

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 as respects to individuals of a particular race, color or national origin.” (Emphasis added. 104(b)(2)).

The Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of DOJ, 45 CFR 80.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national-origin discrimination. In *Lau*, a San Francisco school district that had a significant number of non-English speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in Federally funded educational programs.

Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” 65 FR 50121 (August 16, 2000), was issued on August 11, 2000. Under that order, every Federal agency that provides financial assistance to non-Federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding funding recipients from “restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program” or 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, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.”

On that same day, DOJ issued a general guidance document addressed to Agency Civil Rights Officers setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order and enforcement of Title VI of the Civil Rights Act of 1964, “National Origin Discrimination Against Persons With Limited English Proficiency,” 65 FR 50123 (August 16, 2000) (“DOJ LEP Guidance”). The

Department of Justice’s role under Executive Order 13166 is unique. The Order charges DOJ with responsibility for providing LEP Guidance to other Federal agencies and for ensuring consistency among each agency-specific guidance. Consistency among Departments of the Federal Government is particularly important. Inconsistency or contradictory guidance could confuse recipients of Federal funds and needlessly increase costs without rendering the meaningful access for LEP persons that this Guidance is designed to address.

Subsequently, Federal agencies raised questions regarding the requirements of the Executive Order, especially in light of the Supreme Court’s decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). On October 26, 2001, Ralph F. Boyd, Jr., Assistant Attorney General for the Civil Rights Division, issued a memorandum for “Heads of Departments and Agencies, General Counsels and Civil Rights Directors.” This memorandum clarified and reaffirmed the DOJ LEP Guidance in light of *Sandoval*.³ The Assistant Attorney General stated that because *Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities—the Executive Order remains in force.

VA’s policy guidance is consistent with and is issued under the Title VI and the Title VI regulations, and is also consistent with the August 11, 2000, DOJ “Policy Guidance Document on Enforcement of National Origin Discrimination Against Persons With Limited English Proficiency,” 65 FR 50123 (August 16, 2000); Executive

³ The memorandum noted that some commentators have interpreted *Sandoval* as impliedly striking down the disparate-impact regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to federally assisted programs and activities. See, e.g., *Sandoval*, 532 U.S. at 286, 286 n.6 (“[W]e assume for purposes of this decision that section 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 memorandum, however, made clear that DOJ disagreed with the commentators’ interpretation. *Sandoval* holds principally that there is no private right of action to enforce Title VI disparate-impact regulations. It did not address the validity of those regulations or Executive Order 13166 or otherwise limit the authority and responsibility of federal grant agencies to enforce their own implementing regulations.

Order 13166; and the DOJ LEP guidance issued on June 18, 2002. 67 FR 41457 (June 18, 2002).

III. Who Is Covered?

All entities that receive Federal financial assistance from the VA, either directly or indirectly, through a grant, contract or subcontract, are covered by this policy guidance (see list 38 CFR, part 18, appendix A). Covered entities include (1) any state or local agency, private institution or organization, or (2) any public or private individual that operates, provides, or engages in activities, and that receives Federal financial assistance.⁴

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. 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, the recipient’s entire operation is covered. This is true even if only one part of the recipient receives the Federal assistance.

Example: VA provides assistance to a state agency to improve a particular cemetery. All of the operations of the entire state agency, not just the particular cemetery are covered.

Finally, some recipients operate in jurisdictions in which English has been declared the official language.

Nonetheless, these recipients continue to be subject to Federal non-discrimination requirements, including those applicable to the provision of Federally assisted services to persons with limited English proficiency.

VHA administers several programs and activities that receive Federal financial assistance from the VA. All entities that receive Federal financial assistance from VA are listed in 38 CFR, part 18, appendix A, either directly or indirectly, through a grant, contract, or subcontract, are covered by this policy guidance. Covered entities include (1)

⁴ Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in the VA LEP Guidance are to additionally apply to the programs and activities of federal agencies, including the VA.