

**Limited English Proficiency (LEP) Requirements
The Legal Landscape
A Constitutional and Statutory Perspective**

Michael L. Buenger, Esq.

I. Introduction

The extent to which state courts are obligated to provide LEP services to individuals is driven by three overarching considerations: (1) constitutional due process and equal protection requirements; (2) federal statutory and regulatory requirements primarily stemming from the Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241, 42 U.S.C. §2000d) (hereinafter “Title VI”) and the Omnibus Crime Control and Safe Streets Act of 1968 (Pub.L. 90-351, 82 Stat. 197, 42 U.S.C. § 3711) (hereinafter “Safe Streets Act”); and (3) individual state constitutional, statutory, or court requirements. This summary, along with other documents, was developed to address the first two considerations (due process and equal protection requirements, and statutory requirements) while leaving the third consideration (individual state requirements) open for further discussion at this symposium.

The number of cases actually addressing LEP services in the context of state courts is extremely limited. Therefore, it is difficult to paint the exact contours of the obligation in this narrow context. In contrast to the field of education which has been fertile ground for litigation over the availability and adequacy of LEP services, state court systems have not been a significant source of any notable cases in this area. As a general principle, state courts have acknowledged the obligation to provide LEP services in the context of criminal proceedings given the liberty interests at stake. Most courts have not, however, extended this obligation to civil proceeding. Therefore, the exact LEP obligations applicable in a state court setting are perhaps best understood by examining a broad range of cases and drawing connections to the state court context.

While the constitutional requirements concerning LEP services appear relatively straightforward as discussed below, the statutory and regulatory regimes that apply to state courts have not only produced very few cases, these regimes have been open to multiple interpretations. Recent statements and actions by the U.S. Department of Justice (USDOJ) indicate that it takes a very broad view of Title VI requirements as applied to state courts going so far as to mandate that LEP services be provided without costs across a broad range of activities and services, in and out of the courtroom. Yet the USDOJ’s 2002 own policy document, which remains in effect, suggests greater nuance may be taken, particularly with regards to the extent LEP services must be provided without costs. Moreover, although not directly applicable to state courts, federal law and federal judicial policy continues to limit the availability, responsibility and costs associated with LEP services with regard to federal court proceedings. Consequently, it must be asserted that no firm consensus exists and thus the area

is ripe for further legal developments. Perhaps the best way to think about LEP requirements in the state court context is as a series of expanding concentric circles with the core involving certain types of court proceedings, expanding out to embrace other programs and access issues. The further one moves away from the core the more questions arise regarding the extent to which LEP services must be provided and on what conditions. Stated differently, there is little debate that an indigent criminal defendant is entitled to free LEP services in order to understand the nature of court proceedings. The extent to which a non-indigent civil litigant is entitled to such services has not been resolved. And, the extent to which LEP services must be provided without costs in other programs, *e.g.*, drug counseling, community service, court supervised child visitation programs, etc. becomes an even more vexing question. Prudence is therefore warranted.

This legal landscape perspective is not intended to answer all of the questions that might confront state court leaders in their efforts to provide access to LEP individuals. It is intended to provide court leaders with a perspective on their legal responsibilities and to raise “flags” that should be areas of concern and trigger greater thoughtfulness in designing and implementing programs to address this area.

II. Constitutional Considerations Generally

As noted, the extent to which LEP services must be provided and under what conditions is driven by a series of constitutional and statutory considerations. The following cases address the extent to which constitutional due process requirements mandate that courts provide LEP services and under what circumstances.

A. Due Process Considerations

U.S. v. Silva-Arzeta, 602 F.3d 1208 (10th Cir. 2010): A jury convicted defendant of possession of methamphetamine with the intent to distribute, possession of a firearm in furtherance of a drug-trafficking offense, and possession of a firearm by an illegal alien. Defendant appealed his convictions arguing that: (1) he did not give valid consent required by the Fourth Amendment to search his apartment; and (2) his right to due process was violated when an officer questioned him in Spanish without an interpreter.

HELD: District court properly relied on the internally consistent testimony of officers in concluding that defendant understood English sufficiently well to consent to the search. The totality of the circumstances supported a finding that the consent was voluntary: it was given shortly after defendant’s arrest in a public street several blocks from his apartment; an officer gave defendant a Miranda warning before requesting his consent; and there was no other evidence of coercion. Defendant’s right to due process was not violated when the officer questioned him in Spanish without using an interpreter. Although due process possibly required

the officer to have a threshold capacity to understand Spanish before he was permitted to testify about his conversation with defendant in that language, there was no ground to reject the district court's determination that the officer had sufficient knowledge of Spanish to testify. The court further noted the following: (1) USDOJ recommends that certified interpreters other than police officers be used in custodial interrogations, and that the interrogation be recorded if conducted by an officer, but the documents relied upon are "not a regulation but rather a guide"; and (2) the use of certified interpreters and recording devices during interrogation could improve the accuracy of evidence at trial but "We cannot, however, hold that their use is constitutionally required."

Grigous v. Gonzales, 460 F.3d 156 (1st Cir. 2006): Petitioner alien missed a rescheduled hearing on his removability and asylum claim. The immigration judge (IJ) ordered him removed in absentia. The alien sought review of the order of the Board of Immigration Appeals (BIA) affirming the IJ's denial of a motion to reopen removal proceedings. The alien argued that his motion to reopen to apply for asylum should have been granted because the failure to inform him of the consequences of his failure to appear for subsequent hearings in a language that he could understand violated due process protections and the BIA's past precedent.

HELD: Petitioner failed to establish that the BIA abused its discretion in denying the motion to reopen application for asylum. Petitioner's reliance on a BIA opinion and the language of 8 U.S.C. § 1229a(b)(7) to support his argument were misplaced. Further, petitioner failed to address the regulatory requirements or even discuss the merits of his asylum claim in the petition for review. Having failed to establish prejudice, he could not advance his due process claim. However, the court noted that "Although we do not reach the question of whether * * * due process requires the provision of oral warnings in a language that the petitioner understands, it is clearly the better practice for the IJ to provide these warnings to ensure that petitioners with limited English proficiency – some of whom may lack representation or adequate representation – are aware of the consequences of their failure to attend future hearings."

State v. Lopez, 2011 Ohio 6743 (C.A. 5th Dist. 2011), discretionary appeal not allowed, 131 Ohio St. 3d 1510 (Ohio, Apr. 18, 2012): Defendant argued that the trial court erred by failing to hold a hearing on a motion to vacate plea on aggravated assault.

HELD: Trial court did not abuse its discretion in finding that no manifest injustice was evident from the record or that a hearing was not necessary. The trial court properly relied upon defendant's attorney to function as a translator, apparently with the consent of defendant, and the record reflected that defendant was advised of the possibility of exclusion from the United States as required by R.C. 2943.031. Defendant's argument was premised on inconvenience, not innocence, and did not rise to the level of manifest injustice. A qualified attorney who is expert in a foreign language will guarantee the client due process rights better than an interpreter ignorant in the law.

In re Mirela-Victorita & Danut Petru Ion Tanasescu, 2010 Cal. App. Unpub. LEXIS 8567 (Cal. App. 2d Dist. Oct. 28, 2010): Appellant, acting in propria persona, appealed judgment granting dissolution, and denying his request for annulment after a contested proceeding before the court. Appellant asserted numerous errors, including that he was denied due process in that he was deprived of the effective assistance of counsel through lack of a language interpreter.

HELD: Appellant never raised the issue of the need for an interpreter in the court below nor requested the appointment of an interpreter at public expense. Judgment of the trial court was affirmed.

Columbus v. Lopez-Antonio, 153 Ohio Misc. 2d 4 (Columbus Muni. Ct. 2009): Defendant was charged with two first-degree misdemeanors of domestic violence and assault and requested a hearing to determine whether an interpreter was qualified to interpret. A hearing was held regarding whether the interpreter assigned to the case was qualified to serve as a court interpreter.

HELD: (1) The fundamental right to due process accorded to criminal defendants by the Fifth and Fourteenth Amendments is compromised when a defendant who is limited-English proficient is not provided an interpreter. The failure to ensure that non-English speaking defendants are given the same opportunity as others to be present, to speak in their defense and to understand what is taking place, in whatever language they possess, reaches constitutional proportions. Such a failure amounts to denial of equal treatment and of due process.

(2) The Sixth Amendment rights to confrontation and effective assistance of counsel are violated when a limited-English proficient defendant does not understand the testimony offered against him and is unable to properly confer with his attorney.

(3) A trial court should confirm an interpreter's qualifications and, if necessary, qualify the interpreter as an expert witness. In casual settings, an interpreter may simply use common courtesy or personal judgment to convey meaningful information. In formal or official situations, however, an interpreter may be required to act within predetermined rules or protocol. Court or legal interpreting is in fact, subject to such predetermined rules and protocol. Thus, interpreters in the legal field must work within this framework. Interpreters in this arena must utilize particular techniques in the communication process and demonstrate an understanding of legal terms and legal concepts. Interpreters cannot interpret what they do not know or understand.

Commonwealth v. Pana, 364 A.2d 895 (Penn. 1976): Appellant challenged his convictions on burglary and conspiracy charges arguing that the trial court committed reversible error by refusing to permit him to use an interpreter when he testified in his own behalf. Although an

interpreter sat near appellant during his testimony and although the interpreter aided appellant with particular words and phrases, appellant was required to testify without the use of the interpreter.

HELD: A defendant's ability to use an interpreter encompasses numerous fundamental rights. The failure to understand the proceedings may deny the right to confront witnesses against, the right to consult with an attorney, or the right to be present at trial. The use of an interpreter may also be necessary to protect defendant's right to testify on her or his own behalf. The decision to use an interpreter rests in the sound discretion of the trial judge. This is necessary because numerous factors such as the complexity of issues and testimony and the language ability of the defendant must be taken into consideration. However, in view of the important rights involved, the trial court must consider all relevant factors in its initial determination of need. If it becomes apparent that an interpreter is necessary during the trial, the court should, on its own motion or on motion of a party, make an interpreter available.

Resulovic v. Dep't of Labor & Indus., 2008 Wash. App. LEXIS 892 (Wash. App. April 21, 2008):

Appellant employee received orders from respondent Department of Labor and Industries granting her time loss compensation and a permanent partial disability award. The employee appealed to the Board of Industrial Insurance Appeals, which dismissed the appeal. The superior court affirmed the dismissal and awarded the Department attorney's fees plus interest. Employee was literate only in Bosnian and so had limited English proficiency (LEP). She contended that the orders were not timely communicated to her because the orders were not in her primary language; alternatively, she contended she was entitled to equitable relief from the appeal deadlines.

HELD: Executive Order 13,166 did not require the Department to send all notices to LEP workers in their primary language. The Department provided interpreters through a language line to assist in oral communications and an interpreter was provided during the hearing. The court rejected the employee's claims of due process and equal protection violations finding that she failed to establish intentional discrimination based on her national origin. The employee had access to neighbors who translated Department forms for her and knew that she could request and obtain an interpreter when talking to the Department. Therefore, she did not exercise necessary diligence in perfecting her claim and was not entitled to equitable relief.

Masic v. Dep't of Labor & Indus., 2008 Wash. App. LEXIS 910 (Wash. App. April 21, 2008):

Respondent Department of Labor and Industries denied appellant employee's claim for workers' compensation benefits. The Board of Industrial Insurance Appeals dismissed the employee's appeal on the basis that it was not timely filed and that he was not entitled to equitable relief from the applicable time limitations. On review, the employee contended, inter alia, that the Industrial Appeals Judge's decision to provide him with interpreter services only during proceedings before the Board and not for communications with counsel outside of the hearing, violated Washington statutes, constitutional due process, and equal protection.

HELD: Neither state law nor constitutional due process or equal protection considerations entitled nonindigent limited English proficiency injured workers to free interpreter services for communications with counsel outside of legal proceedings for which an interpreter had already been appointed. Further, Department of Labor and Industries action and claim administration were not “legal proceedings” for which interpreter services were authorized under the Washington Revised Code. As the employee was available, mentally competent, and literate at the time he received the Department order, and as he was represented by counsel for over half of the 60-day time period during which an appeal could have been filed, the Board did not err by finding that he was not entitled to equitable relief from the time requirement.

B. Equal Protection Considerations

Moua v. City of Chico, 324 F. Supp. 2d 1132 (E.D. Calif. 2004): Plaintiffs, city residents of Hmong ancestry, filed suit against city alleging claims under 42 U.S.C. § 1983, the Fair Housing Act (FHA), and the California Fair Employment and Housing Act (FEHA). The action arose out of an altercation between the residents and another individual. The residents who spoke Hmong as their primary language alleged that defendants violated the Equal Protection Clause by failing to provide them with an interpreter during the investigation of the incident.

HELD: Court granted summary judgment to the defendant on the residents’ § 1983 claim because: (1) the residents failed to show that the Hmong language should be equated with Hmong ethnicity for purposes of equal protection analysis; (2) the residents failed to show that the resources devoted to Hmong interpretation services were not rationally related to the city’s legitimate government interest in providing services to its residents on an efficient and cost-effective basis; and (3) the residents failed to show that defendants acted with discriminatory intent toward people of Hmong ethnicity in conducting their investigation. The court further held that:

- (1) So long as a municipal policy or practice distinguishes among people for reasons other than race, ethnicity, national origin, or gender and does not burden the enjoyment of a fundamental right, it will be upheld against an equal protection challenge if it is rationally related to a legitimate governmental interest;
- (2) Government actions that have the effect of treating non-English speakers differently from English speakers do not have a tendency to target or isolate any particular language, hence ethnic, group and thus do not serve as a pretext for ethnic discrimination; and
- (3) The Equal Protection Clause protects against invidious discrimination based on race, ethnicity, or national origin but does not proscribe government actions that have a disproportionate impact on non-English speakers, as long as those actions are supported by a rational basis.

III. Title VI Considerations

Three sections of Title VI of the Civil Rights Act are of great importance in understanding the obligation of states relative to providing LEP services in state court proceedings and programs even in the absence of any specific constitutional violation. Section 601 provides as follows:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

Section 602 provides as follows:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected

(1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or

(2) by any other means authorized by law:

Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement

imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1.¹

Section 606 sets out the definition of the term “program or activity” as follows:

For the purposes of this subchapter, the term “program or activity” and the term “program” mean all of the operations of -

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

¹ Though not discussed at length in this summary, § 603 provides that:

Any department or agency action taken pursuant to section 2000d-1 of this title ***shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds.*** In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter. (Emphasis added)

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a.

Therefore, § 601 sets the general policy while §602 constitutes a general grant of authority by Congress to executive departments and agencies to develop and enforce rules designed to enforce the general mandate. Section 606 defines “program or activity” broadly.

A. Cases Construing § 606 or Like Provisions – Programs, Activities & Financial Assistance

Schroeder v. Chicago, 927 F.2d 957 (7th Cir. 1991): Appellant was injured while fighting a fire and placed on medical leave at full pay, remaining in that status for more than a year. Appellant was advised by doctors that he would be unable to resume duties as a firefighter. Appellant applied to retirement board for duty disability. However, the retirement board could not act on appellant’s application without employer providing a medical certificate, which it did not provide for several months. Eventually, appellant received his benefits, which were retroactive to the date of application. Nevertheless, appellant sued under 42 U.S.C. § 1983 alleging that due process rights were violated by appellee’s failure to timely turn over the needed medical certificate.

HELD: The Rehabilitation Act of 1973 amended Title VI to define “program or activity” to mean “all the operations” of a department, agency, district, or other instrumentality of state or local government that receives or dispenses federal financial assistance. The term “program or activity” was thus expanded from a specific program or specific activity to “all the operations” of the recipient. If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations. If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor’s office are covered along with the departments or agencies which actually receive the aid. However, the amendment was not intended to be so sweeping so that “if two little crannies (the personnel and medical departments) of one city agency (the fire

department) discriminate the entire city government is in jeopardy of losing its federal financial assistance.”

Cureton v. NCAA, 198 F.3d 107 (3rd Cir. 1999): Relying on Title VI, plaintiffs African-American student-athletes whose standardized test scores were too low to satisfy academic requirements promulgated by defendant for participation in Division I college varsity athletics sued alleging defendant’s academic regulations had a disparate impact on students of color.

HELD: Under the regulations implementing § 601 of the Title VI, an application for federal financial assistance must include assurances of nondiscrimination that may go beyond the actual program to be federally assisted. A recipient of federal financial assistance need not give an assurance of nondiscrimination with respect to programs in no way affecting the federally assisted program. The Civil Rights Restoration Act of 1987 modified Title VI so that it encompasses programs or activities of a recipient of federal financial assistance on an institution-wide basis. The critical inquiry in determining whether an entity is an indirect recipient of federal assistance is whether that entity is the intended recipient of federal funds, intention being from Congress’s point of view. Only “recipients” of federal financial assistance are subject to the disparate impact regulations, not merely organizations that have some relationship with entities receiving such assistance or organizations which benefit from such assistance. Defendant was an indirect recipient of federal financial assistance. Plaintiffs’ claims failed because the disparate impact regulations implementing § 601 of Title VI applied only to the specific program receiving financial assistance. The funds over which the court assumed defendant had control were not implicated in the lawsuit and defendant did not exercise control over its member institutions that received federal assistance for their athletic programs.

Russo v. Diocese of Greensburg, 2010 U.S. Dist. LEXIS 96338 (W.D. Penn. Sept. 15, 2010): Plaintiff, former student at defendant private high school, contended that she was discriminated and retaliated against on the basis of gender in violation of Title IX of the Education Amendments of 1972 and discriminated against on the basis of her disability in violation of § 504 of the Rehabilitation Act of 1973.

HELD: Before passage of the Civil Rights Restoration Act, the U.S. Supreme Court held that that anti-discrimination language was “program-specific.” In other words, the prohibition on discrimination applied only to an institution’s operation of the particular program that received federal funds. However, the Civil Rights Restoration Act amended § 606 of Title VI to broadened the definition of “program or activity” so that the anti-discrimination provisions would apply “institution-wide.” The prohibition on discrimination applied to the entire institution and all of its operations, programs, and activities whenever it received any federal funds at all. Since the school and defendant Diocese received federal financial assistance they were amendable to suit under Title IX and the Rehabilitation Act.

Silva v. St. Anne Catholic Sch., 595 F. Supp. 2d 1171 (D. Kan. 2009): Students and parents sued defendants, including a private Catholic school, a diocese, a parish, and a principal, alleging intentional discrimination, hostile environment, and retaliation under 42 U.S.C. § 1981 and Title VI. Plaintiffs alleged discrimination based on race, color, or national origin because of an English-only rule that the school implemented. Defendants contended that the English-only rule was enacted to combat bullying, name-calling, and put-downs.

HELD: Parish and school dismissed from the action because they were not separate legal entities from the diocese. The principal was not subject to liability under Title VI in her individual capacity. The parents lacked standing to sue because the English-only rule applied only to the students. Title VI applied to the entire school because of its receipt of federal funds through the National School Lunch Program. However, only programs directly receiving federal funding can be held liable for disparate impact under Title VI. The program-specific language applies to the claim for disparate impact. In contrast, where a claim is brought for intentional discrimination an organization can be considered a recipient of federal funds for the purposes of Title VI on an institution wide basis.

PAS Communs., Inc. v. U.S. Sprint, Inc., 112 F. Supp. 2d 1106 (D. Kan. 2000): Plaintiffs alleged, in part, that defendant intentionally denied them subcontracting opportunities in connection with defendant's various projects on the basis of race in violation of 42 U.S.C. § 1981 and Title VI. Plaintiffs further alleged defendant conspired with others to boycott plaintiffs' services in violation of § 1 of the Sherman Anti-Trust Act.

HELD: Title VI bans discrimination based upon race, color or national origin under any program or activity receiving federal financial assistance. In order to establish a Title VI claim a plaintiff must prove that he or she has been subjected to discrimination on the basis of race or national origin and that the entity engaging in discrimination is receiving federal financial assistance. The phrase "federal financial assistance" must be given its ordinary meaning: that an entity receives federal financial assistance when it receives a subsidy. In determining whether an entity receives federal financial assistance courts should focus on the intention of the government to give a subsidy as opposed to the intention of the government to provide compensation. In general, government procurement contracts do not constitute federal financial assistance within the meaning of civil rights laws. The Civil Rights Restoration Act modified Title VI so that it encompasses programs or activities of a recipient of federal financial assistance on an institution-wide basis. With respect to corporations, Title VI defines program or activity to include all the operations of an entire corporation if assistance is extended to such corporation as a whole.

A.D.E. Food Servs. Corp. v. City of Philadelphia, 1996 U.S. Dist. LEXIS 15159 (E.D. Penn. Oct. 11, 1996): Plaintiff sold food and beverages at the city airport pursuant to a program by the city and other defendants to provide equal and full opportunities for minority enterprises.

Plaintiff claimed that defendants discriminated against her, causing her to lose money and preventing her from establishing a successful business.

HELD: The Civil Rights Restoration Act of 1987 amended § 606 to define program or activity to mean “all the operations” of a department, agency, district, or other instrumentality of state or local government that receives or dispenses federal financial assistance. The statute was intended to overrule *Grove City College v. Bell* so that the various civil rights statutes would apply to the entirety of any state or local institution that had a program or activity funded by the federal government. The term “program or activity” was expanded from a specific program or specific activity to “all the operations” of the university or hospital or other institutions that conducted the program or activity. While Congress broadened the scope of the definition of “program or activity” to cover, inter alia, whole educational institutions where only part of one had received funds, it expressly kept the earlier definition of program for state governments as including only the department or agency which receives aid. The court held that plaintiff’s Title VI claim was deficient because the statute only proscribed discrimination by recipients of federal funds, and neither the city’s program, nor other defendants were recipients of federal funds. Moreover, the broadened scope of “program or activity” in the Civil Rights Restoration Act of 1987 did not encompass defendants other than the city because their contractual relationships with the city did not make them part of the operations of an entity listed in § 2000d-4a.

Association of Mexican-American Educators v. California, 836 F. Supp. 1534 (N.D. Calif. 1993):

State Legislature amended the education code to bar state created entity from issuing any credential, permit, or certificate to any applicant unable to demonstrate basic reading, writing and mathematics skills in the English language, as measured by a basic skills proficiency test. Law provided that a local school district may not “initially hire on a permanent, temporary, or substitute basis a certificated person seeking employment” unless that person has passed the basic skills proficiency test. Associations and the associated individuals alleged that the requirement violated Title VI and Title VII of the Civil Rights Act of 1964.

HELD: Title VI contains a broad prohibition on the use of federal dollars to subsidize discrimination on the ground of race, color, or national origin in any program or activity receiving federal financial assistance. The Restoration Act amended Title VI by adding an expansive definition of the term “program or activity.” Where an entity of state or local government receives federal aid and distributes it to another department or agency, both entities are covered. The accepted practice has been that a state may be sued so long as it is responsible for the Title VI violation. The undisputed facts show that the state was responsible for creating the Commission on Teacher Credentialing (CTC) and for requiring passage of the California Basic Educational Skills Test (CBEST) as a prerequisite to certificated employment in the California public schools. The commission was a part of the operations of one of the entities listed in 42 U.S.C. § 2000d-4a. The state may not escape Title VI liability simply because it is not

a “program or activity” within the technical meaning of the term, particularly since Congress has waived Eleventh Amendment immunity for Title VI violations.

United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988): Federal government filed an action to remedy defendants’ continued operation of a segregated higher education system in violation of Title VI despite a consent decree between the government and defendants.

HELD: 42 U.S.C. § 2000d-4a amends Title VI by adding § 606, which reads in part that the term “program or activity” and the term “program” mean all the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, or the entity of such state or local government that distributes such assistance and each such department or agency to which the assistance is extended, in the case of assistance to a state or local government, any part of which is extended federal financial assistance. By providing federal funds to a state school system the United States has standing to enforce the Title VI contractual assurances of nondiscrimination upon which its money allotments are made. Title VI did not exceed Congress’ spending power by mandating system-wide compliance with Title VI as a condition of receipt of federal money.

Coleman v. Seldin, 181 Misc. 2d 219 (N.Y. Sup. Ct. 1999): Plaintiff homeowners sought declaratory and injunctive relief against defendants, members of the county board of assessors and the county, contending that defendant county maintained a racially discriminatory residential assessment system that had a disparate impact on minority homeowners. Action was brought alleging violations of Title VI, Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act), 42 U.S.C. § 3601, and the Nassau County, N.Y., Gov. Law § 603. Defendants’ sought dismissal.

HELD: The Rehabilitation Act defines “program or activity” as “all of the operations” of specific entities, including “a department, agency, special purpose district, or other instrumentality of a State or of a local government”. The plain meaning of “activity” is a natural or normal function or operation. It is uncommon for courts in considering claims under analogous Title VI regulations to look to Title VII disparate impact cases for guidance. Title VI itself permits a claim against the State even though it is not technically a program or activity. Moreover, a county is a proper defendant and thus in this case the Board of Assessors and the real property assessment program administered by the Board are subject to Title VI. However, no federal agency administers any program of aid or financial assistance in support of real property assessment in the county nor has any federal agency promulgated any regulations relating to this function or that is otherwise connected to county government’s real property assessment programs or policies. While the court recognizes that Title VI applies to all functions carried out by the county or any of its departments or agencies, plaintiffs would have the court reach one step further and apply a disparate impact analysis to the county’s real property assessment program. Despite claimed discrimination by county’s continued use of a questionable database and methodology, the plaintiffs have not identified nor could the court find any regulations

promulgated under any federal program or activity applicable to the county's real property assessment system, which would warrant the application of the lower disparate impact standard rather than the intentional discrimination standard. Though the plaintiffs seek to utilize the disparate impact analysis of the county's real property assessment program, the simple truth is the program is not a recipient under any program or activity to which federal financial assistance is provided.

B. Cases Construing § 601 – Non-Discrimination

Lau v. Nichols, 414 U.S. 563 (1974): Students of Chinese ancestry who attended school did not speak English. Some of the students received supplemental classes in English, but over half of the students did not receive any instruction. Students initiated a class action against the school system alleging violations of the Fourteenth Amendment and § 601 of Title VI. Appellate court held that there was no constitutional violation or violation of § 601 and that all students had different educational advantages and disadvantages.

HELD: On appeal, the United States Supreme Court held the following:

- (1) Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national-origin discrimination under the Civil Rights Act. By not providing adequate English courses the school system engaged in national origin discrimination by denying LEP students equal access to educational programs funded in part with federal funds and otherwise available to all non-LEP students in the system. The Court concluded that LEP students received fewer educational benefits than the English-speaking majority within the school system.
- (2) Executive agencies have authority to promulgate regulations prohibiting discrimination in federally assisted school systems under 42 U.S.C. § 2000d-1.
- (3) Under § 602 of Title VI an executive agency is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistent with § 601. The department's regulations, 45 C.F.R. § 80.3(b)(1), specify that the recipients may not: (a) provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; or (b) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.
- (4) Discrimination among students on account of race or national origin that is prohibited includes discrimination in the availability or use of any academic or other facilities of the grantee or other recipient.
- (5) Under § 602, discrimination may be barred that has the effect even though no purposeful design is present. A recipient may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination or have

the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

- (6) A federal regulation that provides that where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the deficiency to open its instructional program to these students. Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead end or permanent track.

Barker v. Riverside County Office of Educ., 584 F.3d 821 (9th Cir. 2009): Non-disabled plaintiff and coworker filed a complaint with the U.S. Department of Education alleging that defendant denied its disabled students a free appropriate public education. Plaintiffs allegedly suffered retaliation from supervisors which led to constructive discharge. The district court dismissed suit for lack of standing to sue under federal laws.

HELD: For purposes of securing any right or privilege secured by § 601 of Title VI, the anti-retaliation provision of Title VI incorporated by § 504 of the Rehabilitation Act prohibit intimidation, threats, coercion, or discrimination against any person who has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing. Statute's language evidences congressional intent to broadly define standing to bring a private action under § 504. Because plaintiff engaged in activities opposing policies that allegedly violated the Americans with Disability Act, plaintiff had standing to pursue her claim under 28 C.F.R. § 35.134(a) based upon alleged intimidation.

Thomas v. Salem State Univ. Found., Inc., 2011 U.S. Dist. LEXIS 121036 (D.C. Mass., Oct. 18, 2011): Plaintiff brought suit, in part § 601 of Title VI alleging wrongful expulsion from a graduate program as a result of racial discrimination and retaliation.

HELD: Section 601 of Title VI forbids discrimination in any "program" receiving federal financial assistance. Because Title VI forbids discrimination a "program" individuals cannot be held liable for violations of § 601. Only entities receiving federal financial assistance are liable under § 601.

Kimmel v. Gallaudet Univ., 639 F. Supp. 2d 34 (D.D.C. 2009): Plaintiff professor brought suit alleging discrimination on the basis deafness or alternatively plaintiff's management of it did not conform to what was preferred or accepted by the university. This allegation did not suggest that the professor experienced discrimination solely because deafness, but instead because of the particular kind of deafness. The professor also stated a claim under Title VI based upon complaints of discriminatory treatment of African-American and minority students at the university. Although the alleged protected activity was helping to assert minority

students' rights under § 601, rather than asserting personal rights under the statute, the alleged advocacy on behalf of minority students was a protected activity sufficient to support a retaliation claim under Title VI.

HELD: Section 601 of Title VI contains a private cause of action under which individuals may sue to enforce their rights and obtain both injunctive relief and damages. Section 601's private cause of action is limited, however, because § 601 prohibits only intentional discrimination.

Rubio v. Turner Unified Sch. Dist. No. 202, 523 F. Supp. 2d 1242 (D. Kan. 2007): Student alleged that the school district was liable under the Civil Rights Act of 1964 for a hostile environment based on national origin and race because student was sent to the central office for speaking Spanish in school on one occasion.

HELD: Court overruled district's motion for summary judgment on the student's hostile environment claim based on national origin and race discrimination. Student's allegations that the district had actual knowledge of and was deliberately indifferent to the teacher's harassment, which consisted of sending the student to the principal for speaking Spanish, was sufficient to establish a prima facie case. The teacher was a wrongdoer. The principal, and therefore the school district, was deliberately indifferent to the teacher wrongful conduct. The court granted the school district's motion for summary judgment on the student's retaliation claim because no reasonable jury could have found that the school district had notice that the teacher and the principal detained the student in the office in retaliation for filing suit and failed to take adequate steps to address any such retaliation. The court further held:

- (1) Private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages. However, Title VI further states that no action shall be taken until the department or agency concerned has advised the appropriate person of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. Under an identical provision in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, the U.S. Supreme Court has held that unless an appropriate person has actual knowledge of the alleged discrimination and fails to adequately respond to such discrimination, damages as a remedy are not available. A school district can be held liable where a principal knows of teacher misconduct.
- (2) To establish a prima facie case of hostile environment under Title VI a plaintiff must show that: (1) they are a member of a protected class; (2) the harassment was based on race, color or national origin; (3) defendant had actual knowledge of and was deliberately indifferent to the harassment; and (4) the harassment was so severe, pervasive and objectively offensive that it deprived plaintiff of access to the educational benefits or opportunities provided by the school.
- (3) Although Title VI does not specifically prohibit retaliation, courts imply a private cause of action for retaliation based on the statute's general prohibition of intentional discrimination. To establish a prima facie case of retaliation under Title VI, a plaintiff

must show: (1) that they engaged in protected activity under Title VI; (2) that they suffered adverse action contemporaneous with or subsequent to such activity; (3) a causal nexus between the protected activity and the adverse action; and (4) the defendant knew of the retaliation and did not adequately respond. To establish a causal connection between the filing of a lawsuit and adverse action, the plaintiff may proffer evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.

Rubio ex rel. Z.R. v. Turner Unified Sch. Dist. No. 202, 453 F. Supp. 2d 1295 (D. Kan. 2006):

Plaintiff father sued alleging that by prohibiting students from speaking Spanish at school defendants violated child's rights under 42 U.S.C. § 1983 and Title VI. Plaintiff alleged that the principal knew of a teacher's misconduct and participated in it. Defendants move to dismiss on grounds that: (1) the claims against individuals acting in their official capacities merely duplicated claims against the district; (2) the board of education lacked the capacity to be sued under Kansas law; (3) the complaint did not state a claim against the Doe defendants; (4) the district could not be liable under 42 U.S.C. § 1983 for the acts of a principal because the principal lacked final policymaking authority; (5) no equal protection claim was stated; (6) the principal and a teacher were entitled to qualified immunity on the § 1983 claim; and (7) Title VI applied only to intentional discrimination, and thus the district could not be held liable under a theory of respondeat superior.

HELD: English-only policies are not inherently non-discriminatory as a matter of law. For example, English-only workplace policies may create an atmosphere of inferiority, isolation, and intimidation that creates a discriminatory environment. Such policies may adversely impact employees with limited or no English skills, and the risk of discipline for violating English-only policies falls disproportionately on bilingual employees and those with limited English skills. A school district can be liable for the acts of a principal where the principal is an "appropriate person" under Title VI because Title VI defines an "appropriate person" as an official of the entity with authority to take corrective action to end the discrimination.

Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71 (D.D.C. 2003): Plaintiff alleged that the university denied him access to its facilities and services due to his national origin. Plaintiff also asserted violations of § 601 alleging retaliation.

HELD: Section 601 of Title VI does not contain a specific provision forbidding retaliation for asserting protected rights. In § 602 of Title VI Congress authorizes federal agencies to effectuate the provisions of § 601 by issuing rules, regulations, and orders of general applicability. While Congress created a right to be free from intentional discrimination in Title VI, the statute does not include a specific prohibition on retaliation beyond the general prohibition on discrimination. However, retaliation offends the Constitution because it threatens to inhibit the exercise of a protected right and is thus akin to an unconstitutional condition demanded for the receipt of a government-provided benefit. Further, the existence

of a statutory right implies the existence of all necessary and appropriate remedies. Anti-discrimination statutes are interpreted to include an implied right to be free from retaliation in pursuing claims. A statute prohibiting discrimination should be construed to confer an implicit cause of action protecting people from retaliation for refusing to violate other people's rights.

Almendares v. Palmer, 2002 U.S. Dist. LEXIS 23258 (N.D. Ohio 2002): Plaintiffs were low-income Spanish-speaking or limited English proficient recipients of food stamps. Because all notices, applications, and written communications from the State were almost exclusively in English, plaintiffs asserted that their rights to participate fairly and equally in the food stamp program had been denied.

HELD: The language of the Food Stamp Act lacked "rights-creating" language manifesting congressional intent to create private rights. The act simply imposed conditions on recipients of federal funds. Therefore, the statute did not confer individual entitlement enforceable under 42 U.S.C. § 1983. Because 7 U.S.C. § 2020(e)(1)(B) did not create a private right, regulations could not be used to create such right. However, the USDOJ in an exercise of this authority may promulgate a regulation forbidding funding recipients to utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination based on race, color, or national origin pursuant to 28 C.F.R. § 42.104(b)(2). Regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on protected groups, even though such activities are permissible under § 601. Plaintiffs did not need to exhaust administrative remedies prior to bringing a Title VI claims because there is no mechanism by which a protected class can actively participate in the administrative process.

IV. Cases Construing § 602 – Agency Rules

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983): Minority employees alleged that several written examinations administered by New York City from 1968 to 1970 for entry-level appointments to the city's police department discriminated against blacks and Hispanics in non-job-related ways. Each minority employee achieved a passing score on one of the challenged examinations and was hired as a police officer, but at later dates than similarly situated whites. This lessened the minority employees' seniority and related benefits. Officers with lower test scores were laid off first. Minority employees alleged that the layoffs violated their Title VI and Title VII rights under the Civil Rights Act of 1964. The district court concluded that minority employees had a private right of action under Title VI and granted back seniority.

HELD: The U.S. Supreme Court held the following:

- (1) Compensatory relief, including retroactive seniority, was not available as a private remedy under Title VI violations that did not involve intentional discrimination. Constructive benefit-type seniority was a "form of compensation" to those whose

rights were violated at a time when the employer was under no court-imposed obligation to conform to a different standard.

- (2) Section 602 empowers agencies providing federal financial assistance to issue rules, regulations, or orders of general applicability consistent with achievement of the objectives of the statute authorizing the financial assistance. The regulations are valid because they were reasonably related to the purposes of the enabling legislation.
- (3) Title VI reaches unintentional, disparate-impact discrimination as well as deliberate discrimination.
- (4) Where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief. The general rule yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved.
- (5) Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance.
- (6) Absent clear congressional intent or guidance to the contrary, the relief in private actions for civil rights violations should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations is not available.
- (7) Title VI is spending-power legislation. It is not a regulatory measure but an exercise of the unquestioned power of the federal government to fix the terms on which federal funds are disbursed.
- (8) Section 602 of Title VI requires that any administrative enforcement action be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.
- (9) Damages are usually available in a 42 U.S.C. § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute.
- (10) Injunctive relief is permissible even if it means that the defendants, in order to shape their conduct to the mandate of the court's decree, will have to spend more money than if they had been left free to pursue their previous course of conduct.
- (11) Suit for violation of Title VI as opposed to implementing regulations requires proof of discriminatory intent.

Alexander v. Sandoval, 532 U.S. 275 (2001): Respondent asserted that Alabama's policy of administering driver's license examinations only in English discriminatorily impacted non-English speakers based on national origin. Respondent further argued that such policy violated federal regulations issued by the USDOJ prohibiting recipients from conduct *that had the effect* of subjecting individuals to discrimination, which regulations implemented Title VI.

HELD: On appeal the U.S. Supreme Court held the following:

- (1) Private individuals may sue to enforce § 601 of Title VI to obtain both injunctive relief and damages.
- (2) Section 1003 of the Rehabilitation Act Amendments of 1986 expressly abrogates states' sovereign immunity against suits brought in federal court to enforce Title VI and provides that in a suit against a state remedies, including remedies both at law and in equity, are available to the same extent as such remedies are available in the suit against any public or private entity other than a state.
- (3) Section 601 of Title VI prohibits only intentional discrimination.
- (4) Regulations applying the ban on intentional discrimination under of § 601, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.
- (5) A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. The disparate-impact regulations of the USDOJ do not simply apply § 601 since they forbid conduct that § 601 of Title VI permits. Therefore the private right of action to enforce § 601 does not include a private right to enforce these regulations.
- (6) Like substantive federal law itself, private rights of action to enforce federal law must be specifically created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays a clear intent to create not just a private right but also a private remedy. Courts may not create a private cause of action, no matter how desirable that might be as a policy matter, or how compatible with the statute. Creating causes of action where a statute has not so provided may be a proper function for common-law courts but not tribunals.
- (7) Section 602 authorizes federal agencies to effectuate the provisions of § 601 of Title VI by issuing rules, regulations, or orders of general applicability.
- (8) Section 602 limits agencies to effectuating rights already created by § 601 of Title VI.
- (9) Statutes that focus on the person regulated rather than the individuals protected create no implication of a clear intent to confer rights on a particular class of persons.
- (10) Section 602 empowers agencies to enforce their regulations either by terminating funding to the particular program or by any other means authorized by law. No enforcement action may be taken, however, until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.
- (11) Every agency enforcement action is subject to judicial review.
- (12) The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.

- (13) Neither as enacted or amended does Title VI create a freestanding private right of action to enforce regulations promulgated under § 602.
- (14) Even assuming that the regulations were statutorily authorized and resulted in discriminatory impact, § 602 does not provide a private right of action.
- (15) Title VI prohibits only intentional discrimination and the remedies available for violations of Title VI could not be extended by regulation to remedy disparate impact discrimination that did not violate the implementing statute. The express language of § 602 included no allowance for private enforcement rights especially in view of the elaborate statutory remedial scheme for termination of funding for regulatory violations.

Colwell v. HHS, 558 F.3d 1112 (9th Cir. 2009): Plaintiffs physicians, English only organization and physician organization, sued U.S. Department of Health and Human Services (HHS) challenging 2003 policy guidance document issued by the HHS that sought to clarify the legal obligation of recipients of federal funds regarding the requirement to provide meaningful access for individuals with limited English proficiency to programs supported by federal funds. District court held that under U.S. Constitution, Article III, plaintiffs lacked standing and their suit was unripe.

HELD: Plaintiffs satisfied Article III standing and ripeness requirements. However, plaintiffs failed to satisfy the prudential criteria for ripeness. Much of the 2003 policy guidance was written in non-mandatory terms. The action was unripe because the policy guidance was ambiguous and because of the likelihood that the ambiguity would be reduced or resolved based on the enforcement activities HHS in the future. The regulations did not contemplate any kind of financial sanction other than termination of federal funding. Plaintiffs failed to demonstrate any hardship outweighing the court's and the agencies' interest in delaying review.

Save Our Valley v. Sound Transit, 335 F.3d 932 (10th Cir. 2003): Group filed suit under, inter alia, 42 U.S.C. § 1983, alleging that state authority's plan violated a U.S. Department of Transportation's "disparate impact" regulation promulgated pursuant to Title VI. Plaintiff argued that the regulation created an individual federal right that the group could enforce under § 1983. The question was whether a federal agency's regulations could ever create individual rights enforceable through § 1983.

HELD: Under controlling U.S. Supreme Court precedent of *Gonzaga* and *Sandoval*, an agency regulation cannot create individual rights enforceable through § 1983 unless enabling statute created such a right. Violations of rights, not violations of laws, gave rise to § 1983 actions. Plaintiffs suing under § 1983 must demonstrate that a statute, not a regulation, conferred an individual right. The court's paramount consideration is to determine if Congress intended to create a particular federal right sought to be enforced. In § 601 of Title VI, Congress created a right to be free from *intentional* discrimination. However, far from displaying congressional

intent to create new rights, § 602 of Title VI limits agencies to effectuating rights already created by § 601. A disparate impact regulation cannot create a new right; it can only effectuate a right already created by § 601. For a statute or regulation to be enforced through 42 U.S.C. § 1983 more is needed than for the statute or regulation to be a “law.” The statute or regulation must be a “law” and it must secure “rights, privileges, or immunities.” There is no implied private right of action to enforce “discriminatory effects” regulations promulgated pursuant to § 602 since such regulations go beyond the “intentional discrimination” provisions of § 601. Consequently, a § 1983 action cannot be used to enforce “discriminatory effects” regulations promulgated under § 602 since such regulations do not create a private right.

Nat’l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425 (D.C. 2006): Plaintiffs, two landlord groups, sued Department Housing and Urban Development (HUD), arguing that HUD exceeded its statutory authority under Title VI by adopting recent policy guidance concerning LEP requirements for recipients of federal assistance. The guidance clarified a long-standing requirement that recipients of funding for federal programs communicate with program beneficiaries in languages other than English if those beneficiaries had limited English proficiency. Plaintiffs asserted that Title VI prohibited only discrimination on the basis of national origin, not on the basis of language, and that it did not support “disparate impact” provision. Plaintiffs also argued that the vagueness of the guidance made compliance overly burdensome, rendering it substantively arbitrary and capricious in violation of the Administrative Procedure Act.

HELD: While the claims were ripe, the groups lacked standing. Invalidation of the policy guidance would not redress the claimed injury. The guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones. The guidance was only an expression of the criteria HUD would use in evaluating whether recipients were in compliance with Title VI and its regulations. Moreover, the legal injuries asserted regarding requirements to provide LEP services and “disparate impact” theories under Title VI did not arise from the guidance at all. The court further held:

- (1) Like USDOJ guidance, HUD’s policy guidance offers a flexible and fact-dependent standard that balances four factors: (1) the proportion of limited English proficiency persons served by the program; (2) the frequency with which they come in contact with the program; (3) the importance of the program for those beneficiaries; and (4) the resources available to the recipient. This is a malleable standard that the recipient should use in assessing their own compliance.
- (2) The guidance does not bind or expand HUD enforcement or de-funding authority. Ultimately, it is only an expression of the criteria HUD will use in evaluating whether recipients are in compliance with Title VI and its regulations.

Franks v. Ross, 293 F. Supp. 2d 599 (E.D.N.C. 2003): Plaintiffs claimed defendants’ approval, funding, and construction of a landfill in predominantly minority communities violated federal

laws and forced plaintiffs to bear a disproportionate share of the area's waste management facilities.

HELD: Three aspects of Title VI must be taken as a given. First, private individuals may sue to enforce § 601 to obtain injunctive relief and damages. Second, § 601 prohibits only intentional discrimination. Third, regulations promulgated under § 602 may validly prohibit activities that have a disparate impact on protected groups, even though such activities are permissible under § 601. Title VI does not, however, create a freestanding private right of action to enforce regulations promulgated under § 602. Plaintiffs cannot use § 1983 to enforce a statute that did not alone create a private cause of action.

V. Questions and Answers

Recent statements and actions by the USDOJ indicate that the department is taking a more aggressive stance on state court compliance with LEP requirements. A recent letter from Assistant Attorney General Thomas Perez to Chief Justices and State Court Administrators along with compliance reviews and threatened enforcement actions evidence this more aggressive stance. The following Q & As are intended to answer some of the more pressing questions and provide additional guidance.

1. We have heard much about Executive Order 13166. What impact does the order have on my program?

Executive Order 13166 has little direct impact on specific state court programs. The executive order, issued on August 6, 2000, directs federal departments and agencies to establish guidance for recipients of federal funds. As such, the order has impact on recipients only to the extent that federal departments and agencies promulgated additional rules, regulations or guidance as directed. The order is of no direct and independent legal significance to state court recipients of federal assistance.

2. What constitutes a "Program" for purposes of Title VI?

Pursuant to the Rehabilitation Act's amendments to § 606 of Title VI, the term "program or activity" means all the operations of a department, agency, district, or other instrumentality of state or local government that receives or dispenses federal financial assistance. However, there is no consistent judicial analysis of how extensive "program or activity" is to be read.

3. What constitutes federal financial assistance?

Generally speaking, "federal financial assistance" takes the form of grants or monetary awards. However, the term has been interpreted broadly to include the use of federal land or property

at below market value, donations, assistance offered under a cooperative agreement, federally provided training, and the loan of federal personnel, subsidies, and other arrangements with the intention of providing assistance. Federal financial assistance does not include contracts of guarantee or insurance, regulated programs, licenses, procurement contracts of the federal government at market value, or programs that provide direct benefits. Not only must a program receive federal financial assistance to be subject to Title VI, but the entity must also be subject to Title VI as defined by § 606 and must receive federal assistance at the time of the alleged discriminatory act.

4. Who is a recipient?

Under 28 C.F.R. § 42.102(f), (g), a recipient is “any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program. The term primary recipient means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.” To constitute a “recipient” of federal financial assistance the entity must have voluntarily entered into a relationship with the federal government and receive federal assistance under a condition or assurance of compliance with Title VI. It is important to note that Title VI is tied to Congress’s Spending Clause Authority and as such constitutes a “condition” on the receipt of federal assistance. Federal law requires federal agencies to obtain “assurances” of non-discrimination from recipients as a condition of receiving assistance. 28 C.F.R. §§ 41.5(a)(2), 42.407(b).

It should be noted that the condition does not apply if an entity refuses to accept or does not accept federal financial assistance. This fact does not, however, limit individuals from enforcing their rights under other civil rights provisions such as 42 U.S.C. § 1983.

5. Does federal financial assistance have to be direct assistance or can indirect assistance trigger Title VI compliance concerns?

Both direct and indirect assistance trigger the non-discrimination provisions of Title VI. Direct assistance in the form of grants and monetary awards to a covered recipient is clearly covered. However, a recipient may be required to comply with Title VI when it is the *indirect* recipient of federal assistance such as students or veterans using federal aid to attend school. In such cases, although the federal financial assistance is provided to an individual the institution is considered an indirect recipient as a function as federal assistance is being used to pay for services.

6. What factors should a court considered in determining the level of services necessary to meet Title VI compliance?

The USDOJ has issued guidance stating that the level of services to be provided by a recipient of federal assistance should be determined under the following four-factor test:

1. The number or proportion of LEP persons served or encountered in the eligible service population;
2. The frequency with which LEP individuals come in contact with the program;
3. The nature and importance of the program, activity, or service provided by the program; and
4. The resources available to the recipient and costs.²

However, it should be noted that this constitutes “guidance” and the USDOJ and other federal agencies providing like guidance are not necessarily bound to apply these standards in assessing a recipient’s compliance with Title VI’s prohibitions.

7. What constitutes discrimination under Title VI?

There are generally two broad categories of discrimination under Title VI: (1) disparate treatment; and (2) disparate impact. Disparate treatment is conduct that is *intentionally discriminatory* and, therefore, is a direct violation of § 601. The analysis to determine whether disparate treatment has occurred is similar to the analysis that applies to equal protection violations under the 14th Amendment. Disparate treatment can be enforced by individuals directly affected by the discriminatory conduct.

In contrast, disparate impact is conduct that may be facially neutral but nevertheless has the “effect” of discriminating against a protected group in the administration of a program. For example, the use of screening criteria to access a federally supported program maybe facially neutral but can still violate Title VI if it has a discriminatory impact that lacks a “substantial legitimate justification”. Disparate impact violations flow regulations promulgated pursuant to § 602 of Title VI. Title VI regulations, for example, bar utilization of criteria and methods of administration that have among other results, “the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin.” Disparate impact can only be enforced by a federal agency not by individuals.

8. Who may file a complaint under Title VI?

² Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

It depends. An individual may file a complaint for injunctive relief and damages where they allege that a recipient of federal financial assistance has engaged in “disparate treatment”; that is intentional discrimination under § 601 of Title VI. Once the plaintiff establishes a prima facie case raising an inference of intentional discrimination the burden shifts to the recipient to rebut the inference by presenting legitimate, non-discriminatory reasons for its conduct or action.

However, with regard to allegations of discrimination based on “disparate impact”, only the administrative agency may bring enforcement actions since “disparate impact” rules are promulgated under the general rulemaking authority of § 602. Individual complaints to the agency may give rise to agency action, but only the agency can ultimately pursue an enforcement action against the recipient.

9. Are complaints the only mechanism that triggers review of language access services?

No. Generally speaking complaints filed with a federal agency against recipients of federal assistance can trigger review of a recipient’s Title VI compliance. However, each federal agency has the independent authority and obligation to audit recipient programs – so-called “compliance reviews” – to ensure that federal assistance is being used in a non-discriminatory manner. Federal agencies have broad though not unfettered discretion in determining which recipients to target for compliance reviews. Selection of targets for a compliance review are deemed reasonable if the selection is based on: (1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied; or (3) a showing that the search is pursuant to an administrative plan that is neutral. A credible complaint or series of complaints filed with the USDOJ can be sufficient to trigger a compliance review.

10. Are all reviews or investigations initiated only by DOJ?

Not necessarily. An individual alleging intentional discrimination under § 601 may bring a private action for injunctive relief and damages to enforce their rights. In the course of the action the plaintiffs may engage in discovery that brings to light discrimination in other aspects of a recipient’s program. However, if the basis of the action is “disparate impact” based, only the federal agency can initiate a formal review or investigation of a recipient since only the department has the authority to enforce rules promulgated under § 602.

11. What are the penalties for not complying with Title VI?

It depends. If the action is initiated under § 601, an individual plaintiff is entitled to injunctive relief and damages. A federal court may direct suspension or termination of federal funding as part of granting a plaintiff relief. In addition, Title VI provides that if a recipient is found to have discriminated in a federally assisted program a federal agency may terminate funding, refuse to grant funding, or refuse to consider funding of a program or activity. The agency may also take

other enforcement actions as authorized by law. Such action includes judicial enforcement of Title VI requirements. Thus, a federal agency may pursue judicial enforcement through enforcement of recipient's assurances, certifications of compliance, covenants attached to property, desegregation or other plans submitted to the agency as conditions of assistance, or violations of other provisions of the Civil Rights Act of 1964, other statutes, or the Constitution. It should be noted that in a suit for injunctive relief a court can order termination of federal financial assistance as a remedy.

12. Does a recipient that is found to have violated Title VI have an opportunity to cure the discriminatory conduct or seek judicial review before federal assistance is terminated?

Generally speaking, Title VI's enforcement provisions are to be used to encourage compliance. Consequently, no enforcement action can be taken by a federal department or agency until it has advised the appropriate person or persons of the recipient of its failure to comply with the non-discrimination requirement and it has determined that voluntary compliance efforts will not be successful. Before a federal agency can terminate funding based on a finding of discrimination, such finding must be made "on the record" after the recipient is given an opportunity for a hearing. Although the non-discrimination requirements are applied broadly given the definition of "program or activity", termination of funding is limited to the particular political entity, or part thereof, or other recipient to whom the finding of discrimination has been made and, "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found[.]" When a department or agency terminates funding for non-compliance, the head of the federal department or agency must file with the committees of the House and Senate having jurisdiction over the program or activity a full written report of the circumstances and the grounds for its decision to terminate or refuse to grant federal assistance. No such action shall become effective until 30 days have elapsed after the filing of the congressional report.

Recipients of federal funds are entitled to judicial review of a funding termination decision. However, before a recipient can initiate judicial action it must be clear that the federal agency's action is a final and that all administrative channels have been exhausted. No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.