

Trends: Close Up

October 2018

Hidden Disabilities

Most courts understand that accommodations must be made for a litigant who is blind or deaf, or who has mobility issues or other more obvious types of disabilities. Confusion or misunderstandings may occur when the disability is not visible. Hidden disabilities most typically involve a person with a mental or cognitive impairment (e.g., a combat veteran with PTSD using a service animal), but they could also be situations where a physical impairment could cause fatigue, language, or cognitive difficulties. (e.g., multiple sclerosis). ADA claims for communication accommodations under Title II in the courts have typically focused on deaf or hearing-impairment requests.¹ Because these requests are based on language and communication as fundamental to accessing the courts, similar arguments have been brought for individuals with other language disorders or cognitive disabilities that affect the ability to communicate with the court.

The right of access to the courts falls under the Title II Public Services Section A of the Americans with Disabilities Act (ADA).² In 2004 the U.S. Supreme Court held that “Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ § 5 authority to enforce the guarantees of the Fourteenth Amendment.”³ The ADA applies

About the Series



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to all programs, services, and activities of the state and local judicial branch. This means that the activities and services include more than just the actual courtroom hearing. Anytime jurors, litigants, attorneys, judges, witnesses, spectators, or any other member of the public enters the courthouse to conduct business, an accommodation may be requested. Title II of the ADA ensures that the earlier nondiscrimination requirements of section 504 of the Rehabilitation Act of 1973, which applied to public entities receiving federal financial assistance, now apply to all state public entities, including courts. States may also have disability-rights legislation or court rules broader than Title II. State courts must comply with Title II, the Rehabilitation Act, and their own state laws or court rules.

To request an accommodation, the individual must be a qualified person with a disability who with or without the accommodation would

1 *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (litigant in child custody case with a hearing impairment); *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (litigant requested real-time transcription in court proceeding); *Gregory v. Administrative Office of the Courts*, 168 F.Supp. 2d 319 (D.N.J. 2001) (litigant requested a copy of the CART transcript at the same cost as an audio or video recording); *Soto v. City of Newark*, 72 F. Supp. 2d 489 (D.N.J. 1999) (hearing-impaired couple requested interpreter for civil-wedding service at the courthouse).

2 42 U.S.C. § 12101 (2012).

3 *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) at 1994.



be “eligible to participate” in a courthouse service, such as filing a complaint or serving as a juror. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) ensures that the definition of disability is construed as broadly as possible. Mitigating effects of medications or technology are not taken into account when determining whether the litigant is a qualified individual under the ADA. If a condition is in remission, the determination is made as if it were active.⁴ A qualifying disability affects a major life activity, which includes learning, reading, concentrating, thinking, and communicating.

While not specifically addressed, advocates have argued that this broader definition indicates that individuals with mental-health issues, developmental disabilities, or communication disorders other than hearing impairment are entitled to accommodations such as a courtroom facilitator.⁵ Persons with these types of hidden disabilities, which interfere with their ability to communicate with the court, are

at a particular disadvantage in accessing court services.

The Department of Justice (DOJ) regulations provide information clarifying the ADA effective communication regulations for state and local governments. The regulations require primary consideration be given to the individual’s request. The DOJ overview on “Effective Communication” explains that:

The purpose of the effective communication rules is to ensure that the person with a vision, hearing, or speech disability can communicate with, receive information from, and convey information to, the covered entity.⁶

This language could apply to someone with a hearing impairment or another physical or mental impairment that affects their ability to speak to the court. Judges and other court staff must be able to understand and communicate information to a person with a disability. Vermont

⁴ Id. at 1.

⁵ C. Marx, *Accommodations for All—The Importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities*, DLR ONLINE (2018).

⁶ Dep’t. of Justice, ADA Requirements, Effective Communication (January 31, 2014).

has developed a communication support program that trains and certifies “Communication Support Specialists” to assist individuals with disabilities with their communication with the court.⁷ According to the “ADA Update: A Primer for State and Local Governments,” a “person who has an intellectual or cognitive disability may need assistance in completing an application for public benefits.” They also may need additional assistance to “to communicate effectively in a court proceeding.”⁸

Accommodations such as note takers or oral interpreters have been made to assist individuals with communication disabilities related to mental-health issues, language-processing disorders, learning disabilities, or Attention Deficit Disorder (ADD). A 2001 National Center for State Courts’ survey showed that state courts were making the following accommodations for individuals with hidden disabilities:

- Modifying court schedules (for sleep apnea or chronic fatigue)
- Providing working refrigeration for people to store medicine
- Allowing for more frequent breaks or storing candy in the court (for diabetes)
- Allowing note taking and tape recorders (ADD, ADHD)
- Modifying lighting (lighting/chemical sensitivities)
- Requesting that people not wear perfume or aftershave in court (severe allergies)
- Limit time on stand (ADD and ADHD)⁹

A 2017 Georgia courts guide addresses interacting with individuals with particular disabilities, including speech or language, cognitive, and mental health,

in addition to vision, hearing, and mobility.¹⁰ A Colorado courts guide provides suggested accommodations for persons with cognitive disabilities and psychiatric disabilities, including writing things down, repeating information, talking more slowly, using simple concrete language, taking breaks, providing step-by-step instructions, scheduling around medical needs, providing a “coach or support person at the proceeding,” and allowing remote video conferencing.¹¹

“The ADA applies to the broad range of disabilities that can affect a major life activity, including thinking and communicating.”

As courts continue to review requests for reasonable accommodations from persons coming to the courthouse, they need to be aware that the ADA applies to the broad range of disabilities that can affect a major life activity, including thinking and communicating. While a court is not required to provide the exact accommodation requested, they must consider the request. The court must show an undue financial or administrative burden, or that a program will require a fundamental alteration, before they can deny the request. Even then they must be sure that the person has access to the program or service to the “maximum extent possible.”¹²

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* For an electronic copy of this report, please visit www.ncsc.org/trendscloseup.

7 Vermont Communication Support Project, DISABILITY RIGHTS VERMONT (2011); available at, <http://www.disabilityrightsvt.org/Programs/csp.html>.

8 Dep’t. of Justice, ADA Update: A Primer for State and Local Governments (*last updated* June 8, 2015).

9 Amanda Murer, Non-Apparent Disabilities: The Newest Realm Involving the Courts and the ADA (National Center for State Courts 2001).

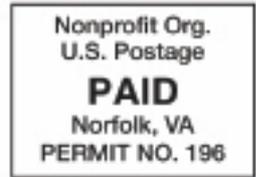
10 Judicial Council of Georgia, Access to Justice for People with Disabilities: A Guide for Georgia Courts (2017).

11 Colorado Judicial Dep’t., Access to the Courts: A Resource Guide to Providing Reasonable Accommodations for People with Disabilities for Judicial Officers, Probation, and Court Staff, 4 (2004).

12 28 C.F.R. § 35.164 (1991).



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A Michigan courts ADA handbook provides a list of accommodations for persons with cognitive disabilities:

-  Speak clearly and slowly and keep sentences short.
-  Break complicated information or instructions down into shorter, distinct parts and avoid complex terms.
-  If possible, use symbols, pictures, or actions to help convey meaning.
-  Ask concrete, open-ended questions. Avoid yes/no answers.
-  Allow for additional time to speak with participants and for them to respond.
-  When necessary, repeat information using different wording or a different communication approach. Allow time for the information to be fully understood.
-  Provide material on audiotape rather than in written form.

Source: A Handbook for Michigan Courts on Accessibility and Accommodation for Individuals with Disabilities (March 2018).