Enforcement of Accessible Care

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There were high hopes that the Patient Protection and Affordable Care Act ("ACA") would provide meaningful access to persons with disabilities to medical services, including needed medical equipment. However, the implementation of the ACA has left much to be desired, similar to the disappointment of many in the disability community to the interpretation of the Americans with Disabilities Act of 1990 ("ADA"). Recently, Healthcare.gov took down their webpage that reviewed how the new law would work for people with disabilities, which asserted claims that the ACA will revolutionize the care that is provided. The removal of this webpage further fuels the discussion about the failure of the ACA and the ADA to provide complete coverage. While all these claims may be true, the time for arguing for coverage has passed and we need to focus on reliable and consistent enforcement of the laws we do have.

Human Rights and Disability Symposium

The Journal of Law, Medicine, & Ethics published several articles related to current disability rights issues in their 2013 volume 4 symposium issue on Human Rights and Disability. The articles published addressed disability rights concerns ranging from the right to inclusive education to access to health care. Of particular interest was the article by Anita Silvers and Leslie Francis discussing the need for essential health benefits to be combined in a way that

does not discriminate against persons with disabilities. The article used several human rights arguments in support of the notion that persons with disabilities have a right to complete health care access. While these arguments were persuasive, there was no discussion of enforcement of these or existing rights.

Silvers and Francis outlined five theories as to why accessible health care and full coverage should be available to persons with disabilities: The Convention on the Rights of People with Disabilities (“CRPD”); Human Exceptionalism; Collective Agreement; Tactic Agreement; and, the ACA. Each of these theories provided a persuasive basis for access to care. Yes, the United States should adopt the CRPD, since we are one of the last countries to do so. Of course, the notion of those who seem less than human is barbaric and we should view every human with equality. Certainly, we have created our own set of political rights that has encompassed basic civil equality notions for decades. Why wouldn’t that be a basis for complete and accessible health care? I found myself agreeing with each of their arguments and theories, but I was left wondering why we could not enforce the laws we already have in place? If enforced correctly current laws could provide the coverage we are looking for.

**Enforcement**

After 20 or so years, disability rights lawyers are still battling with businesses, doctors, and public programs over what the ADA requires of them. In particular, doctors are resistant to the notion that they must provide accessible services to their patients. As a student attorney, I had a client who was denied access from two different doctors for a necessary surgery, because they did not believe that they had to provide an interpreter. They do, and they must consult with the individual about what kind of interpreter is needed, since each deaf individual is not the same. One would think that doctors, those who work with patients with disabilities the

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5 See Id. at 783.
6 See Id. at 784-86.
8 28 C.F.R § 36.303(c)(1)-(3) (2011).
most often, would know the law and want to comply, or possibly go beyond what is required. However, that is not the case. Some doctors are either ignorant or just stubbornly resistant to existing law.9 I propose, then, that the issue of access to health care and services is not a matter anymore of that being recognized by law, but a matter of enforcing what has already been implemented.

The ADA gives the Attorney General and the Department of Justice (DOJ) the authority to enforce the statutes and regulations already in place.10 However, when considering that the ADA has been in effect for over 20 years, that many people still do not know and still do not comply with its requirements suggests that the lack of compliance is rooted in lack of enforcement of these provisions. Elizabeth Pendo pointed out in her article Shifting The Conversation: Disability, Disparities and Health Care Reform,11 that the DOJ has been involved in a shockingly low number of disability access cases over the last 15 years.12 There is a great divide between the enactment and enforcement of the ADA in relation to health care access which cannot be fixed by more coverage but by acknowledgment of the lack of enforcement of provisions already in place.

Dirty Work

Civil suits brought by disability attorneys against private entities have taken on the stigma of back-injury and slip-and-fall suits; disability rights has gained a reputation for being sleazy and cut-throat, just for trying to enforce equal rights.13 While some lawyers may not

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10 42 U.S.C § 12133, § 12188 (2011).
11 See Elizabeth Pendo, Shifting the Conversation: Disability, Disparities and Health Care Reform, 6 FIU L. Rev. 87 (2010).
12 Id. at 94 (“Specifically, between 1994 and September 2009, the DOJ was involved in fifty-five actions involving architectural barriers in a health care setting, and twelve actions involving inaccessible medical equipment,” (footnote omitted)).
being going about enforcement in the best way,\textsuperscript{14} they are well intentioned. If the DOJ and state Attorneys General are not willing to step up to the plate, maybe it is time for rapid fire, low monetary payout cases.

The ADA\textsuperscript{15} and state law\textsuperscript{16} allow a person with disabilities to recover in a discrimination claim. Here, an injunction, as the ADA offers, would be most effective, because it would prevent the entity or person from continuing to discriminate, and would force access. Disability lawyers would have the option under the ADA, ACA, and state law to bring claims of inaccessible medical equipment. These types of lawsuits would be successful in raising awareness of the rights of persons with disabilities to health care services, and raising the awareness of doctors about their responsibilities to make their services accessible.

Interestingly, Texas allows monetary damages to be received by the person with disabilities who was discriminated against, and requires community service to be performed by the person who did the discriminating.\textsuperscript{17} However, there is no mention of injunction, and this type of penalty does nothing to ensure that the behavior will stop or be remedied. A doctor could see the $300 (minimum) fine as a small price to pay compared to the thousands of dollars new examination tables, x-ray machines, or facilities would cost. An attorney bringing this kind of case would need to be wary of this happening, and possibly consider an ADA claim as well.

Calling for more lawsuits to take place is a bold maneuver for a person like me who firmly believes in alternative dispute resolution. However, where firm letters and threats of suit cease to work, and where the Department of Justice is unable to take on every person’s case, I see no other option. Education and awareness is important, but these tactics do not seem to work, and action is the only option.

\textsuperscript{14} Id.
\textsuperscript{15} 42 U.S.C § 12188 (a)(2) & (b) (2011).
\textsuperscript{17} Tex. Hum. Res. Code Ann. § 121.004 (a)(1) and (2) (West 2014).
Conclusion

I applaud the efforts of those who have set out to justify the existence of disability rights laws and the call for a more solid health care access. However, the framework is in place, people have fought for these rights and won them; now is the time for enforcement, not calling for more theories about why these rights exist. I would like to see a symposium on why these laws are not getting the enforcement and recognition that was so hard fought for, rather than another symposium on why these rights exist.

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