

# NONDISCRIMINATION : INTERPRETERS, TRANSLATORS, & SERVICE ANIMALS



# QUESTIONS?

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# OVERVIEW

- Nondiscrimination Statutes
- Obligations of Healthcare Providers
  - Persons with Limited English Proficiency (LEP)
  - Persons with disabilities
  - Service animals
- Impacts of COVID-19



# AFFORDABLE CARE ACT

- Section 1557 of the Patient Protection and Affordable Care Act:
  - “[A]n individual shall not, [on the basis of race, color, national origin, sex, age, or disability] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts or insurance, or under any program or activity that is administered by an Executive Agency or any entity established under [the Affordable Care Act.]”

42 USC §18116, 45 CFR part 92

# NONDISCRIMINATION LAWS

- Section 1557 of the ACA
- Title VI of the Civil Rights Act of 1964
  - Prohibits discrimination on the basis of race, color, or national origin
- Title IX of the Education Amendments of 1972
  - Prohibits discrimination on the basis of sex
- Age Discrimination Act of 1975
- Section 504 of the Rehabilitation Act of 1973
  - Prohibits discrimination on the basis of disability
- Americans with Disabilities Act of 1990
  - Prohibits discrimination on the basis of disability
- State nondiscrimination statutes

# ACA: CURRENT STATUS

- Issued initial Final Rule implementing Section 1557 in 2016
- Legal challenges to interpretation of ACA's protection on the basis of "sex"
- Revised Final Rule issued June 19, 2020
  - Changes to the 2016 regulations include:
    - Limits which entities and health care activities are subject to ACA non-discrimination protections.
    - Eliminates protections based on gender identity, sex stereotyping, and terminations of pregnancy.
    - Provide an explicit religious exemption.
    - Eliminates the notice and tagline requirement
- More legal challenges!

# NONDISCRIMINATION LAWS

- Nondiscrimination laws generally apply to:
  - Entities principally engaged in the business of providing healthcare that receive federal financial assistance from HHS.
    - *Physicians, hospitals, nursing facilities, clinics, medical practices, etc.*
  - Entities not principally engaged in the business of providing healthcare, will apply to the extent operation receives federal financial assistance from HHS.





# GENERAL REQUIREMENTS

- Must submit an assurance of compliance with 1557.
- Covered entities are no longer required to:
  - Appoint a compliance coordinator.
  - Establish a grievance procedure.
  - Post notices of nondiscrimination.
  - Include taglines and statements of nondiscrimination.
- Must provide language assistance (*e.g.*, interpreters and translations) to persons with limited English proficiency.
- Must provide auxiliary aids to those with disabilities.
- Must make newly constructed or altered facilities accessible to those with disabilities.
- Must make information and communication technology accessible to individuals with disabilities.

45 CFR part 92; 28 CFR part 35

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# 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

# LIMITED ENGLISH PROFICIENCY



# LIMITED ENGLISH PROFICIENCY

- Must take “reasonable steps” to ensure meaningful access to persons with limited English proficiency (“LEP”).
  - Provide qualified interpreters.
  - Translations of key documents.
- Requirements for Language Assistance Services:
  - Provided free of charge.
  - Be accurate and timely.
  - Protect the privacy and independence of the individual with LEP.

# LIMITED ENGLISH PROFICIENCY

## DETERMINING “REASONABLE”

### **What is reasonable?**

Based upon how the entity balances the following factors:

- (1) The number or proportion of LEP individuals eligible to be served or likely to be encountered in the eligible service population.
- (2) The frequency with which LEP individuals come into contact with the entity’s health program, activity, or service.
- (3) The nature and importance of the entity’s health program, activity, or service.
- (4) The resources available to the entity and costs.

# LIMITED ENGLISH PROFICIENCY

## INTERPRETERS

- Must offer qualified interpreters to LEP individuals if it is a reasonable step to providing meaningful access.
  - “Qualified interpreter” includes someone who
    - Adheres to generally accepted ethical principles, including client confidentiality.
    - Has demonstrated proficiency in speaking and understanding both languages.
    - Is able to interpret effectively, accurately and impartially using necessary specialized vocabulary.
  - In person or appropriate remote audio interpreting service.

# LIMITED ENGLISH PROFICIENCY

## INTERPRETERS

- Remote audio interpreting requirements:
  - Real-time audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality audio without lags or irregular pauses in communication;
  - A clear, audible transmission of voices; and
  - Adequate training to users of the technology and other involved individuals so they can quickly and efficiently set up and operate the technology.

# LIMITED ENGLISH PROFICIENCY

## INTERPRETERS

### DO NOT:

- Refuse to provide an interpreter.
- Charge for interpreter services.
- Require the individual to provide his/her own interpreter.
- Rely on adult accompanying the individual *unless*:
  - Emergency involving imminent threat to safety and no qualified interpreter immediately available, or
  - Individual requests that the accompanying adult interpret, the adult agrees, and reliance on adult is appropriate under circumstances.
- Rely on non-staff *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 interpretation as part of assigned job duties.



# LIMITED ENGLISH PROFICIENCY

## TRANSLATIONS

- Must use qualified translators to translate vital documents, both in paper or electronic form.
  - “Qualified translator” includes someone who
    - Adheres to generally accepted ethical principles, including client confidentiality.
    - Has demonstrated proficiency in writing and understanding both languages.
    - Is able to translate effectively, accurately, and impartially using necessary specialized vocabulary.
  - Interpreter ≠ Translator
  - Beware using automatic translation technologies.

# LIMITED ENGLISH PROFICIENCY

## TRANSLATIONS: VITAL DOCUMENTS

Title VI requires translation of “vital” documents.

- “Vital” = translation vital to service and important consequences if translation is not accurate and timely.
- Safe harbor: translate vital documents for LEP groups that constitutes 5% / 1,000 in service population; oral translation of other documents.

Vital Documents	Non-Vital Documents
Consent forms	General Information
Complaint forms	Patient satisfaction surveys
Intake forms with health consequences	Menus
Notices of patient rights, <i>e.g.</i> , HIPAA, CoPs, etc.	Large documents, <i>e.g.</i> , enrollment handbooks (but portions could be vital)
Notices of eligibility criteria	
Notice of free LEP services and how to obtain	

# INDIVIDUALS WITH DISABILITIES



# INDIVIDUALS WITH DISABILITIES

- May not discriminate against individuals 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.
  - This includes both patients and their **COMPANIONS** with disabilities.
- Take appropriate steps to ensure that communications are as effective as communication with individuals without disabilities, including providing appropriate auxiliary aids or services where necessary.

42 USC 12101 *et seq.*; 28 CFR part 36; 45 CFR 92.102

# INDIVIDUALS WITH DISABILITIES

## AUXILIARY AIDS

### Hearing Impairment

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

### Visual Impairment

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

28 CFR 36.303; 45 CFR 92.4

# INDIVIDUALS WITH DISABILITIES

## 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.”

# INDIVIDUALS WITH DISABILITIES

## AUXILIARY AIDS: INTERPRETERS

### DO NOT:

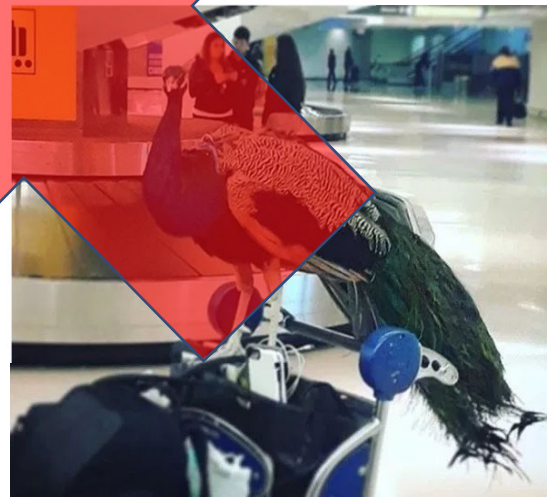
- Refuse to provide care due to cost.
- Charge for interpreters.
- Require person to provide his/her own interpreter.
- Rely on a non-speaking person except:
  - Emergency involving imminent threat to safety and no qualified interpreter immediately available, or
  - Person requests that the accompanying 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.

# WHY IT MATTERS

- Cannot provide proper care without effective communication.
  - Inability to obtain / communicate information necessary to provide effective care.
  - Lack of informed consent for care.
  - Provider liability for resulting injuries.
- Compliance.
  - Licensing and ethical standards.
  - Accreditation standards.
  - **Nondiscrimination laws.**



# SERVICE ANIMALS



# SERVICE ANIMALS

- Service animals = dogs 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.
- 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 work or tasks the dog is trained to perform.

# COVID-19

- Federal civil rights protections apply during emergencies.
- Beware temporary visitor restrictions
  - Individuals with disabilities may have varying support needs and may need a support person to ensure equal access to health care
    - This can include both inpatient and outpatient situations.
- Beware stigma and stereotypes that may influence care.
- Crisis Standards of Care
  - Beware stereotypes, assessments of quality of life, etc.
  - Evaluations as to whether an individual is a candidate for treatment should be based on individualized assessments of the patient based on objective medical evidence.

# ADDITIONAL RESOURCES

- ACA Fact Sheet:  
<https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf> (June 12, 2020)
- HHS website, <https://www.hhs.gov/civil-rights/index.html>
  - Guidance and education
  - Fact Sheets
- ADA website, <http://www.ada.gov/>
  - Guidance and education
  - Technical guidance

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