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RE: DHS DOCKET NO. DHS-2009-0032

The Brennan Center for Justice at NYU Law School submits the following comments on the Department of Homeland Security's proposed Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 75 Fed. Reg. 34465 (June 17, 2010) ("Guidance"). We submit these comments on behalf of the Brennan Center and the following thirteen other organizations: Asian American Federation of Florida; Asian & Pacific Islander American Health Forum; Asian Pacific American Legal Resource Center; Empire Justice Center; Florida Legal Services, Inc.; Legal Aid Foundation of Los Angeles; Legal Services NYC; National Alliance to Nurture the Aged and the Youth; National Council of La Raza; National Health Law Program; New York Immigration Coalition; North Carolina Justice Center; and South Asian Americans Leading Together.

Introduction

The Guidance that is the subject of these comments is enormously important. Almost 25 million people in the United States are considered to be limited English proficient ("LEP").¹ The Guidance covers communication by LEP individuals in circumstances in which the failure to communicate or understand can be a matter of

¹ Laura Abel, Language Access in State Courts 3 (2009), *available at* http://brennan.3cdn.net/684c3cdaaa2bfc8ebc_6pm6iywsd.pdf.

life and death, including law enforcement, corrections and detention, and emergency/disaster services.

The Guidance covers all of these settings, because the Department of Homeland Security (“DHS”) provides funding to many of the state and local government agencies, businesses and nonprofit organizations that provide these essential services. For example, the \$800 million that DHS’ Immigration and Customs Enforcement (“ICE”) budgets annually to acquire bedspace in immigration detention facilities is distributed to more than 350 local and state jails and prisons, and seven privately run facilities, in addition to the facilities run by the federal government itself.² In addition, law enforcement agencies will receive a minimum of \$400 million through DHS’ State Homeland Security Program and Urban Areas Security Initiative for fiscal year 2010.³

The proposed Guidance promises to be a valuable tool for educating these and other recipients of DHS funding about their obligations to provide language assistance pursuant to Title VI of the Civil Rights Act of 1964 (“Title VI”).

However, we submit these comments to request that the Guidance be modified to clarify the obligations of specific types of recipients, thus improving the ability of those recipients to comply with Title VI. The proposed Guidance places too much emphasis on the flexible nature of the four-factor test federal agencies apply to determine the extent of the language assistance services a recipient of federal funding must provide under Title VI.⁴ Hard and fast rules are far more useful to the funding recipients, LEP individuals, DHS officials and others needing to determine the Title VI obligations of DHS funding recipients.

Accordingly, the Guidance should make clear that several other federal agencies have already determined that the language assistance obligations of many types of DHS funding recipients are extensive. For example, the Department of Justice (“DOJ”) has determined that law enforcement agencies must provide competent and timely language assistance for “911 calls, custodial interrogation, and health and safety issues” for people in police custody.⁵ DOJ also has determined that LEP individuals must have access to competent, free interpreters in all court

² Office of Inspector General, Department of Homeland Security, Immigration & Customs Enforcement Detention Bedspace Management 2 (2009), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_09-52_Apr09.pdf; U.S. ICE, Detention Management Program, available at <http://www.ice.gov/partners/dro/dmp.htm>.

³ DHS, Press Release: Secretary Napolitano Announces Grant Guidance for More Than \$2.7 Billion in Fiscal Year 2010 Grant Programs (Dec. 8, 2009), available at http://www.dhs.gov/ynews/releases/pr_1260283102665.shtm.

⁴ Those factors are: 1) the size of the LEP population with which it is likely to come into contact, 2) the likely frequency of that contact, 3) the nature and importance of the activity or service in question, and 4) the cost of language assistance services and the extent of resources available to the grantee. DOJ, 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).

⁵ *Id.* at 41468.

proceedings and important court-related activities.⁶ The United States Department of Health and Human Services (“HHS”) has determined that when a recipient of federal funding provides medical treatment – as is often the case for ICE detention facilities – competent interpreter services are immediately necessary in urgent and important situations and informal interpreters are inappropriate in a number of circumstances.⁷ We urge DHS to amend its proposed Guidance to mirror the determinations of these and other federal agencies. Our comments on specific sections of the proposed Guidance follow.

Comments on Specific Sections

Part III: Covered Recipients

Part III of the Guidance (listing covered recipient programs) should be expanded to explicitly include state motor vehicle departments⁸ and state, county and municipal courts.⁹

As the proposed Guidance makes clear in Section IV, state motor vehicle departments are likely to come into contact with a high number of LEP individuals.¹⁰ Activities such as issuing drivers licenses, non-driver identification cards, and vehicle registration can profoundly affect the rights and obligations of LEP individuals, and the Guidance should recognize the necessity of interpretation and translation in these contexts.

Courts should be included because open and equal access to the justice system is a constitutional guarantee that cannot be adequately safeguarded without interpretation and translation services for LEP individuals. These judicial proceedings often impact an individual’s basic human needs, liberty or safety. Unfortunately, courts are plagued by a troubling prevalence of Title VI violations. Too often, language assistance services are unavailable in civil cases, and are of low quality in

⁶ See DOJ Coordination & Review Section, Commonly Asked Questions About Executive Order 13166 (Oct. 2008).

⁷ HHS, Guidance to the Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47311, 47315, 47318 (Aug. 8, 2003).

⁸ For FY 2010, DHS will distribute \$48,000,000 to state driver’s license agencies, state departments of motor vehicles, motor vehicle administrations, and state public safety agencies or departments with responsibility over driver’s license issuance.. DHS, FY 2010 Preparedness Grant Programs Overview (Dec. 8, 2009), p. 9, available at <http://www.dhs.gov/xlibrary/assets/grant-program-overview-fy2010.pdf>.

⁹ Although courts are not large recipients of DHS funding, they do receive some funding for court security. See, e.g., North Carolina Admin. Office of the Cts., Court Security Survey of Sheriffs and Request for Funds (Dec. 2005) (reporting receipt of \$500,000 from DHS), available at <http://www.nccourts.org/Citizens/SRPlanning/Documents/courtsecuritysurvey.pdf>.

¹⁰ See also U.S. Dep’t of Transp., Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP Persons), 70 Fed. Reg. 74087, 74091 (Dec. 14, 2005) (noting that populations applying for a driver’s license at state motor vehicle departments are likely to include LEP persons and that LEP persons thus “should be considered when planning language services”).

criminal matters.¹¹ When the absence or provision of interpretation and translation services can mean the difference between, for example, retaining and losing custody of a child, courts should always provide language assistance to LEP individuals.¹² Accordingly, DHS should add state, county and municipal courts to the list of covered recipients.

Part V: Recipient Determination of the Extent of Its Obligation to Provide LEP Services

Sections V.1 & V.2

In Sections V.1 and V.2 – which explain how recipients should assess the size of the LEP populations they serve, and the frequency with which they come into contact with those populations – the Guidance should acknowledge that the following types of DHS recipients are likely to have very frequent contact with LEP individuals:

- a) those operating detention facilities under contract to ICE, and performing other services geared specifically at immigrant populations,
- b) law enforcement agencies operating under 287(g) agreements with ICE, which delegate immigration enforcement authority to state and local law enforcement agencies, will have similarly high rates of contact with LEP individuals, and
- c) mass transit agencies, which are likely to have high rates of contact with LEPs because of the heavy reliance of LEP individuals on mass transit.¹³

Section V.3

Section V.3 – which discusses the nature and importance of the program, activity, or service provided by the recipient – should incorporate the statement that is now at the end of the proposed Guidance that “emergency planning and response, health and safety, immigration and other detention, and law enforcement operations” all have the potential for “greater consequences.”¹⁴

¹¹ See Laura Abel, *Language Access in State Courts* (2009), available at http://brennan.3cdn.net/684c3cdaaa2bfc8ebc_6pm6iywsd.pdf.

¹² DOJ, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 Fed. Reg. 41455, 41471 (June 18, 2002) (“At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present”).

¹³ The 2000 Census found that more than 11 percent of LEP people over the age of 16 use public transport as their primary transportation to work, while only 4% of people who are fluent in English do so. Fed. Transit Admin. Office of Civil Rights, Dep’t of Transp., *Implementing the Department of Transportation’s Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons: A Handbook for Public Transportation Providers* (2007), available at: http://www.lep.gov/guidance/guidance_index.html.

¹⁴ DHS, *Proposed Guidance*, 75 Fed. Reg. at 34475.

In addition, as we discuss below, the Guidance should also acknowledge that other federal agencies have already determined that some law enforcement, detention and corrections, and medical activities conducted by DHS recipients are so important that high quality and timely language assistance services are essential.

1. Law Enforcement

The Guidance should incorporate the specific statements DOJ has made regarding the language assistance obligations of law enforcement personnel. DOJ has warned that, “[g]iven the critical role law enforcement plays in maintaining quality of life and property, traditional law enforcement and protective services rank high on the critical/non-critical continuum.”¹⁵ In particular, DOJ states:

critical areas for language assistance could include 911 calls, custodial interrogation, and health and safety issues for persons within the control of the police. These activities should be considered the most important under the four-factor analysis. Systems for receiving and investigating complaints from the public are important. Often very important are routine patrol activities, receiving nonemergency information regarding potential crimes, and ticketing.¹⁶

Because of the importance of these activities, DOJ has suggested the express inclusion of non-English language skills in the hiring criteria for some law enforcement positions.¹⁷ DOJ also suggests that law enforcement agencies identify commonly distributed documents and then arrange for advance translation of these documents into languages commonly spoken in the relevant community.¹⁸

Incorporating DOJ’s guidance regarding the language access obligations of law enforcement agencies is particularly important because of the frequency with which such agencies do not provide adequate language access.¹⁹ Here are just a few examples of noncompliance that have had serious consequences for LEP individuals:

¹⁵ DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41467 (June 18, 2002).

¹⁶ *Id.* at 41468.

¹⁷ DOJ Civil Rights Division, Considerations for Creation of Language Assistance Policy and Implementation Plan for Addressing Limited English Proficiency In a Law Enforcement Agency, available at http://www.justice.gov/crt/lep/Law_Enforcement_Planning_Tool.htm.

¹⁸ *Id.*

¹⁹ See generally Summit County Sheriff’s Office & City of Lorain Police Department, Resource Documentation for Law Enforcement: Interpretation and Translation Services 32-33 (2004), available at <http://www.co.summit.oh.us/sheriff/LEP.pdf> (reporting that a significant proportion of law enforcement agencies in Ohio did not have a language access policy, and that even some that did relied primarily on family, friends and prisoners). See also Make the Road & New York Immigrant Coalition, Still Lost in Translation: City Agencies’ Compliance with Local Law 73 and Executive Order 120 (2010), p. 30, available at http://www.maketheroad.org/pix_reports/MRNY_Still_Lost_in_Translation_July_2010.pdf (over 2/3

Search for toddler was hampered by inability to interview witnesses

In winter 2008, the Detroit Police Department's search for a two-year-old girl was stymied by difficulty communicating with the Bangladeshi immigrants in the girl's community.²⁰ One officer reported that often the only people the police are able to interview are children, because they are the only ones who speak English.²¹

Murder investigation frustrated by shortage of Spanish interpreters

In 2009, the Cleveland Police Department had difficulty conducting a murder investigation in a mostly Spanish-speaking community.²² Apparently, the department has only two bilingual police officers and a professional interpreter whom they bring in "for bigger cases" – a category not including that particular murder case.²³

Korean man spent four days in jail because police could not communicate with him

The Washington D.C. Office of Human Rights found the Metropolitan Police Department in violation of the D.C. Language Access Act when a Korean man was arrested and detained for four days before an interpreter was provided for him. When he was finally able to communicate with the police, they discovered that he was not the person they had sought.²⁴

of LEP individuals surveyed received no language assistance in communications with the New York Police Department).

²⁰ George Hunter, *Cultural Barriers Stall Search for Girl*, The Detroit News, Dec. 26, 2008, available at

<http://www.detnews.com/apps/pbcs.dll/article?AID=/20081226/METRO/812260367/1410/METRO01>.

The Detroit Police Department has been a recipient of DHS funding. See, e.g., Detroit/Wayne County Port Authority, Press Release: Detroit/Wayne County Port Authority Awarded Homeland Security Grant to Secure the Port of Detroit (Dec. 11, 2003) (discussing award of DHS funding to Detroit Police Department and other area agencies), available at

<http://www.portdetroit.com/materials/DetPortAuth%20Homeland.pdf>.

²¹ George Hunter, *Cultural Barriers Stall Search for Girl*, The Detroit News, Dec. 26, 2008.

²² Will Carr, *Language Barrier Poses Hurdle in Murder Investigation*, Channel 9 News (Jan. 26, 2009), available at <http://www.newschannel9.com/news/police-975133-cleveland-department.html>.

The Cleveland Police Department has been a recipient of DHS funding. See City of Cleveland, Cleveland Police Receive \$50,000 CEDAP Grant (May 19, 2006), available at

http://www.clevelandmn.gov/office2.com/index.asp?Type=B_PR&SEC=%7BF1F566A6-7400-4999-A0AF-8B2AE03FF38B%7D&DE=%7B70D98C9B-291E-4DB1-B433-8C5DD6170491%7D.

²³ Will Carr, *Language Barrier Poses Hurdle in Murder Investigation*, Channel 9 News (Jan. 26, 2009).

²⁴ Kathryn Alfisi, *Language Barriers to Justice*, Washington Lawyer (Apr. 2009), available at http://www.dcbarr.org/for_lawyers/resources/publications/washington_lawyer/April_2009/language_barriers.cfm.

Frequently, victims of domestic violence are charged with domestic violence, and abusers go free, because of the victims' inability to communicate with law enforcement.

Aarti was arrested and placed in immigration detention after trying to report domestic violence

For several years, Aarti had been physically and sexually abused by John, who was the father of her child. During one incident, John pushed Aarti against the wall and beat her repeatedly. At one point, Aarti scratched John's face to prevent him from slamming the door on her hand. Aarti, who lived in North Carolina, then called the police. When the police arrived, they tried to communicate with Aarti without an interpreter, even though Aarti does not speak English. Because they could not understand what Aarti was saying, they arrested her instead of John. As a result of Aarti's arrest, DHS learned of Aarti's immigration status and placed her in immigration detention, while her child remained in John's custody.²⁵

A California woman had difficulty obtaining a special visa for crime victims, and her abuser went free

In California, a local sheriff's office had difficulty communicating with an LEP victim of domestic violence who reported the crime. Although the sheriff's office receives federal funding, it did not use an interpreter to communicate with the victim and did not follow up or investigate the incident she reported. Later, when the victim requested that the sheriff's office verify that she reported the crime to law enforcement for a special visa for crime victims, the sheriff's office refused because they did not find the victim helpful because she was LEP.²⁶ Without this verification, she cannot prove her eligibility for the visa.

Mia was forced into a psychiatric hospital and her abuser went free

Mia called 911 after an abusive domestic violence incident. She had very limited English-speaking capacity and the police did not provide interpretation. She became agitated because she could partially understand that her English-speaking abuser was lying to the police officer. The police officer left. After another abusive incident, Mia called 911 again. This time, her abuser's friend interpreted for Mia and told the police that she had threatened suicide. The police officer placed her on a 72 hour involuntary psychiatric hold. Once Mia had access to an interpreter at the hospital, she was released; her abuser was never arrested.²⁷

²⁵ E-mail from Sameera Hafiz, Legal Momentum (Jan. 7, 2010).

²⁶ *Id.*

²⁷ *Id.*

2. Detention and Corrections

In the detention and corrections contexts – including in detention facilities run by ICE²⁸ – DOJ states that “[c]ontact affecting health and safety, length of stay, and discipline likely present the most critical situations under the four-factor analysis.”²⁹ DOJ specifies that “Intake/Orientation,” “[h]ealth care services,” and disciplinary proceedings all fall into this category.³⁰ The DHS Guidance should mirror this language. And, like DOJ, DHS’ Guidance should make clear that “[p]risons providing health services should refer to the Department of Health and Human Services’ guidance regarding health care providers’ Title VI and Title VI regulatory obligations.”³¹

The length of stay in immigration detention facilities is often many months, and may be years in some cases.³² A continued lack of language access in this context may compound existing health risks to LEP individuals in need of medical attention. The availability of interpretation is crucial for these individuals to communicate their experiences to healthcare professionals and receive adequate medical care.³³ LEP individuals in detention or corrections facilities who suffer from mental illnesses may also be particularly at risk here, as misunderstandings between doctors and patients could lead to erroneous civil commitment.³⁴

Clear guidance regarding the language access obligations of detention and corrections facilities is particularly important given the frequency with which detention facilities under contract to DHS fail to provide language access. These facilities sometimes conduct medical exams for LEP individuals without providing interpreters, leading to confusion and fear.³⁵ Sometimes, LEP patients are given medical consent forms and directed to sign them without a clear idea of what they authorize.³⁶ In their daily interactions with facility officials, detainees can be forced to rely on one another to obtain even the most basic necessities, such as medical care, food and toiletries.³⁷ One LEP detainee, separated from her son with no indication of why she was being held or whether or not she would be able to return to her family, attempted suicide after three weeks of detention.³⁸

²⁸ DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41469 n.3

²⁹ *Id.* at 41469.

³⁰ *Id.* at 41469-70.

³¹ *Id.* at 41470.

³² Amnesty International, *Jailed Without Justice 6* (2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

³³ Human Rights Watch, *Detained & Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention 34* (2009), available at http://www.hrw.org/sites/default/files/reports/wrd0309web_0.pdf.

³⁴ *Id.* at 62-63.

³⁵ *Id.* at 3.

³⁶ *Id.* at 34.

³⁷ Amnesty International, *Jailed Without Justice 34* (2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

³⁸ *Id.* at 5.

The Guidance should also make clear that LEP individuals must be guaranteed equal access to detention alternatives such as the Electronic Monitoring Program and the Intensive Supervision Appearance Program.³⁹ The ability to communicate with contractors administering these programs could mean the difference between detention and release for individuals who pose no risk of violence or escape. For this reason, the Guidance should reiterate DOJ's finding, in the corrections context, that a lack of English proficiency should not be the determining factor in weighing the reasonableness of continued incarceration:

If a prisoner's LEP status makes him/her unable to participate in a particular program, such a failure to participate should not be used to adversely impact the length of stay or significantly affect the conditions of imprisonment. Prisons have options in how to apply this standard. For instance, prisons could: (1) Make the program accessible to the LEP inmate; (2) identify or develop substitute or alternative, language-accessible programs, or (3) waive the requirement.⁴⁰

3. Medical Care

The Guidance should also emphasize the importance of adequate interpretation and translation services for LEP persons receiving medical care, even outside of the detention context. A lack of language assistance services can have devastating effects on LEP patients and their families. A study from 2007 found that LEP patients "were more likely than English-speaker patients to experience an adverse event that caused some physical harm."⁴¹ Some of those events resulted in severe temporary harm or death – more than twice the rate that occurred among English-speaking patients.⁴² To prevent harm to LEP persons and their families, the Guidance should make clear the need for timely, competent interpretation in medical situations.

4. Driver's Licenses and Mass Transit

The Guidance should also make clear the importance of many of the services provided by state motor vehicle departments (including driver's license issuance) and mass transit agencies. As the proposed Guidance notes, a decision by a government entity to make an activity compulsory provides "strong evidence of the program's

³⁹ See DHS Immigration and Customs Enforcement, Alternatives to Detention for ICE Detainees (2009), available at <http://www.ice.gov/pi/news/factsheets/alternativestodetention.htm>.

⁴⁰ DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41470.

⁴¹ Chandrika Divi, et al., *Language Proficiency and Adverse Events in U.S. Hospitals: A Pilot Study*, 19 Int'l J. for Quality in Health Care 6067 (2007), available at:

<http://www.commonwealthfund.org/Content/Publications/In-the-Literature/2007/Apr/Language-Proficiency-and-Adverse-Events-in-U-S--Hospitals--A-Pilot-Study.aspx/>.

⁴² *Id.*

importance.”⁴³ The Guidance should go farther and recognize – as the U.S. Department of Transportation (“DOT”) has done – that driver’s licenses are compulsory for anyone needing to drive, and that the activity of issuing them is therefore “important.”⁴⁴

The Guidance should also adopt DOT’s warning that government-provided interpreters are particularly necessary – and the use of family, friends or bystanders is particularly inappropriate – for LEP individuals applying for a driver’s license. An informal interpreter who assists with an LEP person’s application for a driver’s license could gain access to the LEP person’s personal information – such as address, social security number and medical information – “compromis[ing] the personal security” of that LEP person.⁴⁵

An explanation of the need for recipients to provide language assistance for people seeking driver’s licenses is necessary in light of the pressure on recipients to provide driver’s license tests in English only.⁴⁶ One such bill pending before the Georgia legislature mandates that both written and oral license examinations be administered in English only.⁴⁷ The passage of the bill would potentially limit the mobility of the approximately 5,000 people per month who take the written driver’s license test in a language other than English in the state.⁴⁸

The Guidance should also adopt DOT’s instruction that “providing public transportation access to LEP persons is crucial. An LEP person’s ability to utilize effectively public transportation may adversely affect his or her ability to obtain health care, or education, or access to employment.”⁴⁹ As also noted above, large populations of LEP persons use mass transit to reach their homes and places of work. They need information in their language regarding route changes, fares, and safety policies on public transportation. LEP users of San Francisco’s Municipal Railway (“Muni”), for example, reported difficulty using the transport system earlier this year. In comments in front of the city’s Immigrant Rights Commission, the customers noted confusion over transfer tickets printed only in English, and harassment from fare collectors and police due to their uncertainty about which ticket to use.⁵⁰

⁴³ DHS, Proposed Guidance, 75 Fed. Reg. at 34469.

⁴⁴ DOT, Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087, 74091 (Dec. 14, 2005).

⁴⁵ *Id.* at 74094.

⁴⁶ See, e.g., Elizabeth Hovde, *English Only Driver’s Licenses?*, Oregonian (May 3, 2010), available at http://www.oregonlive.com/hovde/index.ssf/2010/05/english_only_drivers_licenses.html; Mary Lou Pickel, *Senate Passes English-Only Drivers License Exams*, Atlanta J.-Const. (March 10, 2009), available at <http://blogs.ajc.com/gold-dome-live/2009/03/10/senate-calls-for-english-only-on-drivers-license-exams/>.

⁴⁷ See S.B. 67, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

⁴⁸ Kate Brumback, *English-only Driver’s Tests Proposed in Georgia*, Associated Press, Apr. 2, 2009, available at: http://www.breitbart.com/article.php?id=D97AFKB01&show_article=1&catnum=1.

⁴⁹ DOT, Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087, 74092–93 (Dec. 14, 2005).

⁵⁰ Rigoberto Hernandez, *Immigrants Say Officers Harass Them on Muni*, Mission Local (Mar. 9, 2010), available at: <http://missionlocal.org/2010/03/immigrants-say-officers-harass-them-on-muni/>.

Part VI: Selecting Language Assistance Services

Section VI.A

1. Discussion of Interpreter Competence

The proposed Guidance's instructions on the elements of interpreter competence will provide valuable guidance to DHS recipients. We suggest a few minor changes, however. First, we recommend that footnote 9 of Section VI.A be amended to read, "For those languages and types of interpretation for which no formal accreditation or certification currently exists" This change is necessary because there is no formal certification process for most types of interpretation outside of the medical and legal contexts.

Second, we suggest that section VI.A make clear that while the use of certified interpreters is advisable whenever there is a need for "precise, complete, and accurate interpretation or translations," certification is not necessarily sufficient to demonstrate competence. There is no national standard for medical or legal interpretation.⁵¹ As a result, states and even individual agencies establish their own certification standards, which sometimes are not sufficient to ensure competence.⁵² Thus, recipients have an obligation to learn about the certification requirements in their jurisdiction and then make their own assessment about whether fulfillment of those requirements is sufficient to demonstrate competence.

Third, the following statement should be amended to remove any reference to summarization: "Demonstrate proficiency in, and ability to communicate information accurately in both English and in the other language, and identify and employ the appropriate mode of interpreting (*e.g.*, consecutive, simultaneous, summarization, or sight translation)."⁵³ Summarization, which allows the "interpreter" to decide what is most important or relevant, is not, in fact, a mode of interpretation.⁵⁴

2. Discussion of Telephone Interpreter Lines

The proposed Guidance's discussion of telephone interpreter lines should be amended in several ways.⁵⁵ First, it should emphasize that telephone interpreting is inappropriate in many situations. In particular, the Guidance should state that, in the medical context, onsite interpreters are generally the appropriate method of

The city subsequently ceased its proof of payment patrols on the railway system. CBS5.com, SF Muni Suspending Fare Payment Raids, <http://cbs5.com/local/muni.ticket.stings.2.1692330.html> (last visited July 6, 2010).

⁵¹ Am. Med. Ass'n, Office Guide to Communicating With Limited English Proficient Patients 4, available at http://www.ama-assn.org/ama1/pub/upload/mm/433/lep_booklet.pdf; Nat'l Ctr. for State Courts, Court Interpretation FAQs (2008), available at <http://www.ncsconline.org/wc/CourTopics/FAQs.asp?topic=CtInte>.

⁵² Laura Abel, Language Access in State Courts 22-23 (2009), available at http://brennan.3cdn.net/684c3cdaaa2bfc8ebc_6pm6iywsd.pdf.

⁵³ DHS, Proposed Guidance, 75 Fed. Reg. 34470.

⁵⁴ Nat'l Ass'n of Judiciary Interpreters & Translators, Summary Interpretation in Legal Settings 1 (2009), available at <http://www.najit.org/documents/SummaryInterpreting200609.pdf>.

⁵⁵ See DHS, Proposed Guidance, 75 Fed. Reg. 34471.

interpretation, while telephone interpretation should be reserved for administrative settings where nonverbal communication is unlikely to play an important role in the conversation.⁵⁶ As the proposed Guidance acknowledges, telephone communication does not allow the interpreter to observe gestures, facial expressions, and other forms of non-verbal communication. Moreover, telephone interpretation can lead to interpreter fatigue and resulting interpretation errors. As a result, it generally is not recommended for lengthy interactions.⁵⁷

Second, the Guidance should clarify that when telephone interpreter services are used, it remains the duty of funding recipients to ensure that interpreters possess *all* the necessary interpreter competencies (not merely the “technical or legal terms specific to a particular program” described by the proposed Guidance,⁵⁸ although those are important, too).⁵⁹ A recipient can fulfill this duty by incorporating quality control and monitoring requirements into the contract with the telephone interpreter agency.⁶⁰

Finally, the Guidance should make clear that telephone and video interpreting should be used only when the equipment involved is sufficient to ensure adequate sound quality (and, where applicable, video quality), and when participants have been trained in both how to operate the equipment and work with telephone and video interpreters.⁶¹ These services will be underutilized if recipient staff is not trained on their proper use.

3. Discussion of the Use of Family Members, Friends or Other Applicants, Detainees, or Inmates as Interpreters

The proposed Guidance should be amended to mirror DOJ’s position opposing the use of family member or inmate interpreters except in situations involving either an emergency or the express, informed consent of the LEP individual.⁶² While the proposed Guidance warns that the use of family, friends or detainees as interpreters “often” is inappropriate,⁶³ DOJ and other federal agencies have identified particular circumstances in which the use of such interpreters is almost always inappropriate. These include:

⁵⁶ See Am. Med. Ass’n, Office Guide to Communicating With Limited English Proficient Patients 6, available at http://www.ama-assn.org/ama1/pub/upload/mm/433/lep_booklet.pdf.

⁵⁷ National Association of Judiciary Interpreters & Translators, Telephone Interpreting in Legal Settings 2 (2009), available at <http://www.najit.org/Publications/Position%20Papers/Telephone%20Interpreting.pdf>.

⁵⁸ DHS, Proposed Guidance, 75 Fed. Reg. 34471.

⁵⁹ Laura Abel, Language Access in State Courts 27 (2009).

⁶⁰ *Id.*

⁶¹ *Id.* at 26.

⁶² See DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41469-41471.

⁶³ DHS, Proposed Guidance, 75 Fed. Reg. at 34471. See also *id.* (stating that “[i]n many circumstances family members, friends, inmates, detainees or other applicants “are not competent to provide quality and accurate interpretations”).

- a) “[r]eliance on fellow prisoners,”⁶⁴
- b) driver’s license applications,⁶⁵ and
- c) “a courtroom or administrative hearing setting.”⁶⁶

The Guidance should be amended to include similar warnings. The Guidance should also indicate that the use of family, friends and fellow prisoners for interpreting is almost never appropriate in the medical context, and may interfere with treatment.⁶⁷

Part VII: Elements of an Effective Plan on Language Assistance for LEP Persons

The issuance of a Language Access Plan is not enough to effectuate language access. We suggest that the Guidance be amended in several ways to ensure that recipients comply with Title VI requirements. First, when a recipient is a state or local government or agency, compliance often requires that they incorporate the key elements of the Language Access Plan into written regulations, guidance documents, or policy manuals. The proposed Guidance should be amended to state that if a government recipient does not implement the Language Access Plan in this way, there will be a presumption that the recipient is in violation of its language access obligations.

Second, the Guidance should be amended to instruct covered recipients to “[d]istribute the documented Language Access Plan to all staff of the recipient agency, as well as interested community organizations serving LEP populations.”⁶⁸

Third, the written Language Access Plan should include information on the time frame for implementation and identify the parties responsible for overseeing implementation,⁶⁹ the means by which the recipient will monitor implementation⁷⁰

⁶⁴ DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41469-41470.

⁶⁵ DOT, Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087, 74094 (Dec. 14, 2005).

⁶⁶ DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41471.

⁶⁷ See Am. Med. Ass’n, Office Guide to Communicating With Limited English Proficient Patients 6, available at http://www.ama-assn.org/ama1/pub/upload/mm/433/lep_booklet.pdf (finding that the use of family and friend interpreters correlates with a higher rate of medical errors).

⁶⁸ See Memorandum of Agreement Between the United States of America and the Palm Beach County Sheriff’s Office, DOJ No. 171-18-17 (May 11, 2010).

⁶⁹ DOJ Civil Rights Division, Considerations for Creation of a Language Assistance Policy and Implementation Plan for Addressing Limited English Proficiency in a Department of Corrections, available at http://www.lep.gov/resources/LEP_Corrections_Planning_Tool.htm.

⁷⁰ See Memorandum of Agreement Between the United States of America and the Palm Beach County Sheriff’s Office, DOJ No. 171-18-17 (May 11, 2010); Gov’t Accountability Office, Better Dissemination and Oversight of DOT’s Guidance Could Lead to Improved Access for Limited English-Proficient Populations (GAO-06-52) 33, 57 (Nov. 2005), available at: <http://www.gao.gov/new.items/d0652.pdf> (finding that the effects of DOT’s policies were largely not

and a protocol for both receiving complaints about language access services and effectuating subsequent investigations.⁷¹

Part IX: Application to Specific Types of Recipients

The Guidance should provide additional information about appropriate resources for covered recipients seeking more specific information about their obligations under Title VI. As the Guidance notes, several other federal agencies have provided guidance geared to specific types of recipients through appendices to their LEP recipient guidance documents, and/or frequently asked questions documents.⁷² DHS' Guidance should do the same, at least for the types of recipients that receive DHS funding most frequently, such as emergency/disaster preparedness agencies, state and local law enforcement, corrections and detention facilities, and motor vehicle departments and mass transit agencies.

Additionally, instead of referring in a general way to the language assistance guidances issued by other federal agencies, the Guidance should refer specific types of recipients to the specific documents aimed at them. Here are some examples:

1. State and Local Law Enforcement

Law enforcement agencies seeking more specific information should be referred to the following DOJ resources:

- a) DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, Appendix A (June 18, 2002).

Note: While the proposed Guidance refers all recipients to this DOJ Guidance, it does so without notifying law enforcement agencies,

well monitored and recommending that it “more fully incorporate [the agency’s] LEP guidance into current review processes” through, in part, having “evaluation and monitoring mechanisms in place in Title VI compliance reviews”). DOT subsequently provided more specific guidance to funding recipients. *See* DOT, Implementing the Department of Transportation’s Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons: A Handbook for Public Transportation Providers (Apr. 2007), available at: http://www.lep.gov/guidance/guidance_index.html.

⁷¹ *See* Memorandum of Agreement, DOJ No. 171-18-17 (May 11, 2010).

⁷² *See, e.g.*, DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41466-41471; HHS, Guidance to the Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47311, 47322- 47323 (Aug. 8, 2003); U.S. Dep’t of Housing and Urban Development, Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 72 Fed. Reg. 2732, 2747(Jan. 22, 2007) (Appendix A, entitled “Application of Limited English Proficiency (LEP) Guidance for JUH Recipients,” contains “examples of how HUD recipients might apply the four-factor analysis described in the general Guidance.”); DOT, Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087, 74097 (Dec. 14, 2005).

departments of correction, courts, juvenile justice agencies, and domestic violence and treatment programs that the Guidance provides specific sections geared to them in particular. Moreover, DHS' proposed Guidance gives an incorrect citation for the DOJ LEP Recipient Guidance.⁷³

- b) DOJ, Sample for Discussion Purposes Planning Tool: Considerations for Creation of a Language Assistance Policy and Implementation Plan for Addressing Limited English Proficiency in a Law Enforcement Agency, available at http://www.justice.gov/crt/lep/Law_Enforcement_Planning_Tool.htm.
- c) Barathi A. Venkatraman, *Lost in Translation: Limited English Proficient Populations and the Police*, The Police Chief (April 2006), available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=861&issue_id=42006. Ms. Venkatraman is an attorney in DOJ's Civil Rights Coordination and Review Section.
- d) DOJ Civil Rights Division, Executive Order 13166 Limited English Proficiency Resource Document: Tips and Tools from the Field (Sep. 21, 2004), available at http://www.lep.gov/resources/tips_and_tools-9-21-04.htm.
- e) Memorandum of Agreement Between the United States of America and the Palm Beach County Sheriff's Office, DOJ No. 171-18-17 (May 11, 2010), available at <http://www.lep.gov/PalmBeachSheriffMOA.pdf>.
- f) Memorandum of Agreement Between the United States of America and Lake Worth, Florida Police Department, DOJ No. 171-18-16 (2007), available at <http://www.lep.gov/resources/lakeworth.pdf>.
- g) Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to the Honorable Thurbert E. Baker, Attorney General of Georgia (July 11, 2002), available at http://www.lep.gov/guidance/2002-07-11-boyd_letter_to_ga.pdf.

2. Prisons and Detention Centers

Prisons and detention centers seeking more specific information should be referred to the following DOJ documents:

- a) DOJ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, Appendix A (June 18, 2002).

⁷³ See DHS, Proposed Guidance, 75 Fed. Reg. at 34475.

- b) Letter from Loretta King, Deputy Attorney General, DOJ Civil Rights Division, to Department of Corrections Commissioner/Director/Secretary (July 15, 2008), available at http://www.lep.gov/whats_new/corrections_7_15_08.pdf.
- c) DOJ Civil Rights Division, Planning Tool: Considerations for Creation of a Language Access Assistance Policy and Implementation Plan for Addressing Limited English Proficiency in a Department of Corrections, available at http://www.lep.gov/resources/LEP_Corrections_Planning_Tool.htm.

And, like DOJ, DHS should state that “[p]risons [and detention centers] providing health services should refer to the Department of Health and Human Services’ guidance regarding health care providers’ Title VI and Title VI regulatory obligations, as well as with this Guidance.”⁷⁴

3. Departments of Motor Vehicles and Mass Transit Agencies

Motor vehicle departments and mass transit agencies seeking more specific information should be referred to the following DOT documents:

- a) DOT, Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087, 74091 (Dec. 14, 2005).
- b) DOT, Implementing the Department of Transportation’s Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons: A Handbook for Public Transportation Providers (2007), available at http://www.lep.gov/guidance/guidance_index.html

4. Courts

Courts seeking more specific information should be referred to the following DOJ documents:

- a) DOJ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, Appendix A (June 18, 2002).
- b) Letter from Loretta King, Deputy Assistant Attorney General, to Director of State Court and/or State Court Administrator, Dec. 1, 2003, available at http://www.justice.gov/crt/cor/courtsletter_generic.php.
- c) Prepared Remarks of Acting Assistant Attorney General for Civil Rights Loretta King, at the April 20th, 2009 Meeting of the Federal Interagency Working Group on Limited English Proficiency, available at www.lep.gov

⁷⁴ DOJ, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41470.

- d) Letter from Merrily A. Friedlander, Chief, DOJ Civil Rights Division Coordination and Review Section, to Lilia G. Judson, Executive Director, Indiana Supreme Court Division of State Court Administration (Feb. 4, 2009), available at http://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf.
- e) DOJ Civil Rights Division, Executive Order 13166 Limited English Proficiency Resource Document: Tips and Tools from the Field (Sep. 21, 2004), available at http://www.lep.gov/resources/tips_and_tools-9-21-04.htm.
- f) Memorandum of Understanding Between the United States and the State of Maine Judicial Branch, DOJ No. 171-34-8 (2008), available at http://www.lep.gov/resources/Maine_MOA.pdf.

Thank you for your consideration of our comments.

Sincerely,

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