure effective communication and consult with the disabled person.** 28 C.F.R. 36.303(c)(ii), 56 Fed. Reg. 35566-67. A Video Remote Interpreting system is a system whereby an interpreter is provided from a remote location through a monitor. It is one possible auxiliary aid along with on-site interpreters, which may be used depending on the situation involved to ensure effective communication with deaf patients who communicate

primarily in ASL. 28 C.F.R. 36.303(b)(i). However the VRI must meet the performance standards as stated by the Department of Justice Regulations in 28 C.F.R. 36.303(f) and must ensure effective communication. Further there are many situations in which the VRI will most likely **not ensure** effective communications especially in situations of high stress and pain, when the patient will be lying in a prone position and situations in which multiple individuals will be involved as demonstrated in the declarations attached and the Resolution Agreement Between the United States and St. Francis Hospital and Medical Center attached as Exhibit 2, § 30.10, Appendix A to Part 36 in the Federal Register, Sept. 15, 2010 attached as Exhibit 3, the Settlement Agreement between the United States and Franciscan St. James Hospital attached as Exhibit 12, § 30,the Settlement Agreement between United States and Virginia Psychiatric Company, Inc. d/b/a Dominion Hospital attached as Exhibit 13, § 33 and the Settlement Agreement between Heisley and the United States and Inova Health Systems attached as Exhibit 14, § 4C and 5C.

Bethesda's practice since 2011 has been to rely almost exclusively on the VRI system regardless if it works properly and regardless of the situation involved. In point of fact Bethesda created a sign they hung on their VRI machine which stated "if you request or desire a live interpreter to come to the hospital to translate instead of using this computer, it will be your responsibility to pay for that service". (See a true copy of the sign attached as Exhibit 4 and a true copy of Caroline Partin's deposition transcript who witnessed the sign on the VRI machine in a patient's room attached as Exhibit 15). This is in direct violation of 28 C.F.R. 36.301(c) which states a public accommodation cannot surcharge the disabled person for the cost of the auxiliary aid they must provide to ensure effective communication and is evidence of their true intentions and practice, despite their written policy.

Defendants' violations are a continuation of a long pattern and practice of discrimination against the deaf.[1] The operative Complaint sounds in two counts, asserting Defendants failed to meet their obligations under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, et seq. (the "ADA") and Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 706 (the "Rehab Act") to ensure that persons who are deaf receive an equal opportunity to participate in, and enjoy the benefits of the services of, Defendants' hospitals (the "Complaint"). Doc.1. In addition to compensatory damages under the Rehab Act, the Complaint also demands equitable relief in the form of a consent order providing that, among other things, on-site certified ASL interpreter(s) will be provided throughout the labor, delivery and aftercare of her second child.

Bethesda refused to provide live ASL on-site interpreters last year when Weiss requested this for the labor and delivery of her first child despite her repeated requests and those of an advocate from the Deaf Services Bureau. Bethesda insisted that they would only provide a video interpreter 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 Complaint sounds in two counts, asserting Defendants failed to meet their obligations under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, et seq. (the "ADA") and Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 706 (the "Rehab Act") to ensure that persons who are deaf receive an equal opportunity to participate in,

[1] Defendants have been subject to prior litigation alleging identical violations of a deaf person's right to effective communication, including a 2013 action filed by Plaintiffs Sandra Sunderland, Bodil Tvede, Barbara Drumm, Morris Steiner, Howard Feltzin, Julia Feltzin, Jacqueline Gluckman, James Liese, Susan, Liese, John Virgadaula, John Donofrio, Carolann Donofrio and Florida Association Of The Deaf, Inc., against Defendants, Case No.: 13-80685, and Beaubien v Bethesda Memorial Hospital, Case No.: 03-810-88. The Department of Justice also entered into a resolution agreement alleging the same violations in 2006 with Bethesda Hospital. www.ada.gov/bethesda.htm

and enjoy the benefits of the services of, Defendants' hospitals (the "Complaint"). Doc.1. In addition to compensatory damages under the Rehab Act, the Complaint also demands equitable relief in the form of a consent order providing that, among other things, on-site certified ASL interpreter(s) will be provided throughout the labor, delivery and aftercare of her second child.

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[2] See Declaration of Margaret Weiss attached hereto as Exhibit 5 and D. Scott's Declaration attached hereto as Exhibit 6, and incorporated herein by reference

and same was unsuccessful both due to the system and the situation involved. All requests by Weiss and even to counsel of Bethesda Hospital for same have been refused and/or ignored as defendants insist upon utilizing only VRI, despite the fact that it cannot afford effective communication in this situation[3]. Defendants have blatantly disregarded their legal obligation to provide Weiss and Reyes with an equal opportunity to participate in, and enjoy the benefits of the services of Defendants' facilities by effectively communicating with them.

Accordingly, the instant motion is being filed to ensure that Weiss and Reyes are provided a live ASL interpreter for a repeated labor and delivery tour so they can fully understand and participate in same, the upcoming labor and delivery of their child, and when necessary thereafter. For the reasons set forth herein, Weiss and Reyes respectfully request that this Court grant their petition and enter an Order enjoining Defendants from failing to provide Weiss and Reyes with on-site live ASL interpreter services for the tour, and when Weiss gives birth at Defendants' facilities.

FACTUAL BACKGROUND

The pending and related case against Bethesda hospital brought on behalf of twelve deaf patients (ten of whom are still alive) and the Florida Association for the Deaf is Sunderland v. Bethesda (CASE NO. 13-80685-CIV-HURLEY/HOPKINS) in the Southern District of Florida before the Honorable Daniel T.K. Hurley. In that case plaintiffs allege that Bethesda Hospital has failed to ensure effective communication due to their reliance and almost exclusive use of a Video Remote Interpreting System only during various forms of medical treatment with deaf patients over the past four years. As part of discovery, plaintiffs engaged an expert, Marvin David Scott,

[3] See Certificate of Compliance, *infra*.

to perform an on-site inspection. During same, the VRI system failed to repeatedly operate correctly in five different locations in both of Defendant's hospitals. (A true copy of Marvin David Scott's Declaration is attached as Exhibit 10). Bethesda's policy states that they will use VRI to ensure effective communication and if it is not effective they will obtain live onsite interpreters. Yet in 2010, they obtained live interpreters 250 times, in 2011 after obtaining the VRI only 13 times, in 2012 only 3 times, in 2014 1 time and not at all in 2015. [See a true copy of certification of June Backer, owner of Nationwide Interpreter Service, listed in Bethesda's policy as their provider of onsite interpreters, attached as Exhibit 17]]. Thus despite their policy, their practice as is demonstrated time and again above and below is that they do not obtain live interpreters even if the VRI does not technically work, much less if the situation itself makes VRI ineffective. Mr. Scott and Dr. Judith Shepard Kegl, a Neurolinguist with Expertise in Deafness and American Sign Language have also both written reports about the inherent limitations of VRI and its inability to ensure effective communication with a deaf patient during childbirth which are attached as Exhibits 6 and 7.

It is undisputed in the instant matter that plaintiffs are completely deaf and that ASL is her primary mode of communication. (See Weiss Declaration attached as Exhibit 5). Further, Defendants' failure to provide Weiss the appropriate auxiliary aids and services necessary for Defendants to effectively communicate with her is neither isolated nor remote. In December of 2013, she was seven months pregnant and wanted to go to Bethesda hospital as it was the closest one to her home and was the hospital her doctor recommended. However when she called Bethesda in December to arrange her pre-labor and delivery tour and requested an interpreter for both her tour and anticipated labor and delivery, she was told that Bethesda only provides VRI and would not provide an on-site interpreter. Thereafter she called the Deaf Service Center of Palm Beach

County for help. Silvia Garcia, the Center's employee, called the Hospital clinical manager, Monique Schiline, and sent her copies of the law and explained why using VRI only would be very hard for her during a walking tour and labor and delivery. The manager advised that she would have to pay for her own interpreter or use VRI only. Mrs. Garcia called and faxed Bethesda Hospital several times trying to obtain an ASL interpreter for me. She had to go to West Boca Medical Center who promised her on-interpreters for the tour and when the baby was born. Since her baby was born with some problems and had to stay in the hospital, Weiss ended up having to go back and forth constantly which was extremely difficult as she had just given birth. West Boca Medical Center provided on site interpreters for her entire stay at the hospital and when she came back and forth to be with her baby. (See true copies of emails between Weiss and Bethesda Hospital and Declaration of Weiss attached as Exhibits 8 and 5 and notes and Certification of Garcia attached as Exhibit 9).

Plaintiffs have tried to utilize the Video Remote Interpreting System at Bethesda on three occasions. In December of 2014, plaintiffs' baby was brought to the emergency room of Bethesda as the closest hospital to their home, due to a serious head injury. After a long period of time of struggling to get the VRI to work and a complete failure of effective communication with the plaintiffs who were distraught over their daughter, an on-site interpreter was provided. However this was only because the VRI machine would not turn on at all and was only done after the Weiss' were subject to severe emotional distress as they struggled to communicate and made many emotional requests for an interpreter. In April of 2015, plaintiffs again brought their baby to the emergency room at Bethesda and again the VRI system was utilized. This time it turned on but kept turning off and was blurry and freezing and was completely ineffective. Plaintiff's requests for an on-site interpreter were refused and plaintiffs were forced to try to use family members who

were present but not fluent in sign language and not interpreters to try to communicate. They left very upset without a full understanding of what had occurred with their daughter's care. Plaintiffs again agreed to try to use the VRI for a tour of the labor and delivery area on April 15, 2015 after defendants refused their request for an on-site interpreter as they were concerned with the VRI's technical performance, the moving nature of a tour and the multiple parties involved. They wanted to do a tour with other prospective parents to hear their comments and questions just as all other nondisabled parents do, and so went on the group tour, only to be unable again to effectively communicate. The machine once again turned on and off and the interpreter could not hear nor identify which speaker talked during the tour. After the tour plaintiffs again requested the tour with an on-site interpreter as they had many unanswered questions but were refused same. (See a true copy of emails between Weiss and Bethesda Hospital attached as Exhibit 8 and Declaration of Margaret Weiss attached as Exhibit 5 as well as a true copy of emails between Counsel regarding same attached as Exhibit 11).

Most importantly at this juncture is the fact that Weiss is currently pregnant with a due date of July 24, 2015. The only aid defendants have told her they will utilize to effectively communicate with her during her labor and delivery is this VRI system. (See Exh. 8 and Exh. 5 (emails and declaration). Weiss plans to give birth at Defendants' Hospital because of her doctor's privileges and its proximity to her home. Weiss plans to have the father of the child and her mother present during the birth, both of whom are also deaf and require a sign language interpreter to effectively communicate. [4] Further she will be utilizing various positions such as walking up and down the hallways, squatting, bending, and lying flat on her back with her legs up. Weiss will also

[4] Under the ADA and the rehabilitation Act, Defendant hospital must ensure effective communication with companions as well as patients

be closing her eyes due to pain and during "pushing" and the interpreter will need to use tactile signing. Ms. Weiss also anticipates screaming from the pain of childbirth as she did in the first birth, which would make it extremely difficult for an interpreter on a machine to hear the doctor, nurse or others in the room as it could not be adjusted as a live interpreter quickly can back and forth. She also anticipates obtaining an epidural which she had during the first birth, which she stated required her to move her body and her head in different positions which cannot be anticipated until the actual procedure. Weiss also states the epidural will require her to mover her head down and the side depending on her pain level and the directions of the anesthesiologist. In her first childbirth the onsite interpreter actually crouched before her or knelt on the floor at different times, the position all of which changed quickly. (See Declaration of Margaret Weiss attached as Exhibit 5). For all of these reasons, the VRI could not possibly be effective as the machine would actually need to be able to move very quickly into different positions and different locations as well as physically touch and tactile sign at times, to accommodate both the patient medical personnel and the companions. In addition, the line of sight to the machine would be often blocked as the interpreter would need to go high, low or in between personnel at times depending on the circumstances and as there will be screaming the video interpreter would not be able to hear all that is going on in the room at different locations as an onsite interpreter who can move quickly and with agility can do. Thus the defendant cannot ensure effective communication with a machine that cannot even if working perfectly, do all of this, much less with a system which has constant technical problems.

The technical problems with the VRI occurred again as recently as June 5, 2015, when the Vice President of the FAD, June McMahon was forced to go to Bethesda as her doctor had privileges there for a colonoscopy. Bethesda hospital again attempted to use the VRI, the machine

they use to ensure effective communication with deaf patients. The machine did not work and their staff did not know how to operate it. Thus they called their technical person who attempted for forty five minutes to get it working before it came on prior to the procedure. When it finally came on it kept freezing. After the procedure, it the technical person was present and again could not get the VRI operational. After fifteen minutes of frustration once again, the machine finally came on only to keep freezing once again. (See a true copy Certification of June McMahon attached as Exhibit 16). These technical problems are a direct violation of 28 C.F.R. 36.303(f).

As a result of various factors and complications, Margaret Weiss could go into labor at any time and it is anticipated that Weiss's labor could begin significantly earlier than her July due date. As is stated above and in the declarations of Marvin David Scott and Dr. Judith Shepard Kegl, and Weiss's certification, Weiss will require an in-person, qualified ASL interpreter, not VRI, when giving birth for a myriad of reasons if she and her husband are to be able to effectively communicate as the law requires. (See a true copy of Declarations of Scott attached as Exhibit 6 and a true copy of Declaration of Kegl attached as Exhibit 7). Bethesda's insistence on using VRI when it is indisputable that it cannot **ensure effective** communication during a labor and delivery when someone may be lying prone, restrained with IVs, and/or blocked from a close, clear line of site with the VRI, in addition to the documented repeated technical problems is clearly a violation of the ADA and the Rehabilitation Act.

ARGUMENT AND AUTHORITIES

A. Legal Standard.

Injunctive relief is the only remedy for violations of Title III of the ADA. 42 U.S.C. §

12188(a)(1). In order to issue an injunction under the ADA, this Court applies the same factors used in any other case in which an injunction is sought. Wilson v. Broward County, Fla., 2008 U.S. Dist. LEXIS 20017, *5 (S.D. Fla. Mar. 14, 2008). To satisfy the test for an injunction, a plaintiff must demonstrate the following four factors: "(1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." McDonalds Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); see also eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). "This standard is essentially the same as the standard for a preliminary injunction, 'except that the movant must establish actual success on the merits, as opposed to a likelihood of success.'" Wilson, 2008 U.S. Dist. LEXIS 20017, *5.

Weiss has satisfied each of the prerequisites necessary to obtain injunctive relief.

B. Analysis.

1. *Likelihood of success on the merits.*

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation…" 42 U.S.C. § 12182(a). Congress enacted this statute to "remedy widespread discrimination against disabled individuals." PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001). The ADA guarantees those with disabilities "more than mere access to public facilities; it guarantees them 'full and equal enjoyment.'" Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135 (9th Cir.2012) (citation omitted). A violation of Title III can happen when a covered entity fails to "make reasonable

modifications in policies, practices, or procedures, when such modifications are necessary to afford…accommodations to individuals with disabilities." Forbes v. St. Thomas Univ., Inc., 456 F. App'x 809, 812 (11th Cir. 2012) (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).

No violation occurs, however, where the entity can show that making the requested modifications would "fundamentally alter the nature" of the services, facilities, or accommodations it provides. See PGA Tour., 532 U.S. at 682 (quoting 42 U.S.C.§12182(b)(2)(A)(ii)).

In order to establish a *prima facie* case of discrimination under Title III of the ADA, a plaintiff "generally has the burden of proving: (1) that [he] is an individual with a disability; (2)that defendant is a place of public accommodation; (3) that defendant denied [him] full and equal enjoyment of the goods, services, facilities or privileges offered by defendant (4) on the basis of [his] disability."[5] Schiavo ex rel Schindler v. Schiavo, 358 F.Supp.2d 1161, 1165 (M.D. Fla.2005) (citing Larsen v. Carnival Corp., Inc., 242 F. Supp. 2d 1333, 1342 (S.D. Fla. 2003)).

Elements 1 and 2 appear undisputed. Weiss is completely deaf and, therefore, disabled under the ADA. Defendants operate hospitals in the region, including Bethesda Memorial Hospital, which constitute public accommodations.[6] Defendants are further required to take those steps that may be necessary to ensure that no individual with a disability is excluded, Denied

[5] Notwithstanding its federal funding requirement, the Rehab Act is interpreted identically to the ADA. Badillo v. Thorpe, 158 Fed. Appx. 208, 214 (11th Cir. 2005) (citation omitted).
[6] As a recipient of federal monies via Medicare and Medicaid, Defendants are also subject to the Rehab Act. 29 U.S.C. § 794

services, segregated or otherwise treated differently than other individuals because of the absence of *auxiliary aids and services, unless* the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered, or would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added). The term "auxiliary aids and services" includes: Qualified interpreters on-site or through VRI services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes…text telephones (TTYs), videophones…or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing. 28 C.F.R. § 36.303(b)(1).

A qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. 28 C.F.R. § 36.104.

Defendants have failed to provide an effective auxiliary aid to ensure effective communication in the past and have stated that they will not do so in the future when Margaret Weiss and her husband will desperately need it. Simply providing some form of communication that did not result in sub-standard care or injury does not constitute effective communication under the ADA or Rehab Act. The law requires more than simply providing Weiss with adequate care or showing that she would not be provided better treatment with better communication.

Defendants' obligation, of which they are expressly aware,[7] is to ensure that deaf patients be provided an *equal* opportunity to participate in their care and treatment at *all* stages.

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[7] By virtue of the prior litigation and settlements of claims identical to those brought in this matter

See Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 820, 827-828 (D. Md. 1998); see also Boyer v. Tift Cty. Hosp. Auth., 2009 U.S. Dist. LEXIS 59700, *13 (M.D. Ga. 2008) ("The regulations charge Defendant hospital with the responsibility of taking steps to ensure that it could communicate with Plaintiff as effectively as it could communicate with its hearing patients. Further, Defendant hospital was responsible for furnishing Plaintiff with a qualified interpreter – if she so desired – so she could be properly treated while hospitalized."); 45 C.F.R. § 84.52(a); U.S. Department of Justice, *ADA Business Brief: Communicating with People who are Deaf or Hard of Hearing in Hospital Settings*, found at http://ada.gov/hospcombr.htm (hereinafter "DOJ Guidance").

Defendants' principal response to Weiss's concerns regarding provision of an interpreter during childbirth is that they will provide VRI. VRI is ineffective for numerous reasons. First, VRI is inappropriate for purposes of a deaf patient in labor. With VRI, an interpreter is present on a video feed with a webcam relaying video of the scene. The view is limited to the scope of the camera. Weiss will be lying prone and, presumably, be surrounded by doctors and nurses during labor. Moreover, her arms and hands may be restrained or obscured because of IVs and other monitors. In fact, touch communication may be required because of Weiss's anticipated limitations during birth. Further, the remote interpreter will not be able to distinguish who is talking off-camera, while also relaying communications from Weiss. With an on-site interpreter, body language and movement can demonstrate the importance of turn taking. As an interpreter on video, just getting the attention of everyone in the room may not work due to the volume of the device being used, visual and audio limitations (i.e. not being able to see, identify who is speaking, etc.), etc. A remote interpreter also cannot assess who is speaking, off-camera, or determine which instructions are coming from which person. This is exacerbated in emergent

situations. In short, VRI is inappropriate and ineffective for this type of medical encounter. (See Exhibits 6 and 7-Certifications of Scott and Kegl).

The Department of Justice is charged with the responsibility of the regulations for implementation of the ADA and the Rehabilitation Act. These regulations are to be given deference and "controlling weight unless arbitrary, capricious or manifestly contrary to the statute" as Congress expressly delegated authority to the DOJ to issue legislative regulations.42 USC 12134, Chevron U.S.A. Inc. v. National Resources Defense Council 467 U.S. 837 (1984). The DOJ has stated unequivocally that while VRI may be effective in an emergency or as a stop-gap measure until a qualified interpreter is available on-site, it has many limitations.

> 30.10 Video Remote Interpreting (VRI) Services. In some circumstances, VRI services can provide immediate, effective access to interpreting services seven (7) days per week, twenty-four (24) hours a day in a variety of situations including scheduled incidents, emergencies, and unplanned incidents, and can also be used as a stop-gap measure until a qualified interpreter is available on-site. In determining whether communication using VRI is appropriate and effective, relevant factors include whether:
>
> a. the Patient or Companion is limited in his or her ability to see the video screen; the Patient or Companion has limited ability to move his or her head, hands, or arms; vision limitations, cognitive or consciousness issues, or pain issues;
> b. there are multiple people in a room and the information exchanged is highly complex or fast-paced;
> c. the Patient or Companion may move repeatedly to areas of SFHMC that do not have a designated high speed Internet line; and
> d. the Patient will be treated in a room where there are space restrictions.
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> See Resolution Agreement Between the United States and St. Frances Hospital and Medical Center (Ex. 2) as well as Appendix A to Part 36, 56270 Federal Register Vol.75, No.178 Wed. September 15, 2010. Also See Dominion Hospital, Franciscan and Heisley Agreements attached as Exhibits 12,13 and 14 wherein it is stated VRI has limitations and should not be used when it is not effective and listing significant pain as one such circumstance.

In this case there will clearly be limited ability to see the screen, the patient will have limited mobility and there will be multiple people in the room and the information will most likely be fast paced. Beyond all of that however, there will clearly be severe pain issues which would render VRI inappropriate and ineffective. Further even if VRI were appropriate, the VRI must operate correctly and according to regulation. See 28 CFR § 36.303(f). This includes

> (1) 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; (2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position; (3) A clear, audible transmission of voices; and (4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

Id. The record reflects that Defendants' VRI is inoperable and insufficient for failing to meet each of the requirements set forth in § 36.303(f).

This matter is very similar to the case of *Boyer.* In *Boyer,* the court found, as a matter of law, that the use of talking, reading lips, writing notes, an unqualified interpreter and using family as interpreters did not satisfy the requirements of effective communication pursuant to the regulations, when the defendant had notice that the Plaintiff requested a certified interpreter. 2008 U.S. Dist. LEXIS 59700 at *13-16. Specifically, the court found:

> The regulations charge Defendant hospital with the responsibility of taking steps to ensure that it could communicate with Plaintiff as effectively as it could communicate with its hearing patients. Further, Defendant hospital was responsible for furnishing Plaintiff with a qualified interpreter – if she so desired. Id at *13.

Although Boyer is a Title II case requiring primary consideration be given to the disabled

person, the regulations governing effective communication are identical in a Title III case such as the instant case, with the exception of the word "primary" when discussing consideration. The DOJ has specifically however, interpreted Title III as requiring substantial deference to the patient's expressed desire for an onsite interpreter. See Heisley, Exhibit 14, § 5C as well as 56 Fed Reg.35566-67.

Recently in the 11th Circuit (in a case on appeal from the Southern District of Florida), the court found that a deaf woman who was a patient at Indian River Memorial Hospital was entitled to communication that would ensure she received an equal opportunity to benefit from her treatment and such lack of access to communication may constitute a violation of Section 504 of the Rehabilitation Act. Similar to this case, the court found that the patients understanding of only a portion of the communication offered and a basic understanding of her medical treatment does not give a patient an equal opportunity to benefit from the hospital's treatment**.** Liese v. Indian River County Hosp. District, 701 F.3d 334 (11th Cir. 2012); see also Proctor, 32 F. Supp. 2d at 827-828 ("The treatment in this case involved several distinct procedures for which consent and follow-up were required and a period of physical therapy. Mr. Proctor had a right under the Rehabilitation Act to benefit equally from each of these services and ***to participate equally at all points in time***.").

In the case *sub judice*, Defendants were sued for the same discriminatory conduct on at least two (2) prior occasions, and agreed to implement measures to ensure that such violations would not re-occur. They did not.[8] In Falls v. Prince George's Hospital Center,

[8] Moreover, Defendants' adherence to its interpretation of what constitutes "effective communication" under the ADA does not eliminate the present need for injunctive relief. United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. Ga. 1971) ("[T]he good faith and present disposition of Defendant to adhere to the letter and spirit of the law does not preclude

1999 U.S. Dist. LEXIS 22551, *29 (D. Md. 1999), the court found that an administrative finding that a hospital violated section 504 in the past was sufficient notice of the potential liability that arises when determining the accommodations appropriate for hearing-impaired patients. Id. Similarly, in this matter, not only were Defendants aware of the liability that arises, but also failed to take the steps required by the prior settlements to ensure that such violations would not re-occur.

Although the prior agreement did not mention Video Remote Interpreting as same did not exist at the time those agreements were entered into, the agreements require that Defendants provide auxiliary aids such as a qualified interpreter when required to ensure effective communication. The fact that defendants now are utilizing VRI to provide an interpreter merely means that the interpreter is being provided through a monitor; the interpreter still must be qualified which is defined as stated above as being able to "…..effectively interpret…". It is clear in a situation such as childbirth, that a VRI interpreter would not be able to "effectively interpret" and thus would not be qualified even in the absence of a long history and evidence of unreliability that the VRI system in place at Bethesda has. Bethesda Hospital cannot **ensure** that communication will be effective as is their obligation by relying on the VRI system.

The plain language of Title III of the ADA articulates that future events are covered by 42 U.S.C. §12188(a). Title III 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". See 42 U.S.C. 12188(a)(1). Further, the language of the ADA is broad enough to provide a private right of action for an individual who

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[the court] from granting [injunctive] relief.")

suffered a single incident of discrimination if the plaintiff is aware that the discrimination is ongoing.[9] Ms. Weiss's doctor has privileges at Bethesda and it is the closest hospital to her home. Ms. Weiss and Mr. Reyes should not have to choose between going to the hospital of their choice or their right and ability to effectively communicate because Bethesda Hospital has and continues to discriminate against them due to their disability by failing to ensure effective communication. The spirit and intent of all of our anti-discrimination laws would be eviscerated if public accommodations can escape their obligations merely be forcing disabled persons to use other accommodations as theirs are not accessible. The lack of effective communication for deaf person is the equivalent of failing to have a wheelchair ramp for a person in a wheelchair; it in effect excludes the deaf person's ability to participate in and enjoy the benefits and services that all non-disabled persons may enjoy.

In this case, a likelihood of success is evident from the facts before the Court.

2. *Irreparable harm / Balancing of interests*.

In the Eleventh Circuit, a likelihood of success on the merits goes hand in hand with a determination of irreparable harm, as "irreparable injury may be presumed from the fact of discrimination and violations of [civil rights] statutes." Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984); see also United States v. Hayes International Corporation, 415 F.2d 1038, 1045 (5th Cir. 1969) ("[I]rreparable injury should be presumed from the very fact that the statute has been violated."). The same court went on to hold "that when a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific [civil

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[9] No person with a disability shall be required to engage in a futile gesture 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)

rights] statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction remedying those violations." Id. Such a showing also gives rise to a presumption of future violations and harm. See Silver Sage v. City of Desert Hot Springs, 251 F. 3d 814, 826-827 (9th Cir. 2001). Moreover, " [w]hen the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown." Star Fuel Marts, LLC v. Sam's East, Inc., 362 F.3d 639, 651 (10th Cir. 2004) (citations omitted). The mere fact

that Defendants have not agreed to provide an on-site interpreter for such a serious medical situation as childbirth and its "failure to recognize its transgressions of the Act," further demonstrates the possibility for this wrongful act to reoccur, and by itself, calls for an injunction in this case. See United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 127 (5th Cir. 1973).

In this matter, Defendants have repeatedly failed to effectively communicate with Weiss and Reyes, and have stated they will only provide VRI for the birth of their child. This wrongful act is clearly a continuing harm to Weiss and Reyes. During Weiss's April 2015 visit, not only did Defendants fail to provide an on-site certified ASL interpreter, they insisted on using a VRI system which did not work properly. This again occurred when they went for their labor and delivery tour.

However even without this history a hospital which insists it will only use VRI for child birth not once but now twice, clearly has violated their obligation to consult with and choose the proper accommodation which will ensure effective communication with a deaf patient. "An Individual who is deaf or Hard of Hearing likely will have experience with auxiliary aids and services to know which will achieve effective communication with his or her healthcare provider.

The United States Department of Justice expects that the Health Care provider will consult with the person and consider carefully his or her self-assessed communication needs before acquiring a particular auxiliary aid or service." 56 Fed Reg. 35566-67. Bethesda Hospital's blanket policy to use VRI regardless of the circumstances and without regard and consultation with Weiss clearly violates the ADA/Rehabilitation Act.

Weiss could go into labor at any time and with childbirth being risk-laden, Weiss and Reyes require an assurance that communication through an in-person, fluent ASL interpreter will be provided so they can be assured that they will be able to effectively communicate and that the hospital will effectively communicate with them during this monumental point in their lives. Reliance on a VRI system which has been shown to have many performance issues and which by virtue of its inherent limitations will be unable to ensure this effective communication is not only a clear violation of the applicable laws, it is unconscionable. Aside from its inoperability, VRI is especially ineffective here as Weiss may be lying prone, restrained with IVs, and/or blocked from a close, clear line of site with the VRI and when there are multiple people in the room and significant pain issues, all resulting in her being unable to see or use VRI as a means of communication.

Weiss and Reyes are rightfully fearful that her labor and delivery could take place in an environment where she is without critical information and decision-making power. Further, the harm or inconvenience caused by requiring Defendants to ensure that an ASL interpreter is present is *de minimus*.

3. *Public interest*.

Regarding the public interest prong, granting injunctive relief advances the public interest

because it "benefit[s] not only the claimant but all other persons subject to the practice or rule under attack." Sandford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173, 178 (4th Cir. 1978).

Defendants' interest in continuing discriminatory practices such as treating the deaf *sans* communication is subservient to the preemptive effect of the federal civil rights laws as enacted by Congress. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("Title VII's strictures are absolute and represent a Congressional command that each employee be free from discriminatory practices.'). Congress and the courts have emphatically declared that the public interest is served by effective enforcement of the federal civil rights laws.

One of the essential elements of personal dignity, and the essence of inviolability of one's person, is the ability to obtain the necessary information to make an adequate and informed choice about one's own medical treatment. Medical treatment and childbirth are some of the most intense and important experiences for a person, and because of Defendants' nonfeasance such experiences are made much worse. The public interest is clearly served by entry of the requested relief.

WHEREFORE, Plaintiffs, Margaret Weiss and Felix Reyes, respectfully request this Honorable Court grant their Emergency Motion for a Preliminary Injunction against Defendants, Bethesda Health, Inc. and Bethesda Hospital East (collectively, "Defendants" or "Bethesda"), and enter an Order enjoining Defendants from failing to provide Weiss and Felix Reyes with a live onsite American Sign Language interpreter for the labor and delivery tour, when Margaret Weiss gives birth at Defendants' facilities and when necessary thereafter.

CERTIFICATE OF COMPLIANCE

Pursuant to S.D. Fla. L.R. 7.1(e), prior to the filing of the instant motion, Plaintiffs advised Defendants several times in March and plaintiffs' counsel advised defense counsel on April 10, 2015 that they were required to ensure that Weiss was provided an on-site interpreter for the tour and the upcoming labor and delivery. Further in response to FAD's motion on behalf of Weiss, Defendants have continued to state that they will provide VRI. As stated above, FAD on Weiss's behalf, filed a prior Preliminary Motion for Injunctive Relief which is currently pending before the Honorable Daniel T.K. Hurley. Pursuant to Court Order, the Honorable James M. Hopkins wrote a report and recommendation that FAD's Motion be denied due to lack of standing as Weiss's individual participation was necessary Accordingly, this motion was prepared and filed with Weiss and Reyes as plaintiffs as Weiss's due date is fast approaching.

Pursuant to Local Rule 7.1(a)(3), the undersigned counsel for Weiss and Reyes has conferred with opposing counsel and they have not consented to the relief sought herein as they have opposed FAD's Motion requesting same. Defendants have however stated they will provide

a live interpreter for the labor and birth of Weiss's child should Ms. Weiss go into labor at this point prior to the ruling of the Court on FAD's motion.

Respectfully submitted this 10th day of June, 2015.

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