

BACKGROUND AND QUESTIONS AND ANSWERS

October 26, 2001 DOJ Clarifying Memorandum Regarding Limited English Proficiency and Executive Order 13166

Background

– **LEP Executive Order.** Title VI of the Civil Rights Act prohibits discrimination on the basis of national origin, among other things. The LEP Executive Order (Executive Order 13166) ensures that, consistent with Title VI, persons with limited English proficiency ("LEP") have meaningful access to federally conducted and federally funded programs and activities. The Order requires all agencies that provide federal financial assistance to issue guidance on how Title VI applies to recipients of that assistance in their contact with persons who are LEP. The Order also requires that federal agencies create plans for ensuring that their own activities also provide meaningful access for persons who are LEP.

– **August 2000 DOJ Guidance.** The Department of Justice, at the time the EO was published, also issued a guidance document for agencies to follow in designing their own LEP guidance for recipients, and in creating plans for making federal activities and programs meaningfully accessible. The guidance clarified long-standing LEP responsibilities under Title VI and the Title VI regulations, including disparate impact regulations and a 1976 DOJ regulation requiring translation of documents in certain circumstances. The DOJ guidance document told agencies to consider four factors in developing LEP guidance for their recipients (the number of LEP persons in the eligible service population or likely to be encountered in recipient activities and programs; the frequency with which LEP individuals come into contact with the program; the importance of the service or information provided by the program; and the resources available to the recipient of the federal funds). Agencies have asked DOJ for additional guidance regarding how to balance these four factors.

– **Agency Recipient Guidance and Federally Conducted Plans.** Pursuant to the Executive Order and the DOJ guidance document, a number of agencies have issued their own LEP guidance documents for their recipients. Several agencies have also created plans for making their own federally conducted activities meaningfully accessible to persons who are LEP ("federally conducted plans").

– **Requests for Clarification.** There has been significant support among recipients for recipient guidance documents issued by agencies. A number of recipients of federal funds, however, have indicated that they believe the documents could be confusing, and that they may impose requirements that are not necessary effectively to deliver important LEP services. Prompted by questions from the recipient community, the Departments of Health and Human Services and Labor have asked the Department of Justice for advice on how to move forward on LEP issues.

– **DOJ Memorandum Clarifies August 2000 Guidance.** In response to these requests, on October 26, the Department of Justice issued a memorandum to agency heads. The memorandum reaffirms the Administration's commitment to ensuring that LEP individuals have meaningful access to federally funded and federally conducted programs and activities. The Administration

likewise recognizes that LEP services must be delivered in a cost-effective manner. Thus, the memorandum is designed to ensure the delivery of LEP services to eliminate invidious discrimination prohibited by Title VI itself and unjustified disparate impact prohibited by the Title VI regulations consistent with the four "reasonableness" factors outlined in the DOJ LEP Guidance.

– A factor in determining the reasonableness of a recipient's efforts is the number or proportion of people who will be excluded from the program or activity absent efforts to remove language barriers.

– Frequency of contact must also be considered. Where the frequency and number of contacts with individuals who speak a particular language is very small, Title VI may impose fewer substantial LEP obligations on recipients. At the same time, when an agency serves a large LEP population, it will have to take more substantial steps to ensure that it meets its Title VI obligations.

– The nature and importance of the program is a consideration. Where the denial or delay of access may have life or death or other serious implications, the importance of the full and effective delivery of LEP services is at its zenith.

– Resources available are a consideration. A larger recipient with extensive resources may have to take greater steps than a smaller recipient with limited resources. Although on-the-premises translators may be needed in some circumstances, written translation, access to centralized interpreter language lines or other means, may be appropriate in others.

– Costs must be factored into this balancing test as part of the consideration of "resources available." "Reasonable steps" may cease to be reasonable where the costs imposed substantially exceed the benefits in light of the factors outlined in the DOJ LEP Guidance.

– **DOJ Memorandum Clarifies Procedures for Recipient Guidance.** In addition to clarifying its LEP guidance, the DOJ memorandum also assures that the public be given a full opportunity to comment on agencies' LEP guidance. Thus, it directs agencies to obtain public comment on their existing recipient guidance. Agencies must review their existing and proposed recipient guidance documents for (a) consistency with DOJ's clarifications; (b) compliance with the Administrative Procedure Act (notice and comment requirements); and (c) compliance with requirements for significant regulatory action (*See* Executive Order 12866 (setting forth OMB clearance requirements)). It is up to each agency to determine whether its recipient guidance document is a significant regulatory action and whether the Administrative Procedure Act's notice and comment requirements apply.

– **DOJ Memorandum Clarifies Procedures for Federally Conducted Plans.** The memorandum clarifies the steps that agencies should take in ensuring that recipients of federal funds comply with Title VI of the Civil Rights Act. Federal agencies likewise should review plans for federally conducted programs and activities in light of the memorandum's clarifications.

Questions and Answers

Q. What does Executive Order 13166 require?

Executive Order 13166 (EO 13166) is directed at implementing the obligations imposed by Title VI of the Civil Rights Act of 1964 and the Title VI regulations. Accordingly, it prohibits recipients of federal financial assistance from discriminating based on national origin by, among other things, failing to provide meaningful access to individuals who are LEP. The Executive Order requires federal agencies that provide federal financial assistance to develop guidance to clarify those obligations for recipients of such assistance ("recipient guidance").

In addition, the Executive Order requires all federal agencies to apply the same four-factor analysis as federal financial assistance recipients in providing meaningful access for LEP individuals to all of its federally conducted programs and activities. Each federal agency is required to develop a plan for taking reasonable steps to provide meaningful access for LEP persons, in light of the four-factor analysis.

Q. Who will enforce the LEP rules?

Most federal agencies have an office that is responsible for enforcing Title VI of the Civil Rights Act. To the extent that a recipient's actions are inconsistent with their obligations under Title VI, then such agencies will take the necessary corrective steps.

The Federal Coordination and Compliance Section of the Civil Rights Division of DOJ has taken the lead in coordinating and implementing this Executive Order.

Q. What are recipients of federal funds required to do to meet LEP requirements?

The actions that a recipient must take to meet the obligations imposed by Title VI of the Civil Rights Act are necessarily an individualized determination. There are no hard-and-fast rules. What might make sense for a large entity may not make sense for a smaller entity. The memorandum that the Department of Justice issues today clarifies that the steps that agencies and federally funded entities must take to ensure compliance with Title VI may vary depending upon the services they offer, the community they serve, and their resources. The Department of Justice stands ready to assist agencies in formulating guidelines that take the appropriate approach to LEP issues.

Q. Has there been a change in Executive Order 13166?

No. There has been no change to the Executive Order. This Administration and the Department of Justice are fully committed to ensuring that LEP persons have meaningful access to federally funded and federally conducted programs and activities.

Q. Didn't the Supreme Court address and reject the LEP obligation under Title VI last term in *Alexander v. Sandoval*?

No. In *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001), the Supreme Court held that there is no private right of action for private parties to enforce the disparate impact regulations under Title VI. It ruled that, even if the Alabama Department of Public Safety's policy of administering driver's license examinations only in English violates the Title VI regulations, a private party could not bring a lawsuit under those regulations to enjoin Alabama's policy. *Sandoval* did not invalidate Title VI or the Title VI disparate impact regulations, and federal agencies' obligation to enforce the statute and regulations remains in effect. Because the legal basis for the recipient guidance documents required under Executive Order 13166 is Title VI and the disparate impact regulations and because *Sandoval* did not invalidate either one, the Executive Order remains in force.

Q. Why did DOJ issue new Guidance?

A number of recipients of federal funds have stated that they are confused by current LEP recipient guidance documents issued by federal agencies. In addition, they have raised concerns that the public be provided sufficient opportunity to comment. The Department of Justice believes that, in light of these concerns, it was necessary to issue this clarifying memorandum.

The Department of Justice has issued this memorandum to clarify the guidance that it issued last August, in which it described LEP obligations that Title VI of the Civil Rights Act imposes. This memorandum makes clear that agencies must ensure that the public has sufficient opportunity to comment on their recipient guidance documents and agencies must review these documents in light of any comments they receive and this clarifying memorandum.

Q. How is the October 26 Memorandum different from the earlier LEP Guidance?

The October 26 Memorandum reaffirms the Administration's commitment to LEP services. It does not change the requirements of the existing Executive Order and existing DOJ guidance. It does require additional process designed to ensure sufficient public comment regarding agencies' responsibilities as follows:

First, the Memorandum states that agencies that published recipient guidance after Executive Order 13166 should: "After notifying the Department of Justice, obtain public comment on the guidance documents that they have issued." This means they must:

- Review that guidance for consistency with the four-factor analysis from the August 2000 DOJ LEP guidance and the October 26 clarifying Memorandum.
- Determine whether or not the document is a significant regulatory action that is subject to the requirements of Executive Order 12866 and whether it is subject to the notice and comment requirements of the Administrative Procedures Act.

Some agencies may determine that they need to revise their guidance, and others may determine that their guidance already complies with Title VI and procedural legal standards as clarified in the Memorandum and is not "significant regulatory action" subject to the requirements of Executive Order 12866.

- After notifying the Department of Justice, publish a notice asking for public comment on the guidance (as revised, if necessary, in light of the October 26 Memorandum). Prior to publication, DOJ should review any substantive revisions for consistency with the August 2000 guidance and clarifying Memo.
- Determine whether further revisions of their existing guidance are appropriate, in light of public comment received (and disseminate as appropriate).

Second, agencies that have not already published recipient guidance should consider these factors and clarifications in preparing guidance documents. They should then submit their guidance documents to DOJ for approval prior to publication, as is required by the Executive Order. Following approval by the Department of Justice and before finalizing its guidance, each agency should obtain public comment on its proposed guidance documents. Those agencies also need to make the determinations regarding the Administrative Procedure Act and Executive Order 12866 as explained above.

Third, as required by the Executive Order, agencies should continue to design and implement plans for making their own federally conducted programs and activities meaningfully accessible to LEP persons, and should consider the four-factor analysis from the DOJ guidance and today's memorandum in doing so.

Q. What about agencies that don't grant federal financial assistance? What do they have to do?

Federal financial assistance includes, but is not limited to, grants and loans of federal funds; grants or donations of federal property; training; details of federal personnel; or any agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. If an agency does not engage in any of those activities, it does not grant federal financial assistance and does not have to issue a recipient guidance document. However, it must still design and implement a federally conducted plan to ensure access for LEP individuals to all of its federally conducted programs and activities (basically, everything that it does).

Q. Is DOJ saying that the existing recipient guidance documents are "significant regulatory action?"

No. The memorandum explains that it is up to each agency to determine whether its recipient guidance is "significant regulatory action" subject to the requirements set forth in Executive Order 12866.

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