

Language Access Responsibilities under Federal Civil Rights Laws

Civil rights enforcement at the federal level has long recognized that national origin minorities must have meaningful language access. These polices stem from a 40-year-old civil rights law, Title VI of the Civil Rights Act of 1964, which says:

No person in the United States shall, on 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.¹

Title VI does not specify how private citizens can enforce it. However, since enactment of the law, courts, Congress, federal agencies, federal funds recipients, and private individuals had assumed that victims of Title VI violations had two independent remedies: an administrative complaint filed with the relevant federal agency or a lawsuit to challenge either intentional discrimination or actions which reflect disparate treatment or have a disparate impact under the Title VI regulations.²

The Supreme Court's *Alexander v. Sandoval* decision

In 2001, the United States Supreme Court issued a 5-4 decision that upset these long-standing assumptions. The case, *Alexander v. Sandoval*,³ involved a challenge to the Alabama Department of Safety's refusal to administer its driver's examination in a language other than English. A majority opinion held that private individuals have no implied right of action to enforce the Title VI regulations in court.

Not surprisingly, this decision has quickly altered the legal landscape. First, private enforcement of Title VI against organizations and individuals is limited to situations where intentional discrimination can be shown, and this can be difficult to prove. Second, *Sandoval* has called into question private individuals' rights to enforce the Title VI regulations against state actors through another federal civil rights law, 42 U.S.C. § 1983, which provides a cause of action to individuals when the state deprives them of rights that are guaranteed by the U.S. Constitution or federal laws.⁴ Third, *Sandoval* raises questions about the continued viability of the Title VI regulations. The majority assumed for purposes of the case that the regulations were valid. However, it noted "considerable tension" between the statute, which it said prohibits only intentional discrimination, and the disparate impact regulations, which proscribe activities that the statute permits.⁵

Finally, *Sandoval* is raising questions about whether Title VI extends to discrimination on the basis of the language. Thirty years ago, in *Lau v. Nichols*,⁶ the Court held that the San Francisco school district violated Title VI when it failed to provide adequate instruction for children of Chinese ancestry who did not speak English. The Court found it "obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority . . . which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by the regulations."⁷ The *Sandoval* majority acknowledged *Lau*'s interpretation of the statute, but it gave this portion of *Lau* no weight.⁸ And while the majority did not question *Lau*'s conclusion that Title VI prohibited discrimination on the basis of language, this premise has been called into question in later, lower court cases.⁹

Federal Guidance and Initiatives

Despite the rollback of civil rights by the Supreme Court, recent years have seen an increased volume of guidance on how federally funded entities can comply with the civil rights laws. The White House, Department of Justice, and other federal agencies have issued guidelines.

Executive Order 13166

On August 11, 2000, President Clinton issued Executive Order (EO) 13166, entitled *Improving Access to Services for Persons with Limited English Proficiency*.¹⁰ The reach of EO 13166 is extensive, affecting all “federally conducted and federally assisted programs and activities.”

EO 13166 contains two major initiatives. First, each federal agency providing federal funding must draft a Title VI guidance specially tailored to its recipients. Second, EO 13166 requires all federal agencies to meet the same standards as federal fund recipients in providing meaningful access to limited English proficient (LEP) persons.¹¹

In carrying out the Order, “agencies shall ensure that stakeholders, such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input.”¹²

Department of Justice Guidelines

EO 13166 designates the Department of Justice (DOJ) as the lead federal agency with the responsibility for providing LEP guidance to other agencies. Simultaneous with the issuance of EO 13166, the DOJ provided General Policy Guidance to federal agencies announcing four factors for determining the extent of their Title VI obligations to assist LEP persons:

- Number or proportion of LEP individuals who will be excluded from the services absent efforts to remove language barriers.
- Frequency of LEP individuals’ contact with the program.
- Nature and importance of the program to beneficiaries.
- Resources available and cost considerations.¹³

Additional DOJ Recipient Guidance was adopted on June 18, 2002 and has become a benchmark against which other agencies’ LEP policies are measured.¹⁴ It makes the following major points:

- State and local “English-only” laws do not excuse federal fund recipients from complying with Title VI and agency guidance.¹⁵
- While designed to be a “flexible and fact-dependent standard,” the starting point for determining meaningful access remains an individualized assessment that balances the four factors originally announced in the DOJ General Guidance.

- Oral language services, interpretation, may be needed. Interpreters should demonstrate proficiency to communicate information in both English and the other language, have knowledge in both languages of specialized terms, and follow confidentiality and impartiality rules.
- “When oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the LEP person.”¹⁶ However, after receiving this offer, the LEP person should generally be permitted to use family members or friends to interpret if this arrangement is appropriate.
- Written language services, translation, may be needed for “vital” documents. The need to translate written documents should be determined on a case-by-case basis. However, the following “safe harbor” activities will provide the recipient with strong evidence of compliance: (1) Written translations of vital documents for each LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons served or likely to be served; or (2) If there are fewer than 50 persons in a language group that reaches the five percent trigger, the recipient does not translate vital documents but provides written notice in the primary language of the LEP group of the right to receive competent oral interpretation of those documents, free of cost.¹⁷
- After completing the four factor analysis and deciding what language assistance services are appropriate, recipients should develop an implementation plan. Five elements for an LEP policy and effective implementation plan are suggested: (1) identifying LEP individuals who need assistance; (2) deciding on the ways in which language assistance will be provided; (3) training staff; (4) providing notice to LEP persons; and (5) monitoring and updating the policy.
- The DOJ recognizes that compliance will take time and will look favorably on the intermediate steps recipients take.¹⁸

Department of Health and Human Services Guidelines

DHHS has long recognized that Title VI requires linguistic accessibility and its Office for Civil Rights (OCR) has played a critical role in defining the steps health care providers and social services agencies should take to comply with Title VI. As the lead Title VI agency within DHHS, OCR has actively issued guidelines to assist federal fund recipients, including state, county or local health and welfare agencies, hospitals, clinics, managed care plans, nursing homes, and physicians who receive funds from Medicaid, State Children’s Health Insurance Program, or Medicare, with complying with the law. OCR has issued several Limited English Proficiency Guidances (LEP Guidance) which set out a framework for compliance and its most recent revised LEP Guidance was published on August 8, 2003. (68 Fed. Reg. 47311-47323.) It explains that providers must take reasonable steps to ensure that LEP persons have meaningful access to their programs and services, and cannot limit, delay or deny services to LEP patients. It also follows the DOJ Recipient Guidance and adopts DOJ’s “flexible and fact-dependent” approach using the four factor analysis. After the four factors have been

applied, recipients can decide what reasonable steps, if any, to take to ensure meaningful access. Recipients may choose to develop a written implementation plan as a means of documenting compliance with Title VI. If so, the following five elements are suggested for designing such a plan:

- Identifying LEP individuals who need language assistance, using for example, language identification cards.
- Describing language assistance measures such as: the types of language services available, how staff can obtain these services and respond to LEP persons, and how competency of services can be ensured.
- Training staff to know about LEP policies and procedures and how to work effectively with in-person and telephone interpreters.
- Providing notice to LEP persons about available language assistance services, through, for example, posting signs in intake areas and other entry points, providing information in outreach brochures, working with community groups, using telephone voice mail menus, providing notices in local non-English media sources, and making presentations in community settings.
- Monitoring and updating the plan, considering changes in demographics, types of services, and other factors.

The OCR LEP Guidance also notes that an effective plan will set clear goals and establish management accountability. Recipients may want to provide opportunities for community input and planning throughout the process. The LEP Guidance also notes its interest in working with recipients to disseminate examples of model plans, best practices, and cost saving approaches.

OCR Complaint Resolution

OCR is, for the most part, complaint-driven, meaning it responds to complaints it receives. The regulations provide that OCR can decide to initiate investigations on its own, but it must respond to complaints filed by an individual.¹⁹ When investigating complaints, the federal regulations require OCR to attempt resolution of the matter through settlement. If settlement is not reached, OCR can terminate federal funding to the program that is out of compliance or ask the Department of Justice to sue for compliance.²⁰

Most of the OCR decisions reflect its primary concern of whether the recipient's language access policies allow LEP individuals to have an equal opportunity to participate in health care and social services programs and activities. Although they involve a range of federal fund recipients and situations, the OCR findings share a number of common features. Specifically, they require federal fund recipients to:

- Develop a written plan for providing LEP services;

- Designate a staff person to coordinate Title VI activities;
- Provide information and training to staff on these policies;
- Post translated notices that contain information on the availability of no cost interpreters;
- Maintain effective interpreter services by emphasizing in-person interpretation and, to the extent possible, minimize telephone interpretation;
- Provide translation of important forms and documents;
- Collect, analyze, and maintain data to determine if interpreter services are adequately provided;
- Monitor subcontractors and include a nondiscrimination clause in all contracts for services.

ENDNOTES

1. 42 U.S.C. § 2000d.
2. The regulations of a number of federal agencies, issued at the time of Title VI's enactment, also prohibit federal fund recipients from "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin." 28 C.F.R. ' 42.104(b)(2) (Department of Justice regulation); *see also, e.g.*, 45 C.F.R. § 80.3(b) (similar Department of Health and Human Services regulation); 49 C.F.R. ' 21.5(b)(2) (similar Department of Transportation regulation).
3. 121 S.Ct. 1511 (2001).
4. 42 U.S.C. § 1983. *See, e.g.*, *South Camden Citizens in Action (SCCIA) v. N.J. Dept. of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001) (refusing to allow enforcement of Title VI regulations pursuant to § 1983).
5. 121 S.Ct. at 1517.
6. 414 U.S. 563 (1974).
7. 414 U.S. 568.
8. 121 S.Ct. at 1519.
9. *See ProEnglish v. Bush*, Civ. No. 02-CV-356-A (E.D. Va.) (Complaint filed March 12, 2002) (arguing that federal policies improperly language with national origin when Title VI does not). The Fourth Circuit Court of Appeals dismissed the case on May 15, 2003, noting that the issues were not "ripe" for review.
10. *See* 65 Fed. Reg. 50121 (Aug. 16, 2000).
11. Each federal agency was to have developed and begun to implement a compliance plan by July 29, 2002. *See, e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Attorney General, DOJ Civil Rights Divisions, to Heads of Federal Agencies, General Counsels and Civil Rights

Directors (July 8, 2002), at <http://www.usdoj.gov>. Most agencies did not meet the deadline, see <http://www.usdoj.gov/crt/cor/13166.htm>.

12. *Id.*

13. See 65 Fed. Reg. 50123-25 (Aug. 16, 2000). The Guidance does not create obligations beyond those already mandated by law. *Id.* at 50121-22.

14. See 67 Fed. Reg. 41455-57 (June 18, 2002).

15. *Id.* at 41459.

16. *Id.* at 41462.

17. *Id.* at 41463-64.

18. *Id.* at 41466.

19. 45 C.F.R. § 80.8.

20. *Id.* See 42 U.S.C. § 2000d-1.