

# At the Crossroads of HIPAA and Language Access

Where the Compliance Rubber Meets the Road

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The purpose of this presentation is to provide an overview and guidance on where Language Access and HIPAA provisions may intersect. This information is not intended to serve as legal advice or opinions to any party or client. You should always consult your relevant regulatory authorities or legal counsel if applicable.

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Have you ever been sick in a country where you didn't speak the language?

[https://www.youtube.com/watch?v=fRaMKI5C\\_fI](https://www.youtube.com/watch?v=fRaMKI5C_fI)

Imagine it was you, with that baby; or in that hospital bed.

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## Language Access is a Civil Right

**Language access** is the provision of language services (interpretation and translation) to limited English proficient (LEP) individuals to ensure meaningful access to government services, programs and activities.

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### Why provide language access? Policy & Principle

- "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."  
*Justice McReynolds – Meyer v. Nebraska, 262 U.S. 390, 401 (1923)*
- **Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.**  
*Justice Douglas in – Lau v. Nichols, 414 U.S. 563, 569 (1974) quoting President John F. Kennedy's message to Congress, June 19, 1963.*
- "Language Access is NOT an unfunded mandate. It is like water and electricity—a necessity if you are going to take federal funds." - *Deeana Jang, JD Chief of the Federal Coordination and Compliance Section of the Civil Rights Division of DOJ*
- Denial of Language Access can be **costly** in lost opportunity, lost human capital, and increased damage control.

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### Federal and State Mandates, Regulatory Guidance, and Case Law

- Title VI of the Civil Rights Act of 1964
- *Lau v. Nichols*, 414 U.S. 563 (1974)
- Executive Order 13166 (2000) & Related Regulations/Guidance
- HRS Chapter 321C
- ACA Section 1557

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### Title VI – Civil Rights Act




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### Title VI – Civil Rights Act

No 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**.

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### Lau v. Nichols

In 1974, the US Supreme Court held in **Lau**, that Title VI requires federally funded entities to provide language access sufficient to give LEP people **meaningful** access to a recipient's programs and activities. Denial of such access constitutes "**national origin**" discrimination.



Images: Historical Photograph Collection of San Francisco Public Library's San Francisco History Center

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### Executive Order 13166 (2000) President Clinton

- Purpose was to improve access to federal government services for persons with limited English proficiency (LEP).
- Required each federal agency to prepare a **Language Access Plan** to improve access to its federally conducted programs and activities by eligible LEP persons, consistent with the compliance standards set forth by the LEP guidance issued by the DOJ- released on same date.
- Required each federal agency to draft its own Regulatory Guidance, reflective of principles in Guidance provided by the Department of Justice – concurrent with EO 13166.

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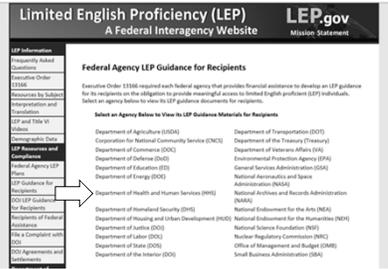
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### Resources on Language Access Compliance:

Check your federal agency counterpart/funder for LEP Guidance. <http://www.lep.gov/>




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### Language Access in Hawaii




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### Hawaii's Language Access Law:

Passed in **2006**: Act 290; codified as HRS §§ 371-31 to 371-37;

Repealed and recodified in **2012**: Act 201 – primarily to transfer the Office of Language Access from DLIR to DoH as an administratively attached agency due to budgetary constraints. HRS Chapter 321C.




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Hawaii's Language Access Law

KEY POINT

Prohibition against National Origin Discrimination

HRS sec. 321C-1 provides:

"The purpose of this chapter is to affirmatively address, on account of **national origin**, the language access needs of limited English proficient persons."

Seven horizontal lines for notes.

Focus is on MEANINGFUL Language Access

HRS sec. 321C-3 provides:

"Each state agency and all **covered entities\* shall** take **reasonable** steps to ensure **meaningful access** to services, programs, and activities by limited English proficient persons, which will be determined by a totality of circumstances, including the [4-Factor Analysis]."

Seven horizontal lines for notes.

Foundational Concept- What is "LEP"?

Federal DHHS Guidance says:

"Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English may be limited English proficient, or "LEP," and may be eligible to receive language assistance with respect to a particular type of service, benefit, or encounter." (p. 47313)

Hawaii Law:

"an individual who, on account of **national origin**, does not speak English as the person's primary language and **self identifies** as having a limited ability to read, write, speak or understand the English language."

HRS sec. 321C-2

Seven horizontal lines for notes.

### Who is covered under Federal Language Access Law?

According to Executive Order 13166:

"The Federal Government provides and **funds** an array of services that can be made accessible to otherwise eligible persons who are not proficient in the English language. . .

**Each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries."**

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### Who is covered under Federal Language Access Law?

According to 2003 DHHS Language Access Guidance, you are obligated to follow federal language access law:

If you are a state or local agency, private institution or organization, or any public or private individual that: Operates, provides or engages in health, or social service programs and activities, and **receives Federal financial assistance** from HHS directly or through another recipient/covered entity,

**"Federal Financial Assistance includes grants, training, use of equipment, donations of surplus property, and other assistance."**

**Examples** of covered entities include but are not limited to the following entities, which may receive federal financial assistance:

- hospitals, nursing homes, home health agencies, managed care organizations, universities and other entities with health or social service research programs;
- state, county and local health agencies;
- state Medicaid agencies;
- state, county and local welfare agencies;
- federally-funded programs for families, youth and children;
- Head Start programs;
- public and private contractors, subcontractors and vendors;
- physicians;
- and other providers who receive Federal financial assistance from HHS."

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### Under Hawaii Language Access Law, a "Covered Entity" is:

*"a person or organization receiving **state financial assistance**, including grants, purchase-of-service contracts, or any other arrangement by which the State provides or otherwise makes available assistance in the form of funds to the person or organization for the purpose of rendering services to the public. It shall not include procurement contracts, state insurance or guaranty contracts, licenses, tax credits, or loan guarantees to private businesses of general concern that do not render services on behalf of the State."*

HRS 321C-2

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**Language Access REQUIREMENTS for Federal Funding "recipients" ('Covered Entities'):**

"Recipients are required to **take reasonable steps to ensure meaningful access** to their programs and activities by LEP persons. While designed to be a **flexible and fact-dependent** standard, the starting point 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 small business, small local governments, or small nonprofits.

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**Language Access Requirements for State Agencies and "Covered Entities" under Hawaii law (HRS 321C):**

- Assess the need for providing language services and take "**reasonable steps**" to ensure "**meaningful**" access to state services, programs and activities.
- Subject to the **4 Factor Analysis**:
  - Provide oral language services in a "**timely**" and "**competent**" manner
  - Provide written translations of "**vital**" documents
- Establish a "**language access plan**"

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**Let's be more specific:  
FOUR FACTOR ANALYSIS**

Federal Guidance (slightly different wording) & HRS sec. 321C-3(a) provide that: **Meaningful** language access is to be "determined by a **totality of circumstances**, including the following factors:

- (1) The **number or proportion** of limited English proficient persons served or encountered in the eligible service population;
- (2) The **frequency** with which limited English proficient persons come in contact with the services, programs, or activities;
- (3) The **nature and importance** of the services, programs, or activities; and
- (4) The **resources** available to the State or covered entity and the costs.

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**Blurred, not Bright Line:**

**Do the Analysis!**

Take time to determine how you will provide meaningful language access; and why you are providing that service – based on these 4 factors.

**Be prepared to show your work!**

Recommendation: document some of the steps you've taken and decisions you've made (your analysis). In the event of an investigation or legal action, you can show how and why you reached the decision your organization came to.

**Good Faith Efforts > nothing**  
Do not let the "perfect" be the enemy of the "good".

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**Good Faith Efforts > nothing**

Do not let the "perfect" be the enemy of the "good".

While all recipients must work toward building systems that will ensure access for LEP individuals, HHS acknowledges that the implementation of a comprehensive system to serve LEP individuals is a process and that a system will evolve over time as it is implemented and periodically reevaluated. **As recipients take reasonable steps to provide meaningful access to federally assisted programs and activities for LEP persons, HHS will look favorably on intermediate steps recipients take** that are consistent with this Guidance, and that, as part of a broader implementation plan or schedule, move their service delivery system toward providing full access to LEP persons. . . .

HHS recipients should ensure that the provision of appropriate assistance for significant LEP populations or with respect to activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries is addressed first. **Recipients are encouraged to document their efforts** to provide LEP persons with meaningful access to federally assisted programs and activities."

DHHS Guidance 2003 p. 47321

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**LANGUAGE ACCESS PLAN**

**Recommended by Feds:**

"If, after completing the four-factor analysis, a recipient determines that it should provide language assistance services, **a recipient may develop an implementation plan** to address the identified needs of the LEP populations it serves. Such recipients have considerable flexibility in developing this plan. The development and maintenance of a periodically updated written plan on language assistance for LEP persons ("LEP plan") for use by a recipient's employees who serve or interact with the public could be an appropriate and cost-effective means of documenting compliance with Title VI and providing a framework for the provision of timely and reasonable language assistance. Moreover, such written plans may provide additional benefits to a recipient's managers in the areas of training, administration, planning, and budgeting. These benefits may lead recipients to document in a written LEP plan their language assistance services, and how staff and LEP persons can access those services." (DHHS Guidance p.47319)

**Required by State:**

HRS sec. 321C-4(a) provides:

"Each state agency and covered entity **shall** establish a plan for language access."

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### VITAL DOCUMENTS

**Recommended by Feds:**

After applying the four factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of **vital written materials** into the language of each frequently-encountered LEP group eligible to be served and/or likely to be affected by the recipient's program. Whether or not a document for the information it solicits is "vital" may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. Where appropriate, recipients are encouraged to create a plan for consistently determining, over time and across their various activities, what documents are "vital" to the meaningful access of the LEP populations they serve.

**Required by State:**

HRS sec. 321C-3(c) requires:

"Subject to [the 4-factor analysis], each state agency and covered entity **shall** provide written translations of **vital documents**" to LEP persons who seek access to their services - in accordance with certain statutory formulas and the **four-factor analysis**.

HRS sec. 321C-2 defines "**vital documents**" as "printed documents that provide important information necessary to access or participate in services, programs, and activities of a state agency or covered entity, including but not limited to applications, outreach materials, and written notices of rights, denials, losses, or decreases in benefits or services."

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### SAFE HARBOR

**Recommended by Feds:**

"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. [Guidance then provides an outline substantially similar to how it is codified in Hawaii law.]

**Required by State:**

HRS 321C-3 specifically provides:

"each state agency and covered entity **shall** provide written translations of vital documents to [LEP] persons who seek to access services, programs, or activities, as follows:

- (1) Written translations of **vital documents** for each eligible [LEP] group that constitutes **five percent or one thousand**, whichever is less, of the population of persons **eligible to be served or likely to be affected or encountered**; or
- (2) If there are fewer than fifty persons in a [LEP] group that reaches the five percent threshold in paragraph (1), **written notice in the primary language to the [LEP] language group of the right to receive competent oral interpretation of those written materials, free of cost.**"

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### Babel Notices & Taglines

A **Babel notice** is a short notice included in a document or electronic medium (e.g., website, "app," email) in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.

A **Tagline** is defined by Section 1557 of the ACA as:

"short statements written in non-English languages that indicate the availability of language assistance services free of charge."

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## “Taglines” – as outlined by Section 1557 Affordable Care Act

Appendix B to Part 92—Sample Tagline Informing Individuals With Limited English Proficiency of Language Assistance Services

ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

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## Translated Resources for those subject to Section 1557 of the Affordable Care Act:

<https://www.hhs.gov/civil-rights-for-individuals/section-1557/translated-resources/index.html>



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## Sample Babel Notice / Tagline

### Sample Babel Notice

**29 CFR 38.9(g)(3):** “Recipients must include a “Babel notice,” indicating in appropriate languages that language assistance is available, in all communications of vital information, such as hard copy letters or decisions or those communications posted on websites.”

A Babel notice is a short notice included in a document or electronic medium (e.g., website, “app,” email) in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.

The Civil Rights Center developed this sample notice to assist recipients comply with this Babel notice requirement. It is being provided in 10 of the most common non-English languages spoken in the United States. Recipients will need to translate the notice into other languages to meet the needs of their local community. Also note that the Babel notice does not replace the obligations for recipients to provide individualized language services.

**IMPORTANT:** This document contains **important information** about your rights, responsibilities and/or benefits. It is critical that you understand the information in this document, and we will provide the information in your preferred language at no cost to you. **Call (xxx) xxx-xxxx** for assistance in the translation and understanding of the information in this document.

**Spanish:** **¡IMPORTANTE!** Este documento contiene **información importante** sobre sus derechos, responsabilidades y/o beneficios. Es importante que usted entienda la información en este documento. Nosotros le podemos ofrecer la información en el idioma de su preferencia sin costo alguno para usted. **Lláme al (xxx) xxx-xxxx** para pedir asistencia en traducir y entender la información en este documento.

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### Sample Babel Notice / Tagline

Sample Tag Line/Babel Notice

**IMPORTANT:** This document(s) contains important information about your unemployment compensation rights, responsibilities and/or benefits. It is critical that you understand the information in this document.

**DEADLINE FOR APPEAL:** If you disagree with this determination or decision, you must file an appeal before the deadline noted in this document.

**IMMEDIATELY:** If needed, call xxx-xxx-xxx for assistance in the translation and understanding of the information in the document(s) you have received.

This sample language has been translated into 10 common languages spoken nationally. These are: Spanish, Chinese, French, German, Tagalog, Italian, Vietnamese, Korean, Polish, and Russian. The Department will make these translations available to the states via the Regional Offices under separate cover.

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### Sample Babel Notice / Tagline

#### B. Sample Taglines

General Tagline:

If you, or someone you're helping, has questions about [insert SBM program name], you have the right to get help and information in your language at no cost. To talk to an interpreter, call [insert number here].

Tagline for Notices:

This Notice has Important Information. This notice has important information about your application or coverage through [insert SBM program name]. Look for key dates in this notice. You may need to take action by certain deadlines to keep your health coverage or help with costs. You have the right to get this information and help in your language at no cost. Call [insert number here].

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### Oral Interpreter Services:

**Recommended by Feds:**

"When providing oral assistance, recipients **should ensure competency** of the language service provider."

POJ's 2002 Guidance

**Required by State:**

"Subject to [the four factor analysis], each state agency and covered entity **shall** provide **competent, timely** oral language services to limited English proficient persons who seek to access services, programs, or activities." HRS sec. 321C-3(b)

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### Certification of Oral Interpreters (?)

There is NO state or federal "certification" requirement.

- The federal government does not regulate professions, that is left up to states.
  - Look to Washington State for what they've done with their certification requirements and processes.
  - Hawaii also does NOT regulate the interpreter profession.

• Note: Not every language has a mechanism for certification. If certification were required, some language interpreters would be 'locked' out.  
 In other words, if a "certified" interpreter is required, but it's impossible to get certification in a given language, then it is impossible to provide the interpreter service in that language.

• KEY POINT: Focus on **FLUENCY** in the language and on the specialized terminology relative to the nature of the service or program.

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### DATA & EVALUATION

OLA recommends that agencies collect data on the number and nature of its LEP encounters, and the types of language services it provides, and evaluate that data.

This process of collecting **DATA & EVALUATION** helps the agency in developing an adequate and appropriate language access plan and to engage in a 'informed' 4-factor analysis.

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### Language Access Provisions of Section 1557 ACA

- Section 1557 contains the **nondiscrimination** provisions of the Affordable Care Act (ACA) on the basis of **race, color, national origin, sex, age, or disability** in certain health programs or activities.

• "Covered entities must take reasonable steps to provide meaningful access to each individual with LEP. The standards incorporated into the final rule are flexible and context-specific, taking into account factors such as the nature and importance of the health program and the communication at issue and other relevant considerations, such as whether an entity has developed and implemented an effective language access plan appropriate to its circumstances."

Available here on this DHHS FAQ: <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html>

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## Language Access Provisions of Section 1557 ACA

- Who is covered:
  - Any health program or activity any part of which received funding from HHS
  - Any health program or activity that HHS itself administers
  - Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces.
- They must:
  - post a **"Non-Discrimination" notice** of individuals' rights providing information about communication assistance for individuals with limited English proficiency, among other information.
  - post **languages** in the top 15 languages spoken by individuals with limited English proficiency in that state that indicate the availability of language assistance.
- They must **not**:
  - use low-quality video remote interpreting services or rely on unqualified staff or interpreters when providing language assistance services.
- They should:
  - develop and implement a **language access plan** to ensure they are prepared to take **reasonable** steps to provide **meaningful** access to each individual that may require assistance.

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## Hawaii Demographics - LEP Profile

*based on U.S. Census Bureau, 2009-2011 American Community Survey Public Use Microdata Sample (PUMS) from DBEDT*

- Out of Hawaii's total population of 1,361,628; more than **24%** or 329,827 speak a language other than English at home.
- Out of those who speak a language other than English at home, 151,187 or **46% are LEP**.
- Out of the total LEP population, 125,602 or 83% live on Oahu.
- Out of the total LEP population, 80% are Asian language speakers while more than 13% are Native Hawaiian and Pacific Island language speakers.

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## Top Non-English Languages Spoken at Home

*The table below displays the top 21 languages spoken at home in Hawaii. The percent displaying those 21 languages made up 95% of all people speaking a language other than English at home in our state.*

Rank	Language spoken at home	Number of speakers	Percent
<b>Total spoke a language other than English at home</b>			
		326,893	100.0
1	Tagalog	58,345	17.8
2	Indonesian	54,000	16.5
3	Japanese	45,633	14.0
4	Spanish	25,493	7.8
5	Hawaiian	18,115	5.5
6	Chinese	17,385	5.3
7	Korean	17,276	5.3
8	Samoan	12,758	3.9
9	Vietnamese	9,412	2.9
10	Cantonese	7,890	2.4
11	Machinese	6,930	2.1
12	Mandarin	5,690	1.7
13	German	4,915	1.4
14	Turkish	4,475	1.4
15	French	4,460	1.3
16	Myanmar	3,965	1.2
17	Tagalog	3,960	1.2
18	Burmese	3,360	1.0
19	Latin	2,279	0.7
20	Thai	1,560	0.5
21	Portuguese	1,515	0.5

Source: U.S. Census Bureau, 2009-2011 American Community Survey 5-Year Estimates, compiled by the Hawaii State Department of Business, Economic Development & Tourism, Research and Economic Analysis Division.

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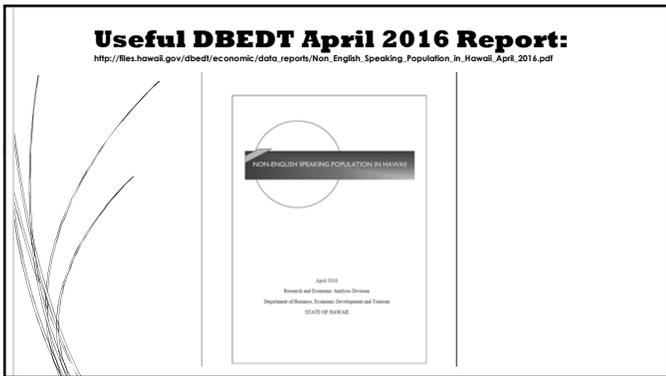
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**Hawaii's LEP Profile - DBEDT's April 2016 Report:**  
 "Non-English Speaking Population in Hawaii"

Major findings in the report are:

- \* About one-in-four Hawaii residents aged 5 and older spoke a language other than English at home in the 2010-2014 period.
- \* The number of non-English speakers at home in Hawaii increased by 44 percent from 1980 to 2014. As the total population in Hawaii grew at a similar rate during the period, the proportion of non-English speakers to the total population remained about the same.
- \* Non-English language speaking at home was more prevalent in Honolulu County than in the neighbor island counties. The proportion of non-English speakers was highest in Honolulu County at 28 percent and lowest in Hawaii County at 19 percent.
- \* Ilocano, Tagalog, and Japanese were the top three most common non-English languages spoken at home in Hawaii. Speakers of these three languages made up about half of non-English speakers at home in Hawaii.

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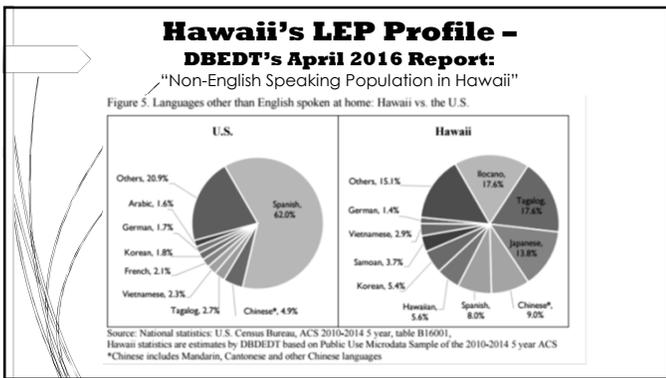
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**HIPAA Requirements for the Provision of Language Access**

► <https://www.youtube.com/watch?v=R2NcwrPZBLMWhys>

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**What were your reactions as you viewed this video?**

**Did you see any possible HIPAA violations?**

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**Minimum Necessary**

**Unpermitted disclosure of patient's PHI**

**Any other observations/potential HIPAA violations?**

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### HIPAA Requires that Covered Entities Use Appropriate Safeguards

"A covered entity must have in place appropriate administrative, technical, and physical safeguards that protect against uses and disclosures not permitted by the Privacy Rule, as well as that limit incidental uses or disclosures." See 45 CFR 164.530(c)

What appropriate safeguards could the staff have used to protect the patient's PHI?

Conduct the interpretation in a private area away from other patients... is this appropriate?

Move the other patients out of the room... is this an appropriate alternative?

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### What does "Appropriate" mean?

- Appropriate is defined as being: "suitable or proper in the circumstances..."

Were the staff acting appropriately to protect the patient's information under the circumstances?

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### Was the disclosure "incidental"?

"The Privacy Rule permits certain incidental uses and disclosures that occur as a by-product of another permissible or required use or disclosure, as long as the covered entity has applied reasonable safeguards and implemented the minimum necessary standard, where applicable, with respect to the primary use or disclosure." See 45 CFR 164.502(a)(1)(iii).

Application of reasonable safeguards and implemented the minimum necessary standard.

At the DOH, we train our staff to communicate with their clients in a private area. We certainly would not allow an interpreter to interpret with a client in our waiting room.

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**To Satisfy HIPAA's "Appropriate Safeguard" Requirement, What Agreement MUST be in Place Before an Interpreter May Provide Services?**

**Business Associate Agreement**

- Even if the service is a "one-off" situation, a BAA must be executed.
- A BAA is needed for translation of documents that have PHI.

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**Avoid using minors, family, and friends to interpret.**

**Why?**

- Lack of skills, training, experience, expertise in interpreting - particularly medical terminology
- Conflict of interest; domestic violence; bias; confidentiality; gender/cultural issues

**What?**

- Honor preference of LEP
- Document (Waiver) LEP's declining of language services offered

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**Vital Documents Translation... What Do You Consider to be "Vital Documents"?**

**1. Vital documents (examples, but not an exhaustive list)**

- a. Client rights (NPP)
- b. Application
- c. Services (Brochure)
- d. Authorization form
- e. Access form

**2. OCR Notice/Tagline**

**3. Posting**

- a. Facility
- b. Webpage

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# Thank You

Please feel free to contact us if you have questions or suggestions on how we can improve our presentation.

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