Federal Laws and Policies to Ensure Access to Health Care Services for People with Limited English Proficiency

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NATIONAL HEALTH LAW PROGRAM

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1. Is there a federal requirement that health care providers offer interpreters to individuals who do not speak English well?

Yes. In 1964, Congress passed Title VI of the Civil Rights Act. This is a civil rights law that prohibits discrimination. Its purpose is to ensure that federal money is not used to support health care providers who discriminate on the basis of race, color, or national origin.[1] Title VI says:

> *No person in the United States shall, on 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.*[2]

The federal Department of Health and Human Services (HHS) and the courts have applied this statute to protect national origin minorities who do not speak English well. Thus, recipients of federal funding must take reasonable steps to ensure that people with limited English proficiency (LEP) have meaningful access to their programs and services.

2. What if a provider unintentionally discriminates against individuals?

HHS issued regulations to implement Title VI that reiterate the statute and extend Title VI beyond the prohibition of intentional discrimination. They prohibit federal fund recipients from:

- using criteria or methods of administration which have the *effect* of discriminating because of race, color or national origin;
- restricting the enjoyment of any advantage or privilege enjoyed by others receiving services through the same program;
- providing services or benefits to an individual that are different, or provided in a different way, from those provided to others;
- treating an individual differently from others in determining admission, enrollment, eligibility, or other requirement to receive services.[3]

Through these regulations, the HHS Office for Civil Rights (OCR) can initiate investigations or respond to complaints of discrimination.

3. Who is covered by Title VI?

The obligations under Title VI and HHS' regulations apply broadly to any "program or activity" that receives federal funding, either directly or indirectly (through a contract or subcontract, for example), and without regard to the amount of funds received.[4] This includes payment for services provided to Medicare, Medicaid and State

Children's Health Insurance Program (SCHIP) enrollees. Thus, in the health care context, this includes virtually all:

- Hospitals;
- Doctor's offices;[5]
- Nursing homes;
- Managed care organizations;
- State Medicaid agencies;
- Home health agencies;

Health service providers; and

Social service organizations.

Further, the Title VI protections extend to all of the operations of the organization or individual, not just that part that received the federal funds.[6]

4. Why has so much discussion recently focused on language access?

The number of languages spoken in the United States is increasing significantly. According to the 2000 Census, over 21 million individuals speak English less than "very well." Many states saw significant increases in their LEP populations. Recent federal activities focusing on improving language access have also increased discussion on the issue. These activities include a presidential "Executive Order" (EO) entitled *Improving Access to Services for Persons with Limited English Proficiency*,[7]publication of guidance on language access by many federal departments, and release of the "CLAS Standards" (Standards for Culturally and Linguistically Appropriate Services in health care) by the Office of Minority Health.[8]

The Executive Order affects all "federally conducted and federally assisted programs and activities." This includes health care providers that receive federal funds such as Medicare, Medicaid and SCHIP. The EO asks each federal agency to draft a guidance specially tailored to its federal fund recipients and applies Title VI to the federal departments and agencies themselves so that they have to administer their programs in a non-discriminatory way.

The current Administration has re-affirmed its commitment to the Executive Order and has continued activities to ensure its implementation.

5. How does a health care provider know what it should do to provide language services?

The Department of Justice, which coordinates the federal government's Title VI oversight, announced four factors for federal fund recipients to use to determine what steps they should take to assist LEP persons:[9]

- *The number or proportion of LEP individuals served or encountered*.[10]
- *The frequency of contact with the program*. If LEP individuals access the program on a daily basis, a recipient has greater duties than if contact is infrequent.
- *The nature and importance of the program to beneficiaries*. More steps must be taken if a denial or delay of services may have critical implications for daily life (e.g. hospitals,

schools) than in programs that are not as crucial (e.g. theaters, zoos).

- *The resources available and cost considerations*. A small recipient with limited resources may not have to take the same steps as a larger recipient in programs where the numbers of LEP persons are limited. Costs are a legitimate consideration in identifying the reasonableness of particular language assistance measures.[11]

In balancing these factors, providers should address the appropriate mix of written and oral language assistance, including which documents must be translated, when oral interpretation is needed, and whether such services must be immediately available.[12]

6. Are there specific guidelines for health care providers?

Yes. On August 8, 2003, the HHS Office for Civil Rights (OCR) issued guidance for its recipients of federal funds, which include health care providers.[13] This guidance does not impose any new requirements but merely brings together all of OCR's policies for overseeing Title VI since 1965.

7. How does OCR determine if a health care provider is discriminating?

OCR looks at the totality of the circumstances in each case. Four factors will be assessed: (1) the number or proportion of LEP individuals eligible to be served or likely to be encountered by the program or grantee; (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 grantee/recipient and costs. According to DHHS, after the four factors have been applied, fund recipients can decide what reasonable steps, if any, they should take to ensure meaningful access. Fund recipients may choose to develop a written implementation plan as a means of documenting compliance with Title VI.

8. How should a provider offer oral interpretation services?

The HHS Guidance describes various options available for oral language assistance, including the use of bilingual staff, staff interpreters, contracting for interpreters, using telephone interpreter lines,[14] and using community volunteers. It stresses that interpreters need to be competent, though not necessarily formally certified. The Guidance allows the use of family members and friends as interpreters but clearly states that an LEP person may not be required to use a family member or friend to interpret. Moreover, DHHS says recipients should make the LEP person aware that he or she has the "option" of having the recipient provide an interpreter for him/her without charge.

"Extra caution" should be taken when the LEP person chooses to use a minor to interpret. Recipients are asked to verify and monitor the competence

and appropriateness of using the family member of friend to interpret, particularly in situations involving administrative hearings; child or adult protective investigations; life, health, safety or access to important benefits; or when credibility and accuracy are important to protect the individual.

9. When should a provider translate written materials?

It depends on the relevant circumstances of each provider based on the factors listed above. After the four factors have been applied, recipients can decide what reasonable steps, if any, they should take to ensure meaningful access. Recipients could develop a written implementation plan as a means of documenting compliance with Title VI. If so, the following five elements are suggested when designing such a plan:

- Identifying LEP individuals who need language assistance, using for example, language identification cards.
- Describing language assistance measures, such as the types of language services available, how staff can obtain these services and respond to LEP persons; how competency of language services can be ensured.
- Training staff to know about LEP policies and procedures and how to work effectively with in-person and telephone interpreters.
- Providing notice to LEP person through, for example, posting signs in intake areas and other entry points, providing information in outreach brochures, working with community groups, using a telephone voice mail menu, providing notices in local non-English media sources, and making presentations in community settings.
- Monitoring and updating the LEP plan, considering changes in demographics, types of services, and other factors.[15]

OCR will evaluate a provider's efforts on a case-by-case basis. For the translation of written materials, the Guidance designates "safe harbors" that, if met, will provide strong evidence of compliance.[16]

10. What are the costs and benefits of providing language services?

The federal Office of Management and Budget (OMB) reported to Congress:

> *Almost all individuals, LEP and non-LEP, need to access the health care system at multiple points in their lives. Making these interactions more effective and more accessible for LEP persons may result in a multitude of benefits, including: increased patient satisfaction, decreased medical costs, improved heath, sufficient patient confidentiality in medical procedures, and true informed consent.17*

The OMB was unable to evaluate the actual costs due to insufficient information. However, using data from emergency room and inpatient hospital visits and outpatient physician and dental visits, it estimated that language

services would cost an extra 0.5 percent of the average cost per visit.18

11. How can health care providers pay for language services?

On August 31, 2000, the Health Care Financing Administration (now Centers for Medicare & Medicaid Services (CMS)) stated that federal Medicaid and SCHIP funds can be used for language activities and services.[19] States can thus submit the costs incurred by themselves or health care providers serving Medicaid and SCHIP enrollees to the federal government for partial reimbursement. For more information, see *How Can States Get Federal Funds to Help Pay for Language Services for Medicaid and CHIP Enrollees?* Available at **http://www.healthlaw.org**.

12. If my state draws down Medicaid/ SCHIP funds, to whom can language services be provided?

States can only receive federal reimbursement for language services provided to Medicaid and SCHIP enrollees (or applicants who need assistance in applying). Depending on how your state structures the reimbursement, it can be available to all providers, including community health centers, managed care organizations and hospitals. Some states have limited the reimbursement to "fee-for-service" providers. Many states currently set their reimbursement rates for hospitals, clinics and managed care organizations to include the costs of language services as part of the entity's overhead or administrative costs. But a state could allow all providers to submit for reimbursement.

13. What if my state has an English-only law — does Title VI still apply?

Yes. As noted by OCR's guidance, the federal law applies regardless of whether your state law makes English its only recognized language (because federal law "preempts" any conflicting state law).[20] Since Title VI applies to the receipt of federal funds, a health care provider cannot forego his/ her obligations under federal law. In addition, your state's English-only laws may have a specific exemption for health care/social services and/or may only apply to government activities.

14. Where can I get more information?

The federal government has launched a website called "Let Everyone Participate," http://www.lep.gov. In addition to tracking federal activities, the website offers direct assistance to federal fund recipients and advocates. For example, fund recipients can download "I Speak" cards that allow LEP persons to identify their primary language.

Endnotes

1 100 Cong. Rec. 1658 (1964). The United States Supreme Court has treated discrimination based on language as national origin discrimination. *See* Lau v. Nichols, 414 U.S. 563 (1974).

2 42 U.S.C. § 2000d. *See also* 45 C.F.R. § 80 app. A (listing examples of federal financial assistance, including Medicare, Medicaid, Maternal and Child Health grants).

3 45 C.F.R. § 80.3(b).

4 *See* 42 U.S.C. § 2000d-4a (defining "program or activity").

5 Title VI has traditionally not applied, however, to doctors who only receive federal payments through Medicare Part B.

6 *See* 42 U.S.C. § 2000d-4a.

7 *See* 65 Fed. Reg. 50121 (Aug. 16, 2000), *see also* 67 Fed. Reg. 41455 (June 18, 2002).

8 *See* 65 Fed. Reg. 80865 (Dec. 22, 2000), *available at* **http://www.omhrc.gov/chas**.

9 *See* 65 Fed. Reg. 50123 (Aug. 16, 2000). In addition to EO 13166, this Guidance is authorized by 28 C.F.R. § 42.404(a), directing agencies to "publish title VI guidelines for each type of program to which they extend financial assistance, where such guidelines would be appropriate to provide detailed information on the requirements of Title VI." According to DOJ, the Guidance does not create new obligations beyond those already mandated by law. *Id*. at 50121–22.

10 *See* 67 Fed. Reg. 41459. "But even recipients that serve LEP person on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if an LEP individual seeks services under the program in question."

11 *Id*. at 50124–25. *See also*, e.g., 67 Fed. Reg. 41455, 41457 (June 18, 2002).

12 *See* 67 Fed. Reg. 41460 (June 18, 2002).

13 68 Fed. Reg 47311 (August 8, 2003). To review previous versions of this guidance, *see* 65 Fed. Reg. 52762 (Aug. 30, 2000).

14 Previous guidance cautioned the fund recipient that telephone interpreter lines should not be the sole language assistance option, unless other options were unavailable. *See* 67 Fed. Reg. at 4975.

15 68 Fed. Reg. at 47319–21. Previous guidance called on recipients to develop and implement a language assistance program that addressed: (1) assessment of language needs; (2) development of a comprehensive policy on language access; (3) training of staff; and (4) vigilant monitoring. See 67 Fed. Reg. at 4971.

16 The safe harbors designate that the recipient provides written translations of "vital" documents (e.g. intake forms with the potential for important consequences, consent and complaint forms, eligibility and service notices) for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally. Or, if there are fewer than 50 persons in a language group that reaches the five percent trigger, above, the recipient provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of vital written materials, free of cost. 68 Fed. Reg. at 47319.

17 Office of Management and Budget, *Report To Congress, Assessment of the Total Benefits and Costs of Implementing Executive Order No.13166: Improving Access to Services for Persons with Limited English Proficiency* (Mar. 14, 2002), available at **http://www.justice.gov/crt/cor/lep/omb-lepreport.pdf.**

18 *Id.*

19 *See* CMS, *Dear State Medicaid Director* (Aug. 31, 2000).

20 *See* 68 Fed. Reg. at 47313.