



June 30, 2003

Ms. Annabelle T. Lockhart, Director
Civil Rights Center
U.S. Department of Labor
200 Constitution Ave., NW, Room N-4123
Washington, DC 20210

VIA E-MAIL: civilrightscenter@dol.gov

RE: Comments on the Department of Labor's Revised Guidance to
Federal Financial Assistance Recipients Regarding Title VI
Prohibition Against National Origin Discrimination Affecting Limited
English Proficient Persons

Dear Ms. Lockhart:

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The National Asian Pacific American Legal Consortium (NAPALC) and its affiliates the Asian Law Caucus in San Francisco (ALC) and the Asian Pacific American Legal Center in Los Angeles (APALC) work to advance the civil and legal rights of Asian Pacific Americans through litigation, public education, and public policy. Joining NAPALC and its affiliates on these comments include the Asian Pacific American Legal Resource Center (APALRC), the Association of Asian Pacific Community Health Organizations (AAPCHO), Hmong National Development, Inc. (HND), and the Southeast Asia Resource Action Center (SEARAC), all of which advocated for the issuance and subsequent implementation of Executive Order 13166 (EO), provided extensive input and assistance to many federal agencies in the development of the policy guidances required under the EO, and advocated against the repeal of the EO. For such reason, we are writing to comment on the Department of Labor's Title VI Policy Guidance.

The Department of Labor's Title VI Guidance is especially important because of the critical role that the Department plays in shaping the future of our nation's many immigrant workers. In 1999, the Economic Roundtable in Los Angeles analyzed Los Angeles County data and found that the two most important factors determining an individual's ability to earn above-poverty wages (and thus to stay off of government-funded programs and benefits) were education and English language skills. The Department funds many important programs that provide job training and development, including to many immigrant laborers and workers. In encouraging self-sufficiency, it is critical that the programs and services funded by the Department be able to serve LEP workers in order to break the cycle of poverty engendered by lack of education and lack of English proficiency. Training programs that provide both Vocational English-as-a-Second Language (VESL) and skills training significantly improve the ability of LEP workers to secure jobs with a career ladder (e.g., union welder versus garment worker).

Thus, we appreciate the opportunity to comment on the Department's Title VI Policy Guidance and we commend the Department for providing a good framework for complying with Title VI and the EO; however, we feel strongly that certain sections of the guidance need to be further clarified and strengthened so that recipients of federal funding clearly understand how to meet their civil rights obligations with respect to LEP persons.

AFFILIATES

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Thank you again for the opportunity to comment on the Department of Labor Title VI Policy Guidance.

Sincerely,

/S/

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COMMENTS REGARDING DEPARTMENT OF LABOR’S LEP POLICY GUIDANCE

The following responds to the May 29, 2003 Department of Labor’s request for comments on its Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.¹ We commend the Department of Labor (the Department) for providing a good framework for complying with Title VI and the Executive Order 13166; however, we feel strongly that certain sections of the guidance need to be further clarified and strengthened so that recipients of federal funding clearly understand how to meet their civil rights obligations with respect to LEP persons.

I. Four-Factor Analysis

A. The consideration of costs should not be used to deny services to LEP persons.

The Department’s Guidance states that one of the factors of the four-factor analysis consists of the resources available to the recipient and costs. It states, “In addition, ‘reasonable steps’ may cease to be reasonable when the costs imposed substantially exceed the benefits.”² This permits recipients to take costs into consideration twice: once during the four-factor analysis, and a second time after completing the four-factor analysis to analyze whether the step it is about to take is “reasonable.” Recipients should consider costs when evaluating their programs, but the Guidance should clarify that the consideration of costs should not be applied to deny services to LEP persons. Although costs are a legitimate consideration, recipients must not make decisions based on cost that result in denying LEP persons meaningful and equal access to federally-funded services, as required by Title VI. We recommend that the four-factor balancing test remain the same as in the prior Guidance, but the Guidance should ensure that recipients do not eliminate essential programs or services due to the over-consideration of costs.

¹ Civil Rights Center; Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 32, 290 (May 29, 2003).

² 68 Fed. Reg. at 32,295.

II. Selecting Language Assistance Services

A. The Department's Guidance should clearly state a preferred order of oral interpretation services that are to be provided to LEP persons, with competent bilingual staff as the first alternative and telephone interpreters as the last alternative.³

The Guidance should establish a clear preference for in-person interpreters rather than telephone interpreters. The Guidance should use stronger language in articulating its preference for bilingual staff. Competent in-person bilingual staff, staff interpreters, contract interpreters, and community volunteers (where a formal arrangement with the individual or organization has been made) are more effective than telephone or other distant interpreter services. The Guidance should state that recipients can use telephone interpreters to provide services in some languages only if bilingual staff cannot meet all the language obligations and if staff, contract, and volunteer interpreters are unavailable to provide in-person contact and communication.

We strongly advocate that recipients strive to provide in-person interpreters because commercial telephone interpreters lack industry-specific vocabulary and off-site interpreters cannot read cultural signs. Furthermore, many recent refugees agree to everything instead of saying “no” because they will not challenge authority; an in-person interpreter may perceive this but an off-site interpreter will not. Therefore, telephone interpreter lines should be the least preferred of the oral language services and should be used only as a last resort.⁴

B. The Guidance should clarify minimum expectations for interpreter competency, including a requirement for a standard training program.

We strongly support the Guidance on the competency of interpreters.⁵ However, we would recommend that community volunteers undergo mandatory training and that certified interpreters should be used where individual rights depend on precise, complete and accurate translations. The Guidance should enforce a set of standards for all interpreters, regardless of whether they are contract interpreters, staff interpreters, or community volunteers. The standards should include an approved training program, a glossary of terms used in the particular program, a method for measuring an interpreter's ability to preserve confidentiality, and a method for testing a bilingual interpreter's competency in both languages.

C. The use of family members, friends, or other community members as interpreters should be strongly discouraged.

The Guidance states, “LEP persons should be permitted to use, at their own expense, interpreters of their own choosing, in place of or as a supplement to the free language

³ 68 Fed. Reg. at 32,297.

⁴ *Id.*

⁵ 68 Fed. Reg. at 32,296.

services expressly offered by the recipient.”⁶ The Guidance should be strengthened to explicitly state that the policy and practice of each recipient is to provide each LEP person with formal interpretive services, unless the LEP person affirmatively rejects the provided competent interpreter. If the LEP person affirmatively chooses to use a family member, friend, or community member in place of the recipient’s services, the recipient must recommend to the LEP person that a formal interpreter also be present to ensure the accuracy of interpretation and to assist in the interpretation of complicated legal, medical, or other technical matters. The Guidance should clarify that the recipient must offer interpreters free of charge to the client. The Guidance should not only caution against the use of minor children as interpreters; it should forbid the use of minors except in emergencies. Finally, the Guidance should require the recipient to document the offer and declination of services.

D. Interpreters and other language services must be provided without unreasonable delays.

The Guidance should explicitly state that LEP persons should not undergo unreasonable delays in interviews or in the processing of their complaints or claims. It should also require interpretation services to be provided to all claimants/clients and their witnesses throughout all stages of proceedings, from initial complaint or claim through hearing. The Guidance should also suggest that recipients offer services during evening and weekend hours to ensure greater accessibility to the LEP population, the majority of whom are employed during normal business hours. Finally, the Guidance should specify that all language services for LEP persons must be delivered in the same manner and time frame as they are for speakers of English in order to ensure equal access under Title VI.

III. Translation

A. Vital documents should be clearly defined and should include all documents that impact legal rights and responsibilities.

The Guidance should clarify its definition of “vital documents.” It states, “Whether or not a document is ‘vital’ may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.”⁷ The Guidance states that Unemployment Insurance applications and health and safety requirement information “could be considered” vital documents requiring translation.⁸ The Guidance should be strengthened to ensure that all documents that impact legal rights and responsibilities of a client are considered “vital” and would include such critical documents as job training applications, workers’ compensation applications and notices, and wage hour complaints and determinations.

⁶ 68 Fed. Reg. at 32,297.

⁷ 68 Fed. Reg. at 32,298.

⁸ *Id.*

B. The Guidance should include a safe harbor provision.

The prior Guidance's safe harbor provision offered clear guidelines to recipients regarding the translation of written documents and increased the odds of compliance.⁹ The elimination of the safe harbor provision is a significant concern, as it leaves too much discretion to the recipients in determining the thresholds for when written translation is needed and it sends the message to recipients that the Civil Rights Center (CRC) will not be forcefully seeking compliance. The safe harbor provision can be a useful tool for assessing a recipient's compliance with Title VI. A concrete, quantitative standard gives recipients some degree of certainty as to whether they are providing sufficient translation of written materials. The safe harbor provision was not a requirement per se and only set forth a minimum standard, but it provided a concrete benchmark for recipients in setting priorities among languages with respect to written translations. From our perspective, even with all the caveats (i.e., failure to provide translations under the circumstances outlined by the safe harbor provision does not mean there is non-compliance), the safe harbor provision provided an objective standard for evaluating compliance, one that could not be watered down. Without the safe harbor provision, we are left with a lax balancing test that is now watered down by consideration of the recipient's costs.

C. The safe harbor provision should follow those outlined by the Department of Justice and the Department of Human and Health Services.

We recommend that the DOL model its safe harbor provision after those outlined by the Department of Health and Human Services¹⁰ and the Department of Justice.¹¹ The recipient should provide complete translation of all written materials when the LEP language group constitutes 10% of the eligible population or 3,000 persons, whichever is less. When the LEP language group constitutes 5% or 1,000 persons, whichever is less, the recipient must provide, at a minimum, translation of vital documents. If there are fewer than 50 persons in a language group, written notice should be provided in the primary language of the LEP group of their right to receive competent oral interpretation of written documents.

⁹ Civil Rights Center; Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance on the Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency, 66 Fed. Reg. 4,596, 4,603 (Jan. 17, 2001).

¹⁰ Guidance to Federal Financial Assistance Recipients on the Title VI Prohibition on National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 14,180, 14,187 (Mar. 24, 2003).

¹¹ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,464 (June 18, 2002).

IV. Elements of an Effective Plan on Language Assistance for LEP Persons

A. All recipients should have a written policy.

The Department's Guidance states, "A written plan, while not a requirement, can be an important tool for a recipient."¹² While the Guidance notes that certain recipients serving very small LEP populations may elect not to develop written policies due to limited resources, the Guidance should require all recipients to have written policies and plans, even if they are fairly simple. Size and resources are more legitimate considerations with respect to hiring bilingual staff, using paid interpreters, translating materials, etc. Because all offices have operations policies, the requirement of a written policy is not a burdensome step. Written plans can help outline staff training, function as effective reminders of necessary steps and processes, and assist in budgeting. Without written plans guiding the operations of a recipient agency or organization, it is hard to imagine how recipients will be able to take steps towards compliance with Title VI.

B. DOL should increase its voluntary compliance efforts, including providing better technical assistance nationally and creating a regional presence in its civil rights compliance activities.

In addition to relying on the complaint process,¹³ the Department should conduct its own biennial assessment of whether each of its recipients is complying with the guidance. The Department should also engage in regular compliance reviews, similar to those conducted by the Department of Health and Human Services' Office for Civil Rights, because many immigrants and refugees may be reluctant to file actual complaints with government agencies. In addition, the Department should provide more technical assistance to recipients, especially outside of the East Coast. Although the Department's CRC does not have regional offices, it is still critically important that the CRC staff create a presence in key cities and areas outside of the Washington, DC area, especially those regions with growing immigrant worker populations.

C. The Guidance should require that all staff be trained in working with LEP persons.

The Guidance states that an effective LEP plan "would likely include training."¹⁴ Because the Guidance will only be effective if its principles are implemented, it should require that all recipients train staff with client contact or who supervise staff with client contact and incorporate its original language regarding the requirement that staff must "understand the dynamics of interpretation between LEP clients, the recipient's staff and interpreters."¹⁵ The Department should also develop a standardized training curriculum, which should include training in diversity and cultural competency, in working effectively with interpreters, in the identification of misinterpretations, and in how to

¹² 68 Fed. Reg. at 32,299.

¹³ 68 Fed. Reg. at 32,300.

¹⁴ *Id.*

¹⁵ 66 Fed. Reg. at 4,604.

ensure that the needs of LEP persons are actually met. The Guidance should also suggest to recipients to maintain a registry that records the training curriculum and the names and dates of employees' training.

V. Appendix

A. The Guidance should incorporate a “Model Plan” or a list of “Promising Practices” prior to the examples set out in the Appendix.

In general, we commend the nature, scope, and appropriateness of the DOL-specific examples set out in the appendix,¹⁶ but we believe that they should be preceded by a description of a “Model Plan” or a list of “Promising Practices,” as outlined in the 2001 Guidance. While the Guidance appropriately remarks that there is no “one size fits all” solution for Title VI and section 188 compliance with respect to LEP individuals, it should outline a model plan to provide a summary introduction to the wide variety of case scenarios described later in the appendix.

In addition, the Department should track promising practices on an ongoing basis in order to provide recipients with concrete examples of how to comply with Title VI. Many recipients would like to better serve their LEP clients, but lack the knowledge or information to serve LEP persons from diverse communities. Successful models should be shared widely in order to avoid “reinventing the wheel” amongst recipients who provide similar services or programs. The Department’s CRC can serve as a centralized resource center to provide this information, as part of its technical assistance to its recipients.

B. Web-based services should be subject to the four-factor analysis.

The Guidance should clarify that web-based services are subject to the same four-factor analysis as are other language services. The fourth example on page 32,303 should be amended to describe the website’s incorporation of a language identification section with hyperlinks to language-appropriate information about its toll-free help line.

C. The references to tag-lines in the UI system should be eliminated.

The first example listed under “Initial Claims and Follow-Up Notices” describes the use of tag lines (annotations) for correspondence and notice to LEP groups numbering from between 3,500 and 6,000 persons.¹⁷ The use of tag-lines for these large LEP groups is inappropriate, especially in consideration of the Guidance’s inclusion of notices in its list of “vital” documents and the former Guidance’s safe harbor provision. The remaining examples in the UI system should also refrain from referring to tag-lines.

¹⁶ 68 Fed. Reg. at 32,301.

¹⁷ 68 Fed. Reg. at 32,303.