BRIEFING PAPER

TO: Chief Justices
State Court Administrators

FROM: National Center for State Courts, Government Affairs Office

SUBJECT: Title VI Considerations in State Courts Providing LEP Services

DATE: February 28, 2011

On August 16, 2010, Assistant Attorney General Thomas Perez sent a guidance letter ("Letter") to state supreme court chief justices and state court administrators providing additional direction concerning state court obligations under Title VI of the Civil Rights Act of 1964 ("Title VI") and the Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act") with regard to services for Limited English Proficiency (LEP) individuals. This briefing paper is intended to provide insight into what is a complex area of law. It examines the requirements of Title VI[1] and the Letter in the following areas: (1) a review the legal basis of Title VI and its requirements; (2) an examination of the legal authority of the Department of Justice (DOJ) to issue rules under Title VI, interpret those rules, and enforce those rules; (3) a review of the DOJ's current interpretation of rules as applied to state courts given the Letter; (4) an analysis of provisions applicable to the federal courts as an alternative interpretation of what Congress considers required for LEP individuals; (5) a discussion of areas that remain open for further interpretation in light of the Letter; and (6) some conclusions concerning providing LEP services given the Letter.

I. Legal basis of Title VI & Congress's spending power

Title VI provides that "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 (2010). Likewise, the Safe Streets Act states that, "No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter." 42 U.S.C. § 3789d(c)(1) (2010). Congress intended for Title VI to apply across-the-board "to make sure that the funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544 (Statement of Sen. Humphrey). Through Title VI, Congress sought to "insure the uniformity and permanence to nondiscrimination policy" in all

[1] For purposes of this memorandum the analysis is generally confined to Title VI of the Civil Rights Act (42 U.S.C. § 2000-d) but the analysis of critical aspects of the Act and the Letter apply equally to similar provisions in the Safe Streets Act (42 U.S.C. § 3789d).

programs supported in whole or in part by federal funds. *Id.* For purposes of this discussion it is important to draw a distinction between § 601 of Title VI and § 602 of Title VI. Section 601 states the general prohibition on discrimination in programs funded in whole or in part by the federal government. Section 602 grants federal agencies general rulemaking authority. As will be discussed, § 601 creates a private right of action to enforce its provisions. However, rules promulgated under § 602, including those related to disparate impact, can only be enforced by the agency.

The U.S. Supreme Court has determined that discrimination based on language is a form of national origin discrimination prohibited by Title VI. The principal case in this regard is *Lau v. Nichols*, 414 U.S. 563 (1974). The Court in *Lau* concluded that a school district violated Title VI when it failed to establish a program to deal with the language problems of students of Chinese ancestry who did not speak English. The Court concluded that the school district's failure to establish such a program "denied a meaningful opportunity [for the students] to participate in [an] educational program" funded in part by the federal government. It is important to note that Court in *Lau* found that Title VI bars discrimination "which has that *effect* even though no purposeful design is present[.]" *Id*. at 568. Consequently, under *Lau* the inquiry is based on whether the action of state officials result in discrimination not whether state officials intended discrimination.

Both Title VI and the Safe Streets Act are tied to Congress's spending authority and seek to compel certain state government behavior by attaching federal financial assistance to non-discrimination in programs funded in whole or in part by the federal government.[2] Through its spending powers, Congress may condition the receipt of federal funds upon recipients taking certain actions so long as the congressional conditions bear some rational relationship to the purpose of the federal spending. *South Dakota v. Dole*, 483 U.S. 203, 206-208 (1987) (statute reducing highway funds to states for having a minimum drinking age below 21 was a valid exercise of spending powers). Summarizing Congress's authority to legislate through its spending power, the Supreme Court noted in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981):

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the

[2] Congress does not have the authority to require states *to govern* (*i.e*., legislate) according to its will. Coyle v. Smith, 221 U.S. 559 (1911). Congress may not commandeer state authorities without their consent in furtherance of a federal objective or direct a state legislature to adopt a particular law. *See,* Prinz v. United States, 521 U.S. 898, 935 (1997) (federal government may not issue directives requiring states to address particular problems nor command states officers to administer or enforce a federal regulatory program); New York v. United States, 505 U.S. 144 (1992) ("take title" requirement in the Low-Level Radioactive Waste Policy Amendments Act unconstitutional as an attempt to require states to legislative according to a particular scheme). However, while Congress cannot commandeer state officials or direct a state legislature to enact a particular regulatory scheme, Congress does retain relatively broad power to regulate directly state conduct. *See*, Reno v. Condon, 528 U.S. 141 (2000) (Driver's Privacy Protection Act is constitutional).

> nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Although Pennhurst has been distinguished on other grounds, its basic holding on Congress's spending power remains good law.[3]

Title VI is not a regulatory measure but rather one rooted exclusively in Congress's spending power. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 599 (1983) *citing, Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143 (1947). Consequently, there is no question that Congress can condition receipt of federal money upon states taking certain actions to improve access to programs for LEP persons. *Cf.*, 110 Cong. Rec. 6546 (1964) ("No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered." (Sen. Humphrey)). Like the statute challenged in *South Dakota v. Dole*, *supra*, Title VI and the Safe Streets Act create incentives (or disincentives) to compel certain behavior. Neither statute, however, establishes a standard to guide recipients; this matter apparently having been left to the rulemaking process. The question, therefore, is not whether Congress can condition spending but rather whether those charged with implementing the overarching policy – in this case the DOJ – are doing so in a manner that reflects the intentions of Congress.

II. Rulemaking, standard of review & enforcement

Both Title VI and the Safe Streets Act delegate general rulemaking authority to executive agencies to carry out the overarching statutory policy. *See, Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (agency rules and regulations issued under 42 U.S.C.S. § 2000d-1 are valid because they are reasonably related to the purposes of the statute). Generally, substantial judicial deference is paid to a federal administrative agency's interpretation of an ambiguous statute when it appears that (1) Congress delegated broad rulemaking authority to the agency**,** and (2) the agency's interpretation was promulgated in the exercise of that authority. *See generally, Chevron v. NRDC,* 467 U.S. 837 (1984). Title VI gives the DOJ general

[3] Although Congress may not commandeer legislative and executive authorities to enact or administer federal regulatory programs, Congress may command state courts to enforce federal proscriptions. As the Supreme Court noted in Alden v. Maine, 527 U.S. 706, 752 (1999), "Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs 'it may require state courts . . . to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power[.]'" (Citation omitted)

authority to issue regulations. However, the Supreme Court has also held that agency policy statements and enforcement guidelines do not have the force and effect of law. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (ordinarily, "policy statements, agency manuals, and enforcement guidelines, all of which lack force of law—do not warrant Chevron-type deference").

Section 602 of Title VI directs federal agencies "to effectuate the provisions of section 2000d of this title (the general mandate) 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." 42 U.S.C. § 2000d-1 (2010).[4] This congressional authorization is a general grant of rulemaking authority and therefore the DOJ's interpretation of its rules would most likely receive substantial judicial deference under the principles articulated in *Chevron*, *supra.* The DOJ's promulgated rules can be found at 28 C.F.R. §§ 42.101-42.412 (2010). In relevant part, the rules define the types of federal assistance covered,[5] the nature of the programs covered,[6]

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[4] The exact language of § 602 is 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." 42 USC § 2000d-1 (2010).

[5] The term Federal financial assistance includes:

> (1) Grants and loans of Federal funds,
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> (2) The grant or donation of Federal property and interests in property,
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> (3) The detail of Federal personnel,
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> (4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and
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> (5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

28 C.F.R. § 42.102(c) (2010).

[6] The rules define program and facility as follows:

> (d) The term program includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, rehabilitation, or other services or disposition, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. The disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance shall be deemed to include any disposition, services, financial aid, or benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any disposition, services, financial aid, or benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

28 C.F.R. § 42.102(d) & (e) (2010).

and the entities covered.[7] The rules re-state the general prohibition on discrimination (28 C.F.R. § 42.104(a)) and outline several specific discriminatory actions that are prohibited (28 C.F.R. § 42.104(b)(1)). The rules apply broadly so that "the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance *shall be deemed to include any portion of any program or function or activity conducted by any recipient of Federal financial* assistance which program, function, or activity is directly or indirectly improved, enhanced, enlarged, or benefited by such Federal financial assistance or which makes use of any facility, equipment or property provided with the aid of Federal financial assistance." (Emphasis added) 28 C.F.R. § 42.104(b)(4). Coverage extends to a recipient's entire program or activity even if only a portion of the program or activity receives federal assistance.[8] 67 Fed. Reg. 41,459 (June 18, 2002).

The Supreme Court has held that three aspects of Title VI must be taken as given relative to its enforcement: (1) § 601 of Title VI creates a private right of action for enforcement through injunctive relief and damages; (2) § 601 prohibits only intentional discrimination; and (3) regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on groups, even though such activities are permissible under § 601. *Alexander v. Sandoval*, 532 U.S. 275, 280, 281 (2001). However, the Court also held in *Alexander* that because § 602 does not focus on individuals protected or on funding recipients being regulated, but rather on agencies that will do the regulating, § 602 methods for enforcement do not manifest an intent to create private remedies. *Id.* at 285. Consequently, while § 601 and its regulations may be enforced by a private right of action, § 602 and its regulations may only be enforced by the promulgating agency. Consequently there is no private right of action to enforce disparate-impact regulations;[9] enforcement of these regulations is accomplished by withholding federal assistance or agency-initiated challenges to state practices.

III. DOJ's recent position relative to LEP participation in state court proceedings

[7]The rules define recipient and application as follows:

> (f) The term recipient means 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.
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> (g) 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.
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> (h) The term applicant means one who submits an application, request, or plan required to be approved by a responsible Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term application means such an application, request, or plan.

28 C.F.R. § 42.102 (f)-(h) (2010).

[8] However, if a federal agency decides to terminate assistance based on noncompliance with the statute or the rules, only the funding directly connected to a particular program or activity that is out of compliance may be terminated. 42 U.S.C. § 2000d-1 (2010).

[9] For an explanation of agency enforcement options, *see* Guidelines for the enforcement of title VI, Civil Rights Act of 1964, 28 CFR § 50.3 (2011).

The DOJ's position concerning state court obligations to provide LEP assistance is grounded in four levels of authority in order of precedence: (1) Title VI and the Safe Streets Act of 1960; (2) the DOJ rules and regulations; (3) the DOJ guidance (67 Fed. Reg. 41,455 (June 18, 2002)); and (4) the recent Letter. The Letter effectively constitutes *an* interpretation of the DOJ and interprets the rules and regulations very broadly, arguably broader than DOJ's own published guidance.

Neither Title VI nor rules promulgated under § 602 establish any standard by which a recipient of federal assistance can measure compliance. To effectuate compliance with 28 U.S.C. § 2001d and agency rules, Executive Order 13166 mandated that agencies publish guidance to the recipient of federal assistance.[10] In response, the DOJ published "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibitions Against National Origin Discrimination Affecting Limited English Proficient Persons", 67 Fed. Reg. 41,455 (June 18, 2002) ("Guidance Document").[11] Unlike the statute or rules, the Guidance Document

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[10] Executive Order 13166 has no legal implications in and of itself. The Executive Order merely directs executive agencies to: (1) draft a plan to improve access to federal programs for LEP persons; (2) draft guidance on the obligations of recipients of federal assistance regarding improving access for LEP persons; and (3) work in consultation with other agencies, interest groups, LEP persons, and federal fund recipients in carrying out the directives of the order. The Executive Order should not be read as imposing new duties or requirements on the states relative to LEP persons. It is merely a directive to executive agencies to provide guidance.

[11] The Letter is narrowly tailored to offer further direction in the specific context of state courts. One outstanding question is the legal significance of the Letter and its interpretation of Title VI and DOJ rules. As one court has observed:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." (Citation omitted) The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000). As the court made clear in *Appalachian Power Co*., an agency can promulgate guidance through a variety of mechanisms outside formal publication in the Federal Register. However, "It is well-established that an agency may not escape the notice and comment requirements * * * by labeling a major substantive legal addition to a rule a mere interpretation." *Id*. at 1024. Or as the Supreme Court noted in *Shalala v. Guernsey Mem. Hosp*., 514 U.S 87, 99 (1995), guidance such as a manual "is a prototypical example of an interpretive rule" and "do[es] not have the force and effect of law and [is] not accorded that weight in the adjudicatory process"). However, an "internal agency guideline, which is akin to an 'interpretive rule' that 'does not require notice and comment' is still entitled to some deference, since it is a 'permissible construction of the statute[.]'" Reno v. Koray, 515 U.S. 50, 61 (1995).

articulates standards recipient *should consider* in assessing their obligations to provide language services to LEP persons. Recipients of federal assistance must provide "reasonable and necessary" assistance to LEP persons. 67 Fed. Reg. 41,455 (June 18, 2002). And, "Recipients are required to take *reasonable steps to ensure meaningful access* to their programs and activities by LEP persons." (Emphasis added) 67 Fed. Reg. 41,459 (June 18, 2002). In determining the reasonable steps to be implemented, a recipient of federal assistance should consider the following four factors:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered by the programs;
2. The frequency with which LEP persons will come in contact with the program;
3. The nature and importance of the program, activities or services provided by the program to people's lives; and
4. The resources available to the recipient and costs. [12]

67 Fed. Reg. 41,459 (June 18, 2002). Each of these factors should be considered in determining "'the mix' of LEP services required." *Id.* at 41,460. Consequently, the correct mix "should be based on what is both *necessary and reasonable* in light of the four-factor analysis." (Emphasis added) *Id*. As the Guidance Document observes, "where the importance and nature of the activity and the number or proportion and frequency of contact with LEP persons may be low and the costs and resources needed to provide language assistance may be high * * * prearranged language services for the particular service may not be necessary." *Id.* at 41,461. A court would not, for example, be required to provide language services for LEP persons attending a public courthouse tour that is educational and voluntary. *Id.* at 41,462. However,

[12] In dismissing a challenge to similar guidance provided by the Department of Health and Human Services, a U.S. District Court observed:

> The Guidance Document sets forth factors that HHS Recipients can use to determine whether or not they have a specific obligation to LEP persons under Title VI. Specifically, the Guidance Document creates a fact-dependant standard that balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the Recipient's program, activity, or service; (2) the frequency with which the LEP individuals come into contact with the Recipient's program, activity, or service; (3) the nature and importance of the Recipient's program, activity, or service; and (4) the resources available to the Recipient and costs.
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> HHS directs its Recipients to "apply the . . . four factors to the various kinds of contacts that they have with the public to assess language needs and decide what reasonable steps, *if any*, they should take to ensure meaningful access for LEP persons." Moreover, the Guidance Document makes clear that "[a]fter applying the above four-factor analysis, a recipient may conclude that different language assistance measures are sufficient . . . or, *in fact, that, in certain circumstances, recipient-provided language services are not necessary.*" Thus, the Guidance Document does not impose an absolute, mandatory rule that HHS Recipients must provide interpretive services to any group of LEP persons. Rather, it serves as a starting point for HHS Recipients to determine their obligation, if any, to provide interpretive services for a predominate foreign language encountered in their programs. (Citations omitted)

Colwell v. Dep't of Health & Human Servs., 2005 U.S. Dist. Lexis 6556 (S.D. Cal. Mar. 4, 2005) *aff'd* Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112 (9th Cir. 2009).

the reverse is also true. Where access to a program is mandated or of critical importance, services may be required with lower regard for their costs.

In providing specific guidance to the state court community, the DOJ has observed the following in its Guidance Document:

> Application of the four-factor analysis requires recipient courts to ensure that *LEP parties and witnesses* receive competent language services, consistent with the four-factor analysis. At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present. When a recipient court appoints an attorney to represent an LEP defendant, the court should ensure that either the attorney is proficient in the LEP person's language or that a competent interpreter is provided during consultations between the attorney and the LEP person. (Emphasis added)

67 Fed. Reg. 41471.

It is important to note two aspects of the Guidance Document relative to the state court community: (1) the mandate that LEP parties and witnesses receive competent language services; and (2) that courts undertake, at a minimum, "every effort * * * to ensure competent interpretation during all hearings, trials and motions[.]" The Guidance Document does not suggest or mandate that such services be provided completely free of charge to everyone nor does the document mandate that interpretation services be provided for any court-related programs or anyone whose attendance at a proceeding might be meaningful.[13] Moreover, the four factor test would appear to vest recipients of federal assistance with some discretion in assessing: (1) the need for services; (2) the cost of services; and (3) the mix of services. Combining these specific provisions relative to state courts with the general mandate that courts provide services based on what is "both reasonable and necessary" under the four factor test in the Guidance Document could lead one to conclude that the DOJ's Letter goes beyond its published policy guidance and effectuates a substantive change in law without notice and public comment as required by the Administrative Procedures Act (APA).[14] The Letter appears to replace what is "reasonable and necessary" under the four factor test with an absolute requirement to provide free LEP assistances to any individual who so requests in any services

[13] A word of caution, under Boddie v. Connecticut, 401 U.S. 371 (1971), the Supreme Court held that due process prohibits states from denying access to their courts because of inability to pay costs. Thus, if translation services are too expensive such that they deny access to the courts, even for those who are not otherwise indigent, a problem may arise.

[14] The four part test laid out in the Guidance Document is intended to guide recipients in assessing what reasonable and necessary steps should be taken in determining the correct "nature and mix" of services a recipient should provide LEP person. The Letter, however, suggests that the only "mix" of services a court can provide is free interpretation. This conclusion would seem contrary to the Guidance Document, which implies more flexibility than stated in the Letter, including flexibility regarding the nature of services, eligibility, and costs associated with the services. As such, the Letter may over interpret the obligation in light of the DOJ's own policy guidance.

provided directly by the court, annexed to the court, or made available through a court. A word of caution is needed: the Guidance Document states "at a minimum" and thus leaves room for courts to undertake more proactive and extensive service programs.

IV. Comparable federal court LEP assistance requirements

Because neither Title VI nor § 602 establish a governing standard on when services must be provided to LEP individuals, and the Guidance Document suggests consideration of the four-factor test, it is worthwhile to examine congressional intent as applied to the federal courts for broader insight into when Congress believes LEP services are to be provided at taxpayer expense. It is dangerous to extrapolate and draw binding conclusions between Title VI and federal court requirements. One may be left with an irreconcilable contradiction in federal policy and the bare fact that Congress has chosen to impose stricter requirements on states receiving federal financial assistance than on federal entities receiving direct appropriations. Notwithstanding the potential contradictions, it is clear that the LEP assistance standards that the DOJ has established for state courts as a condition to receiving federal assistance are substantially higher than the standards that Congress has established for the federal courts.

Under 28 U.S.C. § 1828, the federal courts are required to provide language interpreters "in criminal or civil actions initiated by the United States."[15] This language has had the general effect of limiting the obligation to provide language services to LEP criminal defendants.[16] The federal courts may provide interpreter services to other parties provided, however, that the presiding officer authorizes the interpreter services and "such services [are made] available to the person requesting the services on a reimbursable basis[.]" Even then "the Director may require the prepayment of the estimated expenses of providing the services by the person requesting them."[17] 28 U.S.C. § 1828(b). The federal courts are authorized to charge the costs of interpreter services to one or both of the parties involved in a civil action.[18] There is no requirement that the federal courts provide language assistance "to non-party LEP individuals

[15] Contrary to the DOJ guidance on translating documents in state proceedings, the Federal Court Interpreters Act is not applicable to instances where the government prepares transcripts outside of judicial proceedings during course of criminal investigation and thereafter offers them into evidence at trial; thus, such transcripts need not be translated by certified interpreter. *United States v. Lira-Arredondo,* 38 F.3d 531 (10th Circuit, 1994).

[16] Even in criminal proceedings federal judges have wide latitude in providing interpreter services. *See.,* United States v Sandoval, 347 F.3d 627 (7TH Circuit 2003)(because trial court is in best position to evaluate need for and performance of interpreters, it is afforded wide discretion in implementing Court Interpreter's Act).

[17] The exact wording of 28 U.S.C. § 1828(b) is as follows:

> Upon the request of any person in any action for which special interpretation services established pursuant to subsection (a) are not otherwise provided, the Director, with the approval of the presiding judicial officer, may make such services available to the person requesting the services on a reimbursable basis at rates established in conformity with section 9701 of title 31, but the Director may require the prepayment of the estimated expenses of providing the services by the person requesting them.

[18] 28 U.S.C. § 1828(c) provides, "A presiding judicial officer, in such officer's discretion, may order that all or part of the expenses shall be apportioned between or among the parties or shall be taxed as costs in a civil action, and any moneys collected as a result of such order may be used to reimburse the appropriations obligated and disbursed in payment for such services."

whose presence or participation in a court matter is necessary or appropriate, including parents and guardians of minor victims of crime or of juveniles and family members involved in delinquency proceedings." Letter at 2.

The DOJ standards articulated in 67 Fed. Reg. 41,455 and the expansive explanation provided in the Letter establish a service standard that is much higher than that imposed on the federal courts. Consequently, while state courts are prohibited from charging even wealthy LEP individuals the costs of interpreter services, the federal courts are effectively *prohibited from not charging* for such services except in cases of indigence. Federal courts are authorized to allocate all or part of the costs of such services to one or more parties in a civil action. In actions that are not initiated by the United States, the federal courts are required to recoup costs for providing interpreter services to LEP persons. Moreover, it would appear that in proceedings before the federal courts "non-party LEP individuals whose presence of participation in a court matter is necessary or appropriate" would have no right to free services and would be required to arrange for their own interpreters at their own expense.

As noted, caution should be emphasized in making comparisons between the two statutory schemes. While there is a clear policy disconnect between what Congress has established for the federal courts and what the DOJ has established under its regulatory authority for state courts receiving federal assistance, the legal disconnect is less clear. Congress has broad authority to directly regulate the federal courts, including regulating federal judicial process and procedure. In contrast, Congress's authority to act directly on state courts is far more limited. What Congress can do is "encourage" state courts take certain actions by using its spending power and conditioning federal assistance. The power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. *United States* v. *Butler*, 297 U.S. 1, 66 (1936). Objectives not otherwise within the direct authority of Congress, *e.g.*, regulation of certain state court procedures, may nevertheless be accomplished through the use of the spending power.[19] In the case of the federal courts, Congress is acting directly upon them. In the case of state courts, Congress is acting indirectly upon them through its spending powers. Both are appropriate uses of congressional power, notwithstanding the evident policy disconnects. Nevertheless, the federal statutes relative to the federal courts do provide some insight on the extent to which Congress feels taxpayer dollars should be used to provide LEP individuals access to the courts and ancillary services.

V. Areas that remain unclear

DOJ's most recent guidance raises several issues for state court leaders. The Letter makes mention of "reasonable" only in the context of steps that have not been taken, not

[19]Conditions placed on federal assistance must meet four criteria: (1) the particular expenditure must serve a general public purpose; (2) conditions must be unambiguous to enable states to exercise their choice cognizant of the consequences of participation; (3) conditions must relate to a legitimate federal interest in particular national projects or programs; and (4) no other constitutional provisions act as an independent bar to conditioning federal assistance. South Dakota v. Dole, 483 U.S. 203, 207, 208 (1987).

whether steps are "reasonable and necessary". Consequently, the letter would appear to replace the "reasonable and necessary" standard in the Guidance Document with a "meaningful access" standard that is more expansive and virtually absolute. Additionally, the Guidance Document states that "every effort should be taken to ensure competent interpretation for LEP individuals during *all* hearings, trials, and motions." 67 Fed. Reg. 41,471. However, the Letter provides an imprecise definition of "proceedings" to include all matters handled by the court or "other decision makers". As a result, the extent of a state court's obligations is not entirely clear because the terms "proceeding" and "other decision makers" are not clearly defined. Moreover, the Letter states that the "DOJ expects courts to provide meaningful access for LEP persons to such court operated or managed points of public contact in the judicial process, whether the contact at issue occurs inside or outside the courtroom." State courts "manage points of public contact" far beyond their own programs, *e.g.*, an adult probationer whose supervision in handled by a department of corrections but remains under the jurisdiction of the court. The "judicial process" may be more than what happens after the filing of case and before final disposition given that dispositions in some types of cases provide for years of court management or supervision of services provided outside the court but nevertheless under the auspices of a court or court personnel. Consequently, state court obligations with respect to LEP services may be substantially expanded by the Letter, but the exact parameters of these expanded obligations are unclear.

VI. Conclusions

DOJ's Letter providing additional direction to state court leaders appears to create a broad and virtually absolute service standard in place of the more flexible "necessary and reasonable" standard articulated in its Guidance Document. The letter strongly implies that "meaningful access to courts" and "free access to interpreter services" are synonymous. Consequently, a strict reading of the Letter requires one to conclude that state courts receiving federal financial assistance would not be able to allocate or otherwise charge the costs of interpreter services to the parties involved in litigation or make any type of indigent determinations is assessing the ability of a party to contribute to the costs. Moreover, because the determination of compliance is assessed across all programs receiving federal assistance, state court leaders may face significant pressure from other state actors to provide the services mandated by the DOJ without regard for securing the necessary state funding. As noted, both the DOJ regulations and the Guidance Document take a very expansive view of "program". Current DOJ audit practices of broadly assessing "programs" evidences this expansive view. Therefore, other agencies of government, *e.g.*, law enforcement, corrections, social services, may be placed in the position of bringing significant pressure to bear on state courts out of fear of losing shared federal funding do to a failure in a court program. Many DOJ programs implicate multiple state actors. The failure of any one state actor could conceivably endanger funding for all state actors.