

Interpreters, Translators, and Auxiliary Aids: Provider Obligations



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Preliminaries

- This is an overview of relevant laws concerning communication with patients or companions.
- Additional laws apply to other issues.
 - Eligibility for or participation in programs.
 - Physical access and retrofits.
 - Discrimination for reasons other than ability to communicate (e.g., HIV).

Written Materials



- ACA Nondiscrimination Rules, 45 CFR part 92
- HHS Samples
 - Notice of Nondiscrimination
 - Statement of Nondiscrimination
 - Taglines
- DOJ, Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings (10/03)
- Client Alerts available at <https://www.hollandhart.com/healthcare>
 - Notice Requirements
 - Persons with Limited English Proficiency
 - Persons with Disabilities

Available at:
<http://www.hhs.gov/civil-rights/for-individuals/section-1557/>

Communication Barriers



Communication Barriers

Patient or personal representative:

- Speaks foreign language.
- Suffers a disability that impairs effective communication.
 - Hearing impaired.
 - Visually impaired.
 - Other impairment?
- Lacks sufficient education to understand provider.
- Lacks sufficient capacity to understand provider.

Why do we care?

- Cannot provide proper care without effective communication.
 - Inability to obtain info necessary to provide effective care.
 - Lack of informed consent for care.
- Provider liability for resulting injuries.
 - Malpractice
 - Battery
 - False imprisonment
 - Lack of informed consent
- Licensing and ethical standards.
- Accreditation standards.
- **Anti-discrimination statutes require reasonable accommodation.**

Relevant Statutes and Regulations

- **Affordable Care Act § 1557**
 - 42 USC 18116, 45 CFR part 92
- **Civil Rights Act of 1967, Title VI**
 - 42 USC 2000d, 45 CFR § 80.3
 - Executive Order 13166 (8/00) and HHS Guidance, 68 FR 47311 (8/03)
- **Rehabilitation Act of 1973 § 504**
 - 29 USC § 701; 45 CFR 84.3
- **Americans with Disabilities Act of 1990, Titles II and III**
 - 42 USC § 12101; 28 CFR parts 35 and 36
- **Wyoming Medicaid Regulations**
 - Wyo. Dep. of Health Regulations, Medicaid, Ch. 3 § 5

Penalties for Violations

- OCR investigation
 - Settlement agreement
- DOJ action
 - Settlement agreement
 - Injunction
 - Penalty
- Civil lawsuit by injured persons
- Loss of federal financial assistance
- Termination of provider agreement
- Others?

Penalties for Violations

Gerena v. Fogari (NJ 2008)

- Facts
 - Physician declined to pay \$200 per visit for interpreter requested by deaf patient, claiming that he could not afford interpreter.
 - Physician communicated with patient through family members.
- Held: Jury found violations of anti-discrimination statutes
 - \$200,000 damages
 - \$200,000 punitive damages
 - \$400,000

Beware!

- Patients or personal representatives often understand the law better than providers.
 - Many are very sensitive to discrimination issues.
 - Many are educated about the law, their rights, and your duties.
 - Some may try to impose obligations beyond those required by applicable laws, e.g.,
 - Demand their own choice of interpreters or auxiliary aids even though law may not require provider to use such.
 - Demand provider to pay for interpreter or auxiliary aid that patient brings.
- They may be willing and able to file complaints if you act improperly.

Covered Entities

- Nondiscrimination rules generally apply to:
 - Any entity that receives federal financial assistance from HHS, including:
 - Medicare Parts A, C and D; Medicaid; grants; loans; subsidies; etc.
 - Not Medicare Part B
 - Applies to physicians, hospitals, nursing facilities, clinics, medical practices, etc.
 - Any health program that HHS administers.
 - Places of public accommodation.



General Requirements



- Covered entities with 15+ employees
 - Appoint compliance coordinator.
 - Establish grievance procedure. (See 45 CFR part 92, App. C)
- Include notice of nondiscrimination and taglines
- Do not discriminate on basis of race, color, national origin, sex, age or disability, including:
 - Provide language assistance (e.g., interpreters and translations) to persons with limited English proficiency.
 - Provide auxiliary aids to those with disabilities.
 - Make newly constructed or altered facilities accessible to those with disabilities.

(45 CFR part 92; 28 CFR part 35)

Compliance Coordinator

- Covered entities with 15 or more employees must designate at least one employee to coordinate compliance.
 - **Compliance with rules.**
 - **Investigate grievances.**

(45 CFR 92.7(a))

- May use same person designated under other discrimination statutes, or others.



Grievance Procedure

- Covered entities with 15 or more employees must adopt a written grievance procedure that includes:
 - Due process standards.
 - Prompt and equitable resolution of grievances.
 - issue written decision within 30 days.
 - May not retaliate against complainant.
 - Provide language assistance or auxiliary aids to help with grievance.
 - Complainant may file complaint directly with OCR.

(45 CFR part 92, App. C; 81 FR 31473)

- HHS published a sample grievance procedure at 45 CFR part 92, App. C; 81 FR 31473.



Grievance Procedure

- HHS sample grievance procedure:
 - Complainant may file written grievance within 60 days.
 - Include name, address, problem, and requested remedy.
 - Compliance coordinator must conduct thorough investigation within 30 days and report to complainant.
 - Maintain confidentiality and documentation.
 - Complainant may appeal to Administrator/CEO/Board within 15 days.

**IMPORTANT
NOTICE**

Notice Requirements

Notice Type	Content	Publication
Notice of Nondiscrimination	<ul style="list-style-type: none">• Seven elements in English• Taglines in top 15 languages	<ul style="list-style-type: none">• Public locations• Website• Significant publications or communications
Statement of Nondiscrimination	<ul style="list-style-type: none">• Short statement in English• Taglines in top 2 languages	<ul style="list-style-type: none">• Small-sized publications (e.g., postcards, pamphlets, tri-fold brochures)

(45 CFR part 92)

Notice of Nondiscrimination

- In public locations, website, and significant publications.
- Written in English
 - Covered entity does not discriminate based on race, color, national origin, sex, age, or disability.
 - Covered entity provides auxiliary aids to persons with disabilities free of charge and in timely manner.
 - Covered entity provides language assistance (e.g., interpreters and translations) free of charge and in timely manner.
 - How to obtain aids and services.
 - Contact info for compliance coordinator.
 - How to file grievance.
 - How to file complaint with OCR.
- Taglines in top 15 languages
(45 CFR 92.8)

Statement of Nondiscrimination

- In small-sized publications, include short statement affirming nondiscrimination:
 - E.g., “[Covered entity] does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities.”
- Written in English.
- Must be accompanied by Taglines in top 2 non-English languages.

(45 CFR 92.8)

Taglines

- Post “taglines”, *i.e.*, short statements written in non-English informing person that language assistance services are available free of charge.
 - E.g.: *“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).”*
- Notice of Nondiscrimination: Top 15 non-English languages.
 - **Posted in public venues, website, and significant publications.**
- Statement of Nondiscrimination: Top 2 non-English languages.
 - **Included in small-sized publications or communications.**

(45 CFR 92.8(d), (f), and (g))

<https://www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf?language=en>

Top 15 Languages in Wyoming according to HHS

1. Spanish
2. Chinese
3. German
4. Tagalog
5. French
6. Korean
7. Vietnamese
8. Italian
9. Russian
10. Indonesian
11. Japanese
12. Nepali
13. Persian (Farsi)
14. Gujarati
15. Navajo

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

Sample

- Notice of nondiscrimination
- Statement of nondiscrimination
- Taglines in multiple languages

The screenshot shows a web browser window with the URL www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html. The page features a navigation bar with four main sections: Information for Individuals, Filing a Complaint, Information for Providers, and Newsroom. Below the navigation bar is a breadcrumb trail: [HHS Home](#) > [Civil Rights](#) > [For Individuals](#) > [Section 1557](#) > Translated Resources for Covered Entities. The page content includes a sidebar with a list of categories such as Race, Color, National Origin, Disability, Age Discrimination, Sex Discrimination, Religion, Section 1557, Hill-Burton, Health Care Conscience Protection, Section 1553, Special Topics, Civil Rights FAQs, Fact Sheets, and HHS Nondiscrimination Notice. The main content area is titled "Translated Resources for Covered Entities" and contains a sub-heading "Translated Resources for Covered Entities". Below this, there is a paragraph explaining that under Section 1557 of the Affordable Care Act (ACA), covered entities are required to post notices of nondiscrimination and taglines that alert individuals with limited English proficiency (LEP) to the availability of language assistance services. The translated resources below are available for use by covered entities. There is a section titled "Sample Resources in English" with links to "Notice of Nondiscrimination - PDF | .docx", "Statement of Nondiscrimination - PDF | .docx", and "Tagline - PDF | .docx". At the bottom, there is a table with four columns representing different languages: Español (Spanish), 繁體中文 (Chinese), Tiếng Việt (Vietnamese), and 한국어 (Korean). Each column contains links to the translated resources for that language.

Information for Individuals | Filing a Complaint | Information for Providers | Newsroom

[HHS Home](#) > [Civil Rights](#) > [For Individuals](#) > [Section 1557](#) > Translated Resources for Covered Entities

Civil Rights for Individuals and Advocates

Race, Color, National Origin

Disability

Age Discrimination

Sex Discrimination

Religion

Section 1557

Hill-Burton

Health Care Conscience Protection

Section 1553

Special Topics

Civil Rights FAQs

Fact Sheets

HHS Nondiscrimination Notice

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Translated Resources for Covered Entities

Translated Resources for Covered Entities

Under Section 1557 of the Affordable Care Act (ACA), covered entities are required to post notices of nondiscrimination and taglines that alert individuals with limited English proficiency (LEP) to the availability of language assistance services. The translated resources below are available for use by covered entities.

Sample Resources in English

[Notice of Nondiscrimination - PDF | .docx](#)

[Statement of Nondiscrimination - PDF | .docx](#)

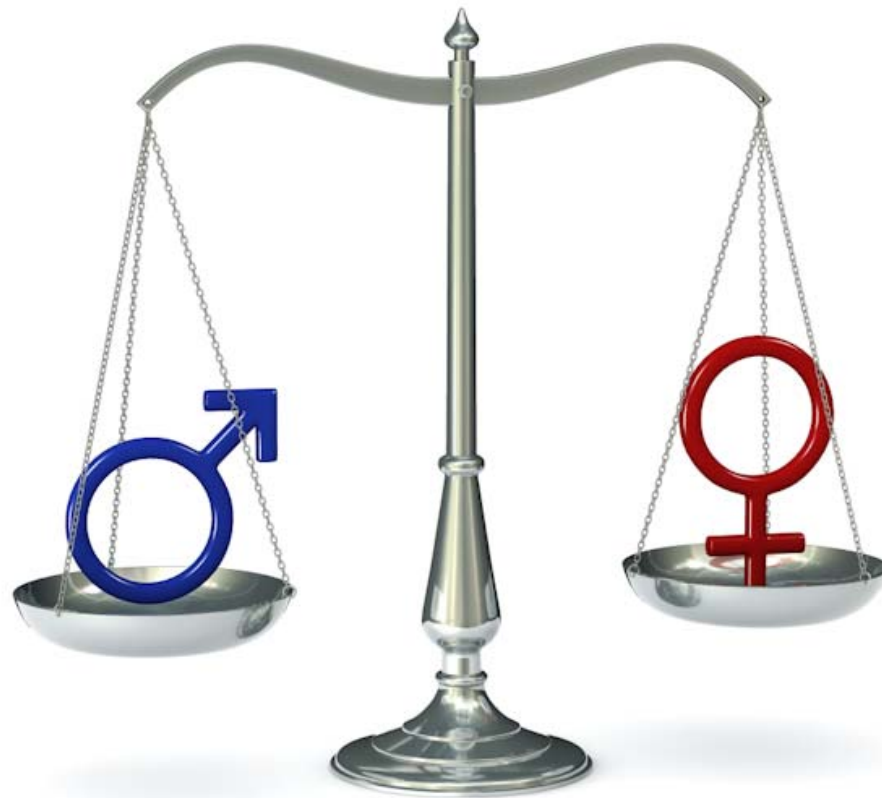
[Tagline - PDF | .docx](#)

Español (Spanish) Notice of Nondiscrimination - PDF .docx Statement of Nondiscrimination - PDF .docx Tagline - PDF .docx	繁體中文 (Chinese) Notice of Nondiscrimination - PDF .docx Statement of Nondiscrimination - PDF .docx Tagline - PDF .docx
Tiếng Việt (Vietnamese)	한국어 (Korean)

Languages of HHS Samples

Español, 繁體中文, Tiếng Việt, 한국어, Tagalog, Русский,
العربية, Kreyòl Ayisyen, Français, Polski, Português, Italiano,
Deutsch, 日本語, हिंदी, فارسی, ગુજરાતી, ગુજરાતી,
Hmoob, اردو, ਪੰਜਾਬੀ, বাংলা, יידיש, ภาษาไทย,
Oroomiffa, Ilokano, ལྷ་སྐད་, Shqip, Srpsko-hrvatski,
Українська, नेपाली, Nederlands, unD, Gagana fa'a Sāmoa,
Kajin Majōl, Română, Foosun Chuuk, Tonga, Bisaya, Ikirundi,
Kiswahili, Bahasa Indonesia, Türkçe, كوردی,
Thuɔŋjaŋ, Norsk, Català, ελληνικά, Igbo asusu, èdè Yorùbá,
(available at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>)

Sex Discrimination



Sex Discrimination

- ACA 1557 prohibits discrimination based on:
 - An individual's sex
 - Pregnancy, childbirth, or related medical conditions
 - Gender identity
- Treat men and women equally in provision of healthcare, insurance and programs.

Franciscan Alliance, Inc. v. Burwell (N.D. Tex. 2016) enjoined regulatory prohibitions against discrimination based on gender identity and termination of pregnancy.

Persons with Limited English Proficiency



Persons with Limited English Proficiency

- Must take “reasonable steps” to ensure meaningful access to persons with limited English proficiency (“LEP”).
 - Qualified interpreters
 - Translations of key documents.

(45 CFR 90.201; Title VI Executive Order 13166 (8/00) and HHS Guidance (8/03))

What is “Reasonable”?

Title VI

- Number or proportion of LEPs likely to be encountered by provider.
- Frequency of contact with LEPs.
- Nature and importance of services to LEPs.
- Cost and resources available to provider.

(HHS Guidance (8/03))

ACA

- Importance of communication.
- Length, complexity, and context of communication.
- Prevalence of LEPs.
- Frequency of LEP encounters.
- LEP’s preferences.
- Cost and whether provider availed itself of cost savings.
- Available resources.

(81 FR 31416)

LEP Interpreters

- Must offer qualified interpreter to LEP individual if it is reasonable to provide meaningful access.
 - “Qualified interpreter” =
 - Adheres to generally accepted ethical principles.
 - Demonstrated proficiency
 - Able to interpret effectively, accurately and impartially using necessary specialized vocabulary.
 - General familiarity with foreign language is insufficient.
 - In person or appropriate video remote interpreting service.

(45 CFR 92.201)

LEP Interpreters

May not:

- Refuse to provide care even though cost > reimbursement.
- Charge for interpreter.
- Require LEP to provide his/her own interpreter.
- Rely on adult accompanying LEP except:
 - **Emergency involving imminent threat to safety and no qualified interpreter immediately available, or**
 - **LEP requests that the accompanying adult interpret, the adult agrees, and reliance on adult is appropriate under circumstances.**
- Rely on minor except in emergency involving imminent threat to safety and no qualified interpreter immediately available.
- Rely on staff other than qualified bilingual/multilingual staff who is designated to provide interpreting as part of assigned job duties.

LEP Translations

- Must use qualified translator to translate vital documents.
 - “Qualified translator”
 - Adheres to generally accepted ethical principles.
 - Demonstrated proficiency
 - Able to translate effectively, accurately and impartially using necessary specialized vocabulary.
 - Beware using automatic translation technologies.

(42 CFR 92.201)

LEP Translations

According to Title VI Guidance, must translate “vital” documents:

- “Vital” Documents = translation vital to service and important consequences if translation is not accurate and timely.
- Consent forms
- Complaint forms
- Intake forms with health consequences
- Notices of patient rights, e.g., HIPAA, COPs, etc.
- Notices of eligibility criteria

“Non-vital” Documents =

- General information
- Patient satisfaction surveys
- Menus
- Large documents, e.g., enrollment handbooks

➤ **No guidance under the ACA.**

Persons with Disabilities



Persons with Disabilities

- May not discriminate against persons with a disability or regarded as having a disability, i.e., a physical or mental impairment that substantially limits one or more major life activities.
- Take appropriate steps to ensure that communications are effective as communication with others, including providing auxiliary aids or services.

(42 USC 12101 *et seq.*; 28 CFR part 36; 45 CFR 92.4 and 92.202)

- **Key: ensure effective communication with:**
 - Patients, and
 - Companions with disabilities, including family member other person with whom the provider should communicate under the circumstances.

(28 CFR 36.303(c); 45 CFR 92.202(a))

Persons with Disabilities

ADA

- Need not take action if:
 - Poses a direct threat to health or safety of others;
 - Action would fundamentally alter nature of service; or
 - Action would result in undue burden.

(42 USC 12101; 28 CFR 36.302-.303).

- Difficult to establish “undue burden.”

ACA

- Need not make electronic and information technology accessible to individuals with disabilities unless doing so would:
 - Impose undue financial or administrative burden; or
 - Fundamentally alter nature of services.

(45 CFR 92.204(a))

- Not clear to what extent this would apply in other contexts.

Auxiliary Aids

Hearing Impaired

- Qualified interpreters
 - ASL or others with proficiency
- Video remote interpreting
 - Must satisfy standards.
- Note takers
- Real-time computer-aided transcription services
- Written materials
- Exchange of notes
- Assistive listening devices
- Others

(28 CFR 36.303; 45 CFR 92.4)

Visually impaired

- Qualified readers
- Taped texts
- Audio recordings
- Braille materials and displays
- Screen reader software
- Optical readers
- Secondary auditory programs
- Large print materials
- Others

Auxiliary Aids

Under ADA:

- “The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.”
- “A [provider] should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the [provider], provided that the method chosen results in effective communication.”

(28 CFR 36.303(c)(1)(ii))

Auxiliary Aids

- DOJ has suggested that interpreters may be required when complex information is being conveyed, e.g.,
 - symptoms, medical condition, and history
 - treatment options and tests
 - medications and surgical procedures
 - obtaining informed consent
 - offering diagnosis, prognosis
 - recommendations for treatment and instructions
 - psychotherapy counseling
 - complex billing or insurance matters.

(DOJ, *ADA Business Brief: Communicating with People Who Are Deaf in Hospital Settings* (10/03))

LEP Interpreters

May not:

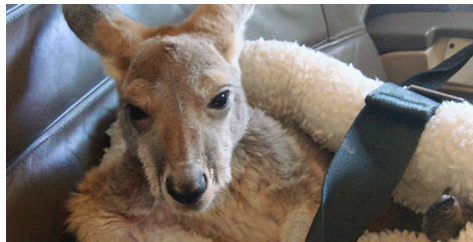
- Refuse to provide care even though cost > reimbursement.
- Charge for auxiliary aid.
- Require person to provide his/her own interpreter.
- Rely on adult accompanying person except:
 - **Emergency involving imminent threat to safety and no qualified interpreter immediately available, or**
 - **Person requests that the accompanying adult interpret, the adult agrees, and reliance on adult is appropriate under circumstances.**
- Rely on minor except in emergency involving imminent threat to safety and no qualified interpreter immediately available.

Service Animals

Yes



No



Service Animals

- Service animals = dogs and miniature horses that are trained to work or perform tasks for people with disabilities.
- Generally must allow service dogs to accompany person with disability in all areas where members of public are allowed to go.
- May limit dog's access if:
 - dog is out of control and handler does not take effective action to control it;
 - dog is not housebroken; or
 - dog poses risk to health or safety.
- May require dog to be on leash unless it would interfere with service.
- May not inquire about disability or certification, but may ask:
 - Whether dog is required because of disability, and
 - What tasks the dog is trained to perform.

(28 CFR 36.302; *see* DOJ Bulletin, *Service Animals* (7/11))

Additional Help?



Additional Help?

- OCR website, www.hhs.gov/ocr/civilrights/index.html
 - Guidance and education
 - Sample policies and procedures
 - Nondiscrimination policy
 - Notifications of rights
 - LEP policy
 - Auxiliary aids policy
 - Program accessibility policy
 - Grievance procedures
- ADA website, <http://www.ada.gov/>
 - Guidance and education
 - Technical guidance
- Lots of stuff on internet, but be careful.

Questions?



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