IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CIVIL ACTION FILE
CASE NO: 15-CV-80831

MARGARET WEISS, and FELIX REYES,

Plaintiffs,

vs.

BETHESDA HEALTH, INC. and
BETHESDA HOSPITAL EAST,

Defendants.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW the Defendants, Bethesda Health, Inc., and Bethesda Hospital, Inc., (Bethesda Hospital East is a fictitious name of Bethesda Hospital, Inc., and not an entity in and of itself) Florida Corporations, and file their Response to Plaintiffs' Motion for Preliminary Injunction, and say:

1. Plaintiffs filed their instant Motion for Preliminary Injunction on June 10, 2015. They also filed their Complaint for alleged violations of the Americans with Disabilities Act, and the Rehabilitation Act on June 10, 2015. Defendants were served with the Complaint on June 15, 2015, and included within the papers received was their instant Motion although it is not included in the summons and bears no certificate of service.

2. Plaintiffs are making the same claim for relief that was presented on their behalf by the Florida Association of the Deaf in the action *Sunderland, et al vs. Bethesda Health, Inc., and Bethesda Hospital, Inc.,* CASE NO: 9:13-80685-CIV-

HURLEY/HOPKINS. In that action, the Court determined that the Florida Association of the Deaf did not have standing to bring Plaintiffs' claims as the applicable federal law did not provide *per se* as a matter of law that VRI (video remote interpreting) could not provide effective communication to a deaf pregnant woman during labor and delivery. (Please see Magistrate Hopkins' Report and Recommendation on Plaintiff's Motion for Preliminary Injunction [D.E. 169] and Judge Hurley's Order Adopting Report and Recommendation and Denying Plaintiff's Motion for Preliminary Injunction [D.E. 173] in *Sunderland, et al vs. Bethesda Health, Inc., and Bethesda Hospital, Inc.,* CASE NO: 9:13-80685-CIV-HURLEY/HOPKINS).

3. The Defendants (hereinafter collectively referred to as "Bethesda"), oppose the relief requested and deny the allegations that Bethesda has discriminated against Weiss and Reyes in the past and deny they would discriminate against them in the future. Bethesda further asserts that Plaintiffs have not demonstrated a substantial likelihood that Weiss and Reyes will be discriminated against. Finally, Bethesda asserts that Plaintiffs have not otherwise satisfied the legal requirements for such extraordinary relief as a preliminary injunction.

Title III of the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973

Title III of the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973 provide, generally, that an individual shall not, by reason of their disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance, or at a place of public accommodation. 29 U.S.C. § 794(a), and 42 U.S.C. § 12182(a). The Department of Health and Human Services promulgated regulations that more

particularly describe an entity's obligations to the disabled. See 45 C.F.R. § 84.3 et seq, and 28 C.F.R. § 36.303. These regulations require that Bethesda provide appropriate auxiliary aids where necessary to ensure effective communication to afford the disabled person an equal opportunity to benefit from the service provided. The aids, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result. 45 C.F.R. § 84.4(b)(2). The auxiliary aids for a deaf person can include on-site **or** video remote interpreters; written materials; exchange of written notes; and a host of other devices or materials. 45 C.F.R. § 36.303(b). 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. 45 C.F.R. § 36.303(c)(1)(ii). 45 C.F.R. § 36.303(c)(1)(ii) specifically provides:

> the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. 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. (emphasis added)

Bethesda, in full compliance with the C.F.R., has a policy to provide effective communication to its deaf and hard of hearing patients and companions, and uses a variety of auxiliary aids, including interpreters by video remote or on-site, when necessary, to do so. When an interpreter is needed, Bethesda first uses a video remote interpreting system (VRI) that provides qualified interpreters via a computer link with a live interpreter via the internet. On any occasion when the video remote interpreter system does not provide effective communication, Bethesda provides an on-site interpreter through an interpreting service which is called to provide an interpreter who comes to the hospital. Bethesda's policy is attached hereto as Exhibit 1. Plaintiffs cannot dispute that Bethesda's policy is in compliance with the C.F.R. Plaintiffs assert, contrary to controlling law, that a pregnant deaf patient has the unilateral right to determine what auxiliary aid the public accommodation must provide. In Plaintiffs' Motion, they are asking this Court to determine, as a matter of law, that a pregnant deaf individual who requests an on-site interpreter, rather than a qualified interpreter provided by a video remote system, must be provided the on-site live interpreter regardless of whether the video remote interpreter is effective. Plaintiffs' position is in direct conflict with what Title III provides.

Injunctive Relief

As the parties seeking injunctive relief, Plaintiffs bear the burden of establishing four elements: (1) that they have a substantial likelihood of success on the merits; (2) that a substantial likelihood of irreparable injury exists if the injunction is not granted; (3) that the threatened injury outweighs the potential harm to Defendant; and, (4) that the injunction, if issued, will not be adverse to the public interest. *See*

Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002) (citations omitted). It is well established that a "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the 'burden of persuasion' as to all four elements." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citations omitted), and *Wilson v. Broward County, Florida, Opinion and Order Denying Injunctive Relief, issued by U.S. District Judge Kenneth A. Marra.* (the Opinion is attached hereto as Exhibit 2).

The *Wilson* case relied upon by Plaintiff in its Motion is distinguishable in that the court considered a request for a permanent injunction, not a preliminary injunction. Judge Marra also recognized that "an injunction, whether permanent or preliminary, is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion. *Id.* at page 4, (internal citation omitted). The court also specifically found that the plaintiff did not demonstrate that he would suffer an injury that could not be compensated by remedies available at law. The Eleventh Circuit has also emphasized the need that the likelihood of future injury must be more than conjecture or a hypothetical threat, and that the claimant must show facts that give rise to the inference that they will suffer future discrimination by the defendant. *Shotz v. Cates,* 256 F.3d 1077, 1081 (11th Cir.2001).

In the instant action, Bethesda has a policy in place to provide whatever auxiliary aids are necessary to provide effective communication to its deaf and hearing impaired patients, including the use of interpreters. When it is determined that an interpreter is necessary, Bethesda initially utilizes the Department of Justice authorized video remote interpreting device. If the video interpreter does not provide effective communication, a

live on-site interpreter is provided if no other auxiliary aid is effective. If the plaintiffs were to suffer discrimination by Bethesda intentionally discriminating against them by not providing appropriate auxiliary aids to ensure effective communication, legal remedies are available under the Rehabilitation Act.

Again, the regulations regarding the use of auxiliary aids, and who determines the aids necessary are contained within 28 CFR §36.303(c)(1)(ii), which provides the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication.

The Plaintiffs inappropriately argue as proof of an alleged "long pattern and practice of discrimination against the deaf" the *Sunderland* action, the *Beaubien* action, and some 2006 agreement with the Department of Justice. (see footnote 1 of Plaintiffs' Motion, page 4). However, the mere fact an action is filed is not proof that allegations are true, and in not one of the actions has there ever been a finding of fact that discrimination ever occurred. Furthermore, these agreements were before the regulations specifically permitted interpreters via video remote interpreting.

Plaintiffs also incorrectly argue the *Boyer vs. Tift County Hospital* case and the St. Francis Hospital settlement agreement with the Department of Justice mandate that Bethesda provide an on-site interpreter as opposed to the VRI. However, neither supports that position. (The *Boyer* order is attached hereto as Exhibit 3), and (the full agreement between St. Francis Hospital and Medical Center and the Department of Justice is attached hereto as Exhibit 4)

Unlike this Motion, *Boyer vs. Tift County Hospital* is a Title II action which addresses different regulations than this Title III action. Contrary to Plaintiff's assertion,

the *Boyer vs. Tift County Hospital* case is not similar to the instant action, and certainly not controlling. The *Boyer* opinion is a trial court order denying the defendant hospital's Motion for Summary Judgment. Tift County Hospital is a public entity, unlike Bethesda, so that case involved a cause of action brought under Title II of the ADA, not Title III which controls this action. The federal regulations and their effect regarding Title II are interpreted to require public entities to provide an interpreter, if one is requested, to an individual with hearing impairments. Title III and its regulations do not permit the disabled individual to unilaterally select the auxiliary aid. The Plaintiff also cites to 45 CFR § 84.52(a), and a Department of Justice publication in support of the statement in *Boyer* that the hospital must provide an interpreter if requested, and neither the 45 CFR § 84.52(a) nor the Department of Justice publication require any such thing for public accommodations.

Additionally, the *Boyer* court did not, as incorrectly stated by plaintiff in its instant Motion, find as a matter of law that the use of auxiliary aids other than an interpreter did not satisfy the requirements of effective communication when the individual requested a live interpreter. The court held in its order denying the defendant hospital's motion for summary judgment, only that it could not, as a matter of law, find that the hospital complied with federal regulations for effective communication. *Boyer,* page 13.

The settlement agreement between the Department of Justice and St. Francis Hospital and Medical Center is equally inapposite. The St. Francis Hospital agreement is a settlement agreement which by its terms only applies to the parties to the agreement. Regarding this settlement agreement, Plaintiffs incorrectly state that the Department of Justice "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" (page 16 of D.E. 5) - citing to a section of the settlement agreement which does not say that. The language of the quoted section actually provides that VRI can be appropriate in a variety of situations, and provides a list of factors to consider in determining whether VRI is appropriate. The language does not establish that VRI is never appropriate in labor and delivery. The settlement agreement itself belies Plaintiffs' argument that the disabled person may unilaterally decide, before visiting a public accommodation, what auxiliary aid must be provided.

The Plaintiffs also incorrectly state in their Motion that the Department of Justice has "specifically however, interpreted Title III as requiring substantial deference to the patient's expressed desire for an on-site interpreter" (D.E. 5, page 18). Again, this is language taken from a consent judgment agreement between two parties and is not applicable as precedent to anyone outside the parties to that agreement.

The Plaintiffs also cite Appendix A to Part 36 which provides comments on Department of Justice guidelines to ADA Regulations. Within these comments the Department of Justice states that there may be situations where VRI does not provide effective communication; but even in those situations only provides that it may be necessary to provide an on-site interpreter, not that an entity shall provide an on-site interpreter. (emphasis added).

The Plaintiffs also argue that *Liese vs. Indian River Memorial Hospital*, 701 F.3d 334 (11th Cir. 2012) supports their demand for an on-site interpreter. However, the Plaintiffs incorrectly state that the Court "*found that the patients* [sic] *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". The court did not make such factual findings. The Court certainly did not conclude as a matter of law that patients are entitled to select the auxiliary aid. The Court merely found that there were disputed issues of material fact which precluded summary judgment on the issue of whether there was deliberate indifference to providing effective communication. The case was ultimately tried and the Lieses failed to prove their claim that Indian River Memorial Hospital discriminated against them by failing to provide appropriate auxiliary aids necessary to provide Mrs. Liese an equal opportunity to benefit from the hospital's services. (Please see verdict in *James Liese and Susan Liese vs. Indian River Memorial Hospital, Inc.,* attached hereto as Exhibit 5).

More relevant to the plaintiff's renewed demand here for an on-site interpreter is the *Liese* Court's observation regarding the language of 45 C.F.R. § 84.52(c), that provides appropriate auxiliary aids shall be provided where "*necessary*" to afford equal opportunity to benefit from the service, when it reasoned:

> "... as both parties agree, the simple failure to provide an interpreter on request is not necessarily deliberately indifferent to an individual's rights under the RA (the Rehabilitation Act). Indeed, construing the regulations in this manner would effectively substitute "demanded" auxiliary aid for "necessary" auxiliary aid." Id. at 343.

This is precisely what the Plaintiffs are asking this Court to do – to decide, as a matter of law, that the ADA and the Rehabilitation Act require that an on-site interpreter be used for a hearing impaired woman, who communicates in sign language, for her labor and delivery if she demands one, in advance, regardless of the effectiveness of other auxiliary aids.

In support of Plaintiffs' Motion, Margaret Weiss executed a declaration that contains conclusory statements that Bethesda discriminated against her on a labor and

delivery tour in April 2015, and during two Emergency Room visits for her daughter. The Plaintiffs also attach a declaration from June McMahon (vice-president of the Florida Association of the Deaf, which is a Plaintiff in *Sunderland,* and which, in that action, unsuccessfully sought the same relief the Plaintiffs now seek in this action), and allege the VRI failed to operate properly during an out-patient procedure she had in June 2015. The Plaintiffs and Ms. Weiss's mother also took another Labor and Delivery tour on June 12, 2015. The testimony of several Bethesda employees, Lora Breda, Claudia Harrington, Cabrini Farano, Juan Rivera, Dorothy Kerr, Carol Wood, Lloyd Wynne, Kevin Berthiaume, Dave Neff, and the records of the Plaintiffs' child's emergency room visits, specifically rebut the allegations that Bethesda failed to provide effective communication to the Plaintiffs during their past visits to the hospital. (The affidavit of Lora Breda regarding the April 2015 tour is attached hereto as Exhibit 6, and her affidavit regarding the June 2015 tour, with photographs of the various rooms, is attached as Exhibit 7; the affidavit of Claudia Harrington as Exhibit 8; the affidavit of Dorothy Kerr is attached hereto as Exhibit 9; the affidavit of Cabrini Farano as Exhibit 10; the affidavit of Juan Rivera as Exhibit 11; the affidavit of Carol Wood as Exhibit 12; the affidavit of Lloyd Wynne as Exhibit 13; the affidavit of Kevin Berthiaume as Exhibit 14, and the affidavit of Dave Neff as Exhibit 15. The medical records of the child's emergency room visits have not been attached due to HIPAA concerns and the protections provided under that Act since the child is not a party to this action.

Ms. Breda conducted the tours of the hospital's labor and delivery and mother-baby units. Ms. Breda's affidavits describe the nature of the tours, the use of the VRI, Ms. Weiss's acknowledgment that all of her questions were answered, and the

photographs depict the types of rooms utilized and the sufficiency of space to accommodate the plaintiffs. Claudia Harrington was also present for the first tour and assisted Ms. Breda with the computer on wheels used for the VRI. She also describes the effectiveness of the communication during the tour. Dave Neff assisted Ms. Breda with the second tour and his affidavit describes the effectiveness of the VRI system.

Cabrini Farano was the nurse on duty in the emergency department on April 5, 2015 when Ms. Weiss' child was brought in after suffering a fall off a bed. Ms. Farano specifically recalls her interaction with Ms. Weiss, the father, other members of the Weiss-Reyes family, and the interactions between the doctor and the parents. The VRI was used when Ms. Farano performed the emergency department triage and the emergency department physical assessment of the child between approximately 11:30 a.m. to 11:45 a.m., and when the doctor examined the child during this same time. The child was discharged just after 12:00 pm. During the time the VRI was used Ms. Farano was present when the doctor orally gave the parents discharge instructions and she advised the parents that she would be providing the same instructions in written form. When shortly thereafter she provided the written discharge instructions, which appear to have been signed by the father, she specifically recalls asking a family member to please ask the parents if they had any questions, and if so, that she would re-connect to the VRI. The family member communicated with them and advised Ms. Farano that they did not have any questions and did not need the VRI. Although Ms. Weiss states in her declaration that she was left with no means of communication, Ms. Farano specifically recalls Ms. Weiss wanting the doctor to order a CT scan of the child. According to Ms. Farano, the doctor explained there was no reason to have a CT scan

as the child was behaving normally, and the additional exposure to radiation should be avoided (the child had undergone a CT scan on December 31, 2014). Ms. Weiss also signed the consent record. Ms. Farano further attests that at no time did the parents complain they were having any difficulty with the interpreter and at no time did she feel either she or the doctor was having problems communicating with the parents.

The testimony of Juan Rivera and Dorothy Kerr concern the emergency department visit for Weiss' and Reyes' child on December 31, 2014. Mr. Rivera and Ms. Kerr will testify that efforts were made to use the VRI system and when those efforts were unsuccessful, an on-site interpreter was obtained. This testimony demonstrates that Bethesda does in fact follow its policy for providing effective communication. When the VRI system was not operational Bethesda's staff acted reasonably in trying to make the VRI system function, and when they could not, they obtained an on-site interpreter.

The affidavits of Carol Wood, Lloyd Wynne, and Kevin Berthiaume rebut the accusations that Mrs. McMahon was not provided effective communication during her June 5, 2015 out-patient procedure.

The affidavits of Plaintiffs' experts are filed to support the argument that labor and delivery always requires the use of an on-site interpreter rather than an interpreter through VRI. This argument has been squarely rejected by the Order of this Court in *Sunderland* adopting Magistrate Hopkins' Report and Recommendation, where the same argument was made. An examination of their declarations reveal nothing particular to Margaret Weiss, but rather just generic statements that labor and delivery might be crowded, confusing, and concluding that VRI is not appropriate in this

hypothetical circumstance. However, neither of the Plaintiffs' experts is a medical doctor. The founder of the service utilized by Bethesda for remote interpreters, Dr. Stanley Schoenbach, is a medical doctor and has testified in this action that VRI can be very effective in the labor and delivery setting and that he has received feedback from obstetricians praising the VRI in labor and delivery. See deposition of Dr. Stanley Schoenbach, at page 13, attached hereto as Exhibit 16. Dr. Schoenbach also addresses in his deposition many of the other "limitations" alleged by Plaintiffs and explains that in these situations the VRI can be as effective, and in some instances more effective than an on-site interpreter.

The Plaintiffs repeatedly and incorrectly allege that Bethesda refuses to provide an on-site interpreter and will use VRI only. The Plaintiffs know this assertion is false since an on-site interpreter was utilized when they brought their child to Bethesda on New Year's Eve 2014. Please see affidavit of Dorothy Kerr, Exhibit 9.

The Plaintiffs also continue to misrepresent to the Court that the "sign" that previously had been displayed on a VRI unit is proof of Bethesda's nefarious intents to discriminate and never use an on-site interpreter. The Plaintiffs know better. First the sign did not say what the Plaintiffs allege it said, and second, Gary Ritson, the Vice President of Risk Management for Bethesda, testified that the "sign" was made to provide nurses with a consistent response to patients who refused to use or even look at the VRI. (Deposition of Gary Ritson, page 113, lines 7 – 18, attached hereto as Exhibit 17). Caroline Partin, a professional sign language interpreter, testified she saw the "sign" in 2011 and it was taped to the desktop of the portable cart used for the VRI.

(Deposition of Caroline Partin, page 17, line 21 through page 18, line 11, attached hereto as Exhibit 18). Therefore, it was never "displayed" to the deaf patients.

The arguments contained in Plaintiffs' Motion and the declarations of Plaintiffs' experts concerning the position of the body, possible restraining of the arms, etc., mirror comments and recommendations made by the public and deaf advocates when the Department of Justice proposed amending the regulations to allow for the use of VRI. *See Appendix A to Part 36, Subpart A – General, Section 36.104, Definitions, Video Remote Interpreting (VRI) Service.* (the pertinent portion is attached hereto as Exhibit 19). The Department of Justice permitted the use of VRI and **did not** find that in labor and delivery that VRI would not be permissible and an on-site interpreter would be required. The Department of Justice only made the comments recited above in the definition of VRI indicating that the use of VRI was on an *ad hoc* basis, depending on the circumstances. Also telling is Title 28 C.F.R., Appendix A to Part 36, Subpart C, Specific Requirements, §36.303, Auxiliary Aids and Services – where the Department of Justice specifies the amendments to the regulations and specifically does not require the use of on-site interpreters in any specific setting. This part of the Appendix also addresses the advocates' request that the regulations be changed to make Title III like Title II requiring public accommodations to provide an interpreter if the individual asks for one as is the case under Title II for public entities, which is what Plaintiffs are asking the Court to do judicially. The Department of Justice wrote:

> The second sentence of §36.303(c)(1)(ii) states that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." Many commentators urged the Department to amend this provision to require public accommodations to give

primary consideration to the expressed choice of an individual with a disability. However, as the Department explained when it initially promulgated the 1991 title III regulation, the Department believes that Congress did not intend under title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability. (emphasis added)

Title 28 C.F.R., Appendix A to Part 36, Subpart C, Specific Requirements, §36.303, Auxiliary Aids and Services. (the pertinent portion is attached hereto as Exhibit 20

The arguments contained in Plaintiff's Emergency Motion are arguments to change the law, not to enforce the law, and thus should properly be made to Congress or the Department of Justice, not to the judicial branch of government. Plaintiff is asking the Court to predetermine that an individual's rights will be discriminated against because Bethesda may not provide the auxiliary aid she demands. Plaintiffs cannot cite any cases in which a court has found that use of VRI is *per se* ineffective during childbirth or for any other particular medical situation, as recognized by this Court's Order in *Sunderland.*

An additional case relied upon by Plaintiffs in support of their Motion is *Proctor v. Prince George's Hospital Center,* 32 F.Supp.2d 820 (D. Md. 1998), but it actually supports Defendants' position. In this Title III case, the Court reviewed a body of cases and the regulations concerning the Rehabilitation Act and observed "Neither the precedents nor the regulations, however, establish a *per se* rule that sign language interpreters are necessary in hospital settings. *Id. at 827*. This is precisely what the Plaintiffs are demanding in this Motion, that a live, on-site sign language interpreter, *per se*, must be used if requested.

Conclusion

Bethesda requests this Court deny the relief demanded by Plaintiffs in their Motion for Preliminary Injunction as there is no unrebutted evidence that Bethesda has

discriminated against Weiss and Reyes in the past and nothing to support the allegation of a substantial likelihood that Bethesda would discriminate against them in the future. The Plaintiffs have not satisfied the legal requirements for such extraordinary relief as a preliminary injunction.

Respectfully Submitted on June 26, 2015:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served to all parties on the attached service list by Electronic mail on June 26, 2015.

s/ JOHN D. HEFFLING

SERVICE LIST

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UNITED STATES DISTRICT COURT
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