

INTERPRETER SERVICES

What functions and requirements are covered under the heading of “Interpreter Services”?

Interpreter services include two broad areas: limited English proficiency¹ and hearing/speech/visual impairments.²

Under what circumstances may physicians need to provide qualified foreign language interpreter services to patients with limited English proficiency?

Physicians may need to provide qualified foreign language interpreter services to patients with limited English proficiency:

- To avoid prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964.³
- To avoid prohibited discrimination on the basis of national origin under the Washington Law Against Discrimination (WLAD).⁴
- To avoid prohibited discrimination on the basis of national origin under any applicable local law.
- When necessary to obtain the patient’s fully informed consent.⁵

See **DISCRIMINATION**; and **INFORMED CONSENT**.

Is inadequate interpretation for patients with limited English proficiency a form of prohibited discrimination under Title VI?

Yes. The Department of Health and Human Services (DHHS) Office for Civil Rights has concluded that inadequate interpretation for patients with limited English proficiency is a form of prohibited discrimination on the basis of national origin under Title VI.⁶ Under Title VI, physicians who treat Medicaid patients (or who receive payment to treat patients under any other program that receives federal financial assistance from DHHS) are obligated to ensure that patients under such programs who have limited English proficiency have an opportunity equal to

¹ WAC 388-03-020.

² WAC 388-891-0620

³ 42 U.S.C. § 2000d, *et seq.*

⁴ Chapter 49.60 RCW.

⁵ RCW 7.70.060.

⁶ 45 C.F.R. 80.3(b)(2); see also *Lau v. Nichols*, 414 U.S. 563 (1974); 68 Fed. Reg. 47311. See also: DHHS *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html>

that of English speaking patients to receive and otherwise benefit from medical services confidentially, with effective communication, and with fully informed consent.

Physicians who treat Medicaid patients (or who receive payment to treat patients under any other program that receives federal financial assistance from DHHS) must take reasonable steps to ensure meaningful access to their services by persons with limited English proficiency.⁷ The starting point for a determination of the extent of the obligation to provide limited English proficiency services is an individualized assessment that balances 4 factors:⁸

- The number or proportion of persons with limited English proficiency eligible to be served, or likely to be encountered.
- The frequency with which individuals with limited English proficiency come in contact with the provider.
- The nature and importance of the services provided to people's lives.
- The resources available to the provider, and the attendant costs.

Thus, if a foreign language interpreter is needed to afford a Medicaid patient with limited English proficiency an opportunity equal to that of English-speaking patients to receive medical services confidentially, with effective communication, and with fully informed consent, then the failure to provide qualified foreign language interpreter services at no cost to the patient may constitute prohibited discrimination on the basis of national origin under Title VI.

Has the DHHS Office of Civil Rights issued any policy guidance to clarify the responsibilities of providers of health services who receive federal financial assistance from DHHS and assist them in fulfilling their responsibilities to persons with limited English proficiency under Title VI?

Yes. On August 8, 2003, the DHHS Office of Civil Rights published, subject to modification after review of comments, its "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" at 68 Fed. Reg. 47311. Copies of that policy guidance can be found at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html>.

Are there any exceptions under Title VI of the Civil Rights Act of 1964?

Yes. In medical emergencies, a physician or other recipient of federal funds does not violate Title VI if the immediate provision of a service is necessary to prevent the death or

⁷ 45 C.F.R. § 80.3(b)(2).

⁸ 68 Fed. Reg. 47311. See also: DHHS *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html>.

serious impairment of the patient's health, and such service cannot be provided except through a medical facility which refuses or fails to comply with Title VI requirements.⁹

Is inadequate interpretation for patients with limited English proficiency also a form of prohibited discrimination under the WLAD?

Probably yes. Although there are no regulations or cases interpreting the WLAD's prohibition of discrimination on the basis of national origin, the Washington State Human Rights Commission (WSHRC) and the state courts typically will resort to interpretations of similar federal laws in interpreting the provisions of the WLAD. Because the DHHS Office of Civil Rights has concluded that inadequate interpretation for patients with limited English proficiency is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964, the WSHRC and the state courts likely would conclude that inadequate interpretation for patients with limited English proficiency is a form of prohibited discrimination on the basis of national origin under the WLAD. Unlike Title VI of the Civil Rights Act of 1964, however, the WLAD is broadly applicable to any place of public accommodation, which includes any place where medical service or care is available, and is not limited in applicability just to recipients of federal financial assistance.¹⁰

Who is responsible for paying for the interpreter services?

The physician or practice is responsible.¹¹ In fact, patients must be fully informed of the availability of a qualified interpreter at no cost to the patient.¹² Qualified interpreters are considered "auxiliary aids" under the Americans with Disability Act.¹³ Physicians are placed in the position of either paying for the costs of the interpreter or being subject to potential liability in tort (failure to get informed consent) and administrative sanctions from federal and state agencies for language discrimination.

Are there any state programs that cover the cost of interpreter services?

Yes. The Washington State Department of Social and Health Services (DSHS) will reimburse physicians for the cost of interpreter services when treating Medicaid patients so long as the interpreter is a contracted vendor with DSHS. For information on reimbursement for interpreter services for Medicaid patients go to the DSHS website at: <http://hrsa.dshs.wa.gov/InterpreterServices/>.

How do I find an interpreter?

Washington State has established procedures for identifying qualified interpreters and translators, in both foreign languages and American Sign Language. Effective September, 2012, the Health Care Authority has entered into an agreement with a single state-wide vendor for

⁹ 45 C.F.R. § 80.3(e).

¹⁰ RCW 48.60.030.

¹¹ 42 U.S.C. § 12182(b)(2)(A)(iii).

¹² 28 C.F.R. 42.405(d)(1), WAC 162-26-070(2).

¹³ 42 U.S.C. § 12103(1)(A).

interpreter services for Medicaid patients. Information about this program may be found at: <http://hrsa.dshs.wa.gov/InterpreterServices/>. The Northwest Translators & Interpreters Society is a helpful resource for locating medical interpreters and can be located at <http://www.notisnet.org/>.

May family members or friends of the patient be used to provide the foreign language interpreter services?

Generally no. Family members or friends of the patient, or other unqualified interpreters, should not be used unless the patient so chooses, without coercion, after being fully informed of the availability of qualified foreign language interpreters at no cost to the patient.¹⁴ If a person with limited English proficiency voluntarily chooses to provide his or her own interpreter, a physician should consider making a record of that choice, and of the physician's offer of assistance. The physician should consider issues of competence, appropriateness, conflicts of interest, and confidentiality in determining if the desire of the person with limited English proficiency to use an interpreter of his or her own choosing should be respected.¹⁵ A physician may not require a patient to use a family member as an interpreter.¹⁶

Even if the failure to provide a qualified foreign language interpreter for a patient with limited English proficiency did not constitute prohibited discrimination under laws prohibiting discrimination on the basis of national origin, should a physician nonetheless provide one?

Yes, in order to assure that informed consent to treatment is obtained. If the physician's failure to provide a qualified foreign language interpreter were to result in a failure to obtain informed consent, the physician could be exposed to civil liability under the medical malpractice laws.¹⁷

Under what circumstances may physicians need to provide auxiliary aids, including qualified sign language interpreters, to patients with hearing, speech, or visual impairments?

- To avoid prohibited discrimination on the basis of disability under Section 504 of the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act of 1973 is a national law that protects *qualified* individuals from discrimination based on their disability.¹⁸ The nondiscrimination requirements of the law apply to employers and organizations that receive financial assistance from any Federal department or agency, including the U.S. Department of Health and Human Services (DHHS).¹⁹

¹⁴ 68 Fed. Reg. 47311. See also: DHHS *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html>

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ RCW 7.70.060.

¹⁸ 29 U.S.C. § 794(a).

¹⁹ 29 U.S.C. § 794(b).

- To avoid prohibited discrimination on the basis of disability under Titles II²⁰ and III²¹ of the Americans with Disabilities Act.
- To avoid prohibited discrimination on the basis of disability under the WLAD.²²
- To avoid prohibited discrimination on the basis of disability under any applicable local law.
- To obtain the patient's fully informed consent.²³

See AMERICANS WITH DISABILITIES ACT; DISCRIMINATION; and INFORMED CONSENT.

Is the failure to provide appropriate auxiliary aids, including qualified sign language interpreters, for patients with hearing, speech or visual impairments a form of prohibited discrimination under Section 504?

Yes. The regulations implementing Section 504 specifically provide in connection with health care services that a recipient of federal financial assistance:

that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.²⁴

The regulations further provide that auxiliary aids include such things as interpreters, brailled and taped material, and other aids for persons with impaired hearing or vision.²⁵

The DHHS Office for Civil Rights has concluded that the failure to provide a sensory-impaired patient with an appropriate auxiliary aid, including a qualified sign language interpreter for the hearing-impaired person whose primary or exclusive language is sign language, is a form of prohibited discrimination under Section 504. Thus, under Section 504, physicians (at least in practices with 15 or more employees) who treat Medicaid patients (or who receive payment under any other program which receives federal financial assistance from DHHS) are obligated to insure that patients under such programs with hearing, speech, or visual impairments have an opportunity equal to that of nonimpaired patients to receive medical services confidentially, with effective communication, and with fully informed consent.

If a Medicaid patient has a hearing, speech or visual impairment that substantially limits the ability to communicate such that an auxiliary aid, or service, such as a qualified sign language interpreter, is needed for effective communication, then the failure to provide an

²⁰ 42 U.S.C. § 12132.

²¹ 42 U.S.C. § 12182

²² Chapter 48.60 RCW.

²³ RCW 7.70.060.

²⁴ 45 C.F.R. § 84.52(d)(1).

²⁵ 45 C.F.R. § 84.52(3).

appropriate auxiliary aid, or qualified sign language interpreter, at no cost to the patient may constitute prohibited discrimination on the basis of disability under Section 504.

Are there any exceptions?

Other than the exceptions for practices with less than 15 employees, outlined above, no exceptions are stated in the regulations implementing Section 504.

A physician probably would not be deemed in violation of Section 504 for providing emergency medical treatment to a hearing, speech or visually impaired Medicaid patient without a qualified sign language interpreter, or other appropriate auxiliary aid or service, if the exigencies of the emergency made it impractical to first obtain an interpreter or other appropriate auxiliary aid or service or to transport the patient to a hospital.

Hospitals which are recipients of federal financial assistance, however, are required to establish a procedure for effective communication with hearing-impaired persons for the provision of emergency health care.²⁶

Is the failure to provide appropriate auxiliary aids, including qualified sign language interpreters, to patients with hearing, speech or visual impairments a form of prohibited discrimination under Titles II and III of the ADA?

Yes. The failure of a public entity (governed by Title II of the ADA) or a public accommodation (governed by Title III of the ADA) to provide an appropriate auxiliary aid, or qualified sign language interpreter, at no cost to the patient, if necessary to afford a patient with a hearing, speech, or visual impairment an opportunity equal to that of nonimpaired patients to receive medical services confidentially, with effective communication, and with fully informed consent, may constitute prohibited discrimination on the basis of disability under Title II²⁷ or Title III²⁸ of the ADA. See AMERICANS WITH DISABILITIES ACT.

Thus, a public entity or a public accommodation's failure to provide an appropriate auxiliary aid, or qualified sign language interpreter, at no cost to the patient, if necessary to afford a patient with a hearing, speech, or visual impairment an opportunity equal to that of nonimpaired patients to receive medical services confidentially, with effective communication, and with fully informed consent, may constitute prohibited discrimination on the basis of disability under Title II²⁹ or Title III³⁰ of the ADA.

Are there any exceptions?

Yes. Neither a public entity nor a public accommodation is required to take any action or provide any auxiliary aid that it can demonstrate would fundamentally alter the goods, services,

²⁶ 45 C.F.R. § 84.52(c).

²⁷ 42 U.S.C. § 12132, 28 C.F.R. § 35.130.

²⁸ 42 U.S.C. § 12182, 28 C.F.R. § 36.201.

²⁹ 28 C.F.R. § 35.160.

³⁰ 28 C.F.R. § 36.303(c).

programs or activities being offered or would result in an undue burden.³¹ Both fundamental alteration and undue burden are difficult defenses to establish.

A “fundamental” alteration is a modification so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, accommodations, programs or activities being offered.

“Undue burden” means “significant difficulty or expense.” Relevant factors to be considered in determining whether there is significant difficulty or expense include:³²

- The nature and cost of the action.
- The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site.
- The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity.
- If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type and location of its facilities.
- If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Even if the provision of a particular auxiliary aid or service, including qualified sign language interpreter services, would result in a fundamental alteration or undue burden, the public entity or public accommodation must still provide an alternative auxiliary aid and/or service, if one exists, that would not result in a fundamental alteration or undue burden, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages or accommodations offered by the public entity or public accommodation.³³

What do “auxiliary aids and services” include under the ADA?

Under both Titles II and III of the ADA, the term “auxiliary aids and services” includes:³⁴

- For hearing-impaired patients:

³¹ 28 C.F.R. § 35.130(b)(7), 28 C.F.R. § 35.150(a)(3), 28 C.F.R. § 35.164 (Title II); 42 U.S.C. § 12182(b)(2)(A)(ii), (iii), 28 C.F.R. § 36.303(a) (Title III).

³² 28 C.F.R. § 36.104.

³³ 28 C.F.R. § 36.303(g).

³⁴ 28 C.F.R. § 35.104 (Title II), 28 C.F.R. § 36.303(b)(1), (2) (Title III).

- Qualified interpreters (on-site or through video remote interpreting).
- Notetakers.
- Real-time computer-aided transcription services.
- Written materials.
- Exchange of written notes.
- Telephone handset amplifiers.
- Assistive listening devices.
- Assistive listening systems.
- Telephones compatible with hearing aids.
- Closed caption decoders.
- Open and closed captioning (including real-time captioning).
- Telecommunications devices for deaf or hearing impaired persons (including TTY's, videophones, and captioned telephones).
- Videotext displays.
- Accessible electronic and information technology.
- Other effective methods of making aurally delivered materials available to individuals with hearing impairments.
- For visually impaired patients:
 - 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 with visual impairments.

Auxiliary aids and services also include the acquisition and modification of equipment or devices and other similar services and actions.³⁵

Where a public entity communicates by telephone with applicants and beneficiaries, telecommunication devices for deaf persons (TDD's), or equally effective telecommunication systems, must be used to communicate with individuals with impaired hearing or speech.³⁶

A public accommodation that offers a patient or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis must make available, on request, a TDD for use by an individual with impaired hearing or speech.³⁷ A public accommodation, however, is not required to use a TDD for receiving or making telephone calls incident to its operations.³⁸

Neither public entities³⁹ nor public accommodations⁴⁰ are required to provide to individuals with disabilities personal devices, such as wheelchairs, individually prescribed devices, prescription eyeglasses or hearing aids, readers for personal use or study, or services of a personal nature including assistance in eating, toileting or dressing.

Is the failure to provide appropriate auxiliary aids, including qualified sign language interpreters, for patients with hearing, speech or visual impairments a form of prohibited discrimination under the WLAD?

Yes. The regulations interpreting the WLAD's disability documentation prohibitions make clear that the purposes of the WLAD are best achieved when persons with disabilities are treated the same as if they had no disability.⁴¹ The regulations further require places of public accommodation to "reasonably accommodate" known physical, sensory, or mental limitations of

³⁵ 28 C.F.R. § 35.104 (Title II), 28 C.F.R. § 303(b)(3).

³⁶ 28 C.F.R. § 35.161(a).

³⁷ 28 C.F.R. § 36.303(d)(2).

³⁸ 28 C.F.R. § 36.303(5).

³⁹ 28 C.F.R. § 35.135.

⁴⁰ 28 C.F.R. § 36.306.

⁴¹ WAC 162-26-060.

persons with disabilities so that persons with disabilities receive and may fully enjoy the same service as persons without disabilities.⁴²

“Reasonable accommodation” is action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person’s sensory, mental, or physical disability.⁴³

For physicians, this means that if a patient has a hearing, speech or visual impairment that limits the ability to communicate such that a reasonable accommodation like an auxiliary aid or service, including a qualified sign language interpreter, is needed for the patient to receive medical services confidentially, with effective communication, and with fully informed consent, then the failure to provide a reasonable accommodation (auxiliary aid or service, such as a qualified sign language interpreter) at no cost to the patient may constitute prohibited discrimination on the basis of disability under the WLAD.⁴⁴

Are there any exceptions?

Yes. Current rules incorporate the concept of “arranged service” within the scope of “reasonable accommodation.”⁴⁵ “Arranged service,” which was formerly set forth in regulations implementing the WLAD, provided that when same service will not carry out the purpose of the law and no accommodation is reasonable, then the place of public accommodation should use the third best solution – “arranged service.”⁴⁶

“Arranged service” means “making the services or goods of a place of public accommodation available to a person with a disability or a person with a disability using a trained guide dog or service animal at a place or in a way that is different from the place or way that the service is offered to the public in general, in order to serve the person.”⁴⁷

Arranged service is fair, however, only when neither the same service nor reasonable accommodation is possible and the choice is between arranged service and no service.⁴⁸

In addition, the Washington State Human Rights Commission (WSHRC) has the power to grant exceptions in specific instances to any rules it adopts.⁴⁹ Requests for exceptions must be in writing and filed with the clerk of the WSHRC.⁵⁰

⁴² WAC 162-26-070(6).

⁴³ WAC 162-26-040(2).

⁴⁴ WAC 162-26-070.

⁴⁵ WAC 162-26-080(4); See also: DSHS Administrative Policy No. 7.02., *Equal Access to Services for Individuals with Disabilities*, (Feb. 24, 2009), 3. Available at: www.dshs.wa.gov/word/dao/AP-07-02.doc.

⁴⁶ WAC 162-26-060. Relevant subsection repealed by 99-15-025 § 162-26-060 (1999).

⁴⁷ WAC 162-26-090, repealed by 99-15-025 (1999)

⁴⁸ *Id.*

⁴⁹ WAC 162-06-030.

⁵⁰ *Id.*

May family members or friends of the patient be used to provide interpreter services when that is the auxiliary aid or reasonable accommodation that is needed?

Generally no. Family members or friends of the patient, or other unqualified interpreters, should not be used unless the patient so chooses, without any coercion, after being fully informed of the availability of qualified interpreters at no cost to the patient.⁵¹

Even if the failure to provide an appropriate auxiliary aid, including a qualified sign language interpreter, for patients with hearing, speech or visual impairments did not constitute prohibited discrimination, should a physician nonetheless do so?

Yes, in order to assure that informed consent to treatment is obtained. If the physician's failure to provide an appropriate auxiliary aid or a qualified sign language interpreter were to result in a failure to obtain informed consent, the physician could be exposed to civil liability under the medical malpractice laws.

⁵¹ 28 C.F.R. § 35.160(c)(2)(ii) (Title II); 28 C.F.R. § 36.303(c)(3)(ii). See also DHHS Guidance, *supra*. Available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html>. .