

the Arts and Humanities). Treasury has not yet, but intends to, issue regulations implementing Title VI. These will be consistent with this long-standing federal policy prohibiting the use of criteria or methods of administration which have the effect of discriminating on the basis of race, color, or national origin.

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 language identical to that quoted above, 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 on 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"). 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*. 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. This Guidance is thus published pursuant to Executive Order 13166.

### III. Who Is Covered?

Recipients of federal financial assistance from Treasury are required 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 assistance from Treasury typically include, but are not limited to, for example:

- Nonprofit organizations engaged in taxpayer education,
- Financial institutions serving distressed communities.

Subrecipients likewise are covered when federal funds are passed through from one recipient to a subrecipient. This is true even if only one part of the recipient receives the federal

<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 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.

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

assistance.<sup>5</sup> Coverage extends to a recipient's entire program or activity; i.e., to all parts of a recipient's operations.

Some recipients may operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be federal non-discrimination requirements, including those applicable to the provision of federally assisted services to persons with limited English proficiency.

### IV. Who Is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or "LEP," entitled to language assistance with respect to a particular type of service, benefit, or encounter. Examples of populations likely to include LEP persons who are encountered and/or served by Treasury's recipients and should be considered when planning language services include, but are not limited to:

- Persons participating in taxpayer education programs conducted by assisted non-profit organizations, and,
- Members of distressed communities seeking fiscal services from assisted financial institutions.

### V. How Does a Recipient Determine the Extent of Its Obligation To Provide LEP Services?

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balance the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or services provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, small local governments, or small nonprofits.

<sup>5</sup> However, if federal agency were to decide to terminate federal funds based on noncompliance with Title VI, only funds directed to the particular program or activity that is out of compliance would be terminated. 41 U.S.C. 2000d-1.