

July 16, 2010

Ms. Margo Schlanger
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security,
245 Murray Lane, SW, Building 410,
Washington, DC 20528, Mail Stop 0190

Re: Comments to Proposed Policy Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Department of Homeland Security, docket number DHS-2009-0032, Federal Register: June 17, 2010 (Volume 75, Number 116, Page 34465)

Dear Ms. Schlanger:

The following organizations submit these comments to the Department of Homeland Security (“DHS”) Office for Civil Rights and Civil Liberties (“OCRCL”) regarding proposed policy guidance DHS-2009-0032, published in the Federal Register on June 17, 2010, relating to individuals with limited English proficiency.

While we applaud DHS’s attention to and drafting of this long-awaited guidance, we have a number of concerns about the proposed guidance’s treatment of immigration enforcement and detention programs. DHS correctly pledges in its proposed guidance that “[i]n the context of . . . immigration and other detention, and law enforcement operations, where the potential for greater consequences are at issue, DHS will look for strong evidence that recipients have taken reasonable steps to ensure access to services to LEP persons.”¹ The comments provided here are offered in a constructive spirit to strengthen the proposed guidance’s impact on covered recipients’ practices in immigration enforcement and detention, in particular state and local police departments, and jails and detention facilities that house ICE detainees.²

Immigration adjudications and enforcement affect a large population of individuals with limited English proficiency (“LEP”).³ The difference between proper language access and a violation of language rights for this LEP population can result in denial of immigration benefits and unnecessary detention. The stakes are particularly

¹ DHS Guidance, 75 Fed. Reg. at 34475.

² “Covered recipients” include “[s]tate and local police departments” and “[j]ails and detention facilities that house detainees of Immigration and Customs Enforcement,” so long as the recipient receives “[f]ederal financial assistance[, which] includes grants, training, use of equipment, donations of surplus property, and other assistance. . . . Coverage extends to a recipient’s entire program or activity, i.e. to all parts of a recipient’s operations. This is true even if only one part of the recipient receives the Federal assistance.” *Id.* at 34468.

³ For example, in FY1999 DOJ estimated that LEP services were required in approximately 90 percent of asylum interview cases. See DOJ, “Departmental Plan Implementing Executive Order 13166.” (Jan. 10, 2001), available at <http://www.justice.gov/crt/cor/lep/dojimp.php#2>. Immigration and Naturalization Service

high for those LEP individuals facing deportation. Potential costs include permanent separation from U.S. citizen family members, permanent loss of property and assets, and forced return to countries where they may face hardship, persecution, torture, and even death.

The courts have recognized that those “who neither speak English nor are familiar with their rights under the Constitution are doubly disadvantaged in their encounters with law enforcement [and detention] personnel.”⁴ Language rights are essential to preserving LEP individuals’ substantive constitutional and statutory rights and therefore a key component of the process they are due as subjects of immigration enforcement, detention, and deportation.

1) The proposed guidance does not adequately address ICE enforcement programs that involve state and local law enforcement agencies.

A. A culture of language rights violations prevails in 287(g) and other ICE ACCESS program jurisdictions.

DHS’s proposed guidance has been issued in a context where violations of LEP persons’ rights by ICE’s 287(g) and other law enforcement partners have been widespread and well-documented. The Department’s own Inspector General (“OIG”) concluded in March 2010 that “ICE needs to develop and implement clear guidelines describing the circumstances under which 287(g) officers should use interpreter support. These guidelines should also encompass foreign language skills assessments.”⁵ The OIG report noted the lack of language training for deputized state and local law enforcement personnel: “287(g) officers do not receive language training or an assessment to determine their language competency.”⁶ The OIG report details several troubling examples of language rights violations:

[W]e spoke with officers who said 287(g) officers with few or no foreign language skills have interviewed and processed non-English-speaking aliens without the aid of interpreters. One 287(g) officer said that he does not speak any Spanish, but used what is referred to as a “cheat sheet” of questions in Spanish to determine aliens’ removability during interviews. Another 287(g) officer admitted to being reluctant to speak Spanish due to his minimal grasp of the language, but served warrants and read non-English-speaking aliens their rights in Spanish.⁷

In some 287(g) jurisdictions language rights violations are rampant and willful. For example, the Department of Justice (“DOJ”) has initiated an investigation of the Arizona Maricopa County Sheriff’s Office (“MCSO”) “regarding allegations of racial

⁴ *Montanez v. State*, 143 S.W.3d 344, 347 (Tex. App. 2004) (quoting *United States v. Gaviria*, 775 F. Supp. 495, 502 (D. R.I. 1991)).

⁵ DHS Office of Inspector General, “The Performance of 287(g) Agreements.” (Apr. 2010), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf, 34.

⁶ *Id.* at 33.

⁷ *Id.* at 34.

profiling and failure to provide language access, including an English-only requirement in the [Maricopa County] jails.”⁸ The ACLU has received first-hand accounts of deplorable conditions in Maricopa County where the Estrella Tents detention camp and Durango Jail draw regular complaints of language and other rights abuses. One Estrella detainee reported in 2009 that “[i]f you are Hispanic and do not speak English, the [MCSO] officers treat you with no respect. If you need help or have a question for the officer, they will ignore you if you only speak Spanish. Even if the officer speaks Spanish, we are told ‘you’re in America, speak English!’” The detainee added that grievance forms at the Estrella Tents detention camp are provided only in English and that “[i]f you are sick or hurt and do not speak English, it is extremely difficult to receive help.” A second Estrella detainee similarly observed that the English-speaking detainees were better treated: “While many of the detention officers treat the Spanish speakers badly, there is one officer in particular who will not allow any Hispanics to work for him. He will not speak to the Spanish speakers, and gives preference to the few of us who speak English. Some time ago there was a five-day lockdown which resulted after that detention officer had beaten one of the Spanish speakers.” At Durango, a third detainee echoed these accounts: “I heard officers telling Hispanic inmates ‘You are in America. Speak English.’ Officers ignore inmates who ask questions in Spanish and often yell at Spanish-speakers.”

Maricopa County is not the lone bad apple. Our organizations have documented numerous instances around the country when people have not been provided with adequate language access assistance in their interactions with state and local LEAs. ACLU affiliates report violations of language rights in 287(g) and Secure Communities jurisdictions. To give just a few recent examples:

- During the June 2008 arrest of a man living in Springdale, Arkansas, a 287(g) “task force” jurisdiction, the arresting officer allegedly understood the man’s Spanish but would not speak or respond in Spanish, instead answering Spanish questions in English. When the man asked him why he would not answer in Spanish, the officer called him “un mojado,” Spanish for “a wetback.” Despite presenting his Temporary Protected Status (“TPS”) card to the officer, the man was told that his status had been canceled and that he was going to be arrested “because you’re illegal.” He was taken to an ICE office in Fayetteville, Arkansas. Once there, he was presented with paperwork to sign. The man refused to sign because he does not read English. The officer then took a detainee from Mexico, who is illiterate in English, out of an adjacent holding cell to translate/explain the paperwork. The other detainee explained that he did not read English, but advised against signing anything. The arrested man knew something was wrong because he has TPS. He spent nine days in ICE custody, causing him to lose his long-held job and then his home. He was released on \$3,000 bond and issued a Notice to Appear in immigration court. Because of his TPS status, the case was immediately administratively closed after the immigration judge expressed surprise that a TPS-protected person was in deportation proceedings.

⁸ Prepared Remarks of Loretta King, Acting Assistant Attorney General (Apr. 20, 2009), 9, available at http://www.lep.gov/Kingremarks4_20_09.pdf

- Driving home alone from her mother’s house one afternoon, Rubi, a 24-year-old mother with a 1-year-old child, was followed by a police car into Cobb County, Georgia. She was pulled over and an officer told her she was stopped for an expired tag and registration. Rubi had difficulty communicating with the officers and could not understand their instructions. The officers were unresponsive to Rubi’s questions and proceeded to arrest and book her in the Cobb County jail, which has a 287(g) agreement with ICE. While detained in Cobb County jail, Rubi was not informed of her right to counsel or offered an interpreter; she was jailed for three days before she was told she could contact her consulate.

- In April 2010, an undercover Prince George’s County, Maryland, police officer asked a woman to sell him a \$2 phone card, which she did. A primary caregiver with no prior law enforcement contact, she was arrested at home in front of her 5-year-old and 13-month-old children. After her arrest, she was taken to a police station and was asked there whether she spoke English. Replying that she did not, she was told “then you go to jail.” She was transported to the Upper Marlboro Detention Center where she was held for three days. Her children, including a 10-year-old, had to stay with her father-in-law. Her state criminal case was resolved pending her performance of 16 community service hours; it will be eradicated from her record. Transferred to ICE custody as a result of the Secure Communities program, she now faces deportation.

These cases illustrate some of the obstacles, rights violations, and language-based discrimination faced by people coming into contact with LEAs party to 287(g) or Secure Communities agreements. Many such stories never get told publicly because individuals who do not have the language facility to communicate in English get lost in the state criminal justice and immigration enforcement systems, and are eventually deported. The troubling accounts that have surfaced underscore the need for DHS to take decisive action and provide specific detailed standards to ensure that LEAs operating under 287(g) or Secure Communities agreements do not violate the rights of LEP individuals.

B. DHS Must Remedy and Prevent Violations of LEP Individuals’ Rights by Amending its LEP Guidance *and* its State/Local Agreements to Provide Specific Clear Standards for LEAs

The need for DHS to take concrete action in its LEP Guidance – as well as in its 287(g) and other state/local agreements – is further reinforced by the OIG 287(g) report’s findings. According to the OIG, ICE’s response to the OIG’s language rights recommendation was inadequate. Specifically, the OIG noted that the language rights issue remains open because “ICE’s response describes interpreter resources available to 287(g) officers. However, our finding addresses a need for clear guidelines that illustrate circumstances under which 287(g) officers should actually use interpreter support.”⁹

The OIG report specifically refers to a section of the memorandum of agreement (“MOA”) for 287(g) partnerships requiring LEA personnel to “provide an opportunity for subjects with limited English language proficiency to request an interpreter.” This phrase

⁹ OIG Report, *supra*, at 57.

recurs verbatim in the MOAs, revised in 2009, that ICE claims cured deficiencies in the 287(g) program.¹⁰ While stating without elaboration that 287(g) partners are bound by Title VI, the MOAs, former and current, provide nothing in the way of standards for interaction with LEP persons or training requirements for 287(g)-deputized local law enforcement officers. It is therefore unsurprising that ICE's lack of formal oversight and practical guidance has resulted in language rights violations documented by OIG and nongovernmental organizations.

The proposed DHS LEP guidance does not provide concrete instruction to 287(g)-designated LEAs on the procedures required to protect the rights of LEP individuals. Nor does the proposed guidance provide any fleshed-out examples involving immigration enforcement and detention. This omission contrasts with the appendices to DOJ's LEP guidance, which address all major categories affected by DOJ's purview.¹¹ Whereas DOJ wrote extensive "examples of how the meaningful access requirement of the Title VI regulations applies to law enforcement, corrections, courts, and other recipients of DOJ assistance,"¹² the DHS proposed guidance provides only cursory and repeated examples – focused on disaster relief and emergency services – that exclude concrete descriptions of how immigration enforcement and detention implicate LEP persons. The absence of engagement with immigration enforcement and detention issues in the DHS guidance contrasts markedly with its DOJ counterpart, producing the very "inconsistency or contradictory guidance [that] could confuse recipients of Federal funds and needlessly increase costs without rendering the meaningful access for LEP persons that this guidance is designed to address."¹³ In response to the guidance's request for "comments on the nature, scope, and appropriateness of the DHS-specific examples set out in this guidance explaining and/or highlighting how those Federal-wide guidelines are applicable to recipients of DHS financial assistance,"¹⁴ the ACLU recommends that specific immigration enforcement and detention examples be added to the guidance.

The DOJ guidance lays out in detail the types of enforcement activities for which LEP protocols are important. While we appreciate that the DHS guidance frequently cross-references, incorporates, and borrows from the DOJ guidance, this is no substitute for including DHS-specific analysis of immigration enforcement activities. Critical law enforcement settings that must be addressed in the proposed guidance include communications during traffic, *Terry*, and pedestrian stops, jail processing, and custodial interrogations. *See, e.g.*, DOJ LEP Guidance, 67 Fed. Reg. at 41468 ("[T]he ability of law enforcement agencies to discharge fully and effectively their enforcement and crime interdiction mission requires the ability to communicate instructions, commands and notices. For example, a routine traffic stop can become a difficult situation if an officer is

¹⁰ See ICE Office of State and Local Coordination, "Updated Facts on ICE's 287(g) Program." ("The Office of the Inspector General report does not reflect the current 287(g) program."), available at http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm

¹¹ Department of Justice, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons." 67 Fed. Reg. No. 117 (June 18, 2002), 41455.

¹² *Id.* at 41466.

¹³ DHS Guidance, 75 Fed. Reg. 34467.

¹⁴ *Id.* at 34466.

unable to communicate effectively the reason for the stop, the need for identification or other information, and the meaning of any written citation.”); *see also id.* at 41469 (“State or local law enforcement agencies that arrest LEP persons should consider the inherent communication impediments to gathering information from the LEP arrestee through an intake or booking process.”). In the immigration enforcement context, clear communication is particularly important to ensure that reasonable suspicion and probable cause to arrest are developed based on accurate information rather than misunderstanding. Further, law enforcement officers have a duty to convey accurate and comprehensible information regarding an individual’s rights, and to ensure that miscommunication does not result in erroneous or involuntary waivers of rights or consents to search. Detailed guidance can help prevent 287(g) arrests resulting from violations of an individual’s Fourth Amendment or other constitutional rights. *See, e.g., id.* at 41468 (“Requests for consent to search are meaningless if the request is not understood.”).¹⁵

Unlike the DHS proposed guidance, the DOJ guidance makes clear that “[c]ustodial interrogations of unrepresented LEP individuals trigger constitutional rights” and that specific steps must therefore be taken by law enforcement to ensure consistency with constitutional mandates. *Id.* at 41469. Specifically, the DOJ guidance elaborates:

Given the importance of being able to communicate effectively under such circumstances, law enforcement recipients should ensure competent and free language services for LEP individuals in such situations. . . . [I]n formulating a plan for effectively communicating with LEP individuals, agencies should strongly consider whether qualified independent interpreters would be more appropriate during custodial interrogations than law enforcement personnel themselves.

Id. Indeed, where LEP individuals are interrogated in an adversarial setting, rarely if ever would it be appropriate to use a law enforcement officer as an interpreter because interpreters must be impartial and unbiased.¹⁶

In addition, special consideration should be given to ensure that survivors of domestic abuse, sexual assault, and human trafficking are provided LEP services. As

¹⁵ *See also, e.g., State v. Ortiz*, 766 N.W.2d 244, 253 (Iowa 2009) (the state did not meet its *Miranda* burden where state failed to prove that defendant spoke and understood English, law enforcement gave him written translations that failed to convey the essence of *Miranda* rights, and he still had to ask orally what his rights were after reading the Spanish-language waiver); *State v. Farrah*, 735 N.W.2d 336, 342-43 (Minn. 2007) (the state did not meet its burden of showing knowing and voluntary *Miranda* waiver given suspect’s English difficulties, and lack of oral or written advisory in his native tongue); *People v. Redgebol*, 184 P.3d 86, 95 (Colo. 2006) (defendant did not knowingly waive his *Miranda* rights given the translator’s “incorrect and insufficient interpretation, the frequent miscommunication between the parties, and [defendant’s] cultural background and limited intellectual functioning”).

¹⁶ *See* National Center for State Courts, Model Code of Professional Responsibility for Interpreters in the Judiciary, Canon 3 (Impartiality and Avoidance of Conflict of Interest: “Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.”).

recognized by DOJ in its LEP guidance: “Language barriers can . . . prevent victims from effectively reporting crimes to the police and hinder police investigations of reported crimes. For example, failure to communicate effectively with a victim of domestic violence can result in reliance on the batterer or a minor child and failure to identify and protect against harm. . . . Effective reporting systems transform victims, witnesses, or bystanders into assistants in law enforcement and investigation processes.”¹⁷ Without clear DHS-issued LEP procedures, both immigrant crime victims and law enforcement have much to lose; law enforcement officers have “returned fleeing human trafficking victims to the custody of their traffickers due to language barriers impeding communication with the victims.”¹⁸ To avoid these dangers, DHS should add specific language to its proposed guidance, and to all 287(g) agreements, addressing the needs of immigrant survivors of domestic abuse, sexual assault, and human trafficking.

These are just a few examples of law enforcement settings in which the proposed guidance must provide explicit guidance, but currently fails to do so. Given the critical constitutional considerations applicable to such law enforcement encounters, the need for detailed guidance is especially important. Accordingly, the DHS LEP guidance should outline a model of best practices and training for state and local LEAs that participate in immigration enforcement. In so doing, the guidance should take as a *minimum* starting point the standards outlined in the appendix to DOJ’s guidance specifically addressing state and local LEAs,¹⁹ as well as the detailed agreements reached between DOJ and state and local LEAs.²⁰ For example, whereas DOJ’s MOAs lay out clearly how to identify and document an LEP person’s primary language,²¹ neither DHS’s guidance nor the standardized 287(g) MOA provides such instructions to immigration enforcement partners. The overriding principle should be, as captured in DOJ’s 2001 description, that “[t]o the maximum extent practical, limited English proficiency should play no role, directly or indirectly, in the grant or denial of authority to remain in the United States.”²²

Much work has been done in the area of law enforcement and language rights since the publication of DOJ’s guidance in 2002, but this work is not referenced in the DHS LEP guidance. Accordingly, covered recipients are not pointed to best practices on which to model an LEP policy, such as the Summit/Lorain Project’s *Resource Document for Law Enforcement: Interpretation and Translation Services* from Ohio (“*Resource Document*”).²³ Aside from detailing best practices, the *Resource Document* carefully breaks down the “[t]ype of contacts an employee may encounter with a LEP person.”²⁴

¹⁷ 67 Fed. Reg. at 41466-68.

¹⁸ Bharathi A. Venkatraman, “Lost in Translation: Limited English Proficient Populations and the Police.” *Police Chief Magazine* (Apr. 2006), available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=861&issue_id=42006

¹⁹ 67 Fed. Reg. at 41466-67.

²⁰ See, e.g., Memorandum of Agreement with the Palm Beach County Sheriff’s Office (May 2010), available at <http://www.justice.gov/crt/lep/PalmBeachSheriffMOA.pdf>

²¹ *Id.* at 2.

²² DOJ, “Departmental Plan Implementing Executive Order 13166,” *supra*.

²³ Available at <http://www.co.summit.oh.us/sheriff/LEP.pdf>

²⁴ *Id.* at 63.

DHS's guidance similarly should consider and spell out all the ways in which immigration enforcement affects LEP persons, including an assessment of whether explicit advice of the right to an interpreter and written knowing and voluntary waivers of interpretation rights should be required of LEP persons who indicate a wish to proceed in English at some or all of these points of contact.

Finally, the DHS guidance needs to make clear that there will be swift and sure costs attached to noncompliance. DHS's decision to continue Maricopa County's jail-based 287(g) authority despite the Sheriff's Office's repeated flouting of federal law communicates a message that Title VI compliance by 287(g) jurisdictions is optional. Especially given the decade-long delay in DHS's response to Executive Order 13166's mandate to produce this guidance, DHS should not further delay by allowing badly deficient covered recipients in the immigration enforcement field to take "a series of implementing actions over a period of time."²⁵ Where there is a pattern of disregard for language rights, the proposed DHS guidance should make clear the imperative of immediate compliance by state and local law enforcement, and the consequences of failure to comply, including termination of 287(g) authority and Secure Communities agreements. The costs of continued language rights denial for immigrants are simply too high. As former Acting Assistant Attorney General Loretta King stated in 2009, "The need to show progress in providing all LEP persons with meaningful access increases over time. This is not a new concept. We cannot reward past non-compliance with lenient enforcement today."²⁶

In sum, we recommend that the guidance be revised to:

- detail the types of contacts with LEP persons that occur in immigration enforcement programs like 287(g) and assess whether express advice of the right to an interpreter and written waivers of interpretation rights from LEP persons who decide to proceed in English should be required at certain points of contact.
- provide examples, using the model of DOJ's guidance, of immigration enforcement and detention scenarios that require adoption of LEP procedures, including investigatory stops, custodial interviews and interrogation, and jail processing.
- include a quality-assurance component, in addition to the guidance's referenced complaint procedures, based on sampling and spot-checks to determine whether LEP individuals' interactions with law enforcement resulted in satisfactory communication. Statistical data collection about LEP interactions with ICE and state and local LEAs should be extensive, detailed, and accessible to the public.

2) The DHS guidance should be revised to address fully LEP needs in immigration detention facilities.

²⁵ DHS Guidance, 75 Fed. Reg. at 34475.

²⁶ Remarks of Loretta King, *supra*, 8.

While ICE is currently revising its Performance-Based National Detention Standards (“PBNDS”), including sections about LEP protocols, existing practice in immigration detention facilities is dangerously deficient on LEP issues. DHS’s guidance should address the particular language access challenges facing immigration detention facilities, including the high proportion of LEP detainees and the fact that 84 percent of detainees lack legal representation.²⁷ The proposed DHS guidance should explicitly make the same commitment that DOJ did in 2001, that “a detainee’s limited English proficiency should, to the maximum extent practical, have no impact on his or her eligibility for benefits, receipt of services, or the imposition of a burden different in kind or degree than other detainees.”²⁸

The proposed DHS guidance contains many useful principles, including the observation that “[w]hen particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options.”²⁹ Yet the ACLU of Wisconsin has received reports that the Dodge County Detention Facility in Juneau, Wisconsin, a principal immigration detention facility for the state, has few if any staff who speak Spanish despite the prevalence of that language among the detained population. This staffing is at odds with the guidance’s accurate statement that “hiring bilingual staff offers one of the best, and often most economical, options [for LEP compliance].”³⁰ The ACLU of Georgia has received reports from immigration detainees in Cobb County jail that there is “a lack of interpreters available to facilitate communication between detainees and jail personnel. Many people are coerced to sign documents they do not understand.”³¹ A complaint concerning the Wake County, North Carolina jail describes language-based harassment: “A Latino cop in jail mocked me for not knowing English. I asked him a question shortly after I’d entered jail. A cop was explaining bond to me and asked if I understood. I said not really and they offered an interpreter. This officer came to interpret, and said ‘You don’t know English? What are you doing here if you don’t know English?’”

In these contexts, positive components of ICE’s detention standards, such as the principle that LEP persons “must be provided with more than access to a set of English-language law books,”³² are rendered ineffective in practice. Indeed, immigration detainees “told Amnesty International that the law library didn’t contain immigration-related material or that materials were outdated or not available in the languages they needed.”³³ Beyond Title VI, due process principles provide a backdrop for measuring the

²⁷ American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), 5-8, available at <http://new.abanet.org/immigration/pages/default.aspx>

²⁸ DOJ, “Departmental Plan Implementing Executive Order 13166,” *supra*.

²⁹ DHS Guidance, 75 Fed. Reg. at 34470.

³⁰ *Id.*

³¹ Azadeh Shahshahani (ed.) “Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety.” (ACLU Foundation of Georgia, Oct. 2009), 17.

³² ICE/DRO Detention Standard, “Law Libraries and Legal Material.” (2008), 6, available at http://www.ice.gov/doclib/PBNDS/pdf/law_libraries_and_legal_material.pdf

³³ “Jailed without Justice: Immigrant Detention in the USA” (2009), 34, available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>

inadequacies of LEP services in immigration detention facilities. Courts have not looked kindly on the government's past failings.³⁴ The ACLU recommends that the proposed DHS guidance be amended to include a proviso contained in the DOJ guidance, that complementary legal provisions applying to LEP persons are not supplanted by DHS's guidance, while contrary state rules such as English-only laws do not excuse noncompliance.³⁵

Despite the importance of LEP services for those held in immigration detention facilities, guidance is starkly lacking where it is most necessary. For example, the Corrections Corporation of America's T. Don Hutto Residential Center *Unaccompanied Female Resident Handbook* (2009) makes a sole mention of language rights outside of the disciplinary context, stating that "[l]anguage assistance will be provided during orientation." While translation of grievance procedures is assured by the handbook, no parallel provision regarding health services is included, despite ICE's own requirements in its 2008 PBNDS on "Medical Care."³⁶

Inadequate language access for medical care can have lethal consequences.³⁷ Under the American Public Health Association's standards, "[i]t is the institution's responsibility to maintain communication with the prisoners; therefore, personnel must be available to communicate with prisoners with language barriers."³⁸ Yet the proposed DHS guidance, unlike its DOJ counterpart, does not exhort detention facilities "providing health services [to] refer to the Department of Health and Human Services' guidance regarding health care providers' Title VI and Title VI regulatory obligations."³⁹ Nor does it suggest that immigration detention facilities consult DOJ's LEP "Planning Tool" for

³⁴ See, e.g., *Orantes Hernandez v. Meese*, 685 F. Supp. 1488, 1510-1513 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990), (ordering the INS to fulfill its duties to immigration detainees by providing detainees with translations of legal materials). Moreover, courts have not tolerated detention facilities that fail to provide LEP persons with access to legal materials. See *Knop v. Johnson*, 977 F.2d 996, 1005 (6th Cir. 1992) ("Standing alone, law libraries that are adequate for prisoners who know how to use them and who have reasonable physical access to their collections are not adequate for prisoners who cannot read and write English."); see also *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999); cf. *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006) (a habeas corpus petitioner's lack of access to Spanish-language legal materials or translation assistance can justify equitable tolling of a filing deadline).

³⁵ 67 Fed. Reg. at 41466 ("The requirements of the Title VI regulations, as clarified by this Guidance, supplement, but do not supplant, constitutional and other statutory or regulatory provisions that may require LEP services. Thus, a proper application of the four-factor analysis and compliance with the Title VI regulations does not replace constitutional or other statutory protections mandating warnings and notices in languages other than English Rather, this Guidance clarifies the Title VI regulatory obligation to address, in appropriate circumstances and in a reasonable manner, the language assistance needs of LEP individuals beyond those required by the Constitution or statutes and regulations other than the Title VI regulations."); *id.* at 41468 ("The police department should be aware that despite the state's official English law, the Title VI regulations apply to it.").

³⁶ Available at http://www.ice.gov/doclib/PBNDS/pdf/medical_care.pdf

³⁷ See generally Nina Bernstein, "Language Barrier Called Health Hazard in E.R." *New York Times* (Apr. 21, 2005) (giving examples of faulty medical care resulting from language access problems).

³⁸ American Public Health Association, Task Force on Correctional Health Care Standards, "Standards for Health Services in Correctional Institutions." (2003), 27.

³⁹ 67 Fed. Reg. at 41470.

departments of corrections, which addresses health care protocols among others.⁴⁰ With Human Rights Watch reporting last year that “language interpretation deficiencies prevented some women from participating fully in their care” in immigration detention facilities,⁴¹ and our concerns about violations of confidentiality and the Health Insurance Portability and Accountability Act through the use of detainees as interpreters in some of these facilities, more specific LEP health care measures must be communicated by DHS to its contractors.

In contrast to the lack of detail provided in the proposed DHS guidance, the DOJ guidance explicitly discusses obligations relating to detention of LEP individuals. For example, it provides that “law enforcement agencies should evaluate their ability to communicate with the LEP arrestee about his or her medical condition. Because medical screening questions are commonly used to elicit information on the arrestee’s medical needs . . . it is important for law enforcement agencies to consider how to communicate effectively with an LEP arrestee at this stage.” 67 Fed. Reg. at 41469. DHS should use the DOJ guidance as a *minimum* starting point for providing detailed guidance for operators of ICE contract detention facilities.

In sum, with respect to immigration detention facilities and jails, DHS should amend its proposed guidance to:

- include the principle that no detainee should be disadvantaged “for benefits, receipt of services, or the imposition of a burden” based on his or her LEP status.
- address DHS’s oversight responsibility to ensure that its detention standards protecting language rights are actually implemented in contract facilities, with regular quality-assurance mechanisms.
- note that the guidance supplements rather than replaces existing legal protections for LEP persons and that contrary state rules such as English-only laws do not excuse noncompliance.
- add a cross-reference to the Department of Health and Human Services’ guidance for health care providers.
- discuss and promote DOJ’s “Planning Tool” for departments of corrections as containing best practices for immigration detention facilities’ LEP services.

⁴⁰ DOJ, Coordination and Review Section, LEP Initiative, Civil Rights Division, “Planning Tool: Considerations on 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

⁴¹ “Detained & Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention” (Mar. 2009), 30, available at http://www.hrw.org/sites/default/files/reports/wrd0309web_0.pdf

3) DHS must make issuing its own LEP plan a top priority and should present the plan for public comment. DHS should also conduct a comprehensive review of its immigration enforcement and detention operations with the goal of setting a strong example of protecting the language rights of LEP persons.

Executive Order 13166 requires that “[e]ach Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons.”⁴² The Order provided a deadline for plan preparation: “By December 11, 2000, each agency was to develop and begin implementation of a plan for providing meaningful access for LEP individuals to the agency’s federally-conducted activities.”⁴³ To date, DHS has not developed such a plan, as noted by the Government Accountability Office (“GAO”) in a recent report to Congress. In fact, the Department has spent years in defiance of the Executive Order: “FEMA officials stated that, prior to its merger with DHS, FEMA developed an LEP plan and recipient guidance *in 2002*, which they have used in the absence of an LEP plan issued by DHS. FEMA officials stated that they were instructed to not publish their recipient guidance and LEP plan in the Federal Register until a DHS-wide LEP plan and recipient guidance was developed.”⁴⁴

Although DHS accepted GAO’s recommendation that “the Secretary of Homeland Security finalize and issue the department’s LEP plan,”⁴⁵ no such plan was issued to complement this proposed guidance, which states only that “[p]ursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in the DOJ LEP Guidance are to additionally apply to the programs and activities of Federal agencies, including DHS.”⁴⁶ The ACLU urges DHS to produce an LEP plan without further delay and to invite public comment on the plan before it is finalized.

In addition, it is vital for DHS to improve outreach and its own practices. As stated by former Acting Assistant Attorney General Loretta King in a 2009 address to the Federal Interagency Working Group on Limited English Proficiency, “[w]e know that advocates and those they represent bring real life stories, important concerns, practical solutions, analysis, and passion to our work. They know, sometimes better than we do, where we need to focus our efforts within our agencies and with our recipients. . . . We need to build upon our connections to the advocacy community in a thoughtful and paradigm-shifting way. We need to ensure true collaborations to strengthen our enforcement and outreach efforts. I want us to see building strong working relationships

⁴² “Improving Access to Services for Persons with Limited English Proficiency.” 65 Fed. Reg. No. 159 (Aug. 11, 2000), 50121.

⁴³ U.S. Department of Justice, Civil Rights Division, Coordination and Review Section, “Commonly Asked Questions and Answers Regarding Executive Order 13166.” Available at <http://www.justice.gov/crt/cor/Pubs/lepqa.php>

⁴⁴ G.A.O. Report 10-91, “Language Access: Selected Agencies Can Improve Services to Limited English Proficient Persons.” (Apr. 2010), 11-12 (emphasis added), available at http://www.lep.gov/whats_new/GAO_LEP4_10.pdf

⁴⁵ *Id.* at 38.

⁴⁶ DHS Guidance, 75 Fed. Reg. at 34468 n.4.

with community groups as essential to getting the job done.”⁴⁷ DHS should commit in its proposed guidance to ensuring local community group participation in monitoring and oversight activities for covered recipients’ LEP activities.

DHS also needs to improve its own LEP practices, which currently undermine the authority of the guidance and communicate a “do as I say, not as I do” message to covered recipients. As detailed by the National Language Access Advocates Network (“NLAAN”), “DHS frequently fails to provide language access services to the LEP individuals it encounters.”⁴⁸ In life-or-death matters such as asylum interviews, 90 percent of which need LEP assistance, DHS chooses not to provide interpreters, which is inconsistent with the proposed guidance’s correct principle that “when oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the LEP person.”⁴⁹ This lack of interpretation comes despite DOJ’s 2001 commitment that “as soon as fiscal resources permit, [the government will] provide a competent interpreter or hearing officer in the appropriate language at every asylum interview,”⁵⁰ and is starkly inconsistent with courts’ emphasis on the importance of competent interpretation in the asylum process.⁵¹ Even where interpretation is provided by DHS, best practices are not always in place: NLAAN reports that an applicant was interviewed for credible fear purposes in a non-primary language and then impeached based on that transcript.⁵²

By failing (i) to prioritize the production of an LEP plan; (ii) to involve local and national advocacy groups in LEP oversight of covered recipients; and (iii) to lead on language access issues by making its own programs accessible, DHS over the years, since issuance of Executive Order 13166, has failed to show that it understands the crisis and consequences of language rights denial. The publication of this guidance is an excellent opportunity for DHS to make a clean break and improve its operations along with those of covered recipients.

Thank you for your consideration of these important matters. If you have any questions regarding these comments please contact Joanne Lin, ACLU Legislative Counsel, at 202/675-2317 or jlin@dcaclu.org.

⁴⁷ Remarks of Loretta King, *supra*, 3-4.

⁴⁸ “Language Access Problems at Federal Agencies.” (Feb. 2, 2010), available at <http://www.brennancenter.org/page/-/Justice/LangAccess/FactSheet.LA-ExecAgencies.pdf>

⁴⁹ DHS Guidance, 75 Fed. Reg. at 34471.

⁵⁰ DOJ, “Departmental Plan Implementing Executive Order 13166,” *supra*.

⁵¹ See, e.g., *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000) (“It is long-settled that a competent translation is fundamental to a full and fair hearing.”); *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996) (noting that interpretation is a “fundamental requirement” of the United Nations *Refugee Handbook*: “It is difficult to imagine how any bona fide refugee, with little or no knowledge of English, could ever spontaneously convey a ‘well-founded fear of persecution’ to an asylum officer.”); cf. *Ememe v. Ashcroft*, 358 F.3d 446, 451-52 (7th Cir. 2004) (illustrating that when a translator is not provided in an interviewee’s native language, the information obtained may be inaccurate or unreliable).

⁵² “Language Access Problems at Federal Agencies” *supra*, at 1.

Sincerely,

American Civil Liberties Union
Legal Aid Society - Employment Law Center
National Immigration Law Center
Pennsylvania Immigration Resource Center