

# Enforcing Language Access Rights: Trends and Strategies

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**E**qual access to governmental activities is necessary. In large part people with limited English proficiency do not have equal access. In this article we suggest some strategies and offer examples of programs working to achieve more access. We review the federal law on language access and describe some programs' advocacy to maximize such access.

Jane Perkins discusses recent federal court trends on the enforceability of federal obligations to provide language access. Mary R. Mannix describes advocacy efforts to secure language access in public benefit programs and a new Welfare Law Center project which aims to ensure that welfare agencies and private contractors delivering welfare and related services provide language access. Jack Daniel and Wanda Hasadsri describe California Rural Legal Assistance's strategies based on state law.

## I. Language Access Responsibilities Under Federal Civil Rights Laws

For over thirty years, civil rights policies at the federal level have required national-origin minorities to have meaningful language access. These policies stem from 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."<sup>1</sup>

Title VI does not address enforcement by private citizens. However, from the enactment of the law until 2001, courts, Congress, federal agencies, federal fund recipients, and private individuals 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.<sup>2</sup>

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

<sup>1</sup>Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2004).

<sup>2</sup>The regulations of a number of federal agencies, issued at Title VI's enactment, 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) (2004) (U.S. Department of Justice); see, e.g., 45 C.F.R. § 80.3(b) (2003) (U.S. Department of Health and Human Services); 49 C.F.R. § 21.5(b)(2) (2003) (U.S. Department of Transportation).

<sup>3</sup>*Alexander v. Sandoval*, 532 U.S. 275 (2001) (Clearinghouse No. 51,706).

Not surprisingly, this decision quickly altered the legal landscape. First, private enforcement of Title VI against organizations and individuals was limited to situations where intentional discrimination could be shown. Intentional discrimination can be difficult to prove. Second, *Sandoval* called into question private individuals' rights to enforce the Title VI regulations against state actors through 42 U.S.C. § 1983, which provides for a cause of action to individuals when the state deprives them of rights guaranteed by the Constitution or federal laws.<sup>4</sup> Third, *Sandoval* raised 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.<sup>5</sup>

*Sandoval* raises questions about whether Title VI extends to discrimination on the basis of primary language. Thirty years ago, in *Lau v. Nichols*, 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.<sup>6</sup> 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."<sup>7</sup>

The *Sandoval* majority acknowledged *Lau's* interpretation of the statute, but it gave this portion of *Lau* no weight.<sup>8</sup> While the majority did not question *Lau's* conclusion that Title VI prohibited discrimination on the basis of language, recent lower court cases call this premise into question.<sup>9</sup>

Despite the Supreme Court's rollback of civil rights, federally funded entities have received more guidance on how to ensure meaningful language access. The White House, U.S. Department of Justice, and other federal agencies have issued guidelines outlining procedures to provide access to persons with limited English proficiency.

#### A. Executive Order 13166

On August 11, 2000, Pres. Bill Clinton issued Executive Order 13166, entitled *Improving Access to Services for Persons with Limited English Proficiency*.<sup>10</sup> The executive order's reach is extensive, affecting all federally conducted and federally assisted programs and activities. The Bush administration affirmed its commitment to the order.

Executive Order 13166 has two major initiatives: it requires each federal agency granting federal funding to draft Title VI guidance specially tailored to its recipients; and it requires all federal agencies to meet the same standards as federal fund recipients in assuring meaningful access to persons with limited English proficiency.<sup>11</sup> In carrying out the order, "agencies shall ensure that stakeholders,

<sup>4</sup>42 U.S.C. § 1983 (2004). See, e.g., *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001) (Clearinghouse No. 53,759) (refusing to allow enforcement of Title VI regulations pursuant to § 1983).

<sup>5</sup>*Sandoval*, 532 U.S. at 282.

<sup>6</sup>*Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>7</sup>*Id.* at 568.

<sup>8</sup>*Sandoval*, 532 U.S. at 285.

<sup>9</sup>See *ProEnglish v. Bush*, 70 Fed. App. 84, 2003 U.S. App. LEXIS 9397 (4th Cir. May 14, 2003), dismissing as not ripe for review, Civ. No. 02-CV-356-A (E.D. Va. filed March 12, 2002) (Clearinghouse No. 55,320) (arguing that federal policies improperly equate language with national origin when Title VI does not).

<sup>10</sup>Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 16, 2000).

<sup>11</sup>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, Civil Rights Divisions, U.S. Department of Justice, to Heads of Federal Agencies, General Counsels and Civil Rights Directors (July 8, 2002), at [www.usdoj.gov](http://www.usdoj.gov). Most agencies did not meet the deadline. See [www.usdoj.gov/crt/cor/13166.htm](http://www.usdoj.gov/crt/cor/13166.htm).

such as [persons with limited English proficiency] and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input.”<sup>12</sup>

## B. Justice Department Guidelines

Executive Order 13166 designates the Justice Department as the lead federal agency with the responsibility for guiding other agencies on language access. Simultaneously with Executive Order 13166, the Justice Department issued general policy guidance to federal agencies that grant federal financial assistance. The guidance announced four factors for determining the extent of a federal fund recipient’s Title VI obligations to assist persons with limited English proficiency:

- The number or proportion of individuals who have limited English proficiency and could not access services without efforts to remove language barriers.
- The frequency with which individuals with limited English proficiency contact the federally assisted program.
- The nature and importance of the program to beneficiaries.
- Available resources and cost considerations.<sup>13</sup>

Additional Justice Department guidance, adopted on June 18, 2002, for recipients of financial assistance has become a benchmark against which to measure agencies’ language access policies.<sup>14</sup> The recipient guidance 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.<sup>15</sup>

- While the standard is designed to be “flexible and fact-dependent,” the starting point for determining meaningful access remains an individualized assessment that balances the four factors originally announced in the Justice Department general guidance.
- Oral language services—interpretation—may be needed. Interpreters should demonstrate proficiency in communicating 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 [person with limited English proficiency].”<sup>16</sup> However, after receiving this offer, the person with limited English proficiency 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 are strong evidence of the recipient’s compliance: (1) written translations of vital documents for each language group that constitutes 5 percent or 1,000 individuals, whichever is less, of the population served or likely to be served; or (2) if fewer than fifty persons are in a language group that reaches the 5 percent trigger, the recipient does not translate vital documents but gives

<sup>12</sup>65 Fed. Reg. 50,121.

<sup>13</sup>Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency: Policy Guidance, 65 Fed. Reg. 50123–25. The guidance does not create obligations beyond those already mandated by law. *Id.* at 50121–22.

<sup>14</sup>Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455–57 (June 18, 2002).

<sup>15</sup>*Id.* at 41459.

<sup>16</sup>*Id.* at 41462.

written notice in the group's primary language of the right to receive competent oral interpretation of those documents, free of cost.<sup>17</sup>

- After completing the four-factor analysis and deciding what language assistance services are appropriate, recipients should develop an implementation plan. Five elements for a language access policy and effective implementation plan are suggested: (1) identifying individuals who have limited English proficiency and need assistance; (2) deciding on the ways to provide language assistance; (3) training staff; (4) notifying persons with limited English proficiency; and (5) monitoring and updating the policy.

Recognizing that compliance will take time, the Justice Department will look favorably on intermediate steps that recipients take.<sup>18</sup>

## II. Strategies to Ensure Access to Public Benefits

According to the U.S. Census Bureau, the proportion of the population that does not speak English very well grew from 6.1 percent in 1990 to 8.1 percent in 2000, and the number of linguistically isolated households in which no person aged 14 or over speaks English at least "very well" grew to 4.4 million households.<sup>19</sup> For low-income individuals with limited English proficiency, whether welfare agencies provide services in languages other than English, as required by federal law, may determine whether they receive desperately needed cash assis-

tance, Medicaid, and food stamps and related services to help them secure employment.<sup>20</sup>

Reports from legal advocates indicate that many welfare agencies have a long way to go to ensure that individuals with limited English proficiency receive language-appropriate services. Moreover, the increasing role of private contractors in delivering critical welfare-to-work and related services presents additional challenges. These entities may not be aware of their legal obligations. Too often private contractors are not responsive to public and consumer advocacy and input. Numerous vendors may deliver welfare services, increasing the entities that advocates must monitor. State and local agency oversight of contractors may be weak.<sup>21</sup>

Given the historic racial and ethnic discrimination that has permeated welfare administration, legal aid programs and community groups should consider advocacy on this issue strongly.<sup>22</sup> Because federal court litigation to enforce agencies' obligations to serve individuals with limited English proficiency has become difficult, advocates may want to consider state-law claims as well as non-litigation strategies. Depending on local circumstances, a multifaceted strategy may be necessary.

### A. Advocacy Before the Office for Civil Rights

Within the federal agencies, an office for civil rights is often designated to receive

<sup>17</sup>*Id.* at 41463-64.

<sup>18</sup>*Id.* at 41466.

<sup>19</sup>HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS 2000, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 3, 10 (2003). For a review of studies regarding the Temporary Assistance for Needy Families program and individuals with limited English proficiency, see SHAWN FREMSTAD, CENTER ON BUDGET AND POLICY PRIORITIES, IMMIGRANTS, PERSONS WITH LIMITED PROFICIENCY IN ENGLISH, AND THE TANF PROGRAM: WHAT DO WE KNOW? (2003), available at [www.cbpp.org/pubs/welfare03.htm](http://www.cbpp.org/pubs/welfare03.htm).

<sup>20</sup>Civil Rights Act of 1964, *supra* note 1. See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47311 (Aug. 8, 2003) (U.S. Department of Health and Human Services). The federal Food Stamp Act and implementing regulations also require states to provide bilingual services. 7 U.S.C. § 2020(c), (e) (2003); 7 C.F.R. §§ 272.4(b), 272.5(b)(4) (2004).

<sup>21</sup>For a discussion of privatization and its implications for advocacy, see generally 35 CLEARINGHOUSE REVIEW 491-676 (Jan.-Feb. 2002) (special issue on the implications of privatization on low-income people).

<sup>22</sup>See generally Henry A. Freedman, *The Welfare Advocate's Challenge: Fighting Historic Racism in the New Welfare System*, 36 CLEARINGHOUSE REVIEW 31 (May-June 2002).

and investigate complaints. For example, within the U.S. Department of Health and Human Services (HHS), the Office for Civil Rights is the agency charged with enforcing Title VI. The regulations provide that the Office for Civil Rights can decide to initiate investigations on its own, but it must respond to complaints filed by an individual.<sup>23</sup> The federal regulations require that when investigating complaints the office attempt resolution of the matter through settlement. If settlement is not reached, HHS can terminate federal funding to the program that is out of compliance or ask the Justice Department to sue for compliance.<sup>24</sup> Individuals and their advocates should learn about their regional offices for civil rights because, for the most part, complaints are filed and resolved there.

Advocacy before the Office for Civil Rights of the relevant federal agency has its advantages and disadvantages, and advocates report varying experiences with individual regional offices for civil rights, including dissatisfaction with the offices' process.<sup>25</sup> These offices can be uneven in the degree of their enforcement activities and the time frames in which they complete investigations. But there has been some recent good news. In the fall of 2003 California advocates won a comprehensive resolution of their 1999 complaint to the HHS Office for Civil Rights. The complaint charged that the Los Angeles County welfare agency denied equal access to individuals with limited English proficiency by, among other misdeeds, not providing adequate bilingual staff and interpreters or translated materials and by steering non-English-speaking and non-Spanish-speaking individuals to the least desirable welfare-to-work activities. The county agreed to take numerous remedial steps, including establishing a com-

munity advisory board and a central coordinating office to oversee development and implementation of a comprehensive language policy; adopting policies to promote meaningful access to employment and training programs; creating new programs in vocational skills for individuals with limited English proficiency; and reporting on an ongoing basis to the Office for Civil Rights.<sup>26</sup>

## B. Negotiations with State and Local Agencies

State and local welfare agencies may be willing to work with advocates to develop a language access policy. The federal guidance puts agencies on notice of their obligations and the elements of an adequate language access plan. Many agencies likely are well aware of their shortcomings and the need to come into compliance. In Arizona, for example, the agency's failure to translate all of its public benefit notices into Spanish was but one glaring sign of its noncompliance. In 2002 the Welfare Law Center, the Morris Institute for Justice, and Southern Arizona Legal Aid's negotiations with this welfare agency resulted in the agency's prompt adoption of a twelve-step corrective action plan. The plan included assessment of the language diversity of the state's low-income population; development of posters with "I speak" cards to alert clients to free translation services; development of a form to assess clients' language needs; translation of all notices and forms into Spanish; development of a notice in multiple languages advising clients how to get notices translated into other languages; revisions of the language assistance policy; and staff training. Ensuring the agency's continued progress will require ongoing monitoring. Nevertheless, the negotiations achieved real results for clients.

<sup>23</sup>45 C.F.R. § 80.8 (2003).

<sup>24</sup>*Id.* See 42 U.S.C. § 2000d-1 (2004).

<sup>25</sup>See Randal S. Jeffrey et al., *Drafting an Administrative Complaint to Be Filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 35 CLEARINGHOUSE REVIEW 276 (Sept.–Oct. 2001).

<sup>26</sup>Resolution Agreement between the Office for Civil Rights, U.S. Department of Health and Human Services Region IX, and the Los Angeles County Department of Public Social Services, Complaint 09-00-3082 (Oct. 2003) (on file with Welfare Law Center).

### C. State and Local Legislation

Advocates may want to consider seeking state or local legislation that defines more precisely the obligations of welfare agencies to ensure meaningful language services. For example, in late 2003, as part of their multifaceted strategy, New York City advocates won enactment of city council legislation specifying the steps that the welfare agency must take to provide language services. Among other provisions, the legislation requires keeping records of the provision of these services, applies to agency contractors, and prescribes agency contract terms aimed at securing contractors' compliance with the law's provisions.<sup>27</sup>

### D. Advocacy by Grassroots Groups

Community groups that serve low-income individuals with limited English proficiency can play an important role in exposing agency failures and securing changes in policies and practices. In New York City a community survey by Make the Road by Walking documented community complaints about the local welfare agency and recommended improvements, including the need for services for non-English speakers.<sup>28</sup> With colleagues in the city, Make the Road by Walking has been actively involved in language access advocacy including a successful Office for Civil Rights complaint, successful litigation to enforce food stamp bilingual requirements, and advocating city council legislation.<sup>29</sup>

When low-income Idaho families, especially families of color, reported denials of benefits in the Children's Health Insurance Program, Idaho Community Action Network launched a campaign to determine whether the program was discriminating against minorities. Its test-

ing project uncovered discrimination against Latino families; it uncovered, among others, a lack of translators, hostile treatment, and burdensome verification requirements. Idaho Community Action Network publicized its findings and secured reforms, including a simplified application process and a Spanish application form. Enrollment of children in the Children's Health Insurance Program and Medicaid increased after this campaign.<sup>30</sup>

### E. Welfare Law Center Project

The Welfare Law Center is stepping up its efforts across the country to ensure that welfare agencies and private contractors delivering welfare and related services comply with their obligations to ensure access for individuals with limited English proficiency. Beginning in September 2004, an Equal Justice Works fellow, Erin Oshiro, will work on this project along with senior center staff. The center will partner with local advocates to develop and implement advocacy strategies; identify and publicize advocacy efforts, resources, and model policies and practices; and promote communication among advocates addressing these issues through a listserv and other means, where appropriate, such as conference calls. The center welcomes inquiries from advocates about advocacy efforts and collaborating.

### III. State-Law-Based Strategies of California Rural Legal Assistance

Given the practical hurdles inhibiting direct enforcement in federal court of the rights of persons with limited English proficiency to access basic services, California Rural Legal Assistance is developing and implementing alterna-

<sup>27</sup> Equal Access to Human Services Act of 2003, New York City Admin. Code § 8-1001 – 8-1011.

<sup>28</sup> Make the Road by Walking, System Failure: Mayor Giuliani's Welfare System is Hostile to Immigrant and Poor New Yorkers (1999) (on file with Welfare Law Center) (summary available at [www.maketheroad.org](http://www.maketheroad.org)).

<sup>29</sup> *Ramirez v. Giuliani*, 99 Civ. 9287 (BSJ) (S.D.N.Y. Sept. 5, 2001) (stipulation and order of settlement) (Clearinghouse No. 52,785).

<sup>30</sup> For a description of this campaign, see APPLIED RESEARCH CENTER, WORTHWHILE WELFARE REFORMS (2001), at [www.arc.org/Pages/ArcPub.html#warp](http://www.arc.org/Pages/ArcPub.html#warp).

