Your patient doesn’t speak English — what now?

BY CLIFFORD WARREN LOBER, MD, JD

Every month, Dermatology World covers legal issues in “Legally Speaking.” Clifford Warren Lober, MD, JD, presents legal dilemmas in dermatology every other month. He is a dermatologist in practice in Florida and a partner in the law firm Lober, Brown, and Lober.

Irene: Bryan, I just heard that I need to provide a translator for my patients who have difficulty speaking English. What’s going on?

Bryan: On May 18, 2016, a final rule was issued by the Department of Health and Human Services to implement Section 1557 of the Patient Protection and Affordable Care Act (“Obamacare”) which addresses nondiscrimination. It requires, among other provisions, that entities which receive funds from Medicare and/or Medicaid take “reasonable steps to provide meaningful access” to patients with limited English proficiency (LEP) so that they can access or benefit from the services you provide.

Irene: Who are “limited English proficiency” patients?

Bryan: The final rule defines a person with limited English proficiency as “an individual whose primary language for communication is not English and who has a limited ability to read, write, speak, or understand English.”

Irene: What do I have to do to comply?

Bryan: Although there are several specific requirements, the regulations implementing Section 1557 are intended to be “flexible and context-specific.” Prior to the issuance of the final rule, the Office for Civil Rights (OCR), which enforces the non-discrimination rule, stated that as a “starting point” four key factors should be taken into account:

1. the number or proportion of individuals with LEP eligible to be served or likely to be encountered in your practice,
2. the frequency with which LEP individuals come into contact with your practice,
3. the nature and importance of the services and communications you provide, and
4. the resources available and the cost of providing services.

What constitutes effective, reasonable compliance by a solo or small medical practice may not be the same for a larger practice. The final rule explicitly states that it will be determined “on a case-by-case basis, whether entities have taken reasonable steps to provide meaningful access” and that “all relevant factors” will be considered in making that assessment.

Irene: You mentioned that there are specific requirements. What are they?

Bryan: Significant, vital publications and communications must contain a nondiscrimination notice in English as well as taglines (which are short statements in non-English languages) in at least the top 15 languages spoken by individuals with LEP in your state. The nondiscrimination notice and taglines must be displayed in a conspicuous location in your office and be posted on your website. When appropriate, you must provide a qualified interpreter at your expense as well as translations of significant or vital written information into the LEP individual’s language. Entities with 15 or more employees must have a designated compliance coordinator and a written process for handling grievances.

Suggested Topics

If you have any suggestions for topics to be discussed in this column, please email them to loberc@gmail.com.

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The development and implementation of a language assistance plan, although not required, is recommended since the final rule requires that a compliance assessment must “consider, if relevant, whether the entity has developed and implemented an effective written language access plan.” That plan “need not be long, complex, or burdensome.”

**Irene:** Can I charge the patient for translation services?

**Bryan:** Absolutely not. You cannot charge an LEP patient for the cost of an interpreter or for any additional expense you incur when providing written translations of vital written material.

**Irene:** Bryan, the cost to provide these services is quite expensive in my area!

**Bryan:** There may well be instances in which the cost of providing interpretation or translation services exceeds the amount you will be paid for providing medical services. However, you are still required to make significant or vital information and communications available to LEP patients in their language. The OCR has stated that “if written translation of certain documents would be so financially burdensome as to defeat the legitimate objectives of the program, the translation of the written materials is not necessary.” Given the cost of these providing these services relative to the resources of your practice, however, I would be reluctant to assert that providing a qualified interpreter or translating significant documents would be “so financially burdensome.”

**Irene:** Must I provide an on-site interpreter if the patient demands one?

**Bryan:** This depends upon the particular situation. Oral interpretation “can range from on-site interpreters for critical services provided to a high volume of LEP persons, to access through commercially available telephonic interpretation services.” Again, the four factors previously mentioned provide guidance.

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**Key points**

1. Entities that receive funds from Medicare and or Medicaid must provide access to individuals with limited English proficiency (LEP).

2. You must take “reasonable steps to provide meaningful access” to information that affects the ability of LEP patients to access or benefit from the services you provide.

3. The implementing regulations are flexible and context-specific. What constitutes compliance for a large medical practice may not necessarily be the same for a solo or small practice.

4. Significant communications must contain a nondiscrimination notice in English as well as taglines in at least the top 15 languages spoken in your state. This notice and the taglines must be posted in your office and on your website.

5. Entities with 15 or more employees must have a designated compliance coordinator and a written process for handling grievances.

6. You may not charge the LEP patient for translation or interpretation services and may not require him or her to use a friend or relative.

7. If the patient elects to use a friend or relative, concerns may arise as to the accuracy of translation as well as confidentiality, privacy, and conflict of interest issues.
Irene: If the patient has a relative or friend who speaks their language, can I require that they use that person to translate?

Bryan: You cannot require an LEP patient to use a friend, relative, or companion or to provide their own interpreter. If the patient wants to use their relative or friend, concerns may arise about the competency of that person to accurately translate medical information as well as potential privacy, confidentiality, and conflict of interest issues. In a life-threatening emergency, however, the use a friend or relative is acceptable.

Irene: Do I need to insist that an interpreter I select be “certified”?

Bryan: The final rule states that “licensure and certification are neither necessary nor sufficient evidence of qualification” and recognizes that “many interpreters who are currently unlicensed and uncertified are competent to translate at a level that would meet the requirements of Section 1557.” You are, however, required to use a “qualified interpreter” who “is able to interpret effectively, accurately, and impartially,” who uses “any necessary specialized vocabulary, terminology, and phraseology,” and who adheres to ethical principles including client confidentiality.

Irene: You mentioned having a language assistance plan. What should be in that plan?

Bryan: A good plan would include confirmation that you have posted the required notification of nondiscrimination and taglines in your office and on your website. It would describe how you will identify LEP individuals, your response when an LEP patient calls or shows up in your office, the availability of translation services, staff training, and measures to monitor and update the plan. The plan should also identify how you will determine what information is “vital” for your patients.

Irene: You mentioned that vital or significant information must be made available to LEP patients in their spoken language. How do I determine what is “vital” or “significant?”

Bryan: This will depend upon the importance of the information or service and the consequences to the LEP patient if it is not provided accurately or in a timely manner. The final rule draws no firm, bright-line determination as to which specific services or information are “vital” or “significant.”

Irene: Can you give me examples of publications which would not be considered significant or vital?

Bryan: Appointment cards, business cards, and envelopes are often not considered “significant.” Furthermore, small-sized documents (such as postcards or pamphlets) are only required to contain a nondiscrimination statement in English and taglines in the top two languages spoken by LEP individuals.

Irene: Where can I get the telephone number of someone competent to provide telephonic interpretation?

Bryan: You may get the telephone number from your local hospital, county or state medical society, or even a colleague who has already taken the time to find this information. If all else fails, you can get the information by performing an internet search.

Irene: Is there anything else I should consider?

Bryan: Yes. States may impose additional requirements on translators and interpreters. I will check and see if there are any in our state.

Irene: Thanks, Bryan! dw