



Maine Human Rights Commission

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Investigator's Report PA13-0607

November 14, 2014

██████████ (Sanford)

v.

██████████ ██████████ ██████████ ██████████ (Windham)

I. The Complaint:

The Complainant, who is Deaf, alleged that she was discriminated against due to her physical disability when her health care provider failed to provide an American Sign Language ("ASL") interpreter to ensure effective communication about her treatment.

II. Respondent's Answer:

Respondent ██████████ ██████████ ██████████ ██████████ ("██████████") denied the allegation of discrimination and asserted that arrangements to provide an ASL interpreter had been made both for Complainant's initial consultation and for the date of the actual surgery. On both occasions, the ASL interpreters failed to appear at the appointment as scheduled, but Complainant understood enough to provide consent to her treatment.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: September 17, 2013 and October 1, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): October 21, 2013.
- 3) ██████████ is a place of public accommodation subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, and state and federal employment regulations.
- 4) Complainant is represented by ██████████ Respondent is represented by ██████████, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties. This preliminary investigation is believed to be adequate to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

1) The parties in this case are as follows:

- a) Complainant [REDACTED] [REDACTED] is a 49-year old woman who is Deaf and speaks ASL as her primary language.
- b) [REDACTED] is the largest oral and maxillofacial practice in Maine. The entity has three locations, including South Portland, Windham, and Biddeford.

2) Complainant's position:

- a) Ms. [REDACTED] has been using ASL to communicate for her entire life. She struggles with and generally does not read written English. Although she occasionally browses through the newspaper, she does this more to look at pictures than to read the news, as she does not understand the writing. She does not read books. English is not Ms. [REDACTED] primary language; ASL is.
- b) Ms. [REDACTED] was referred to [REDACTED] by her dentist because she needed to have two teeth extracted. She called [REDACTED] approximately two weeks ahead of time to request an ASL interpreter. [REDACTED] assured her that she would have an interpreter at her appointment.
- c) When she arrived for the consultation on September 17, 2013, there was no interpreter. The surgery was scheduled for that day.¹ One of [REDACTED] surgeons ("Surgeon") attempted to explain to Ms. [REDACTED] in writing complex information regarding her treatment and other information. There was no interpreter, therefore, Complainant did not understand what Surgeon was attempting to convey to her, nor could she ask questions about the upcoming surgery. Ms. [REDACTED] requested that the appointment be rescheduled until an interpreter could be present; [REDACTED] reset the appointment for the following month.
- d) A couple of days prior to the October appointment, [REDACTED] called Complainant to remind her of the appointment. When she asked if there would be an interpreter, she was told that there would be.
- e) When Ms. [REDACTED] arrived for her October appointment, there was again no interpreter present. She waited and asked where the interpreter was. Staff told her that the interpreter was en route. She continued to wait, but no interpreter arrived. She became increasingly upset and stressed that no interpreter was present.
- f) Ms. [REDACTED] had a friend ("Friend") with her to drive her home following the surgery. Friend is hard of hearing, and can speak ASL. As they waited for the interpreter to arrive, staff observed Ms. [REDACTED] and Friend communicating in ASL. Staff then made the decision to ask if Friend would interpret. Friend informed [REDACTED] staff that he is neither a good interpreter nor a licensed interpreter, and that he was only there to drive Complainant home following the surgery. It was clear that Friend was hard of hearing, and he often had to ask that things be repeated to him. He had not been trained as an interpreter, and certainly had no training as an interpreter of medical terminology. [REDACTED] nonetheless continued to request his assistance as an interpreter in the matter.

¹ In its response to the MHRC, [REDACTED] denies that surgery was scheduled on 9/17, but their internal documents show that surgery was scheduled for that date but Ms. [REDACTED] wanted to "hold off with treatment till [sic] October." See Respondent's Attachment 5, "Alert Report," which states "9/17/13 30 min surgeon time for IV and extraction x2 here in Biddeford. We would need an interpreter that day and she wants to hold off with treatment till October. Rwc"

- g) Complainant was in pain, had swelling and already had been forced to postpone her surgery the month before. She was very upset, anxious, and frustrated about feeling pressured to go through with the surgery without an ASL interpreter. She felt that she was being forced to use her driver as an ASL interpreter. In her view, [REDACTED] staff had abandoned the idea of an ASL interpreter being "on the way" and was simply substituting its own judgment about what the most appropriate solution would be. Ms. [REDACTED] had seen no effort on the part of [REDACTED] staff to secure another qualified ASL interpreter for her procedure on that day, or to find any solution other than using her hard-of-hearing Friend as an interpreter.
- h) Friend did attempt to translate for Complainant, although he had never affirmatively agreed to it. Ms. [REDACTED] was given no alternative. She was experiencing intolerable pain, had no ASL interpreter, and needed to have the surgery done that day.
- i) Ms. [REDACTED] and Friend both were very uncomfortable when Friend was trying to interpret the information that [REDACTED] staff was trying to convey. Furthermore, it seemed to Complainant that [REDACTED] staff said complicated words that went over Friend's head. He kept asking them to repeat over and over again so that he could try to lip read and hear to the best of his ability, and then tried to convey what he could to Ms. [REDACTED].
- j) Friend stated that he tried his best to read lips, but because he is hard of hearing, he was forced to ask staff members to repeat information. A combination of hearing loss, lack of training as an interpreter and unfamiliarity with medical terms caused Friend to miss many words which a trained ASL interpreter would know and be able to communicate in ASL. It was a struggle for him to try to understand and convey the information [REDACTED] staff was speaking.
- k) Additionally, Friend was then privy to Complainant's medical information that would otherwise have been shared behind closed doors.
- l) Complainant felt rushed and forced to sign forms although she did not fully understand what they said.
- m) In any event, although she did not want to be operated on without an ASL interpreter present, Ms. [REDACTED] went forward with the extraction because she was in so much pain and she felt pressured to do so. When Complainant awoke after her surgery, [REDACTED] staff brought Friend in to translate the aftercare instruction. Again, Friend could not hear well, and the staff talked fast, which made it very difficult to understand and convey information. The type of information that would have needed to be conveyed was critical. According to [REDACTED]'s website, this information would likely include: instructions about how to deal with bleeding gums; not to brush her teeth, smoke, or drink alcohol for 72 hours and not to exercise vigorously for 24 hours; information about swelling and how to address it; using pain medication; resuming normal dental care and activity; and when to call the office for help. See [http://www.\[REDACTED\].com/surgical-instructions/tooth-extractions-southern-maine.html](http://www.[REDACTED].com/surgical-instructions/tooth-extractions-southern-maine.html).
- n) Unfortunately, due to the lack of effective communication, Complainant could not possibly have received the majority of this information under the circumstances. Friend continued to have difficulty hearing and reading lips. The [REDACTED] staff was talking fast and Complainant and Friend were struggling to understand them. There was little to no opportunity for Complainant to ask questions or have a meaningful exchange. Finally, Complainant gave up and left.

3) Respondent [REDACTED] provided its position:

- a) [REDACTED] is a small dental surgery practice with four doctors. In the past, [REDACTED] has treated several patients who have hearing disabilities. On those occasions, [REDACTED] has utilized a third-party interpreting service ("Interpreting Service") when needed. [REDACTED] practice is that once it is notified that interpretation services are required, a staff member will fax Interpreting Service the details, including date, time and location of service. [REDACTED] retains a copy of the notification in the patient's file. On occasion, [REDACTED] will also call Interpreting Service if the time or date of the appointment changes or if a patient calls to tell [REDACTED] that they will be late to an appointment.
- b) On September 6, 2013, Complainant made an appointment with [REDACTED]'s Biddeford office for a consultation, which was scheduled for September 17, 2013.
- c) Contrary to her charge, Complainant was not scheduled to "have two teeth pulled" on September 17. The purpose of that appointment was to conduct an initial examination to determine what, if any, future treatment might be needed and to determine what would be an appropriate surgical plan. After scheduling the September 17 appointment, [REDACTED] faxed a request for an ASL interpreter to Interpreting Service. All of the pertinent information was transmitted and, based upon prior experience, [REDACTED] fully expected the interpreter to arrive at the appointed time.
- d) Complainant appeared for the consultation, but the interpreter failed to appear. Given that absence, [REDACTED] asked Ms. [REDACTED] using written notes, if she wanted to reschedule the appointment so that an interpreter could be present. Ms. [REDACTED] explicitly told [REDACTED] that she wanted to move forward that day with the consultation without an interpreter. Ms. [REDACTED] then proceeded with [REDACTED]'s necessary paperwork. Importantly, she indicated throughout the appointment that she understood the questions being asked, and at no time did she object to moving forward that day without an interpreter. If Complainant had objected at any time, or if there had been any indication that she did not completely understand what was being conveyed, [REDACTED] would have immediately stopped and rescheduled the appointment.
- e) Given her consent, Ms. [REDACTED] engaged in a written exchange with a staff member to review her medical history and dental problems.
- f) Ms. [REDACTED] did not object to this at any time. She clearly indicated an understanding of the process. After the medical history had been completed, Surgeon reviewed the history and written exchanges to ensure that Complainant not only understood the process, but also consented to being examined that day. Surgeon specifically asked Complainant's permission to perform an oral exam. Ms. [REDACTED] agreed to it. After the examination had been completed, Surgeon reviewed the x-rays which Complainant's dentist had provided. Written notes were also used at this time.
- g) Surgeon outlined Complainant's options, and explained that he thought that the teeth would come out in pieces, that this was not just a "simple" extraction, and that he would have to work in two separate areas of the jaw. Again, Complainant affirmed that she understood what Surgeon was saying to her.
- h) After this discussion, Complainant and Surgeon agreed to a treatment plan which included the need for intravenous anesthesia and surgical removal of the two molars. Ms. [REDACTED] told Surgeon that she wanted to wait until October before moving forward with treatment. Surgeon reviewed written pre-operative instructions with Complainant; Complainant was also given a printed sheet of instructions.

- i) Complainant scheduled her surgical appointment for October 8, 2013. Consistent with its usual practice, ██████ faxed Interpreting Service requesting an ASL interpreter for the appointment.
- j) The next day, the appointment was rescheduled for October 1, 2013. ██████ telephoned Interpreting Service cancelling the October 8 appointment and requested that the ASL interpreter report on October 1 instead. This is reflected in the patient's notes.
- k) On October 1, 2013, Complainant arrived for the surgical appointment with Friend, with whom it appeared she could communicate via ASL. Complainant indicated that she had followed all of the pre-operative instructions. Despite having notified Interpreting Service of the appointment well in advance, the ASL interpreter did not arrive as scheduled. A ██████ staff member then called Interpreting Service to determine why no interpreter had been provided for the appointment, and was told that the ASL interpreter could not make it that day.
- l) Since no interpreter was sent by Interpreting Service, ██████ met with Ms. ██████ and Friend, and told them that the interpreter could not make it that day. Ms. ██████ was upset by this news and was told by a staff member and Surgeon that the appointment would be rescheduled. Through both written notes and Friend, Complainant expressed concern about her condition that day, which included swelling of the gum around the upper tooth, and indicated that she wanted to proceed.
- m) ██████ then asked Complainant and Friend a series of questions, including whether she was able to fully communicate with Friend, whether she was comfortable communicating through Friend about her medical treatment, whether Friend was comfortable doing so, and whether she wanted to go forward on that date using Friend and notes to communicate or whether she wanted to reschedule her surgery to another day.
- n) Ms. ██████ unambiguously elected to allow Surgeon to treat her that day, and to utilize Friend and notes to help with communications as needed.
- o) After Ms. ██████ elected to move forward, Surgeon reviewed a "Consent for Surgical Treatment" form with her, which states, "I certify that I have had an opportunity to read, ask questions and fully understand the terms and words of this document and the explanations given to me and that any inapplicable paragraphs were stricken before I signed."
- p) Complainant signed the Consent Form and Friend initialed it as a witness.² Without the receipt of the Consent Form, Surgeon would not have proceeded on October 1 and would have rescheduled to a date when an interpreter was available to attend.
- q) The choice to move forward with the surgery was Complainant's. At no time was Complainant "pressured" to move forward with the surgery.

V. Analysis:

1. The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

² Complainant denies that the initials on the form are those of Friend; his initials do not match the ones on the form.

2. The MHRA provides that it is unlawful for any public accommodation “to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . physical or mental disability . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.” 5 M.R.S. § 4592(1).
3. The MHRA also defines unlawful public accommodations discrimination to include, “[a] failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless, in the case of a private entity, the private entity 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.” 5 M.R.S. § 4592(1)(C).
4. The Commission’s Accessibility Regulations require that a public accommodation “shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with physical or mental disabilities.” Me. Hum. Rights Comm’n Reg. § 7.17(C).
5. The term “auxiliary aids and services” includes qualified ASL interpreters. Me. Hum. Rights Comm’n Reg. § 7.17(B).
6. To establish a denial of reasonable accommodation/modification by a public accommodation, Complainant must show that:
 - (1) She comes within the protections of the MHRA as a person with a disability;
 - (2) Respondent operates a public accommodation under the MHRA;
 - (3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant’s disability, results in Complainant’s inability to access Respondent’s goods, services, facilities, privileges, advantages or accommodations;
 - (4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded her access to the desired goods, services, facilities, privileges, advantages or accommodations;
 - (5) The requested modification—or a modification like it—was necessary to afford that access; and
 - (6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

See 5 M.R.S. § 4592(1) & (1)(C); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003).

7. Upon such a showing, Respondent must make the modification unless it proves either that doing so would alter the fundamental nature of its goods, services, facilities, privileges, advantages or accommodations or that the requested modification poses a direct threat to the health or safety of others. *See* 5 M.R.S. § 4592(1) & (1)(B); *Dudley v. Hannaford Bros. Co.*, 333 F.3d at 308.
8. In this case, Complainant has established that she requested and was denied a reasonable accommodation, with reasoning as follows:
 - a. Complainant is Deaf, which is a disability without regard to severity under the MHRA. 5 M.R.S. § 4553-A(1)(B).
 - b. Respondent is a place of public accommodation. 5 M.R.S. § 4553(8)(F).

- c. Complainant is a native ASL speaker, does not understand spoken English well, and does not read English effectively. She repeatedly requested an ASL interpreter for her surgical appointment with Respondent, as this would be the only option that would provide effective communication for her under these circumstances.
- d. Complainant established that she needed this accommodation in order to effectively communicate with Respondent. Particularly in the context of these medical and surgical appointments, which involved complex and unusual language and stressful situations, it was crucial for Complainant to have the ability to speak and ask questions in her native language, and to fully understand the options and procedures being provided to her.
- e. The MHRA prohibits a public accommodation from relying on an adult accompanying an individual with a disability to interpret or facilitate communication. Me. Hum. Rights Comm'n Reg. § 7.17(C)(3). The only exceptions to this rule are in an emergency situation or when an individual with a disability specifically requests that the accompanying adult interpret, the adult agrees, and reliance on that adult for such assistance is appropriate under the circumstances. In this case, the evidence shows that it was Respondent which asked Friend to interpret, that Friend was reluctant to do so and then was uncomfortable when he did so, and it was inappropriate for Friend to be asked to interpret in a situation involving Complainant's confidential medical information. In addition, Friend was hard of hearing himself, and often had to ask [REDACTED] staff to repeat information and to attempt to read lips in order to understand what they were saying. He was not an appropriate interpreter, and Respondent should not have put him (or Complainant) in that position.
- f. With regard to the use of notes for communication, understanding written material may depend on the reading level or literacy skills of the individual. ASL, not English, is Complainant's primary language. Because the grammar and syntax differs considerably from English, exchanging written notes did not in this situation provide effective communication. Under these circumstances, the services of a qualified ASL interpreter offered the only effective method of communication.
- g. [REDACTED] now suggests that exchanging written notes was effective communication for Complainant. For example, it asserts that Ms. [REDACTED] signature on the "Consent for Surgical Treatment Form" is evidence that she understood the form. She did not. [REDACTED] was aware that Complainant was Deaf and that she repeatedly requested an ASL interpreter. Rather than responding appropriately and providing a qualified interpreter for critical medical issues like consent for surgical treatment, it used an unqualified friend of Ms. [REDACTED] and put the forms in front of her to "read" and sign. This was not effective communication.
- h. Respondent's claim that Ms. [REDACTED] gave free and willing consent to have Driver translate or interpret for her in these circumstances lacks credibility. What is true is that Ms. [REDACTED] had two teeth that she desperately needed to have extracted. Her gums were swollen and she was in pain. The September 17, 2013 consultation was stressful for Complainant because she had not been provided with an ASL interpreter. Now, on the day of the surgery, she was still without an interpreter although she had been assured that there would be one. She was in a great deal of pain and simply wanted the surgical intervention so that the pain would subside. She chose to have the teeth extracted because she had no other reasonable option.
- i. An interpreter should be present in all situations in which the information exchanged is sufficiently lengthy or complex to require an interpreter for effective communication. Examples may include, but are not limited to, discussing a patient's medical history, obtaining informed consent and

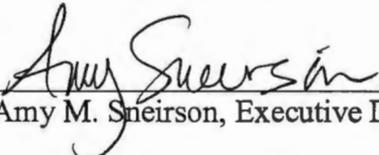
permission for treatment, explaining diagnoses, treatment, and prognoses of an illness, conducting psychotherapy, communicating prior to and after major medical procedures, providing complex instructions regarding medication, explaining medical costs and insurance, and explaining patient care upon discharge from a medical facility. [REDACTED] should have provided qualified ASL interpreting here.

- j. Despite Complainant's repeated requests for the ASL interpreter she needed, Respondent failed (or refused) to provide a qualified interpreter. Instead, it gave her a choice between two inadequate options: postpone surgery and remain in pain, or continue without a clear way to communicate with Surgeon and [REDACTED] staff. Exchanging written notes did not constitute effective communication for Ms. [REDACTED] and neither did Respondent's pressuring Friend into serving as an "interpreter" here. Respondent failed to provide Complainant with a necessary and reasonable accommodation.
9. Respondent has not shown that providing the accommodation would have altered the fundamental nature of its services, amounted to an undue burden, or posed a direct threat to safety:
- a. Respondent has a general policy of providing interpreters, which shows that it is not an undue burden, fundamental hardship, or safety risk for it to do so.
 - b. It appears, however, that Respondent addresses all requests for interpreters in exactly the same way: by faxing a request (or occasionally by calling) to Interpreting Service. This was an ineffective means of addressing requests, since Complainant had two appointments, and the interpreter failed to appear at either of them.
 - c. Respondent did not have any appropriate means of addressing the failure of its provider. It did not explore other options for finding an ASL interpreter, or communication methods such as using an ASL interpreter through a video relay interpreting service.
 - d. It was Respondent's duty to ensure that it could effectively communicate with Complainant. It did not do so here. Instead, it placed her in the position of choosing between continuing to experience pain or accepting medical care without adequate communication.
10. It is found that Respondent unlawfully discriminated against Complainant when it failed to provide her with an ASL interpreter.

VI. Recommendation:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following findings:

- 1) There are **REASONABLE GROUNDS** to believe that Respondent [REDACTED] [REDACTED] [REDACTED] [REDACTED] discriminated against Complainant [REDACTED] when it failed to provide her with appropriate auxiliary aids and services; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612 (3). 4



Amy M. Sneirson, Executive Director



Michèle Dion, Investigator