


**Interpreters, Translators, and Auxiliary Aids:
Provider Obligations**


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5/6/2016 

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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)

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Communication Barriers

Patient or personal representative:

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

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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**

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Relevant Statutes and Regulations

- Affordable Care Act § 1557
 - 42 USC 18116
- Civil Rights Act of 1967, Title VI
 - 42 USC 2000d, 45 CFR 80.3
- Rehabilitation Act of 1973 § 504
 - 29 USC 701; 45 CFR 84.3
- Americans with Disabilities Act of 1990, Title III
 - 42 USC 12101
- Idaho Human Rights Act
 - IC 67-5901

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Proposed Regulations

- On 9/8/15, HHS issued proposed ACA regulations that would require providers to:
 - Ensure meaningful access for individuals with limited English proficiency or disabilities.
 - Limits circumstances when provider may rely on person with patient.
 - If provider has 15+ employees:
 - Designate employee for coordinating compliance.
 - Adopt grievance procedure for responding to allegations of discrimination.
 - Post notice that consumers have right to communication assistance.
 - HHS to provide samples.
 - Post taglines in top 15 languages nationally.
 - HHS to provide samples.
- *Stay tuned...*

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hhs/ada.htm

ADA.gov

United States Department of Justice
Civil Rights Division

Information and Technical Assistance on the Americans with Disabilities Act

Search ADA.gov

More Search Options

Law / Regulations
Design Standards
Technical Assistance Materials
Enforcement

Barrier-Free Health Care Initiative

Press Release (April 13, 2013)

Press Release (July 26, 2012)

Through the Barrier-Free Health Care Initiative, U.S. Attorneys' offices across the nation and the Department's Civil Rights Division target their enforcement efforts on a critical area for individuals with disabilities – access to medical services and facilities. The Barrier-Free Health Care Initiative is a multi-phase initiative that will include effective communication for people who are deaf or have hearing loss, physical access to medical care for people with mobility disabilities, and equal access to treatment for people who have HIV/AIDS.

The Civil Rights Division and U.S. Attorneys' offices have long enforced the ADA in this area. This nationwide initiative seeks to focus and leverage the Department's resources together and aggregate the collective message that disability discrimination in health care is illegal and unacceptable.

Grady Memorial Hospital – re: provision of auxiliary aids and services, including sign language interpreters, to persons who are deaf or hard of hearing to ensure effective communication at a hospital (1/12/16)

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Filing a Complaint

Information for Providers

Newsroom

[Providers](#) > [Compliance Enforcement](#) > [Examples](#) > Enforcement Success Stories - Limited English Proficiency

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Enforcement Success Stories Involving Persons with Limited English Proficiency

Summary of Selected OCR Compliance Reviews and Complaint Investigations

- **Me Memorial Hospital of California** agrees to expand and improve accessibility for persons with limited English proficiency (LEP). MMH consists of a main hospital and five clinics serving approximately 50,000 people throughout 2,500 square miles in rural California. (8/21/14) [Read the HHS Bulletin](#) | [Read the Resolution Agreement](#)
- **Mississippi Department of Human Services, Division of Family and Children's Services** (MDHS-DFCS) - OCR and (MDHS-DFCS), have signed a voluntary resolution agreement to expand language assistance services for persons with Limited English Proficiency (LEP). Under the agreement with OCR, MDHS-DFCS will take a comprehensive approach to ensure persons with LEP have meaningful and timely access to a variety of critical services, activities and programs. (04/15/14) [Read the Voluntary Resolution Agreement](#) (PDF /344KB) | [Read the Bulletin](#) (PDF /298KB)

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Why do we care?

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

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Why do we care?

- Patients or personal representatives often understand the law better than providers – dealing with issues on day-to-day basis:
 - Heightened awareness regarding discrimination issues
 - Educated about the law, individual rights, and provider's duties
 - Some may try to impose obligations beyond those required by applicable laws, for example:
 - Demand a choice of interpreters or auxiliary aids even though law may not require provider to use such
 - Require a provider to pay for interpreter or auxiliary aid that patient brings
- Potential liability for complaints filed against providers for improperly handling and addressing important issues

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General Requirements

- Provider must generally make reasonable accommodations (e.g., interpreter services or auxiliary aids) for:
 - Persons who do not speak English
 - Persons with a disability that impairs effective communication
- Provider generally cannot:
 - Require patient to supply his or her own interpreter or auxiliary aid
 - Charge patient for cost of the interpreter or auxiliary aid
 - Refuse to provide care even though cost of interpreter or auxiliary aid may exceed cost of care

* **Caution:** It is better to defend a discrimination claim than a malpractice claim; it is critical to provide effective care. Do not ignore a communication problem.

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Foreign Language Challenges (Limited English Proficiency)

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Requisite Accommodations

- Executive Order 13166 (8/00) and HHS Guidance (8/03) require recipients of federal financial assistance to take “reasonable steps” to ensure meaningful access to persons with limited English proficiency (“LEP”)
 - Interpreters
 - Accurate translations of key documents
- 8/03 HHS Guidance provides for 4 factors to assess:
 1. Number or proportion of LEPs likely to be encountered by provider
 2. Frequency of contact with LEPs
 3. Nature and importance of services to LEPs
 4. Cost and resources available to provider

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Circumstances Determine Accommodations

- Number of LEPs in area
- Frequency of contact with LEPs
- Nature and importance of services
- Complexity of services
- Available resources and costs

- Mix of services available
 - Interpreters
 - On-site
 - Skilled
 - Translation
 - Vital documents
 - Oral translation of documents

Interpreter Options

- Allow LEP to provide his or her own interpreter, *e.g.*, family member, but:
 - Advise LEP that he or she may receive LEP services for free
 - Never require LEP to provide interpreter
 - Consider documenting LEP's choice
 - Consider using interpreter service to supplement patient's interpreter, especially if provider has concerns about LEP's interpreter
 - Competency, *e.g.*, interpreter is a minor
 - Confidentiality, *e.g.*, patient may not disclose info to interpreter
 - Cultural factors
 - Suspect abuse
 - Complexity of informed consent disclosures

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Interpreter Options

- Hire or train bilingual staff
- Use interpreter or translator services
- Use telephonic or video or online remote interpreter ("VRI") services
- Share LEP services with other providers, *e.g.*, purchase bulk telephonic interpretation services
- Use qualified community volunteers
- Use "I speak" (language identification) flashcard
- Create arrangement to refer LEPs to another provider so long as there is no discriminatory intent (but be careful when making such referrals)

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Translating Vital Documents

- "Vital" documents are critical to services and may result in harmful consequences if translation is not accurate, comprehensive and timely:
 - Consent forms
 - Complaint forms
 - Intake forms with health consequences
 - Notices of patient rights, *e.g.*, HIPAA, COPs, etc.
 - Notices of eligibility criteria
 - Notice of free LEP services and process to obtain services

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Translating Non-Vital Documents

- “Non-vital” documents are those for which translation is not vital to services being provided
 - General information (i.e. facility information)
 - Patient satisfaction survey
 - Menus
 - Large documents, *e.g.*, enrollment handbook

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Translations: Safe Harbors

- Safe harbor provides for “strong evidence” of reasonable compliance
 - Written translation of vital documents for LEP groups that constitute 5% of population served or 1,000 persons, whichever is less; oral translation for other documents.
 - If there are fewer than 50 persons in LEP group that reaches 5%, may provide written notice of right to receive oral translation.
- Translations may be costly, \$.15-\$.20/word or \$150/page.

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Translation Options

- Standardize and share translated documents with other providers and/or facilities
 - Ensure the translation is appropriate to your practice
- Some translated documents may be found on government and nonprofit websites
 - Ensure the translation is appropriate to your practice
- Consider oral interpretation of some documents
- Use qualified community volunteers
- Hiring practices should also address your LEP needs

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Implementation Plan

- OCR has developed optional guidance
- Suggested steps:
 - Identify LEPs with whom you have contact
 - Identify available LEP services and how staff may obtain them
 - Establish procedures for handling LEP situations
 - Train staff on appropriate procedures
 - Provide notice of LEP services to LEPs
 - Monitor and update plans accordingly
- See <http://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-VI/>

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Additional resources: LEP

- HHS Guidance: www.hhs.gov/ocr/lep/revisedlep.html.
- OCR website: www.hhs.gov/ocr/lep
- LEP website: www.lep.gov.
- "I speak" (language identification) cards: www.lep.gov/ISpeakCards2004.pdf
- LEP notices in various languages: <http://lep.gov/recip.html>.
- OCR Compliance Review Initiative: www.hhs.gov/ocr/civilrights/activities/agreements/compliancereview_initiative.pdf
- Local OCR Regional Office
- *Continue to watch for ACA regulations...*

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Disability Issues

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What must you do?

- Providers may not discriminate against persons with a disability.
- Disabilities include:
 - A physical or mental impairment that substantially limits one or more major life activities, including but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - A history or record of such an impairment; or
 - Regarded as having, such an impairment.

(42 USC 12131 *et seq.*; 28 CFR part 36)

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What must you do?

- Discrimination includes but is not limited to:
 - failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford services to individuals with disabilities, or
 - failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,

unless the entity can demonstrate that:

- such person poses a direct threat to health or safety of others,
- the proposed action would fundamentally alter the nature of services being offered (e.g., provider does not typically provide the treatment sought), or
- the proposed action would result in an undue burden.

(42 USC 12101 *et seq.*; 28 CFR 36.208, 36.302, 36.303)

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What must you do?

- Undue burden is a significant difficulty or expense, evaluating the following factors:
 - Nature and cost of the action;
 - Overall size and financial resources of the entity;
 - Legitimate safety requirements;
 - Impact on the entity's operations; and
 - Relationship to and overall size and financial resources of any parent corporation.

(28 CFR 36.104)

- Fact that cost of providing auxiliary aid or service exceeds reimbursement is not, in and of itself, an "undue burden"
- It is difficult to establish an "undue burden"

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What must you do?

- Providers may not:
 - Impose a surcharge on persons with a disability to cover the costs of auxiliary aids, policy modifications, etc.
 - Require an individual with a disability to bring his or her own interpreter
 - Rely on an adult accompanying the individual with a disability to interpret or facilitate communication, except:
 - In an emergency involving an imminent threat to safety when there is no interpreter available; or
 - Where individual with disability specifically requests that the adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on the adult for such assistance is appropriate.
 - Use caution when relying on family members
 - Generally do not rely on minor children to interpret except in an emergency involving imminent threat to safety when there is no interpreter available

(28 CFR 36.301(c), 36.303(c)(2))

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What must you do?

- Providers may not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of their rights, for example:
 - Coerce an individual to deny or limit rights granted by the statute
 - Threaten, intimidate, or interfere with an individual with a disability who is seeking to exercise their rights
 - Retaliate against a person because the person has participated in an investigation or action to enforce their rights

(28 CFR 36.206)

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Auxiliary Aids

- Providers must furnish appropriate auxiliary aids and services where necessary to ensure effective communication with:
 - Persons with disabilities
 - Companions with disabilities, including family member other person with whom the provider should communicate under the circumstances

(28 CFR 36.303(c))

- No auxiliary aids are required if effective communication exists without them. *See Board of Education v. Rowley*, 458 U.S. 176 (1982) (sign language interpreter not required when lip reading or other accommodations are sufficient).
- Again, use caution when determining what is and is not “effective communication”

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Auxiliary Aids

- "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. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.
(28 CFR 36.303(c)(1)(ii))

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Auxiliary Aids

- DOJ has suggested that interpreters may be required when complex information is being conveyed, including:
 - 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))

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Auxiliary Aids: Hearing Impaired

- Qualified interpreters on-site or through video remote interpreting (VRI) services
 - VRI must satisfy regulatory standards
- What types of services are being used in practice?

(28 CFR 36.303(b)(1))

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Auxiliary Aids: Hearing Impaired

- Oral interpreters (enable patient to lip read)
- Notetakers
- Real-time computer-aided transcription services
- Written materials
- Exchange of written notes (e.g., pen and notepad or computer screen)
- Telephone handset amplifiers
- Assistive listening devices
- Telephones compatible with hearing aids
- Open and closed captioning, including real-time captioning
- Voice, text, and video-based telecommunications systems, including text telephones (TTYS), videophones, captioned telephones
- Other effective means of making aurally delivered info available
(28 CFR 36.303(b)(1))

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Auxiliary Aids: Visually Impaired

- Qualified readers
- Taped texts
- Audio recordings
- Brailled materials and displays
- Screen reader software
- Magnification software
- Optical readers
- Secondary auditory programs (SAP)
- Large print materials
- Accessible electronic and information technology
- Other effective methods of making visually delivered materials available to individuals who are blind or have low vision
(28 CFR 36.303(b)(2))

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Auxiliary Aids: Factors to Consider


- Effectiveness of method of communication without and with the proposed auxiliary aid
- Nature and complexity of communication
- Nature of treatment or procedure
- Size of practice or facility
- Cost of alternatives
- Number of patients who will require auxiliary aids
- Patient's preferences
- Provider's risk tolerance
- Others?

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Service Animals


- Service animals include dogs and miniature horses that are trained to work or perform tasks for people with disabilities
- Generally facilities must allow service dogs to accompany person with disability in all areas where members of public are allowed to go
- May limit a 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))

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Costs

- Interpreters may cost \$30 to \$400/hour
- Fact that cost of interpreter exceeds reimbursement for services does not constitute "undue burden"
- Do not make the patient pay for language or auxiliary aids provided by the provider
- Provider may be able to seek reimbursement from insurer or group health plan if patient is not required to pay
- There may be federal or state funds available to cover some costs under Medicaid or SCHIP
- Small businesses may receive a tax credit for the cost of services
- Do not delay provision of services while you fight about reimbursement

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Timing

- Provide timely services
 - Undue delay may constitute discrimination or effective denial of service
 - Depends on circumstances of care/treatment
 - Where timeliness is important, cannot delay
 - Where timeliness is not important, may be able to justify some delay
- May require advance notice of need for auxiliary aids (when possible) so that you may arrange for auxiliary aids

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Payment for Interpreter

- Sometimes patient will bring interpreter who later bills physician office
 - Provider is not required to pay for such services unless provider agreed to pay for service
 - Make sure you have available, offer, and document effective alternative interpreter services
 - Never require patient to provide his or her own interpreter

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Qualifications of Interpreters

- Ensure interpreter or translator is qualified
 - Check certification
 - Check state laws re certification requirements
 - May not know medical terms
 - May not know language “regionalisms”
 - May not be direct translation for some words
 - May not communicate at educational level of patient
 - May have conflict or be compromised by circumstances, e.g., family member - beware when using a family member!
 - Ability to interpret does not establish ability to translate
 - HIPAA still applies; get business associate contract
- Per DOJ, “qualified interpreter” is one who is able to interpret effectively, accurately, and impartially both receptively and expressively, using necessary specialized vocabulary.” (28 CFR 36.104)

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HIPAA Concerns

- Probably do not need authorization to use interpreter
 - Disclosure is for treatment, payment or healthcare operations. (45 CFR 164.506(c))
 - Disclosure is to persons involved in care of the patient. (45 CFR 164.510(b))
- Do not need business associate agreement if:
 - Interpreter/translator is a member of your workforce, i.e., an employee or volunteer under your control
 - Patient provides their own interpreter/translator
- Otherwise, provider probably needs a business associate agreement with interpreter/translator

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Implementation Plan

- See implementation plan for LEPs
- Develop policy for communication with persons with disability
 - Identify patient/companion needs
 - Process for assessing auxiliary aids
 - Process for advising patients and family of available auxiliary aids
- Make arrangements to have auxiliary aids available, including interpreters and other relevant services
- Train staff
- Consult with patient
- Make informed decision based on applicable facts, including:
 - Patient's preferences
 - Effectiveness of communication
 - Burden on provider

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Additional Resources

- HHS LEP Guidance (8/03)
- OCR, *Compliance Review Initiative: Advancing Effective Communication in CAHs* (4/13)
- ADA regulations concerning public accommodation, 28 CFR part 36
- DOJ, *ADA Business Brief: Communicating with People Who are Deaf in Hospital Settings* (10/03)

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HHS Support

- HHS is “committed” to providing technical assistance
 - Translated forms and vital documents
 - Training and information regarding best practices
 - Identify and share model plans and examples of best practices
 - Information about available resources
 - Grants and model demonstration funds for LEP services


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Additional Resources

- 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, use caution when implementing external protocol and guidance

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Questions?



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