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HEALTH LAW CHECKUP

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Physicians Required to Provide Interpretive Services to Non-English Speaking Patients

By Anne W. Bishop

Health care providers often wonder if and when they must provide interpretive services to patients who do not speak English or who are deaf or hearing impaired. Federal law mandates that health care providers take certain steps to provide interpretive services. The roots of this issue are in the physician's need to communicate effectively with patients so that patients may make informed decisions about their health care.

Patients with Limited English Proficiency

Title VI of the Civil Rights Act of 1964 is the federal law that protects individuals from discrimination on the basis of their race, color, or national origin in all programs that receive federal financial assistance. The Office for Civil Rights (OCR) of the United States Department of Health and Human Services (HHS) has a long-standing position that, in order to avoid discrimination against limited English proficiency (LEP) persons, healthcare entities receiving federal financial assistance must take adequate steps to ensure that such LEP persons receive, *free of charge*, the language assistance necessary to afford them meaningful access to their services.

All entities that receive any federal funding, either directly or indirectly through a sub-grant or sub-contract, are obligated to comply with Title VI. Because federal funding in health care is pervasive, nearly every health care practitioner and all health departments are bound by the requirements of Title VI. OCR's position is that physicians who receive reimbursement from Medicaid are recipients of federal financial assistance and, thus, must comply with the Title VI requirements for language assistance.

Title VI and its supporting regulations guarantee individuals with LEP any language assistance necessary to guarantee "meaningful access" to health and social services that receive any form of federal funding. Court decisions have extended the Civil Rights Act protections against discrimination to include discrimination against persons regardless of whether they are in this



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country legally or not.

There is no one-size-fits-all solution to meet the language requirements of the Civil Rights Act. The OCR determines the language assistance necessary on a case-by-case basis. The OCR recommends a four-factor analysis to identify an obligation to ensure meaningful language assistance for LEP persons: (1) how many LEP patients are likely to be seen; (2) how often are LEP patients likely to be seen; (3) the importance and urgency of the medical care typically provided to patients; and (4) the resources available to the medical office to pay for the LEP program. The OCR suggests telephone translation lines for practices that do not have large LEP patient populations or for patients who speak languages not usually encountered in the community. The cost or lack of practice resources is not a viable defense in most circumstances. Of course any use of such translation services should be HIPAA compliant.

Using informal or untrained interpreters has pitfalls. OCR policies specifically state that requiring a patient to use family members and friends as interpreters is not considered an adequate means of guaranteeing access to health care. If the LEP person voluntarily chooses to provide his or her own interpreter, the physician should consider whether making a record of that choice, and of the recipient's offer of assistance, is appropriate.

Physicians should take reasonable steps to ascertain that family, legal guardians, caretakers and other informal interpreters are not only competent in the circumstances, but are also appropriate in light of the subject matter, given the complexity of the diagnosis and the use of unfamiliar medical terms. The goal is to make sure that a patient fully understands his or her diagnosis and consents to receiving treatment. In addition, care must be taken to ensure that if protected health information is shared, that proper consents are signed, in order to comply with HIPAA.

Patients Who Are Deaf or Hard of Hearing

Similarly, the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. The ADA applies to both hospitals and physician offices. The ADA requires that no individuals with disabilities are excluded or denied services because of the absence of auxiliary aids or services. Auxiliary aids include qualified interpreters or other effective methods of making information available to individuals with hearing impairment.

As such, under the ADA, physician offices must provide effective communications with the patient. However, there are a number of ways to effectively communicate with someone who is deaf or hard of hearing. There is nothing in the ADA that mandates an interpreter. Indeed, the Department of Justice (DOJ) acknowledges that, under some (limited) circumstances, written notes can be effective. However, the DOJ also acknowledges that in other situations, such as diagnosis or getting informed consent, an interpreter may be required in order to satisfy the requirement of effective communications.

A physician is not required to provide an interpreter if it would be unduly burdensome. However, as with Title VI, this is a high threshold that applies to a very limited set of health care providers. If an interpreter is needed and not available, a physician may be required to refer the patient to another

physician. Interpreters are not required to be licensed or have other specific credentials in order to perform interpretive services. Nevertheless, there are certain interpreters that are inappropriate. For example, asking a child to interpret a complex diagnosis is problematic. In addition, HIPAA concerns and protections may preclude a family friend from hearing or understanding sensitive health-related information.

If a patient requests an interpreter, the best practice is to comply with that request. There are a number of court cases that hold physicians liable for damages if an interpreter is requested by a patient and not provided.

Conclusion

Whether treating a patient who does not speak English or who is hearing impaired, physicians should consider the ability of their patients to understand their diagnosis and treatment options. Failing to provide the assistance that allows for effective communication can lead to assertions of violations of the ADA and the Civil Rights Act. When a patient asks for assistance, or the physician observes conduct that leads him to believe that the patient does not understand, an interpreter is needed. Though other alternatives may also suffice, careful consideration of the patient's needs is required.

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