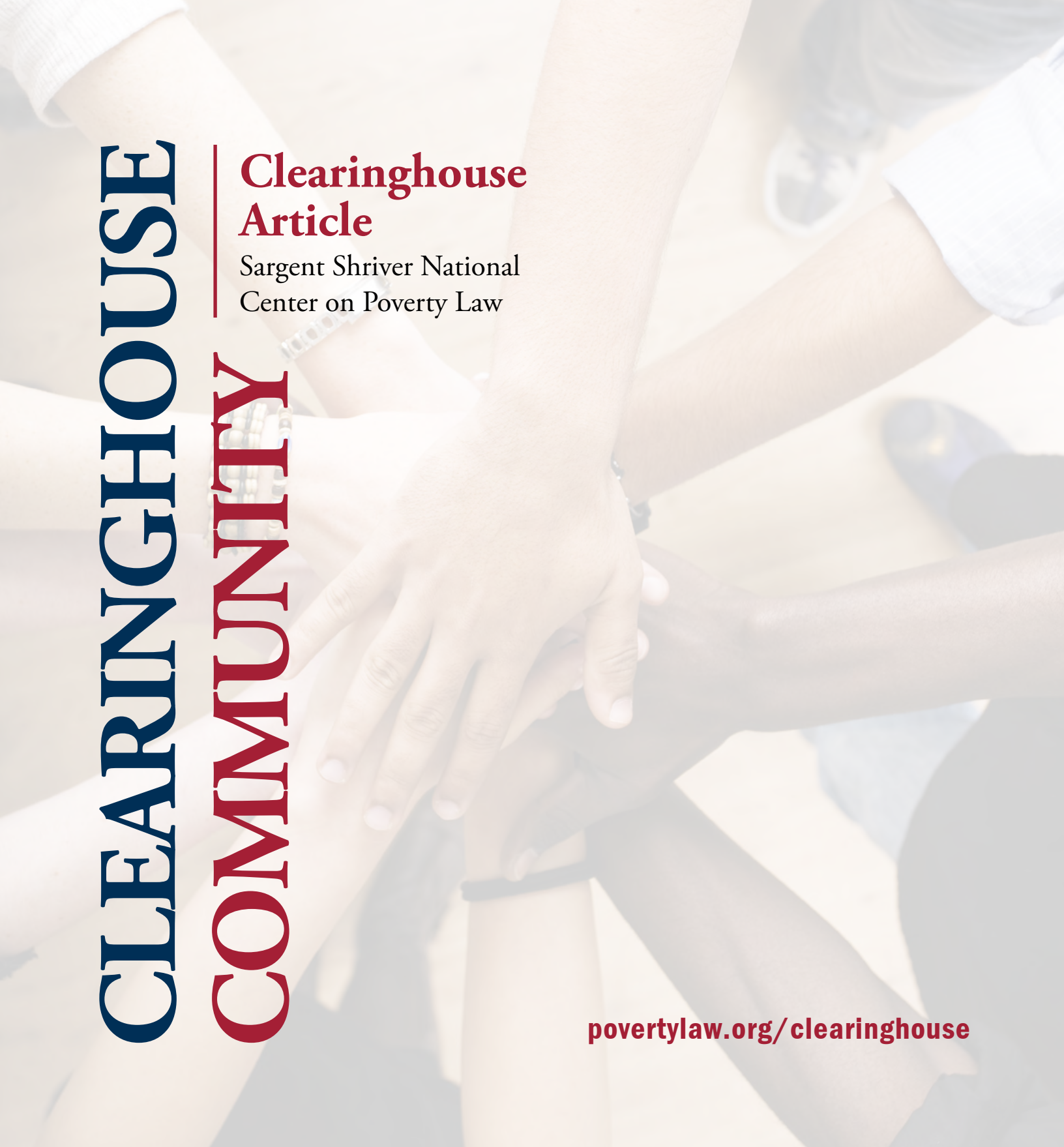

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When Access to Language Means Access to Justice:

How to Advocate Effectively on Behalf of Limited-English-Proficient Persons

BY TERE RAMOS

The United States is a country of immigrants. From the Mayflower to the Irish Potato Famine to the Bracero program, the United States has witnessed over its history surges in the influx of individuals seeking new opportunities.[1] According to the Pew Research Center, the number of foreign-born individuals in the United States has more than quadrupled since 1965 and is expected to reach 78 million by 2065.[2] This rise, mostly fueled by Hispanic and Asian immigration, means that by 2044 the United States will become a "majority minority" country, and no racial or ethnic group will dominate the United States in terms of population.[3]

This flow of foreign-born persons has resulted in over 60 million people, or 21 percent of the U.S. population, speaking a language other than English at home.[4] Many, but not all, of them are considered "limited English proficient," that is, individuals who speak English less than "very well."[5] Although most limited-English-proficient individuals are immigrants, almost 19 percent (4.7 million) were born in the United States; most are the children of immigrants.[6] Groups such as Puerto Ricans also often move to the mainland United States with limited English skills. States and cities with large immigrant and Puerto Rican communities have high numbers of limited-English-proficient residents; 44 percent of Californians speak a language other than English at home, while in New York City 49 percent do.[7]

Title VI is the cornerstone of language-access rights.

How does this large number of individuals access government-funded programs if they cannot communicate effectively in English? Under federal law, a person must have meaningful language access to federally funded programs if that person speaks a language other than English and has a limited ability to read, write, speak, or understand English.[8] When a federally funded program does not provide language access to a limited-English-proficient person, that program discriminates on the basis of national origin.

Here I describe how Title VI of the Civil Rights Act of 1964 protects the civil rights of limited-English-proficient individuals in accessing federally funded programs. I outline the language-access obligations of recipients of federal funds. I explain how language-access rights can be embedded in federal and state statutes, opening other arguments for attorneys defending clients who have been denied access to programs or benefits due to lack of meaningful language access. I conclude with guidelines on how attorneys can effectively manage relationships with their limited-English-proficient clients.

Language-Access Obligations Under Title VI

Language-access rights are crucial in a person's life. Without access to a known language, a person can unwittingly waive the right to something as fundamental

1 See Bracero History Archive (2018); The Mayflower, HISTORY.COM (2010); Joel Mokyr, *Great Famine*, ENCYCLOPAEDIA BRITANNICA (2017).

2 Pew Research Center, Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065 (Sept. 28, 2015).

3 William H. Frey, Brookings, New Projections Point to a Majority Minority Nation in 2044 (Dec. 12, 2014).

4 Steven A. Camarota & Karen Zeigler, Center for Immigration Studies, One in Five U.S. Residents Speaks Foreign Language at Home, Record 61.8 Million (Oct. 3, 2014); U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over: 2009–2013 (Oct. 28, 2015).

5 AMERICAN COMMUNITY SURVEY AND PUERTO RICO COMMUNITY SURVEY: 2013 SUBJECT DEFINITIONS 47 (n.d.).

6 Jie Zong & Jeanne Batalova, Migration Policy Institute, The Limited English Proficient Population in the United States (July 8, 2015).

7 Arun Venugopal, *The Many Languages of New York City*, WNYC (Dec. 7, 2012); Dan Walters, *Multicultural California Leads Nation in Linguistic Complexity*, SACRAMENTO BEE (Nov. 3, 2015).

8 Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123 (Aug. 16, 2000).

as liberty—imagine being read *Miranda* rights in a language you do not understand and having your response used against you. The legal obligation to language access stems from the Civil Rights Act of 1964's Title VI, which has been further clarified through executive orders, federal agencies' guidance, and the courts.

Title VI is the cornerstone of language-access rights. It states: "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."[9] Under Title VI, recipients of federal funding must ensure meaningful access by limited-English-proficient persons to programs and benefits. Guidance published on Title VI requires recipients to "take reasonable steps" to provide "information in appropriate languages" to limited-English-proficient persons so that they are effectively informed of or able to participate in the recipient's program.[10]

According to the U.S. Department of Justice's guidance, the term "recipient" refers to an agency or other entity—private or public—receiving federal financial assistance.[11] Federal financial assistance not only is defined as money grants and awards but also includes the use or rent of federal land or property below market value, federal training, loan of federal personnel, use of federal equipment, and donations of surplus federal property.[12] An organization that is the subrecipient of federal funds is also bound by Title VI obligations.[13] Note

Sandoval turned the court-enforcement option on its head.

that a federal agency is not considered a "recipient" within the meaning of Title VI; therefore Title VI does not apply to the federal government.[14] Any state court system that receives federal financial assistance must also comply with Title VI regulations.[15] A court-appointment program must also comply with Title VI regulations if the program receives funding from a program receiving federal financial assistance.[16]

Regulations and court opinions published in the years after the enactment of Title VI clarify that national-origin discrimination includes discrimination based on a person's native language since "language is a close and meaningful proxy for national origin."[17] In *Lau v. Nichols* the U.S. Supreme Court held that a school district violated Title VI by failing to take reasonable steps to ensure that limited-English-proficient Chinese American students had a meaningful opportunity to participate in the school's educational programming.[18] The Supreme Court remanded, finding that the U.S. Department of Health, Education, and Welfare (HEW) (the precursor to the U.S. Department of Education) guidelines required districts to take affirmative steps to rectify the language deficiency

9 42 U.S.C. § 2000d (2016).

10 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41463 (June 18, 2002).

11 28 C.F.R. § 42.102(f) (2018).

12 *Id.* § 42.102(c); U.S. Department of Justice, Title VI Legal Manual (Jan. 25, 2016).

13 28 C.F.R. § 42.102(f).

14 U.S. Department of Justice, Title VI Legal Manual, *supra* note 12.

15 See Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Chief Justices and State Court Administrators (Aug. 16, 2010); U.S. Department of Justice, Language Access in State Courts (Sept. 2016).

16 The California appellate court found it an abuse of discretion for a dependency court to order a reunification plan with which a limited-English-proficient parent indisputably cannot comply due to a language barrier (*In re J.P.*, 14 Cal. App. 5th 616 (2017)).

17 *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995) (en banc), vacated on other grounds sub nom. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). The U.S. Supreme Court observed: "Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond" (*Hernandez v. New York*, 500 U.S. 352, 370 (1991) (plurality opinion)).

18 *Lau v. Nichols*, 414 U.S. 563 (1974).

No formula specifies what constitutes meaningful language access.

to open its instructional program to limited-English-proficient students.[19]

Following *Lau*, the Justice Department was directed to coordinate the enforcement of Title VI. In 1976 the Justice Department published a federal regulation that required effective communication and language access between recipients of federal funds and limited-English-proficient beneficiaries:

> Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.[20]

For the next 24 years, the Justice Department regulations were the main guidance for federal funding recipients to ensure meaningful language access under Title VI. The Justice Department also issued guidance to federal agencies on the standards that their funding recipients must follow to ensure that programs are accessible to limited-English-proficient persons, but implementation and enforcement by agencies varied.[21] Then on August 11, 2000, Pres. Bill Clinton signed Executive Order 13166 to "improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency."[22] The executive order requires all federal agencies to comply with Title VI and its implementing regulations and to meet the same standards in assuring meaningful language access by the recipients of federal funds. The order prohibits national-origin discrimination that occurs when limited-English-proficient persons are denied language access to federal programs and activities. The order also directs federal agencies to develop language-access guidance documents and compliance plans for each agency's recipients of federal financial assistance.[23]

Shortly after Executive Order 13166 was published, the U.S. Supreme Court issued a 5-to-4 decision in *Alexander v. Sandoval*. From the enactment of the Civil Rights Act until *Sandoval*, victims of Title VI discrimination had a private right of action to sue for intentional discrimination or disparate impact. The other available option for harmed parties was to file an administrative complaint with the relevant federal agency.

Sandoval turned the court-enforcement option on its head. Sandoval challenged Alabama's 1990 amendment to its constitution that declared English "the official language of the state of Alabama," as well as the Alabama Department of Public Safety's refusal to administer driver examinations in a language other than English.[24] In a majority opinion written by Justice Scalia, the Court held that Title VI had no private right of action to enforce disparate impact claims, only claims for intentional discrimination. Scalia wrote: "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."[25] After *Sandoval*, plaintiffs could not rely on the courts to enforce Title VI claims unless they could prove intentional discrimination and had to rely instead on a federal agency's administrative complaint process.

Language-Access Obligations of Recipients of Federal Funds

President Clinton's Executive Order 13166 designated the Justice Department as the federal agency responsible for guidance on Title VI. The Justice Department issued the first guidelines clarifying Title VI obligations on the same day that Executive Order 13166 was signed.[26] The Justice Department later published a comprehensive manual giving an overview of the legal principles under Title VI and clarifying obligations under the statute.[27] Executive Order 13166 and the Justice Department's guidance on limited English proficiency require recipients of federal financial assistance to ensure that limited-

19 *Id.* at 567–68.

20 28 C.F.R. § 42.405(d)(1). See *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977–78 (N.D. Cal. 2013); *National Multi Housing Council v. Jackson*, 539 F. Supp. 2d 425, 430 (D.D.C. 2008); *Aghazadeh v. Maine Medical Center*, No. 98-421-P-C, 1999 WL 33117182, at *6 (D. Me. June 8, 1999).

21 See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455; Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123.

22 Exec. Order No. 13166, 3 C.F.R. § 301 (2001).

23 See, e.g., Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455. See also Limited English Proficiency (LEP): A Federal Interagency Website (March 28, 2018) (guidance from various federal agencies on limited English proficiency).

24 *Alexander v. Sandoval*, 532 U.S. 275 (2001). See Ala. Const. of 1901, amend. 509.

25 *Sandoval*, 532 U.S. at 286.

26 See Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123.

27 See U.S. Department of Justice, Title VI Legal Manual, *supra* note 12.

English-proficient persons have meaningful language access for both oral interpretation and written translation of documents. The guidance introduces a four-factor test that recipients must use to determine their language-access obligations. The four factors must be weighed equally, and recipients must not assign a greater value to any factor that may lessen the program's language-access responsibility.

The Four-Factor Framework

No formula specifies what constitutes meaningful language access. Rather, the program should rely on a number of factors, each weighed equally:

1. The number or proportion of limited-English-proficient persons in the eligible service population or likely to be encountered by the program. This total includes "the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers."[28]

2. The frequency of contact with the program or activity. The guidance places greater weight on programs where a limited-English-proficient person has daily contact (e.g., school) than on a program with infrequent contact.

3. The nature and importance of the program. The program is more crucial if the denial or delay of access to benefits can have life-or-death implications.

4. The resources available. Smaller recipients may not have the same resources as a large program.[29]

Once the four-factor test is complete, recipients should have a better understanding of their language-access needs. The Justice Department strongly recommends that the recipient create a language-access plan that details when and how language-access services will be provided. The plan should detail how limited-English-proficient individuals who need language services will be identified, how the limited-English-proficient community will interact with the agency in accessing language assistance, how documents will be translated, and how staff will be trained on language-access policies and procedures. The plan should include provisions on implementation of and compliance with the language-access plan and timelines for monitoring and revising it. The plan should detail how the recipient will notify limited-English-proficient clients that language assistance is available at no cost.[30]

Interpretation and Translation

As the executive order explains, language assistance usually means interpretation and translation services. Interpretation is the act of listening to something in one language (the source language) and orally translating it into another language (the target language). Translation is the rendering of a written text from the source language into an equivalent written text in the target language. Recipients need to ascertain whether interpreters and translators are properly trained and qualified.

A common misconception is that interpreters need certification. The certification requirement tends to exist in specific high-stakes situations with a critical need for accuracy, such as courts and hospitals. In most cases, being competent in the skill of interpretation and proficient in the ability to communicate information accurately both in English and in the other language is sufficient. But be aware that "[c]ompetency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English."[31] The interpreter must have knowledge in both languages of any specialized terms or concepts peculiar to the entity's programs or activities. The interpreter must also understand and follow confidentiality and impartiality rules, without deviating from the interpreter role to offer advice or serve in another capacity.[32] Interpretation also needs to occur in a timely manner: "at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the [limited-English-proficient] person."[33]

A common misconception is that interpreters need certification.

A recipient's language-access plan must include how "vital" written materials will be translated into the language of each frequently encountered language group likely to be served by the program. Vital materials are documents critical to accessing a program, such as consent and complaint forms; intake forms with potential consequences; written notices of rights, denials, or changes in benefits;

28 Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. at 50124.

29 *Id*. at 50125.

30 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41461–65.

31 *Id*. at 41461.

32 *Id*.

33 *Id*.

notices of disciplinary action; notices advising of free language assistance; and applications to participate in a recipient's program.[34] As with interpreters, having a certified translator may be necessary, although it is not a requirement. Translators need to understand the reading level of the intended audience and verify the translated document's consistency in the terms used. The permanent nature of written translations imposes an additional responsibility for accuracy.[35]

The Justice Department guidance includes a "safe harbor" provision that, if followed, gives strong evidence of the recipient's compliance with the document-translation obligation: the recipient offers "written translations of vital documents for each eligible [limited-English-proficient] language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered."[36] If fewer than 50 persons are in a language group that reaches the 5 percent trigger, "the recipient does not translate vital written materials but provides written notice in the primary language of the [limited-English-proficient] language group of the right to receive competent oral interpretation of those written materials, free of cost."[37] The safe-harbor provision applies to the translation of written documents only and does not affect the requirement to provide interpretation services whenever they are needed and can be reasonably supplied.[38]

Language-Access Rights Under Other Federal and State Laws

As federal funding for programs has expanded significantly in the 54 years since the passage of the Civil Rights Act, so has the number of agencies and programs that must provide language-access services. From housing offices and police departments to schools, community health programs, and state courts, finding a state government program that is not covered by Title VI is rare.

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The Justice Department has generally taken a "voluntary compliance" approach to Title VI compliance. During the Obama administration a revitalized and more active Civil Rights Division stepped up enforcement and investigations of Title VI complaints. As a result, the Justice Department issued a large number of corrective action plans.[39] The Trump administration's Justice Department has not been as active in Title VI enforcement, and a former U.S. attorney general voiced concern that "some policies and priorities may shift over the span of time or the turn of the electoral wheel" and that the administration may not investigate discrimination or enforce laws against discrimination.[40]

Attorneys and advocates who work with limited-English-proficient clients and who face lackluster Justice Department enforcement of language-access rights can benefit from other federal and state laws that grant language rights, especially when those laws can circumvent Justice Department involvement. These statutes are especially useful when the law includes a private right of action or the regulation grants broader rights than those enumerated under Title VI. Lawyers and advocates should always review the statutes in their substantive area of law for language-access rights.[41]

Education

Education regulations on language access are some of the most comprehensive, and they allow for a private right of action. HEW (the precursor to the Education Department) published in 1970 one of the first guidance documents on Title VI.[42] The U.S. Supreme Court in Lau, the seminal language-access case, examined HEW's 1970 language-access guidelines, which included the requirement that districts take "affirmative steps to rectify the language deficiency in order to open its instructional program to [limited-English-proficient] students."[43]

Congress enacted the Equal Educational Opportunities Act of 1974 as a result of the Lau opinion.[44] The Act mandates that public schools and state educational agencies act to overcome language barriers that

34 *Id.* at 41463.

35 *Id.* at 41464.

36 *Id.*

37 *Id.*

38 *Id.*

39 While it is early in the Trump administration, the number of agreements and resolutions regarding Title VI has been much lower than during the Obama administration (see U.S. Department of Justice, DOJ Agreements and Resolutions (July 20, 2017); U.S. Department of Justice, Federal Coordination and Compliance Section (n.d.)).

40 Eric Tucker, *Trump Could Reshape Justice Department's Civil Rights Focus*, Daily Herald (Nov. 11, 2016).

41 See, e.g., Katharine Hsiao & Gerald A. McIntyre, *What You Need to Know About Advocacy for Limited-English-Proficient Elders*, 42 Clearinghouse Review 301 (Sept.–Oct. 2008).

42 Memorandum from J. Stanley Pottinger, Director, Department of Health, Education, and Welfare Office for Civil Rights, to School Districts with More Than Five Percent National Origin-Minority Group Children (May 25, 1970).

43 *Lau*, 414 U.S. at 568. In his opinion, Justice Douglas wrote extensively about the guidelines of the U.S. Department of Health, Education, and Welfare (HEW) and concluded that "[r]espondent school district contractually agreed to 'comply with title VI of the Civil Rights Act of 1964 ... and all requirements imposed by or pursuant to the Regulation' of [HEW] which are 'issued pursuant to that title ...' and also immediately to 'take any measures necessary to effectuate this agreement'" (*Lau*, 414 U.S. at 568–69 (internal citation omitted)).

44 See Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701–1721 (2016).

Lawyers and advocates should always review the statutes in their substantive area of law for language-access rights.

impede equal participation by students in their instructional programs and requires states and school districts to provide an equal educational opportunity to students learning English.[45] The Act requires specifically that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ... the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[46] The Act includes an express private right of action that enables individuals to sue for lack of language-access implementation and enforcement.[47] The Act allows students and their parents to rely on disparate treatment arguments, unlike Title VI, which requires intentional discrimination theories, to bring an action in federal court.[48]

Limited-English-proficient students with disabilities can also rely on the Individuals with Disabilities Education Act (IDEA). It mandates language access, for students and parents, throughout the special education process. According to the IDEA, a school's multidisciplinary team must consider the language needs of English language learners when developing, reviewing, or revising individualized education programs; the team must perform evaluations in the native language, translate all vital documents, and arrange for a qualified and impartial interpreter.[49] Under the IDEA, parents must be able to give "informed consent" to the individualized education program proposed for their child.[50] Limited-English-proficient parents likely cannot give informed consent if they are unable to read and understand the documents that detail the proposed program, service, or activities. When school teams fail to provide language access, limited-English-proficient children with disabilities and their parents can seek relief through their state's special education administrative hearing process with appeal to federal district court. Under the IDEA, language rights are part of the child's free appropriate public education, and the hearing officer and the district court can order the school to correct problems or offer compensatory relief.[51]

Separately from the statutes detailed above, the Education Department's Title VI regulations require school districts to take "affirmative steps" to tackle language barriers so that students can participate meaningfully in the schools' educational programs.[52] Consistent with *Sandoval*, the Education Department's Title VI regulations allow only for administrative relief through the Justice Department.[53] For this reason, education attorneys usually rely on other educational statutes, such as the Equal Educational Opportunities Act and the IDEA to defend Title VI rights.

Education attorneys usually rely on other educational statutes, such as the Equal Educational Opportunities Act and the IDEA to defend Title VI rights.

Health

The Patient Protection and Affordable Care Act became law in 2010. Among the important aspects of the law is Section 1557, which extends federal antidiscrimination law, including language access, into the health care context.[54] Section 1557 extends nondiscrimination protections to individuals participating in any health pro-

45 See Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education, and Vanita Gupta, Acting Assistant Attorney General for Civil Rights, U.S. Department of Justice, to Colleagues (Jan. 7, 2015).

46 20 U.S.C. § 1703.

47 *Id*. § 1706. See Rachel F. Moran, Undone by Law: The Uncertain Legacy of Lau v. Nichols, 16 Berkeley La Raza Law Journal 1 (2005).

48 Moran, *supra* note 47, at 6.

49 See, e.g., 34 C.F.R. § 300.322(e) (2018) ("The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the [individualized education program] Team meeting, including arranging for an interpreter for parents ... whose native language is other than English."). See generally Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482.

50 34 C.F.R. § 300.300(b)(1) ("A public agency that is responsible for making [free appropriate public education] available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.").

51 U.S. Department of Education, Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of the Rehabilitation Act of 1973 (Aug. 2010).

52 Letter from Lhamon & Gupta, *supra* note 45, at 5 n.9. See 34 C.F.R. § 100.3(b) (2018).

53 Letter from Lhamon and Gupta, *supra* note 45, at 5 n.10 ("Any Federal agency, such as the Department of Education or Justice, that provides Federal funds to [a state educational agency] or school district may initiate a compliance review to ensure compliance with, or investigate a complaint alleging a violation of, Title VI and its implementing regulations. DOJ also may initiate a Title VI suit if, after notice of a violation from a Federal funding agency, a recipient of Federal funds fails to resolve noncompliance with Title VI voluntarily and the agency refers the case to DOJ. Furthermore, DOJ coordinates enforcement of Title VI across Federal agencies and can participate in private litigation involving Title VI.").

54 42 U.S.C. § 18116 (2016) ("an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or [section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance.").

gram or activity, any part of which received funding from the U.S. Department of Health and Human Services (HHS); any health program or activity that the department itself administers; or health insurance marketplaces and all plans offered by issuers that participate in those marketplaces.[55]

HHS issued accompanying regulations in 2016. These regulations require any "covered entity" to take "reasonable steps to provide meaningful access" to those with limited English proficiency.[56] The regulations require translation and interpretation services to be provided where appropriate and prohibit a limited-English-proficient person from being required to provide an interpreter.[57]

Section 1557 permits a private cause of action for discrimination on the basis of national origin. Whether this private right of action extends to claims on the basis of disparate impact or only intentional discrimination remains unsettled. Only two cases so far have dealt substantively with whether Section 1557 includes a private right of action for disparate impact claims.[58] In both cases, the courts concluded that Section 1557 creates the same right as Title VI of the Civil Rights Act, Title IX of the Education Amendments, Section 504 of the Rehabilitation Act, and the Age Discrimination Act.[59] While one could infer that the courts in these two cases determined no private right of action for disparate impact claims, both courts declined to discuss this question in depth.

55 U.S. Department of Health and Human Services, Section 1557 of the Patient Protection and Affordable Care Act (April 25, 2018).

56 45 C.F.R. § 92.201(a) (2018).

57 *Id.* § 92.201(d), (e)(1).

58 See *Southeastern Pennsylvania Transportation Authority v. Gilead Sciences Incorporated*, 102 F. Supp. 3d 688 (E.D. Pa. 2015); *Rumble v. Fairview Health Services*, No. 14-cv-2037 (D. Minn. March 16, 2015).

59 *Id.*

Everything is said twice when using an interpreter, and cramming twice the amount of information into a standard appointment slot is impossible.

Housing

Most landlords, public housing agencies, and state and local governments that run housing must abide by the Fair Housing Act.[60] The Act prohibits intentional discrimination based on race, national origin, or other protected characteristics. The Act grants a private right of action for both intentional discrimination and disparate impact, even when the provider had no intent to discriminate.[61] The complainant can decide whether to file an administrative complaint with the U.S. Department of Housing and Urban Development and the Justice Department or to file privately and directly in U.S. district court.[62]

State Antidiscrimination Statutes and State Access Orders

State law can be a fruitful enforcement tool in the absence of federal leadership. Some states have regulations and executive orders that prohibit language and national-origin discrimination. For example, in Massachusetts, Chapter 151B prohibits discrimination due to race, color, religious creed, national origin, ancestry, or sex.[63] Massachusetts Executive Order 526 prohibits discrimination, including language discrimination, in all state agencies and programs funded by the state.[64] Following Order 526, the governor's office issued an administrative bulletin outlining the state's language-access policy and implementation guidelines.[65] Another relevant Massachusetts law is the Emergency Room Interpreters Law, which requires that every acute care hospital "provide competent interpreter services in connection with all emergency room services."[66] The law allows individuals to sue in superior court. Massachusetts food stamp, cash assistance, and unemployment regulations also include language-access protections.[67] Attorneys have litigated successfully on behalf of limited-English-proficient communities in the state by using these regulations.[68]

Managing Effective Relationships with Limited-English-Proficient Clients

Attorneys need to prepare to work and maximize relationships with limited-English-proficient clients. Here I list six tips to improve the quality of your communication with such clients.[69]

Find the Right Interpreter

Before sitting down with a new client, identify the client's language and country of

60 E.g., the Fair Housing Act exempts owner-occupied buildings with no more than four units and single-family housing sold or rented without the use of a broker (U.S. Department of Housing and Urban Development, Fair Housing Information for Housing Providers (n.d.)).

61 24 C.F.R. §100.500; U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency 3–8 (Sept. 15, 2016). See U.S. Department of Justice, Fair Housing Act (Aug. 6, 2015).

62 See 42 U.S.C. §§ 3610, 3613 (2016).

63 Mass. Gen. Laws ch. 151B §§ 1–10 (2017).

64 Mass. Exec. Order No. 526 (Feb. 17, 2011).

65 Massachusetts Office of Access and Opportunity, Language Access Policy and Implementation Guidelines (March 20, 2015).

66 Act of April 14, 2000, ch. 66, § 1, 2000 Mass. Acts.

67 See, e.g., Mass. Gen. Laws ch. 151A, § 62A(d)(i), (iii) (2017); 106 Mass. Code Regs. 360.510 (2016); 106 Mass. Code Regs. 701.360 (2018). See Jane Perkins et al., *Enforcing Language Access Rights: Trends and Strategies*, 38 Clearinghouse Review 265 (Sept.–Oct. 2004).

68 See, e.g., *Luciano v. Malmborg*, No. 07-4285C (Suffolk Super. Ct. 2008).

69 For more information on how language-access requirements apply to programs receiving funds from the Legal Services Corporation, see Michael Mulé, *Language Access 101: The Rights of Limited-English-Proficient Individuals*, 44 Clearinghouse Review 24 (May–June 2010).

If documents will be used at the meeting, share them in advance to save time and answer questions from the interpreter about them.

origin. This may sound simplistic, but some countries have many languages based on ethnicity, and the different ethnic groups within a country may have a long history of war or conflict. The interpreter must not have animosity toward the client due to heritage or other factors. Investigate whether cultural issues might affect your relationship or the client's relationship to the interpreter. While not a language issue, cultural and gender issues can influence client responses. For example, a female client on a domestic or sexual violence case may feel uncomfortable with a male interpreter.

Many legal aid organizations use phone interpreters or have contracts with specific organizations for in-person interpreters. If you encounter a good interpreter, take the interpreter's name and ask for that interpreter for future meetings. You should also have a phone interpreter service in case an in-person interpreter fails to show up or is of poor quality. Phone interpreters offer more flexibility with scheduling since they are usually available immediately. The phone interpreter can serve as a backup if an in-person interpreter (or another phone interpreter) fails to do the job.

Budget Enough Time

Everything is said twice when using an interpreter, and cramming twice the amount of information into a standard appointment slot is impossible. To keep the meeting to a reasonable time frame, without compromising the quality of the interpretation, think about how the conversation will be organized and plan ahead.

Many limited-English-proficient clients do not have high levels of literacy in their own language. More complicated terms will increase confusion and slow down the conversation. Speak in plain English as much as possible, and pause every few sentences; this simplifies the interpretation work, and in turn the conversation will be easier to follow. Avoiding legalese also helps smoothe the conversation and makes it flow faster. If using a legal term is critical, you should state the term and then define it in plain language; thus the interpreter is explaining the law rather than using a word that the client does not understand. Do not use idioms; they rarely translate well.[70]

Prepare the Interpreter

Speak to the interpreter for a few minutes before the client joins the conversation. Verifying that the interpreter is qualified is important. Most interpreters hired from companies have received extensive training in the skill of interpretation. They have also received training in the ethics of confidentiality and impartiality. The interpreter should know the terms and vocabulary being used during the encounter. You would be wise to give a list of more complicated and rare terms to the interpreter or to help the interpreter understand the vocabulary. If documents will be used at the meeting, share them in advance to save time and answer questions from the interpreter about them.

Give the interpreter ground rules to follow to lessen misunderstandings. One rule should be that the interpreter always speaks in the first person (i.e., in the voice of the person being interpreted). An interpreter's use of the third person is confusing (and an outdated practice). Another rule is that the client and the interpreter should not have side conversations. First, you want to be in control of the conversation; the interpreter should be as invisible as possible. Second, if questions arise, the interpreter should be translating them to the appropriate person for clarification. Third, the interpreter has to be impartial and cannot take sides or advocate on behalf of a party.

Set Expectations with the Limited-English-Proficient Client

Just as the interpreter needs to understand the ground rules, the limited-English-proficient client needs to be prepared to work effectively with an interpreter. Many limited-English-proficient individuals have had negative experiences with interpreters, and a good introduction can help change preconceived opinions about working with an interpreter.

Introduce yourself to the client. Then introduce the interpreter and allow a quick exchange to ensure that the client and the interpreter understand each other. Explain that the interpreter will be interpreting so that you and the client can communicate directly. Ask the client to stop every few sentences and speak clearly so that the interpreter will not miss anything. Tell the client to speak to you directly. Explain that you—not the interpreter—will answer the questions.

Manage the Relationship During the Meeting

Remember that the interpreter should be as invisible as possible during the meeting. Sit with the interpreter next to you or behind the client. If possible, have the client sit facing you. Keep eye contact with the client as much as possible, especially when speaking to the client.

70 E.g., in Russian you would tell someone who is pulling your leg: "Don't hang noodles on my ears!"

Watch for nonverbal cues that are difficult for the interpreter to copy—for example, the tone of the conversation, facial expressions, or hand gestures. If the client is confused at some point in the conversation, a facial expression may be the best indication. The client's expression may also signal that the interpreter is making the client uncomfortable or that the interpreter is not being clear in the interpretation. If the client is uncomfortable, the client may omit important facts or parts of a story. When this happens, you must slow down and figure out what is happening and whether the client fears the space is not safe. Ask the interpreter and the client, "Do you know each other?" In some small ethnic communities, finding interpreters who do not run in the same social circles (such as belonging to the same temple or having children in the same schools) as the client can be difficult. Before determining that the problem lies with the quality of the interpretation, you must rule out any potential class, ethnic, or gender issues that can affect the interpreter-client relationship.

Be in Charge

If any of the problems mentioned occur, interrupt the conversation. For example, you must stop a side conversation between the client and interpreter as soon as possible. If the interpreter is using too few or too many words in comparison to the client's and your comments, stop the conversation. The interpreter might be "sanitizing" the story—sharing a summary rather than a word-for-word interpretation or adding information that was not in the original comment.

If your gut tells you that things are not going well, stop. End the meeting or the call with the phone interpreter. Restart with a different interpreter.

Given the current political and social climate in the United States, lawyers and advocates must understand Title VI rights. Laws and federal guidance are clear in requiring meaningful language access to federally funded programs. Limited-English-proficient and immigrant communities are increasingly dealing with discrimination and open hostility from current federal policies, and language access could be affected as a result. Lawyers and advocates need to pay attention to the federally funded agencies and programs with which they interact and guarantee enforcement of language-access laws and regulations for their clients. Watch for qualified phone and in-person interpreters, the availability of properly translated documents, and discriminatory policies that create delays. Lawyers should always consider enforceable language-access provisions in state and federal statutes beyond Title VI.[71]

As our communities and client base continue to diversify, lawyers, especially those working with underserved communities, must improve their ability to serve limited-English-proficient individuals. All legal professionals should learn to work effectively with interpreters, as they can be a powerful tool in case preparation and in breaking barriers with limited-English-proficient clients. An effective interpreter will allow the lawyer and client to be more thorough and thoughtful in conversation about important issues in the case. History has shown us that, despite government politics and racist rhetoric, the United States is a melting pot of cultures that will continue to evolve over time. The legal community's job is to ensure access to justice for our population, whatever its makeup may be.

71 For more on specific language-access strategies, see the collection of *Clearinghouse Review* articles on the topic (Language Access, Clearinghouse (n.d.)).

TERE RAMOS
Attorney

Ramos Law LLC
945 Concord St.
Framingham, MA 01701

855.946.7266
tere@ramosdisability.com