



## DOCTORS' EXPLANATIONS CAN'T GET LOST IN TRANSLATION

Laws mandate sign language, foreign language interpreters

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Federal law prohibits certain health care providers from denying care to patients based on their need for language assistance. The Americans with Disabilities Act prohibits providers that offer care in a place of public accommodation from denying services to individuals because of their disability. Hospitals, physicians' offices, health centers and other health care providers that accept patients from the general public are considered places of public accommodation under the ADA. In addition, Title VI of the Civil Rights Act of 1964 says that health care providers that receive federal financial assistance, other than only Medicare Part B payments, cannot deny individuals with limited English proficiency meaningful access to health care services based upon their inability to speak English.

To provide appropriate care, health care providers must be able to communicate with patients who are hearing impaired or who speak limited English. What's difficult for providers covered by the ADA and/or Title VI is ascertaining the effort they must make to facilitate this communication. Recent case law and other guidance suggest that the burden on a provider may be con-

siderable and that the size of the provider will rarely provide an exemption.

### Sign Language Interpreters

Under the ADA, providers cannot deny services to hearing impaired patients simply because they do not have language assistance (i.e. qualified interpreter, note taker, etc.) readily available to effectively communicate with the patient. The ADA also prohibits providers from passing the cost of the language assistance on to the patient.

However, the ADA does not require a sign language interpreter every time services are provided to a hearing impaired patient. Providers are required only to ensure that hearing impaired patients are able to effectively communicate with their health care provider. How the provider accomplishes that is not mandated by the ADA; but if the communication is determined to be ineffective, the provider's choice will be subject to scrutiny and a violation of the ADA may be found. To determine what sort of language assistance is appropriate, providers should consult with the patient, take into consideration the patient's abilities, and recognize that the type of language assistance will likely vary depending on the nature and complexity of the communication involved. A more complex communication (i.e. pre-surgery instructions or informed consent) would likely require the provider to obtain a sign language interpreter, whereas the use of written notes would likely suffice for simpler communications (i.e. routine examinations).



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Small providers and solo practitioners have argued in court that providing language assistance is financially burdensome, especially in light of decreasing reimbursement rates from government and commercial payors. The ADA says that if a health care provider demonstrates that offering language assistance would fundamentally alter the nature of the services being offered or result in an undue burden (i.e. a significant difficulty or expense), then the provider can substitute an alternative type of language assistance, if one exists. In determining whether the language assistance would cause an undue burden, providers need to consider, among other things, the nature and cost of the language assistance needed and the provider's overall financial resources. While this may suggest that small providers will not be required to hire a sign language interpreter for a patient, a New Jersey case recently demonstrated how difficult it is for providers to demonstrate an undue burden. The court in *Gerena v. Fogari* held that it was not an undue burden for a solo

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physician to pay more for a sign language interpreter than he was receiving from the patient's insurer. While this case may be an aberration, it highlights that all providers must ensure appropriate communication with hearing impaired patients.

### Foreign Language Interpreters

Title VI requires health care providers to provide patients with limited English proficiency with meaningful access to their services. A provider must apply a four-factor analysis to determine what language services it must provide to patients. The provider must consider: (1) number or proportion of limited English proficiency patients served or encountered in the geographic area; (2) frequency with which these types of patients are served; (3) the nature and/or urgency of the provider's services (i.e. emergency surgery, routine examinations, etc.); and (4) a provider's available resources and costs.

Specifically, a health care provider must consider the predominant languages spoken in the area served and the number of patients speaking only those languages. For example, a provider in an area with a significant population of Chinese-speaking individuals may be required to provide Chinese-speaking interpreters. In other geographic areas, Span-

ish may be the predominant language and Spanish-speaking interpreters may be required.

Smaller providers with limited budgets are not expected to provide the same level of language services as larger providers with greater resources. A provider offering only outpatient services has a lesser burden than a hospital. If the service being offered is not urgent, and the provider's resources and frequency of contact with low English proficiency patients are low, then such providers may not be required to employ staff interpreters. Instead, the provider could use telephonic interpreter services or share language assistance services with other providers. Health care providers have the burden of determining the level to which language services are necessary and reasonable and of providing such services in a timely manner.

Providers often have patients who want to use a family member or friend as their interpreter. In these circumstances, providers need to inform the patient that he has the option of receiving outside interpreter services at no cost. A provider cannot rely on the patient's family or friends to provide interpreter services if the patient wants an independent interpreter. If a friend or family member is

suggested as an interpreter, the provider must consider whether the interpreter is competent, appropriate, will maintain confidentiality, and whether the interpreter has a conflict of interest. If the interpreter is determined to be inappropriate, the health care provider should strongly recommend the use of an independent interpreter.

Providers have some flexibility in determining whether they have to provide sign language and foreign language interpreters for patients. Under both the ADA and Title VI, providers are allowed to consider their resources when determining how to ensure meaningful access. The predominance of patients speaking a particular foreign language in the community will increase the obligation of the provider. In both cases, covered providers should have a process in place for obtaining some type of language assistance for its hearing impaired and low English proficiency patients. As for sign language interpreters, recent case law suggests that the bar is high for demonstrating that the provision of sign language interpreters for hearing impaired patients would be an undue burden. Providers must identify the language needs of their community and patients and be prepared to provide appropriate assistance. ■