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12 **ARBITRATION PURSUANT TO CONTRACT**

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RODNEY HOWARD,

OIA CASE NO. 1480

15 Claimant,

FINAL ARBITRATION AWARD

16 vs.

**Hearing Date(s): August 13-15, 21, 22,
September 26 and October 23, 2018**

17
18 KAISER FOUNDATION HEALTH PLAN,
19 INC., KAISER FOUNDATION
20 HOSPITALS, THE PERMANENTE
21 MEDICAL GROUP, INC.

22

Respondents

23 The Evidentiary Hearing on this matter was held on the above-scheduled dates. Claimant
24 Howard (“Howard”) was represented by Margot P. Cutter, Esq., and Catherine M. Corfee, Esq.;
25 Respondents Kaiser Foundation Health Plan, Inc. et al., were represented by Gigi M. Knudtson,
26 Esq.

27 THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the
28 Arbitration Agreement contained in the parties’ Members’ Agreement, and having been duly
29 sworn and duly heard the proofs, allegations and arguments of the parties, hereby renders this
Arbitration Award as follows:

FACTS

1 Deaf since birth (Rubella measles) Howard grew up lip reading and orally speaking and also
2 learned ASL means of communication. For the last 35 or so years, Howard worked for the State
3 Franchise Tax Board in its warehouse, using lip reading, writings and sign language (ASL) for
4 work, and a live interpreter for significant work meetings. In 2015, he got a new processor for
5 his Cochlear Implant device, which his audiologist, Dr. Nitensen, testified gives him good
6 receptive/communication skills when he wears the device. As an adult Howard uses a program
7 on his cell phone and home computer, called Purple Communications, which features a live ASL
8 interpreter online and on-call, which is similar to the video remote interpreting (“VRI”) system
9 used by Kaiser and many hospitals.

10 On February 25, 2016, Howard was checked into Kaiser’s South Sacramento Hospital for a
11 laparoscopic prostatectomy, using the Da Vinci machine. As she had with Howard’s medical
12 appointments with Dr.s Nitensen and Troxel, Howard’s mother, Ardyth Howard (“Ardyth”)
13 accompanied him to his surgery and was virtually a constant presence with him while in the
14 hospital. Ardyth says she does not sign ASL, but, for 40 or so years, she has developed an
15 ability to communicate with, and for, Howard. Howard also lists her in his Life Care Affidavit,
16 authorizing her to make his critical medical decisions when he is unable to communicate.

17 Per its standard procedures, Kaiser furnished a live interpreter on Feb. 25 for both the pre-op
18 and the post-op interviews. As Howard was still groggy after the surgery, the live ASL
19 interpreter left shortly after meeting him and seeing his condition.

20 Feb. 26--Friday

21 Howard was groggy, so largely non-communicative. A Kaiser nurse, however, noticed signs
22 of a “saggy” left side of his face the first night, and on the second night, another nurse noticed
23 weakness in his left side. Kaiser proposed to his father, Ken (“Ken”), and Ardyth to discharge
24 him, but, given his difficulty ambulating, Ardyth rejected the proposition, exclaiming, “Not in
25 that condition!”

26 Saturday the 27th,

27 Upon seeing his son Howard’s drooping left side of his face and diminished use of his left
28 hand, Ken went straight to the nursing station and told them Howard’s face was “hanging down.”
29 The nurse asked him if he thought Howard had had a stroke? “It’s obvious!” declared Ken.
Then he asked Dr. Keane, “Didn’t you see his face? He’s had a Stroke! Dr. Keane was reported
to have said, “Oh; I thought he was always that way,” making Ken even angrier. Howard was
taken downstairs to have a CT scan done, then was taken to the ‘Stroke Ward’ on the fourth
floor.

1 Nurse Chiang placed an order for the Stroke Education Packet for Howard at 12:23 pm.

2 Dr. Koopmans, a neurologist who had been called in by Dr. Keane re the possibility of a
3 stroke, arrived at 2:19 p.m., told Ken and Ardyth that Howard had had a stroke, and that it would
4 take a lot of work to get him to be able to fully use his body. Both Ken and Ardyth said Dr.
5 Koopman never addressed Howard, but only spoke to them about the stroke. Dr. Koopmans says
6 she ordinarily would ask a patient who had a communication disability how he/she would like to
7 communicate, but can't remember doing so with Howard. She recalled no express authorization
8 by Howard that she should communicate through Ardyth, but she had "the impression that
9 [Howard] did not want to communicate except through his parents."

10 The flow chart of Nurse Marcus Moore stated that the VRI was not used that day, because
11 the "patient preferred to use relative/friend Ardy Howard." When asked if she ever told Howard
12 the results of the CT scan that she'd reviewed with his parents, Dr. Koopmans said, "I must
13 have." Ken said he never saw anyone sit down and tell Howard that he'd had a stroke.

14 Howard testified that he remembers nothing about that day, other than waking up without
15 any feeling in his leg. All he wanted to do that day was to sleep; he wanted to speak to no one.
16 He remembers waking up, but, when a nurse came in to speak, since she didn't "sign," he went
17 back to sleep. He recalled speaking to no one about his preferred method of communicating, but
18 "wishes he'd have had a live interpreter there." But he also never testified that he'd asked Kaiser
19 to provide one.

20 Howard testified that he'd never asked his mom to interpret Koopmans's discussion, and that
21 no person had told him he'd had a stroke. However, Ardyth admitted that, by Feb. 27, Howard
22 was aware that he had had a stroke.

23 At 2:42 p.m., R.N. Baysa examined Howard and reported reviewing with the patient/family
24 Stroke Signs and Symptoms, to call 911 immediately, if any symptoms occur again, reviewed
25 personal risk factors (smoking, high blood cholesterol, etc.), medications that can reduce the risk
26 of another stroke and instructed Howard to follow up with primary care after discharge.

27 Sunday, Feb. 28.

28 Michael Guevara, a long-time friend of Howard's, who's also deaf, testified that, when he
29 visited Howard on Feb. 28, he noticed that Howard could not "sign" in ASL with his left hand.
30 So he called the nurse on the call-button in Howard's room. He then wrote out a note to a nurse,
31 asking for a live interpreter. The nurse then addressed Howard as if he were not deaf, but

1 Howard never responded. So Guevara again pointed to his note, “over and over again,” telling
2 her that Howard is deaf, and they want a live interpreter. Guevara testified that the nurse told
3 him, “Not available,” and then ignored him. Guevara, Ken and Ardyth testified to no VRI device
4 being in Howard’s room on Feb. 28. Nurse Apple told them Howard should have a VRI in his
5 room; one was placed there the next day, on Feb. 29.

6 Howard’s sister-in-law, Deborah Galway visited on Feb. 28 and was troubled at the lack of
7 any indication denoting that Howard was deaf. She also saw staff treating him and talking to
8 him as though he could hear every word. Galway asked at the Nurses’ Station if they could
9 provide such. Galway: “They looked at me as though I were from outer space!” So she made a
10 sign, saying “Patient is Deaf,” and put it on the door. She also wrote the same on the white
11 board in his room, to alert staff that they should be making some accommodation for his hearing
12 disability when they come see him.

13 One Robert Sortwell, another good friend of Howard’s also visited this day. He reported no
14 communications difficulties and stated they’d all had a “nice visit.”

15 Monday, Feb. 29

16 Guevara said a VRI setup was present in the room, but that it was not helpful, because a) it
17 was located at the end of the bed, so, at no more than the size of a standard iPhone (approx. 9”
18 tall), it was hard to see, b) Howard was lying down in the bed, hard for him to see the iPad, c)
19 with his left side and arm in a weakened state due to the stroke, he could not effectively use the
20 VRI interpreter, which requires both hands and d) the VRI’s picture was often pixelated, was not
21 dependable and kept cutting out. Again, Guevara asked the nurse to obtain a live interpreter and
22 that, while she said she would, she never did.

23 Shari Rita testified that ASL interpreters are rarely available to assist and, of those that are,
24 only a few are adept at translating medical terminology. Arranging such an ASL interpreter
25 generally takes 72 hours.

26 Wednesday, Mar. 2,

27 When Howard’s sister, Rhonda Howard-Vachon visited, she found him sobbing, due to his
28 left side’s lack of function. When medical staff came in, they spoke to him as though he could
29 hear. She told the person he was deaf, and, since when they spoke, they didn’t look at him,
impairing his ability to read their lips, she asked if they could please look at him when they
spoke and/or bring in an auxiliary aid or live interpreter. They did neither.

1 Nurse Tranchina met with Howard to teach him about his stroke, utilizing both the VRI and
2 Kaiser's Stoke Education package. The package is a 'soup-to-nuts' compendium of everything
3 about strokes, from what they are, to how you treat them and the means and likelihood of
4 recovery. Tranchina testified that she was able to communicate effectively with Howard using
5 the packet, the VRI and his reading the written material. She told him he'd had an ischemic, vs.
6 an embolic, stroke, and that Howard objectively communicated his understanding of such.

7 Thursday, Mar. 3, Howard-Vachon called Northern California interpreter service to come to
8 Kaiser and help Howard understand what was wrong with his left side and what to do about it.

9 Friday, March 4

10 Stephanie Piscatelli, a deaf interpreter from Northern Cal Center, arrived at the time Howard
11 was being placed onto a gurney to go in a van to the Kaiser Stroke Center in Vallejo. He was
12 still sobbing when Nurse Tranchina tried to explain via VRI that he was leaving, but she had
13 difficulty with the device. Then Nurse Melinda Young told Howard, via the VRI, that he was
14 going to Vallejo for treatment for his stroke. (Nurse Young had earlier apologized to Ardyth
15 about the staff's having failed to recognize the stroke symptoms displayed by Howard, or, due to
16 his deafness, to have communicated with him sufficiently about them.) Stephanie Piscatelli
17 assisted with the explanation, but Howard continued to sob uncontrollably on the gurney.

18 Over the full nine days of Howard's hospital stay at South Sacramento, as well as over his
19 extended stay at the Vallejo Center, the record reflected some 50-plus times that the VRI system
20 was utilized in connection with his treatment. The "flow chart" notes are replete with
21 information gleaned from Howard as to his condition, his likes and dislikes re diet, medicines,
22 elimination, etc.

23 *GOVERNING LEGAL AUTHORITIES*

24 *The Americans with Disabilities Act ("ADA")* requires that "No individual shall be
25 discriminated against on the basis of disability in the full and equal enjoyment of the ...services,
26 facilities, privileges, advantages or accommodations..." and that a [hospital] shall take steps
27 necessary to ensure that no individual with a disability is excluded, denied services, segregated
28 or otherwise treated differently than other individuals because of the absence of auxiliary aids
29 and services, unless modifications to alleviate such would "fundamentally alter the nature of the
goods, services, facilities, etc." Further, the hospital should consult with [the patient] ...to
determine what type of auxiliary aid is needed to ensure effective communication." The law
gives the hospital the ultimate decision to choose that accommodation that results in effective
communication. 28 S.F.R. Sec. f36.303(C)(I)(II)

1 “The relevant inquiry is whether the hospital’s failure to offer an appropriate auxiliary aid
2 impaired the patient’s ability to exchange medically relevant information with hospital staff.”
3 *Silva v. Baptists*, 856 F.3d 824.

4 “For more complicated and interactive communications, such as a patient’s discussion of
5 symptoms with medical personnel, a physician’s presentation of diagnosis and treatment options
6 to patients or family members... it may be necessary to provide a qualified sign language
7 interpreter or other interpreter.” U.S. Dept. of Justice, *Communicating with People Who Are
8 Deaf or Hard of Hearing*.

9 The [hospital] shall not rely on an adult accompanying an individual with a disability to
10 interpret or facilitate communication, except—i. In an emergency, or ii. where the patient
11 requests such, the adult agrees, and reliance on the adult is appropriate under the circumstances.
12 28 C.F. R. Sec. 36.303(C)(3).

13 The hospital may utilize a VRI to facilitate communication with a deaf person under Sec.
14 36.303(C)(F), if it provides a system that delivers high-quality video images, without
15 interruption or cloudy images, is large enough to show the interpreter’s face, arms, hands and
16 fingers and adequately trains its user/staff to quickly and efficiently set up and operate the VRI.
17 *Ninth Circuit Jury Instruction 12.71* requires proof of the following:

- 18 1. The plaintiff requested an accommodation due to his disability, or the hospital knew, or
19 had reason to know, that the plaintiff was experiencing ineffective communication, and
20 his disability prevented him from requesting a reasonable accommodation for
21 communication;
- 22 2. The hospital could have made a reasonable accommodation to enable better
23 communication. Reasonable accommodation includes qualified interpreter or other
24 effective methods of making aurally-delivered materials available ...

25 *Unruh Civil Rights Act*

26 CACI 3060 requires proof that—

- 27 1. The hospital denied full and equal ...services to Claimant;
- 28 2. A motivating reason was hospital’s perception of Claimant’s disability, OR that
29 defendant violated a provision of the Federal ADA;
3. Claimant was harmed; and
4. Hospital’s conduct was a substantial factor in causing such harm.

*Section 504 of the Rehabilitation Act—45 CFR 84.52 and 29 USCA Sec. 504--*Requires that

1. Hospital knew that Plaintiff was not provided with appropriate auxiliary aids necessary to ensure effective communication;
2. Hospital had authority to order such auxiliary aid to be provided, but failed to provide such for emergency health care; and
3. Such failure was the result of intentional discrimination, i.e., deliberate indifference, meaning that hospital knew that harm to a protected right was substantially likely, but made the deliberate choice to fail to act on that likelihood.

Negligence

Failure to exercise duty of due care, which failure proximately causes the foreseeable harm arising therefrom.

PARTIES' CONTENTIONS

Howard asserts that Kaiser is liable for its violations of some or all of the above, based on—

1. Kaiser's having excluded him from participating in his medical care treatment, in that he was not able to ask questions, describe his symptoms, understand what treatments he was being given and why;
2. Kaiser did not inform him of his stroke diagnosis;
3. Kaiser did not give him an "experience equal to that of a hearing person;"
4. Kaiser did not consult with him re which type of auxiliary aid would ensure his effective communication, and the choices Kaiser made were neither appropriate nor effective;
5. Kaiser did not produce its VRI device timely, and, at times, no interpretation services were provided, as a VRI could not be located timely;
6. Kaiser's reliance on Guevara, Ardyth or other friends and family was unlawful, as he never specifically requested such persons to interpret or facilitate communication for him;
7. Kaiser's use of its VRI was unlawful, as--
 - a. The screen froze, or was pixelated;
 - b. The screen, at only nine inches tall, and located some six feet from his eyes, was inadequate;
 - c. He was lying prone, so could not see the screen adequately; and
 - d. Staff was not sufficiently trained to operate VRI.
8. Kaiser failed to provide a live, in-room ASL interpreter at critical times, including just after his diagnosis of having had a stroke, to assist in assessing his response to

1 medication, inform him of treatment options and prognosis, and advise that he was being
2 transferred to Vallejo for rehab.

3 ***Kaiser's Defenses-***

- 4 1. As used by Kaiser, the VRI provides a live person interpreting for the deaf person, so it is
5 considered under the ADA a lawful auxiliary method in all cases, except where Claimant
6 proves such to be inappropriate;
- 7 2. Howard failed to prove that, as used by Kaiser, the VRI was ineffective as a tool to
8 exchange medical information, or that he ever complained about the VRI being
9 ineffective;
- 10 3. Howard failed to prove that he or his family ever requested a live interpreter, that there
11 was an obvious, objective need for a live interpreter, or that, due to his disability, he
12 could not have communicated the need for a live interpreter.
- 13 4. Any allegations of pixelated or fuzzy images on the VRI are not persuasive, in light of
14 the failure of corroboration by any family members or medical staff and the fact that, as
15 that system runs off the same system as the rest of the hospital's digital network, no such
16 instances were shown or corroborated, and that, in the end, even Mr. Guevara conceded
17 that any pixelization was only momentary;
- 18 5. Substantial proof exists, in both live testimony at the Hearing and in the numerous flow
19 chart notes and others, that Howard and medical staff exchanged medically significant
20 information regarding his treatment, diagnosis, prognosis and plan of care;
- 21 6. As Ardy played a significant role in assisting with Howard's communication throughout
22 his stay, Kaiser's reliance on information provided by her to and from both Howard and
23 Kaiser was responsible and within the appropriate means allowed for conducting
24 effective communication with Howard;
- 25 7. Howard was afforded numerous opportunities to ask questions of medical staff utilizing
26 the VRI, which was used over fifty (50) times for assessments by medical staff over the
27 seven days of his stay and treatment at South Sacramento, and more times during his stay
28 at Vallejo;
- 29 8. Kaiser is not required by the ADA to have a policy of obtaining a live interpreter on
demand, rather than allowable alternatives that will provide effective communication.
First, live ASL interpreters who are conversant with medical terminology are limited in
number in the greater Sacramento area. Secondly, deferring medical treatment or
diagnosis for the seventy-two hours required to obtain a live interpreter would

1 “fundamentally alter the nature of the goods, services, facilities, etc.” it provides. Dr.
2 Keane suspected Howard had suffered a stroke on the morning of Feb 27, so ordered a
3 CT Scan at that time. Delaying such for three days in order to obtain a live interpreter
4 before administering needed treatment could have been problematical.

- 5 9. Dr. Koopmans’ reliance on Guevara was appropriate, since Howard had indicated he
6 wanted him to assist, and Guevara did so;
- 7 10. Any deficiency of Dr. Koopmans’ explanation of Howard’s stroke to him may have been
8 malpractice (which was not pled), but did not violate the ADA;
- 9 11. Howard failed to prove any “deliberate indifference” or “intentional discrimination” or
10 wrongdoing; and
- 11 12. Howard’s negligence claims fail, due to the lack of medical expert testimony on the
12 significance of any alleged delay in giving time-sensitive evaluation or treatments.

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16 *DISCUSSION*

17 At bottom, the issue here is whether Kaiser afforded Howard the opportunity to engage in
18 effective communication regarding his medical diagnosis, treatment progress and prognosis for
19 recovery.

20 *Adequacy of the VRI in general.*

21 This is not a case to determine that the VRI currently used by hospitals is deficient as a
22 matter of law. Use of such is authorized by law; the only issue is whether its use in treating
23 Howard failed to assist hospital staff to engage with Howard in an effective communication
24 about critical medical information.

25 Guevara insisted on the use of a live person instead of the interpreter available through
26 the VRI; Howard and his parents complained about the use of the VRI, but did not request a live
27 person. Ken’s problem with Kaiser was not that it used a VRI instead of a live person, but that it
28 ignored Howard’s stroke symptoms and hadn’t yet told him he’d had a stroke. Similarly,
29 Ardyth’s problem with Kaiser was that, as explained by a sympathetic Melinda Young, staff

1 “failed to detect stroke symptoms...[so she would] go over this with her nursing staff” and
2 contact the Howards in the morning. To the extent that such failure resulted in mis-treatment, or
3 a failure to treat Howard’s stroke, causing him harm, it would be basis for a malpractice suit. No
4 such suit, while explored, was filed.

5 *Use of VRI as relates to communicating effectively with Howard—*

6 On February 27, after the CT Scan had confirmed Howard’s stroke, Dr. Koopmans
7 arrived to speak with him. Knowing he was deaf, she nonetheless could not be certain that she
8 inquired of him as to his preference for communicating with him, nor did she obtain any
9 direction from Howard that she should speak with his mother about what turned out to be critical
10 information that he’d had a stroke. Rather than arranging to have a VRI brought in, or speaking
11 directly to him, so he might read her lips, she spoke directly to Ken, Ardyth and Guevara about
12 his diagnosis, symptoms and next steps. As Howard was medicated, she knew, or should have
13 known, that his condition rendered him unable to request a better form of communication.
14

15 On Feb. 28, Guevara tried desperately to get assistance for Howard, since Guevara
16 detected that he’d had a stroke. He wrote a piece of paper, asking the nurse to get a live
17 interpreter, but she first ignored him, then told him one was not available, then promised to get a
18 VRI, but didn’t.

19 Guevara, Ardyth and Ken described the difficulty the nurse had in, first, finding a VRI on
20 Feb. 28, then setting up the VRI on February 29. They alleged its placement was at the foot of
21 his bed, six feet away, and the small size of the screen, and the fact that Howard was lying down
22 and couldn’t see it, were all problematical to its effective use. After its placement and use,
23 Guevara asked Howard if he understood the communication, to which Howard shook his head,
24 ‘no.’ So Guevara asked Dr. Koopman repeatedly for a live person to assist, to which, she said,
25 “not available.” At the same time, no other objection to its use, or complaint about its
26 effectiveness by Howard, his parents or his other relatives or friends was entered into the record,
27 and the record is replete with references of its use throughout Howard’s stay.
28
29

1 Secondly, before his stay, and before his stroke, Howard customarily used “VRI-type”
2 apps or aids in the form of the Purple Communications app, which is similar in nature, including
3 having used it from his iPhone, which has a much smaller screen than the iPad.

4 Even if not found deficient, however, a bigger screen, such as that used on a typical
5 computer monitor, and more extensive training for staff would be helpful.

6 *Violation of ADA’s requirement to deliver equal treatment as a hearing person to Howard post-*
7 *surgery, by treating him differently—*

8 At a minimum, Howard’s right to have an effective communication with Kaiser entails a
9 two-way exchange with appropriate medical personnel, here, Dr. Koopmans, as soon as possible
10 after his stroke diagnosis was made, regarding a) the nature of the stroke and cause, if possible,
11 b) his cognitive response to any proposed medication in treatment, c) his alternative options for
12 treatment, d) his prognosis for improvement, and an educated guess of the time-frame within
13 which such may be expected, e) plans for his rehab and treatment, including that he would be
14 transferred to the Vallejo Stroke Center in an ambulance and f) eliciting further information
15 about questions arising during the communication.
16

17 The record evinces no time during Howard’s stay at which this type of exchange was had
18 between Dr. Koopmans, or anyone with her knowledge, and Howard. Rather, the record shows
19 any number of instances where Dr. Koopman and most other medical staff talked around
20 Howard to others they entrusted with critical medical information, including Guevara and
21 Ardyth. While proper in many instances, in too many cases, those did not reflect a two-way
22 conversation regarding the types of information described above that would have allowed
23 Howard to inquire and explore the significance and likely prognosis of his stroke.

24 Kaiser knew, or had reason to know, that Howard was experiencing ineffective
25 communication with Dr. Koopmans, among others, and that his disability prevented him from
26 requesting a reasonable accommodation for communication. If Dr. Koopmans could not have
27 summoned a live interpreter within a reasonable time, at least she could have addressed him
28 directly, in order to allow him to try to read her lips. If she felt that he was too “out of it,” either
29 to engage or to comprehend, then she could have re-scheduled to a time when he could be more

1 receptive. As it was, when she did come by the next day when he was more alert, she continued
2 her pattern of speaking only to his parents, as opposed to Howard.

3 The same pattern of staff appearing not to know of Howard's deafness, or failing to
4 accommodate it in their treatment was testified to by others, including—

- 5 a) Deb Galway, who asked at the desk for a sign, then made one herself, to alert staff to
6 take into consideration Howard's deafness in treating him;
- 7 b) Rhonda Howard-Vachon, who asked staff to look at Howard while addressing him, so
8 that he could try to read their lips, then, dissatisfied with the level of communication
9 her brother was receiving, called on March 3, the Northern California Center, to
10 arrange for a live interpreter. While Piscatelli was not a medically-trained ASL
11 interpreter, neither did she take three days to respond, but arrived at South
12 Sacramento the next day, on March 4, raising questions about Kaiser's assertion that
13 it could not get a live interpreter in fewer than three days.
- 14 c) Nurse Melinda Young, who concurred that nothing at the Nurses' Station alerted that
15 the person calling from Howard's room was likely deaf. Accordingly, on getting
16 calls from there, they would merely answer, "Yes?" Kaiser explained that, if no one
17 heard or responded, then a staff person would matriculate to his room, but no
18 evidence was received as to how long that response might take.

19
20 The record reflects that Kaiser failed to establish effective communication with Howard
21 on critical medical issues in contravention of the ADA.

22 As Howard continues to be a member of Kaiser, so will likely seek treatment at its South
23 Sacramento hospital or related facilities, he has standing to seek injunctive relief under the ADA.

24 Unruh Civil Rights Act

25 Kaiser knew, or had reason to know, that Howard was experiencing ineffective
26 communication, and his disability prevented him from requesting a reasonable accommodation
27 for communication. Dr. Koopmans, among others, on February 27, 28 and 29, had the ability to
28 have provided effective communication to Howard, mainly by speaking directly to him, either
29

1 with or without a VRI, using a white board with him, or obtaining a live interpreter in the time
2 between his diagnosis on Feb. 27 and her conference with him on Feb. 29, but failed to do so.

3 Throughout Howard's stay, staff denied Howard the benefits usually enjoyed by non-deaf
4 persons, by speaking past him, or ignoring that he was deaf, so mis-managed communications
5 with him.

6 Such failures were a violation of the ADA, which was the proximate cause of harm
7 suffered by Howard in not having the benefits of such communication.

8 Section 504 Rehab Act

9 Kaiser's/Dr. Koopmans' failure to have provided Howard with such communication was
10 the result of deliberate indifference, that is, it/she knew that harm to his protected right was
11 substantially likely, but made the deliberate choice to fail to act on that likelihood.

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16 *Negligent cause of action.*

17 Howard failed to carry his burden of proof on this claim, as he failed to provide expert
18 testimony on the standard of care.

19 *RULING*

20 *I, THE UNDERSIGNED ARBITRATOR, having been duly designated by the Office of*
21 *Independent Administrator in accordance with the RULES FOR KAISER PERMANENTE*
22 *MEMBER ARBITRATIONS ADMINISTERED BY THE OFFICE OF THE INDEPENDENT*
23 *ADMINISTRATOR, AMENDED AS OF JANUARY 1, 2016, and having been duly sworn and*
24 *duly heard the proofs and allegations of the Parties, do hereby issue this ARBITRATION*
25 *AWARD, as follows:*

26 1. Unruh Act damages:

- 27 a. \$4,000 each day for denying effective communication on February 27, 28 and
28 29 and March 2: \$16,000.00;
b. Non-Economic compensatory damages (CACI No. 3905A) for emotional
suffering: \$48,000.
c. Attorneys' fees and costs, subject to proof.

1 2. Rehab Section 504 Damages: \$4,000 each day for denying effective communication
2 on February 27, 28 and 29 and March 2: \$16,000.00

3 3. Injunctive Relief, per Americans with Disabilities Act:

4 a. Kaiser South Sacramento shall implement and carry out the enhanced training
5 program for staff outlined by Nurse Melinda Young to Ardyth, to improve
6 staff's ability to recognize the symptoms of stroke;

7 b. Kaiser South Sacramento shall implement and carry out enhanced training of
8 staff in the location, placement and use of the VRI device with patients
9 needing such, and shall consider the use of devices or monitors displaying a
10 larger screen than the typical, nine-inch screen on many current versions of
11 the iPad;

12 c. Kaiser South Sacramento shall have created and posted on any and all hospital
13 rooms in which a deaf person is in residence that alerts any and all staff that
14 such patient is deaf, with a message substantially as follows: "The patient in
15 this room is deaf. Adapt all communications accordingly."

16 d. Kaiser South Sacramento shall adopt as part of its standard operating
17 procedures that, any time a call comes in from a room assigned to a deaf
18 patient, such call will not only result in a verbal response over that phone, but,
19 within a very short time, a qualified attendant will physically go in person to
20 such room to ascertain the existence of any emergency.

21 e. The undersigned reserves jurisdiction to review compliance and resolve any
22 alleged deficiencies.

23 4. Howard is deemed the prevailing party in this matter.

24 *POST-AWARD ISSUES OR MATTERS*

25 ***Request to Correct Award or Move for Further Relief***

26 Pursuant to the terms of Cal. Code of Civ. Proc., Sections 1286.6 and 1286.8, within
27 twenty (20) calendar days after the transmittal of this Final Arbitration Award, any party, upon
28 notice to the other parties, may request the arbitrator to correct such Award, by

29 a) filing a written statement raising--

i. the omission or failure of the Final Award to have decided any matter or issue
submitted to the Arbitrator for decision, or

1 ii. any clerical, typographical, or computational error(s) in the Award, constituting
2 a material, factual inaccuracy as to dates, times, numerical quantities or
3 computations, financial figures or physical data; or

4 b) moving for further relief authorized by the law or the parties' arbitration agreement.

5 c) Note that the arbitrator is without authority to redetermine the merits of any claim
6 already decided in the Final Award.

7 Upon filing such a request or motion, the opposing party, or parties, shall be given ten
8 (10) calendar days within which to respond to the request. The arbitrator shall dispose of the
9 request within twenty (20) calendar days after transmittal to the arbitrator of the request and any
10 response thereto.

11 The allowance of any party to submit the written statement(s) described above is made
12 pursuant to the laws of the State of California. Any attempt to request a "correction" in the form
13 of further argument on the merits of any matter which has been decided in this Final Award will
14 be denied.

15 In the event neither party submits timely a written statement or motion provided for
16 above, this Final Arbitration Award shall be deemed closed as of the close of business of the
17 twentieth (20th) day following its transmittal.

18 ***Attorneys' Fees and Costs***

19 As Howard has been deemed the prevailing party in this matter, the Arbitrator will
20 entertain his application for attorney fees and costs pursuant to CCP Sec. 1033.5 and Civil Code
21 Section 1717. Fontana shall submit its application on the latter of the fourteenth (14th) day
22 following the service of this Award, if no statements are filed raising omissions or factual
23 inaccuracies or motions for further relief, as allowed above, or on or before the fourteenth day
24 following the date of the arbitrator's disposition of any such statements filed per the above.
25 Opposition papers will be due nine (9) calendar days thereafter, and a Reply will be due three (3)
26 court days after receipt of the Opposition.

27 Such application shall include the appropriate legal bases for the requested recovery and
28 demonstrate the reasonableness of the fees and costs sought. Any briefing setting forth
29 arguments of counsel shall not exceed twenty-five (25) pages, not including declarations or

1 exhibits supporting the reasonableness of the fees and costs requested. The Reply may not
2 exceed ten (10) pages, again, not including exhibits.

3 **Per Kaiser OIA Rule 38.b: Nothing in this arbitration decision prohibits or restricts**
4 **the enrollee from discussing or reporting the underlying facts, results, terms and conditions**
5 **of this decision to the Department of Managed Health Care.**

6
7 This Award is in full settlement of all claims and counterclaims submitted to this
8 Arbitration. All claims not expressly granted herein are hereby, denied.

9 I, Judge Brian R. Van Camp, Ret., do hereby affirm upon my oath as Arbitrator that I am
10 the individual described in and who executed this instrument which is my Award.

11 **It is so ordered.**

12 **Date: December 20, 2018**

13 

14 **Judge Brian R. Van Camp, Ret.,**
15 **Superior Court of CA, County of Sacramento**
16 **Arbitrator**

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PROOF OF SERVICE

RE: HOWARD v. KAISER
OIA Case No. 14820; ADRS Case No. 17-5155-BVC

I, the undersigned, declare:

I am a citizen of the United States, employed in the City and County of Sacramento, California. My business address is 2443 Fair Oaks Blvd., Sacramento, California 95825 and my email address Tiffany@vancampadr.com . I am over the age of 18 years and not a party to the within action.

On December 20, 2018 I served the attached, and all exhibits thereto:
FINAL ARBITRATION AWARD

[X] (VIA EMAIL [CRC § 2.251]) I caused each such document to be sent by electronic mail to the addressees at the email addresses listed below.

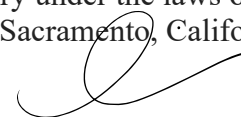
[X] (BY U.S. MAIL [CCP § 1013]) I placed such sealed envelope, with postage thereon fully prepaid for first-class mail with the United States Postal Service, for collection and mailing that same day at Van Camp ADR, Sacramento, California, following ordinary business practices as addressed as follows; and

Gigi M. Knudtson, Esq.
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1731 East Roseville Parkway, Suite 150
Roseville, California 95661
GKnudtson@knfirm.com

Catherine M. Corfee, Esq.
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C. Brooks Cutter, Esq.
Margot P. Cutter, Esq.
CUTTER LAW
401 Watt Avenue
Sacramento, California 95864
mcutter@cutterlaw.com

I declare under the penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at Sacramento, California, on December 20, 2018.



Tiffany Frisa,
Paralegal, Van Camp ADR