

Reducing Risk

A Publication on HealthCare Risk Management from Princeton Insurance

Limited English Proficiency Patients Meaningful Access to Healthcare

Introduction

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin by any program or entity, including physicians, that receives federal financial assistance. Federal financial assistance includes grants, training, use of equipment, and other assistance. Providers who only receive Medicare Part B payments are specifically excluded from the definition of a recipient of federal financial assistance.

Healthcare providers who are recipients of federal financial assistance are required to “take reasonable steps to ensure meaningful access” to their services by Limited English Proficient (“LEP”) persons. LEP persons are those who do not speak English as their primary language and have a limited ability to read, write, speak, or understand English.

On August 30, 2000, the U.S. Department of Health and Human Services (“HHS”) issued written policy guidance to assist health and social services providers in ensuring that persons with limited English proficiency can effectively access critical health and social services. On August 8, 2003, HHS issued revised guidance entitled, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*. The 2003 guidance supplants the original guidance and became effective immediately. The guidance and other related information may be accessed on the internet at <http://www.hhs.gov/ocr/lep>.

Both HHS and its Office of Civil Rights (“OCR”) which investigates complaints have expressed their continual commitment to LEP which they view as a “priority area.” The following is a discussion of some of the obligations of physician recipients of federal financial assistance who provide care to LEP persons.

The Extent of Your Obligation to Provide LEP Services

The obligation to take reasonable steps to ensure meaningful access for LEP persons is fact dependent and is based upon an individualized analysis that balances four factors:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered in your practice - the greater the number or proportion of LEP persons, the more likely that language services are needed.
2. The frequency with which LEP persons have contact with your practice.

3. The nature and importance of the services you provide to peoples' lives—the more important the service or the greater the potential consequences to LEP persons, the more likely language services are needed.
4. The resources available to your practice and the costs.

The expressed intent of the HHS guidance is to achieve a balance that ensures the meaningful access by LEP persons to critical services, without imposing undue burdens on small practices. HHS recognizes that what constitutes “reasonable steps” to provide language services for a large practice may not be reasonable for a small practice.

HHS expects that some of the resources and costs issues with providing language services may be addressed by advances in technology such as telephone interpretation services; sharing of resources among industry groups; and “reasonable business practices” such as using standardized documents and hiring and training bilingual staff to act as interpreters and translators.

Physician practices must “carefully explore” the most cost-effective means for providing competent and accurate language services before making a decision to limit services on the basis of resource concerns. Documentation of the process used for any decision to limit language services based on resources or costs is strongly advised.

Ways to Provide Language Services

Language services may be provided in one of two ways: 1) oral interpretation, either in person or via a telephone interpretation service; and 2) written translation.

Physician practices have “substantial flexibility” in determining the appropriate mix of the language services they provide, applying the four-factor analysis described above. However, HHS notes that the quality and accuracy of the services is “critical to avoid serious consequences” to both the practice and the LEP person.

Oral Interpretation Services

Oral interpretation services options include:

- Bilingual staff
- Staff interpreters
- Contract interpreters
- Telephone interpreter lines
- Video teleconferencing
- Community volunteers
- Family members or friends—upon request by the LEP person

You are required to expressly advise a LEP person who presents at your office for services that he or she has the option of having an interpreter provided free of charge or using an interpreter of his or her choice. The practice may *not* require a LEP person to use a family member or friend as his or her interpreter.

You are not required to obtain an individual's HIPAA authorization to use or disclose protected health information to an interpreter who is either a member of your workforce, another person who is a business

associate of yours as defined by HIPAA, or any person designated by the patient as his or her interpreter for a healthcare encounter.

Where the individual chosen by a LEP person to interpret is a family member or friend, be mindful that issues of competency, confidentiality, privacy, cultural beliefs and practices, and conflict of interest such as an abuse situation involving family, may present and make the use of the family member or friend inappropriate. This situation may also present when the LEP person's interpreter is a minor.

Anytime that you determine that a family member or friend chosen by the LEP person is not competent or appropriate to interpret, you should provide a competent interpreter in place of or in addition to the one designated by the LEP person. Also consider providing an independent interpreter as a supplement to an interpreter chosen by a LEP person where the information to be interpreted or translated is of a critical or complex nature.

If a LEP person voluntarily chooses to provide his or her own interpreter, document in the medical record that the person declined the offer of free language services. Also document the name of the interpreter designated by the LEP person, the interpreter's relationship to the LEP person, and the time or portions of the patient encounter that the interpreter's services were used.

Written Translation

Documents in your practice that require written translation are those that are "vital" to the meaningful access to your services by the LEP groups that you frequently encounter. Determine which documents are "vital" by applying the four-factor analysis. Consider the importance of the information, encounter, or service involved, and the consequence to the LEP person of not having the information in question provided accurately or timely.

Vital documents that require written translation include:

- Consent and complaint forms
- Intake forms with potential for important health consequences
- Notices of eligibility criteria or rights
- Notices advising LEP persons of free language assistance

Safe Harbor for Written Translation Obligations

Safe harbor provisions apply to the translation of written documents only. The following actions will be considered as "strong evidence" that a practice has complied with its written translation obligations:

1. Written translations of vital documents are provided for each eligible LEP language group that constitutes 5% or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Oral translation of other *non-vital* documents is permitted.
2. If there are fewer than 50 persons in a language group that reaches the 5% trigger, the practice may, as an alternative to translating vital written materials, provide written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of the written materials without cost.

The intent of the safe harbor provisions is to provide a guide that offers a greater degree of certainty of compliance than that offered by applying the fact-intensive, four-factor analysis. However, failure to provide written translations under the safe harbor provisions does not necessarily mean there is non-compliance

Competency of Interpreters and Translators

Competency to interpret requires more than self-identification as bilingual. Competency to interpret requires demonstrated proficiency in and ability to communicate information accurately in both English and the other language, and to identify and utilize appropriate modes of interpreting. A competent interpreter also has knowledge in both languages of terms or concepts particular to a program or service (e.g., medical terms), and is able to understand and comply with confidentiality and impartiality rules as required. Formal certification is helpful, but not required.

A person who is a competent interpreter may or may not be competent as a translator of written documents. Translators should understand the expected reading level of the target audience and have fundamental knowledge about vocabulary and phraseology in the target group's language. Competence in translation can often be ensured by use of certified translators, or by having a second, independent translator check the work of the primary translator.

The permanent nature of written translations requires that you take reasonable steps to determine that the quality and accuracy of translations of your vital documents permit meaningful access by LEP persons.

An Effective Plan for Language Assistance

HHS in its revised LEP guidance focuses much attention on the importance of planning for what your practice will do to provide meaningful access by LEP persons who seek your services. For those practices who serve LEP persons on an unpredictable or infrequent basis, a plan does not have to be complex. A simple plan could be to use a telephonic interpretation service for immediate assistance.

Whatever plan you develop, it is strongly recommended that it be written so that all necessary staff can refer to it. A written plan also serves as an appropriate and cost-effective method of documenting your compliance with your Title VI obligations.

Recipients who serve very few LEP persons and have very limited resources may choose not to have a written plan. However, they are not excused from their obligation to ensure meaningful access that complies with Title VI.

Elements of an Effective LEP Implementation Plan

The following five steps have been identified by HHS as being “typically part of effective implementation plans” for providing language assistance:

1. Identify LEP individuals who your practice encounters who need language assistance. A set of language identification cards, “I speak cards,” is available from the federal government at

<http://www.lep.gov>. Recipients are also encouraged to post notices in commonly encountered languages notifying LEP persons that language assistance is available.

2. Identify the language assistance measures that you will use. Include information on the types of available services and how staff can obtain them; how to respond to oral, written, and in-person contacts from LEP persons; and how to ensure competency of interpreters and translators.
3. Train staff regarding your LEP policies and procedures. Management staff must be knowledgeable of the plan so that they can reinforce its importance to other staff and ensure its implementation. All staff that have contact with the public must be trained to work effectively with in-person and telephone interpreters.
4. Notify LEP persons of the language assistance services that you provide. The notice should state what services are available and that they are free of charge, and should be written in a language that the identified LEP groups will understand. Methods of providing notice to LEP persons include posting signs in intake areas; working with community-based organizations; using a telephone voice menu in the most common languages encountered by your practice; and publishing notices in local newspapers. The Social Security Administration has made sample notice signs available that may be accessed at <http://www.lep.gov>.
5. Monitor and update your LEP plan as necessary. This includes determining on an ongoing basis whether additional documents or services need to be made accessible to LEP persons you service, and whether changes in demographics require changes in the language assistance services that your office provides.

Clear goals and management accountability are also identified by HHS as components of an effective LEP plan.

Compliance and Enforcement

Achieving voluntary compliance is the HHS goal for Title VI and its regulatory enforcement. HHS provides various kinds of technical assistance for recipients who serve LEP persons. Available assistance includes translated forms and vital documents, and training and information about best practices. Information from OCR may be accessed on the internet at <http://www.hhs.gov.ocr>.

The OCR is charged with investigation of Title VI complaints. If an investigation results in a finding of noncompliance, the OCR will send the recipient a Letter of Findings that will specify the areas of noncompliance and the corrective steps that must be taken. HHS must first attempt to secure voluntary compliance through informal means; it does so at all stages of an investigation, and also provides technical assistance to the recipient.

If the matter cannot be resolved informally, the OCR may have an administrative hearing scheduled, or refer the matter to the Department of Justice for injunctive relief or other enforcement proceedings before federal assistance to the recipient may be terminated.

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