

[Federal Register: February 1, 2002 (Volume 67, Number 22)]

[Notices]            [Page 4968-4982]

From the Federal Register Online via GPO Access [wais.access.gpo.gov]

[DOCID:fr01fe02-67]

[[Page 4968]]

-----

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office for Civil Rights; Title VI of the Civil Rights Act of 1964; Policy Guidance on the Prohibition  
Against National Origin Discrimination as It Affects Persons With Limited English Proficiency

AGENCY: Office for Civil Rights (OCR), HHS.

ACTION: Notice of republication of policy guidance with request for comment.

-----

**SUMMARY:** The United States Department of Health and Human Services (HHS) is republishing for comment policy guidance on Title VI's prohibition against national origin discrimination as it affects limited English proficient (LEP) persons.

**DATES:** The guidance was effective August 30, 2000. Comments must be submitted on or before April 2, 2002. OCR will review all comments and will determine what modifications to the policy guidance, if any, are necessary.

**ADDRESSES:** Comments should be addressed to Deeana Jang with ``Attention: LEP Comments," and should be sent to 200 Independence Avenue, SW. Room 506F, Washington, DC 20201. Comments may also be submitted by e-mail at [LEP.comments@hhs.gov](mailto:LEP.comments@hhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Deeana Jang or Ronald Copeland at the Office for Civil Rights, Room 506F, U.S. Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, addressed with ``Attention: LEP Comments;" telephone toll-free number: 1-866-

OCR-7748, or 202-619-0553; TDD: toll-free 1-800-537-7697. Arrangements to receive the policy in an alternative format may be made by contacting the named individuals.

**SUPPLEMENTARY INFORMATION:** The United States Department of Health and Human Services (HHS) is republishing for comment the policy guidance, ``Title VI Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency" (the ``guidance"). This guidance was originally published on August 30, 2000, and included a 60-day comment period. 65 FR 52762. However, pursuant to a memorandum issued by the United States Department of Justice on October 26, 2001, HHS is republishing this guidance and inviting public comment on the guidance. The United States Department of Justice memorandum is attached and can be found at: <http://www.usdoj.gov/crt/cor/lep/>

Oct26Memorandum.htm.

The Secretary is interested in comments on all aspects of the guidance, including comments on

the issues listed below. If you are raising a concern, please be as specific as possible.

(1) Have persons with limited English proficiency seeking health care or social services benefitted as a result of the guidance? If so, what have been the benefits? Please be specific about your experiences.

(2) Have persons with limited English proficiency faced challenges or problems in accessing health care or social services following issuance of the guidance? If so, what have been the challenges or problems? Please be specific about your experiences.

(3) Have health care or social services providers faced challenges or problems in providing these services to persons with limited English proficiency as a result of the guidance? If so, what have been the challenges or problems? Please be specific about your experiences. The Secretary is particularly interested in the experiences of small providers.

(4) Are there areas of the guidance that you believe need to be clarified or modified? If so, please explain what areas, why the area(s) need clarification or modification, and provide any suggestions for clarification or modification.

(5) Has the guidance been effective in identifying reasonable ways of providing services to individuals with limited English proficiency? What are some of the cost-effective ways that are used successfully to provide services for persons with limited English proficiency that are not included in the guidance? Again, the Secretary is particularly interested in the experiences of small providers.

(6) What technical assistance from the Office for Civil Rights (OCR) and other components of HHS would be most helpful to recipients/

covered entities?

(7) In providing services to persons with limited English proficiency, what costs have health care or social services providers incurred in providing translation, interpreter, or other language services? Please be specific about your experiences. The Secretary is particularly interested in the experiences of small providers. If health care or social services providers have not yet provided translation, interpreter or other language services for persons with limited English proficiency, what costs are anticipated? Please provide the basis for your estimate.

(8) Some may assert that the guidance has materially assisted in achieving the goal of access to health or social services by limited English proficient individuals. Others may assert that the guidance has unintentionally had the opposite effect. Is there actual experience to support either view? Please describe.

(9) Based on your experience, does the guidance and/or OCR's application of the guidance in practice, strike the right balance with respect to the factors enunciated in the Department of Justice's October 26, 2001 memorandum: (1) The number or proportion of limited English proficient persons, (2) the frequency of contact with the program, (3) the nature and importance of the program, and (4) the resources available? Please note that these factors are discussed in greater detail in the Department of Justice memorandum. In particular, in considering the resources available, does the guidance and/or OCR's application of the guidance adequately factor in the costs of providing translation, interpreter or other language services to limited English proficient individuals, as well as the resources available to the recipient/covered entity?

The Department welcomes comments from the public on these and any other issues related to the guidance. Even if you have commented before on the guidance, you may have additional comments. In accordance with the instructions from the Department of Justice, the Department will review the guidance in light of the public comments received and the Department of Justice memorandum, and will determine what modifications to the guidance, if any, are necessary.

The text of the complete guidance document, including appendices, appears below.

Dated: January 28, 2002.

Robinsue Frohboese,

Principal Deputy and Acting Director, Office for Civil Rights.

## Policy Guidance--Title VI Prohibition Against National Origin Discrimination as It Affects Persons With Limited English Proficiency

### A. Background

English is the predominant language of the United States. According to the 1990 Census, English is spoken by 95% of its residents. Of those U.S. residents who speak languages other than English at home, the 1990 Census reports that 57% above the age of four speak English ``well to very well."

The United States is also, however, home to millions of national origin minority individuals who are ``limited

[[Page 4969]]

English proficient" (LEP). That is, they cannot speak, read, write or understand the English language at a level that permits them to interact effectively with health care providers and social service agencies. Because of these language differences and their inability to speak or understand English, LEP persons are often excluded from programs, experience delays or denials of services, or receive care and services based on inaccurate or incomplete information.

In the course of its enforcement activities, OCR has found that persons who lack proficiency in English frequently are unable to obtain basic knowledge of how to access various benefits and services for which they are eligible, such as the State Children's Health Insurance Program (SCHIP), Medicare, Medicaid or Temporary Assistance to Needy Families (TANF) benefits, clinical research programs, or basic health care and social services. For example, many intake interviewers and other front line employees who interact with LEP individuals are neither bilingual nor trained in how to properly serve an LEP person. As a result, the LEP applicant all

too often is either turned away, forced to wait for substantial periods of time, forced to find his/her own interpreter who often is not qualified to interpret, or forced to make repeated visits to the provider's office until an interpreter is available to assist in conducting the interview.

The lack of language assistance capability among provider agency employees has especially adverse consequences in the area of professional staff services, such as health services. Doctors, nurses, social workers, psychologists, and other professionals provide vitally important services whose very nature requires the establishment of a close relationship with the client or patient that is based on empathy, confidence and mutual trust. Such intimate personal relationships depend heavily on the free flow of communication between professional and client. This essential exchange of information is difficult when the two parties involved speak different languages; it may be impeded further by the presence of an unqualified third person who attempts to serve as an interpreter.

Some health and social service providers have sought to bridge the language gap by encouraging language minority clients to provide their own interpreters as an alternative to the agency's use of qualified bilingual employees or interpreters. Persons of limited English proficiency must sometimes rely on their minor children to interpret for them during visits to a health or social service facility. Alternatively, these clients may be required to call upon neighbors or even strangers they encounter at the provider's office to act as interpreters or translators.

These practices have severe drawbacks and may violate Title VI of the Civil Rights Act of 1964. In each case, the impediments to effective communication and adequate service are formidable. The client's untrained "interpreter" is often unable to understand the concepts or official terminology he or she is being asked to interpret or translate. Even if the interpreter possesses the necessary language and comprehension skills, his or her mere presence may obstruct the flow of confidential information to the provider. This is because the client would naturally be reluctant to disclose or discuss intimate details of personal and family life in front of the client's child or a complete stranger who has no formal training or obligation to observe confidentiality.

When these types of circumstances are encountered, the level and quality of health and social services available to persons of limited English proficiency stand in stark conflict to Title VI's promise of equal access to federally assisted programs and activities. Services denied, delayed or provided under adverse circumstances have serious and sometimes life threatening consequences for an LEP person and generally will constitute discrimination on the basis of national origin, in violation of Title VI. Accommodation of these language differences through the provision of effective language assistance will promote compliance with Title VI. Moreover, by

ensuring accurate client histories, better understanding of exit and discharge instructions, and better assurances of informed consent, providers will better protect themselves against tort liability, malpractice lawsuits, and charges of negligence.

Although OCR's enforcement authority derives from Title VI, the duty of health and human service providers to ensure that LEP persons can meaningfully access programs and services flows from a host of additional sources, including federal and state laws and regulations, managed care contracts, and health care accreditation organizations.<sup>1</sup> In addition, the duty to provide appropriate language assistance to LEP individuals is not limited to the health and human service context. Numerous federal laws require the provision of language assistance to LEP individuals seeking to access critical services and activities. For instance, the Voting Rights Act bans English-only elections in certain circumstances and outlines specific measures that must be taken to ensure that language minorities can participate in elections. See 42 U.S.C. Section 1973 b(f)(1). Similarly, the Food Stamp Act of 1977 requires states to provide written and oral language assistance to LEP persons under certain circumstances. 42 U.S.C. Section 2020(e)(1) and (2). These and other provisions reflect the sound judgment that providers of critical services and benefits bear the responsibility for ensuring that LEP individuals can meaningfully access their programs and services.

-----

<sup>1</sup> A description of these requirements is included as Appendix B to this policy guidance.

-----

OCR issued internal guidance to its staff in January 1998 on a recipient's obligation to provide language assistance to LEP persons. That guidance was intended to ensure consistency in OCR's investigation of LEP cases. This current guidance clarifies for recipient/covered entities and the public, the legal requirements under Title VI that OCR has been enforcing for the past 30 years.

This policy guidance is consistent with a Department of Justice (DOJ) directive noting that recipient/covered entities have an obligation pursuant to Title VI's prohibition against national origin discrimination to provide oral and written language assistance to LEP persons.<sup>2</sup> It is also

consistent with a government-wide Title VI regulation issued by DOJ in 1976, ``Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs," 28 CFR part 42, subpart F, that addresses the circumstances in which recipient/covered entities must provide written language assistance to LEP persons.<sup>3</sup>

-----

2 The DOJ directive has been issued contemporaneously with this policy guidance.

3 The DOJ coordination regulations at 28 CFR Section 42.405(d)(1) provide that ``[w]here 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."

-----

## B. Legal Authority

### 1. Introduction

Over the last 30 years, OCR has conducted thousands of investigations and reviews involving language

[[Page 4970]]



differences that impede the access of LEP persons to medical care and social services. Where the failure to accommodate language differences discriminates on the basis of national origin, OCR has required recipient/covered entities to provide appropriate language assistance to LEP persons. For instance, OCR has entered into voluntary compliance agreements and consent decrees that require recipients who operate health and social service programs to ensure that there are bilingual employees or language interpreters to meet the needs of LEP persons seeking services. OCR has also required these recipient/covered entities to provide written materials and post notices in languages other than English. See *Mendoza v. Lavine*, 412 F.Supp. 1105 (S.D.N.Y. 1976); and *Asociacion Mixta Progresista v. H.E.W.*, Civil Number C72-882 (N.D. Cal. 1976). The legal authority for OCR's enforcement actions is Title VI of the Civil Rights Act of 1964, the implementing regulations, and a consistent body of case law. The legal authority is described below.

## 2. Statute and Regulation

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et. seq. 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." Regulations implementing Title VI, provide in part at 45 CFR Section 80.3 (b):

(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program or the class of individuals to whom, or the situations in which such services, financial aid or other benefits, or facilities will be provided \* \* \* may not directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination, because of their

race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color or national origin. (emphasis added).

### 3. Case Law

Extensive case law affirms the obligation of recipients of federal financial assistance to ensure that LEP persons can meaningfully access federal-assisted programs.

The U.S. Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), recognized that recipients of Federal financial assistance have an affirmative responsibility, pursuant to Title VI, to provide LEP persons with meaningful opportunity to participate in public programs. In *Lau v. Nichols*, the Supreme Court ruled that a public school system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied the students a meaningful opportunity to participate in a public educational program in violation of Title VI of the Civil Rights Act of 1964.

The *Lau* decision affirmed the U.S. Department of Health, Education and Welfare's Policy Memorandum issued on May 25, 1970, titled "Identification of Discrimination and the Denial of Services on the Basis of National Origin," 35 FR 11,595. The memorandum states in part: "Where the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

As early as 1926, the Supreme Court recognized that language rules were often discriminatory. In *Yu Cong Eng et.al. v. Trinidad, Collector of Internal Revenue*, 271 U.S. 500 (1926), the Supreme Court found that a Philippine Bookkeeping Act that prohibited the keeping of accounts in languages other than English, Spanish and Philippine dialects violated the Philippine Bill of Rights that Congress had patterned after the U.S. Constitution. The Court found that the Act deprived Chinese merchants, who were unable to read, write or understand the required languages, of liberty and property without due process.

In *Gutierrez v. Municipal Court of S.E. Judicial District*, 838 F.2d 1031,1039 (9th Cir. 1988),

vacated as moot, 490 U.S. 1016 (1989), the court recognized that requiring the use of English only is often used to mask national origin discrimination. Citing *McArthur, Worried About Something Else*, 60 Int'l J. Soc. Language, 87, 90-91 (1986), the court stated that because language and accents are identifying characteristics, rules that have a negative effect on bilingual persons, individuals with accents, or non-English speakers may be mere pretexts for intentional national origin discrimination.

Another case that noted the link between language and national origin discrimination is *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) cert. denied, 449 U.S. 1113 (1981). The court found that on the facts before it a workplace English-only rule did not discriminate on the basis of national origin since the complaining employees were bilingual. However, the court stated that ``to a person who speaks only one tongue or to a person who has difficulty using another language other than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth." *Id.* At 269.

The Fifth Circuit addressed language as an impermissible barrier to participation in society in *U.S. v. Uvalde Consolidated Independent School District*, 625 F.2d 547 (5th Cir. 1980). The court upheld an amendment to the Voting Rights Act which addressed concerns about language minorities, the protections they were to receive, and eliminated discrimination against them by prohibiting English-only elections.

Most recently, the Eleventh Circuit in *Sandoval v. Hagan*, 197 F. 3d 484 (11th Cir. 1999), petition for cert. filed, May 30, 2000, held that the State of Alabama's policy of administering a driver's license examination in English only was a facially neutral practice that had an adverse effect on the basis of national origin, in violation of Title VI. The court specifically noted the nexus between language policies and potential discrimination based on national origin. That is, in *Sandoval*, the vast majority of individuals who were adversely affected by Alabama's English-only driver's license examination policy were national origin minorities.

In the health and human service context, a recipient's failure to provide appropriate language assistance to LEP individuals parallels many of the fact situations discussed in the cases above and, as in those cases, may have an adverse effect on the basis of national origin, in violation of Title VI.

The Title VI regulations prohibit both intentional discrimination and policies and practices that appear neutral but have a discriminatory effect. Thus, a recipient/covered entity's policies or

practices regarding the provision of benefits and services to LEP persons need not be intentional to be discriminatory, but may constitute a

[[Page 4971]]

violation of Title VI if they have an adverse effect on the ability of national origin minorities to meaningfully access programs and services. Accordingly, it is useful for recipient/covered entities to examine their policies and practices to determine whether they adversely affect LEP persons. This policy guidance provides a legal framework to assist recipient/covered entities in conducting such assessments.

## C. Policy Guidance

### 1. Who Is Covered

All entities that receive Federal financial assistance from HHS, either directly or indirectly, through a grant, contract or subcontract, are covered by this policy guidance. Covered entities include (1) any state or local agency, private institution or organization, or any public or private individual that (2) operates, provides or engages in health, or social service programs and activities and that (3) receives federal financial assistance from HHS directly or through another recipient/covered entity. Examples of covered entities include but are not limited to hospitals, nursing homes, home health agencies, managed care organizations, universities and other entities with health or social service research programs, state, county and local health agencies, state Medicaid agencies, state, county and local welfare agencies, programs for families, youth and children, Head Start programs, public and private contractors, subcontractors and vendors, physicians, and other providers who receive Federal financial assistance from HHS.

The term Federal financial assistance to which Title VI applies includes but is not limited to grants and loans of Federal funds, grants or donations of Federal property, details of Federal personnel, or any agreement, arrangement or other contract which has as one of its purposes the provision of assistance. (See, 45 CFR section 80.13(f); and appendix A to the Title VI regulations, 45 CFR part 80, for additional discussion of what constitutes Federal financial assistance).

Title VI prohibits discrimination in any program or activity that receives Federal financial assistance. What constitutes a program or activity covered by Title VI was clarified by Congress in 1988, when the Civil Rights Restoration Act of 1987 (CRRRA) was enacted. The CRRRA provides that, in most cases, when a recipient/covered entity receives Federal financial assistance for a particular program or activity, all operations of the recipient/covered entity are covered by Title VI, not just the part of the program that uses the Federal assistance. Thus, all parts of the recipient's operations would be covered by Title VI, even if the Federal assistance is used only by one part.

## 2. Basic Requirements Under Title VI

A recipient/covered entity whose policies, practices or procedures exclude, limit, or have the effect of excluding or limiting, the participation of any LEP person in a federally-assisted program on the basis of national origin may be engaged in discrimination in violation of Title VI. In order to ensure compliance with Title VI, recipient/

covered entities must take steps to ensure that LEP persons who are eligible for their programs or services have meaningful access to the health and social service benefits that they provide. The most important step in meeting this obligation is for recipients of Federal financial assistance such as grants, contracts, and subcontracts to provide the language assistance necessary to ensure such access, at no cost to the LEP person.

The type of language assistance a recipient/covered entity provides to ensure meaningful access will depend on a variety of factors, including the size of the recipient/covered entity, the size of the eligible LEP population it serves, the nature of the program or service, the objectives of the program, the total resources available to the recipient/covered entity, the frequency with which particular languages are encountered, and the frequency with which LEP persons come into contact with the program. There is no "one size fits all" solution for Title VI compliance with respect to LEP persons. OCR will make its assessment of the language assistance needed to ensure meaningful access on a case by case basis, and a recipient/covered entity will have considerable flexibility in determining precisely how to fulfill this obligation. OCR will focus on the end result--whether the recipient/covered entity has taken the necessary steps to ensure that LEP persons have meaningful access to its programs and services.

The key to providing meaningful access for LEP persons is to ensure that the recipient/covered entity and LEP person can communicate effectively. The steps taken by a covered entity must ensure that the LEP person is given adequate information, is able to understand the services and benefits available, and is able to receive those for which he or she is eligible. The covered entity must also ensure that the LEP person can effectively communicate the relevant circumstances of his or her situation to the service provider.

In enforcing Title VI and its application to LEP persons over the last 30 years, OCR has found that effective language assistance programs usually contain the four elements described in section three below. In reviewing complaints and conducting compliance reviews, OCR will consider a program to be in compliance when the recipient/covered entity effectively incorporates and implements these four elements. The failure to incorporate or implement one or more of these elements does not necessarily mean noncompliance with Title VI, and OCR will review the totality of the circumstances to determine whether LEP persons can meaningfully access the services and benefits of the recipient/covered entity.

### 3. Ensuring Meaningful Access to LEP Persons

#### (a) Introduction--The Four Keys to Title VI Compliance in the LEP Context

The key to providing meaningful access to benefits and services for LEP persons is to ensure that the language assistance provided results in accurate and effective communication between the provider and LEP applicant/client about the types of services and/or benefits available and about the applicant's or client's circumstances. Although HHS recipients have considerable flexibility in fulfilling this obligation, OCR has found that effective programs usually have the following four elements:

--Assessment--The recipient/covered entity conducts a thorough assessment of the language needs of the population to be served;

--Development of Comprehensive Written Policy on Language Access--The recipient/covered entity develops and implements a comprehensive written policy that will ensure meaningful communication;

--Training of Staff--The recipient/covered entity takes steps to ensure that staff understands the policy and is capable of carrying it out; and

--Vigilant Monitoring--The recipient/covered entity conducts regular oversight of the language assistance program to ensure that LEP persons meaningfully access the program.

The failure to implement one or more of these measures does not necessarily mean noncompliance with Title VI, and OCR will review the totality of the circumstances in each case. If implementation of one or more of these options would be so financially burdensome as to defeat the legitimate objectives of a recipient/covered entity's program, or if there are equally effective alternatives for ensuring that LEP

[[Page 4972]]

persons have meaningful access to programs and services, OCR will not find the recipient/covered entity in noncompliance.

#### (b) Assessment

The first key to ensuring meaningful access is for the recipient/

covered entity to assess the language needs of the affected population. A recipient/covered entity assesses language needs by:

Identifying the non-English languages that are likely to be encountered in its program and by estimating the number of LEP persons that are eligible for services and that are likely to be directly affected by its program. This can be done by reviewing census data, client utilization data from client files, and data from school systems and community agencies and

organizations;

Identifying the language needs of each LEP patient/client and recording this information in the client's file;

Identifying the points of contact in the program or activity where language assistance is likely to be needed;

Identifying the resources that will be needed to provide effective language assistance;

Identifying the location and availability of these resources; and

Identifying the arrangements that must be made to access these resources in a timely fashion.

#### (c) Development of Comprehensive Written Policy on Language Access

A recipient/covered entity can ensure effective communication by developing and implementing a comprehensive written language assistance program that includes policies and procedures for identifying and assessing the language needs of its LEP applicants/clients, and that provides for a range of oral language assistance options, notice to LEP persons in a language they can understand of the right to free language assistance, periodic training of staff, monitoring of the program, and translation of written materials in certain circumstances.<sup>4</sup>

-----

<sup>4</sup> The Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 both provide similar prohibitions against discrimination on the basis of disability and require entities to provide language assistance such as sign language interpreters for hearing impaired



individuals or alternative formats such as braille, large print or tape for vision impaired individuals. In developing a comprehensive language assistance program, recipient/covered entities should be mindful of their responsibilities under the ADA and Section 504 to ensure access to programs for individuals with disabilities.

-----

(1) Oral Language Interpretation-- In designing an effective language assistance program, a recipient/covered entity develops procedures for obtaining and providing trained and competent interpreters and other oral language assistance services, in a timely manner, by taking some or all of the following steps:

Hiring bilingual staff who are trained and competent in the skill of interpreting;

Hiring staff interpreters who are trained and competent in the skill of interpreting;

Contracting with an outside interpreter service for trained and competent interpreters;

Arranging formally for the services of voluntary community interpreters who are trained and competent in the skill of interpreting;

Arranging/contracting for the use of a telephone language interpreter service. See Section 3(e)(2) for a discussion on ``Competence of Interpreters."

The following provides guidance to recipient/covered entities in determining which language assistance options will be of sufficient quantity and quality to meet the needs of their LEP beneficiaries:

**Bilingual Staff**--Hiring bilingual staff for patient and client contact positions facilitates participation by LEP persons. However, where there are a variety of LEP language groups in a recipient's service area, this option may be insufficient to meet the needs of all LEP applicants and clients. Where this option is insufficient to meet the needs, the recipient/covered entity must provide additional and timely language assistance. Bilingual staff must be trained and must demonstrate competence as interpreters.

**Staff Interpreters**--Paid staff interpreters are especially appropriate where there is a frequent and/or regular need for interpreting services. These persons must be competent and readily available.

**Contract Interpreters**--The use of contract interpreters may be an option for recipient/covered entities that have an infrequent need for interpreting services, have less common LEP language groups in their service areas, or need to supplement their in-house capabilities on an as-needed basis. Such contract interpreters must be readily available and competent.

**Community Volunteers**--Use of community volunteers may provide recipient/covered entities with a cost-effective method for providing interpreter services. However, experience has shown that to use community volunteers effectively, recipient/covered entities must ensure that formal arrangements for interpreting services are made with community organizations so that these organizations are not subjected to ad hoc requests for assistance. In addition, recipient/covered entities must ensure that these volunteers are competent as interpreters and understand their obligation to maintain client confidentiality. Additional language assistance must be provided where competent volunteers are not readily available during all hours of service.

**Telephone Interpreter Lines**--A telephone interpreter service line may be a useful option as a supplemental system, or may be useful when a recipient/covered entity encounters a language that it cannot otherwise accommodate. Such a service often offers interpreting assistance in many different languages and usually can provide the service in quick response to a request. However, recipient/covered entities should be aware that such services may not always have readily available interpreters who are familiar with the terminology peculiar to the particular program or service. It is important that a recipient/

covered entity not offer this as the only language assistance option except where other language assistance options are unavailable (e.g., in a rural clinic visited by an LEP patient who speaks a language that is not usually encountered in the area).

(2) Translation of Written Materials--An effective language assistance program ensures that written materials that are routinely provided in English to applicants, clients and the public are available in regularly encountered languages other than English. It is particularly important to ensure that vital documents, such as applications, consent forms, letters containing important information regarding participation in a program (such as a cover letter outlining conditions of participation in a Medicaid managed care program), notices pertaining to the reduction, denial or termination of services or benefits, of the right to appeal such actions or that require a response from beneficiaries, notices advising LEP persons of the availability of free language assistance, and other outreach materials be translated into the non-English language of each regularly encountered LEP group eligible to be served or likely to be directly affected by the recipient/covered entity's program. However, OCR recognizes that each federally-funded health and social service program has unique characteristics. Therefore, OCR will collaborate with respective HHS agencies in determining which documents and information are deemed to be vital.

[[Page 4973]]

As part of its overall language assistance program, a recipient must develop and implement a plan to provide written materials in languages other than English where a significant number or percentage of the population eligible to be served or likely to be directly affected by the program needs services or information in a language other than English to communicate effectively. 28 CFR Section 42.405(d)(1). OCR will determine the extent of the recipient/covered entity's obligation to provide written translation of documents on a case by case basis, taking into account all relevant circumstances, including the nature of the recipient/covered entity's services or benefits, the size of the recipient/covered entity, the number and size of the LEP language groups in its service area, the nature and length of the document, the objectives of the program, the total resources available to the recipient/covered entity, the frequency with which translated documents are needed, and the cost of translation.

One way for a recipient/covered entity to know with greater certainty that it will be found in compliance with its obligation to provide written translations in languages other than English is for the recipient/covered entity to meet the guidelines outlined in paragraphs (A) and (B) below.

Paragraphs (A) and (B) outline the circumstances that provide a "safe harbor" for recipient/covered entities. A recipient/covered entity that provides written translations under these circumstances can be confident that it will be found in compliance with its obligation under

Title VI regarding written translations.<sup>5</sup> However, the failure to provide written translations under these circumstances outlined in paragraphs (A) and (B) will not necessarily mean noncompliance with Title VI.

-----

5 The ``safe harbor'' provisions in paragraphs (A) and (B) below are not intended to establish numerical thresholds for when a recipient must translate documents. The numbers and percentages included in these provisions are based on the balancing of a number of factors, including OCR's experience in enforcing Title VI in the context of health and human services programs, and OCR's discussions with other Department agencies about experiences of their grant recipient/covered entities with language access issues.

-----

In such circumstances, OCR will review the totality of the circumstances to determine the precise nature of a recipient/covered entity's obligation to provide written materials in languages other than English. If written translation of a certain document or set of documents would be so financially burdensome as to defeat the legitimate objectives of its program, or if there is an alternative means of ensuring that LEP persons have meaningful access to the information provided in the document (such as timely, effective oral interpretation of vital documents), OCR will not find the translation of written materials necessary for compliance with Title VI.

OCR will consider a recipient/covered entity to be in compliance with its Title VI obligation to provide written materials in non-

English languages if:

(A) The recipient/covered entity provides translated written materials, including vital documents, for each eligible LEP language group that constitutes ten percent or 3,000, whichever is less, of the population of persons eligible to be served or likely to be directly affected by the recipient/covered entity's program; 6

-----

6 As noted above, vital documents include applications, consent forms, letters containing information regarding eligibility or participation criteria, and notices pertaining to reduction, denial or termination of services or benefits, that require a response from beneficiaries, and/or that advise of free language assistance. Large documents, such as enrollment handbooks, may not need to be translated in their entirety. However, vital information contained in large documents must be translated.

-----

(B) Regarding LEP language groups that do not fall within paragraph (A) above, but constitute five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be directly affected, the recipient/covered entity ensures that, at a minimum, vital documents are translated into the appropriate non-

English languages of such LEP persons. Translation of other documents, if needed, can be provided orally; and

(C) Notwithstanding paragraphs (A) and (B) above, a recipient with fewer than 100 persons in a language group eligible to be served or likely to be directly affected by the recipient/covered entity's program, does not translate written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral translation of written materials.

The term ``persons eligible to be served or likely to be directly affected" relates to the issue of what is the recipient/covered entity's service area for purposes of meeting its Title VI obligation. There is no ``one size fits all" definition of what constitutes ``persons eligible to be served or likely to be directly affected" and OCR will address this issue on a case by case basis.

Ordinarily, persons eligible to be served or likely to be directly affected by a recipient's program are those persons who are in the geographic area that has been approved by a Federal grant agency as the recipient/covered entity's service area, and who either are eligible for the recipient/covered entity's benefits or services, or otherwise might be directly affected by such an entity's conduct. For example, a parent who might seek services for a child would be seen as likely to be affected by a recipient/covered entity's policies and practices. Where no service area has been approved by a Federal grant agency, OCR will consider the relevant service area for determining persons eligible to be served as that designated and/or approved by state or local authorities or designated by the recipient/covered entity itself, provided that these designations do not themselves discriminatorily exclude certain populations. OCR may also determine the service area to be the geographic areas from which the recipient draws, or can be expected to draw, clients/patients. The following are examples of how OCR would determine the relevant service areas when assessing who is eligible to be served or likely to be affected:

A complaint filed with OCR alleges that a private hospital discriminates against Hispanic and Chinese LEP patients by failing to provide such persons with language assistance, including written translations of consent forms. The hospital identifies its service area as the geographic area identified in its marketing plan. OCR determines that a substantial number of the hospital's patients are drawn from the area identified in the marketing plan and that no area with concentrations of racial, ethnic or other minorities is discriminatorily excluded from the plan. OCR is likely to accept the area identified in the marketing plan as the relevant service area.

A state enters into a contract with a managed care plan for the provision of health services to Medicaid beneficiaries. The Medicaid managed care contract provides that the plan will serve beneficiaries in three counties. The contract is reviewed and approved by HHS. In determining the persons eligible to be served or likely to be affected, the relevant service area would be that designated in the contract.

As this guidance notes, Title VI provides that no person may be denied meaningful access to a recipient/covered entity's benefits and services, on the basis of national origin. To comply with the Title VI requirement, a recipient/covered entity must ensure that LEP persons have meaningful access to and can understand information contained in program-related written documents. Thus, for

[[Page 4974]]

language groups that do not fall within paragraphs (A) and (B), above, a recipient can ensure such access by, at a minimum, providing notice, in writing, in the LEP person's primary language, of the right to receive free language assistance in a language other than English, including the right to competent oral translation of written materials, free of cost.

Recent technological advances have made it easier for recipient/

covered entities to store translated documents readily. At the same time, OCR recognizes that recipient/covered entities in a number of areas, such as many large cities, regularly serve LEP persons from many different areas of the world who speak dozens and sometimes over 100 different languages. It would be unduly burdensome to demand that recipient/covered entities in these circumstances translate all written materials into dozens, if not more than 100 languages. As a result, OCR will determine the extent of the recipient/covered entity's obligation to provide written translations of documents on a case by case basis, looking at the totality of the circumstances.<sup>7</sup>

-----

7 For instance, a Medicaid managed care program that regularly encounters, or potentially will encounter on a regular basis, LEP persons who speak dozens or perhaps over 100 different languages, would not be required to translate the lengthy program brochure into every regularly encountered language. Rather, the recipient/covered entity in these circumstances would likely be required to translate the written materials into the most frequently encountered languages. Regarding the remaining regularly encountered languages, the recipient/covered entity would be required to ensure that the LEP person receives written notification in the appropriate non-

English language of the right to free oral translation of the written materials. In addition, the recipient/covered entity would frequently be required to provide written translations of vital documents that are short in length and pertain to important aspects of critical programs, such as a cover letter that outlines the terms and conditions of participation in a Medicaid managed care program, and/or contains time sensitive information about enrollment or continued participation.

-----

It is also important to ensure that the person translating the materials is well qualified. In addition, it is important to note that in some circumstances verbatim translation of materials may not accurately or appropriately convey the substance of what is contained in the written materials. An effective way to address this potential problem is to reach out to community-based organizations to review translated materials to ensure that they are accurate and easily understood by LEP persons.

(3) Methods for Providing Notice to LEP Persons--A vital part of a well-functioning compliance program includes having effective methods for notifying LEP persons regarding their right to language assistance and the availability of such assistance free of charge. These methods include but are not limited to:

--Use of language identification cards which allow LEP beneficiaries to identify their language needs to staff and for staff to identify the language needs of applicants and clients. To be effective, the cards (e.g., "I speak cards") must invite the LEP person to identify the language he/she speaks. This identification must be recorded in the LEP person's file;

--Posting and maintaining signs in regularly encountered languages other than English in waiting rooms, reception areas and other initial points of entry. In order to be effective, these signs must inform applicants and beneficiaries of their right to free language assistance services and invite them to identify themselves as persons needing such services;

--Translation of application forms and instructional, informational and other written materials into appropriate non-English languages by competent translators. For LEP persons whose language does not exist in written form, assistance from an interpreter to explain the contents of the document;

--Uniform procedures for timely and effective telephone communication between staff and LEP persons. This must include instructions for English-speaking employees to obtain assistance from interpreters or bilingual staff when receiving calls from or initiating calls to LEP persons; and



--Inclusion of statements about the services available and the right to free language assistance services, in appropriate non-English languages, in brochures, booklets, outreach and recruitment information and other materials that are routinely disseminated to the public.

#### (d) Training of Staff

Another vital element in ensuring that its policies are followed is a recipient/covered entity's dissemination of its policy to all employees likely to have contact with LEP persons, and periodic training of these employees. Effective training ensures that employees are knowledgeable and aware of LEP policies and procedures, are trained to work effectively with in-person and telephone interpreters, and understand the dynamics of interpretation between clients, providers and interpreters. It is important that this training be part of the orientation for new employees and that all employees in client contact positions be properly trained. Given the high turnover rate among some employees, recipient/covered entities may find it useful to maintain a training registry that records the names and dates of employees' training. Over the years, OCR has observed that recipient/covered entities often develop effective language assistance policies and procedures but that employees are unaware of the policies, or do not know how to, or otherwise fail to, provide available assistance. Effective training is one means of ensuring that there is not a gap between a recipient/covered entity's written policies and procedures, and the actual practices of employees who are in the front lines interacting with LEP persons.

#### (e) Monitoring

It is also crucial for a recipient/covered entity to monitor its language assistance program at least annually to assess the current LEP makeup of its service area, the current communication needs of LEP applicants and clients, whether existing assistance is meeting the needs of such persons, whether staff is knowledgeable about policies and procedures and how to implement them, and whether sources of and arrangements for assistance are still current and viable. One element of such an assessment is for a recipient/covered entity to seek feedback from clients and advocates. OCR has found that compliance with the Title VI language assistance obligation is most likely when a recipient/covered entity continuously monitors its program, makes modifications where necessary, and periodically trains employees in implementation of the policies and procedures.

### 4. OCR's Assessment of Meaningful Access

The failure to take all of the steps outlined in Section C. 3, above, will not necessarily mean that a recipient/covered entity has failed to provide meaningful access to LEP clients. As noted above, OCR will make assessments on a case by case basis and will consider several factors in assessing whether the steps taken by a recipient/covered entity provide meaningful access. Those factors include the size of the recipient/covered entity and of the eligible LEP population, the nature of the program or service, the objectives of the program, the total resources available, the frequency with which particular languages are encountered, and the frequency with which LEP persons come into contact with the program. The following are examples of

[[Page 4975]]

how meaningful access will be assessed by OCR:

--A physician, a sole practitioner, has about 50 LEP Hispanic patients. He has a staff of two nurses and a receptionist, derives a modest income from his practice, and receives Medicaid funds. He asserts that he cannot afford to hire bilingual staff, contract with a professional interpreter service, or translate written documents. To accommodate the language needs of his LEP patients, he has made arrangements with a Hispanic community organization for trained and competent volunteer interpreters, and with a telephone interpreter language line, to interpret during consultations and to orally translate written documents. There have been no client complaints of inordinate delays or other service related problems with respect to LEP clients. Given the physician's resources, the size of his staff, and the size of the LEP population, OCR would find the physician in compliance with Title VI.

--A county TANF program, with a large budget, serves 500,000 beneficiaries. Of the beneficiaries eligible for its services, 3,500 are LEP Chinese persons, 4,000 are LEP Hispanic persons, 2000 are LEP Vietnamese persons and about 400 are LEP Laotian persons. The county has no policy regarding language assistance to LEP persons, and LEP clients are told to bring their own interpreters, are provided with application and consent forms in English and if unaccompanied by their own interpreters, must solicit the help of other clients or must return at a later date with an interpreter. Given the size of the county program, its resources, the size of the eligible LEP population, and the nature of the program, OCR would likely find the county in violation of Title VI and would likely require it to develop a comprehensive language assistance program that includes all of the options discussed in Section C. 3, above.

--A large national corporation receives TANF funds from a local welfare agency to provide computer training to TANF beneficiaries. Of the 2,000 clients that are trained by the corporation each month, approximately one-third are LEP Hispanic persons. The corporation has made no arrangements for language assistance and relies on bilingual Hispanic students in class to help LEP students understand the oral instructions and the written materials. Based on the size of the welfare agency and corporation, their budgets, the size of the LEP population, and the nature of the program, OCR would likely find both the welfare agency and the corporation in noncompliance with Title VI. The welfare agency would likely be found in noncompliance for failing to provide LEP clients meaningful access to its benefits and services through its contract with the corporation, and for failing to monitor the training program to ensure that it provided such access. OCR would likely also find the corporation in noncompliance for failing to provide meaningful access to LEP clients and would require it to provide them with both oral and written language assistance.

## 5. Interpreters

Two recurring issues in the area of interpreter services involve (a) the use of friends, family, or minor children as interpreters, and (b) the need to ensure that interpreters are competent, especially in the area of medical interpretation.

(a) Use of Friends, Family and Minor Children as Interpreters--A recipient/covered entity may expose itself to liability under Title VI if it requires, suggests, or encourages an LEP person to use friends, minor children, or family members as interpreters, as this could compromise the effectiveness of the service. Use of such persons could result in a breach of confidentiality or reluctance on the part of individuals to reveal personal information critical to their situations. In a medical setting, this reluctance could have serious, even life threatening, consequences. In addition, family and friends usually are not competent to act as interpreters, since they are often insufficiently proficient in both languages, unskilled in interpretation, and unfamiliar with specialized terminology.

If after a recipient/covered entity informs an LEP person of the right to free interpreter services, the person declines such services and requests the use of a family member or friend, the recipient/

covered entity may use the family member or friend, if the use of such a person would not compromise the effectiveness of services or violate the LEP person's confidentiality. The

recipient/covered entity should document the offer and declination in the LEP person's file. Even if an LEP person elects to use a family member or friend, the recipient/

covered entity should suggest that a trained interpreter sit in on the encounter to ensure accurate interpretation.

(b) Competence of Interpreters--In order to provide effective services to LEP persons, a recipient/covered entity must ensure that it uses persons who are competent to provide interpreter services. Competency does not necessarily mean formal certification as an interpreter, though certification is helpful. On the other hand, competency requires more than self-identification as bilingual. The competency requirement contemplates demonstrated proficiency in both English and the other language, orientation and training that includes the skills and ethics of interpreting (e.g. issues of confidentiality), fundamental knowledge in both languages of any specialized terms, or concepts peculiar to the recipient/covered entity's program or activity, sensitivity to the LEP person's culture and a demonstrated ability to convey information in both languages, accurately. A recipient/covered entity must ensure that those persons it provides as interpreters are trained and demonstrate competency as interpreters.

## 6. Examples of Frequently Encountered Scenarios

Over the course of the past 30 years enforcing Title VI in the LEP context, OCR has observed a number of recurring problems. The following are examples of frequently encountered policies and practices that are likely to violate Title VI:

--A woman is brought to the emergency room of a hospital by her brother. The hospital has no language assistance services and requires her brother to interpret for her. She is too embarrassed to discuss her condition through her brother and leaves without treatment. Alternatively, she is forced to use her brother as the interpreter, who is untrained in medical terminology and through whom she refuses to discuss sensitive information pertaining to her medical condition.

--A health clinic uses a Spanish-speaking security guard who has no training in interpreting skills and is unfamiliar with medical terminology, as an interpreter for its Hispanic LEP patients. He frequently relays inaccurate information that results in inaccurate instructions to patients.

--A local welfare office uses a Vietnamese janitor to interpret whenever Vietnamese applicants or beneficiaries seek services or benefits. The janitor has been in America for six months, does not speak English well and is not familiar with the terminology that is used. He often

[[Page 4976]]

relays inaccurate information that results in the denial of benefits to clients.

--A state welfare agency does not advise a mother of her right to free language assistance and encourages her to use her eleven year old daughter to interpret for her. The daughter does not understand the terminology being used and relays inaccurate information to her mother whose benefits are jeopardized by the failure to obtain accurate information.

--A medical clinic uses a medical student as an interpreter based on her self-identification as bilingual. While in college, the student had spent a semester in Spain as an exchange student. The student speaks Spanish haltingly and must often ask patients to speak slowly and to repeat their statements. On several occasions, she has relayed inaccurate information that has resulted in misdiagnosis.

--A managed care plan calls the receptionist at an Ethiopian community organization whenever it or one of its providers needs the services of an interpreter for an Ethiopian patient. The plan instructs the receptionist to send anyone who is available as long as that person speaks English. Many of the interpreters sent to a provider either do not understand English well enough to interpret accurately or are unfamiliar with medical terminology. As a result, clients often misunderstand their rights and benefits.

--A local welfare office forces a Mandarin-speaking client seeking to apply for SCHIP benefits on behalf of her three year old child to wait for a number of hours (or tells the client to come back another day) to receive assistance because it cannot communicate effectively with her, and has no effective plan for ensuring meaningful communication. This results in a delay of benefits.

--An HMO that enrolls Medicaid beneficiaries instructs a non-English speaking client to provide his or her own interpreter services during all office visits.

--A health plan requires non-English speaking patients to pay for interpreter services.

#### D. Promising Practices

In meeting the needs of their LEP patients and clients, some recipient/covered entities have found unique ways of providing interpreter services and reaching out to the LEP community. As part of its technical assistance, OCR has frequently assisted, and will continue to assist, recipient/covered entities who are interested in learning about promising practices in the area of service to LEP populations. Examples of promising practices include the following:

**Simultaneous Translation**--One urban hospital is testing a state of the art medical interpretation system in which the provider and patient communicate using wireless remote headsets while a trained competent interpreter, located in a separate room, provides simultaneous interpreting services to the provider and patient. The interpreter can be miles away. This reduces delays in the delivery of language assistance, since the interpreter does not have to travel to the recipient/covered entity's facility. In addition, a provider that operates more than one facility can deliver interpreter services to all facilities using this central bank of interpreters, as long as each facility is equipped with the proper technology.

**Language Banks**--In several parts of the country, both urban and rural, community organizations and providers have created community language banks that train, hire and dispatch competent interpreters to participating organizations, reducing the need to have on-staff interpreters for low demand languages. These language banks are frequently nonprofit and charge reasonable rates. This approach is particularly appropriate where there is a scarcity of language services, or where there is a large variety of language needs.

**Language Support Office**--A state social services agency has established an "Office for Language Interpreter Services and Translation." This office tests and certifies all in-house and contract interpreters, provides agency-wide support for translation of forms, client mailings,

publications and other written materials into non-English languages, and monitors the policies of the agency and its vendors that affect LEP persons.

**Multicultural Delivery Project**--Another county agency has established a "Multicultural Delivery Project" that is designed to find interpreters to help immigrants and other LEP persons to navigate the county health and social service systems. The project uses community outreach workers to work with LEP clients and can be used by employees in solving cultural and language issues. A multicultural advisory committee helps to keep the county in touch with community needs.

**Pamphlets**--A hospital has created pamphlets in several languages, entitled "While Awaiting the Arrival of an Interpreter." The pamphlets are intended to facilitate basic communication between inpatients/outpatients and staff. They are not intended to replace interpreters but may aid in increasing the comfort level of LEP persons as they wait for services.

**Use of Technology**--Some recipient/covered entities use their internet and/or intranet capabilities to store translated documents online. These documents can be retrieved as needed.

**Telephone Information Lines**--Recipient/covered entities have established telephone information lines in languages spoken by frequently encountered language groups to instruct callers, in the non-

English languages, on how to leave a recorded message that will be answered by someone who speaks the caller's language.

**Signage and Other Outreach**--Other recipient/covered entities have provided information about services, benefits, eligibility requirements, and the availability of free language assistance, in appropriate languages by (a) posting signs and placards with this information in public places such as grocery stores, bus shelters and subway stations; (b) putting notices in newspapers, and on radio and television stations that serve LEP groups; (c) placing flyers and signs in the offices of community-based organizations that serve large populations of LEP persons; and (d) establishing information lines in appropriate languages.

## E. Model Plan

The following is an example of a model language assistance program that is potentially useful for all recipient/covered entities, but is particularly appropriate for entities such as hospitals or social service agencies that serve a significant and diverse LEP population. This model plan incorporates a variety of options and methods for providing meaningful access to LEP beneficiaries:

A formal written language assistance program;

Identification and assessment of the languages that are likely to be encountered and estimating the number of LEP persons that are eligible for services and that are likely to be affected by its program through a review of census and client utilization data and data from school systems and community agencies and organizations;

Posting of signs in lobbies and in other waiting areas, in several languages, informing applicants and clients of their right to free interpreter services and inviting them to identify themselves as persons needing language assistance;

Use of "I speak" cards by intake workers and other patient contact

[[Page 4977]]

personnel so that patients can identify their primary languages;

Requiring intake workers to note the language of the LEP person in his/her record so that all staff can identify the language assistance needs of the client;



Employment of a sufficient number of staff, bilingual in appropriate languages, in patient and client contact positions such as intake workers, caseworkers, nurses, doctors. These persons must be trained and competent as interpreters;

Contracts with interpreting services that can provide competent interpreters in a wide variety of languages, in a timely manner;

Formal arrangements with community groups for competent and timely interpreter services by community volunteers;

An arrangement with a telephone language interpreter line;

Translation of application forms, instructional, informational and other key documents into appropriate non-English languages. Provision of oral interpreter assistance with documents, for those persons whose language does not exist in written form;

Procedures for effective telephone communication between staff and LEP persons, including instructions for English-speaking employees to obtain assistance from bilingual staff or interpreters when initiating or receiving calls from LEP persons;

Notice to and training of all staff, particularly patient and client contact staff, with respect to the recipient/covered entity's Title VI obligation to provide language assistance to LEP persons, and on the language assistance policies and the procedures to be followed in securing such assistance in a timely manner;

Insertion of notices, in appropriate languages, about the right of LEP applicants and clients to free interpreters and other language assistance, in brochures, pamphlets, manuals, and other materials disseminated to the public and to staff;

Notice to the public regarding the language assistance policies and procedures, and notice to and consultation with community organizations that represent LEP language groups, regarding problems and solutions, including standards and procedures for using their members as interpreters;

Adoption of a procedure for the resolution of complaints regarding the provision of language assistance; and for notifying clients of their right to and how to file a complaint under Title VI with HHS.

Appointment of a senior level employee to coordinate the language assistance program, and ensure that there is regular monitoring of the program.

#### F. Compliance and Enforcement

The recommendations outlined above are not intended to be exhaustive. Recipient/covered entities have considerable flexibility in determining how to comply with their legal obligation in the LEP setting, and are not required to use all of the suggested methods and options listed. However, recipient/covered entities must establish and implement policies and procedures for providing language assistance sufficient to fulfill their Title VI responsibilities and provide LEP persons with meaningful access to services.

OCR will enforce Title VI as it applies to recipient/covered entities' responsibilities to LEP persons through the procedures provided for in the Title VI regulations. These procedures include complaint investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

The Title VI regulations provide that OCR will investigate whenever it receives a complaint, report or other information that alleges or indicates possible noncompliance with Title VI. If the investigation results in a finding of compliance, OCR will inform the recipient/

covered entity in writing of this determination, including the basis for the determination. If the investigation results in a finding of noncompliance, OCR must inform the recipient/covered

entity of the noncompliance through a Letter of Findings that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance, and must attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, OCR must secure compliance through (a) the termination of Federal assistance after the recipient/covered entity has been given an opportunity for an administrative hearing, (b) referral to DOJ for injunctive relief or other enforcement proceedings, or (c) any other means authorized by law.

As the Title VI regulations set forth above indicate, OCR has a legal obligation to seek voluntary compliance in resolving cases and cannot seek the termination of funds until it has engaged in voluntary compliance efforts and has determined that compliance cannot be secured voluntarily. OCR will engage in voluntary compliance efforts, and will provide technical assistance to recipients at all stages of its investigation. During these efforts to secure voluntary compliance, OCR will propose reasonable timetables for achieving compliance and will consult with and assist recipient/covered entities in exploring cost effective ways of coming into compliance, by sharing information on potential community resources, by increasing awareness of emerging technologies, and by sharing information on how other recipient/covered entities have addressed the language needs of diverse populations.

OCR will focus its compliance review efforts primarily on larger recipient/covered entities such as hospitals, managed care organizations, state agencies, and social service organizations, that have a significant number or percentage of LEP persons eligible to be served, or likely to be directly affected, by the recipient/covered entity's program. Generally, it has been the experience of OCR that in order to ensure compliance with Title VI, these recipient/covered entities will be expected to utilize a wider range of the language assistance options outlined in section C. 3, above.

The fact that OCR is focusing its investigative resources on larger recipient/covered entities with significant numbers or percentages of LEP persons likely to be served or directly affected does not mean that other recipient/covered entities are relieved of their obligation under Title VI, or will not be subject to review by OCR. In fact, OCR has a legal obligation under HHS regulations to promptly investigate all complaints alleging a violation of Title VI. All recipient/covered entities must take steps to overcome language differences that result in barriers and provide the language assistance needed to ensure that LEP persons have meaningful access to services and benefits. However, smaller recipient/covered entities--such as sole practitioners, those with more limited resources, and recipient/covered entities who serve small numbers of LEP persons on an infrequent basis--will have more flexibility in meeting their obligations to ensure meaningful access for LEP persons.

In determining a recipient/covered entity's compliance with Title VI, OCR's primary concern is to ensure that the recipient/covered entity's policies and procedures overcome barriers resulting from language differences that would deny LEP persons a meaningful opportunity to participate in and access programs, services and benefits. A recipient/covered entity's appropriate

[[Page 4978]]

use of the methods and options discussed in this policy guidance will be viewed by OCR as evidence of a recipient/covered entity's willingness to comply voluntarily with its Title VI obligations.

#### G. Technical Assistance

Over the past 30 years, OCR has provided substantial technical assistance to recipient/covered entities, and will continue to be available to provide such assistance to any recipient/covered entity seeking to ensure that it operates an effective language assistance program. In addition, during its investigative process, OCR is available to provide technical assistance to enable recipient/covered entities to come into voluntary compliance.

#### H. Attachments

Appendix A is a summary, in question and answer format, of a number of the critical elements of this guidance. The purpose of the summary is to assist recipient/covered entities further in understanding this guidance and their obligations under Title VI to ensure meaningful access to LEP persons. Appendix B is a list of numerous provisions, including but not limited to Federal and state laws and regulations, requiring the provision of language assistance to LEP persons

in various circumstances. This list is not exhaustive, and is not limited to the health and human service context.

## Appendix A: Questions and Answers Regarding the Office for Civil Rights Policy Guidance on the Title VI Prohibition Against National Origin Discrimination as it Affects Persons With Limited English Proficiency

1. Q. What Is the Purpose of the Guidance on Language Access Released by the Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS)?

A. The purpose of the Policy Guidance is two-fold: First, to clarify the responsibilities of providers of health and social services who receive Federal financial assistance from HHS, and assist them in fulfilling their responsibilities to Limited English Proficient (LEP) persons, pursuant to Title VI of the Civil Rights Act of 1964; and second, to clarify to members of the public that health and social service providers must ensure that LEP persons have meaningful access to their programs and services.

2. Q. What Does the Policy Guidance Do

A. The policy guidance does the following:

Reiterates the principles of Title VI with respect to LEP persons.

Discusses the policies, procedures and other steps that recipients can take to ensure meaningful access to their program by LEP persons.

Clarifies that failure to take one or more of these steps does not necessarily mean noncompliance with Title VI.

Provides that OCR will determine compliance on a case by case basis, and that such assessments will take into account the size of the recipient, the size of the LEP population, the nature of the program, the resources available, and the frequency of use by LEP persons.

Provides that small providers and recipient/covered entities with limited resources, will have a great deal of flexibility in achieving compliance.

Provides that OCR will provide extensive technical assistance as needed by recipient/covered entities.

### 3. Q. Does the Guidance Impose New Requirements on Recipient/

#### Covered Entities?

A. No. Since its enactment, Title VI of the Civil Rights Act of 1964 has prohibited discrimination on the basis of race, color or national origin in any program or activity that receives federal financial assistance. In order to avoid violating Title VI, recipient/covered entities must ensure that they provide LEP persons meaningful opportunity to participate in their programs, services and benefits. Over the past three decades, OCR has conducted thousands of investigations and reviews involving language differences that affect the access of LEP persons to medical care and social services. Where such language differences prevent meaningful access on the basis of national origin, the law requires that recipient/covered entities provide oral and written language assistance at no cost to the recipient. This guidance synthesizes the legal requirements that have been on the books and that OCR has been enforcing for over three decades.

### 4. Q. Who Is Covered by the Guidance?

A. Covered entities include any state or local agency, private institution or organization, or any public or private individual that (1) operates, provides or engages in health, or social service programs and activities, and (2) receives Federal financial assistance from HHS directly or through another recipient/covered entity. Examples of covered entities include but are not

limited to hospitals, nursing homes, home health agencies, managed care organizations, universities and other entities with health or social service research programs; state, county and local health agencies; state Medicaid agencies; state, county and local welfare agencies; programs for families, youth and children; Head Start programs; public and private contractors, subcontractors and vendors; physicians; and other providers who receive Federal financial assistance from HHS.

#### 5. Q. How Does the Guidance Affect Small Practitioners and Providers?

A. The key to providing meaningful access for LEP persons is to ensure that the relevant circumstances of the LEP person's situation can be effectively communicated to the service provider and the LEP person is able to understand the services and benefits available and is able to receive those services and benefits for which he or she is eligible in a timely manner. Small practitioners and providers will have considerable flexibility in determining precisely how to fulfill their obligations to ensure meaningful access for persons with limited English proficiency. OCR will assess compliance on a case by case basis and will take into account the size of the recipient/covered entity, the size of the eligible LEP population it serves, the nature of the program or service, the objectives of the program, the total resources available to the recipient/covered entity, the frequency with which languages are encountered and the frequency with which LEP persons come into contact with the program. There is no "one size fits all" solution for Title VI compliance with respect to LEP persons.

In other words, OCR will focus on the end result, that is, whether the small practitioner or provider has taken steps, given the factors that will be considered by OCR, to ensure that the LEP persons have access to the programs and services provided by the physician. OCR will continue to be available to provide technical assistance to any physician seeking to ensure that s/he operates an effective language assistance program.

For example: A physician, a sole practitioner, has about 50 LEP Hispanic patients. He has a staff of two nurses and a receptionist derives a modest income from his practice, and receives Medicaid funds. He asserts that he cannot afford to hire bilingual staff, contract with a professional interpreter service, or translate written documents. To accommodate the language needs of his LEP patients he has made arrangements with a Hispanic community organization for trained and competent volunteer interpreters and with a telephone interpreter language line, to interpret during consultations and to orally translate written documents. There have been no client complaints of inordinate delays or other service related problems with respect to LEP clients. Given the physician's resources, the size of his staff, and the size of the LEP population, OCR would find the physician in compliance with Title VI.

6. Q. The Guidance Identifies Some Specific Circumstances Under Which OCR Will Consider a Program To Be in Compliance With Its Obligation Under Title VI To Provide Written Materials in Languages Other Than English. Does This Mean That a Recipient/Covered Entity Will Be Considered Out of Compliance With Title VI if Its Program Does Not Fall Within These Circumstances?

A. No. The circumstances outlined in the guidance are intended to provide a "safe harbor" for recipients who desire greater certainty with respect to their obligations to provide written translations. Thus, a recipient/covered entity whose policies and practices fall within these circumstances can be confident that, with respect to written translations, it will be found in compliance with Title VI. However, the failure to fall within the "safe harbors" outlined in the guidance does not necessarily mean that a recipient/covered entity is not in compliance with Title VI. In such circumstances, OCR will review the totality of circumstances to determine the precise nature of a recipient/covered entity's obligation to provide written materials in languages other than English. If

[[Page 4979]]

translation of a certain document or set of documents would be so financially burdensome as to defeat the legitimate objectives of its program, or if there is an alternative means of ensuring that LEP persons have meaningful access to the information provided in the document (such as timely, effective oral interpretation of vital documents), OCR will likely not find the translation necessary for compliance with Title VI.

7. Q. The Guidance Makes Reference to "Vital Documents" and Notes That, in Certain Circumstances, a Recipient/Covered Entity May Have To Translate Such Documents Into Other Languages. What Is a Vital Document?

A. Given the wide array of programs and activities receiving HHS financial assistance, we do not attempt to identify vital documents and information with specificity in each program area. Rather, a document or information should be considered vital if it contains information that is critical for accessing the federal fund recipient's services and/or benefits, or is required by law. Thus, vital documents include, but are not limited to, applications, consent forms, letters and notices pertaining to the reduction, denial or termination of services or benefits, letters or



notices that require a response from the beneficiary or client, and documents that advise of free language assistance. OCR will also collaborate with respective HHS agencies in determining which documents and information are deemed to be vital within a particular program.

8. Q. Will Recipient/Covered Entities Have To Translate Large Documents Such as Managed Care Enrollment Handbooks?

A. Not necessarily. As part of its overall language assistance program, a recipient must develop and implement a plan to provide written materials in languages other than English where a significant number or percentage of the population eligible to be served, or likely to be directly affected by the program, needs services or information in a language other than English to communicate effectively. OCR will assess the need for written translation of documents and vital information contained in larger documents on a case by case basis, taking into account all relevant circumstances, including the nature of the recipient/covered entity's services or benefits, the size of the recipient/covered entity, the number and size of the LEP language groups in its service area, the nature and length of the document, the objectives of the program, the total resources available to the recipient/

covered entity, the frequency which particular languages are encountered and the frequency with which translated documents are needed and the cost of translation. Depending on these circumstances, large documents, such as enrollment handbooks, may not need to be translated or may not need to be translated in their entirety. For example, a recipient/covered entity may be required to provide written translations of vital information contained in larger documents, but may not have to translate the entire document, to meet its obligations under Title VI.

9. Q. May a Recipient/Covered Entity Require an LEP Person To Use a Family Member or a Friend as His or Her Interpreter?

A. No. OCR's policy requires the recipient/covered entity to inform the LEP person of the right to receive free interpreter services first and permits the use of family and friends only after such offer of assistance has been declined and documented. Our policy regarding the use of family and friends as interpreters is based on over three decades of experience with Title VI. Although OCR recognizes that some individuals may be uncomfortable having a stranger serve as an interpreter, especially when the situation involves the discussion of very personal or private matters, it is our experience that family and friends frequently are not competent to act as interpreters, since they may be insufficiently proficient in both languages, untrained and

unskilled as interpreters, and unfamiliar with specialized terminology. Use of such persons also may result in breaches of confidentiality or reluctance on the part of the individual to reveal personal information critical to their situations. These concerns are even more pronounced when the family member called upon to interpret is a minor. In other words, when family and friends are used, there is a grave risk that interpretation may not be accurate or complete. In medical settings, in particular, this can result in serious, even life threatening consequences.

10. Q. How Does Low Health Literacy, Non-Literacy, Non-Written Languages, Blindness and Deafness Among LEP Populations Affect the Responsibilities of Federal Fund Recipients?

A. Effective communication in any language requires an understanding of the literacy levels of the eligible populations. However, literacy generally is a program operations issue rather than a Title VI issue. Where a LEP individual has a limited understanding of health matters or cannot read, access to the program is complicated by factors not directly related to national origin or language. Under these circumstances, a recipient/covered entity should provide remedial health information to the same extent that it would provide such information to English-speakers. Similarly, a recipient/covered entity should assist LEP individuals who cannot read in understanding written materials as it would non-

literate English-speakers. A non-written language precludes the translation of documents, but does not affect the responsibility of the recipient to communicate the vital information contained in the document or to provide notice of the availability of oral translation. Section 504 of the Rehabilitation Act of 1973 requires that federal fund recipients provide sign language and oral interpreters for people who have hearing impairments and provide materials in alternative formats such as in large print, braille or on tape for individuals with impairments. The Americans with Disabilities Act imposes similar requirements on health and human service providers.

11. Q. Can OCR Provide Help to Recipient/Covered Entities Who Wish To Come Into Compliance With Title VI?

A. Absolutely. For over three decades, OCR has provided substantial technical assistance to recipient/covered entities who are seeking to ensure that LEP persons can meaningfully access their programs or services. Our regional staff is prepared to work with recipients to help them meet their obligations under Title VI. As part of its technical assistance services, OCR can help identify best practices and successful strategies used by other federal fund recipients, identify sources of federal reimbursement for translation services, and point providers to other

resources.

12. Q. How Will OCR Enforce Compliance by Recipient/Covered Entities With the LEP Requirements of Title VI?

A. OCR will enforce Title VI as it applies to recipient/covered entities through the procedures provided for in the Title VI regulations. The Title VI regulations provide that OCR will investigate whenever it receives a complaint, report, or other information that alleges or indicates possible noncompliance with Title VI. If the investigation results in a finding of compliance, OCR will inform the recipient/covered entity in writing of this determination, including the basis for the determination. If the investigation results in a finding of noncompliance, OCR must inform the recipient/covered entity of the noncompliance through a Letter of Findings that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance. By regulation, OCR must attempt to secure voluntary compliance through informal means. In practice, OCR has been quite successful in securing voluntary compliance and will continue these efforts. If the matter cannot be resolved informally, OCR must secure compliance through (a) the termination of Federal assistance after the recipient/covered entity has been given an opportunity for an administrative hearing, (b) referral to DOJ for injunctive relief or other enforcement proceedings, or (c) any other means authorized by law.

13. Q. Does Issuing This Guidance Mean That OCR Will Be Changing How it Enforces Compliance With Title VI?

A. No. How OCR enforces Title VI is governed by the Title VI implementing regulations. The methods and procedures used to investigate and resolve complaints, and conduct compliance reviews, have not changed.

14. Q. What Is HHS Doing To Ensure It Is Following the Guidance It Is Giving to States and Others?

A. Although legally, federally conducted programs and activities are not subject to Title VI, HHS recognizes the importance of ensuring that its programs and services are accessible to LEP persons. To this end, HHS has established a working group to assess how HHS itself is providing language access. Currently, agencies across HHS have taken a number of important

steps to ensure that their programs and services are accessible to

[[Page 4980]]

LEP persons. For example, a number of agencies have translated important consumer materials into languages other than English. Also, several agencies have launched Spanish language web sites. In order to ensure that all HHS federally conducted programs and activities are accessible to LEP persons, the Secretary has directed the working group to develop and implement a Department-wide plan for ensuring LEP persons meaningful access to HHS programs. This internal HHS initiative was begun prior to the President's August 11, 2000, Executive Order 13166, ``Improving Access to Services for Persons with Limited English Proficiency". The Executive Order requires Federal Agencies to develop and implement a system for ensuring LEP persons meaningful access to their federally-conducted programs. It also requires agencies to issue guidance to their recipients on the recipients' obligations to provide LEP persons meaningful access to their federally-assisted programs. HHS is a step ahead on each of the obligations outlined in the Executive Order.

## Appendix B: Selected Federal and State Laws and Regulations Requiring Language Assistance

### Federal Laws and Regulation

Federal laws that recognize the need for language assistance include:

1. The Voting Rights Act, which bans English-only elections and prescribes other remedial devices to ensure nondiscrimination against language minorities; 1

---

<sup>1</sup> 42 U.S.C. Section 1973 b(f)(1).

-----

2. The Food Stamp Act of 1977, which requires states to provide written and oral language assistance to LEP persons under certain circumstances; 2

-----

27 U.S.C. Section 2020(e)(1) and (2)(A).

-----

3. Judicial procedure laws that require the use of certified or otherwise qualified interpreters for LEP parties and witnesses, at the government's expense, in certain proceedings; 3

-----

38 U.S.C. Section 1827(d)(1)(a).

-----

4. The Older Americans Act, which requires state planning agencies to use outreach workers who are fluent in the languages of older LEP persons, where there is a substantial number of such persons in a planning area; 4

-----

4 42 U.S.C. Section 3027(a)(20)(A).

-----

5. The Substance Abuse and Mental Health Administration Reorganization Act, which requires services provided with funds under the statute to be bilingual if appropriate; 5

-----

5 42 U.S.C. Section 290aa(d)(14).

-----

6. The Disadvantaged Minority Health Improvement Act, which requires the Office of Minority Health (OMH) to enter into contracts to increase the access of LEP persons to health care by developing programs to provide bilingual or interpreter services; 6

-----

6 42 U.S.C. Section 300u-6(b)(7).

-----

7. The Equal Educational Opportunities Act of 1974, which requires educational agencies to take appropriate action to accommodate the language differences that impede equal participation by students in instructional programs; 7 and

-----

7 20 U.S.C. Section 1703(f).

-----

8. Regulations issued by the Health Care Financing Administration (HCFA) which require that evaluations for the mentally ill and mentally retarded be adapted to the cultural background, language, ethnic origin and means of communication of the person being evaluated.<sup>8</sup>

-----

8 42 C.F.R. Section 483.128(b).

-----

## State Laws and Regulations

Many states have recognized the seriousness of the language access challenge and have enacted laws that require providers to offer language assistance to LEP persons in many service settings.<sup>9</sup> States that require language assistance include:

-----

9 At least twenty six (26) states and the District of Columbia have enacted legislation requiring language assistance, such as interpreters and/or translated forms and other written materials, for LEP persons.

-----

1. California, which provides that intermediate care facilities must use interpreters and other methods to ensure adequate communication between staff and patients; 10

-----

10 22 California Code of Regulations, Section 73501. California has a wide array of other laws and regulations that require language assistance, including those that require: (a) Intermediate nursing facilities to use interpreters and other methods to ensure adequate communications with patients, (b) adult day care centers to employ ethnic and linguistic staff as indicated by participant characteristics, (c) certified interpreters for non-

English speaking persons at administrative hearings, and (d) health licensing agencies to translate patients rights information into every language spoken by 1% or more of the nursing home population.

-----

2. New Jersey, which provides that drug and alcohol treatment facilities must provide interpreter services if their patient population is non-English speaking; 11



-----

11 New Jersey Administrative Code Section 42A-6.7.

-----

3. Pennsylvania, which provides that a patient who does not speak English should have access, where possible, to an interpreter; 12 and

-----

12 28 Pennsylvania Administrative Code Section 103.22(b)(14).

-----

4. Massachusetts, which in April 2000, enacted legislation that requires every acute care hospital to provide competent interpreter services to LEP patients in connection with all emergency room services.<sup>13</sup>

-----

13 M.G.L.A. 111, Section 25J.

-----

## Medical Accreditation Organizations

1. The Joint Committee on Accreditation of Healthcare Organizations (JCAHO), which accredits hospitals and other health care institutions, requires language assistance in a number of situations. For example, its accreditation manual for hospitals provides that written notice of patients' rights must be appropriate to the patient's age, understanding and language.<sup>14</sup>

-----

14 JCAHO, 1997 Accreditation Manual for Hospitals, Section R1.1.4.

-----

2. The National Committee for Quality Assurance (NCQA), which provides accreditation for managed care organizations, also requires language assistance in a variety of settings. As part of its evaluation process, the NCQA assesses managed care member materials to determine whether they are available in languages, other than English, spoken by major population groups.

October 26, 2001.

Memorandum for Heads of Departments and Agencies General Counsels and Civil Rights Directors

From: Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division

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 113166 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 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

[[Page 4981]]

programs. *Lau v. Nichols*, 414 U.S. 563 (1974)<sup>1</sup>

-----

<sup>1</sup> "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.

-----

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.<sup>2</sup>

-----

<sup>2</sup> See *Sandoval*, 121 S. Ct. at 1519 n.6 ("[W]e assume for purposes of this decision that Sec. 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' Sec. 601 \* \* \* when Sec. 601 permits the

very behavior that the regulations forbid.").

-----

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.

#### 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 implicates, 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. Sec. 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 comments 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 Sec. 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

[[Page 4982]]

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.

\* \* \* \* \*

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.

[FR Doc. 02-2467 Filed 1-31-02; 8:45 am]

BILLING CODE 4153-01-P