



Dated at Montpelier, Vermont, this 27th day of January, 2022.

BY: VERMONT HUMAN RIGHTS COMMISSION

/s/ Kevin Christie  
Kevin Christie, Chair

/s/ Nathan Besio  
Nathan Besio

/s/ Donald Vickers  
Donald Vickers

/s/ Joan Nagy  
Joan Nagy

/s/ Charles Kletecka  
Charles Kletecka, Alternate



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## **INVESTIGATIVE REPORT**

HRC Case No.: PA20-0009

**COMPLAINANT:** Maria Ester Gutierrez

**RESPONDENT:** University of Vermont Medical Center

**CHARGE:** Discrimination in public accommodation based on national origin

### **SUMMARY OF COMPLAINT**

Ms. Gutierrez traveled from Argentina to Vermont to seek medical treatment from the University of Vermont Medical Center (hereafter UVMMC) for her breast cancer. Ms. Gutierrez speaks only Spanish and requires interpretation and translation services. However, during numerous visits to UVMMC over multiple years, UVMMC failed to provide adequate interpretation and translation services. When an in-person interpreter or virtual interpretation was provided, Ms. Gutierrez experienced communication that she either did not understand or that led her to believe inaccurate conclusions about her health. Her daughter, who usually accompanied her, was forced directly and indirectly to interpret for her mother on multiple occasions. UVMMC also failed to provide translated documents even when Ms. Gutierrez or her daughter specifically requested translated materials.

### **SUMMARY OF RESPONSE**

UVMMC's policy is to provide effective communication to all patients receiving its medical services. UVMMC trains its staff regarding effective communication and language access. UVMMC acknowledges that there is always room for improvement in delivery of services but denies Ms. Gutierrez's allegations that it did not provide effective communication.

### **PRELIMINARY RECOMMENDATIONS**

This investigation makes a preliminary recommendation to the Human Rights Commission (HRC) to find there are **reasonable grounds** to believe that UVMMC discriminated against Ms. Gutierrez on the basis of her national origin.

## DOCUMENTS

### Investigation

- Complaint – 2/25/2020
- Response – 4/17/2020
- Email from Mercedes Avila, daughter of Complainant, to HRC – 4/13/2020
- Email from Mercedes Avila, daughter of Complainant, to HRC – 5/5/2020
- Email from Ms. Avila, daughter of Complainant, to HRC – 6/2/2020
- Email from Clara Avila, daughter of Complainant, to HRC – 6/29/2021
- Email from Erika Smart, attorney for UVMMC, to HRC – 2/9/2021
- Email from Erika Smart, attorney for UVMMC, to HRC – 10/22/2021
- Email from Erika Smart, attorney for UVMMC, to HRC – 11/30/2021

### University of Vermont Medical Center

#### *Policies*

- Policy for Interpretation Services for Persons with Limited English Proficiency – 6/20/2019
- Policy for Interpretation Services for Persons Deaf, Hard of Hearing and DeafBlind – 6/20/2019
- Grievance Policy

#### *Compliance Reports*

- UVMMC 6 Month Compliance Report– 5/18/2018
- UVMMC 12 Month Compliance Report– 11/20/2018

#### *Patient Messages*

- Patient Message from Jennifer Sargent, RN, to Maria Gutierrez, Complainant – 2/27/2019
- Patient Message from Jessica Rickstad to Maria Gutierrez, Complainant – 2/28/2019
- Patient Message from Maria Gutierrez, Complainant, to Jennifer L. Jackman – 4/4/2019
- Patient Message from James Williamson to Maria Gutierrez, Complainant – 5/8/2020
- Patient Message from Maria Gutierrez, Complainant, to Karen E. Abernathy, MD – 6/9/2019
- Patient Message from Stephanie Calderwood, RN, to Maria Gutierrez, Complainant – 8/22/2019
- Patient Message from Kimberly Brant, LPN, to Maria Gutierrez, Complainant – 10/3/2019
- Patient Message from Katherine Boyd, Primary Care, to Maria Gutierrez, Complainant – 1/20/2020
- Patient Message from UVM Medical Center, Adult Primary Care, to Maria Gutierrez, Complainant – 3/12/2020

- Patient Message from Karen Stern, LPN, to Maria Gutierrez, Complainant – 3/24/2020

#### *Other Documents*

- UVMHC Agreement for Stratus Video Interpreting Service – 2016
- Grievance to Patient and Family Advocacy – 4/9/2018
- Minutes from Meeting of VRI Interpretive Services & Technology Remediation – 4/16/2018
- Admission Notes and Discharge Risk Assessment for Maria Gutierrez, Complainant – 1/17/2019-1/24/2019
- Clinical Report for Maria Gutierrez, Complainant – 5/22/2019
- Medical Record for Maria Gutierrez – 12/4/2018-12/13/2019
- Safe Report – 12/13/2019
- Revised Welcoming Policy Recommendations in Response to Coronavirus (COVID-19) – 6/15/2020
- Record of Interpretation through Stratus – 12/2018-5/2021
- Interpreter Inquiry Records – 2019-2020
- VRI Call Detail Report – 2018-2021
- Communication Assessment Form
- New Employee Orientation Agenda
- UVMHC Non-Discrimination Notice
- UVMHC Pocket-Card Template
- UVMHC Handout for Employees, Which Modality Should I Use?

#### *Photos*

- Epic Primary Contact Screenshot for Maria Gutierrez, Complainant
- Screenshots of MyChart Letters to Maria Gutierrez, Complainant
- Screenshot of MyChart Discharge Attachment

#### Emails

- Email from Lynette Reep, Interpreter, to Mercedes Avila, Complainant's daughter – 1/8/2019
- Email from Lynette Reep, Interpreter Coordinator, to Mercedes Avila, daughter of Complainant – 1/15/2019
- Email from Lynette Reep, Interpreter Coordinator, to Mercedes Avila, daughter of Complainant – 1/16/2019
- Email from Lynette Reep, Interpreter Coordinator, to Mercedes Avila, daughter of Complainant – 1/17/2019

#### Letters

- English and Spanish Letter from Kathleen Carey, Patient and Family Advocate, to Maria Gutierrez, Complainant – 3/18/2020

## Recordings

- Conversation between Mercedes Avila, daughter of Complainant, and Registration Employee for Maria Gutierrez, Complainant – 12/21/2018
- Conversation between Mercedes Avila, daughter of Complainant, and Carmel Thomas, RN Manager for Maria Gutierrez, Complainant – 1/21/2019
- Conversation between Mercedes Avila, daughter of Complainant, and Kathleen Carey, Patient Advocate for Maria Gutierrez, Complainant – 12/13/2019
- Conversation between Elaine Perry, Physical Therapist, and Maria Gutierrez, Complainant – 5/2020

## **INTERVIEWS**

- Maria Gutierrez, Complainant – 10/16/2020
- Mercedes Avila, daughter of Complainant – 10/26/2020
- Dr. Kim Dittus, Medical Oncologist for UVMMC – 2/5/2021
- Julianna Ingalls, Registered Nurse for UVMMC – 2/9/2021
- Lynette Reep, Interpreter Coordinator for UVMMC – 2/10/2021
- Betsy Sussman, Diagnostic Radiologist for UVMMC – 3/19/2021
- Dr. Michelle Sowden, Associate Professor of Surgery for UVMMC – 3/29/2021
- Michele Mosley, Outpatient Oncology Social Worker for UVMMC – 3/30/2021
- Dr. Karen Abernathy, Primary Care Provider for UVMMC – 4/5/2021
- Michelle Rickard, Registered Nurse for UVMMC – 4/5/2021
- Penelope Gibson, Physician Assistant for UVMMC – 4/5/2021
- Kathleen Carey, Patient and Family Advocate for UVMMC – 4/6/2021
- Barbara Lindberg, Registered Nurse for UVMMC – 6/9/2021
- Dr. Chris Holmes, Attending Physician for UVMMC – 6/28/2021
- Karen Stern, Licensed Practical Nurse for UVMMC – 7/26/2021
- Celeste Baker, Intake Coordinator for UVMMC – 7/28/2021
- Michael Higgins, Physician Assistant for UVMMC – 8/9/2021
- Amy Larow, Physician Assistant for UVMMC – 8/25/2021
- Kristin Grover, Program Developer and Researcher for UVM – 7/22/2021
- Clara Avila, daughter of Complainant – 9/30/2021
- Alita Perez-Tamayo, former General Surgery Resident at UVMMC – 10/25/2021
- Anna Maynard, Registered Nurse for UVMMC – 10/26/2021
- Maria, Senfleber, Patient and Family Advocate – 10/26/2021
- Mary Alice Favro, coworker and friend of Mercedes Avila, daughter of Complainant – 11/3/2021
- Dr. Havaleh Gagne, Radiation Oncologist for UVMMC – 11/5/2021
- Karen Willet, Radiation Oncology Nurse for UVMMC – 11/19/2021
- Megan Stem-Cobb, Licensed Nursing Assistant for UVMMC – 11/23/2021
- Stephanie Calderwood, Registered Nurse for UVMMC – 11/29/2021
- Dr. Peter Kaufman, Oncologist for UVMMC – 11/30/2021

## FACTUAL HISTORY

2018

Maria Gutierrez is originally from Argentina.<sup>1</sup> In Argentina, Ms. Gutierrez was diagnosed with breast cancer after she underwent a mammogram and a biopsy.<sup>2</sup> In November, Ms. Gutierrez moved from Argentina to Vermont in order to receive cancer treatment in the U.S.<sup>3</sup> She moved in with her daughter, Mercedes Avila, in South Burlington, Vermont.<sup>4</sup> Ms. Gutierrez purchased private insurance, and she planned to receive care at the University of Vermont Medical Center (UVMMC).<sup>5</sup>

Ms. Gutierrez speaks Spanish, and she does not speak English.<sup>6</sup> Ms. Avila, who speaks Spanish and English, helped Ms. Gutierrez arrange to receive medical care, and she informed UVMMC that Ms. Gutierrez does not speak English and would need an interpreter.<sup>7</sup> UVMMC received documents from Ms. Gutierrez's medical provider in Argentina, and UVMMC had the documents translated to English.<sup>8</sup> On December 4, Dr. Michelle Sowden ordered a biopsy for Ms. Gutierrez, writing, "will need Spanish interpreter."<sup>9</sup>

On December 11, Ms. Gutierrez attended a new patient visit with Dr. Sowden.<sup>10</sup> Ms. Gutierrez's daughter, Ms. Avila, also attended the appointment.<sup>11</sup> Dr. Sowden used an in-person interpreter for the appointment with Ms. Gutierrez, and they discussed the details of Ms. Gutierrez's care, such as surgery and radiation.<sup>12</sup>

On December 12, Ms. Gutierrez, along with Ms. Avila, attended an appointment with Dr. Peter Kaufman.<sup>13</sup> Ms. Gutierrez and Ms. Avila greeted Dr. Kaufman when they entered his office.<sup>14</sup> Ms. Gutierrez spoke in Spanish, and Ms. Avila spoke in English.<sup>15</sup> Dr. Kaufman did not use an interpreter for the appointment, and his notes in Ms. Gutierrez's medical record do not mention interpretation.<sup>16</sup> In his interview, he stated, "[Ms. Gutierrez] has a moderately reasonable understanding of English...I recollect [the daughter] translating a modest amount of what I was saying."<sup>17</sup> According to Ms. Avila, Dr. Kaufman directed his communication to Ms. Avila without looking at Ms. Gutierrez for the duration of the appointment.<sup>18</sup> According to Dr.

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<sup>1</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>2</sup> Medical Record for Ms. Gutierrez, 12/11/2018.

<sup>3</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Medical Record for Ms. Gutierrez, 12/11/2018.

<sup>9</sup> Medical Record for Ms. Gutierrez, 12/4/2018.

<sup>10</sup> Medical Record for Ms. Gutierrez, 12/11/2018.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Medical Record for Ms. Gutierrez, 12/12/2018.

<sup>14</sup> Interview with Ms. Avila, 10/16/2020.

<sup>15</sup> *Id.*

<sup>16</sup> Medical Record for Ms. Gutierrez, 12/12/2018.

<sup>17</sup> Interview with Dr. Kaufman, 11/30/2021.

<sup>18</sup> Interview with Ms. Avila, 10/16/2020.

Kaufman, he spoke with both Ms. Gutierrez and Ms. Avila.<sup>19</sup> In his interview, Dr. Kaufman stated, “I have a pretty good read on patients’ and family members’ behaviors and wishes...both [Ms. Gutierrez] and her daughter were absolutely comfortable with me speaking to both of them and her daughter translating as necessary.”<sup>20</sup>

In Ms. Gutierrez’s interview, she stated, “[t]he hospital says that I requested that my daughter interpret for me...That is not correct; it is a lie.”<sup>21</sup> She stated that getting an interpreter “was a battle; it is not like you request an interpreter and you get one.”<sup>22</sup> Because of the lack of interpretation at the appointment with Dr. Kaufman, Ms. Avila requested that Ms. Gutierrez be switched to a different oncologist, and UVMMC changed her oncologist to Dr. Kim Dittus.<sup>23</sup> UVMMC’s Response stated that Dr. Kaufman was new to UVMMC, and that Ms. Gutierrez was one of the first patients he saw in the clinic.<sup>24</sup> However, no one at UVMMC informed Dr. Kaufman about the reason Ms. Gutierrez was transferred to another oncologist, and Dr. Kaufman believed that she might have transferred because she preferred a female oncologist.<sup>25</sup>

On December 21, Ms. Gutierrez was in the oncology registration area before her PET scan appointment.<sup>26</sup> Ms. Avila was also present with her mother.<sup>27</sup> UVMMC did not have an interpreter for Ms. Gutierrez, and the registration employee told Ms. Avila that, if Ms. Gutierrez does not speak English and Ms. Avila was not willing to interpret, then she cannot have that procedure done.<sup>28</sup> Ms. Avila recorded part of her conversation with the employee:

Employee: We have to get some signatures.

Ms. Avila: Do you have an interpreter? She doesn’t speak English.

Employee: Do you want me to, um...so you’re not going to speak for...are you?

Ms. Avila: I am her daughter.

Employee: So you can.

Ms. Avila: No you can’t. By law, you have to have an interpreter.

Employee: Okay. We don’t here. I mean if you...to sign...you mean down for her procedure?

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<sup>19</sup> Interview with Dr. Kaufman, 11/30/2021.

<sup>20</sup> *Id.*

<sup>21</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>22</sup> *Id.*

<sup>23</sup> Interview with Ms. Avila, 10/16/2020.

<sup>24</sup> Response, 4/17/2020.

<sup>25</sup> Interview with Dr. Kaufman, 11/30/2021.

<sup>26</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



Ms. Avila: You have to have an interpreter when somebody doesn't speak English...

Employee: If we explain to you what she's signing, can she sign her name?<sup>29</sup>

## 2019

On January 3, Ms. Gutierrez and Ms. Avila attended an appointment with Dr. Dittus.<sup>30</sup> Dr. Dittus used an iPad interpreter to talk to Ms. Gutierrez about her cancer medicine.<sup>31</sup> Dr. Dittus said that it would be three months until Ms. Gutierrez would start seeing the effect of the medication.<sup>32</sup> However, the interpreter did not fully interpret each person's questions and answers, and Ms. Gutierrez heard the interpreter state that, with that medication, she was going to have "three months of life."<sup>33</sup> Ms. Gutierrez believed that she had only three months to live and became so nervous that she began to cry.<sup>34</sup> Dr. Dittus was not aware that Ms. Gutierrez had believed that she had only 3 months to live.<sup>35</sup> Ms. Avila told Ms. Gutierrez multiple times, over several days after the appointment, that what Ms. Gutierrez had heard was not what the provider had said.<sup>36</sup>

On January 7, Ms. Avila, who works for the University of Vermont as an Associate Professor of Pediatrics and Adjunct Assistant Professor of Nursing,<sup>37</sup> spoke with Lynette Reep, the interpreter coordinator for UVMMC, and mentioned the problems that Ms. Gutierrez had been having with interpretation at UVMMC.<sup>38</sup>

On January 8, Ms. Reep emailed Ms. Avila, asking her to send Ms. Reep information regarding the problems Ms. Avila had in interpreter coverage while Ms. Gutierrez was at UVMMC.<sup>39</sup> Ms. Avila replied on the same day, writing:

Yes i will this weekend. We are at the hospital right now cardiology McClure 1 and they don't have interpreter they said I can interpret. I told them no, they are required by law to have one. It's every time. It's getting ridiculous and exhausting.<sup>40</sup>

Ms. Gutierrez's medical record states that she had an echocardiogram that day, and the record does not mention anything about interpretation.<sup>41</sup> However, after Ms. Avila emailed Ms. Reep, UVMMC staff told Ms. Avila that they found someone who could speak Spanish to Ms.

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<sup>29</sup> Recording of Conversation between Mercedes Avila and UVMMC Registration Employee, 12/21/2018.

<sup>30</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>31</sup> Medical Record for Ms. Gutierrez, 1/3/2019; UVMMC Stratus Record, 1/3/2019.

<sup>32</sup> Interview with Ms. Avila, 10/16/2020.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Interview with Dr. Dittus, 2/5/2021.

<sup>36</sup> Interview with Ms. Avila, 10/16/2020.

<sup>37</sup> University of Vermont, College of Nursing and Health Sciences, available at: [https://www.uvm.edu/cnhs/csd/profiles/maria\\_mercedes\\_avila\\_phd](https://www.uvm.edu/cnhs/csd/profiles/maria_mercedes_avila_phd) (last visited 10/6/2021).

<sup>38</sup> Interview with Mercedes Avila, 10/26/2020.

<sup>39</sup> Email from Ms. Reep to Mercedes Avila, 1/8/2019.

<sup>40</sup> Email from Ms. Avila to Ms. Reep, 1/8/2019.

<sup>41</sup> Medical Record for Ms. Gutierrez, 1/8/2019.

Gutierrez.<sup>42</sup> A technician came in and said “[h]ola,” and Ms. Gutierrez was excited that she would be able to communicate with the provider.<sup>43</sup> The technician started looking at Ms. Avila because she did not know enough Spanish to communicate with Ms. Gutierrez.<sup>44</sup> The technician told Ms. Avila that she lived in Mexico for a year and that she knew some vocabulary but would need help from Ms. Avila.<sup>45</sup> For example, the technician asked Ms. Avila what the Spanish word is for ‘bra.’<sup>46</sup>

The technician started doing an ultrasound, and Ms. Avila stayed in the room.<sup>47</sup> Ms. Gutierrez asked the technician if her heart looked good or if the technician saw any issues.<sup>48</sup> The technician told her it was good, and Ms. Avila explained to the technician that Ms. Gutierrez had been asking if her heart was okay to have the surgery she needed.<sup>49</sup> The technician told Ms. Avila that she cannot give that type of information, and Ms. Avila told Ms. Gutierrez that they would not actually know if her heart was okay to have surgery until the doctor reviewed the information.<sup>50</sup> Ms. Gutierrez was disappointed because she thought her heart was okay to have surgery, and then she realized she would have to wait to find out.<sup>51</sup> In Ms. Avila’s interview, she stated that, as the technician left the room with Ms. Gutierrez and Ms. Avila, the technician was in tears and she said that she would not agree to interpret again because she realized the distress that the interaction caused for Ms. Gutierrez.<sup>52</sup> Ms. Gutierrez’s medical record lists Kristin Smith as sonographer for Ms. Gutierrez’s echocardiogram.<sup>53</sup> Kristin Smith no longer works for UVMMC, and she did not respond to requests for an interview.

Ms. Reep responded again on the same day, writing:

...So sorry to hear that.

If you can make yourself some notes and send me details later on: if possible dates, times and people you spoke with—I will generate a SAFE report<sup>54</sup> to get more attention on the issue.

Apologies again and thank you for your assistance.

(By the way you can also report this yourself to Patient and Family Advocacy at 847-3500)...<sup>55</sup>

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<sup>42</sup> Interview with Ms. Avila, 10/26/2020.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Medical Record for Ms. Gutierrez, 1/8/2019.

<sup>54</sup> A SAFE report is an internal document that members of staff generate when there is a situation that could have led to a patient being unsafe.

<sup>55</sup> Email from Ms. Reep to Ms. Avila, 1/8/2019.

Ms. Avila wrote:

They got a sonographer who speaks broken Spanish because she lived in Mexico 1 year. This is not only a serious violation but a safety issue she does not know have [sic] of the words so she asks me. I filed two complaints with patient advocacy in the past they don't do anything. It's a volunteer group with no power.<sup>56</sup>

Ms. Reep wrote:

...Patient Advocacy? They are a formal department and are staff run, not staffed by volunteers. Would you like me to reach out to their director about this? If you can give me (when you have a moment), date/time/any names I will ABSOLUTELY follow up with this through other channels...<sup>57</sup>

Ms. Avila wrote:

Ok i will. My mom has lung biopsy on 1/22 they called me about pre op and sending instructions for preparation i told them they had to send these in Spanish she said they don't have them in Spanish I told them to get them translated fast because I'm not the patient and they have two weeks to get these to my mom.

On January 12, Ms. Gutierrez, along with Ms. Avila, attended an appointment with Physician Assistant Michael Higgins, who did not use an interpreter.<sup>58</sup> In his interview, PA Higgins stated that he did not remember the details of his specific interactions with Ms. Gutierrez but, when a patient speaks a language other than English, he tries to have an interpreter or use an iPad.<sup>59</sup> PA Higgins's notes from the medical record state, "Pt. Daughter interpreted this clinic encounter for her as it is her (the patient's) preference and she did not wish to utilize the interpreter service."<sup>60</sup>

On January 15, Ms. Reep emailed Ms. Avila again, writing that Ms. Avila could send her Ms. Gutierrez's full name and date of birth, and that she would be happy to follow up.<sup>61</sup> Ms. Avila emailed Ms. Reep with Ms. Gutierrez's full name and date of birth, and Ms. Reep wrote again that she would follow up.<sup>62</sup>

On January 16, Ms. Avila emailed Ms. Reep, writing:

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<sup>56</sup> Email from Ms. Avila to Ms. Reep, 1/8/2019.

<sup>57</sup> Email from Ms. Reep to Ms. Avila, 1/8/2019.

<sup>58</sup> Email from Ms. Avila to HRC, 5/5/2020.

<sup>59</sup> Interview with Mr. Higgins, 8/9/2021.

<sup>60</sup> Medical record for Ms. Gutierrez, 1/12/2019.

<sup>61</sup> Email from Ms. Reep to Ms. Avila, 1/15/2019.

<sup>62</sup> Email from Ms. Avila to Ms. Reep, 1/15/2019; email from Ms. Reep to Ms. Avila, 1/15/2019.

We need to get the instructions for next Tuesday's procedure in Spanish this week. I talked to them almost two weeks ago and we have not received anything yet.<sup>63</sup>

Ms. Reep replied to Ms. Avila on the same day, writing:

You can do one of two things at this point: tell the person who promised you the instructions to please email it to me immediately, or else give me their name and number and I will call them...<sup>64</sup>

Ms. Avila emailed Ms. Reep, writing:

I don't have the name of the person it was someone from surgical radiology who called. I will try to see if the case manager from breast care knows who that might be.

Ms. Avila and Ms. Gutierrez did not receive a translation of the instructions.<sup>65</sup> In Ms. Reep's interview, she stated, "I assumed the ball was in her court. If I hadn't been doing other things, I might have noticed that she did not respond...She didn't have to provide the name. They should have gotten in touch with me about the document...We can always do better."<sup>66</sup>

On the evening of January 16, Ms. Gutierrez experienced increasing abdominal pain, nausea and vomiting, and she went by ambulance to the Emergency Department.<sup>67</sup> A medical student<sup>68</sup> came into Ms. Gutierrez's room and said that he needed to ask Ms. Gutierrez a few questions.<sup>69</sup> Ms. Avila told him that Ms. Gutierrez doesn't speak English and that he needed to get an interpreter.<sup>70</sup> The student told Ms. Avila that she could interpret, and Ms. Avila told him he needed to get an interpreter.<sup>71</sup> The student left, and Dr. Eike Blohm came into the room and asked Ms. Avila why she was sending the medical students back when they came to ask Ms. Gutierrez questions.<sup>72</sup> Ms. Avila told him that she was sending them back because they needed to have an interpreter.<sup>73</sup>

Dr. Blohm examined Ms. Gutierrez and contacted the surgery department.<sup>74</sup> Dr. Blohm told Ms. Gutierrez that he was going to give her some pain medication and that they needed to start

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<sup>63</sup> Email from Ms. Reep to Ms. Avila, 1/16/2019.

<sup>64</sup> Email from Ms. Avila to Ms. Reep, 1/16/20219.

<sup>65</sup> Email from Ms. Avila to HRC, 5/5/2020.

<sup>66</sup> Interview with Ms. Reep, 2/10/2021.

<sup>67</sup> Medical Record for Ms. Gutierrez, 1/17/2019.

<sup>68</sup> UVMHC is a teaching hospital in alliance with the University of Vermont, see University of Vermont Medical Center, *About the UVM Medical Center*, available at: <https://www.uvmhealth.org/medcenter/about-uvm-medical-center> (last visited 12/9/2021).

<sup>69</sup> Interview with Ms. Avila, 10/16/2020.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Medical Record for Ms. Gutierrez, 1/17/2018.

emptying her stomach.<sup>75</sup> Ms. Avila told Dr. Blohm that Ms. Gutierrez wasn't understanding anything that he was saying.<sup>76</sup> In Ms. Gutierrez's interview, she stated that the doctor spoke all in English, and she didn't understand anything he said.<sup>77</sup> Dr. Blohm's notes state that Ms. Gutierrez's daughter "translated Spanish."<sup>78</sup> Dr. Blohm no longer works for UVMMC, he is believed to be incarcerated, and this investigation was unable to reach him for an interview.<sup>79</sup>

Three nurses came in, and they gave Ms. Gutierrez an IV.<sup>80</sup> Ms. Gutierrez asked what was happening, and Ms. Avila told her they were giving her an IV and that they were going to use a tube to empty her stomach.<sup>81</sup> Dr. Blohm told Ms. Avila that they would wait overnight to see if Ms. Gutierrez needed surgery.<sup>82</sup> During the night, nurses gave Ms. Gutierrez medication and did blood tests.<sup>83</sup> Ms. Avila told the nurse who came to do blood tests that Ms. Gutierrez did not understand what was happening and that she needed an interpreter.<sup>84</sup> The nurse told Ms. Avila, "if you really loved your mother, you would be helping right now."<sup>85</sup> Notes from Nurse Kate Morrison state that Ms. Gutierrez does not speak English, but her daughter was answering questions and interpreting for her.<sup>86</sup> The HRC requested an interview with Nurse Morrison, but she was no longer employed by UVMMC, UVMMC did not have her forwarding information, and the HRC was unable to locate her.<sup>87</sup>

On the morning of January 17, a group of surgeons, residents and medical students came into Ms. Gutierrez's room and lifted Ms. Gutierrez's clothing to check her abdomen.<sup>88</sup> Ms. Avila told them that it was important for them to have an interpreter while they were talking and lifting Ms. Gutierrez's clothes.<sup>89</sup> One of them said that the nurses would figure that out, but no one got an interpreter.<sup>90</sup> Someone in the group told Ms. Avila that she could continue to interpret and that she was doing a great job.<sup>91</sup>

While UVMMC staff was discussing the possibility of surgery, Ms. Gutierrez asked Ms. Avila if they were talking about surgery.<sup>92</sup> Ms. Avila tried not to tell Ms. Gutierrez anything that would

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<sup>75</sup> Interview with Ms. Avila, 10/16/2020.

<sup>76</sup> *Id.*

<sup>77</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>78</sup> Medical Record for Ms. Gutierrez, 1/17/2018.

<sup>79</sup> Email from Ms. Smart to HRC, 2/9/2021.

<sup>80</sup> Interview with Ms. Avila, 10/16/2020.

<sup>81</sup> *Id.*

<sup>82</sup> Interview with Ms. Avila, 10/16/2020.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Medical Record for Ms. Gutierrez, 1/17/2018.

<sup>87</sup> Email from Ms. Smart, 2/9/2021.

<sup>88</sup> Interview with Ms. Avila, 10/16/2020.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

raise her blood pressure, and she told her mother they did not know whether she would need surgery.<sup>93</sup>

Also, on January 17, Ms. Avila emailed Ms. Reep, writing:

Someone just came from registration again with patient forms for her to sign and i asked for those in Spanish she said the hospital doesn't translate forms. I told her to please connect with you. Her name is loiuise [sic] dubuque and gave me an attitude about having forms translated.

Ms. Reep replied by email, writing that she spoke to the department, and they would send Ms. Reep the documents for translation shortly.<sup>94</sup> UVMMC had no record of a current or former employee named Louise Dubuque.<sup>95</sup>

On January 17, Dr. Gino Trevisani used Dr. Alita Perez-Tamayo, a general surgery resident and native Spanish speaker, as interpreter to ask Ms. Gutierrez how she was feeling.<sup>96</sup> Dr. Trevisani's notes state that Ms. Gutierrez was "feeling better."

On January 18, Ms. Avila felt heat at Ms. Gutierrez's abdomen, and she requested for someone to come.<sup>97</sup> Two surgeons came in, lifted Ms. Gutierrez's gown to examine her and said they needed to operate.<sup>98</sup> Ms. Avila told Ms. Gutierrez that she needed to have surgery, and Ms. Gutierrez's blood pressure started going up.<sup>99</sup> Employees came in with consent forms, and Ms. Avila told them it would be better to have an interpreter.<sup>100</sup> Ms. Avila ended up interpreting the forms for Ms. Gutierrez to sign, but she did not tell Ms. Gutierrez all the things that could go wrong, including dying.<sup>101</sup> In Ms. Avila's interview, she stated that Ms. Gutierrez should have been told everything that was happening and that families should not have to go through an extra layer of stress because of UVVVC's failure to provide the same level of care to patients who speak a language other than English as to patients who speak English.<sup>102</sup> In Ms. Gutierrez's interview she stated that she felt that UVMMC forced relatives to interpret, and she was concerned because sometimes relatives don't interpret everything they hear to avoid causing their family member suffering.<sup>103</sup>

Ms. Avila accompanied Ms. Gutierrez to the entrance of the operating room, but she was not allowed inside.<sup>104</sup> Ms. Avila sat in the waiting room.<sup>105</sup> After about an hour and a half, a surgeon

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<sup>93</sup> *Id.*

<sup>94</sup> Email from Ms. Reep to Ms. Avila, 1/17/2018.

<sup>95</sup> Email from Ms. Smart to HRC, 10/22/2021.

<sup>96</sup> Medical record for Ms. Gutierrez, 1/17/2019.

<sup>97</sup> Interview with Ms. Avila, 10/26/2020.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>104</sup> Interview with Ms. Avila, 10/26/2020.

<sup>105</sup> *Id.*

came to talk to Ms. Avila in the waiting room.<sup>106</sup> The surgeon told her that they had removed thirty inches of intestine and that Ms. Avila would be able to see Ms. Gutierrez soon.<sup>107</sup> When Ms. Gutierrez awoke after the surgery, there were six people holding her arms and legs, and none of them could communicate with her.<sup>108</sup> Someone from UVMHC ran to the waiting room and asked Ms. Avila if she was Maria Gutierrez's daughter.<sup>109</sup> Ms. Avila accompanied the employee to the Post Anesthesia Care Unit, where she saw that her mother was disoriented and speaking in Spanish.<sup>110</sup> There was no interpreter present, and Ms. Avila heard employees telling Ms. Gutierrez, in English, that she needed to stay still.<sup>111</sup> Notes filed in Ms. Gutierrez's medical record the week after the surgery state that "Ms. Gutierrez awoke from anesthesia without event..."<sup>112</sup>

On January 21, one of the nurses suggested that Ms. Avila talk to patient advocacy about the lack of interpretation.<sup>113</sup> Ms. Avila requested for a manager to come to Ms. Gutierrez's room so that Ms. Avila would not have to leave Ms. Gutierrez without someone to interpret for her.<sup>114</sup> A nurse told Ms. Avila that she would have to go to the manager's office, which she did.<sup>115</sup> Ms. Avila recorded their conversation with assistant nurse manager Carmel Thomas.<sup>116</sup> In the recording, Ms. Thomas stated that the interpreter had not been there for multiple days, and the nurse manager told Ms. Avila she was "trying to kick it up the ladder because we're supposed to have those things put into place for patients."<sup>117</sup>

Ms. Avila also talked to Maria Senfleber, who works with the patient and family advocacy department.<sup>118</sup> Ms. Senfleber worked with Assistant Nurse Manager Thomas to arrange an in-person interpreter.<sup>119</sup> On the afternoon of January 21, UVMHC provided an in-person interpreter for Ms. Gutierrez for approximately three hours.<sup>120</sup> Ms. Gutierrez and Ms. Avila stayed at UVMHC until January 24.<sup>121</sup> UVMHC also provided in-person interpretation for approximately three hours twice per day until Ms. Gutierrez was discharged on January 24.<sup>122</sup>

Ms. Avila also asked a friend, Mary Alice Favro, to come to the hospital to be with Ms. Gutierrez so that Ms. Avila could take a break from being at the hospital.<sup>123</sup> While Ms. Favro

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>109</sup> Interview with Ms. Avila, 10/26/2020.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Medical Record for Ms. Gutierrez, 1/25/2019.

<sup>113</sup> Interview with Ms. Avila, 10/26/2020.

<sup>114</sup> Recording of conversation between Ms. Thomas and Ms. Avila, 1/21/2019.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Interview with Ms. Senfleber, 10/26/2021.

<sup>119</sup> *Id.*

<sup>120</sup> University of Vermont Medical Center, Interpreter Inquiry Records, 1/2019.

<sup>121</sup> Medical Record for Ms. Gutierrez, 1/30/2019.

<sup>122</sup> University of Vermont Medical Center, Interpreter Inquiry Records, 1/2019; interview with Ms. Avila, 10/26/2020.

<sup>123</sup> Interview with Ms. Favro, 11/3/2021.

was with Ms. Gutierrez, nursing staff came in to do tasks such as taking Ms. Gutierrez's vitals, administering medicine, and helping with positioning.<sup>124</sup> Ms. Favro does not remember any UVMMC staff asking her whether she would interpret, and she does not think any staff asked Ms. Gutierrez whether she wanted Ms. Favro to interpret, but she ended up interpreting while she was there.<sup>125</sup>

Ms. Favro is familiar with the iPads that are sometimes used for interpretation at UVMMC, but she did not see an iPad for Ms. Gutierrez while she was there.<sup>126</sup> According to Dr. Holmes, an attending physician, there's often an iPad in each inpatient area, and it will generally be at the bedside of a patient who has been there for some time.<sup>127</sup> UVMMC's response states that telephone and video remote interpreter services are always available at the bedside to ensure effective communication.<sup>128</sup> Throughout Ms. Gutierrez's stay, she did not have an iPad next to her bed.<sup>129</sup> Records of iPad interpretation use show that twelve minutes of iPad interpretation in Spanish occurred at UVMMC during Ms. Gutierrez's week-long stay, and the records do not specify for which patient the interpretation was required.<sup>130</sup>

In Ms. Gutierrez's interview, she stated that, during her stay at UVMMC, she did not know what UVMMC employees were doing to her, such as what medicines was receiving when she was injected.<sup>131</sup> Employees would talk to Ms. Avila instead of Ms. Gutierrez.<sup>132</sup> Ms. Gutierrez stated that not knowing what was going on was "very hard" and made her "very anxious."<sup>133</sup>

The medical record shows that several nursing employees participated in Ms. Gutierrez's care during her stay, when an interpreter was not present, including Anna Maynard and Megan Stem-Cobb.<sup>134</sup> In Nurse Maynard's interview, she stated that she always uses an interpreter for medical conversations, but family can interpret for communication like asking whether the patient is hungry or thirsty.<sup>135</sup> Nurse Maynard's notes also state that Ms. Avila refused an iPad interpreter and asked for an in-person interpreter.<sup>136</sup> Licensed Nursing Assistant (LNA) Stem-Cobb stated that she works with very few patients who need an interpreter, and she "think[s they] keep an iPad in the back."

On January 22, Ms. Gutierrez had a lung biopsy, which had been previously scheduled.<sup>137</sup> Ms. Gutierrez prepared for her lung biopsy surgery without fully understanding the English instructions she was given.<sup>138</sup> However, UVMMC provided an interpreter for the biopsy

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Interview with Dr. Holmes, 6/28/2021.

<sup>128</sup> Response, 4/17/2020.

<sup>129</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>130</sup> University of Vermont Medical Center, VRI Call Detail Report.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Interview with Ms. Gutierrez, 10/26/2020.

<sup>134</sup> Medical Record for Ms. Gutierrez, 1/21/2019.

<sup>135</sup> Interview with Ms. Maynard, 10/26/2021.

<sup>136</sup> Medical Record for Ms. Gutierrez, 1/21/2019.

<sup>137</sup> Medical Record for Ms. Gutierrez, 1/22/2019.

<sup>138</sup> Email from Ms. Avila to HRC, 5/5/2020.



appointment, and the interpreter explained to Ms. Gutierrez what was going to happen during the biopsy.<sup>139</sup> The interpreter was not allowed to enter the room where the biopsy was happening or the booth where UVMMC employees give instructions to the patient.<sup>140</sup> The interpreter left, and the UVMMC employees used a Spanish recording that told Ms. Gutierrez when to breathe.<sup>141</sup>

After Ms. Gutierrez's January 18 surgery, she had drains that needed to be emptied regularly.<sup>142</sup> When Ms. Gutierrez was discharged on January 24, PA Higgins and an interpreter went through the discharge document with Ms. Gutierrez and Ms. Avila.<sup>143</sup> Ms. Avila asked for the instructions to be translated in Spanish.<sup>144</sup> In Ms. Gutierrez's interview, she stated, "It is difficult to remember everything. When they discharge you, they give you a lot of instructions. I told them that I needed to get everything written."<sup>145</sup> In his interview, PA Higgins stated that he did not remember receiving a request for the after-visit summary (AVS) to be translated.<sup>146</sup>

The medical record states, "Spanish version being translated and will be available for pt tomorrow 1/25 at her appt here at UVMMC."<sup>147</sup> Emails show that UVMMC employees did request a translation, which was received by UVMMC on January 24.<sup>148</sup> However, neither Ms. Gutierrez nor Ms. Avila received a Spanish version, and Ms. Gutierrez's MyChart shows the availability of the English document only.<sup>149</sup> Emails show that the employee who was going to share the translated document with Ms. Gutierrez did not receive the translation until February 14.<sup>150</sup>

On January 30, Ms. Gutierrez visited the UVMMC surgery clinic for a visit with Nurse Michelle Rickard. Nurse Rickard's notes state, "Patient comes to clinic with her daughter (who also interprets for her, per pt request)."<sup>151</sup> In Nurse Rickard's interview, she stated that "we always offer an interpreter, and we had an interpreter on standby with the phone in case Ms. Gutierrez's daughter did not attend the appointment."<sup>152</sup>

On February 18, Ms. Gutierrez had a mastectomy.<sup>153</sup> Ms. Avila was present at UVMMC, as well as Ms. Gutierrez's additional daughter, Clara Avila, who flew from Argentina to be present for the surgery.<sup>154</sup> UVMMC provided an in-person interpreter during the pre-op and discharge.<sup>155</sup> However, after Ms. Gutierrez's surgery and before an interpreter was present to review Ms.

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<sup>139</sup> Interview with Ms. Avila, 10/26/2020.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Interview with Ms. Avila, 10/26/2020.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Interview with Ms. Gutierrez, 10/26/2020.

<sup>146</sup> Interview with Mr. Higgins, 8/9/2021.

<sup>147</sup> Medical Record for Ms. Gutierrez, 1/24/2019.

<sup>148</sup> Email from Ms. Reep to Ms. Morris, 1/24/2019.

<sup>149</sup> Screenshot of MyChart Discharge Attachment for Ms. Gutierrez.

<sup>150</sup> Email from Ms. Reep to Ms. Bouffard, 2/14/2019.

<sup>151</sup> Medical Record for Ms. Gutierrez, 1/30/2019.

<sup>152</sup> Interview with Ms. Rickard, 4/5/2021.

<sup>153</sup> Medical Record for Ms. Gutierrez, 2/18/2019.

<sup>154</sup> Interview with Clara Avila, 9/30/2021.

<sup>155</sup> *Id.*

Gutierrez's discharge information, a UVMMC employee came to the waiting area to get Ms. Gutierrez's daughters because UVMMC employees were asking Ms. Gutierrez questions in English and she was not responding.<sup>156</sup> Both Ms. Gutierrez's daughters interpreted so that UVMMC staff could ask Ms. Gutierrez questions about how she was feeling and whether she was in pain.<sup>157</sup>

The University of Vermont Health Network provides home health services to some patients to help them recover after surgery.<sup>158</sup> From January to March, Ms. Gutierrez had eight home visits from nurses or PTs.<sup>159</sup> None of the visiting nurses or PTs used an interpreter, and, when Ms. Avila asked about having an interpreter, they told her they did not know how to provide interpreter services in the home setting.<sup>160</sup> One of Ms. Gutierrez's daughters interpreted for each of the visits and for calls to schedule the visits.<sup>161</sup> One of the nurses told Clara Avila that what they were doing was simple and that it should not be a problem for her to interpret.<sup>162</sup> In Ms. Gutierrez's interview, she stated, "[w]hat I felt as a human being is that I was not there. They would not make eye contact. It was like they were ignoring me. It was terrible."<sup>163</sup>

After Ms. Gutierrez's mastectomy, she underwent radiation treatments.<sup>164</sup> Michele Mosley is an outpatient oncology social worker who meets with patients undergoing active radiation treatment.<sup>165</sup> On March 29, Ms. Mosley conducted a social work assessment of Ms. Gutierrez, during which she communicated with Ms. Gutierrez through an in-person interpreter during their interaction.<sup>166</sup> In Ms. Mosley's interview, she stated that Ms. Avila communicated her frustration about inadequate interpretive services with her, but Ms. Mosley did not take any steps to address the issue because Ms. Avila was already in touch with interpretive services and Ms. Mosley did not want to go above patients to complain for them.<sup>167</sup>

On July 30, no interpreter was present when Ms. Gutierrez arrived for her oncology appointment with PA Penelope Gibson.<sup>168</sup> Ms. Avila told the employee at registration that Ms. Gutierrez needed an interpreter, and the employee told Ms. Avila that she could interpret.<sup>169</sup> In PA Gibson's interview, she stated that the medical assistants usually set up an online interpreter or let her know that there is an in-person interpreter.<sup>170</sup> However, according to Ms. Avila, the

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<sup>156</sup> Interview with Ms. Avila, 10/26/2020; Interview with Clara Avila, 9/30/2021.

<sup>157</sup> *Id.*

<sup>158</sup> University of Vermont Health Network, *Recovery from Surgery*, available at: <https://www.uvmhomehealth.org/rehabilitation-services/recovery-from-surgery/> (last visited 12/14/2021).

<sup>159</sup> Email from Mercedes Avila to HRC, 5/5/2020.

<sup>160</sup> Interview with Clara Avila, 9/30/2021; interview with Ms. Avila, 10/26/2020; Interview with Ms. Gutierrez, 10/26/2020.

<sup>161</sup> Email from Mercedes Avila to HRC, 5/5/2020; interview with Clara Avila, 9/30/2021.

<sup>162</sup> Interview with Clara Avila, 9/30/2021.

<sup>163</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>164</sup> *Id.*

<sup>165</sup> Interview with Ms. Mosely, 3/30/2021.

<sup>166</sup> Medical Record for Ms. Gutierrez, 3/29/2019.

<sup>167</sup> Interview with Ms. Mosley, 3/30/2021.

<sup>168</sup> Interview with Ms. Avila, 10/26/2020.

<sup>169</sup> *Id.*

<sup>170</sup> Interview with Ms. Gibson, 4/5/2021.

medical assistant told Ms. Avila, “if you really care about your mother, you would not be causing this issue and you would be interpreting for her.”<sup>171</sup> Ms. Avila told him that he should not be talking to a family member like that and he should do what is required by law.<sup>172</sup>

The interim division chief, Dr. Chris Holmes, came over to talk to the UVMHC employees about what was going on.<sup>173</sup> Dr. Holmes and the registration and medical assistant employees were standing approximately 10 feet away from Ms. Avila, and she heard one of the employees tell Dr. Holmes that Ms. Avila was complaining because they did not have an interpreter.<sup>174</sup> Ms. Avila said they were required by law to have an interpreter, and, according to Ms. Avila, Dr. Holmes “shushed her.”<sup>175</sup> Ms. Avila stated, “I’m telling you, you’re breaking the law.”<sup>176</sup> Dr. Holmes told Ms. Avila that she was not talking to her, and she turned around and left.<sup>177</sup> In Dr. Holmes’s interview, she stated that she does not remember the interaction with Ms. Avila.<sup>178</sup>

PA Gibson used an iPad interpreter for Ms. Gutierrez’s appointment.<sup>179</sup> Notes from PA Gibson state, “unfortunately, a translator was not organized prior to this visit and we needed to establish an online translator.”<sup>180</sup>

On August 9, Ms. Gutierrez had a follow-up appointment with Dr. Sowden, and no interpreter was scheduled.<sup>181</sup> Celeste Baker is the intake coordinator who checked Ms. Gutierrez in.<sup>182</sup> In Ms. Baker’s interview, she stated that the scheduler usually arranges an interpreter for appointments with patients who speak a language other than English.<sup>183</sup> The record did not show who had scheduled the appointment without arranging for an interpreter, but the medical assistants got an iPad interpreter for Ms. Gutierrez.<sup>184</sup>

In September, Kristin Grover called Ms. Gutierrez, through an interpreter, and left a voicemail about health coaching.<sup>185</sup> Ms. Grover also sent an email to Ms. Avila, who is listed as Ms. Gutierrez’s contact for email.<sup>186</sup> Ms. Grover did not hear back from Ms. Gutierrez or Ms. Avila.<sup>187</sup>

In November, UVMHC upgraded their electronic health records.<sup>188</sup> Prior to the upgrade, a patient’s need for an interpreter was noted in “an FYI flag on the ‘cover page’ of the patient

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<sup>171</sup> Interview with Ms. Avila, 10/26/2020.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Interview with Dr. Holmes, 6/28/2021.

<sup>179</sup> Interview with Ms. Gibson, 4/5/2021.

<sup>180</sup> Medical Record for Ms. Gutierrez, 7/30/2019.

<sup>181</sup> Interview with Ms. Baker, 7/28/2021.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Medical Record for Ms. Gutierrez, 9/19/2019.

<sup>186</sup> Interview with Ms. Grover, 7/22/2021.

<sup>187</sup> *Id.*

<sup>188</sup> Email from Ms. Smart to HRC, 11/30/2021.

chart.”<sup>189</sup> According to legal counsel for UVMMC, the flag was “tiny...and buried in the corner of the screen.”<sup>190</sup> That type of flag was also utilized for other information, such as guardianships, and any employee could create that type of flag.<sup>191</sup> As part of the upgrade to the electronic health records, UVMMC began using a specific interpreter flag that is a large, red banner.<sup>192</sup>

On December 13, Ms. Gutierrez had a mammogram.<sup>193</sup> UVMMC staff walked Ms. Gutierrez and Ms. Avila to the changing area without an interpreter.<sup>194</sup> The interpreter arrived before the imaging began, but she made multiple errors regarding basic vocabulary.<sup>195</sup> Ms. Avila corrected the interpreter’s incorrect interpretations and eventually asked her to leave.<sup>196</sup>

Kathleen Carey is the patient and family advocate for UVMMC.<sup>197</sup> Ms. Carey received a call from someone in Mammography letting her know that a patient’s daughter was very upset and wanted to talk to someone.<sup>198</sup> Ms. Carey visited Mammography and met with Ms. Avila and Ms. Gutierrez.<sup>199</sup>

According to Ms. Carey, Ms. Gutierrez did not participate in the conversation between Ms. Carey and Ms. Avila, but she looked teary.<sup>200</sup> In her interview, Ms. Carey stated that she thought that Ms. Gutierrez might have been upset because Ms. Avila was complaining to the hospital and not necessarily because of the service she received.<sup>201</sup> In Ms. Gutierrez’s interview, she stated, “[w]hen I had a mammogram, I had a very bad experience. The tech, instead of telling me to breathe, told me to swallow. In another instance, the interpreter confused menstruation with menopause.”<sup>202</sup> Ms. Avila recorded the conversation with Ms. Carey, which begins with Ms. Gutierrez speaking in Spanish and Ms. Avila interpreting.<sup>203</sup> Ms. Avila stated:

She wants to share because she’s the patient. She gets stressed out because she gets asked questions and she can’t answer them because she doesn’t speak English. The interpreter who is supposed to translate the questions precisely and correctly so that the technician can interpret in the computer. The interpreter couldn’t speak in Spanish and she doubted that the translation was correct... Two surgeries, two biopsies. She’s been coming to this hospital a year. She’s really upset. She’s better but these

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Medical Record for Ms. Gutierrez, 12/13/2019.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Interview with Kathleen Carey, 4/6/2021.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>203</sup> Patient Advocacy Recording, 12/13/2019.

things affect her. They exhaust her. She gets exhausted by all these situations.<sup>204</sup>

Ms. Carey apologized for the experience they had and asked if Ms. Avila had been in touch with interpreter services.<sup>205</sup> Ms. Avila told her that she had been in touch with interpreter services and the situation had not improved.<sup>206</sup> Ms. Avila told Ms. Carey that family members should not serve as interpreters and that Ms. Carey should be using an interpreter for the meeting they were having.<sup>207</sup> A later report about the meeting states that Ms. Carey “said she didn’t understand the need [for an interpreter] and offered to get one but [Ms. Avila] declined.”<sup>208</sup> The recording of the conversation does not include any offer by Ms. Carey to get an interpreter for their conversation.<sup>209</sup>

On December 13, the same day as Ms. Gutierrez’s appointment, Dr. Peggy Warren, the lead radiologist at the breast care center, generated a SAFE report.<sup>210</sup> The SAFE report states that the interpreter was not a native Spanish speaker and that she scored an 8 out of 12 on the Alta language testing scale.<sup>211</sup> According to the Alta scale, a person at level 8 “will potentially cause misunderstandings between himself/herself and the listener based on some lack of ability to convey clearly his/her message.”<sup>212</sup>

Ms. Avila filed a formal grievance.<sup>213</sup> When someone files a grievance, UVMMC tries to respond within 7 to 30 days with findings or to communicate that they need more time.<sup>214</sup> In this instance, UVMMC took over 30 days to respond to Ms. Avila because, according to Ms. Carey, Ms. Avila did not want to hear from her until she had something substantive to communicate.<sup>215</sup>

## 2020

On January 11, Ms. Gutierrez went to the emergency department, accompanied by Ms. Avila, because her arm was swelling.<sup>216</sup> Physician Assistant Amy Larow evaluated Ms. Gutierrez, and PA Larow’s notes state, “patient Spanish-speaking here with family who agrees to be interpreter and is comfortable with this.”<sup>217</sup> In Ms. Gutierrez’s interview, she stated that she did not want Ms. Avila to have to interpret for her; she wanted UVMMC to provide interpretation.<sup>218</sup> In PA Larow’s interview with the HRC, she stated that UVMMC’s primary goal is to use an iPad or

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Safe Report, 12/13/2019.

<sup>209</sup> Patient Advocacy Recording, 12/13/2019.

<sup>210</sup> Safe Report, 12/13/2019.

<sup>211</sup> Alta, Alta’s Language Testing Scale, available at: <https://www.altalang.com/language-testing/alta-scale/> (last visited 11/19/2021).

<sup>212</sup> *Id.*

<sup>213</sup> Interview with Ms. Carey, 4/6/2021.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Medical record for Ms. Gutierrez, 1/11/2020; interview with Ms. Avila, 10/16/2020.

<sup>217</sup> Medical record for Ms. Gutierrez, 1/11/2020.

<sup>218</sup> Interview with Ms. Avila, 10/16/2020.

telephone for interpretation but that, in an emergency, if those resources are not available, they will use family members.<sup>219</sup> However, she stated that Ms. Gutierrez was not in an emergency situation during their interaction.<sup>220</sup>

Ms. Gutierrez developed lymphedema, and, beginning in January, she went to several appointments at the UVMMC's rehab clinic.<sup>221</sup> Ms. Gutierrez's first two rehab sessions were conducted without an interpreter.<sup>222</sup> In Ms. Gutierrez's interview, she stated that the rehab employees were kind, but they seemed to have no idea about interpretation.<sup>223</sup> After her first two appointments, Ms. Gutierrez's medical record states that UVMMC used an in-person interpreter.<sup>224</sup> Progress notes for Ms. Gutierrez's first two rehab sessions were entered by Physical Therapist (PT) Margaret Shadroui.<sup>225</sup> This investigation requested to interview PT Shadroui, but UVMMC was unable to schedule the interview.

In February, Ms. Gutierrez filed her complaint with the HRC.<sup>226</sup>

In March, Ms. Carey sent a letter, including a copy in Spanish, to Ms. Gutierrez in response to the grievance UVMMC received.<sup>227</sup> In the letter, Ms. Carey apologized for Ms. Gutierrez's experience and stated that Ms. Carey was working with Ms. Reep to include a review of legal provisions that require interpretation in UVMMC's training for new employees, to add a mandatory annual training to make sure employees continue to be trained about how and when to use interpreter services, and to possibly upgrade UVMMC's scheduling system to electronically submit an interpreter request when an appointment is made.<sup>228</sup>

In April, Ms. Gutierrez received an electronic questionnaire to fill out before her scheduled appointment on April 10. Nurse Karen Stern sent behavioral health surveys to patients, including Ms. Gutierrez.<sup>229</sup> Patients also received a paper version of the survey when they arrived for their appointment, but they did not need to fill out the paper form if they had already completed the electronic version.<sup>230</sup> Nurse Stern was not aware that Ms. Gutierrez does not read English.<sup>231</sup> In her interview, Nurse Stern stated that she does not know of any process to send electronic communications to people who use a language other than English.<sup>232</sup> She also stated that she is now more familiar with Epic, including seeing when someone needs an interpreter, which she said would be an indicator not to send a survey in English.<sup>233</sup>

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<sup>219</sup> Interview with PA Larow, 8/25/2021.

<sup>220</sup> *Id.*

<sup>221</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Medical Record for Ms. Gutierrez, 1/27/2020.

<sup>225</sup> Medical Record for Ms. Gutierrez, 1/15/2020; Medical Record for Ms. Gutierrez, 1/22/2020.

<sup>226</sup> Complaint, 2/25/2020.

<sup>227</sup> Letter from Ms. Carey to Ms. Gutierrez, 3/18/2020.

<sup>228</sup> *Id.*

<sup>229</sup> Interview with Ms. Stern, 7/26/2021.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Ms. Gutierrez continued to receive email communication from UVMMC in English. For example, in May, she received an email about how UVMMC was addressing COVID-19 concerns.<sup>234</sup>

On May 18, Ms. Gutierrez had a telehealth appointment with PT Elaine Perry.<sup>235</sup> PT Perry used an iPad interpreter during the appointment, and the connection with the interpreter failed partway through the appointment but began working again.<sup>236</sup> Ms. Gutierrez told PT Perry that the consent forms she had received before the appointment were not in Spanish, and she requested to receive information for her appointments, such as forms, in Spanish.<sup>237</sup> PT Perry summarized the consent form and told Ms. Gutierrez, “[w]e’re learning. It’s all new...[receiving the form in Spanish] would have helped, wouldn’t it have.”<sup>238</sup>

On September 18, Ms. Gutierrez attended an appointment with Dr. Sowden.<sup>239</sup> Ms. Gutierrez arrived early for the appointment, and staff led her to a patient room.<sup>240</sup> Dr. Sowden began her examination of Ms. Gutierrez, using an iPad interpreter.<sup>241</sup> Ms. Avila arrived and asked the front desk staff to join the appointment with Ms. Gutierrez.<sup>242</sup> Staff told Ms. Avila that she was not allowed to go into the appointment with Ms. Gutierrez unless she was interpreting for Ms. Gutierrez.<sup>243</sup> Ms. Avila believed that UVMMC was trying to force her to provide interpretation, and she became upset.<sup>244</sup> In Dr. Sowden’s interview, she stated that she could hear “a ruckus” outside of the patient room, and that, when she went to see what was happening, she saw Ms. Avila yelling at the front desk staff.<sup>245</sup> The front desk staff called security, and Dr. Sowden led Ms. Avila into the clinic so they could talk in a more private area.<sup>246</sup> Dr. Sowden told Ms. Avila that the front desk staff was instructed to limit the number of attendees to appointments because of COVID-19 unless the attendee met an exception such as being an interpreter.<sup>247</sup> In June, UVMMC had issued a revised welcoming policy that stated, “one support person may be permitted in rare circumstances such as for a patient with a communication need (such as persons who are deaf or who do not understand/speak English)”.<sup>248</sup> The policy also states that security will be called to respond to any family members or visitors who do not leave when asked.<sup>249</sup>

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<sup>234</sup> Screenshot of MyChart Message from UVMMC to Ms. Gutierrez, 5/8/2020.

<sup>235</sup> Email from Ms. Avila to HRC, 6/2/2020.

<sup>236</sup> Recording of Conversation between Ms. Perry and Ms. Gutierrez, 5/2020.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Interview with Dr. Sowden, 3/29/2021; University of Vermont Medical Center, Interpreter Inquiry Records, 9/18/2020.

<sup>240</sup> Interview with Dr. Sowden, 3/29/2021.

<sup>241</sup> Interview with Dr. Sowden, 3/29/2021; University of Vermont Medical Center, Interpreter Inquiry Records, 9/18/2020.

<sup>242</sup> Interview with Dr. Sowden, 3/29/2021; interview with Ms. Avila, 10/26/2020.

<sup>243</sup> Interview with Ms. Avila, 10/26/2020.

<sup>244</sup> *Id.*

<sup>245</sup> Interview with Dr. Sowden, 3/29/2021.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> University of Vermont Medical Center, *Revised Welcoming Policy Recommendations in Response to Coronavirus (COVID-19)- Phase 2*, 6/15/2020.

<sup>249</sup> *Id.*

On May 11, Ms. Gutierrez and Clara Avila attended Ms. Gutierrez's appointments for a mammogram and an ultrasound.<sup>250</sup> During interviews with the HRC, multiple UVMMC employees stated that employees will generally have an interpreter or wait for one before moving forward with the appointment so that the patient has a complete understanding from start to finish.<sup>251</sup> However, when the mammogram technician came to get Ms. Gutierrez from the waiting room, she told Ms. Gutierrez and Clara Avila, in English, that she planned to use a phone interpreter once they were in the room.<sup>252</sup> Ms. Avila interpreted what the technician said so that Ms. Gutierrez would understand what was happening.<sup>253</sup> During the mammogram appointment, the telephone communication was not good, and Clara Avila helped to interpret for two questions because Ms. Gutierrez and the interpreter could not hear each other.<sup>254</sup>

A UVMMC employee led Ms. Gutierrez and Clara Avila to the room where Ms. Gutierrez was going to have her ultrasound.<sup>255</sup> The employee told Clara Avila that interpretation services were not necessary because what they would be doing was simple, and that she could easily interpret.<sup>256</sup>

On June 10, Ms. Gutierrez had a telemedicine appointment with Dr. Dittus.<sup>257</sup> Clara Avila was in the room next to Ms. Gutierrez, and she could hear their conversation.<sup>258</sup> Dr. Dittus spoke in English, and Ms. Gutierrez greeted her in English but said "no English" and asked for an interpreter.<sup>259</sup> Dr. Dittus asked if there was anyone there who could help interpret.<sup>260</sup> Ms. Gutierrez did not understand Dr. Dittus's question.<sup>261</sup> Dr. Dittus called an interpreter, and she put the phone close to the microphone.<sup>262</sup> They were talking about the side effects of Ms. Gutierrez's cancer medicine.<sup>263</sup> There was interference with the sound, and it was difficult to understand what was being said.<sup>264</sup> The interpreter repeated a question about side effects twice, but Ms. Gutierrez could not understand the question.<sup>265</sup> Clara Avila heard the doctor say, "[t]hat's okay, let's skip that question."<sup>266</sup> Clara Avila entered the room and stated that it was not okay to skip questions about side effects because communication through an interpreter is bad.<sup>267</sup> Dr. Dittus

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<sup>250</sup> Interview with Clara Avila, 9/30/2021.

<sup>251</sup> Interview with Celeste Baker, 7/28/2021; interview with LPN Stern, 7/26/2021.

<sup>252</sup> Interview with Clara Avila, 9/30/2021.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*



offered to postpone the meeting.<sup>268</sup> Clara Avila did not want her mother to have to postpone her appointment, and she thought that UVMMC should have been prepared for the appointment, which had been scheduled months in advance.<sup>269</sup> To avoid having to postpone the appointment, Clara Avila interpreted during the half hour appointment.<sup>270</sup>

In June, Ms. Gutierrez moved back to Argentina.<sup>271</sup>

Throughout Ms. Gutierrez's time as a UVMMC patient, she received over 400 pages of documents, almost all in English, including discharge information, medication instructions, discharge instructions, and mammogram results.<sup>272</sup> Ms. Avila interpreted for over 70 calls between UVMMC and Ms. Gutierrez, including calls with surgical oncology, the breast care center, the preoperative screening clinic, hematology and medical oncology, billing, osteoporosis center, outpatient rehab Physical Therapy and other parts of UVMMC.<sup>273</sup> Ms. Avila requested multiple times to have an interpreter, but the callers "did not know what we were talking about."<sup>274</sup> Once, when Ms. Avila requested an interpreter, the UVMMC caller hung up on her.<sup>275</sup>

### UVMMC Policy and Training

UVMMC's website states that UVMMC knows that clear communication is key to patient comfort and safety. The website states that UVMMC offers patients and families on-site interpreters in many languages, they have telephone and video remote interpreters available 24 hours a day, and, with a few days' notice, they can translate UVMMC documents for you.<sup>276</sup>

UVMMC's Interpretation Services for Persons with Limited English policy states that UVMMC is committed to providing interpretation services to individuals with limited English proficiency to ensure that these individuals can effectively provide staff with a clear statement of their medical condition, needs and history, and understand their provider's assessment of their medical condition and treatment options.<sup>277</sup> The policy states that the procedure for an employee is that when the employee sees an interpreter flag in the patient's record or the employee is interacting with a patient who is having difficulty speaking or understanding English, the employee will ask the patient, "[w]ould you like an interpreter?"<sup>278</sup> The policy also states that UVMMC does not encourage interpretation by patients' friends, family members, or UVMMC employees and that, if the patient can express, via professional interpreter (remote or in-person), that a professional

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Email from Clara Avila to HRC, 6/29/2021.

<sup>272</sup> Email from Mercedes Avila to HRC, 4/13/2020; screenshot of MyChart Letters for Ms. Gutierrez, 12/13/2019.

<sup>273</sup> Email from Mercedes Avila to HRC, 4/13/2020.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> University of Vermont Medical Center, Language Access Services, <https://www.uvmhealth.org/medcenter/patients-and-visitors/patients/assistance/translation-services> (last visited 12/17/2021).

<sup>277</sup> University of Vermont Medical Center, *Interpretation Services for Persons with Limited English Proficiency*, 2019.

<sup>278</sup> *Id.*

interpreter will not be needed or desired for the appointment or procedure, the use of a family member as interpreter may be permitted.<sup>279</sup>

Ms. Reep conducts trainings for UVMMC employees regarding interpretation services.<sup>280</sup> Ms. Reep's training became part of UVMMC's new employee orientation in 2019.<sup>281</sup> Ms. Reep gives the 20-to-25-minute training to approximately 70 people every other week.<sup>282</sup> Ms. Reep has also given an hour-long training to a variety of departments within UVMMC.<sup>283</sup> Ms. Reep has not given a registration department-wide training "in the last few years."<sup>284</sup>

A UVMMC handout for employees about which type of interpretation to use states, "[w]henver possible, use the option the patient prefers...s/he has likely had experience and knows which option works best...For example...the patient may prefer an in-person interpreter."<sup>285</sup>

## LEGAL ANALYSIS

### I. Legal Framework

The Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A § 4502 states:

- (a) An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.

Although the VFHPAA does not specifically identify federal statutes other than the Americans with Disabilities Act, the Supreme Court of Vermont has held that federal precedence may be relevant to analyzing state statutes when the state statute is patterned on the federal laws, and that this is especially true when the federal laws are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination."<sup>286</sup> The VFHPAA is patterned after the Civil Rights Act of 1964, which states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>287</sup>

Under the principles of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>288</sup> courts give controlling weight to agency interpretations.<sup>289</sup> The

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<sup>279</sup> *Id.*

<sup>280</sup> Interview with Ms. Reep, 2/10/2021.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> University of Vermont Medical Center, *Which Modality Should I Use?*.

<sup>286</sup> *Human Rights Comm'n v. Labrie, Inc.*, 164 Vt. 237, 243 (1995).

<sup>287</sup> 42 USCS § 2000d.

<sup>288</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>289</sup> Courts give controlling weigh to agency interpretations unless they are arbitrary, capricious, or manifestly

Department of Justice (DOJ) issued policy guidance stating that programs covered by the Civil Rights Act of 1964 are required to take reasonable steps to ensure meaningful access to their programs and activities by Limited English Proficient (LEP) persons.<sup>290</sup> Meaningful access depends on whether there was effective communication, such as through interpretation and translation.<sup>291</sup> The guidance outlines an assessment that balances the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the program and the costs.<sup>292</sup> The intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small programs.<sup>293</sup>

Similarly, the Department of Health and Human Services (HHS) also issued policy guidance to clarify the responsibilities of health providers to LEP individuals under the Civil Rights Act of 1964.<sup>294</sup> The policy guidance reiterates HHS' longstanding position that in order to avoid discrimination against LEP persons based on their national origin, health providers must take adequate steps to ensure that such persons receive the language assistance necessary to afford them meaningful access to their services.<sup>295</sup>

## II. The Elements of the Prima Facie Case for National Origin Discrimination

Ms. Gutierrez can establish a prima facie case of public accommodations discrimination under the VFHPAA by showing that:

- 1) She is a member of a protected class;
- 2) UVMC is a place of public accommodation;
- 3) She was denied the full benefits and enjoyment of the public accommodation;

### **1. Ms. Gutierrez is a member of a protected class;**

Ms. Gutierrez is from Argentina.<sup>296</sup>

Finding: Ms. Gutierrez is a member of a protected class based on her national origin.

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contrary to the statute. K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District, 725 F.3d 1088 (9th Cir., 2013) citing Armstrong v. Schwarzenegger, 622 F.3d 1058, 1065 (9th Cir., 2010).

<sup>290</sup> United States Department of Justice, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (2002).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> United States Department of Health & Human Services Office for Civil Rights, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (2004).

<sup>295</sup> *Id.*

<sup>296</sup> Interview with Ms. Gutierrez, 10/16/2020; Medical Record for Ms. Gutierrez, 12/11/2018.

## **2. UVMMC is a place of public accommodation;**

The VFHPAA defines public accommodation as “any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public.”<sup>297</sup> Medical facilities, such as UVMMC offer medical services to the general public.<sup>298</sup> Therefore, UVMMC is a place of public accommodation.

Finding: UVMMC is a place of public accommodation.

## **3. Ms. Gutierrez was denied the full benefits and enjoyment of UVMMC’s services;**

Whether a patient in a hospital received effective communication is highly dependent on the specific facts of each case. This investigation considers the four factors from the DOJ guidance along with the facts of Ms. Gutierrez’s case to help determine whether UVMMC took adequate steps to provide meaningful access for Ms. Gutierrez to UVMMC’s services.

*Factor 1: The number or proportion of LEP persons eligible to be served or likely to be encountered by the program*

According to the 2011-2015 American Community Survey, 8,541 residents of the state of Vermont ages 5 or older spoke English less than very well, representing 1.43% of the population.<sup>299</sup> The largest language-group among these LEP persons was French with 1,570 LEP individuals.<sup>300</sup> Spanish speakers were the second largest group, with 1,359 LEP individuals.<sup>301</sup> These numbers likely underestimate the number of LEP individuals who are eligible to be served by UVMMC because UVMMC serves patients from northern New York in addition to patients from Vermont.

*Factor 2: The frequency with which LEP individuals come in contact with the program*

In 2016, UVMMC stated that, each week, it was receiving over 200 requests for spoken-language interpreters.<sup>302</sup> The number of requests has likely increased because the percentage of LEP patients has been rising.<sup>303</sup> In interviews with UVMMC employees, estimates of how often the employees came into contact with an LEP patient varied greatly. Answers included at least once a week, once every one or two weeks, once per month, a couple times per month, a few

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<sup>297</sup> 9 V.S.A. §4501.

<sup>298</sup> The University of Vermont Medical Center, *About the UVM Medical Center*, available at: <https://www.uvmhealth.org/medcenter/about-uvm-medical-center> (last visited 12/8/2021).

<sup>299</sup> Vermont Agency of Transportation, *Access to Services by Persons with LEP*, available at: <https://vtrans.vermont.gov/sites/aot/files/civilrights/documents/titlevi/LEP%20Four%20Factor%20Analysis.pdf> (last visited 12/23/2021).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Sari Kymelya, *Medical Interpreters Speak for New American Patients*, SEVEN DAYS, Jan. 27, 2016.

<sup>303</sup> *Id.*

times a month, 10 times per year, every couple months, a couple times per year, fairly often, occasionally, rarely, less than 10 percent of the time, and 5-10 percent of the time.<sup>304</sup>

*Factor 3: The nature and importance of the program, activity, or service provided by the program to people's lives*

UVMMC provides a wide range of services to its patients. Many of these services are fundamentally important to the health and well-being of individuals living in Vermont. For example, UVMMC is designated as a Level I Trauma Center<sup>305</sup> and is capable of providing total care for every aspect of injury – from prevention through rehabilitation.<sup>306</sup>

The quality of services is especially important to LEP patients, who are among the most vulnerable patient populations.<sup>307</sup> LEP patients experience high rates of medical errors with worse clinical outcomes than English-proficient patients and receive lower quality of care by other metrics.<sup>308</sup> Interpreter Coordinator Reep uses the example of W. Ramirez, who became quadriplegic after a misunderstanding of a single word led to a misdiagnosis and erroneous treatment.<sup>309</sup>

*Factor 4: The resources available to the program and the costs*

UVMMC has a variety of resources available to provide services for its LEP patients. UVMMC hires in-person interpreters through the Association of Africans Living in Vermont (AALV) and the Vermont Refugee Resettlement Program, and it uses Video Remote Interpreting (VRI) through iPads and telephonic interpretation.<sup>310</sup>

UVMMC's budget for fiscal year 2021 was \$1,415,656,433.<sup>311</sup> Each year, the medical center gets partial reimbursement from Medicaid for hiring interpreters.<sup>312</sup> VRI costs one dollar and ten

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<sup>304</sup> Interview with Dr. Kaufman, 11/30/2021; interview with Stephanie Calderwood, 8/22/2019; interview with Karen Willet, 11/19/2021; interview with Ms. Grover, 7/22/2021; interview with Mr. Higgins, 8/9/2021; interview with Ms. Baker, 7/28/2021; interview with Ms. Stern, 7/26/2021; interview with Ms. Rickard, 4/5/2021; interview with Ms. Mosley, 3/30/2021; interview with Kathleen Carey, 4/6/2021; interview with Ms. Sussman, 3/19/2021; interview with Dr. Holmes, 6/28/2021; interview with Ms. Ingalls, 2/9/2021; interview with Dr. Abernathy, interview with Dr. Sowden 4/5/2021; interview with Ms. Gibson, 4/5/2021.

<sup>305</sup> University of Vermont Medical Center, About the UVM Medical Center, available at: <https://www.uvmhealth.org/medcenter/about-uvm-medical-center> (last visited 12/23/2021).

<sup>306</sup> American Trauma Society, Trauma Levels Explained, available at: <https://www.amtrauma.org/page/traumalevels> (last visited 12/23/2021).

<sup>307</sup> AMA J. Ethics, *Language-Based Inequity in Healthcare: Who is the "Poor Historian"?* (2017).

<sup>308</sup> *Id.*

<sup>309</sup> Sari Kymelya, *Medical Interpreters Speak for New American Patients*, SEVEN DAYS, Jan. 27, 2016.

<sup>310</sup> Interview with Ms. Reep, 2/10/2021.

<sup>311</sup> Letter from Green Mountain Care Board to UVMMC (2020), available at: <https://gmcbboard.vermont.gov/sites/gmcb/files/documents/FY21%20The%20University%20of%20Vermont%20Medical%20Center%20Budget%20Order%20and%20Cover%20Letter.pdf> (last visited 12/22/2021).

<sup>312</sup> Sari Kymelya, *Medical Interpreters Speak for New American Patients*, SEVEN DAYS, Jan. 27, 2016.

cents (\$1.10) per minute.<sup>313</sup> Translation through AALV costs sixty dollars (\$60.00) per hour.<sup>314</sup>

### *Analysis*

Although the number of LEP persons eligible to be served may be higher in some other states than Vermont, this investigation found that LEP individuals frequently come in contact with UVMMC. This is supported by UVMMC's development of an interpretation policy and the existence of an interpreter coordinator position.

HHS policy guidance states that entities that provide effective communication usually have a comprehensive written policy on language access and train their staff on the material in that policy.<sup>315</sup> In this case, although UVMMC has an interpretation policy and conducts some training of UVMMC staff about language access, information from the investigative record made it clear that UVMMC is generally not following its own policy. The UVMMC policy states that the employee will ask the patient if the patient would like an interpreter.<sup>316</sup> The policy also states that UVMMC does not encourage interpretation by patients' friends, family members, or UVMMC employees and that, if the patient can express, via professional interpreter (remote or in-person), that a professional interpreter will not be needed or desired for the appointment or procedure, the use of a family member as interpreter may be permitted.<sup>317</sup> However, UVMMC providers regularly failed to ask Ms. Gutierrez whether she needed an interpreter, and they instead encouraged interpretation by Ms. Gutierrez's family members, a friend and UVMMC employees.

Ms. Gutierrez received a variety of services through UVMMC, ranging from physical therapy to emergency surgery. Although each individual appointment was not a life-or-death situation, the medical services UVMMC provided were critically important to her health and longevity. UVMMC's failure to provide interpretation and translation impacted all levels of Ms. Gutierrez's care, from basic interactions such as taking blood pressure to the complex treatment of her breast cancer. The investigative record includes multiple instances of UVMMC's failure to communicate with Ms. Gutierrez in situations with extremely serious potential consequences for Ms. Gutierrez's health. For example, Ms. Gutierrez awoke from surgery without anyone to interpret for her, she mistakenly believed she had only three months to live, one of her doctors decided to forgo questioning Ms. Gutierrez about one of her medication's side effects because of poor interpretation, and UVMMC employees and students examined Ms. Gutierrez and administered medicine without communicating to her what they were doing. Ms. Gutierrez described the importance of understanding all the levels of the care provided to her and the stress

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<sup>313</sup> UVMMC Agreement for Stratus Video Interpreting Service, 2016.

<sup>314</sup> Email from AALV to HRC, 11/9/2020.

<sup>315</sup> United States Department of Health & Human Services Office for Civil Rights, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (2004).

<sup>316</sup> University of Vermont Medical Center, *Interpretation Services for Persons with Limited English Proficiency*, 2019.

<sup>317</sup> *Id.*

that she experienced because she was not able to fully participate in the services she received from UVMMC.

In the Second Circuit, a court found that a patient had been entitled to an interpreter under the law when the hospital provided an interpreter only after several days of requests for an interpreter from the patient's family.<sup>318</sup> In this case, UVMMC failed to provide interpretation for numerous out-patient appointments as well as much of the time that Ms. Gutierrez spent as an inpatient at UVMMC, despite repeated requests to provide interpretation.

In another case in the Second Circuit, when an interpreter was not provided on separate occasions and the hospital argued that it had nonetheless provided effective medical care, the Court rejected the hospital's argument, stating that it had missed the point as the question was whether plaintiff could effectively communicate and meaningfully participate in their medical care, not whether their medical care and treatment was effective.<sup>319</sup> In this case, although Ms. Gutierrez's health improved, she was unable to effectively communicate and meaningfully participate in her medical care in a variety of ways. In addition to the examples above, Ms. Gutierrez could not review documents about her care, such as how to prepare for surgery or properly care for her body after surgery.

UVMMC's failure to provide meaningful communication to Ms. Gutierrez is particularly harmful because UVMMC is a teaching hospital. A study in the AMA Journal of Medicine found that medical students learn to have an indifferent or negative attitude towards LEP patients when supervisors model that behavior.<sup>320</sup> In this case, the record shows that Dr. Blohm modeled an indifferent or negative attitude towards LEP patients when he failed to correct the behavior of students who told Ms. Avila that she could interpret for Ms. Gutierrez and then Dr. Blohm himself examined Ms. Gutierrez without using an interpreter.

Ms. Gutierrez offered sufficient evidence to show that UVMMC denied her the full benefit of their services.

Finding: Ms. Gutierrez was denied the full benefit of UVMMC's services.

### III. Whether UVMMC Produced a Legitimate Non-Discriminatory Reason for Its Actions

This investigation also considers whether UVMMC has a non-discriminatory reason for denying Ms. Gutierrez the full benefit of UVMMC's services.

UVMMC's response and interviews with a variety of employees suggest that Ms. Gutierrez wanted her daughters to interpret for her. However, the record does not support UVMMC's

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<sup>318</sup> *Freydel v. New York Hosp.*, 242 F. 3d 365 (2d Cir. 2000).

<sup>319</sup> *Naiman v. New York Univ.*, 1997 WL 2499770, at \*1 (S.D.N.Y. May 13, 1997) citing *Aikins v. St. Helena Hosp.*, 843 F.Supp. 1329, 1338 (N.D.Cal.1994) recognizing that adequate medical treatment is not a defense to claim that defendant failed to provide effective communication.


<sup>320</sup> AMA J. Ethics, *Language-Based Inequity in Healthcare: Who is the "Poor Historian"?* (2017).

position. In Ms. Gutierrez’s interview, she stated that getting an interpreter “was a battle” and that she did not want her family to have to interpret for her.<sup>321</sup> If UVMMC employees had followed their policy and asked Ms. Gutierrez whether she wanted UVMMC to provide an interpreter, the employees could have learned that their assumptions about what Ms. Gutierrez wanted were incorrect.

In limited situations, the fourth factor from the DOJ’s policy, the resources available to the program and the costs, may provide a successful defense. Smaller entities with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets, and reasonable steps may cease to be reasonable where the costs imposed substantially exceed the benefits.<sup>322</sup> However, with UVMMC’s budget of over one billion dollars,<sup>323</sup> UVMMC is unlikely to be considered small and is unlikely to succeed with a defense based on financial burden.

**Conclusion**

Ms. Gutierrez established a prima facie case of discrimination based on national origin, and UVMMC failed to produce a legitimate non-discriminatory reason for its treatment of Ms. Gutierrez. Therefore, this investigation makes a preliminary recommendation to the Human Rights Commission to find there are reasonable grounds to believe that UVMMC discriminated against Ms. Gutierrez based on her national origin in violation of the VFHPAA.

  
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Cassandra Burdyslaw, Investigator

1/11/2022  
\_\_\_\_\_  
Date

Approved By:

  
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Bor Yang, Executive Director

1/11/2022  
\_\_\_\_\_  
Date

<sup>321</sup> Interview with Ms. Gutierrez, 10/16/2020.

<sup>322</sup> United States Department of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (2002).

<sup>323</sup> Letter from Green Mountain Care Board to UVMMC (2020), available at: <https://gmcboard.vermont.gov/sites/gmcb/files/documents/FY21%20The%20University%20of%20Vermont%20Medical%20Center%20Budget%20Order%20and%20Cover%20Letter.pdf> (last visited 12/22/2021).