

Understanding Civil Rights Protections for Limited English Proficient (LEP) Individuals Information for RWHAP Part A Planning Councils and Staff May 2020

Introduction: Individuals who are limited English proficient (LEP) are protected from discrimination in programs and services under federal civil rights legislation and an Executive Order, as interpreted through federal guidance. This brief document summarizes the responsibility of service providers receiving federal financial assistance to provide access to care for people who speak limited English. This document briefly summarizes the legal background for LEP protections, and explains the rights of LEP individuals and the responsibilities of providers of health and human services, including Ryan White HIV/AIDS Program (RWHAP) recipients and subrecipients. Part A Planning Councils and their staff need to understand these requirements as part of their responsibility for ensuring a comprehensive and high quality system of care that meets all people living with HIV in their jurisdictions.

Definition of limited English proficiency (LEP): LEP persons are persons who, as a result of national origin, “do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.”¹ These individuals are sometimes called English language learners (ELLs).

Federal requirements: The federal requirements are provided in the LEP Guidelines from the Office for Civil Rights within each of the various cabinet agencies. Department of Health and Human Services (HHS) LEP Guidance (often referred to as the “LEP Guidelines”) apply to all recipients of HHS awards and their subrecipients.

What determines which providers are covered: Providers are covered if they receive “Federal financial assistance,” which includes “any grant, loan, or contract (other than a contract of insurance or guaranty).”²

Legal background: Current protections for LEP persons are based on federal legislation, a Supreme Court case, and a Presidential Executive Order, which led to development of LEP guidelines.

- **Legislation:** Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. Section 601 states that:

"No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

¹ Definition widely used by federal agencies. See, for example, <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/about/civilrights/?cid=stelprdb1262663>.

² See [https://www.hhs.gov/civil-rights/for-individuals/faqs/index.html#limited-english-proficiency-\(lep\)](https://www.hhs.gov/civil-rights/for-individuals/faqs/index.html#limited-english-proficiency-(lep)).

subjected to discrimination under any program or activity receiving Federal financial assistance.”³

As President John F. Kennedy said in 1963:

“Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.”⁴

- **Supreme Court case:** In *Lau v. Nichols* in 1974, the U.S. Supreme Court ruled that Title VI prohibits conduct that has a disproportionate effect on LEP persons because it constitutes national-origin discrimination. The case was based on a lawsuit against a San Francisco school district that was not taking the steps necessary to provide LEP students of Chinese origin a meaningful opportunity to participate in federally funded education programs.
- **Executive Order:** On August 11, 2000, President Bill Clinton signed Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency.”⁵ The Executive Order requires Federal agencies to examine the services they provide, identify any need for services to LEP persons, and develop and implement a system to provide LEP persons meaningful access to those services. Agency plans were to provide for such meaningful access consistent with, and without unduly burdening, the fundamental mission of the agency. The Executive Order also requires that the Federal agencies work to ensure that recipients of Federal financial assistance provide meaningful access to their LEP applicants and beneficiaries. This Executive Order led to the development of agency LEP Guidelines, to provide clear guidance on implementation of Title VI protections.
- **Policy Guidance from the U.S. Department of Justice (DOJ):** To assist Federal agencies in carrying out LEP non-discrimination responsibilities, DOJ issued a Policy Guidance Document, “Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination against Persons with Limited English Proficiency,” known as the 2002 LEP Guidance.⁶ It sets forth the compliance standards recipients of Federal financial assistance must follow to ensure that their programs and activities normally provided in English are accessible to LEP persons and thus do not discriminate on the basis of national. It directed the various federal agencies to “public guidance for their recipients on meaningful access for LEP individuals.”
- **LEP Guidelines for HHS:** HHS Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons – HHS LEP Guidelines – were issued in 2004.⁷

³ See <https://civilrights.findlaw.com/discrimination/title-vi-of-the-civil-rights-act-of-1964-non-discrimination-in.html>.

⁴ See <https://www.justice.gov/crt/fcs/TitleVI>.

⁵ See <https://www.lep.gov/13166/eo13166.html>.

⁶ See <https://www.lep.gov/sites/lep/files/resources/BoydJul82002.pdf>.

⁷ See <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-vi/index.html>.

Key Components of the HHS LEP Guidelines:

Four-Factor Analysis: This is an approach used to determine the obligation of a recipient of federal funds to provide LEP services.⁸ (Language comes directly from the Guidance, with some formatting changes to highlight the four-factor analysis.)

How Does a Recipient Determine the Extent of Its Obligation to Provide LEP Services?

“Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors:

- (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
- (2) The frequency with which LEP individuals come in 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 intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, small local governments, or small nonprofits.

After applying the above four-factor analysis, a recipient may conclude that different language assistance measures are sufficient for the different types of programs or activities in which it engages, or, in fact, that, in certain circumstances, recipient-provided language services are not necessary.... For instance, some of a recipient's activities will be more important than others and/or have greater impact on or contact with LEP persons, and thus may require more in the way of language assistance. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed. HHS recipients should apply the following four factors to the various kinds of contacts that they have with the public to assess language needs and decide what reasonable steps, if any, they should take to ensure meaningful access for LEP persons.

(1) The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population

One factor in determining what language services recipients should provide is the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population. The greater the number or proportion of these LEP persons, the more likely language services are needed. Ordinarily, persons "eligible to be served, or likely to be directly affected, by" a recipient's program or activity are those who are served or encountered in the eligible service population. This population will be program- specific, and includes persons who are in the geographic area that has been approved by a federal grant

⁸ See <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-vi/index.html>.

agency as the recipient's service area. However, where, for instance, a particular office of the county or city health department serves a large LEP population, the appropriate service area is most likely that office, and not the entire population served by the department. Where no service area has previously been approved, the relevant service area may be that which is approved by state or local authorities or designated by the recipient itself, provided that these designations do not themselves discriminatorily exclude certain populations. When considering the number or proportion of LEP individuals in a service area, recipients should consider whether the minor children their programs serve have LEP parent(s) or guardian(s) with whom the recipient may need to interact.

Recipients should first examine their prior experiences with LEP encounters and determine the breadth and scope of language services that were needed. In certain circumstances, it is important in conducting this analysis to include language minority populations that are eligible for their programs or activities but may be underserved because of existing language barriers. Other data should be consulted when appropriate to refine or validate a recipient's prior experience, including the latest census data for the area served, data from school systems and from community organizations, and data from state and local governments.⁽⁵⁾ Community agencies, school systems, religious organizations, legal aid entities, and others can often assist in identifying populations which may be underserved because of existing language barriers and who would benefit from the recipient's program, activity, or service, were language services provided.

(6) The focus of the analysis is on lack of English proficiency, not the ability to speak more than one language. Note that demographic data may indicate the most frequently spoken languages other than English and the percentage of people who speak that language who speak or understand English less than well. Some of the most commonly spoken languages other than English may be spoken by people who are also overwhelmingly proficient in English. Thus, they may not be the languages spoken most frequently by limited English proficient individuals. When using demographic data, it is important to focus in on the languages spoken by those who are not proficient in English.

(2) The Frequency with Which LEP Individuals Come in Contact with the Recipient's Program, Activity or Service

Recipients should assess, as accurately as possible, the frequency with which they have or should have contact with an LEP individual from different language groups seeking assistance. The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. The steps that are reasonable for a recipient that serves an LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. It is also advisable to consider the frequency of different types of language contacts. For example, frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish. Less frequent contact with different language groups may suggest a different and less intensified solution. If an LEP individual accesses a recipient's program, activity, or service on a daily basis, a recipient has greater duties than if an LEP individual's contact with the recipient's program, activity, or service is unpredictable or infrequent. But even recipients that serve LEP persons on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if an LEP individual seeks services

under the program in question. This plan need not be intricate. It may be as simple as being prepared to use one of the commercially available telephonic interpretation services to obtain immediate interpreter services. For example, a drug treatment program that encounters LEP persons on a daily basis most likely may have a greater obligation than a drug treatment program that encounters LEP persons sporadically. The obligations of both programs are greater than that of a drug treatment program which has never encountered a LEP individual where the service area includes few or no LEP individuals.

In applying this standard, certain recipients should take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups. For example, in areas where a community health center serves a large LEP population, outreach may be appropriate. On the other hand, for most individual physicians or dentists, outreach may not be necessary.

(3) The Nature and Importance of the Recipient's Program, Activity, or Service

The more important the recipient's activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual. Thus, the recipient should consider the importance and urgency of its program, activity, or service. If the activity is both important and urgent--such as the communication of information concerning emergency surgery and the obtaining of informed consent prior to such surgery--it is more likely that relatively immediate language services are needed. Alternatively, if the activity is important, but not urgent--such as the communication of information about, and obtaining informed consent for, elective surgery where delay will not have any adverse impact on the patient's health, or communication of information regarding admission to the hospital for tests where delay would not affect the patient's health-- it is more likely that language services are needed, but that such services can be delayed for a reasonable period of time. Finally, if an activity is neither important nor urgent--such as a general public tour of a facility--it is more likely that language services would not be needed. The obligation to communicate rights to a person whose benefits are being terminated or to provide medical services to an LEP person who is ill differ, for example, from those to provide medical care for a healthy LEP person or to provide recreational programming.

Decisions by a federal, state, or local entity to make an activity compulsory, such as job search programs in welfare to work programs, can serve as strong evidence of the program's importance.

(4) The Resources Available to the Recipient and Costs

A recipient's level of resources and the costs that would be imposed on it may have an impact on the nature of the steps it should take to comply with Title VI. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, reasonable steps may cease to be "reasonable" where the costs imposed substantially exceed the benefits.

Resource and cost issues, however, can often be reduced by technological advances; the sharing of language assistance materials and services among and between recipients, advocacy

groups, and Federal grant agencies; and reasonable business practices. Where appropriate, training bilingual staff to act as interpreters and translators, information sharing through industry groups, telephonic and video conferencing interpretation services, pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be "fixed" later and that inaccurate interpretations do not cause delay or other costs, centralizing interpreter and translator services to achieve economies of scale, or the formalized use of qualified community volunteers, for example, may help reduce costs.(7) Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

(7) Recipients with limited resources may find that entering into a bulk telephonic interpretation service contract will prove cost effective."

Other Excerpts from the LEP Guidance:

Safe Harbor. This applies only to compliance with requirements for written translation of materials – Section C. Written Language Services (Translation).

"The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

(a) The HHS recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

(b) If there are fewer than 50 persons in a language group that reaches the five percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

These safe harbor provisions apply to the translation of written documents only. They do not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where an application of the four factor test leads to the determination that oral language services are needed and are reasonable. Conversely, oral interpretation of documents may not substitute for translation of vital written documents. For example, oral interpretation of the rules of a half-way house or residential treatment center may not substitute for translation of a short document containing the rules of the half-way house or residential treatment center and the consequences of violating those rules."

Components of a LEP Plan: The LEP Guidelines describe five steps that can be helpful in designing a LEP implementation plan:

- 1) Identifying LEP Individuals Who Need Language Assistance
- 2) Language Assistance Measures
- 3) Training Staff
- 4) Providing Notice to LEP Persons
- 5) Monitoring and Updating the LEP Plan

Information from HHS LEP Guidance FAQs:⁹

Requirements are not new: “Since its enactment, Title VI of the Civil Rights Act of 1964 has prohibited discrimination on the basis of race, color, or national origin in any program or activity that receives Federal financial assistance. Title VI requires that recipients take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.”

Who is covered: “Covered entities include any state or local agency, private institution or organization, or any public or private individual that (1) Operates, provides or engages in health, or social service programs and activities, and (2) receives Federal financial assistance from HHS directly or through another recipient/covered entity.”

Documents deemed "vital" to the access of LEP persons to programs and services may often have to be translated. “Vital documents’ are generally documents that affect access to, retention in, or termination or exclusion from a recipient’s program services or benefits.”

Use of a family member or friend as interpreter: “May a recipient/covered entity require a LEP person to use a family member or a friend as his or her interpreter? No.”

CLAS Standards: The Culturally and Linguistically Appropriate Services (CLAS) Standards were developed by the HHS Office of Minority Health and revised in 2013. Four of the 15 standards directly address Communication and Language Assistance. Following are the current CLAS Standards.¹⁰

“The National CLAS Standards are intended to advance health equity, improve quality, and help eliminate health care disparities by establishing a blueprint for health and health care organizations to:

Principal Standard

1. Provide effective, equitable, understandable, and respectful quality care and services that are responsive to diverse cultural health beliefs and practices, preferred languages, health literacy, and other communication needs.

⁹ See [https://www.hhs.gov/civil-rights/for-individuals/faqs/index.html#limited-english-proficiency-\(lep\)](https://www.hhs.gov/civil-rights/for-individuals/faqs/index.html#limited-english-proficiency-(lep)).

¹⁰ See <https://www.thinkculturalhealth.hhs.gov/clas/standards>.

Governance, Leadership and Workforce

2. Advance and sustain organizational governance and leadership that promotes CLAS and health equity through policy, practices, and allocated resources.
3. Recruit, promote, and support a culturally and linguistically diverse governance, leadership, and workforce that are responsive to the population in the service area.
4. Educate and train governance, leadership, and workforce in culturally and linguistically appropriate policies and practices on an ongoing basis.

Communication and Language Assistance

5. Offer language assistance to individuals who have limited English proficiency and/or other communication needs, at no cost to them, to facilitate timely access to all health care and services.
6. Inform all individuals of the availability of language assistance services clearly and in their preferred language, verbally and in writing.
7. Ensure the competence of individuals providing language assistance, recognizing that the use of untrained individuals and/or minors as interpreters should be avoided.
8. Provide easy-to-understand print and multimedia materials and signage in the languages commonly used by the populations in the service area.

Engagement, Continuous Improvement, and Accountability

9. Establish culturally and linguistically appropriate goals, policies, and management accountability, and infuse them throughout the organization's planning and operations.
10. Conduct ongoing assessments of the organization's CLAS-related activities and integrate CLAS-related measures into measurement and continuous quality improvement activities.
11. Collect and maintain accurate and reliable demographic data to monitor and evaluate the impact of CLAS on health equity and outcomes and to inform service delivery.
12. Conduct regular assessments of community health assets and needs and use the results to plan and implement services that respond to the cultural and linguistic diversity of populations in the service area.
13. Partner with the community to design, implement, and evaluate policies, practices, and services to ensure cultural and linguistic appropriateness.
14. Create conflict and grievance resolution processes that are culturally and linguistically appropriate to identify, prevent, and resolve conflicts or complaints.
15. Communicate the organization's progress in implementing and sustaining CLAS to all stakeholders, constituents, and the general public.

Use of CLAS Standards in RWHAP Programs

- A number of RWHAP programs require their subrecipients to meet CLAS Standards. For example:
 - As part of its “Standard Program Conditions,” The Portland TGA’s service standards require culturally competent service delivery, and specify that “Providers shall adopt

- and implement the National Standards for Culturally and Linguistically Appropriate Services as relevant to their agency.”¹¹
- The Seattle TGA’s General (Universal) Standards include “CLAS Mandates” to help its subrecipients meet CLAS standards related to LEP clients.¹²
 - A recent RFP for the Illinois Minority AIDS Initiative AIDS Drug Assistance Program (ADAP) stated that the CLAS Standards “must be applied to services rendered in accordance with this grant.”¹³
 - The Texas Part B service standards for Linguistic Services require that “Services provided must comply with the National Standards for Culturally and Linguistically Appropriate Services (CLAS).”¹⁴
 - The Oakland TGA includes being “able to serve clients according to the CLAS Standards” in its “Recommended Best Practices” for Medical Case Management.¹⁵
- In PCN 16-02, Ryan White HIV/AIDS Program Services: Eligible Individuals & Allowable Uses of Funds, the description of Linguistic Services includes the following “*Program Guidance*: Linguistic Services provided must comply with the National Standards for Culturally and Linguistically Appropriate Services (CLAS).”¹⁶

¹¹ See <https://multco.us/file/29770/download>.

¹² See <https://www.kingcounty.gov/depts/health/communicable-diseases/hiv-std/patients/~media/depts/health/communicable-diseases/documents/hivstd/Seattle-TGA-Ryan-White-General-Standards.ashx>.

¹³ See <https://govappsqa.illinois.gov/gata/csfa/Program.aspx?csfa=1027>.

¹⁴ See <https://www.dshs.texas.gov/hivstd/taxonomy/universal.shtm>.

¹⁵ <http://acphd.org/media/430395/ryan-white-hiv-aids-standards-of-care.pdf>.

¹⁶ See https://hab.hrsa.gov/sites/default/files/hab/program-grants-management/ServiceCategoryPCN_16-02Final.pdf.