Serving Immigrant Clients in the Local Health Department: Some Frequently Asked Questions

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Eligibility for Benefits

1. May the local health department refuse to serve people because they are not United States citizens or do not have legal immigration status?

For most (if not all) health department programs and services, the answer is clearly "no."[1] All of the following services must be made available without regard to the service recipient's citizenship or immigration status:

- Immunizations
- Communicable disease control services, including examination for and treatment of communicable disease
- WIC
- Environmental health services
- Clinical services, including (but not limited to) prenatal care, family planning, and child health
- Medical and public health services (including disease and injury prevention as well as treatment) that are necessary to protect life and safety, so long as those services do not involve cash assistance and are not conditioned on the recipient's income or resources
- Assistance provided during adverse weather conditions, so long as it is not cash assistance and is not conditioned on the recipient's income or resources

The federal welfare reform act of 1996 barred immigrants who do not meet the law's definition of "qualified alien" from receiving any service that constitutes a "federal public benefit" or a "state or local public benefit." This law rendered all undocumented immigrants and some documented immigrants ineligible for many publicly funded benefits and services. However, exceptions written into the law and executive agency interpretations of the law have resulted in "non-qualified

[1] The major programs and services that are offered in all or most local health departments, many of which are listed here, must be made available to clients without regard to citizenship or immigration status. However, it is possible that a local health departments could offer a program or service that could constitute a federal, state, or local public benefit that must be denied to "nonqualified aliens" (a group that includes some documented immigrants as well as all undocumented immigrants). A local health department that has a question about immigrant eligibility for a particular program or service should contact the department's attorney or the School of Government.

aliens" remaining eligible for a number of publicly funded services, including most (if not all) of the services provided by N.C. local health departments.[2]

2. Are immigrants eligible for Medicaid?

Sometimes, depending on the applicant's immigration status and the type of Medicaid the immigrant is seeking.

Regular Medicaid: Nonqualified aliens are not eligible for regular Medicaid. Qualified aliens ordinarily are not eligible for regular Medicaid until five years after they enter the United States. However, refugees, persons granted asylum, and other immigrants who are admitted to the US for humanitarian reasons may be eligible for regular Medicaid right away.

Emergency Medicaid: Both qualified and nonqualified aliens are eligible for emergency Medicaid. However, aliens who are lawfully in the US but with temporary visas (such as those with student visas) are not eligible for emergency Medicaid because they cannot satisfy Medicaid's residency requirement. The residency requirement requires a Medicaid applicant to be living in North Carolina with the intent to remain here indefinitely. North Carolina courts have held that aliens with unexpired temporary visas cannot satisfy this requirement because they cannot claim that they have an intention to remain in NC indefinitely when their official paperwork requires them to leave the US by a definite date.

Presumptive eligibility: The health department is not required to ascertain an individual's citizenship or immigration status before certifying a patient as presumptively eligible. A person who meets the other requirements for presumptive eligibility may be certified as presumptively eligible, regardless of citizenship or immigration status.

3. You say the health department is not required to ascertain citizenship or immigration status before certifying a patient for presumptive eligibility Medicaid, but there is a space on the presumptive eligibility form for a social security number. Does this mean the health department must ask for a SSN? What if the client does not have a SSN?

The N.C. Division of Medical Assistance (DMA) has advised that health departments that certify patients for presumptive eligibility Medicaid should ask for the patient's SSN. However, if the patient does not have a SSN, the health department may leave the SSN space on the form blank and certify the patient as presumptively eligible.

[2] For more detailed discussion of this issue, see "Immigrants' Access to Public Benefits: Who Remains Eligible for What?," by Jill D. Moore, *Popular Government*, Vol. 65 No. 1 (Fall 1999) (out of print but available on the internet at http://www.iog.unc.edu/pubs/electronicversions/pg/pg-archv.html).

4. What about the new "proof of citizenship" requirement for regular Medicaid? Does that mean that a person must be a citizen to be eligible for regular Medicaid?

No. The new requirement affects only applicants who claim to be citizens. Such applicants must support that claim with documentation. In the past, an applicant who claimed to be a citizen was not required to provide documentation. Instead, applicants were permitted to "self-attest" to citizenship. The "proof of citizenship" requirement did not alter the Medicaid eligibility rules or application requirements for immigrants. Since 1996, immigrants who are eligible for regular Medicaid have been required to provide documentation supporting their eligibility when they apply for regular Medicaid.

Inquiring About Immigration Status/Reporting Undocumented Immigrants

5. Should local health department staff inquire about a client's citizenship or immigration status?

No. Since a person's citizenship or immigration status is irrelevant to his or her eligibility for health department services, health department staff are not required to, *and should not attempt to*, ascertain the individual's status. Questions of this nature could violate Title VI of the federal Civil Rights Act, which prohibits discrimination on the basis of national origin.[3]

6. Even though they don't inquire about immigration status, local health department staff sometimes discover that a client is an undocumented immigrant. Is the health department required to report this information to law enforcement or the US Bureau of Citizenship & Immigration Services (CIS)?

No. The local health department and its staff have no legal duty to make such reports to law enforcement or CIS.

7. Suppose a staff member who discovers that a client is an undocumented immigrant *wants* to report the information to law enforcement or CIS. Even though they are not required to report the information, may they do so if they choose?

For state or local law enforcement, the answer is no – there is nothing in HIPAA or state law that authorizes health departments to voluntarily make reports of this nature to state or local law enforcement agencies.

[3] For more on this issue, see "When Should Agencies Inquire About Immigration Status?," by Alison Brown, *Popular Government*, Vol. 65 No. 1 (Fall 1999) (out of print but available on the internet at http://www.iog.unc.edu/pubs/electronicversions/pg/pg-archv.html).

For CIS, the answer is unclear. A health department that wishes to give CIS information about a client's immigration status should consult with its attorney because, while it may be possible to make such a report without violating confidentiality laws, the law on this subject is murky and the risk that the department may violate confidentiality laws is substantial.

The lack of clarity arises from a section of the 1996 federal welfare reform law that is sometimes called the "anti-confidentiality rule."[4] The anti-confidentiality rule states that no federal, state, or local laws may prohibit or restrict state or local government entities from giving information about an individual's immigration status to CIS. On its face, the rule would appear to allow health departments to provide immigration status information to CIS, regardless of HIPAA or any other confidentiality law that would otherwise prohibit disclosure of information. However, in practice, a health department may not be able to release immigration status without releasing other confidential information in violation of HIPAA or state law (such as the mere fact that the person was a health department patient—that fact is protected health information under HIPAA). Furthermore, it is important to keep in mind that health department staff members are not experts in immigration law and could be mistaken in their belief that a patient is an undocumented immigrant. A person who reports information that is based on a mistaken belief may or may not be protected from liability for violating confidentiality laws by saying he or she did so in reliance on the anti-confidentiality rule. There is presently no case law in North Carolina to tell us whether that is a good defense to a claim of breach of confidentiality. In light of all this, reporting individuals to CIS could be a legally risky practice.

Inquiries about Undocumented Immigrants

8. Suppose a CIS official comes to the health department and asks for information about a particular individual?

Let's assume the CIS official does not have a warrant or court order for this information (we'll consider that scenario in question 9, below).

The HIPAA privacy rule is clear on this subject, but state law is less so. The HIPAA privacy rule *allows* (but does not *require*) a health care provider to disclose a limited amount of protected health information to a law enforcement official who requests the information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. Before making a disclosure under this provision of the privacy rule, a health care provider must ensure that all the following conditions are met:

- The person requesting the information is a law enforcement official (CIS officials enforcing immigration laws are law enforcement officials).
- The law enforcement official must request the disclosure of information.

[4] P.L. 104-193, § 434.

- The law enforcement official must affirm that the request is for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person.
- The health care provider must verify the law enforcement officer's identity and authority to request the information.

If all those conditions are met, the health care provider may disclose *only* the following information about the person: name, address, date and place of birth, social security number, blood type, type of injury (if any), date and time of treatment, date and time of death (if applicable), and a description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence of absence of facial hair, scars and tattoos. A health care provider who makes this kind of disclosure must then document the disclosure. If the patient requests an accounting of disclosures, the disclosure must be included in the accounting.

State law is not as clear. GS 130A-12 is the primary confidentiality law for local health departments. It allows health departments to disclose protected health information when disclosure is authorized or required by state or federal law, but it does not permit health departments to ignore stricter state laws when they apply to a situation. HIPAA is a federal law that allows this disclosure, as described above. However, it is possible that the state physician-patient or nurse-patient privilege law would apply and restrict the disclosure. Privilege laws govern the disclosure of information for court proceedings, and it is possible that a disclosure in this situation could lead to the use of information in a court proceeding—especially if the request is for information about a suspect or fugitive. North Carolina law does not make clear whether privilege laws apply to this type of disclosure. In the absence of clarity, the most conservative course of action would be for the health department to refuse to disclose this information without a court order.

9. Suppose the CIS official produces a court order or a search warrant demanding protected health information?

HIPAA clearly permits a disclosure in this situation, so long as the disclosure is limited to information that is specified in the warrant or court order. State law also permits disclosure, so long as the order or warrant is issued by a judge, who may issue the order only after finding that disclosure of the information is necessary for a proper administration of justice.

Sometimes a warrant is issued by a magistrate rather than a judge. This poses a dilemma for the health department, since the privilege statutes specify that only a judge may issue an order compelling disclosure of privileged information for a criminal investigation. But at the same time, department staff who refuse to provide the information could be threatened or even charged with resisting an officer or obstructing an investigation.

One approach the department could take would be to inform the agent that the information is privileged and cannot be disclosed without patient authorization or a judge's order. If the agent insists on receiving the information, however, the health department should not resist. In that case, I recommend providing the information in a sealed envelope with a note attached explaining that the information is privileged and should not be viewed without the patient's authorization or a court order that specifies that the court has found that disclosure of the information is necessary to a proper administration of justice.[5]

10. Suppose a county manager or other local official asks the local health department how many of its patients are undocumented immigrants. How should the health department respond?

The health department should not have this information, because it should not be asking clients about their citizenship or immigration status. See the answer to question 5, above. If the health department does not have this information, it cannot provide it.

Language Assistance

11. What kinds of assistance should the local health department offer to clients with limited English proficiency?

Local health departments must offer oral interpretation services to health department clients with limited English proficiency (LEP clients). Important written materials must be translated into other languages that the health department encounters regularly. These duties arise out of Title VI of the federal Civil Rights Act. All language assistance services must be made available *at no cost to the client.*

12. May a local health department require a client to provide his or her own interpreter?

No.

13. Suppose a client is accompanied by an English-speaking friend or family member. May the health department use that person as an interpreter.

[5] For more information about subpoenas, court orders, and warrants for patient information, see "Responding to Subpoenas for Health Department Records," by John Rubin and Aimee Wall (Health Law Bulletin No. 82, Sept. 2005). A PDF version of this document is available for free downloading at http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/hlb82.pdf. Hard copies may be ordered through the UNC School of Government's Publications Office. See http://www.sogpubs.unc.edu/index.php for ordering information.

Probably not. This practice is not entirely prohibited, but it is restricted to very limited circumstances. Friends and family members may be used as interpreters only if all of the following conditions are met:

- The health department must inform the client, in a language the client can understand, that the department will provide an interpreter at no charge to the client.
- After being so informed, the client must *ask* to use the friend or family member as an interpreter.
- The health department must determine that use of the friend or family member as an interpreter will not compromise either the effectiveness or confidentiality of the service.

Minor children should not be used as interpreters unless it is an emergency or other extenuating circumstance in which interpretation is needed right away and no one else is available.

Issues with Names

Multiple Patients, One Name

14. The health department uses names and social security numbers to identify its clients. Sometimes it is discovered that more than one person is using a particular name and social security number. Health department staff suspect the clients may be doing this in order to conceal their illegal immigration status. How should the health department respond to this situation?

It is of course very important for health care providers to be able to distinguish one patient from another, to ensure appropriate care and to protect confidentiality. Therefore, when a health department encounters this situation, it must try to differentiate the individuals. This probably cannot be done unless the health department can persuade the clients to cooperate with these efforts. Some health departments have had success with educational efforts directed toward their immigrant communities, in which they explain why it is important for each patient to be uniquely identifiable and stress that the health department will not inquire about the patients' citizenship or immigration status.

If the educational/persuasive approach is unsuccessful, health departments still need to try to differentiate individuals. Perhaps a department could identify patients with the same name and other identifying information as Jane Smith 1, Jane Smith 2, etc., and use other information in the record (such as height and weight, or other distinguishing characteristics) to differentiate them.

15. May a health department require clients to show a driver's license or some other form of identification? May it retain a copy of the license in the record,

to use to identify the client or distinguish between clients with the same name?

A health department may ask to see a driver's license or other identification, but it may not require a person to show a driver's license or other ID as a condition of service. Likewise, a health department may request permission to copy a driver's license or other ID for its records, but it may not make this a requirement.

A health department that asks patients to show identification should have procedures in place to ensure that health department staff do not discriminate by requesting identification from some groups of patients but not others. For example, a department should not ask only Hispanic clients to provide a driver's license—to do so would probably violate Title VI of the federal Civil Rights Act.

16. May a health department photograph clients and keep a copy of the photo in the medical record, to make it easier to distinguish patients with the same name?

A health department may request permission to photograph clients for the record, but it may not require a person to agree to be photographed as a condition of service.

One Patient, Multiple Names

Some health department clients have a "work" name and a "real" name. This practice raises a number of questions for health department staff, many of which implicate administrative as well as legal concerns and have no clear answers. The discussion that follows each question below offers suggestions for practices that I believe are defensible; however, this should not be taken as a definitive statement of "the law" in this area.

17. Which name should go on the medical record?

Quality of care can be compromised when information about a single patient appears in multiple records, each bearing a different name. Therefore, health departments should strive to ensure that they can retrieve an individual's record under any name the patient is likely to present. For example, if a prenatal patient named Jane Smith sometimes calls herself Mary Jones, the medical record could read, "Jane Smith AKA Mary Jones."

18. If staff need to write a note to the patient's employer, which name should go on the note?

There are several different approaches a health department might take. Here are a few:

- If the patient has an employee ID number, a department might choose to use only the ID number on the note and not include a name at all.

- A department might choose to write notes only in the name that they believe to be the patient's "real" name, even if it differs from what they know to be the patient's "work" name.
- A department could both names on the note—e.g., "Jane Smith AKA Mary Jones."
- Some health departments have considered putting only the "work" name on the note, provided they are certain the person requesting the note really does use the other name at work, and is not simply trying to get the note for another person who wasn't actually seen at the health department.

The first three approaches are clearly the least risky practices. The last approach seems riskier, but it is not clear that it violates any civil or criminal laws. However, it is possible that under some circumstances the health department's actions could amount to a fraud against the employer. A person may be civilly liable for fraud if: (1) he or she falsely represents or conceals a "material" fact, (2) does so in a manner that is reasonably calculated to deceive another party, (3) does so with the intent to deceive the other party, (4) does in fact deceive the other party, and (5) the false representation or concealment results in damage to the injured party.

19. Should the health department bill insurance that is in one name, when it also knows the client by another name?

A health department is correct to be concerned when this situation arises. The first step for the department to take is to inquire further, as there may be an explanation for the different names. If there is no satisfactory explanation, the department could ask the client to produce proof that he or she is in fact the individual who is named in the insurance. (The department may wish to ask for this proof even when the explanation for the different names seems satisfactory.) If the individual can produce the proof, the health department is probably not taking a substantial legal risk by relying on that and proceeding to bill the insurance company.

If the individual cannot provide proof of his or her identity, the situation becomes riskier for the health department. In the past, some health departments have accepted a client's written statement attesting to his or her identity as sufficient proof to support billing the insurance company. North Carolina law presently does not answer the question of whether this would be sufficient to protect the department against charges of insurance fraud.

In some cases, health department staff know or have good cause to suspect that an individual used false identification to obtain insurance. In those circumstances, the department should not bill the insurance.