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Civil Rights Division

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MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES
GENERAL COUNSELS AND CIVIL RIGHTS DIRECTORS

FROM:

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SUBJECT:

Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency)

Federal agencies have recently raised several questions regarding the requirements of Executive Order 13166. This Memorandum responds to those questions. As discussed below, in view of the clarifications provided in this Memorandum, agencies that have issued Limited English Proficiency ("LEP") guidance for their recipients pursuant to Executive Order 13166 and Title VI of the Civil Rights Act should, after notifying the Department of Justice ("DOJ"), publish a notice asking for public comment on the guidance documents they have issued. Based on the public comment it receives and this Memorandum, an agency may need to clarify or modify its existing guidance. Agencies that have not yet published guidance documents should submit agency-specific guidance to the Department of Justice. Following approval by the Department of Justice and before finalizing its guidance, each agency should obtain public comment on their proposed guidance documents. With regard to plans for federally conducted programs and activities, agencies should review their plans in light of the clarifications provided below.

BACKGROUND OF EXECUTIVE ORDER 13166

The legal basis for Executive Order 13166 is explained in policy guidance issued by the Department of Justice entitled "Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination Against Persons With Limited English Proficiency." 65 F.R. 50123 (August 16, 2000). This "DOJ LEP Guidance" was referenced in and issued concurrently with the Executive Order.

As the DOJ LEP Guidance details, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Department of Justice regulations enacted to effectuate this prohibition bar recipients of federal financial assistance from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination” because of their race, color, or national origin. These regulations thus prohibit unjustified disparate impact on the basis of national origin.

As applied, the regulations have been interpreted to require foreign language assistance in certain circumstances. For instance, where a San Francisco school district had a large number of non-English speaking students of Chinese origin, it was required to take reasonable steps to provide them with a meaningful opportunity to participate in federally funded educational programs. *Lau v. Nichols*, 414 U.S. 563 (1974).¹

The Supreme Court most recently addressed the scope of the Title VI disparate impact regulations in *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001). There, the Court held that there is no private right of action to enforce these regulations. It ruled that, even if the Alabama Department of Public Safety’s policy of administering driver’s license examinations only in English violates the Title VI regulations, a private party could not bring a case to enjoin Alabama’s policy. Some have interpreted *Sandoval* as impliedly striking down Title VI’s disparate impact regulations and thus that part of Executive Order 13166 that applies to federally assisted programs and activities.²

The Department of Justice disagrees. *Sandoval* holds principally that there is no private right of action to enforce the Title VI disparate impact regulations. It did not address the validity of those regulations or Executive Order 13166. Because the legal basis for Executive Order 13166 is the Title VI disparate impact regulations and because *Sandoval* did not invalidate those regulations, it is the position of the Department of Justice that the Executive Order remains in force.

¹“It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents’ school system which denies them a meaningful opportunity to participate in the education program – all earmarks of the discrimination banned by the regulations.” 414 U.S. at 568.

²*See Sandoval*, 121 S. Ct. at 1519 n.6 (“[W]e assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations; . . . We cannot help observing, however, how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with’ § 601 . . . when § 601 permits the very behavior that the regulations forbid.”).

REQUIREMENTS OF EXECUTIVE ORDER 13166

Federally Assisted Programs and Activities. The DOJ LEP Guidance explains that, with respect to federally assisted programs and activities, Executive Order 13166 “does not create new obligations, but rather, clarifies existing Title VI responsibilities.” Its purpose is to clarify for federal-funds recipients the steps those recipients can take to avoid administering programs in a way that results in discrimination on the basis of national origin in violation of the Title VI disparate impact regulations. To this end, the Order requires each Federal Agency providing federal financial assistance to explain to recipients of federal funds their obligations under the Title VI disparate impact regulations.

In developing their own LEP guidance for recipients of federal funds, an agency should balance the factors set forth in the DOJ LEP Guidance. These factors include, but are not limited to (i) the number or proportion of LEP individuals, (ii) the frequency of contact with the program, (iii) the nature and importance of the program, and (iv) the resources available.

As the DOJ LEP Guidance explains, “a factor in determining the reasonableness of a recipient’s efforts is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers.” Similarly, the frequency of contact must be considered. Where the frequency and number of contacts is so small as to preclude any significant national origin based disparate impact, agencies may conclude that the Title VI disparate impact regulations impose no substantial LEP obligations on recipients.

The nature and importance of the program is another factor. Where the denial or delay of access may have life or death implications, LEP services are of much greater importance than where denial of access results in mere inconvenience.

Resources available and costs must likewise be weighed. A small recipient with limited resources may not have to take the same steps as a larger recipient. *See* DOJ LEP Guidance at 50125. Costs, too, must be factored into this balancing test. “Reasonable steps” may cease to be reasonable where the costs imposed substantially exceed the benefits in light of the factors outlined in the DOJ LEP Guidance. The DOJ LEP Guidance explains that a small recipient may not have to take substantial steps “where contact is infrequent, where the total costs of providing language services is relatively high and where the program is not crucial to an individual’s day-to-day existence.” By contrast, where number and frequency of contact is high, where the total costs for LEP services are reasonable, and where the lack of access may have life and death implications, the availability of prompt LEP services may be critical. In these latter cases, claims based on lack of resources will need to be well substantiated.

Finally, consideration of resources available naturally implicates the “mix” of LEP services required. While on-the-premise translators may be needed in certain circumstances, written translation, access to centralized translation language lines or other means may be appropriate in the majority of cases. The correct balance should be based on what is both necessary to eliminate unjustified disparate impact prohibited by the Title VI regulations and reasonable in light of the factors outlined in the DOJ LEP Guidance.

Federally Conducted Programs and Activities. Executive Order 13166 also applies to federally conducted programs and activities. With respect to these, the Order requires each Federal Agency to prepare a plan to improve access to federally conducted programs and activities by eligible LEP persons. These plans, too, must be consistent with the DOJ LEP Guidance. Federal agencies should apply the same standards to themselves as they apply to their recipients.

PROCEDURAL CONSIDERATIONS

Administrative Procedure Act: Agency action taken pursuant to Executive Order 13166 and the DOJ LEP Guidance may be subject to the Administrative Procedure Act’s (“APA”) rulemaking requirements. 5 U.S.C. § 553. Although interpretive rules, general statements of policy, and rules of agency organization and procedure are not subject to section 553, courts have ruled that any final agency action that carries the force and effect of law must comply with section 553’s notice and comment requirements. *See Paralyzed Veterans of America v. D. C. Arena*, 117 F.3d 579, 588 (D. C. Cir. 1997). Agencies, therefore, should consider whether the action they have taken or that they propose to take to implement Executive Order 13166 and Title VI of the Civil Rights Act is subject to the APA’s requirements. If it is, they must comply with these statutory obligations. Agencies must bear in mind, however, that Executive Order 13166 “does not create new obligations, but rather, clarifies existing Title VI responsibilities.” Accordingly, agency action taken pursuant to Executive Order 13166 must not impose new obligations on recipients of federal funds, but should instead help recipients to understand their existing obligations.

Executive Order 12866: Agency action taken pursuant to Executive Order 13166 and the DOJ LEP Guidance may also be subject to requirements set forth in Executive Order 12866 (*Regulatory Review and Planning*, Sept. 30, 1993). That Order directs agencies to submit to the Office of Management and Budget for review any “significant regulatory actions” the agency wishes to take. *See* § 6(a). Agencies, therefore, should consider whether the action they have taken or that they propose to take to implement Executive Order 13166 and Title VI of the Civil Rights Act is subject to Executive Order 12866’s requirements. If it is, they should ensure that the action or proposed action complies with Executive Order 12866’s obligations. With regard to federally conducted programs and activities, agencies should review their plans for their federally conducted programs in light of the clarifications below and make any necessary modifications.

FURTHER AGENCY ACTION

Existing LEP Guidance and Plans for Federally Conducted Programs and Activities:

Agencies that have already published LEP guidance pursuant to Executive Order 13166 or Title VI of the Civil Rights Act should obtain public comment on the guidance documents they have issued. Agencies should then review their existing guidance documents in view of public comment and for consistency with the clarifications provided in this Memorandum. The Justice Department's Civil Rights Division, Coordination and Review Section ((202) 307-2222), is available to assist agencies in making this determination. Should this review lead an agency to conclude that it is appropriate to clarify or modify aspects of its LEP guidance documents, it should notify the Department of Justice of that conclusion within 60 days from the date of this Memorandum. Any agency effort to clarify or modify existing LEP guidance should be completed within 120 days from the date of this Memorandum. Agencies likewise should review plans for federally conducted programs and activities in light of the above clarification.

New LEP Guidance and Plans for Federally Conducted Programs and Activities:

Agencies that have not yet published LEP guidance pursuant to Executive Order 13166 and Title VI of the Civil Rights Act should submit to the Department of Justice, within 60 days from the date of this Memorandum, agency-specific recipient guidance that is consistent with Executive Order 13166 and the DOJ LEP Guidance, including the clarifications set forth in this Memorandum. In preparing their guidance, agencies should ensure that the action they propose to take is consistent with the requirements of the Administrative Procedure Act and Executive Order 12866. The Justice Department's Civil Rights Division, Coordination and Review Section, is available to assist agencies in preparing agency-specific guidance. Following approval by the Department of Justice and before finalizing its guidance, each agency should obtain public comment on its proposed guidance documents. Final agency-specific LEP guidance should be published within 120 days from the date of this memorandum. Agencies likewise should submit to the Department of Justice plans for federally conducted programs and activities. The Department of Justice is the central repository for these agency plans.

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Federally assisted programs and activities may not be administered in a way that violates the Title VI regulations. Each Federal Agency is responsible for ensuring that its agency-specific guidance outlines recipients' obligations under the Title VI regulations and the steps recipients can take to avoid violating these obligations. While Executive Order 13166 requires only that Federal Agencies take steps to eliminate recipient discrimination based on national origin prohibited by Title VI, each Federal Agency is encouraged to explore whether, as a matter of policy, additional affirmative outreach to LEP individuals is appropriate. Federal Agencies likewise must eliminate national origin discrimination in their own federally conducted programs and activities. The Department of Justice is available to help agencies in reviewing and preparing agency-specific LEP guidance and federally conducted plans.