

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Section 602 authorizes and directs federal agencies that are empowered to extend federal financial assistance to any program or activity “to effectuate the provisions of [section 601] * * * by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. 2000d-1.

Department of Health and Human Services regulations promulgated pursuant to section 602 forbid recipients 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 with respect to individuals of a particular race, color, or national origin.” 45 CFR 80.3(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 (HHS’s predecessor), 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.

On August 11, 2000, Executive Order 13166 was issued. “Improving Access to Services for Persons with Limited English Proficiency,” 65 FR 50121 (August 16, 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, the Department of Justice (“DOJ”) issued a general

guidance document addressed to “Executive Agency Civil Rights Officers” setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order. “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 Federal Guidance”).

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 for recipients of DOJ federal financial assistance in light of *Sandoval*.¹ 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.

Consistent with Executive Order 13166, HHS developed its own guidance document for recipients and initially issued it on August 30, 2000. “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,” 65 FR 52762 (August 30, 2000) (“HHS Guidance”). Following the instructions in the October 26, 2001

¹ The memorandum noted that some commentators had 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. DOJ stated that *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.

memorandum from Ralph F. Boyd, Jr., the Department republished, on February 1, 2002, its existing guidance document for additional public comment. “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,” 67 FR 4968 (February 1, 2002).

II. Revised HHS LEP Guidance

Following republication of our guidance in February 2002, the Department received nearly 200 public comments. Most comments were in full support of the principles behind the HHS Guidance, and a number supported maintaining the guidance without change. While the comments reflected recognition that effective communication is critical for necessary health and human services, many commentors raised serious concerns about coverage, compliance costs, and use of family and friends as interpreters. In addition, many providers of services requested assistance from the Office for Civil Rights on how to comply with both general and specific provisions of the guidance.

On July 8, 2002, Assistant Attorney General Boyd issued a memorandum expressing the need for consistency across federal agency LEP guidance documents. Specifically, he requested that the Department (and all other affected agencies) use the DOJ LEP guidance (published at 67 FR 41455, June 18, 2002) as a model, and revise and republish the HHS guidance based on that model for public comment.

The DOJ’s role under Executive Order 13166 is unique. The Executive Order charges DOJ with responsibility for providing LEP Guidance to other Federal agencies and for ensuring consistency among each agency-specific guidance. DOJ’s guidance stated the following principles. “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. As with most government initiatives, this requires balancing several principles. While this Guidance discusses that balance in some detail, it is important to note the basic principles behind that balance. First, we must ensure that federally assisted programs aimed at the American public do not leave some behind simply because they face challenges communicating in English.