UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 14-CV-21803-WILLIAMS

CHEYLLA SILVA and JOHN PAUL JEBIAN,

Plaintiffs,

vs.

BAPTIST HEALTH SOUTH FLORIDA, INC., *et al.*,

Defendants.
_____/

FINAL JUDGMENT

THIS MATTER is before the Court following a bench trial. The Court having issued its findings of fact and conclusions of law (DE 222), **ORDERS AND ADJUDGES** that judgment is entered in favor of Defendants Baptist Health South Florida, Inc., Baptist Hospital of Miami Inc. and South Miami Hospital, Inc. Plaintiffs Cheylla Silva and John Paul Jebian shall take nothing from their claims.

DONE AND ORDERED in Chambers in Miami, Florida, this 12th day of June, 2019.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

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ORDER

THIS MATTER is before the Court following a bench trial beginning November 5, 2018. At trial, the Court heard from several witnesses, including the two plaintiffs, and reviewed numerous exhibits. After a careful review of the parties' written and oral submissions and the applicable law, the Court issues the following findings of fact and conclusions of law.[1]

II. FINDINGS OF FACT

In its past orders, the Court set out the undisputed facts of the case. Some of those discussions are repeated here, along with additional facts gathered from evidence presented at the bench trial.

Plaintiffs Cheylla Silva and John Paul Jebian are deaf and communicate primarily in American Sign Language ("ASL"). Both Silva and Jebian read and write English at a

[1] To the extent that any findings of fact constitute conclusions of law, they are adopted as such; and to the extent that any conclusions of law constitute findings of fact, they are also adopted as such.

basic level, and they are able to communicate in English through emails, faxes and gesturing. They also both communicate through video phone. Silva uses cameras and monitors to communicate via ASL on a videophone while Jebian uses Video Relay Services (VRS), which is like videophone, except that an ASL interpreter also participates to help the callers communicate. Additionally, Jebian carries a notebook with him in order to exchange written notes with non-ASL speakers.

Defendants Baptist Health South Florida, Inc. ("Baptist Health"), Baptist Hospital of Miami, Inc. ("Baptist Hospital"), and South Miami Hospital, Inc's ("SMH") (collectively, "Defendants") are two Miami-area non-profit hospitals and their non-profit parent company. Under the Americans with Disabilities Act ("ADA") and Rehabilitation Act of 1973 (the "RA"), Defendants are places of public accommodation. (*See* DE 172 at 10). Defendants have promulgated policies for the provision of interpreter services to the deaf that are periodically updated.

In their complaint, Plaintiffs allege that, during their many visits to Defendants' facilities, Defendants ineffectively communicated with them and were deliberately indifferent to their federally-protected rights. Consequently, Plaintiffs filed this lawsuit seeking injunctive relief and compensatory damages pursuant to the ADA and the RA. After an appeal of this Court's order granting summary judgment, the Eleventh Circuit determined that Plaintiffs' injunctive relief claims should proceed to trial because genuine issues of material fact existed as to whether Defendants provided Plaintiffs with effective communication as required by the ADA and RA. (DE 149); *see also Silva v. Baptist Health S. Florida, Inc.*, 856 F.3d 824 (11th Cir. 2017). On remand, this Court found that Plaintiffs were not entitled to money damages because the undisputed facts showed that

Defendants were not deliberately indifferent to Plaintiffs' rights. Consequently, this matter proceeded to trial solely on the issue of whether Plaintiffs are entitled to injunctive relief.

In the operative complaint (DE 12) Plaintiffs referred to 18 visits where they alleged they were subject to discrimination. Because Plaintiffs' remaining claims were only for injunctive relief, the Court admitted evidence of the visits mentioned in the complaint and visits that post-dated the complaint, but excluded visits that were barred by the statute of limitations or were not otherwise pled. The Court will address the relevant visits below.

a. Defendants' policies and interpretive services

Silva and Jebian first visited Defendants' facilities in 2009. At that time, Defendants provided a range of services to assist deaf patients and their family members. One of those services was an in-person interpreter, although this accommodation was not universally and automatically provided upon request. Another was video remote interpreting ("VRI") services.[2] Although VRI was not available at Baptist Health's outpatient facilities, these facilities now provide live in-person interpreters upon request. Additionally, depending on circumstances, Defendants provided patients with other auxiliary aids and accommodations such as ASL translation via family member, text telephones (TTYs), lip-reading, gestures and written notes.

[2] With VRI, a live interpreter provides interpretation services by video teleconferencing where at least one person, typically the video interpreter, is at a separate location. VRI machines consist of a monitor on a pole, which is on wheels and mobile. Attached to each VRI machine are laminated cards, which provide step-by-step instructions on how to operate the machine. Defendants contract with third-party-vendor Language Access Network ("LAN") to provide VRI interpreter service. Defendants' witnesses testified that VRI has been very successful at their facilities.

Sometime between 2014 and 2015, Defendants changed their policies with respect to the interpretive services they offered for deaf patients. Under the new policies, Defendants provide live in-person ASL interpreters to patients or guests upon request, with no exceptions. While waiting for the in-person interpreter to arrive, Defendants provide an interpreter through VRI. Staff members have no discretion to deny a request for an interpreter. Moreover, if a patient has scheduled an appointment, arrangements for an interpreter are made in advance so that the interpreter is on-site when the patient arrives for the appointment. Hospital staff can no longer rely on family members or friends for interpretation purposes. Ivette Castro, Manager of the Patient and Guest Services Department at Baptist Hospital, and Christine Stiltner-Angulo, Manager of the Patient and Guest Services Department at South Miami Hospital, testified that these are the governing policies of the hospitals and that Defendants have no plans to change these policies. While all Defendants' witnesses – whose testimony the Court finds to be credible – testified that these have been their policies for the last 4 years, they also acknowledge that these policies have not been put into writing.

Castro and Stiltner-Angulo testified that all staff are trained on the various auxiliary aids that are available and the methods to use them. However, Defendants did not produce any of the training materials and, at trial, Castro did not recognize a Baptist Hospital's brochure of services for patients with disabilities. Nevertheless, Castro explained that Baptist Hospital has a computer intranet system, which can be accessed by employees, that is used to disseminate information to employees and where employees can review policies and complete online education and training. Employees

are also informed of hospital policies including any updates through "WINKS" (What I Need to Know) and "roll-outs."[3]

b. Plaintiffs' visits to Defendants' facilities before May 2014

Between 2010 and May 2014, Jebian visited Defendants' facilities five times. Two of those times, Jebian was accompanying his father, who was experiencing chest pains. Jebian testified at trial that he requested a live interpreter in writing both times, but his requests were denied. He explained that on his first visit, he was told the hospital only provided live interpreters to deaf patients for their care and not to communicate regarding family members' care. Thus, during those two visits, Jebian's niece interpreted for him.[4]

In 2012, Jebian visited Defendants' facilities as a patient twice. One time he was experiencing chest pains and the other time he had lower back and kidney pain. For both visits, Jebian was offered VRI but he refused to accept this service. Although, at trial, Jebian first testified that he was never offered VRI, after reviewing his notes, he stated that they did offer him VRI, but the VRI did not work. The hospital records for those visits corroborate that Jebian refused the VRI when it was offered to him. (*See* 213-32 at 17-

[3] As noted earlier, the new policies have not been reduced to writing. Moreover, Castro and Stiltner-Angulo acknowledged that the old policies are still available in the hospitals' intranet, without providing an explanation for this.

[4] Although Jebian testified that he requested a live interpreter several times in writing and was denied each request in writing, his notebook – in which he contemporaneously logged his visits to the hospital – does not contain memorialization of such communications. This notebook did not always contain dates to reference and was not set out in any clear chronological order. (*See* DE 213-27). Additionally, during his deposition, Jebian could not recall whether he had asked for a live interpreter the second time he accompanied his father to the hospital.

18).[5] Jebian also testified at trial that he requested a live in-person interpreter for those visits, but he was not provided one and that he communicated with the hospital staff through written notes and with the help of his father. He stated that he was not able to understand the purpose of the medicine being prescribed or the terminology used because he did not receive ASL interpretation.

On March 11, 2014, Jebian arrived at the Westchester Urgent Care for injuries sustained while playing football. He was offered transport to Baptist Health to be treated for his injuries but he refused the offer against medical advice. Jebian drove to Baptist Hospital and although at first he refused Baptist Hospital's offer of VRI, he eventually agreed to use it. However, Jebian testified that the VRI was pixelated and was only used for a short period of time. The medical record for this visit states that patient "has an interpreter (due to hearing loss)," that patient is "deaf mute with spouse as interpreter," that patient "refuses video language interpreter," that "interpreter [was] needed - this communication barrier is an ongoing problem" but that the medical history was taken "using an interpreter (VIA LAN MACHINE . . .)." (*See* DE 213-34).

Between 2010 and May 2014, Silva visited Defendants' facilities twelve times.[6] Silva was asked about each of these visits during trial. The first day of trial, during direct

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[5] During his deposition, Jebian admitted that he was offered VRI but had refused to accept it during those visits. (*See* DE 173-5).

[6] On November 29, 2010 and January 4, 2011 Silva presented at Baptist Hospital because of stomach pain; on April 2, 2011, Silva attended Baptist Hospital because of finger pain; on May 9-10, 2011, Silva went to Baptist Hospital because of stomach pain and was admitted for an emergency appendectomy; on May 20, 2011, Silva went to Baptist Hospital to receive treatment for abdominal pain; on December 20, 2011, Silva went to West Kendall Urgent Care after she was assaulted by her boyfriend; on September 15, 2012, Silva presented at Baptist Hospital to receive treatment for an ear

examination, Silva did not have any particular recollection of any of her visits to Defendants' facilities, including whether she had asked for a live in-person interpreter or whether the hospital had provided her with VRI. The second day of trial, however, Silva had a better recollection of some of the visits. For example, during the first day of trial, Silva testified that she did not recall if she had asked for a live interpreter or if she had been provided with a live interpreter or VRI during her visit to Baptist Hospital on May 20, 2011. When she was asked about this visit on the second day of trial, Silva testified that she did request a live interpreter in writing. For the visits she could remember, Silva generally testified that she requested a live in-person interpreter in writing when she arrived at the hospital, but none was provided to her. For most of these visits, she could not remember if she was provided with VRI. She testified that most times she was unable to understand what was going on.

During cross-examination, Silva was impeached with her deposition testimony and with her corresponding medical records; when confronted with these inconsistencies she testified that she could not recall her deposition testimony. For example, Silva testified at trial that Baptist Hospital had not provided her with a live in-person interpreter or VRI when she was admitted for finger pain on April 2, 2011. Although in her deposition, Silva had testified that she had been provided with VRI during that visit, at trial she testified that she had no recollection of her deposition testimony. Also, during trial, Silva testified that

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infection; on December 6, 2012, Silva arrived at Baptist Hospital with chest pains; on March 4, 2013, Silva went to Baptist Hospital to get treated for shoulder pain; on June 11 and 12, 2013, Silva presented at Baptist Hospital with nausea; on February 25, 2014, Silva arrived at Baptist Hospital suffering from nausea; and on April 29, 2014, Silva arrived at South Miami Hospital with pregnancy complications.

she could not remember if VRI was provided to her during her visit of June 11 and 12, 2013 and that the hospital collected a urine sample from her and took bloodwork, but she did not understand the purpose of those tests. During her deposition, however, she did not recall any specifics from these visits, except that Baptist Hospital had provided her VRI. And the medical records for those visits show that although the VRI system did not work at first, (*see* DE 213-10 at 14), the issue was resolved, and the hospital obtained her history "using an interpretter (sic)." *Id.* The medical records also show that Silva verbalized her understanding of the discharge instructions. (*Id.* at 15).

Similarly, Silva testified at trial that she could not recall if she had asked for a live interpreter or whether she had received a live interpreter or VRI when she visited Baptist Hospital on February 25, 2014. In her deposition, however, Silva had testified that VRI was made available to her and she believed that was the day she found out she was pregnant. Although the evidence showed she had a sonogram that day, at trial she had no recollection of the sonogram. She also testified that Baptist never gave her information about her blood tests and that she was just finding out that day (at trial) her blood type was O positive.[7] However, the medical records on this visit show that an "[o]nline interpreter" was used during the evaluation, that the "[e]xamination, diagnosis and

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[7] During Silva's direct examination, the following exchange occurred:

Q. Did I just inform you that you were O positive?
A. Yes, that's the first time I learned this.
THE COURT: I just want to make something clear; you have given birth twice; is that correct?
THE WITNESS: Yes. I have never been told my blood type. I did not even know what it meant.

treatment plan was discussed via interpreter" and that the "patient understood and agreed with course of care." (DE 213-11 at 15). The nurse's notes also indicate that Silva was offered VRI during triage, but she declined the offer. (*Id.* at 18).

Silva's testimony has been inconsistent throughout this litigation. Her deposition testimony is contradicted by the affidavit she filed in support of her summary judgment motions and by her trial testimony. Silva even provided conflicting testimony while on the witness stand. Indeed, during the first day of trial, Silva was unable to recall any specific information about her visits to Defendants' facilities. The second day of trial, she was able to provide detailed accounts about her visits on direct examination, only to be unable to recall any detail about the visits she was asked about during cross-examination. Consequently, the Court finds that Silva is not a reliable witness.

c. Plaintiffs' visits to Defendants' facilities after May 2014

Jebian only visited Defendants' facilities once since May 2014, when he went to Westchester Urgent Care complaining of neck pain on August 10, 2014. Because Westchester Urgent Care did not have VRI, Jebian was offered transport to Baptist Hospital. He refused to be transported to Baptist Hospital and instead drove himself there, against medical advice. Jebian then requested a live in-person interpreter but was not provided one. At trial Jebian testified that he never received VRI during this visit, even though in his deposition, he had testified that Baptist Hospital provided VRI to him briefly. Jebian's testimony and the medical records for that visit demonstrate that for most of the visit the hospital staff communicated with Jebian through Jebian's wife.

Since May 2014, Silva has visited Defendants' facilities over 15 times. When asked about these visits at trial, Silva testified that she did not recall any specifics about

most of these visits. For example, Silva visited Defendants' facilities for different illnesses and conditions on July 18, 2014, August 1, 2014, August 22, 2014, September 8, 2014, March 9-10, 2015, October 11, 2015, June 3, 2016, August 31, 2016, September 22, 2016, June 30, 2017, August 19, 2017 and February 8, 2018. During trial, Silva stated that she did not recall whether she got VRI or in person interpreters for any of these visits. However, in her deposition, taken only a few months before trial, Silva admitted that for each of those visits she was provided with a live in-person interpreter upon request. (*See* DE 59-1; DE 173-3). Except for two visits in May and early July 2014,[8] where the evidence shows Silva was successfully provided VRI, since May 2014, Silva has been provided with a live in-person interpreter every time she has visited Defendants' facilities.

d. Plaintiffs' intent to return to Defendants' facilities

Although Jebian has not been to any of Defendants' facilities since August 10, 2014, Jebian testified that he has carpal tunnel syndrome and intends to get surgery at Baptist Hospital. He stated that he has put off the surgery because he would like to be assured that he will receive the accommodations he needs because the use of his hand will be limited. Jebian, however, was unable to provide any details with respect to his carpal tunnel syndrome, his diagnosis, his treating physician or his plan to have surgery. In fact, Jebian has not been diagnosed with carpal tunnel by a hand specialist or surgeon.

[8] On May 19, 2014, Silva arrived at South Miami Hospital because of vomiting. At trial, she testified that although the VRI worked well it was only given to her after triage. However, the medical records for that visit show that triage began at 9:50 pm and lasted approximately 20 minutes and that Silva was provided VRI at 9:55 pm. (*See* DE 213-12 at 16). Also, on July 6, 2014, Silva went to South Miami Hospital to receive treatment for heartburn. She admitted in her deposition and at trial that she was provided with VRI and that it worked well on that occasion.

He testified that he had discussed the possibility of having carpal tunnel surgery with a neurologist approximately a year ago, but he has not identified a surgeon, a date or even scheduled an initial consultation to determine the necessity of this procedure. Additionally, in his deposition, Jebian had testified that he did not want to return to Baptist Hospital.[9] Accordingly, the Court finds that Jebian's testimony on this point is not credible.

Because, as the Eleventh Circuit noted, Silva has a long history of visiting Defendants' facilities, the Court finds that Silva is likely to return to Defendants' facilities. Even though she moved to Allapatah and currently treats her asthma at the University of Miami hospital, Silva testified that her daughters' school is close to Baptist Hospital and that Defendants have all her medical records.

III. CONCLUSIONS OF LAW

Claims under the ADA and the Rehab Act are analyzed similarly because "both statutes are generally construed to impose the same legal requirements." *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222, 1227 (S.D. Fla. 2010) (citing *Wilbourne v. Forsyth Cty. Sch. Dist.*, 306 F. App'x 473, 476 (11th Cir. 2009)). Moreover, "the Rehabilitation Act uses the same standards as the ADA, and therefore, cases interpreting either are applicable and interchangeable." *Martin v. Halifax Healthcare Sys., Inc.*, No. 6:12-CV-1268-ORL, 2014 WL 1415647, at *3 (M.D. Fla. Apr. 11, 2014), aff'd, 621 F. App'x 594 (11th Cir. 2015) (citing *Badillo v. Thorpe*, 158 Fed. Appx. 208, 214 (11th Cir. 2005), in turn citing *Cash v. Smith*, 231 F.3d 1301, 1305 & n.2 (11th Cir. 2000)).

[9] (See DE 173-5) (When asked whether he had returned to Defendants' facilities since 2014, Jebian responded: "No, no. Thank G-d. No. That's it . . . I did not want to go back.").

To succeed on their claims, Plaintiffs need to prove that "(1) that [plaintiffs] [are] individual[s] with a disability; (2) that defendant[s] [are] place[s] of public accommodation; (3) that defendant[s] denied [them] full and equal enjoyment of the goods, services, facilities or privileges offered by defendant[s] (4) on the basis of [their] disability." *Martin*, 2014 WL 1415647, at *3 (quoting *Schiavo ex rel Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1165 (M.D. Fla. 2005)) (internal brackets omitted). Similarly, the Rehab Act requires proof of four elements: "(1) that [the plaintiffs] [are] 'handicapped individual[s]' under the Act, (2) that [they] [are] 'otherwise qualified' for the [benefit] sought, (3) that [they] [were] [discriminated against] solely by reason of [their] handicap, and (4) that the program or activity in question receives federal financial assistance." *Schiavo*, 358 F. Supp. 2d at 1165-66 (quoting *Grzan v. Charter Hosp. of Nw. Ind.*, 104 F.3d 116, 119 (7th Cir. 1997)), *aff'd sub nom., Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005).

Title III of the ADA proscribes discrimination "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." 42 U.S.C. § 12182(a). Similarly, the Rehab Act makes it unlawful for any person, "solely by reason of her or his disability," to "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a); *see also Berkery v. Kaplan*, 518 F. App'x 813, 814 (11th Cir. 2013) (same).

"[D]iscrimination" includes a failure to take steps to ensure that no disabled person "is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." 42 U.S.C. § 12182(b)(2)(A)(iii). The term "auxiliary aids and services" is broadly defined and includes the following:

> 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.

28 C.F.R. § 36.303(b)(1). Family members also may be used as interpreters in emergency situations or when requested by the patient. 28 C.F.R. § 36.303(c)(3).

Ultimately, it is the hospital's duty to provide "effective communication," but hospitals are not required to provide interpreters on demand in all instances. *Silva*, 856 F.3d 824, 835 ("That does not mean that deaf patients are entitled to an on-site interpreter every time they ask for it.") (collecting cases); *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1147 (11th Cir. 2014) ("[R]egulations do not require healthcare providers to supply any and all auxiliary aids even if they are desired and demanded."). However, "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure 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." 28 C.F.R. § 36.303 (c).

Further, because Plaintiffs' claims are for injunctive relief, Plaintiffs must establish four elements: "(1) that [they] [have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff[s] and defendant[s], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Wilson v. Broward Cty., Fla.*, No. 04-61068-CIV, 2008 WL 708180, at *2 (S.D. Fla. Mar. 14, 2008) (quoting *Canal Authority of the State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). Where a plaintiff seeks a permanent injunction, as here, he "must establish actual success on the merits, as opposed to a likelihood of success." *Wilson*, 2008 WL 708180, at *2 (citing *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)). An injunction is "an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion." *Id.*

But, before reaching the merits of the injunction claim, Plaintiffs first must establish Article III standing, which requires proof of three elements: "(1) injury-in-fact; (2) a causal connection between the asserted injury and the defendant's activities; and (3) that the injury would be redressed by a favorable decision." *Arthur v. JP Morgan Chase Bank, NA*, 569 F. App'x 669, 677-78 (11th Cir. 2014) (citing *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013)). "When injunctive relief is sought, the Article III injury-in-fact requires an additional showing: In addition to past injury, a plaintiff seeking

injunctive relief 'must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future.'" *Longfellow v. Lee Mem'l Health Sys.*, No. 2:14-CV-142-FTM-29, 2014 WL 4682080, at *1 (M.D. Fla. Sept. 19, 2014) (quoting *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1283 (11th Cir. 2001)). Thus, a plaintiff must show "a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury." *Longfellow*, 2014 WL 4682080, at *1 (quoting *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001)).

"[I]njunctions regulate future conduct." *Lucibello v. McGinley*, No. 207CV-217-FTM-34SPC, 2008 WL 398981, at *4 (M.D. Fla. Feb. 12, 2008) (citing *Shotz*, 256 F.3d at 1081). Thus, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* (internal citations omitted); *see also A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, No. 17-15606, 2019 WL 2292326, at *3 (11th Cir. May 30, 2019) ("[W]hen a plaintiff is seeking declaratory relief—as opposed to seeking damages for past harm—the plaintiff must allege facts from which it appears that there is a "substantial likelihood that he will suffer injury in the future."). In sum, a plaintiff seeking injunctive relief must establish, at a minimum, that (1) he is "likely to return" to the defendant's facility and (2) if he does return, he "will suffer future discrimination." *Lucibello*, 2008 WL 398981, at *4.

The Court finds that Plaintiffs have no Article III standing because they have not shown that they will suffer future discrimination if they return to Defendants' facilities. In reversing summary judgment, the Eleventh Circuit found that Plaintiffs had standing in this case because "given Plaintiffs' numerous visits to Defendants' facilities and the

wealth of evidence showing repeated VRI malfunctions . . . Plaintiffs have Article III standing to proceed with their claims for injunctive relief." *Silva*, 856 F.3d 824 at 842. However, standing is a constitutional requirement, and Plaintiffs must have standing at all stages of the litigation and bear "the burden of proving it with the manner and degree of evidence required at the successive stages of the litigation." *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006); *Bishop v. Smith*, 760 F.3d 1070, 1086 (10th Cir. 2014) (a prior appellate decision "does not require a finding of standing" at a later stage of the proceedings). Because standing "stems directly from Article III's 'case or controversy' requirement," standing implicates the court's subject-matter jurisdiction and, therefore, may be raised "at any time." *Esteves v. SunTrust Banks, Inc.*, 615 F. App'x 632, 636-37 (11th Cir. 2015) (collecting cases).

Further, "the request for declaratory and injunctive relief must be assessed in light of [Defendants'] revised policies that were in place at the time of trial . . . ." *JW v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1267 (11th Cir. 2018) (citing *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1549 n.8 (11th Cir. 1989)). In *JW*, a group of students from a Birmingham high school filed suit for damages and injunctive relief against the Birmingham Board of Education challenging a policy that allowed Student Resource Officers (SROs) to use chemical spray as means of control when a student demonstrated defensive or passive resistance, which included "verbal non-compliance." *Id.* The Eleventh Circuit found that there was no real threat that some of these students would be subjected to excessive force by the SROs in the future because, by the time of trial, the Birmingham Police Department had revised its policies concerning the use of control mechanisms, and the new policies required SROs to consider a number of factors to

determine the appropriate amount of control required for a given situation. *Id.* Based on these new policies, the Eleventh Circuit found that the students could not show a sufficient likelihood of future injury. *Id.*

Here, the evidence adduced at trial shows that, at least since 2015, Defendants have implemented policies that mandate providing live in-person interpreters upon a patient's or a guest's request. Defendants' witnesses all testified that hospital staff do not have any discretion to deny a patient's or a guest's request for a live in-person interpreter. Further, it is Defendants' policy to provide a deaf patient VRI while they wait for the live in-person interpreter to arrive. And if the visit is for a scheduled appointment, Defendants arrange for a live in-person interpreter to be there at the time of the appointment.

The record also shows that these new policies have been consistently implemented by Defendants since 2014. Since July 2014, Silva has visited Defendants' facilities at least a dozen times. And for each of those visits she was provided with a live in-person interpreter. Plaintiffs do not dispute this evidence.[10] However, Plaintiffs now argue that these policies do not comply with the ADA or the RA. In their latest argument, Plaintiffs contend that the new policies suggest that a patient who does not request a live in-person interpreter will be provided VRI, which is not appropriate for every circumstance. In essence, Plaintiffs argue that providing more than the law requires in certain instances will violate the ADA and the RA in all other instances. Plaintiffs' premise, however, fails on several levels. The record evidence shows that Defendants' staff are

[10] In fact, at calendar call, Plaintiffs' counsel stated in open court that the new policies are "better than what Your Honor could rule. To say you could have interpreters on demand is the – is better than what we even requested; because we couldn't under the *McCullum* case . . . It's best; couldn't be better."

trained on the various auxiliary aids that are available and how to use them. And as counsel for Plaintiffs has conceded, there is no legal requirement that deaf patients be provided with live in-person interpreters every time they seek medical assistance or even every time they request a live in-person interpreter. *See Silva*, 856 F.3d at 835 ("That does not mean that deaf patients are entitled to an on-site interpreter every time they ask for it."); *McCullum*, 768 F.3d at 1147 ("The regulations do not require healthcare providers to supply any and all auxiliary aids even if they are desired and demanded.").

Therefore, there is no reason to believe that Defendants will discriminate against patients that do not request a live in-person interpreter upon arrival by using what regulations and case authority recognize as legitimate, alternate aids – such as VRI – that would provide effective communication for treatment. And Plaintiffs have presented no evidence of instances where Defendants failed to effectively communicate with Plaintiffs, or provide a live in-person interpreter when requested, since the implementation of the new policies in 2014 and 2015.

Further, Plaintiffs' argument on mootness misses the mark. Plaintiffs are correct that, to render a case moot, the Court has to view Defendants' change of policies in light of the factors established in *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (the factors are "(1) whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability"). However, the question of whether a case is moot

is separate from the question of whether a plaintiff is entitled to permanent injunctive relief. As the Eleventh Circuit in *Sheely* made clear:

> To be sure, the analysis of whether a case is moot overlaps with the analysis of whether a permanent injunction is appropriate on the merits because both are concerned with the likelihood of future unlawful conduct. But the two inquiries are strikingly different. As we discuss at length below, a defendant seeking dismissal on mootness grounds under the doctrine of voluntary cessation bears the extremely heavy burden of showing that it is absolutely clear that he will not revert to his old ways. But whether a permanent injunction is appropriate—a question that we do not address and upon which we express no opinion—turns on whether the plaintiff can establish by a preponderance of the evidence that this form of equitable relief is necessary. We emphasize, however, that, like the district court, we have decided only the mootness question; we offer no opinion on the merits of Sheely's claims for declaratory and injunctive relief. Even though a case is not moot, that does not mean that injunctive relief follows automatically; undoubtedly, injunctive relief requires "something more than the mere possibility which serves to keep the case alive." Therefore, nothing in this opinion should be read to preclude the district court on remand, and after appropriate review, from deciding that equitable relief is not warranted.

Id. at 1182 n. 10 (internal citations omitted). As a preliminary matter, the facts in *Sheely* are distinguishable because *Sheely* involved written policies that were facially discriminatory. However, even if the Court relied on *Sheely* and found that the case is not moot, for the reasons stated above and regardless of the mootness issue, Plaintiffs would still not be entitled to permanent injunctive relief. *See Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1549 n.8 (11th Cir. 1989) (finding that district court properly found Plaintiffs lacked standing because the Court's focus "would not be on the policies of the City of West Palm Beach at the time the plaintiffs were apprehended by the municipality's canine unit, but instead on the policies of the City at the time appellants submitted their case for equitable relief to the court for decision").

Finally, the Court's factual findings and legal conclusions regarding Plaintiffs' injunction claim apply with equal force to their claim for declaratory relief. *See Roth v. GEICO Gen. Ins. Co.*, No. 16-62942-CIV, 2017 WL 5640740, at *2 (S.D. Fla. Jan. 24, 2017) ("In the absence of continuing conduct or an imminent threat of future harm to the parties, declaratory relief is unavailable."); *Odyssey Marine Expl., Inc. v. Unidentified, Shipwrecked Vessel*, No. 8:06-CV-1685-T-23 MAP, 2012 WL 3541988, at *3 (M.D. Fla. Aug. 15, 2012) (holding that "[a]bsent a threat of an immediate injury or harm," a plaintiff lacks standing to obtain declaratory relief), *aff'd sub nom.*, *Odyssey Marine Expl., Inc. v. Unidentified, Shipwrecked Vessel*, 512 F. App'x 890 (11th Cir. 2013).

In sum, because Plaintiffs lack Article III standing, the Court cannot grant their request for a permanent injunction or declaratory relief.

IV. CONCLUSION

For the reasons set forth above, it is **ORDERED AND ADJUDGED** that Final Judgment shall be entered in favor of the Defendants, Baptist Health South Florida, Inc., Baptist Hospital of Miami, Inc., and South Miami Hospital, Inc., and against Plaintiffs, Cheylla Silva and John Paul Jebian, on their claims for injunctive and declaratory relief. The Court will enter final judgment separately pursuant to Federal Rule of Civil Procedure 58. All pending motions are **DENIED AS MOOT**. All deadlines and hearings are **CANCELED**. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers in Miami, Florida, this 5th day of June, 2019.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE