Title VI of the Civil Rights Act of 1964

How Planning Can Lower Health Care Providers' Liability Risk

By Bruce L. Adelson, Esq.

This White Paper was Commissioned by CyraCom International, Inc.

Introduction

Health care providers have more at stake concerning their compliance with Title VI than virtually any other recipients of federal largess. Providers' failure to make available effective language assistance is inextricably linked to issues of standard of care, negligence, and medical malpractice. Simply put, if a patient does not understand medical information conveyed by health care professionals because of a language barrier, there could be no informed consent to a specific medical procedure. Without informed consent, it is axiomatic that providers could face significant liability for negligence and malpractice, plus monetary damages for national origin discrimination pursuant to Title VI of the Civil Rights Act of 1964.

This paper will address how health care providers can reduce their liability risk by developing and implementing LEP or Language Assistance Plans. Such plans are essential roadmaps for providers, their staff and their patients concerning the specifics of providers' compliance. The active use of such plans, which comply with applicable federal law, can substantially assist providers with their Title VI compliance, can reduce the risk of federal investigation, and increase the odds of winning a lawsuit alleging medical malpractice and civil rights violations.

President Lyndon Johnson's enactment of the Civil Rights Act of 1964 represented the federal government's response to a series of tumultuous events spanning more than a decade - the landmark 1954 *Brown v. Board of Education* U.S. Supreme Court school integration decision, massive and bloody resistance through much of the South to the Court's mandate, and President John F. Kennedy's 1963 assassination.

Today, much in America has changed since 1964. However, the Civil Rights Act remains vital, with its Title VI having garnered significant attention over the past several years. With historic growth among language minority groups in America, Title VI has substantial contemporary implications for the health care industry, perhaps more than ever before. This Title requires that all health care providers receiving virtually any kind of federal financial generosity, including Medicare and Medicaid reimbursement, offer oral and written language assistance to limited English proficient, or "LEP," individuals who speak English "less than very well" or "not at all." This language assistance has many components: utilizing trained, proficient medical interpreters, translating "vital" documents into various languages, using bilingual staff for specific tasks, retaining a telephonic interpretation service, instituting Title VI training for all personnel, and developing and implementing LEP or Language Assistance Plans.

Limited English Proficiency in America

Title VI's language mandates are especially relevant today, as the non-English speaking population in the United States continues growing. Census data reveal the size of America's non-English speaking population while also demonstrating the daunting challenge of providing the language assistance required by federal law.

In 2007, according to the U.S. Census Bureau, more than 54 million people living in the U.S., nearly 20 percent of the country's total population, spoke a language other than English at home while 24 million of these same people spoke little or no English. Of the country's non- English speaking population, more than 16 million Spanish-speaking people have virtually no ability to write, speak, or read English.

Approximately thirty percent of Spanish speakers and twenty-five percent of all Asian language speakers in the U.S., identify themselves as being LEP, according to the 2000 Census. Of course, these numbers have likely grown since the last Census's release.

Data from the 2010 Census will be made available during the 2010 calendar year. Expectations are that new census data will reveal an increase in the United States' LEP population, further turning up the heat on Title VI compliance given the larger number of people legally entitled to language assistance by federally subsidized health care providers.

CYRACOM

Title VI in Brief

By its own words, Title VI specifically prohibits discrimination based on race, color or national origin by federal financial assistance recipients. This part of the Civil Rights Act was intended to ensure "that the funds of the United States are not used to support racial discrimination." (Comments of Senator Hubert Humphrey in Senate debate on passage of the Civil Rights Act of 1964, 110 Congressional Record 6544).

Section 601 of Title VI states that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This section prohibits intentional discrimination by recipients of federal financial assistance.

Section 602 directs federal agencies that give federal financial assistance "to effectuate the provisions of [Section 601]… by issuing rules, regulations, or orders of general applicability." For example, U.S. Department of Justice (DOJ) regulations promulgated pursuant to Section 602 forbid federal aid recipients from discriminatory conduct that disproportionately impacts individuals because of their race, color, or national origin. Section 602 empowers federal agencies to terminate federal funding to a program, or otherwise sanction such a program, that is found to have violated Title VI. 42 U.S.C. §2000d-1.

In 2000, President Clinton signed Executive Order 13166, which requires all federal agencies to adopt regulations and guidance for their financial assistance recipients about providing language services to LEP individuals. This Order does not create any new individual rights. Those were created when President Johnson enacted Title VI in 1964. Rather, EO 13166 directs federal agencies to help their financial assistance recipients understand the law's mandates and their federal legal obligations.

Two years later, the DOJ issued its LEP regulations – Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons ("DOJ's Guidance"). Other federal agencies modeled their regulations on DOJ's. For example, the U.S. Department of Health and Human Services ("HHS") issued its Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons in 2003.

Title VI applies to all recipients of federal funds or assistance, such as states, counties, municipalities, their myriad agencies and departments, and health care providers. Federal financial assistance for Title VI purposes is much more than cash or direct grants. Such assistance includes:

- use or rent of federal land or property at below market rates,
- Medicare and Medicaid reimbursements,
- equipment,
- grants,
- economic stimulus money from the recently enacted American Recovery and Reinvestment Act of 2009,
- federal training, and
- loan of federal employees.

Medical Malpractice and Intentional Discrimination

To win a Title VI case in federal or state court, plaintiffs must prove they are the victims of intentional discrimination by a federally subsidized organization. While such proof may at first blush appear difficult to show, federal law says otherwise. Sometimes, intent is very obvious. Hostile statements by decision makers and service providers, such as 'Go back to your country,' 'Why don't you learn English,' 'This is an English-first country,' and actions that remove minority groups from the decision-making process can be textbook examples of intentional discrimination.

Under federal law, the existence of intentional discrimination is determined by an in-depth examination of all relevant facts and developments, the "totality of the circumstances," according to the federal courts.

Intentional discrimination can be shown by a change in established procedures. Racial slurs and insults directed at a racial or language minority group or individual can also be indicative of racial hostility and thus, discriminatory intent. The Epileptic Foundation. v. City and County of Maui, 300 F. Supp 2d 1003, 1014 (D. Hawaii, 2004).

Repeated deviations from established policies and procedures can be a well-accepted example of discriminatory intent.

For example, in the health care setting, a medical professional's regular refusal of medical interpreters for LEP patients while instead relying upon friends or relatives or even that professional's own untested language abilities can be evidence of discriminatory intent, particularly if this is in violation of the provider's language assistance policies. The professional's regular reliance upon untested people to provide language assistance and to explain his medical advice and diagnoses, also implicates his and his institution's medical malpractice liability. Simply put, the provider is legally obligated ûı make sure that staff "sticks with the program," and uses the resources made available by the hospital to provide language assistance.

The provider could be further at risk if the provider takes no action to educate the professional in question concerning Title VI compliance and curb his regular use of untrained people to provide language assistance. Federal law is clear that "choice implicates intent" in Title VI cases. *Bryant v. Independent School District No. 1-38*, 334 F.3d 928, 930-931 (10th Cir., 2003)

In addition, a provider's doing nothing or virtually nothing to provide non-English language assistance can be evidence of intentional discrimination against LEP people and, therefore, a legally actionable violation of Title VI.

For example, in Almendares v. Palmer, 284 F. Supp 2d 799 (N.D. Ohio, 2003), government agencies knew that many of their customers needed Spanish-language assistance. However, plaintiffs claimed the defendants did virtually nothing to assist them in Spanish.

Plaintiffs alleged that defendants' continued failure to provide almost no Spanish-language assistance to LEP individuals who needed such assistance to access the desired, federally subsidized government service (food stamps) could be intentional discrimination on the basis of national origin or language. The Almendares court found that the plaintiffs' allegations about this continuing failure were sufficient to show intentional discrimination and defeat defendants' attempt to dismiss the case.

LEP Plans - Lowering and Managing Liability Risk - Step-by-Step

Invariably, when DOJ takes action against a federally subsidized organization for failing to provide adequate language assistance to LEP people, the Department requires the organization to implement detailed language assistance plans and effective training. Often, the time frame for instituting these requirements is short, perhaps 60-120 days from the signature date on any consent agreement. This means that the offending organizations must act very expeditiously, quicker than if they had acted on their own, all while under the ever watchful eye of federal law enforcement officials.

The process for developing and implementing LEP or Language Assistance Plans is very involved, requiring input and buy-in from all of a provider's departments, agencies, and executive leadership. When done properly, the process is also lengthy since compliant, detailed, well-developed plans can take many months to complete.

The following four-step process can inform the language assistance planning process and start federally subsidized health care providers on the path toward legal compliance and effective liability risk management.

Step I

The first, most essential step in developing a language assistance plan is utilizing DOJ's four-factor analysis. Using this analysis is also the first step in defusing a potential intentional discrimination claim since it can inform providers' entire language assistance process.

1. The number or proportion of LEP persons eligible to be served or likely to be encountered by the grantee;
2. The frequency with which LEP individuals come into contact with the program;
3. The nature and importance of the program, activity or service provided by the program to people's lives; and
4. The resources available to the grantee/recipient and costs.

The fourth factor does not mean that a federally subsidized health care provider can legally opt to not offer language assistance because of its cost. Simply put, if the provider accepts federal financial assistance, it MUST provide language assistance. The cost of language assistance and the provider's resources come into play in the planning process in deciding how to provide assistance, not whether to do so. That issue is resolved as soon as the provider accepts federal funding.

Step II

After using the four-factor analysis to inform the provision of language assistance, providers should look to HOW they provide such assistance - what tools and methods are used in offering this aid:

- How are in-person interpreters and bilingual staff used to provide language assistance, (For example, are trained interpreters utilized to give directions at the information desk or are they used for interactions with patients by medical staff?);
- How does the provider assess language assistance needs across its departments, clinics, and facilities?
- How does the provider use its telephonic interpreter service?

Providers should consider using all of the above, trained medical interpreters, bilingual staff, community volunteers, language services companies, and translated documents, in meeting their federal obligations. The use of all such delivery methods is highly advisable since Title VI compliance and language assistance is multi-faceted. The language assistance planning process will reveal how best to provide language services for various contingencies, involving such examples as emergency room visits, in-patient services, information desk inquiries, and billing issues.

Step III

To inform a provider's staff and medical professionals most effectively about the Title VI mandate and language assistance policies, authoritative and effective Title VI mandatory training must be given to all staff that interacts, or may possibly interact, with the public. This effectively covers EVERYONE. To make the greatest impact on staff, the training should be done by someone with sufficiently authoritative credentials and expertise for all staff, including management, to accept and incorporate the realities of Title VI requirements into their daily procedures and policies.

Step IV

In evaluating their Title VI compliance and developing a compliant language assistance plan, providers should develop procedures that address the following:

- NOT using minor children to interpret or translate, except in emergencies;
- Using friends, relatives, or other third parties to interpret if LEP patient waives the Title VI language assistance right and signs a translated waiver form that the provider's interpreter explains in the patient's native language;
- NOT telling people they need to learn English to access medical services;
- NOT using untrained, untested staff to interpret or translate;
- NOT tolerating racially insensitive or hostile comments from staff to LEP people; and
- NOT having staff tell people to come back another day because language assistance is immediately unavailable

Comments and practices as listed above can be legally problematic, especially a provider's permitting minor children to interpret for their LEP parents. This can be a significant liability problem and an investigative red flag for the federal government. Such a practice should be routinely disfavored.

The number of people in the United States who do not speak English continues to grow. The imminent release of the 2010 Census will likely confirm this growth while also illustrating the ongoing challenges of federally subsidized health care organizations to provide language assistance.

With this growth will come an increased need for language services as well as greater awareness by limited English proficient people of their rights. This awareness will result in an increased understanding of the confluence between medical malpractice and Title VI national origin discrimination, with substantial, expensive consequences for the unprepared hospital, clinic, or medical office. The health care industry can best address its federal legal obligations and lower its risk of being held liable for Title VI intentional discrimination by adopting certain policies and plans to obey the language assistance requirements of Title VI of the Civil Rights Act of 1964. This would truly be the best kind of preventive medicine for everyone.

About Bruce Adelson

Bruce L. Adelson, Esq., is a former Senior Attorney for the U.S. Department of Justice, Civil Rights Division where he had nationwide enforcement responsibility for Title VI of the Civil Rights Act of 1964. Now Chief Executive Officer of Federal Compliance Consulting, Bruce provides strategic consulting, risk management assessments, training, and technical assistance regarding compliance with federal law. Bruce is a nationally recognized expert concerning Title VI, federal voting laws, and federal mandates for non-English language assistance. Bruce is also the author of *Title VI, Limited English Proficiency and the Public Lawyer* and *Minority Language Election Rules and the Public Lawyer*, What You Need to Know to Comply With a Broader Americans with Disabilities Act, all published by the American Bar Association, and *Brushing Back Jim Crow - The Integration of Minor League Baseball in the American South* (University of Virginia Press, 1999). Bruce can be reached at badelson1@comcast.net and 301-762-5272.

CyraCom Compliance Expertise

CyraCom assists clients to demonstrate compliance by aiding in the development and implementation of a comprehensive language program.

For more information, visit http://www.cyracom.com/Compliance

Download More Resources

In addition to resources on Language Assistance Plans, CyraCom also offers information on:

- Healthcare Interpreter Certification
- Language Services and Patient Safety
- Comparison between in-person interpreters, telephonic interpreters, and bilingual staff (August 14, 2009 webinar)
- How to comply with the legal requirements of language access

Resources can be downloaded from www.cyracom.com/resources

About CyraCom

CyraCom is the leading provider of innovative language solutions for healthcare including Over-the-Phone Interpretation, Video Interpretation, Translation and Localization, and Assessment and Training. CyraCom's language services contribute to:

- Improved patient flow for Limited English Proficient patients
- Improved quality patient care and better health outcomes
- Meaningful access to health services and improved patient satisfaction
- Compliance with federal & state regulations

For more information, visit http://www.cyracom.com or call (800) 713-4950 ext. 1.

ISO Certified Quality

9001:2015, 13611:2014, 17100:2015
Quality Management System
Guidelines for Community Interpreting
Translation Services