

recipients from utilizing 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 to individuals of a particular race, color, or national origin. 14 CFR 1250.103-2.

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 NASA, 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 restricting 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. Title VI regulations also prohibit utilizing 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 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 Guidance). The DOJ role under Executive Order 13188 (the Executive Order) 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. 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*.<sup>3</sup> 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.

Pursuant to Executive Order 13166, DOJ developed its own guidance document for recipients and initially issued it on January 16, 2001. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 66 FR 3834 (January 16, 2001) (LEP Guidance for DOJ Recipients). NASA published in the

<sup>3</sup> 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 commentator's 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.

**Federal Register** (66 FR 15141) its own LEP Guidance. NASA did not receive comments from the public.

This guidance document is thus published pursuant to Executive Order 13166 and supplants the January 16, 2001, publication in light of the public comment received and Assistant Attorney General Boyd's October 26, 2001 clarifying memorandum.

## Guidance

### III. Who Is Covered?

NASA regulations, 14 CFR part 1250, require all recipients of Federal financial assistance from NASA to provide meaningful access to LEP persons.<sup>4</sup> Federal financial assistance includes grants, training, use of equipment, donations of surplus property, and other assistance. Recipients of NASA assistance include, for example:

- State or local agencies
- Non-profit institutions or organizations
- Educational Institutions
- Any public or private individual to whom Federal assistance is extended, directly or through another recipient, including any successor, assignee, or transferee thereof.

Sub-recipients likewise are covered when Federal funds are passed through from one recipient to a sub-recipient. Coverage extends to a recipient's entire program or activity, i.e., to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance.<sup>5</sup>

Example: NASA provides assistance to a state department of education for curriculum enhancement in science and mathematics in its public schools. All of the operations of the entire state department of education—not just the schools—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.

<sup>4</sup> Pursuant to Executive Order 13166, the meaningful access requirement of Title VI regulations and the four-factor analysis set forth in the DOJ LEP Guidance are to additionally apply to the programs and activities of Federal agencies, including NASA.

<sup>5</sup> However, if a Federal agency were to decide to terminate Federal funds based on noncompliance with Title VI or its regulations, only funds directed to the particular program or activity that is out of compliance would be terminated. 42 U.S.C. 2000d-1.