



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

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TO: David Cardona
Oregon Health Authority
Office of Equity and Inclusion

FROM: Deanna Laidler, Senior Assistant Attorney General
Health and Human Services Section

SUBJECT: Limited English Proficiency Translation and Interpretation Requirements

The Oregon Health Authority asked the Department of Justice to determine the current requirements with respect to public assistance beneficiaries with limited English proficiency (LEP) and corresponding modification of services required to address this matter, including instances in which written documents must be translated and oral interpretation and translation services provided.

I. Title VI of the Civil Rights Act

The overarching federal law governing language access is Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides:

[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.

42 U.S.C. § 2000d.

For purposes of Title VI, a “program or activity” refers to all of the operations of--
(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government

any part of which is extended Federal financial assistance. 42 U.S.C. § 2000d-4a(1).

The Office for Civil Rights defines “recipients” of Federal financial assistance very broadly as follows:

Health care providers participating in CHIP and Medicaid programs are recipients of Federal financial assistance. Hospitals and nursing homes are recipients of Federal financial assistance under Medicare Part A. Medicare Advantage Plans (e.g., HMOs and PPOs) are recipients of Federal financial assistance under Medicare Part C. Prescription Drug Plan sponsors and Medicare Advantage Drug Plans are recipients of Federal financial assistance under Medicare Part D. As recipients of Federal financial assistance, these entities are subject to the nondiscrimination requirements under Title VI and its implementing regulations.¹

In accordance with the definition above, and relevant to this analysis, recipients include Medicaid plans, health care providers, pharmacies and pharmacists.

Under Title VI, recipients are required to address, consistent with the core objectives of the federally assisted programs or activities, the specific language needs of their LEP beneficiaries which operate as artificial barriers to full and meaningful participation in the federally assisted program or activity. This requires that recipients evaluate how a LEP person's inability to understand oral and written information provided by and about a federally assisted program or activity might adversely impact his or her ability to fully participate in or benefit from that program or activity.

II. Four Factor Analysis

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. This simple statement belies the complexity of determining both what steps are “reasonable” and whether the access to such programs is “meaningful”. In addressing these terms, the federal Department of Health and Human Services (DHHS) adopted a flexible and fact-dependent standard, the starting point of which is an individualized 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 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. As indicated above, 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 agencies or businesses.

¹ Applicability of Title VI of the Civil Rights Act (1964) for Medicaid, CHIP, & Medicare Providers, <http://www.hhs.gov/ocr/civilrights/faq/TitleVI/404.html>

- **Factor One: The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population**

The first factor in determining the language services a recipient should provide is the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population. The greater the number or proportion of these LEP persons, the more likely language services are needed. Ordinarily, persons “eligible to be served, or likely to be directly affected, by” a recipient’s program or activity are those who are served or encountered in the eligible service population. This population will be program-specific, and includes persons who are in the geographic area that has been identified as the recipient's service area.

- **Factor Two: The Frequency With Which LEP Individuals Come in Contact With the Recipient's Program, Activity or Service**

Recipients must assess the frequency with which they have or may have contact with an LEP individual from different language groups seeking assistance. The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. The steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. It is also advisable to consider the frequency of different types of language contacts. If an LEP individual accesses a recipient's program, activity, or service on a daily basis, a recipient has greater duties than if an LEP individual's contact with the recipient's program, activity, or service is unpredictable or infrequent. But even recipients that serve LEP persons 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.

- **Factor Three: The Nature and Importance of the Recipient's Program, Activity, or Service**

The more important the recipient's activity, information, service, or program, or the greater the possible consequences of the interaction with the LEP individuals, the more likely language services are needed. A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual. Thus, the recipient should consider the importance and urgency of its program, activity, or service. If the activity is both important and urgent - such as the communication of information concerning emergency surgery and the obtaining of informed consent prior to such surgery - it is more likely that relatively immediate language services are needed. Alternatively, if the activity is important, but not urgent - such as the communication of information about an elective surgery where delay will not have any adverse impact on the patient's health - it is more likely that language services are needed, but that such services can be delayed for a reasonable period of time.

Within this factor, and as part of the analysis related to written translation, consideration must be given to whether a particular document is deemed “vital”. In determining whether a document is vital, recipients must evaluate the importance of the program and the information communicated,

and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. Awareness of rights or services is an important part of meaningful access, and thus information regarding enrollment, member rights, and available services may be deemed vital documents.

Even when a document is identified as vital, DHHS does not expect that the document be translated into every language that a recipient may encounter. In preparing guidance on LEP, DHHS noted as follows:

To translate all written materials into all of those languages is unrealistic. Although recent technological advances have made it easier for recipients to store and share translated documents, such an undertaking would incur substantial costs and require substantial resources. Nevertheless, well-substantiated claims of lack of resources to translate all vital documents into dozens of languages do not necessarily relieve the recipient of the obligation to translate those documents into at least several of the more frequently-encountered languages and to set benchmarks for continued translations into the remaining languages over time.²

- **Factor Four: The Resources Available to the Recipient and Costs**

A recipient's level of resources and the costs that would be imposed on it may have an impact on the nature of the steps it should take to comply with Title VI. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, reasonable steps may cease to be "reasonable" where the costs imposed substantially exceed the benefits. Resource and cost issues, however, can often be reduced through the sharing of language assistance materials and services among and between recipients, advocacy groups, and Federal agencies. Recipients serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

III. Effect of the Four Factor Analysis

In balancing the factors discussed above to determine what reasonable steps must be taken by recipients to provide meaningful access to each LEP individual, recipients must determine whether written or oral language assistance is required. The analysis of the four factors will assist the recipient in determining which documents must be translated, when oral translation or interpretation is necessary, and whether such services must be immediately available.³

² Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.

<http://www.hhs.gov/ocr/civilrights/resources/laws/revisedlep.html>

³ Fed Register, Vol. 65, No. 159, 50123, 50124 (August 16, 2000)

A recipient may conclude that different language assistance measures are applicable for the different types of programs or activities in which it engages, or, in fact, that, in certain circumstances, recipient-provided language services are not necessary at all. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be thoroughly addressed. Regardless of the decision, recipients should document their analysis of the four-factor test to the services they provide in the event of subsequent challenges.

IV. Safe Harbors

As noted above, the four factor analysis is a tool used by recipients to assist such entities in developing policies and procedures with respect to translation and interpretation requirements for LEP individuals. However, application of the four factor analysis is not a guarantee that the procedures followed by a recipient will be found to comply with Title VI. Certain circumstances can provide a “safe harbor” for recipients regarding the requirements for translation of written materials.⁴ As used herein, a “safe harbor” means that if a recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written-translation obligations.

The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

- (a) Written translations of vital documents 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
- (b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

V. Oregon Laws

Under ORS 411.400, both the Department of Human Services (DHS) and Oregon Health Authority (OHA) are required to provide application and recertification assistance to individuals with disabilities and individuals with limited English proficiency. In accordance with state law, such assistance must be available over the internet, by telephone and in person. This requirement for translation is not contingent upon the number of individuals within the geographic area who speak a specific language.

Under ORS 411.970(2), if a DHS local office has a caseload that consists of 35 or more non-English-speaking households that share the same language, the department shall provide, at that

⁴ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.
<http://www.hhs.gov/ocr/civilrights/resources/laws/revisedlep.html>

office, written materials in that language and access to a bilingual assistance worker or caseworker who is fluent in both that language and English. Of note is the fact that this specific rule references a “local office”. While DHS has local offices, OHA does not, and therefore this law may be interpreted as limiting the written translation requirement to DHS local offices meeting the designated threshold.

VI. Pharmacies and Prescription Medications

Pharmacies and pharmacists that receive Medicaid or Medicare funds, or any other federal funds, must comply with Title VI to the same degree as any other recipient. In addition to the requirements of Title VI, the Omnibus Budget Reconciliation Act of 1990 (“OBRA”) established standards for prospective drug utilization review, record-keeping requirements, and medication counseling for Medicaid recipients. Oregon’s laws mirror the OBRA requirements, though expanded the provisions to encompass Medicaid and non-Medicaid beneficiaries alike.

Under Oregon Administrative Rule (“OAR”) 855-019-0230, a pharmacist must orally counsel the patient or patient's representative on the use of a drug or device. A pharmacist may provide counseling in a form other than oral counseling when, in the pharmacist’s professional judgment, another form of counseling will be more effective. Regardless of the form of counseling utilized, the pharmacist must provide that degree of counseling that is “reasonable and necessary under the circumstance to promote safe and effective use or administration of the drug or device, and to facilitate an appropriate therapeutic outcome for that patient.”⁵

The above rules should be read in association with the provisions of Title VI to ensure that LEP individuals receive sufficient counseling and the translation of vital documents related to prescription medications.

VII. Additional Considerations

On November 26, 2014, DHHS issued proposed rules regarding the Affordable Care Act, including additional considerations regarding the LEP translation requirements applicable to Exchanges and Qualified Health Plans (QHPs). Under the current rules, Exchanges and QHPs are required to ensure that information is provided to applicants and enrollees in a manner that is accessible and timely to individuals who are limited English proficient through the provision of language services at no cost to the individual, including written translations and taglines in non-English languages indicating the availability of language services.⁶

VIII. Conclusion

With respect to written translation requirements, recipients can use the four factor analysis described above to determine if specific documents or portions of documents should be translated into the language of the various frequently-encountered LEP groups eligible to be served and/or likely to be affected by the recipient's program. Recipients should assess whether specific documents or portions of documents are vital to the program, information, encounter, or

⁵ OAR 855-019-0230(1)(f)

⁶ 45 CFR 155.205(c)

service involved and the consequences to the LEP person if the information in question is not provided accurately or in a timely manner. The DHHS guidance provides recipients with a safe harbor that, if undertaken, will be considered strong evidence that the recipient has satisfied its written translation obligations, including translation of vital documents.

Please contact us as follow-up questions may arise. Pursuant to ORS 180.060(3), persons other than state officers may not rely upon this letter.

Regards,

/Deanna Laidler/

Deanna Laidler
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