

Health Information Compliance Alert

Compliance: Heed Language Discrimination Updates or Risk OCR Reprisals

Tip: Translate your Patient's Rights notice into top 15 languages, expert advises.

Home health agencies best pay close attention to the changes issued in the final Interpretive Guidelines (IGs) for the new Home Health Conditions of Participation (CoP). Scrutiny and possible sanction from the HHS Office for Civil Rights (OCR) may ensue if the update isn't followed correctly.

Background: According to the most recent guidance, home health agencies must provide patients with a written copy of their patients' rights in the appropriate language by the second visit to avoid the wrath of the OCR. Moreover, new information in the IGs suggests that oral translations will no longer be accepted, and that the fulfillment of the requirement is now tied to home health agencies' CoP.

Under tag G490 covering §484.50(f)(2) Information must be provided to patients in plain language and in a manner that is accessible and timely to persons with limited English proficiency through the provision of language services at no cost to the individual, including oral interpretation and written translations, the final IGs say, "Concerns related to potential discrimination issues under 504 should be referred to the Office of Civil Rights [OCR] for further review."

This addition to the IGs "worries me," says consultant **Pam Warmack** with **Clinic Connections** in Ruston, Louisiana. An OCR referral "could be a disaster for a provider," Warmack stresses. "If there is one regulatory body I would not want to have problems with, it would be Civil Rights."

The problem: "In rural settings it is very, very difficult to find interpreters quickly," Warmack notes. That's true "even if a provider makes arrangements to the best of their abilities ahead of time."

"Written translations can take even more time," Warmack adds.

Complicating the matter may be CMS's revision to the definition of "plain language," notes attorney **Robert Markette Jr.** with **Hall Render** in Indianapolis. The IGs now say:

"Plain language' (also referred to as 'Plain English') is communication the patient and/or his or her representative ... can understand the first time they read or hear it. Language that is plain to one set of readers may not be plain to others. Written material is in plain language if the audience can:

- Find what they need;
- Understand what they find; and
- Use what they find to meet their needs."

"Do they mean understand the words or the meaning," for example, Markette says. Confusion over that may end with an OCR referral, he fears.

"You're going to see surveyors turning agencies in" to OCR, Markette predicts. That means in addition to a survey citation, HHAs will be getting a follow-up from OCR.

The home health industry's experience with OCR has mostly been limited to HIPAA audits thus far, and those are pretty rare, Markette notes. HHAs may be in for a shock when they start seeing surveyor referrals to OCR over discrimination.

Another IG change that could trigger an OCR discrimination referral might be under tag G420 covering §484.50(a)(3)

Provide verbal notice of the patient's rights and responsibilities in the individual's primary or preferred language and in a manner the individual understands, free of charge, with the use of a competent interpreter if necessary, no later than the completion of the second visit from a skilled professional as described in §484.75.

The IGs keep the draft language "if an HHA patient speaks a language that the HHA has not translated into written material, the HHA may delay oral explanation of the patient's rights and responsibilities until an interpreter is present (either physically, electronically or telephonically) to verbally translate. However, this may be delayed until no later than the second visit."

But the final IGs add this potentially troublesome sentence: "In addition, such oral explanation does not satisfy the requirement that the HHA provide written notice of a patient's rights and responsibilities in advance of providing care in accordance with §484.50(a)(1)(i)."

"This sentence creates a huge problem," Markette laments. Based on the draft IGs, many providers had assumed that an oral explanation would allow agencies to begin services, and a translated written patient's rights notice could follow. But the final IGs seem to indicate that an agency can't provide care until that translated written notice is furnished, Markette notes.

What it means: Instead of having your patient's rights notice ready to go in the top two or three languages in your area, you should consider going ahead and having it translated into the top 15 languages for your area, Markette recommends.

Tool: OCR has provided a list of top 15 non-English languages by state at www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf.