

Beyond the Right Thing to Do: The Legal Case for CLAS Implementation



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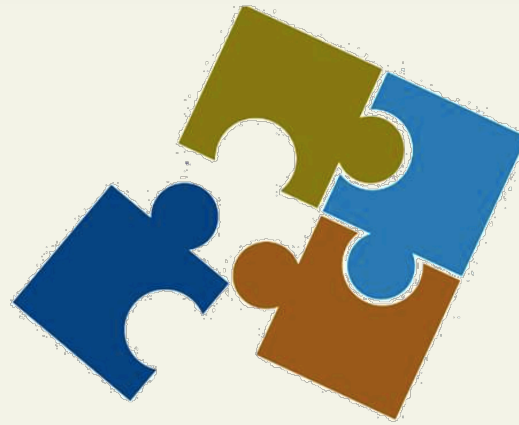
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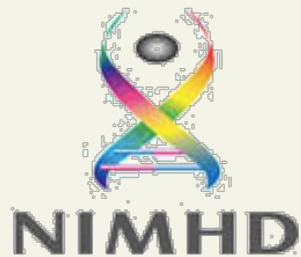
About Us



*Hopkins Center for
Health Disparities Solutions*

*“Exploration and Intervention for Health
Equality...”*

Designated a “National Center of Excellence”
by the National Institutes of Health,
National Institute on Minority Health and Health Disparities



Beyond the Right Thing to Do: The Legal Case for CLAS Implementation

By Bruce L. Adelson, Esq.

Beyond the Right Thing to Do: The Legal Case for CLAS Implementation

Bruce L. Adelson, Esq, CEO of Federal Compliance Consulting LLC, is nationally recognized for his compliance expertise concerning Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, the Americans with Disabilities Act, and federal voting laws. Mr. Adelson is a former U.S Department of Justice Senior Attorney. During his Justice career, Mr. Adelson had national enforcement responsibility for many federal laws.





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Good Intentions?

Doing the Right Thing?

Often, they are not enough to bring desired changes

Witness:

The End of Slavery in the United States
The End of Legal Segregation in the United States
The Civil Rights Act of 1964
The Voting Rights Act of 1965
The Americans with Disabilities Act

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Key Points



- Title VI of the Civil Rights Act of 1964
- The Basics – How the law applies to you
- Cultural Competence, CLAS, and Federal Law
 - Liability
- Current State of Enforcement and Litigation

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Key Terms - Part I

- Bilingual refers to the ability to understand and communicate fluently in two languages
- Interpretation means the act of listening to a communication in one language (source language) and orally converting it to another language (target language) while retaining the same meaning.
- Translation means the rendering of written text from one language (source language) into an equivalent written text in another language (target language), while retaining the same meaning.
- Vital document means paper or electronic written material that contains information critical for accessing federally-conducted programs or activities.

Source: U.S. Department of Justice

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Key Terms – Part II

- LEP Person means an individual whose primary spoken language is not English and who has a limited ability to read, write, speak, or understand English. LEP Persons may be competent in certain types of communication (e.g., speaking or understanding), but still have limited English proficiency for other purposes (e.g., reading or writing).
- Language-assistance services generally means interpretation, translation, sight translation, or other services, as appropriate, that assist LEP Persons in understanding or communicating with federally subsidized organization.

Source: U.S. Department of Justice

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Change has come to the United States

Check the Census Data



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Title VI of the Civil Rights Act of 1964

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

42 United States Code § 2000d

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Title VI – Historic Law



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Title VI – Historic Law

“Let us close the springs of racial poison. Let us pray for wise and understanding hearts. Let us lay aside irrelevant differences and make our Nation whole. Let us hasten that day when our unmeasured strength and our unbounded spirit will be free to do the great works ordained for this Nation by the just and wise God who is the Father of us all.”

President Lyndon B. Johnson – July 2, 1964

Source: *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1963-64*. Volume II, entry 446, pp. 842-844. Washington, D. C.: Government Printing Office, 1965.

“Title VI ensures that the funds of the United States are not used to support racial discrimination.”

U.S. Senator Hubert H. Humphrey

Source: 110 Congressional Record 6544

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Title VI of the Civil Rights Act of 1964

No Discrimination in Federally Subsidized Programs or Activities

No Discrimination Based on Race, Color, or National Origin

Language-Based Discrimination = National Origin Discrimination

Title VI applies equally if federal aid is \$1 or \$1,000,000,000 – Money from State Can Also Trigger Title VI

Title VI applies to ENTIRE federally subsidized office, hospital, court, agency, police department, school system, etc...

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- Title VI and its implementing regulations can be violated by the denial of federally funded program benefits on the basis of English proficiency

Lau v. Nichols, 414 U.S. 563, 568-69 (1974)

- “... longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI.”

United States of America v. Maricopa County, Arizona (D. AZ, 2012)

- “Longstanding Justice Department regulations also expressly require communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance.”

Nat’l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 430 (D.D.C. 2008)

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Title VI applies to ENTIRE federally subsidized office, hospital, court, agency, police department, school system, etc...

Who is Covered:

- Hospitals
- State Agencies
- City Departments
- County Departments
 - Public Schools
 - Non-Profits
- Many More.....

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Title VI Requires “Meaningful Access” to Services

- Language Assistance to Limited English Proficient (LEP) People
- Trained, Certified Interpreters, Bilingual Staff, Volunteers
- Translated Vital Documents
- No Children, Friends, Parents, Relatives

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How Do You Provide Language Assistance?

In-Person Interpreters

Certified Bilingual Staff

Language Services Companies

Certified Volunteers

Translated Documents

Technology – Telephone, Video Conferencing, Video Remote Interpreting, etc.

ALL OF THE ABOVE

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National Standards for Culturally and Linguistically Appropriate Services
in Health Care

CLAS Standards

- Framework for health organizations to best serve diverse communities
- Guidelines and recommendations to inform practices for cultural and linguistic competency in health care



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CLAS and Title VI

An Unbreakable Connection



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“Published research from organizations like the Institute of Medicine (www.iom.edu), the Agency for Healthcare Research and Quality (www.ahrq.gov), the Centers for Disease Control and Prevention (www.cdc.gov), the Health Resources and Services Administration (www.hrsa.gov), and the Robert Wood Johnson Foundation (www.rwjf.org) has shown that not only do people from different backgrounds have unequal access to care, but they also have **disparities in health outcomes and in healthcare itself.**”

A Failure to Communicate - Caring for Patients with Limited English Proficiency – Dr. Robert Like, MD

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“Two additional topics that are also increasingly attracting the attention of researchers are: 1) **patient safety/risk management concerns related to caring for people with limited English proficiency**, low health literacy, and/or other communication challenges, and 2) making the business case for cultural competence as well as the **potential impact of pay for performance and other reimbursement strategies on disparities in health and healthcare.**”

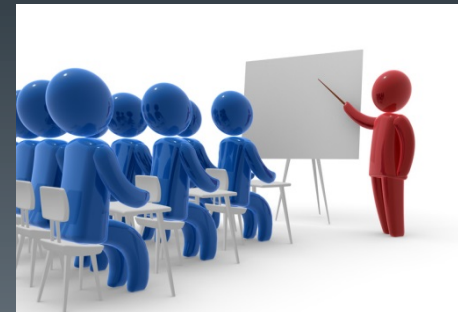
A Failure to Communicate - Caring for Patients with Limited English Proficiency – Dr. Robert Like, MD

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Looking at CLAS – Tracking the LAW

4. Educate and train governance, leadership, and workforce in culturally and linguistically appropriate policies and practices on an ongoing basis.

Training, Training, and More Training



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Looking at CLAS – Tracking the LAW

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.

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Looking at CLAS – Tracking the LAW

“Standards 4, 5, 6, and 7 are based on Title VI of the Civil Rights Act of 1964 (Title VI) with respect to services for limited English proficient (LEP) individuals. Title VI requires all entities receiving Federal financial assistance, including health care organizations, take steps to ensure that LEP persons have meaningful access to the health services that they provide.”

Courtesy: US HHS, Office of Minority Health, March, 2001



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Looking at CLAS – Tracking the LAW

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.

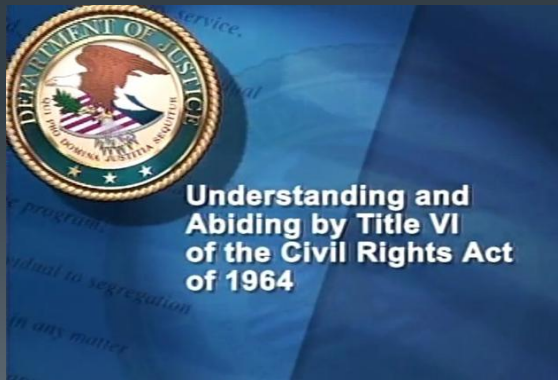
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Standards 12-15

Follow Title VI Outreach, Notice, and Grievance Requirements

See: Title VI and its implementing regulation, 45 C.F.R. Part 80



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Title VI - Private Right of Action in Court
Money Damages + Attorneys Fees

Plaintiffs Must Prove Intentional Discrimination
How?



- No CLAS Compliance
- No language assistance
- Inadequate assistance
- Third parties for language assistance
- Hostile comments from staff
 - No LAP Plan
 - No staff training
- Some or all of the above



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“The HHS Health Resources and Services Administration [HRSA] found that health professionals who lack cultural and linguistic competency can be found liable under tort principles in several areas (2005). For instance, providers may be presumed negligent if an individual is unable to follow guidelines because they conflict with his/her beliefs and the provider neglected to identify and try to accommodate the beliefs (HRSA, 2005). Additionally, if a provider proceeds with treatment or an intervention based on miscommunication due to poor quality language assistance, he/she and his/her organization may face increased civil liability exposure (DeCola, 2010). Thus, culturally and linguistically appropriate communication is essential to minimize the likelihood of liability and malpractice claims.”

Source: National Standards for CLAS in Health and Health Care: A Blueprint for Advancing and Sustaining CLAS Policy and Practice

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Looking at CLAS – Tracking the LAW

CLAS Standard 5: “Offer language assistance to individuals who have limited English proficiency **and/or other communication needs.....**”

People who are deaf or hard of hearing

Federal Law Prohibits Disability Discrimination

Americans with Disabilities Act

Rehabilitation Act of 1973

Affordable Care Act

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CONSEQUENCES of Non-Compliance

- Cut-off of federal funds
- Compliance reviews of organizations investigated for Title VI violations
 - Ongoing Federal investigations and oversight
- Civil rights money damages – NOT covered by malpractice
- Post-2012 Election enforcement

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Federal Enforcement Activity

- Cut-off \$60,000,000 federal funding to a large West Coast agency
- Suspension of federal funding to East Coast public organization
- Health Care Provider investigations and CMS readmission penalties
- HHS Office of Civil Rights announced termination of Medicaid funding to a California surgeon who discriminated against an HIV-positive patient by refusing to perform surgery July 2013 (ADA & Rehabilitation Act)

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Federal Enforcement Activity

Recent Federal Enforcement Agreement w/Large Hospital:

“The training program shall be of sufficient content and duration to cover the following....



The impact of ethnic and cultural differences on effective communication and the need for sensitivity to diversity issues...”

One of **17** required training topics, mandated for hospital by US HHS



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Could This Happen To You?

- LEP parents of infant patient - Adult sibling of one parent used to interpret informed consent and other communications.
- Tragic outcome to surgery
- Medical Malpractice + Title VI Lawsuit - 2010
- Out of Court Settlement – Multi-Million Dollar
NO INFORMED CONSENT w/o Qualified Interpreter



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Would CLAS Compliance Have Made a Difference?

With Effective, Authoritative Training, Title VI & CLAS Compliant Policies:

Would the Adult Sibling Still Be Used to “Interpret”?

YOU DECIDE



MAKE The Legally Required Changes or,
A Jury Will Decide For You

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Readmission Penalties

- October 2012 - Medicare began levying financial penalties against 2,217 hospitals it says have had too many readmissions.
- Of those hospitals, 307 will receive maximum punishment, 1% reduction in Medicare's regular payments for every patient over the next year
- Barnes-Jewish Hospital in St. Louis loses \$2 million
- The crackdown on readmissions is part of Affordable Care Act's effort to eliminate unnecessary care and curb Medicare spending, which reached \$556 billion in 2012. Hospital inpatient costs are $\frac{1}{4}$ of that spending and are projected to grow by more than 4% annually in coming years, according to Congressional Budget Office.

Source: New York Times, November 26, 2012

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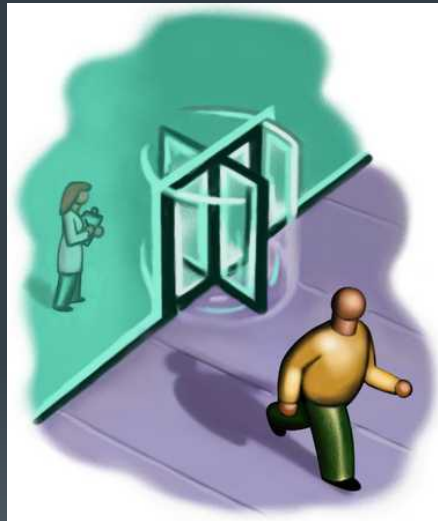
Making the LEGAL Case for Culturally Competent Health Care

Can't Argue with the Data



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Longer length of hospital stays for LEP patients when professional interpreters not used at admissions and/or discharge.



Source: Improving Patient Safety Systems for Patients With Limited English Proficiency - Agency for Healthcare Research and Quality - U.S. Department of Health and Human Services – September, 2012

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Greater risk of surgical delays and readmission due to LEP patients' greater difficulty understanding instructions, including how to prepare for a procedure, manage their condition, and take their medications, as well as which symptoms should prompt a return to care or when to follow up.



Source: Improving Patient Safety Systems for Patients With Limited English Proficiency - Agency for Healthcare Research and Quality - U.S. Department of Health and Human Services – September, 2012


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- Greater chance of readmissions for certain chronic conditions among racial and ethnic minorities compared to their white counterparts.
- Difference may be caused by limited English proficiency, low literacy, or other communication barriers that make patients more likely to misunderstand discharge and medication instructions.
- With advent of financial disincentives for excessive readmissions, greater attention should be paid to ensuring effective communication, including appropriate medication reconciliation, at discharge.

Source: Improving Patient Safety Systems for Patients With Limited English Proficiency - Agency for Healthcare Research and Quality - U.S. Department of Health and Human Services – September, 2012

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Health Care Providers report that language difficulties and inadequate funding of language services are major barriers to LEP individuals' access to health care and a serious threat to the quality of the care they receive.



To the doctor and nurse:

IF THIS BOX IS CHECKED, THIS PATIENT IS A LIMITED ENGLISH PROFICIENCY PATIENT WHO SPEAKS ONLY

Please print the name of the language

Source: Kaiser Commission on Medicaid and the Uninsured, Caring for Immigrants: Health Care Safety Nets in Los Angeles, New York, Miami, and Houston (Feb. 2001)

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Kaiser Commission Study – Evidence of Discriminatory Intent For Health Care Providers Who Do Not Provide Meaningful Access to Health Care and Who Do Not Implement CLAS??



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Looking at CLAS – Tracking the LAW

“...circumstantial evidence alone may establish discriminatory intent.”

See: *The Epileptic Foundation v. City and County of Maui*, 300 F. Supp 2d 1003, 1014 (D. Hawaii, 2004)

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)

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Multiple Liability Exposures Connected to Non-Compliant Language Assistance:

- Patient comprehension of medical condition, treatment plan, discharge instructions, complications, and follow-up;
- Inaccurate and incomplete medical history;
- Ineffective or improper use of medications or serious medication errors;
- Improper preparation for tests and procedures; and
- Poor or inadequate informed consent.



Source: Improving Patient Safety Systems for Patients With Limited English Proficiency - Agency for Healthcare Research and Quality - U.S. Department of Health and Human Services – September, 2012

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In 32 of 35 analyzed cases, health care providers did not use competent interpreters. In 12 of these cases, family members or friends were used as interpreters, including minor children in two cases.

PAYMENTS > \$5,000,000.00 in damages and settlements



Source: The High Costs of Language Barriers in Medical Malpractice (2010) – National Health Law Program and School of Public Health, University of California

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Compliance?

Training and Implementation

MANDATORY Training

MANDATORY Training for ALL Staff Interacting with
the Public

Planning Process
Updates



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Compliance Self-Assessment

- Do you have children, friends, or relatives provide language assistance?
- Do you have Title VI and LAP Plans?
- Do you have mandatory staff Title VI training?
- Do you have CLAS/Cultural Competence Training
- Do you decide type of language assistance or does customer?
- Do you train and certify interpreters?
- Do you charge for language assistance services?
- Do you restrict language access to certain areas?
- Have you asked customers to bring their own translated documents?
- Have you asked LEP people to come back another day when an interpreter will be available?
- Have you asked an LEP person why he/she does not speak English?
- Have you provided language assistance without assessment?
- Have you implemented CLAS?
- Have you spoken lately with your malpractice insurance carrier?

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Do you have children, friends,
or relatives provide language
assistance?



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Effective, Title VI Compliant Language Assistance + Legally Compliant Language Assistance Policies + CLAS Compliance + Culturally Competent Health Care =

Lower Liability Risk, More Cost-Efficient Services, Lower Hospital Readmissions, Lower Risk of Federal Sanctions, Lower Risk of Losing Federal \$\$\$\$, New Customers



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Proper Language Assistance is the LAW!
CLAS = Title VI



Courtesy: Michael Adelson

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