

November 16, 1999 [Web posted Dec. 15, 1999]

Thomas E. Perez, Director
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Room 509F, HHS Building
Washington, DC 20201

Re: Guidance on LEP Issues in Health Care

Dear Tom:

Last July, organizations, including the National Health Law Program, submitted suggestions for strengthening the Office for Civil Rights' Guidance Memorandum on "Title VI Prohibition Against National Origin Discrimination -- Persons with Limited-English Proficiency." In this letter, NHeLP provides additional suggestions on: the target audience for a revised guidance, circumstances for triggering heightened scrutiny of federal fund recipients, and use of qualified interpreters. These three areas are key to determining the nature and extent of services that will be provided to LEP patients.

Target audience for the a revised guidance

A revised Guidance should be addressed to federal fund recipients, as well as OCR staff, and include managed care organizations and their contractors.

OCR's January 1998 Guidance is addressed only to OCR staff. It is equally important that federal fund recipients be included in OCR's instructions for Title VI. Over the last two years, NHeLP has spoken with a number of health care providers, and the confusion regarding Title VI

is startling. This can be addressed, in part, through a widely disseminated, revised Guidance that speaks directly to federal fund recipients. Such a Guidance would also be helpful to enforcement efforts because it would probably receive greater deference from mediators and judges who may be reviewing a recipient's actions.

In addition, the Guidance should expressly include managed care organizations (MCOs) and their contractors and subcontractors. It should be no subterfuge for health care providers that they are receiving their payments from an MCO rather than directly from the government.

Benchmarks for Triggering Heightened Review

A revised Guidance should include a numeric/proportional benchmark that OCR staff will use to determine when to engage in primary reviews and careful scrutiny of federal fund recipients: 100 persons or 5 percent of the population in the recipient's service area, whichever is less

Title VI of the Civil Rights Act protects individuals, and the Guidance should recognize this.

The Guidance should also describe OCR's expectations for the provision of language services in situations where it is reasonable to expect heightened preparedness on the part of the federal fund recipient. To accomplish this, a revised Guidance should provide OCR staff with a clear benchmark for engaging in primary review or careful scrutiny of a federal fund recipient. While federal fund recipients would not be subjected to this threshold directly (as they would through an Administrative Procedure Act rule), this would place them on notice of the benchmarks that will be used by OCR as they review the provision of general services and written materials.

We suggest the benchmark that was included in the August 1993 draft regulations -- 100 persons or 5 percent of the population in the recipient's service area -- because:

- It is consistent with the threshold that has been used by OCR when applicants first seek to become federal fund recipients in the Medicare program. During pre-award clearance reviews, OCR staff has been instructed to collect from the applicant and review data on: "If the applicant's service area has more than 100 LEP persons, the applicant's methods for serving LEP clients, including whether the applicant has bilingual contact staff." Office for Civil Rights, Investigative Procedures Manual, Chapter 18, p. 11. For more discussion of the role of the Investigative Procedures Manual and the subsequent Case Resolution Manual, see U.S. Commission on Civil Rights, The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality (Vol. II) at 155-61 (Sept. 1999).

- It is consistent with the thresholds contained in other civil rights provisions. The Voting Rights Act refers to: "any group which comprises either 100 persons or at least 5 percent of the population." Pub. L. No. 102-344, 106 Stat. 921 (Aug. 26, 1992). Enforcement of the same standard in health care settings will provide continuity to civil rights enforcement and is all the more compelling because the health care entities are recipients of federal taxpayer subsidies.

- It builds upon what hospitals already should be doing to meet Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards, which notably, require hospitals to "have a way of providing for effective communication for each patient served...." JCAHO, 1997 Comprehensive Accreditation Manual for Hospitals, §§ RI and PF (1996) (emphasis added). If a patient cannot understand written notices and postings, then the patient must be informed of his or her rights in a manner that he or she can understand. Id. , RI-15. JCAHO standards also require hospitals to offer education to patients and families to enable them to meet ongoing health care needs. Id. , PF-6. Explanations and instructions must be presented in ways that are understandable to patients and their families, taking into account their culture and language.

Id.
, PF-9-10.

- A threshold tied simply to 10 percent or 5 percent of the population fails to reflect the diverse and changing immigration patterns in the United States: The national origin minorities immigrating to the United States are introducing increasing numbers of languages beyond Spanish, with over 300 different languages currently spoken. These trends will continue in the future. From our work in California, for example, we understand that application of a 5 percent threshold in a diverse county such as Alameda County would produce only two languages: Spanish and Vietnamese, thus leaving thousands of other non-English speaking immigrants without access to information needed to access health services. From now on, health care providers simply must account for this language diversity if they are going to provide safe, informed health care.

- A number of states have recognized the importance of health care and providing language access to LEP communities by implementing Medicaid managed care programs that use thresholds that are similar, if not identical, to the 100 person/5 percent benchmark. A number of states are using lower thresholds, without undue cost or administrative burden. A revised Guidance should not represent a retrenchment from these standards. To give some examples:

Washington:

In order to assure equal access for non-English speaking Members and Members with disabilities: a. The Contractor and the PCP shall assure that interpreter services are provided for Members with a primary language other than English for all interactions between the Member and the Contractor or any of its providers including, but not limited to, all appointments with any provider for any covered services, emergency services, and all steps necessary to pursue the grievance procedure.... At a minimum the Contractor shall translate all written materials generally available to Members for the most commonly used languages in the service area as set forth in Exhibit C. [Exhibit C lists each county with the languages that must be translated. Requirements vary from zero - in counties where there are fewer than 100 non-English speaking members - to thirteen different language in King County.] Washington Basic Contract, pages 15-16, Exhibit C.

Oregon:

"Measurement Standard Contractor shall have appropriate written information in the primary language of each substantial population of non-English speaking OMAP Members enrolled with Contractor. A substantial population is 35 non-English speaking households enrolled with Contractor which have the same language." Oregon 1998 RFA, 8.4, page 36.

California:

"The Contractor will provide 24 hour access to interpreter services for all Members at all provider sites within the Contractor's network either through telephone language services or interpreters.... The Contractor will provide linguistic services [at key points of contact] to a population group of mandatory Medi-Cal eligibles residing in the proposed Service Area who indicate their primary language as other than English and who meet a numeric threshold of 3,000, or who meet the concentration standards of 1,000 in a single ZIP code or 1,500 in two contiguous ZIP codes." California Contract, 6.10.2, page 110.

Rhode Island:

"Interpreter Services If Contractor has more than fifty (50) members who speak a single language other than English as a primary language, Contractor agrees to make available general written materials, such as its member handbook, in that language. If Contractor has more than one-hundred (100) members or 10 percent (10%) of its Rhode Island care membership (whichever is less) who speak a single language other than English as a primary language, Contractor agrees to make available interpreter services in that language." Rhode Island Contract, 2.06.02.04, pages 28, 29.

Vermont:

"Interpreter Services" If the Contractor has more than one hundred (100) VHAP members who speak a single language other than English as a first language and are unable to read English at a sixth grade level, Contractor shall make available general written materials, including its member handbook, in that language." Vermont Contract, 2.4.12.4, page 28.

Hawaii:

"Plan's Responsibilities" The booklet or pamphlets shall be prepared in at least the following languages" English, Ilocano/Tagalog, Chinese, Samoan, Vietnamese, Korean." Hawaii RFP, 48.020, pages 71-72.

Massachusetts:

"Customer Services" Materials shall be written in English, Spanish, Portuguese, Creole, Khmer, Vietnamese, Braille, and any other language, as determined appropriate for Enrollees, by the Division." Massachusetts MH/SAP Contract, Appendix B, page 24.

Nebraska:

"Client handbooks" shall be made available in at least the following languages: Spanish, Vietnamese, Laos shall be made available, if OPTIONS has Clients who are conversant only in those languages." Nebraska Mental Health Contract, Addendum A.

Missouri:

"Multilingual Services" If the health plan has more than two hundred (200) members or five (5) percent of its program membership (whichever is less) who speak a single language other than English as a primary language, the health plan must agree to make available general services

and materials, such as its member handbook in that language...." Missouri RFP, 6.6, page 31.

Oklahoma:

"Languages Other Than English— If Contractor has more than 100 members or ten percent of its membership (whichever is greater) who speak a language other than English as a first language, Contractor must make available written materials (e.g., member handbook) and interpreter services in that language." Oklahoma Contract, 2.11, page 38.

Maine:

"Contractor must make available interpretive services for all enrollees, and written materials for other languages when two hundred (200) enrollees, or five percent (5%) of the enrolled population in the Health Plan, whichever is greater, are non-English speaking and share a common native language." Maine Contract, page 16.

Arizona:

Member information and services "shall be provided in English and a second language when 200 members or 5% of the Contractor's enrolled population, whichever is greater, are non-English speaking."

Qualified Interpreters

The Guidance include clear discussion on the use of qualified interpreters.

The Guidance should ask all federal fund recipients to have a written policy on the provision of services to LEP populations, which includes explanation of how interpreter services will be provided within reasonable time frames. Federal fund recipients should be required to assure that the interpreters it uses are qualified -- bi-lingual and trained in medical terminology and ethics. For this reason, minors should not be used to interpret. The only exception to this would be emergency or urgent situations and, then, a qualified interpreter should be secured as soon as possible. Moreover, family and friends generally should not be used to interpret. An exception to this rule might be allowed when a patient insists on using a family member or friend and if: an offer of the no-cost services of a qualified interpreter has been made, the offer has included an explanation of the need for accurate translation of medical terms, and the recipient monitors the situation to assure that the patient understands vital communications. Finally, the recipient should assure that interpretive services are available within reasonable time frames at critical points during the patient's visit. The California Medi-Cal managed care program provides helpful instruction with its requirement that linguistic services be provided at "key points of contact," which include medical (telephone, face to face encounters with providers) and non-medical (membership services, appointments) encounters.

Thank you for your consideration of these comments. Please do not hesitate to contact us if you have questions.

Sincerely,

Jane Perkins
Director of Legal Affairs

Doreena Wong
Staff Attorney