



To Whom it May Concern:

The National Association of the Deaf (“NAD”) seeks to ensure that all healthcare providers, including doctor’s offices and hospitals, understand their legal obligations with respect to serving deaf and hard of hearing patients and companions. The Americans with Disabilities Act (“ADA”) has clear mandates requiring healthcare providers to provide effective communication to patients and companions who are deaf and hard of hearing. Healthcare providers who violate such provisions are subject to legal action and have been the focus of litigation by the United States Department of Justice (“DOJ”), as was the case in *Heisley v. Inova Health System*. Consent Decree, *Heisley v. Inova Health Sys.* (E.D. Va. 2011), No. 1:10-cv-714-LMB/IDD.

Errors from ineffective communication increase a patient’s health risks, decrease patient satisfaction, and drive up medical costs to the provider. The NAD believes that providing qualified on-site interpreters should be the primary method by which healthcare providers and their sign-language-using patients communicate. Only when qualified on-site interpreters are unavailable in urgent matters should providers use Video Remote Interpreting (“VRI”) services to “fill the gap”.

VRI is a computer-based service, often accessed via a laptop or iPad, to access a remotely located interpreter. This letter contains all the information necessary for healthcare providers to understand the requirements for ADA compliance regarding serving deaf and hard of hearing patients, particularly with respect to the use of VRI services. The relevant provisions are found in Title III of the ADA and its implementing regulations. *See* Americans with Disabilities Act tit. 3, 42 U.S.C. §§ 12181-12189 (2020); 28 C.F.R. §§ 36.101-36.607 (2016). These provisions show that:

- 1) Title III of the ADA applies to all private health care providers. *See* 42 U.S.C. § 12181(7)(F).
  - a. The number of employees associated with the healthcare provider, its size or status as a non-profit, and the nature of the care or treatment, is irrelevant as to whether the provider must follow Title III of the ADA.
  - b. Medical offices that do not accept Medicaid or Medicare must abide by Title III.



- c. State-run healthcare providers or providers that receive federal financial assistance may have additional obligations under federal and state law.
    - d. Medical offices subject to the Affordable Care Act (“ACA”) have additional obligations. *See* 45 C.F.R. § 92.202 (2016).
  - 2) Healthcare providers must furnish (that is, obtain and pay for) any auxiliary aid or service that is necessary to achieve effective communication with the deaf or hard of hearing patient or companion of a patient. *See* 42 U.S.C. § 12182(b)(A).
    - a. Whether a particular auxiliary aid or service, such as a sign language interpreter, is necessary depends on a variety of factors, including the length and complexity of the interaction, and the effectiveness of any alternative used.
    - b. To be effective, an auxiliary aid or service must ensure that the deaf or hard of hearing individual can both understand and participate in discussions or other interactions.
    - c. The deaf population varies greatly in its ability to read lips and/or to communicate in written English. Therefore, a short or simple interaction may still require an interpreter if the deaf or hard of hearing individual communicates successfully only through sign language.
    - d. Ultimately, the key inquiry is whether the communication was effective, that is, could the health care provider communicate with the patient (or other relevant party) as thoroughly and effectively as they could with a hearing person.
  - 3) Auxiliary aids and services include but are not limited to qualified sign language interpreters. *See* 28 C.F.R. § 36.303(b). The provision of a qualified sign language interpreter through VRI services does not automatically ensure effective communication.
    - a. Auxiliary aids and services can also include Video Remote Interpreters (“VRIs”), oral interpreters, cued speech transliterators, tactile interpreters, Certified Deaf Interpreters (“CDIs”), captioning of audio-visual materials, and text-based services such as Communication Access Realtime Transcription (“CART”). *See* 28 C.F.R. § 35.104.



- 4) Any interpreter provided, either on-site or through VRI services, must also be qualified.
  - a. To be “qualified”, an interpreter must be able to “interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.” 28 C.F.R. § 36.104.
  - b. It is important to ensure that the interpreter provided is properly licensed as many states require sign language interpreters to obtain state licenses.
  - c. If a deaf or hard of hearing individual does not communicate effectively through standard American Sign Language, the healthcare provider may be required to furnish an additional interpreter with expertise in the deaf individual’s particular communication style in order to achieve effective communication.
    - i. For some deaf and hard of hearing individuals, effective communication can only be achieved with the use of a CDI. CDIs are deaf interpreters who have been trained to interpret for deaf or hard of hearing individuals who have a limited knowledge of ASL, use a mixture of gesture or home signs, or may have a psychological or physical challenge preventing them from using ASL fluently. A CDI works in tandem with a hearing ASL interpreter.
- 5) The ACA requires healthcare providers to give “primary consideration” to requests for a particular auxiliary aid or service. *See* 45 C.F.R. § 92.202. If a patient requests an on-site interpreter, providers must honor this request unless they can show that VRI is equally effective.
- 6) According to the DOJ, healthcare providers must provide the following technology support for VRI to have the potential to be effective:
  - a. “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.” 28 C.F.R. § 36.303(f)(1).



- b. “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.” 28 C.F.R. § 36.303(f)(2).
  - c. “A clear, audible transmission of voices.” 28 C.F.R. § 36.303(f)(3).
  - d. In addition, the healthcare provider must ensure that:
    - i. Personnel receive adequate training “so that they may quickly and efficiently set up and operate the VRI.” 28 C.F.R. § 36.303(f)(4).
    - ii. The patient is a suitable match for VRI services. For example, (1) the patient is alert, oriented and not heavily medicated; (2) the patient has no injuries or conditions that interfere with their ability to view the VRI screen; (3) the patient has the cognitive ability to understand the nature and purpose of VRI services. *See Settlement Agreement, United States v. St. Joseph Hosp. of Nashua, N.H.* (2010), No. 202-47-49.
  - e. When VRI services are not effective, healthcare providers must furnish an on-site interpreter promptly (within 2 hours). *See Settlement Agreement, United States v. Franciscan St. James Health* (2014), No. 202-23-247; *Settlement Agreement, United States v. Swedish Edmonds Hosp.* (2014); *Settlement Agreement, United States v. Associated Foot & Ankle Ctrs. of N. Va., PC* (2014), No. 202-79-281.
- 7) Healthcare providers may not charge the individual requesting the auxiliary aid or service (e.g., the deaf or hard of hearing patient) for the provision of these services. *See* 28 C.F.R. § 36.301(c).
- a. Healthcare providers may not require the deaf or hard of hearing patient or companion to bring an interpreter or other auxiliary aid or service to the appointment.
  - b. Fees or surcharges associated with providing interpreting services may not be passed on to a deaf or hard of hearing patient or companion.



- c. Healthcare providers may not require that the deaf or hard of hearing patient or companion pay for interpreting services in case of a cancellation of the appointment.
  - d. Healthcare providers may charge a “missed appointment” or “no-show” fee to all patients as long as the fee is charged to all patients equally. The deaf or hard of hearing patient or companion may not be required to pay a higher cancellation fee and may not be penalized for missed appointments in ways not imposed on all patients equally.
  - e. Healthcare providers may not impose additional requirements on deaf or hard of hearing patients that are not imposed on all patients equally (i.e. requiring only deaf or hard of hearing patients to arrive well in advance of their scheduled appointment).
  - f. A lack of advance notice of the need for an auxiliary aid or service does not excuse the healthcare provider from making best efforts to secure the aid or service.
  - g. To ensure that certain auxiliary aids and services (e.g., sign language interpreters) can be secured, healthcare providers must procure the service as soon as the deaf or hard of hearing patient or companion makes their request.
  - h. Healthcare providers should view the cost of providing interpreters as part of its overhead. Thus, the healthcare provider may increase charges for all patients to cover the cost of the interpreter but may not bill the deaf or hard of hearing patient or companion exclusively.
- 8) Deaf or hard of hearing companions of a patient or recipients of other services that the healthcare facility provides have an identical entitlement to auxiliary aids and services. *See* 28 C.F.R. § 36.303(c).
- a. Healthcare providers must provide auxiliary aids and services for family meetings and any other situation where a companion would normally be included.



- b. “[C]ompanion” means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate”. 28 C.F.R. § 36.303(c)(1)(i).
  - c. Deaf parents of hearing children, deaf children of hearing parents, deaf spouses, and other deaf relatives have a right to auxiliary aids and services to communicate effectively with healthcare providers, participate in their loved one’s health care, and give informed consent for the loved one’s medical treatment.
- 9) Classes, support groups, and other activities that are open to the public must also be accessible to deaf and hard of hearing participants.
- 10) Although the ADA does not require healthcare providers to furnish auxiliary aids and services where doing so would create an undue burden, such a situation is unlikely to arise in the context of a single appointment or a series of appointments, especially if such appointments are scheduled in advance. *See* 28 C.F.R. § 36.303(a).
- a. The nature of the burden is measured in the context of the facility’s overall resources, including the resources of any parent company. *See* 28 C.F.R. § 36.104.
  - b. That the cost of providing an interpreter exceeds the reimbursement for the patient’s care does not mean that the cost imposes an undue burden.
  - c. The inability to satisfy *all* communication needs does not excuse the healthcare provider from providing auxiliary aids and services that “to the maximum extent possible” ensure effective communication without incurring an undue burden. *See* 28 C.F.R. § 36.303(h).
  - d. Healthcare providers are encouraged to consult a tax advisor regarding available tax credits and other positive tax consequences of providing auxiliary aids and services. *See IRS Tax Credits and Deductions, ADA.GOV, <http://www.ada.gov/taxcred.htm>.*



- 11) Healthcare providers must place and accept calls placed through Video Relay Services (“VRS”) or text-based telecommunications relay services (“TRS”) in the same manner that they place and accept direct telephone calls. *See* 28 C.F.R. § 36.303(d)(4).
  - a. The Federal Communications Commission (“FCC”) has ruled that relay services “can be used to facilitate calls between health care professionals and patients without violating HIPAA’s Privacy Rule.” Public Notice: Clarification of the Use of Telecommunications Relay Services (TRS) and the Health Insurance Portability and Accountability Act (HIPAA), 69 Fed. Reg. 41264 (proposed June 16, 2004).
  - b. The healthcare provider incurs no additional charge for placing or accepting calls placed through relay services.
  - c. The FCC prohibits the use of VRS as a substitute for in-person interpreting or VRI services. Public Notice, 20 FCC Rcd 1471, DA 05-2417 (2005).
  
- 12) Healthcare providers may not refuse to accept a patient because the patient or the patient’s companion may require auxiliary aids and services, nor may healthcare providers dismiss a patient because the patient may require auxiliary aids and services. *See* 42 U.S.C. § 12182(b)(1)(A)(i).
  
- 13) More information regarding the use of VRI in healthcare settings can be found online:
  - a. Position Statement, National Association of the Deaf (NAD) and Deaf Seniors of America (DSA) Minimum Standards for Video Remote Interpreting Services in Medical Settings (Feb. 13, 2018) (available at <https://www.nad.org/about-us/position-statements/minimum-standards-for-video-remote-interpreting-services-in-medical-settings/>).
  - b. Standard Practice Paper, Registry of Interpreters for the Deaf, Video Remote Interpreting (2010) (available at <https://drive.google.com/file/d/0B3DKvZMfIFLdTk4QnM3T1JRR1U/view>).

Please note that healthcare providers may have additional obligations under state and federal law not included in this letter.



National Association of the Deaf

[www.nad.org](http://www.nad.org)

A healthcare provider may find a local agency that contracts to provide auxiliary aids and services by conducting a basic internet search for the particular aid or service needed. For example, searching for “American Sign Language interpreter Washington, DC” will bring up a list of interpreting agencies in Washington, DC.

Thank you for your attention to this important matter.

Sincerely,

The National Association of the Deaf  
Law and Advocacy Center



## Relevant Sections of Title III of the Americans with Disabilities Act

### § 12181. DEFINITIONS

As used in this title:

(7) Public accommodation. The following private entities are considered public accommodations for purposes of this title [42 U.S.C. §§ 12181-12189], if the operations of such entities affect commerce-- . . .

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

### § 12182. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS

(a) General rule. No 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction.

(1) General prohibition.

(A) Activities.

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods. An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association. It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions.

(A) Discrimination. For purposes of subsection (a), discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as 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 the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

## Relevant Sections of the Implementing Regulations of the Americans with Disabilities Act

### 28 C.F.R. § 36.301. ELIGIBILITY CRITERIA.

(b) Safety. A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(c) Charges. A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

### 28 C.F.R. § 36.303. AUXILIARY AIDS AND SERVICES.

(b) Examples. The term "auxiliary aids and services" includes—

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(c) Effective communication.

(1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities.

(i) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.

(ii) 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.

(2) A public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her.

(3) A public accommodation shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication, except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(4) A public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) Telecommunications.

(3) A public accommodation may use relay services in place of direct telephone communication for receiving or making telephone calls incident to its operations.

(4) A public accommodation shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

(f) Video remote interpreting (VRI) services. A public accommodation that chooses to provide qualified interpreters via VRI service shall ensure that it provides—

(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.

28 C.F.R. § 36.104. DEFINITIONS.

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 36.303(f).

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include—

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

## Relevant Sections of the Affordable Care Act and Implementing Regulations

### 42 U.S.C. § 18116. NONDISCRIMINATION

#### (a) In general

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

### 45 C.F.R. § 92.202. EFFECTIVE COMMUNICATION FOR INDIVIDUALS WITH DISABILITIES.

(a) A covered entity shall take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others in health programs and activities, in accordance with the standards found at 28 CFR § 35.160 through 35.164. Where the regulatory provisions referenced in this section use the term “public entity,” the term “covered entity” shall apply in its place.

(b) A recipient or State-based Marketplace SM shall provide appropriate auxiliary aids and services to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

### 28 C.F.R. § 35.160. GENERAL. (Selected portions)

(a) (1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

...

(b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(2) 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. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

### 28 C.F.R. § 35.164. DUTIES.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and

administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.