

Title VI, Limited English Proficiency and the Public Lawyer

By Bruce L. Adelson

When President Lyndon Johnson signed the Civil Rights Act of 1964, one of the most all-encompassing pieces of civil rights legislation in U.S. history was enacted. Today, the act's prohibition against national origin discrimination, which effectively requires federal fund recipients to provide non-English-language help to limited English proficient (LEP) people, has particular relevance. With tens of millions of LEP people (the U.S. Census Bureau defines an LEP person as someone who speaks English "not well" or "not at all") living throughout the country and billions of federal dollars distributed to almost all states, counties, and municipalities, this law's reach is tremendous.

Title VI, 42 U.S.C. § 2000d of the 1964 Civil Rights Act prohibits discrimination based on race, color or national origin by any public entity that receives federal funding or financial assistance. This section is especially important to the public lawyer and his/her client because it applies to all federal agencies and recipients of federal funds or assistance, such as states, counties, municipalities and their myriad agencies and departments. The vast majority of public entities throughout the United States receive some type of federal assistance: subsidies, loans, personnel exchanges, grants, or in-kind services. Title VI covers all such aid. This title also has no minimum amount for its application. The receipt of any amount of federal assistance brings with it the strictures of Title VI.

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According to the 2000 Census, nearly 50 million people in the United States speak a language other than English at home. In addition, approximately 30 percent of Spanish speakers and 25 percent of all Asian-language speakers, for example, identify themselves as being LEP, according to the 2000 Census. Presumably, these numbers have grown since the last census's release.

The U.S. Supreme Court has held that pursuant to Title VI, federal assistance recipients must provide non-English-language assistance to LEP individuals who utilize the recipients' federally subsidized services. In *Lau v. Nichols*,¹ the Supreme Court interpreted Title VI implementing regulations promulgated by the U.S. Department of Health, Education, and Welfare. In *Lau*, the Court required a San Francisco school district with a significant number of non-English-speaking students of Chinese origin to take reasonable steps to provide them with a meaningful opportunity to participate in federally funded educational programs. *Lau* conflated Title VI's national origin discrimination prong with non-English-language-based discrimination. The Court found that the failure of a federally assisted program to provide LEP individuals with "meaningful access" to the program in their relevant non-English languages constituted national origin discrimination in violation of Title VI.

Title VI therefore requires all recipients of federal aid to open their services to LEP individuals and provide them with meaningful access to their federally subsidized services by using, for example, competent interpreters and accurately translated "vital documents."

In 2000, President Clinton took Title VI a step further. He signed Executive Order 13166, which requires all federal agencies to promulgate regulations and guidance for their financial assistance recipients regarding the provision of services to LEP individuals. In 2002, the U.S.

Department of Justice, the federal agency charged with enforcing Title VI and providing statutory guidance to other federal agencies, issued its LEP regulations, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (DOJ's Guidance).² Other federal agencies have modeled their regulations on DOJ's guidance and most issued them subsequently.

Far-Reaching Implications

Ignorance of Title VI and statutory non-compliance put federal aid recipients at significant risk. If a complaint alleging a Title VI violation is made to the federal government, a federal financial aid recipient could be faced with a compliance review by its funder or DOJ. Compliance reviews are intrusive, lengthy audits. The ultimate sanction, if the federal government determines that a federal assistance recipient has violated Title VI, is termination of that federal assistance.

Under Title VI, private plaintiffs have standing to sue for monetary damages and injunctive relief. In *Alexander v. Sandoval*,³ the Supreme Court held that plaintiffs must prove intentional discrimination rather than merely disparate impact. This change made it more difficult for private plaintiffs to prevail in Title VI enforcement actions.

However, as *Rodriguez v. Lucas County Department of Job and Family Services*⁴ reveals, private plaintiffs still have ample opportunity to win Title VI claims. In *Rodriguez*, the plaintiffs filed a class action against the Lucas County and Ohio Departments of Job and Family Services. The plain-

Title VI Success Stories

The Maryland Transit Administration (MTA) prints schedules and other fare information in English and Spanish. The agency also uses laminated cards with pictures of coins representing the base bus fare. MTA's bus drivers use these cards to inform LEP passengers about their fares.

The Maricopa County Superior Court in Arizona conducts a Spanish-language drug court for LEP misdemeanor drug defendants whose primary language is Spanish. The court convenes on the same day each month. Officials have found that LEP Hispanic defendants are better able to understand their offenses and have a higher participation rate in diversion programs than before the Spanish-language court began. The Spanish language program has also reportedly reduced recidivism rates among participating defendants.

tiffs alleged that the defendants' almost exclusive use of English-language notices, applications and other communications and their failure to use Spanish-language interpreters discriminated against LEP Hispanics. The plaintiffs claimed that the defendants' alleged failures constituted national origin discrimination in violation of Title VI.

As the district court held in denying the defendants' motion to dismiss the Title VI claim, "[t]he existence of the [federal] mandate and the defendants' alleged knowing and long-term noncompliance shows, arguably, an intent to treat Spanish-speaking recipients of food stamps differently than English-speaking recipients. Basically, plaintiffs claim that Spanish-speakers do not have the same access to food stamps as English speakers do."⁵ This suit followed previous litigation in which the same defendants agreed to provide Spanish-language assistance to LEP people and then failed to do so.

After years of protracted battles, the court entered a consent decree that included a comprehensive plan to address the plaintiffs' Title VI allegations and awarded the plaintiffs \$72,000 in attorney fees. The defendants could have avoided significant time and expense, as well as unwanted attention from their federal funder, the Department of Health and Human Services (HHS), if they had complied with the Title VI regulatory guidance of HHS and DOJ by providing such services as telephonic interpretation and the translation of certain documents into Spanish.

Ensuring Compliance

Faced with the Title VI mandate, what should public lawyers and their clients do? The first place to look for answers is the Executive Order 13166 regulations of the federal assistance recipient's funder.

DOJ's Title VI Regulatory Guidance outlines a four-factor analysis for federal assistance recipients to use when assessing how to ensure meaningful access to their programs and activities by LEP persons. The four factors are as follows:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered by the grantee
2. The frequency with which LEP individuals come into contact with the program
3. The nature and importance of the program, activity or service provided by the program to people's lives
4. The resources available to the grantee/recipient and costs⁶

After completing the four-factor assessment, federal assistance recipients "should develop an implementation plan [an LEP plan] to address the identified needs of the LEP populations they serve."⁷ The development and implementation of an LEP plan provides evidence of Title VI compliance to the federal funder in case of a complaint

against the recipient or as a defense in court.

As the four-factor analysis suggests, the extent that a recipient must provide meaningful access to its programs for LEP people will depend upon the nature and importance of the services provided. For example, DOJ regards the services that state courts and law enforcement agencies provide as important and essential to the community. DOJ's guidance states thus:

[The importance of competent and free interpretation services] is particularly [apparent] in a courtroom or administrative hearing, pre- and post-trial proceedings, situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual's rights and access to important services.⁸

Accordingly, these agencies have a higher threshold to reach concerning Title VI compliance and ensuring meaningful access to their services by the LEP population.

Examples of Questionable Title VI Compliance

Compliance with Title VI can be called in to question in a wide variety of ways. Below are some examples.

- A large southeastern state maintains a statewide interpreter program for its courts. A complaint was filed against the state's administrative office of the courts with the U.S. Department of Justice, alleging Title VI violations in the state's courts. The complaint's most egregious allegation focused on one Spanish-language interpreter, who allegedly posted racially offensive comments directed at Hispanics on a white supremacist website. The complaint further alleged that the interpreter made several racist comments to Hispanics for whom he interpreted, including statements that they should speak English and return to Mexico.
- A trial judge in a western state presided over a divorce case with child custody and property issues involving an LEP couple. The husband spoke marginally better English than the wife, who spoke virtually no English. The court had no LEP plan, no interpreters and no translated documents. The lawyers also failed to hire interpreters for their clients. The trial judge decided to use the husband as the interpreter and asked him to translate letters from his wife and her messages left on his telephone answering machine. The court entered judgment for the husband and granted him custody of the couple's children. The judgment was reversed on appeal. The appeals court found that the trial judge abused his discretion by using the husband as the interpreter and translator.
- A federal agency provides substantial services to the

public. An Hispanic supervisor tested his agency's Title VI compliance by pretending to be a customer who spoke only Spanish. He approached a clerk who spoke only English and requested services in Spanish. Not knowing how to communicate with someone who spoke no English, the clerk raised his voice and began pointing to several areas of the facility in an attempt to direct the customer elsewhere. Eventually, the clerk disappeared into another room and returned with a Vietnamese employee who did not speak Spanish and said, "Here, you can help him." The agency subsequently instituted additional Title VI training as a result of this interaction.

- A county clerk had one employee who was bilingual in Spanish and English. She went on maternity leave, and the clerk had no plan to provide Spanish-language assistance while the employee was on leave. Someone in the clerk's office posted a sign in Spanish that read, "Spanish assistance is unavailable. Please come back another time." The local Hispanic community, with the largest percentage of LEP individuals in the area, reacted quickly. The clerk removed the sign and the clerk's office began developing an LEP plan, which included outreach to the Hispanic community.

Conclusion

As with any complex federal law, training and education of management and front-line personnel are essential to complying with Title VI and avoiding unwanted attention from the federal government and private plaintiffs. The United States' LEP population will continue to grow. This growth will be accompanied by an increased need for LEP

Title VI Information

For more information about Title VI and LEP issues, log onto www.lep.gov. This website is federally operated and maintained by DOJ. It has useful information about Title VI and tools recipients can use for compliance.

services as well as greater awareness of LEP people's rights. Public lawyers who represent federal assistance recipients have an obligation to inform their clients about Title VI and ensure that these clients comply with one of this nation's most far-reaching and least-known civil rights laws. ■

Endnotes

1. 414 U.S. 563 (1974).
2. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002).
3. 532 U.S. 275 (2001).
4. 222 F.R.D. 324 (N.D. Ohio, 2004).
5. *Almendaras v. Palmer, et al.*, No. 3:00CV7524, 2002 U.S. Dist. LEXIS 23258 (N.D. Ohio Dec. 3, 2002).
6. 67 Fed. Reg. at 41459.
7. *Id.* at 41464.
8. *Id.* at 41462.