

GUIDANCE MEMORANDUM
Title VI Prohibition Against National Origin
Discrimination--Persons with Limited-English Proficiency

I. BACKGROUND

This memorandum is intended to offer guidance to staff of the Office for Civil Rights (OCR) with respect to its enforcement of the responsibilities of recipients of Federal financial assistance from HHS to persons with Limited-English Proficiency (LEP), pursuant to Title VI of the Civil Rights Act of 1964, 2000d et seq. ("Title VI"). Such recipients include hospitals, managed care providers, clinics and other health care providers as well as social service agencies and other institutions or entities that receive assistance from HHS. This document will provide guidance to OCR investigators in assessing compliance, negotiating voluntary compliance, and providing technical assistance. Through OCR's investigative activities in this area, both recipients and LEP beneficiaries will be made more aware of their respective obligations with respect to the provision and receipt of services.

The guidance is intended to clarify standards consistent with case law, well established legal principles that have been developed under Title VI, and policies developed by HHS and OCR in ensuring Title VI compliance.

Section 601 of Title VI states that "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." Regulations implementing Title VI which are published at 45 C.F.R. Part 80, specifically provide that a recipient may not discriminate and may not, directly or through contractual or other arrangements, use criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular, race, color or national origin.

The statute and regulations prohibit recipients from adopting and implementing policies and procedures that exclude or have the effect of excluding or limiting the participation of

beneficiaries in their programs, benefits or activities on the basis of race, color or national origin. Accordingly, a recipient must ensure that its policies do not have the effect of excluding from, or limiting the participation of, such persons in its programs and activities, on the basis of national origin. HHS and OCR have consistently interpreted the prohibition of discrimination on the basis of national origin to require the provision of language accessible services to LEP persons. This interpretation is based on the U.S. Supreme Court's decision, in Lau v. Nichols, 414 U.S. 563 (1974), wherein it recognized that recipients of Federal financial assistance have an affirmative responsibility, pursuant to Title VI, to provide LEP persons with meaningful opportunity to participate in public programs.¹ In Lau v. Nichols, the Supreme Court ruled that a school system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied the students a meaningful opportunity to participate in a public educational program in violation of the Civil Rights Act of 1964.² Further, HHS itself has made it clear that a recipient of Federal financial assistance that does not have the ability to communicate with person of limited English proficiency deprives such persons of an equal opportunity to participate in and benefit from the services provided by the recipient. Because persons of limited English are disproportionately represented in certain national origin groups, the inability to communicate with persons of limited English proficiency has the effect of discriminating on the basis of national origin . . . no person may be subjected to discrimination on the basis

¹ Other courts have generally also followed Lau in the content of social services programs, e.g., Sanchez v. Maher 560 F.2d 1105(2d Cir. 1977); Reyes v. Thomson No. C91-0303 (D. Wash. Mar. 12 1991; Asociacion Mixta Progesista V. United States Dept of Health, Educ., & Welfare, Civ. No. C72-882 SAW (N.D. Cal. 1976). But See Kuri v. Edelman 491 F.2d 684 (7th Cir. 1974).

² The Lau decision affirmed the U.S. Department of Education's Policy Memorandum issued on May 25, 1970, titled "Identification of Discrimination and the Denial of Services on the Basis of National Origin", 35 Fed. Reg. 11,595. The memorandum states in part: "Where the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

of national origin. . .³ Therefore, a recipient must take reasonable steps to provide services and information in languages other than English in order to ensure that LEP persons are effectively informed and can effectively participate in and benefit from its programs.

English is the predominant language of the United States and according to the 1990 Census is spoken by 95% of its residents. Of those residents who speak languages other than English at home, the 1990 Census reports that 57% of U.S. residents above the age of four speak English "well to very well." The United States is also, however, home to millions of national origin minority individuals who are limited in their ability to speak, read, write and understand the English language. The language barriers experienced by these LEP persons can result in limiting their access to critical public health, hospital and other medical and social services to which they are legally entitled and can limit their ability to receive notice of or understand what services are available to them. Because of these language barriers, LEP persons are often excluded from programs or experience delays or denials of services from recipients of Federal assistance. Such exclusions, delays or denials may constitute discrimination on the basis of national origin, in violation of Title VI.

LEP persons can and often do encounter barriers to health and social services at nearly every level within such programs. The primary reason for this difficulty is the language barrier that often confronts LEP persons who attempt to obtain health care and social services. Many health and social service programs provide information about their services in English only. Many LEP persons presenting at hospitals or medical clinics are faced with receptionists, nurses and doctors who speak English only, and often interviews to determine eligibility for medical care or social services are conducted by intake workers who speak English only.

The language barrier faced by LEP persons in need of medical care and/or social services severely limits their ability to gain access to these services and to participate in these programs. In addition, the language barrier often results in the denial of medical care or social services, delays in the receipt of such care and services, or the provision of care and services based on inaccurate or incomplete information.

³ 45 Fed.Reg.82,972 (December 17, 1980)(Notice).

Services denied, delayed or provided under such circumstances could have serious consequences for an LEP patient as well as for a provider of medical care. Some states recognize the seriousness of the problem and require providers to offer language assistance to patients in certain medical care settings.

Since the Lau decision, OCR has conducted a number of complaint investigations and compliance and pre-grant reviews involving language barriers that impede the access of LEP persons to federally-assisted health and medical care and social services. OCR has found that where language barriers exist, eligible LEP persons are often excluded from programs, denied medical services or suffer long delays in the receipt of health and social services.

This guidance sets out standards for OCR staff to consider in determining whether federally-assisted providers of medical care or social services are taking steps to overcome language barriers to health care and social services encountered by LEP persons. The guidance emphasizes that Title VI requires recipients to provide language accessible services to all LEP individuals regardless of the size of the language population to which they belong or how uncommon the language may be. Based on the application of certain factors, it calls for stricter standards for certain providers, but provides flexibility to other providers in choosing the language assistance methods they will employ. Thus, small providers which do not have a significant language populations in their service area may be able to meet their responsibilities by choosing fewer or different options than the options which should be employed by larger providers or those providers serving many language groups.

OCR's position as set forth in this document is fully consistent with a government-wide Title VI regulation issued by the Department of Justice (DOJ) in 1976, "Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs," 28 C.F.R. Subpart F. The DOJ regulation addresses the circumstances in which recipients must provide language assistance, in written form, to LEP persons.⁴ The DOJ regulation does not address

⁴ The DOJ coordination regulations at 28 C.F.R. Section 42.405 (d)(1) provide that "[w]here a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g. affected by

the question of oral language assistance. OCR's experience in conducting complaint investigations and compliance and pre-grant reviews demonstrates that oral communication between recipients and program beneficiaries is an integral part of the exchange that must occur in order for assisted programs and activities to appropriately function. Thus, OCR's longstanding position has been that recipients must also provide oral language assistance in languages other than English. This statement affirms this position.

II. DISCUSSION

A. Who is Covered

All entities that receive Federal financial assistance, regardless of the amount of that assistance, from HHS, either directly or indirectly through a subgrant or subcontract, are covered by this guidance. Covered entities would thus include any state or local agency, private institution or organization, or any public or private individual that operates, provides or engages in health, medical or social service programs and activities that receive or benefit from HHS assistance. Coverage includes all areas of operation of the recipient and is not limited to those areas funded by HHS. For example, an insurance company or managed-care organization that receives Medicare or Medicaid reimbursement would be ultimately responsible for ensuring that member limited English proficient persons are receiving language accessible care through any provider office or agency it has a contract or subcontract with. The insurance company or managed-care

relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public."

organization may directly provide the bilingual staff or interpreter, or it may require the contracted agency to provide such assistance.

B. Ensuring Equal Access to LEP Persons

All recipients have the responsibility for ensuring that their policies and procedures do not deny or have the effect of denying such LEP persons equal access to federally assisted health, medical and social service programs, benefits and services for which such persons qualify.

In fulfilling its obligation of providing equal access for limited English proficient persons, a recipient may not:

- Provide services to persons of limited English proficiency that are more limited in scope or that are lower in quality than those provided to other persons;
- Subject a beneficiary to unreasonable delays in the provision of services because the beneficiary is of limited English proficiency;
- Require a beneficiary to provide an interpreter or to pay for the services of an interpreter;
- Rely on persons other than those employed directly by the recipient or under contractual or volunteer arrangement with the recipient to serve as interpreters, except where a beneficiary expressly requests that an adult family member or friend be allowed to serve as an interpreter after being informed that a qualified interpreter will be provided at no cost;
- Limit participation in a program or activity on the basis of limited English proficiency;
- Provide services to persons of limited English proficiency that are not as effective as those provided to others.

The key to ensuring equal access to benefits and services for LEP persons, is to ensure the service provider and the LEP client can communicate effectively, i.e., the LEP client should be given information about, and be able to understand, the services that can be provided by the recipient to address his/her situation and must be able to communicate his/her situation to the recipient service provider. The LEP client should also be advised and understand information about his/her rights and obligations regarding health and public

benefits programs. Equal access requires the provision of culturally and linguistic competent services.

Recipients are more likely to develop effective communication methods if they approach their Title VI responsibility in a structured rather than on an ad hoc basis.³ Therefore, recipients must, at no cost to the recipient:

Have a procedure for identifying the language needs of patients/clients. This should include an ability to collect, report and review data on:

- the racial and ethnic composition and primary languages of the recipient's service area;
- the racial and ethnic composition and primary languages of the recipient's contact staff by type of position held; and
- whether persons who are limited-English proficient receive language assistance.

(B) Have a procedure for tracking the provision of bilingual/interpreter services to LEP persons at all points of access to the recipient's services, to ensure that LEP persons are not denied access to the same range of services as English-speaking persons. This should include: Collecting and reviewing data regarding the provision of bilingual/interpreter services for each recipient service provided to LEP persons. [Data collected by the recipient regarding the frequency of delivery of those services, and segregating the data by primary language].

(C) Have ready access to, and provide services of linguistically proficient, culturally competent, bilingual staff or interpreters in a timely manner during hours of operation. Providers should identify and record the beneficiary's preferred language.

(D) Develop written policies and procedures for addressing the language assistance needs of LEP persons that include an assessment of:

the points of contact in the program or activity where language assistance is likely to be needed

- the non-English languages that are most likely to be encountered
- the resources that will be needed to fulfill this responsibility

and the location and/or availability of such resources. In identifying available resources, recipients should

consult with national origin organizations and groups in their service areas.

- (E) Disseminate interpreter policies and procedures to staff and ensure staff and patient/client awareness of these policies and procedures, availability of language accessible services, and of the recipient's Title VI obligations to LEP persons. In addition, all staff should receive training on interpreter policies and procedures.
- (F) Collect and review data identifying the patient/client's primary language and language used at home.
- (G) In collaboration with community-based organizations serving immigrant communities, develop a notification and outreach plan for LEP beneficiaries regarding the availability of bilingual/interpreter services, and the patient or client's right to them.
- (H) Where there is an underutilization of a recipient's services among persons in particular ethnic or LEP communities who qualify for them, develop a plan for outreach to those communities to notify them of the availability of the recipient's services.
- (I) Conduct a civil rights impact study before making decisions that would have a major implication and/or substantially alter a LEP individual's access to Health and Social Services.
 - **Major implications** are those consequences of proposed policy actions which, if implemented, will negatively or disproportionately affect persons with limited English proficiency, who are employees, program beneficiaries or applicants for employment or program benefits or services.
 - **Policy actions** means those actions including, but not limited to, reorganization; office consolidation, closure or relocation; changes in service delivery methods; and implementation of new programs or services.
 - The study must identify and address major language access impacts of proposed policy actions, and set forth a plan to correct any impacts so identified.
- (J) Establish internal systems to identify and address the language access implications of proposed policy actions, as defined above, before those actions are approved and implemented.
- (K) Designate someone within the recipient's agency or organization to serve as Title VI Coordinator. The

Coordinator is responsible for developing, maintaining, and implementing an LEP plan.

C. Methods for Providing Interpretative Services

1. Standards for Applicable Options.

As was mentioned earlier, OCR's position is that in order to ensure that recipients develop effective communication methods that will comply with Title VI there must be structure and uniformity. However, OCR also recognizes that it should allow for some flexibility for certain providers given different factors that may exist in their service areas. Thus, the guidance sets forth that recipients who serve a significant non-English speaking language group must provide language accessible services by employing specific methods, while other recipients are provided with more flexible options. For purposes of this guidance, significant number or proportion means either 100 or more persons or 5% of the population eligible, whichever is less.

Where there are significant numbers or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program who needs service or information in a language other than English in order effectively to be informed of or to participate in the program, a recipient must have competent, bilingual staff in contact positions and/or staff interpreters.

Where there is not a significant number or proportion of eligible persons who need assistance or information in a language other than English, recipients should use the best option available as discussed in 2. And 3. below to provide language access. Recipients are reminded that Title VI imposes a duty on health and benefit providers to furnish language-appropriate services to all LEP patients or clients regardless of the size of the language group to which they belong. Further, they are reminded that the denial of services, delay in provision of services or any denial of equal access to just one LEP person is a Title VI violation.

A recipients use of such minimum thresholds will not necessarily guarantee compliance with Title VI.

2. Provision of culturally competent, language matched staff and/or interpreter services

Bilingual/Interpreter services

Based on experience, OCR's position is that the best method for removing language barriers and ensuring equal access to LEP individuals is the provision of services by language and ethnic matched service providers. As discussed above, certain recipients must provide language access by using this method, while other recipients have the flexibility of choosing the option that best meets their Title VI obligations. Methods of providing language accessible services, in order of preference, include:

- 1) Hiring bilingual staff in positions having patient/client contact
- 2) Hiring staff interpreters
- 3) Arranging for an outside service to interpret/translate:
 - a. Using trained volunteer staff interpreters
 - b. Arranging for the services of and providing training to community interpreters who can either be paid or provide their services on a volunteer basis.
 - c. Contracting for with an outside in-person interpreter service such as community based organizations serving immigrant communities
- 4) Using a commercial service or community based organization to provide telephone interpreter service

Factors that must be considered by a recipient in determining which option(s) will best meet its Title VI obligation and the needs of its LEP beneficiaries are its size, the size of the LEP population in its service area, the setting in which interpreter services are needed, the availability of staff members and/or volunteers to provide interpreter services during its hours of operation and the proficiency of available staff members or volunteers available to provide the needed services.

The options available to recipients for providing interpreter services to LEP persons have differing weaknesses and strengths depending on the situation. Hiring bilingual staff for certain critical positions, e.g., for patient or client contact positions, would facilitate participation by LEP persons. However, where there are several LEP language groups in a recipient's service area this option may be impractical

as the only interpreter option, and additional language assistance options may be required.

Use of staff or community volunteers may provide recipients with a cost-effective method for providing interpreter services. However, recipients should ensure that such a system is sufficiently organized so that interpreters are readily available during all hours of its operation. In addition, recipients should ensure that such volunteers are qualified, trained and capable of ensuring patient confidentiality.

The use of contract interpreters may be an option for recipients that are small, have a significant but small LEP population, have less common LEP language groups in their service areas, or need to supplement their in-house capabilities on an as needed basis. Such contract interpreters should be readily available, qualified and trained.

Paid staff interpreters are especially appropriate where there is a very large LEP presence in a few major language groups. As in other options, these persons should be qualified and available. In most instances these employees are salaried and are entitled to the same benefits received by other employees.

A commercially or community-based organization run telephone interpreter service may be a useful option as a supplemental system, or may be useful when a recipient encounters an uncommon language that it cannot otherwise accommodate. Such a service often offers interpreting services in many different languages and usually can provide the service in quick response to a request. However, recipients should be aware that such services may not always have readily available interpreters who are familiar with the terminology peculiar to the particular program or service or may require special arrangements to use such persons. Thus, the use of telephone interpreting services should be limited to situations where there is no bilingual staff person or contracted interpreter available to provide translation services.

General Prohibition of Use of Friends or Family members

A recipient should not require, suggest or encourage a beneficiary to use friends or family members as interpreters. Use of such persons could result in a breach of confidentiality or reluctance on the part of beneficiaries to

reveal personal information critical to their situations, to family or friends. In a medical and social services settings, ineffective communication can lead to serious, even life threatening, consequences. In almost all situations covered by this Guidance, family members and friends are not competent to act as interpreters, since they may lack familiarity with specialized terminology and concepts. Minor children should never be used as interpreters. Moreover, use of children to interpret can result in serious problems for the entire family, such as children making adult decisions, placing additional stress and responsibilities on children, and causing tension and disruption of the family structure.

At the first point of contact, if a language match staff is not available, a recipient must advise an applicant or beneficiary in his or her primary language that they have a right to a free, trained interpreter and that one is available at no cost. A recipient must not in any way discourage an LEP individual from receiving the assistance of a free interpreter. A recipient must not ask, suggest, encourage or require an applicant or beneficiary to provide his or her own interpreter. This offer of a free interpreter and the LEP person's response must be documented. A trained and competent free interpreter must be made available without unavoidable delay.

An adult family member or adult friend may be used as an interpreter only if all of the following occur: (1) a recipient initially advises of the right to and availability of a free interpreter; (2) the recipient does not in any way discourage the LEP individual's use of a free interpreter provided by the recipient; (3) the LEP individual requests the use of a non-minor family member or non-minor friend as an interpreter; and (4) the recipients should have their own bilingual staff or interpreter present to ensure that use of the family member or friend would not compromise the effectiveness of services or violate the beneficiary's confidentiality.

Cultural and Linguistic Competency

A recipient should ensure that it uses persons who are competent to provide interpreter services. Competency does not necessarily mean formal certification as an interpreter, as there is no nationally accepted certification for medical or social service interpreters. However, the competency requirement does contemplate proficiency in both English and the other language; training which includes interpreting

skills, the ethics of interpreting, and cultural competence; and fundamental knowledge in both languages of any specialized terms and concepts peculiar to the recipient's program or activity. In clinical settings in particular, persons utilized as interpreters should be trained (orientation is not sufficient, and 40 hours is the average length among trainings well-regarded by medical interpreters), and assessed for their knowledge and before they are allowed to interpret in a medical setting. The National Council of Interpretation in Health Care can recommend the most current standards of practice upon which training and competency assessment can be based for interpreting in health care settings.

With respect to using bilingual staff as interpreters in health care settings, it can NOT be assumed that a nurse, medical student, or other staff (clinical or not) who speaks two languages will be sufficiently familiar with medical terms and concepts in both languages. Bilingual individuals, unless they were trained as health professionals in another country, generally only have conversational skills in the target language, and medical terminology would need to be specifically acquired through a course of study. In addition, such a bilingual individual may not have had training in medical interpreting skills, and risk making the same kinds of mistakes as untrained family or friends.

This issue can also be a problem when assumptions are made about "bilingual" staff, health, or other professionals that communicate directly with LEP patients. Almost universally, the level of true bilingual ability is never ascertained, and these individuals may have learned the language conversationally at home, in high school, or in college, but lack training in appropriate terminology and concepts. Many recipients rely heavily on bilingual (untested) staff lists for both direct client interaction and interpreting. The presence of these lists may not be indicative of true language access. Recipients may need to formally assess the bilingual proficiency and cultural competency of staff who wish to operate in a bilingual or interpreter capacity.

Cultural competency means: A set of knowledge, skills, and attitudes that allows individuals, organizations, and systems to work effectively with diverse racial, ethnic, religious, and social groups.⁵ Culturally appropriate refers to an

⁵ *Healthy People 2010 Objectives: Draft for Public Comment,*

unbiased attitude and organizational policy that values cultural diversity in the population served; reflects an understanding of diverse attitudes, beliefs, behaviors, practices, and communication patterns that could be attributed to race, ethnicity, religion, socioeconomic status, historical and social context, physical or mental ability, age, gender, sexual orientation, or generations_and acculturation status; an awareness that cultural differences may affect health and the effectiveness of health care delivery; and knowledge of disease prevalence in specific cultural populations, whether defined by race, ethnicity, socioeconomic status, physical or mental ability, gender, sexual orientation, age, disability, or habits. Linguistically competent refers to skills to communicate effectively in the native language or dialect of the targeted population, taking into account general educational level, literacy, and language preferences.⁶

D. Translated Signage and Written Materials

A recipient who serves a significant number or proportion of a particular language group must translate all written information including applications, forms, notices, information, educational and/or informational materials, and signage at key points of contact to clients in that language. Additionally, such recipient must provide in such language written information regarding the client's right to receive interpreter services free of charge, the recipient's Title VI obligations, and the process for filing a complaint of discrimination based on a recipient's failure to provide language accessible services.

Other recipients, must employ the different factors discussed in section 2. above to determine whether they also have the obligations to directly translate materials as discussed above. If after assessing these factors, it is unfeasible for a recipient to translate applications, forms, notices, information, educational and/or informational materials, and signage at key points of contact, the recipient must ensure that the information is interpreted, in full, by either bilingual staff, interpreters or other method as mentioned above. Such a recipient must inform the client in writing of the written information itself or through another written

U.S. Department of Health and Human Services, Office of Public Health and Science, September 15, 1998, Page 23-3.

⁶ Id at Page 4-18.

method of the availability of free interpretation of said written materials.

Competency of Written Translations

Recipients should translate and make available signage and commonly-used written patient educational material and other materials for members of the predominant language groups in service areas. The quality of written translations and competence in translating is as important as in oral interpretation. Agencies should have in place translation methodologies and review processes to ensure the accuracy and appropriateness of translations. Professionally accepted standards include translation by an individual with demonstrated proficiency in both languages, including knowledge of appropriate terminology and concepts; back translation; and review by target audience groups. These minimum standards would discourage the direct translation of complicated jargon and concepts that are essentially untranslatable or require further explanation.

Recipients also should have in place written criteria for selecting translation vendors, including: 1) a review of the methods and procedures that are used, from submission of English copy to printing of finished materials; 2) how translators are recruited and trained; and 3) how review of translated material is accomplished. They should also have in place knowledgeable people to work with the vendors. Similar criteria should be in place for determining the quality of purchased translations. There should be written policies forbidding "wildcat" translation (e.g. the doctor's sister who took Spanish in college).

Recipients should also make appropriate accommodations (such as verbal translations, audio or video formats) for limited English speakers who may not read well in their first language and persons whose languages lack a written version.

III. Compliance and Enforcement

In determining a recipient's compliance with Title VI, OCR's concern will be whether the recipient's system allows LEP beneficiaries to overcome language barriers and thus have equal access to, and an equal opportunity to participate in, health care and social service programs and activities. A recipient's use of the appropriate methods as discussed in

this guidance, will be viewed by OCR as evidence of a recipient's intent to comply with its Title VI obligations.

Finally, it is very important when assessing recipient compliance with Title VI that processes not be mistaken for fulfilling the intent of the law. The intent is to ensure equal access to services. However, in reviewing the policies and processes that an institution says are intended to comply with the law, equal access is not a given if those policies are not adhered to and the processes for securing language access are of inadequate quality. For example, if an institution is able to show policies and procedures for collecting information about a client's primary language, keeping a list of bilingual employees, calling a bilingual employee who can act as an interpreter, or accessing a telephone language service with which they have a contract, it may appear that this institution is in compliance. But if in fact the clients do not understand everything being communicated to them and have the opportunity to question or otherwise exchange information with the provider because an interpreter is never brought to the patient, or staff person doing the interpretation has never been tested for proficiency or adequately trained to interpret, then equal access is not occurring. The *effect* is the same as if the institution had no systems in place and staff just called the local ethnic restaurant for an ad hoc telephone interpretation.

The procedural provisions of the regulations implementing Title VI, found at 45 C.F.R. Sections 80.6 through 80.10, are applicable to all complaints or compliance reviews regarding a recipient's compliance with its Title VI responsibility to LEP beneficiaries.

