

**Analysis of DHHS OCR LEP Guidance
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I. Introduction

On August 30, 2000, the Office for Civil Rights of the U.S. Department of Health and Human Services (OCR) issued its long anticipated guidance, “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.”¹ (65 Fed. Reg. 52762-52774.) The guidance is effective immediately and OCR is seeking comments to be submitted by October 30, 2000 to determine what modifications to the policy guidance, if any, are necessary.²

OCR has been enforcing Title VI for more than 30 years, has investigated hundreds of complaints, and has negotiated dozens of voluntary resolution agreements. It issued an internal guidance memorandum on LEP issues on January 29, 1998 to instruct its regional offices on enforcement of Title VI and to ensure consistency in OCR’s investigation of LEP cases. (*See* <http://www.hhs.gov/progorg/ocr/lepfinal.htm>.) This current Guidance is issued to clarify for all federal fund recipients, as well as the general public, the recipients’ legal obligations under Title VI. Thus, all health and social services agencies, facilities, and other entities that receive federal funds are on notice of their legal obligations, and beneficiaries will hopefully be aware of their legal rights pursuant to Title VI. This memorandum summarizes and analyzes the most recent OCR LEP Guidance.

II. General Comments

¹ We wholeheartedly support OCR’s Limited English Proficient (“LEP”) Guidance (“Guidance”) as proposed and believe that the clarification of Title VI will greatly facilitate the

¹ OCR is the first federal agency to issue its LEP Guidance pursuant to Executive Order No. 13166, which requires that each federal agency develop and implement a plan in order to comply with Title VI, as well as issue Title VI policy guidelines for its federal fund recipients. *See* White House Executive Order at www.healthlaw.org. At the same time, on 8/11/00, the Department of Justice (“DOJ”) issued a Policy Guidance Document, “Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination Against Persons With Limited English Proficiency (“Guidance”). The purpose of the DOJ Policy Guidance Document is to set forth general principles for federal agencies to apply in developing Title VI guidelines for services to individuals with limited English proficiency. *See* DOJ LEP Guidance at www.healthlaw.org, at 1.

² We will be submitting formal comments to OCR with specific recommendations to the Guidance shortly.

process of opening the doors to health care and social services for the population. Although we view the Guidance as a critically important affirmative step forward toward removing linguistic barriers for LEP persons, we understand the Guidance to be the minimum that must be done to comply with Title VI. We would encourage providers to go much further than the minimum guidelines elucidated in the Guidance to maximize the goal of the Guidance: ensuring “meaningful access” to health care services for all LEP persons.

' With regard to OCR’s point regarding the flexibility of providers to meet their legal obligations under Title VI, we strongly recommend that OCR clearly state that such flexibility means that each facility must take whatever steps necessary to comply with the law, taking into account the particular circumstances of the provider.

' We fully agree with OCR that the newly released Guidance is a restatement of current law and merely clarifies its current policy. The document provides more explicit and useful guidance for enforcing compliance with Title VI. We are very pleased with the inclusion of the Appendices which provide useful information for recipients, especially Appendix A (the Question and Answer document), which further articulates the practical application of the Guidance. The document provides important insight into issues which the Guidance does not address directly.

' While we understand that the broader issue of “Cultural Competence” in health care and social services may be beyond the scope of this Guidance, we hope OCR seriously considers the issuance of guidance on “cultural competence” since it too is related to ethnic and national origin discrimination under Title VI.³ We believe that it would be very useful for OCR to address this timely issue, of which language access issues are but one part. To ensure meaningful access to health care and social services (similar to the requirement that the services be linguistically appropriate), the recipient must provide culturally appropriate services to all of its intended beneficiaries.

' Finally, with regard to the use of untrained interpreters, we would like the Guidance to provide stronger language discouraging the use of untrained interpreters such as family members or friends, and specifically prohibiting the use of minors as interpreters, except in emergency situations. (*See* Section II(C)(5)(a).)

³ There are currently various efforts throughout the country to create culturally and linguistically appropriate standards in health care, such as the recent issuance of OMH’s “CLAS” standards. In Los Angeles, the Office of Women’s Health and other county agencies and community advocates are working on draft standards on cultural and linguistic standards in health care. The National Council on Interpreters in Health Care and the California Health Interpreters Association are attempting to establish competency and training standards for health care interpreters.

III. Section by Section comments - the summary of the sections of the Guidance is followed by bulleted comments):

A. Background (65 Fed. Reg. 52763-64)

Summary: This section provides general statistics regarding the limited English proficiency⁴ population, discusses the serious adverse consequences (which persons who lack fluency in English experience), stresses the importance of providing meaningful access to federally funded programs and services, and examines the benefits of providing effective language assistance to limited English proficient (“LEP”) persons. It explains that OCR’s enforcement authority derives from a host of sources, including Title VI (28 U.S.C. 2000d, et seq.), the duty of health and human service providers to ensure meaningful access to LEP persons, federal and state laws and regulations, managed care contracts, and health care accreditation organizations. It also points out that the duty to provide appropriate language assistance to LEP persons is not limited to the health and human services context, but applies to many other areas, including the right to vote, the food stamp program, and the Department of Justice.

B. Legal Authority (65 Fed. Reg. 52764-65)

Summary: This section describes the legal framework underlying the Guidance, which encompasses OCR’s prior practice in investigating and resolving Title VI complaints, existing statutes and regulations, and relevant case law. The Guidance explicitly states that “a recipient’s failure to provide appropriate language assistance to LEP individuals ... may have an adverse effect in the basis of national origin, in violation of Title VI.” 65 Fed. Reg. at 52765. It is also clear from the discussion that Title VI prohibits “both intentional discrimination and policies and practices that appear neutral but have a discriminatory effect.”

Comments: We agree with OCR’s discussion and conclusions in Sections A and B, and strongly believe that it correctly restates the powerful legal and public policy authority upon which this guidance is based. Moreover, by reiterating that Title VI applies not only to policies or practices that are intentionally discriminatory but also to programs and services which have a “disproportionate adverse effect” on LEP persons, it will provide an extremely useful tool for advocates to ensure compliance with Title VI. Moreover, it gives clear direction to health care providers and social service agencies about their legal responsibility pursuant to Title VI.

C. Policy Guidance (65 Fed. Reg. 52765-70)

Summary: This is one of the most important sections of the document, as it contains

⁴ According to the Guidance, LEP persons are individuals who 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.

most of the substantive requirements of the Guidance:

1. Who is Covered? (65 Fed. Reg. 52765)

The Guidance interprets Title VI's coverage correctly to include all "entities that receive Federal financial assistance from HHS, either directly or indirectly, through a grant, contract or subcontract 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 that (3) receives federal financial assistance from HHS directly or through another recipient/covered entity." The Guidance lists examples such as hospitals, nursing homes, home health agencies, managed care organizations, universities and other entities with health or social services 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.

Federal financial assistance is also broadly defined to include, 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. Most important, all parts of the recipient's operations are covered by Title VI, even if the Federal assistance is only used by one part.

' **Comments:** We strongly support OCR's understanding of the scope of entities covered by Title VI. According to OCR, all programs operated by any recipient that receives any federal funding will be covered, regardless of whether federal funds are actually used to operate a specific program. This explicit interpretation makes it clear that any subcontractor or vendor to the recipient would be covered by Title VI.

' We also urge OCR to include another example in Appendix A to illustrate the full responsibility of various recipients: an insurance company or managed care organization that receives Medicaid or Medicare reimbursement would be ultimately responsible for ensuring that LEP members receive language accessible health care through any provider office or agency with which it has a contract or subcontract. The insurance company or managed care organization may directly provide the bilingual staff or interpreter, or it may require the contracted agency to provide such assistance. We believe that this additional example will address the common question of which organization is responsible for actually providing the language assistance: both appear to be liable.

2. Basic Requirements Under Title VI (65 Fed. Reg. 52765-66)

Summary: The recipient or covered entity ("recipient") must take steps to ensure that eligible LEP persons have "meaningful access" to the health and social service benefits that the recipient provides. The most important step in meeting this obligation is to provide the language

assistance necessary to ensure such access, at no cost to the LEP person. Many factors contribute to the analysis of exactly what steps a given recipient must utilize to insure “meaningful access,” including: 1) the size of the recipient, 2) the size of the eligible LEP population it serves, 3) the nature and objectives of the program or service, 4) the resources available to the recipient, and 5) the frequency with which LEP persons come into contact with the program. Because there is no “one size fits all” solution, any assessment will be conducted on a case by case basis considering the “totality of the circumstances.” Thus, the recipient will have considerable flexibility in determining precisely how to meet its Title VI obligations. The key to “meaningful access” for LEP persons is to ensure that the recipient and the LEP person can communicate effectively and accurately.⁵

' **Comments:** In this section, OCR reinforces the key requirement that recipients must provide language assistance free of charge to any LEP person eligible to receive any services or benefits from any of its programs. From our experience working with providers, most are simply unaware of their obligations under Title VI and massive public education is needed to inform providers of their legal responsibilities. However, the Guidance does not include the requirement that language assistance must be provided during all hours of service (which is noted in Section II(3)(C)(2) in the discussion regarding the use of community volunteers.) We would like to see such an explicit requirement, similar to the requirement that such services be provided without charge to any LEP person.

' Although we agree that compliance with Title VI should depend on the “totality of the circumstance,” we are concerned that this flexibility may allow recipients simply to argue that their LEP population is too small to require them to provide them with any language assistance or to claim that they do not have the resources to provide adequate language assistance to LEP clients. In fact, the most common response from providers when interpreter assistance is requested has been that they cannot provide such assistance due to its high costs. However, many have not even attempted to research the costs or to find low cost ways to provide language assistance. We suggest that, within the contours of flexibility, the guidance clarify that OCR expects that no federal fund recipient will rely on impressions or word of mouth in reaching conclusions regarding the need to provide translation services, but rather each will periodically engage in an objective community needs assessment to accurately verify the extent of need. This will assist the federal fund recipient in operational and clinical planning and will enable the facility to justify its translation policies to OCR (see additional discussion, below).

' If providing language assistance is considered to be an essential part of providing good health care for its patients, the recipient must find a way to provide such assistance. Because recipients often cite cost constraints as a basis for the lack of provision of language assistance to

⁵ The recipient should ensure that the LEP person: 1) is given adequate information; 2) is able to understand the services and benefits available; 3) is able to receive those services for which he or she is eligible; and, 4) can effectively communicate the relevant circumstances of his or her situation to the service provider.

LEP persons, it would be helpful if OCR provided some information regarding the availability of Federal matching money for language assistance costs, either in the body of the Guidance or Appendix A (Questions and Answers).⁶ Moreover, in the list of assessments which the recipient should include in section (b), we would add the following, “vii) identify potential sources of new resources.”

Furthermore, although the Guidance explains the need to allow flexibility in any Title VI assessment, it does not clearly state in the Guidance that all LEP persons who seek services from the recipient must be provided language assistance, specifically, at a minimum, oral assistance including an interpreter free of charge, whether telephonically or in person.⁷ This should be clarified.

3. *Ensuring Meaningful Access to LEP Persons*⁸ (65 Fed. Reg. 52766-69)

Summary:

(a) Introduction - The Four Keys to Title VI Compliance in the LEP Context (65 Fed. Reg. 52766)

From hundreds of investigations that OCR has conducted, it has found that effective

⁶ The Health Care Financing Administration (“HCFA”) released a “Dear State Medicaid Letter” regarding limited English proficiency on August 31, 2000. It emphasized that “under both the SCHIP and Medicaid programs, Federal matching funds are available for States’ expenditures related to the provision of oral and written translation administrative activities and services provided for SCHIP and Medicaid recipients. Federal financial participation is available in State expenditures for such activities or services whether provided by staff interpreters, contract interpreters, or through a telephone service.” HCFA “Dear State Medicaid Director” Letter” 8/31/00, at 1 (www.healthlaw.org, “What’s New.”)

⁷ In discussing one of the factors in considering what reasonable steps to take to ensure meaningful access, the DOJ Guidance explains: “Programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access...[A] plan of what to do if a LEP individual seeks service under the program in question ... need not be intricate, it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter services.” This point was made in reference to a recipient who serves very few LEP persons on an infrequent basis but it supports the requirement that every LEP person must be provided with some type of language assistance. See DOJ Guidance at www.healthlaw.org, at 4.

At least one OCR decision found that “a recipient who denies services to even one person due to his LEP status violates Title VI.” *In re* Department of Social Services, OCR No. 08917009 at 3, n.1 (Sept. 30, 1992.)

⁸ OCR notes that the failure to incorporate or implement one of more of these elements does not necessarily signify 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.

programs usually have the following four elements: 1) Assessment, 2) Development of a Comprehensive Written Policy on Language Access, 3) Training of Staff, and 4) Vigilant Monitoring.

' **Comments:** The Guidance sets out four key elements to ensure meaningful access but does not state that they are mandatory minimum requirements. It also does not mention as one of the major elements the need for community input, such as a Community Advisory Committee or Board which could provide valuable input into the needs assessment. Community-based organizations located in the recipient's service area could provide much assistance to the recipient in any development, implementation and monitoring of its language assistance program.

' With regard to the Assessment requirement, we would encourage the Guidance to insure that the recipients have an ability to collect, report and review data on the racial and ethnic composition and primary languages of the recipient's service area, including data identifying the patient/client's primary language and language used at home; the racial and ethnic composition and primary languages of the recipient's contact staff by type of position held; and whether persons who are LEP receive language assistance.

Summary:

(b) Assessment (65 Fed. Reg. 52766) - The recipient conducts a thorough assessment of the language needs of the affected population to be served by:

- i) identifying the non-English languages that are likely to be encountered in its programs and estimating the number of eligible LEP persons and the number likely to be affected by its programs, using such sources as census data, client utilization data from client files, and data from school systems and community agencies and organizations;
- ii) identifying the language needs of each LEP patient/client and recording this information in the client's file;
- iii) identifying the points of contact in the program or activity where language assistance is likely to be needed;
- iv) identifying the resources that will be needed to provide effective language assistance;
- v) identifying the location and availability of these resources; and
- vi) identifying the arrangements that must be made to employ these resources in a timely matter.

' **Comments:** This list is helpful in explaining the process of conducting an assessment. However, in the list of factors, we would add the following: "vii) identify potential sources of

new translation resources.”

Summary:

(c) Development of a Comprehensive Written Policy on Language Access (65 Fed. Reg. 52766) - A recipient can ensure effective communication by implementing a comprehensive written language assistance program that includes policies and procedures for identifying and assessing the language needs of its LEP clients, and that provides for a range of oral language assistance options, notice to LEP persons of the right to free language assistance, periodic training of staff, monitoring of the program, and translation of written materials in certain circumstances.

(1) Oral Language Interpretation (65 Fed. Reg. 52766-67) - The recipient should develop 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:⁹

- Hiring bilingual and/or bi-cultural staff who are trained and competent in the skill of interpreting;
- Hiring staff interpreters who are trained and competent;
- 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, and
- Arranging/contracting for the use of a telephone language interpreter service.

' **Comments:** We suggest that OCR, at a minimum, state its expectation that each and every federal fund recipient will have a written statement regarding its language access policies. Of course, there would be flexibility in the length and detail of this statement as it would be driven by the extent of language needs in the community and with the federal fund recipient; however, we think that at this point in time -- given the lack of understanding or attention to these matters to date -- the act of preparing a written policy will ensure careful thought and planning by federal fund recipients.

' We fully support OCR's conclusion that certain options, such as the use of outside interpreter services, especially telephonic interpreter services, should only be used as a supplemental system and not as the sole language option. There are many disadvantages to the use of telephone interpreter services, such as higher costs, awkward and/or inadequate interactions, the use of untrained medical interpreters, and confidentiality concerns. We would urge the Guidance to limit the use of telephone language interpreter services to situations where an in-person interpreter is unavailable.

⁹ The Guidance provides additional discussion regarding which language assistance options will be sufficient in quantity and quality to meet the needs of the LEP beneficiaries.

Moreover, OCR provides clear guidance related to the appropriate use of various methods of interpreter services. In fact, the Guidance carefully explains the circumstances when the different types of oral assistance should be used. We agree with this reasoning and believe that the use of bilingual, professionally and culturally competent, and ethnically matched staff in patient/client contact positions is the ideal way to ensure meaningful access to health and social services. However, we realize that this may not always be possible and the best alternative option available should be used. We would further support an explicit statement in the Guidance regarding the order of preference, which should be similar to the order of the interpreter services listed in the Guidance, i.e., the use of bilingual staff being the optimal method of providing language assistance to LEP persons (if the demand for translation supports such hiring).

In a question and answer, we suggest that OCR can acquaint federal fund recipients with activities underway in other jurisdictions to encourage the hiring of bilingual staff, for example, the bilingual bonus program in Los Angeles County.

OCR also correctly acknowledges that all interpreters must be trained and competent, as an inadequate interpreter may do more harm than good by providing a false sense of security that the patient fully understands the provider when he or she may not. Finally, we very much agree with the Guidance that the oral language assistance must be timely and readily available during all hours of operation

Summary:

(2) Translation of Written Materials¹⁰ (65 Fed. Reg. 52767-68)

a) A recipient must develop and implement a plan to provide written materials in languages other than English for each regularly encountered LEP group where a significant number or percentage of the population eligible to be served or likely to be affected by the program needs language assistance to communicate effectively. OCR will assess compliance in this area by taking into account the following factors:

- the nature of the recipient services or benefits
- the size of the recipient
- 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 resources available to the recipient
- the frequency with which translated documents are needed
- the cost of translation

Comments: The list of factors presents clear guidelines for providers to consider when

¹⁰ The Guidance notes that an effective language assistance program ensures that written materials that are routinely provided in English to the public are available in regularly encountered languages other than English.

determining compliance with Title VI.

Summary:

b) Compliance with the following translation guidelines will constitute a safe harbor for purposes of Title VI:

(i) the recipient provides translated written material, including vital documents, for each eligible LEP language group that constitutes 10% or 3000, whichever is less, of the population of persons eligible to be served or likely to be directly affected by the recipient's program;

(ii) for those LEP language groups that do not meet the 10% or 3000 threshold but constitute 5% or 1000, whichever is less, of the population of persons eligible to be served or likely to be directly affected, the recipient ensures, at a minimum, that vital documents¹¹ are translated into the appropriate non-English languages of such LEP persons;¹²

(iii) notwithstanding the two groups above, the recipient has fewer than 100 persons in a language group eligible to be served or likely to be directly affected, does not translate written materials but provides written notice in the primary language of the LEP group of the right to receive competent oral interpretation/translation of written materials free of cost.

c) For languages that do not fall within paragraphs (i) or (ii), above, a recipient can ensure meaningful access by, at a minimum, providing notice, in writing, in the LEP person's primary language, of the right to receive language assistance in a language other than English, including the right to competent oral translation of written materials, free of cost.¹³

' **Comments:** The Guidance sets out what it calls "safe harbor" provisions in subsections

¹¹ Vital documents include applications, consent forms, letters containing information regarding eligibility or participation criteria (such as a cover letter outlining conditions of participation in a Medicaid managed care program), notices pertaining to reduction, denial or termination of services or benefits that require a response from beneficiaries, those that advise of free language assistance, and other outreach materials. Because each Federal health and social services program has unique characteristics, OCR will collaborate with respective DHHS agencies in determining which documents and information are deemed to be vital.

¹² OCR allows for the oral translation of non-vital documents, if needed.

¹³ This paragraph appears to be out of order, and moving it to follow the safe harbor provisions in the Guidance would greatly clarify this entire section, rather than keeping it in its present location where it comes after the definition of "service area." *See* Fed. Reg. at 52768.

(i) & (ii),¹⁴ which providers can follow to ensure compliance with Title VI. OCR does not view the safe harbor provisions as thresholds but rather circumstances under which a recipient can be certain of being found in compliance.¹⁵ While we recognize the need to provide guidance to recipients regarding situations which trigger coverage of certain languages, we believe that the numerical and percentage requirements in the Guidance are too high and leave out too many LEP people. By using such high numbers and percentages, thousands of LEP persons will continue to face language access barriers to health care. We believe that the lower figure of 100 LEP persons should trigger translation for vital documents and 1000 LEP persons for all other written materials.¹⁶ Similarly lower thresholds have been used in various state managed care contracts, the Food Stamp program,¹⁷ and other programs. Moreover, if the figure of 100 LEP persons and 1000 LEP persons (who are eligible to be served or likely to be directly affected) is used to trigger paragraphs (i) and (ii), respectively, the confusion about paragraph (iii) could be lessened (*see below.*)

As noted, there is some confusion over paragraph (iii)'s interpretation. Upon an initial reading of this section, the reader might not recognize that this paragraph only applies to those situations in which the triggers of 10% or 5% in (i) and (ii), respectively, do not meet at least 100 LEP persons. It was only after discussions with OCR concerning this provision that it was made clear that OCR intends paragraph (iii) to qualify paragraphs (i) and (ii), and if there are less than 100 LEP persons, the recipient does not have to translate written materials but only provide written notice in the primary language of the LEP group of the right to receive free and competent oral translation of written materials. Furthermore, as currently written, the provision raises the question of what happens for those LEP language groups whose numbers fall between 100-999, and the concern that they would not be covered by any of the three paragraphs. In fact, OCR responded to this question by stating that it would make its decision on a case-by-case basis

¹⁴ Paragraphs (i), (ii), and (iii) correspond to paragraphs (A), (B), and (C) in the Guidance.

¹⁵ The Guidance further states that if a provider does not meet these safe harbor provisions, it will not necessarily be found out of compliance with Title VI. *See* (e).

¹⁶ The numeric threshold of 100 LEP persons is consistent with the Medicare pre-award clearance reviews conducted by OCR. *Investigative Procedures Manual*, ch. 18, p.11.

¹⁷ For example, Food Stamp regulations state that the agency shall provide materials used in Program informational activities in the appropriate languages: 1) in project areas with less than 2,000 low-income households, if approximately 100 or more those households are of a single-language minority; 2) in project areas with 2,000 or more low-income households, if approximately 5% or more of those households are of a single-language minority. 7 C.F.R. §272.4(b)(2). The regulations further state that the State agency shall provide both certification materials, such as the food stamp application form, change report form and notices to households, and bilingual staff or interpreters in each certification office that provides service to an area containing approximately 100 single-language minority low-income households and in each project area with a total of less than 100 low-income households if a majority of those households are of a single-language minority. 7 C.F.R. §272.4(b)(3).

taking various factors into consideration. However, according to provision (c), at a minimum, those groups should also be provided written notice of the right to receive free oral translation of written materials. These questions support the conclusion that subsection (iii) is confusing as drafted. Therefore, we would strongly encourage OCR to clarify these questions by using examples to illustrate its interpretation, restating the paragraph more clearly, and moving the appropriate paragraph as suggested in footnote 13.

Summary:

d) “Persons eligible to be served or likely to be directly affected” relates to the issue of what the recipient’s service area¹⁸ is for purposes of meeting its Title VI obligation. The phrase covers those persons who are in a geographic area that has been approved by a Federal grant agency as the recipient’s service area, and who either are eligible for the benefits or services, or otherwise might be directly affected by discriminatory conduct;¹⁹

-- If the service area has not been approved by a Federal grant agency, OCR will consider the relevant service area as that designated and/or approved by state or local authorities or designated by the recipient itself, provided that these designations do not themselves discriminatorily exclude certain populations;

-- OCR may determine the service area to be the geographic area from which the recipient draws, or can be expected to draw clients/patients, and the Guidance provides examples of how compliance will be assessed.²⁰

Comments: We suggest OCR require the recipient to provide affirmative evidence of its service area, which could be done by using the needs assessment described in Section II(C)(3)(b) (recommending a recipient conduct a needs assessment to identify its LEP population using census data, client utilization files, and data from schools and community agencies.) In addition, we suggest that the language of the Guidance be modified slightly with regard to whom should be considered when determining the LEP population within a service area. Under the Guidance, those to be considered are “persons eligible to be served or likely to be directly affected by the recipient’s program”. We suggest that this standard be adjusted to read “persons eligible to be served or likely to be directly or significantly affected by the recipient’s program.” This

¹⁸ The Guidance notes that this is another area in which there is no “one size fits all” definition.

¹⁹ OCR gives as an example of a person who might be “directly affected” by the recipient’s policies or practices: a parent who might seek services for his or her child.

²⁰ The examples include: 1) acceptance of a private hospital’s marketing plan as its geographic or service area if a substantial number of the hospital’s patients are drawn from the identified service area, and no area with concentrations of racial, ethnic, or other minorities is discriminatorily excluded from the plan; 2) acceptance of a managed care plan’s service area designated in its state Medicaid managed care contract, and 3) acceptance of a political subdivision’s designation of its service area as that geographic area within its political jurisdiction if the service areas were also designated by the state.

modification will, we believe, more accurately reflect the intent of the Guidance, and will forestall future disputes about whether an adverse effect, although significant, is sufficiently “direct”.

' As noted in the Guidance, in this day and age of technological advances, we are very close to the time when computers will be able to store and translate documents into many different languages, which should decrease the costs to individual providers of providing translated materials to any LEP person. There are already software programs which can translate documents into various languages, possibly requiring professional translators simply to review the translations for accuracy. Also, innovative approaches for translating materials are constantly being explored, such as centralized translation departments which could reduce the cost of translating commonly used documents.

Summary:

e) The failure to meet the “safe harbor” provisions described in section b, above, will not necessarily mean noncompliance with Title VI, and OCR will consider the totality of the circumstances to determine the precise nature of the recipient’s obligation to provide written materials in languages other than English.

-- If the recipient can demonstrate that requiring 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 that 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 require translation of written materials.²¹

' **Comments:** We again suggest a slight alteration of the language of this provision to better reflect what we believe to be the intent of the Guidance. We believe that this provision will prove more serviceable, and better balance the competing interests involved, if it is modified as follows:

-- If the recipient can demonstrate that requiring written translation of a certain document or set of documents would be so financially burdensome as to defeat the legitimate objectives of its program, **and** that 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 require translation of written materials.

Summary:

²¹ The Guidance notes that technological advances may allow the recipient to store translated documents more easily, but also recognizes that the translation of all written materials in many languages may be unduly burdensome.

e) The Guidance notes the importance of ensuring that the persons translating the materials are competent and well qualified, and suggests using community-based organizations to review translated materials to ensure accuracy and comprehension by LEP persons.

Comments: We completely agree with the requirement that the translation of materials be done by a well-qualified translator and be checked with the LEP community.²² We would even go further in recommending that back translations be used to increase the accuracy and effectiveness of the translations, and that a written policy prohibiting “wildcat” translations, e.g., by the doctor’s sister who took Spanish in college, be included as well. The quality of written translations is as important as competence in oral interpretation.²³ At the least, recipients should have in place written criteria for selecting translation vendors, including: 1) review of the methods and procedures that are used, from submission of English copy to printing of finished materials; 2) how translators are recruited and trained, and 3) how review of translated material is accomplished. It would also be preferable to have a written protocol to evaluate and to insure adequate and effective translations of written materials.

Summary:

(3) Methods for Providing Notice to LEP Persons (65 Fed. Reg. 52768) - The Guidance states that a critical part of an effective compliance program includes effective methods for notifying LEP persons of their right to free language assistance and provides examples of such methods:

- a) Use of language identification cards, such as “I speak cards,” and the recording of the language spoken in the person’s file;
- b) Posting and maintaining signs informing LEP individuals of their right to free language assistance in regularly encountered non-English languages in waiting rooms, reception areas, and other initial points of entry;
- c) Competent translation of application forms and instructional, informational and other written materials in appropriate non-English languages;²⁴
- d) Uniform procedures for timely and effective telephone communication between

²² This could be another function of the Community Advisory Committee which we recommended each recipient establish in Section II(C)(3)(b.)

²³ With regard to the use of “interpretation” versus “translation,” we have adopted the use by professional medical interpretation associations which distinguishes the two by using the term “interpretation” in reference to oral language interpretation and “translation” in reference to translation of written materials.

²⁴ For LEP persons whose language does not have a written form, oral assistance may be used to explain the contents of the document.

staff and LEP persons, including situations in which staff receive calls from or initiate calls to LEP persons; and

e) Inclusion of statements about available services and the right to free language assistance in appropriate languages in brochures, booklets, outreach and recruitment information and other regularly distributed materials.

' **Comments:** The use of examples provides helpful guidance to recipients. It might be beneficial to include a couple of additional examples, either in this section or in Appendix A (Questions & Answers): 1) at the University of Massachusetts Medical Center in Worcester, the staff at the main informational kiosk direct incoming LEP patients to a sign on the wall that has tear-off identification cards in many different languages, and 2) at the Pacific Medical Center Clinics in Seattle, WA, all new patients are automatically assigned an interpreter in their native language who appears at each visit unless the first visit reveals that an interpreter is unnecessary. We recommend that the requirement to record the LEP person's preferred language in her file be highlighted in the general statement preceding the examples, rather than included in the first example with "I speak cards." The current structure may give the false impression that the identification of an LEP's spoken language need only be recorded if such cards are used. Rather, it should be required whenever the staff identifies an LEP person who requests or requires language assistance.

Summary:

(d) Training of Staff (65 Fed. Reg. 52768-69) - The Guidance identifies dissemination of the recipient's policy to all employees likely to have contact with LEP persons and periodic training of these employees as other vital elements in ensuring that the recipient's policies are followed.²⁵ OCR notes the importance of the training as part of the orientation for new employees in client contact positions and maintenance of a training registry to record the names and dates of employees' training.

' **Comments:** We are pleased that OCR recognizes that staff training regarding the recipient's language assistance policies and procedures is critical to any effective language assistance program. We would recommend that trainings be conducted at least annually for all employees, to remind the staff of the LEP policies and procedures and inform them of any changes in this rapidly developing area. This suggestion is consistent with OCR's recommendation that recipients monitor their language assistance programs at least annually (see below).

' From our experience, continuous reinforcement of the policies ensures continued compliance with Title VI, and this can be achieved through regularly scheduled trainings.

²⁵ OCR advises that an effective training ensures that the staff is knowledgeable and aware of LEP policies and procedures, is trained to work effectively with both in-person and telephone interpreters, and understands the dynamics of interpretation among clients, providers and interpreters.

Because of its importance, we would ask OCR to state its expectation that all staff, including management, attend trainings in culturally and linguistically competent health care and social services delivery. Most employees interact with patients at some point and must be sensitive to their cultural and linguistic needs. Also, management must participate in the trainings to send a strong message that the recipient regards cultural and linguistic access as a priority. Supervisors and managers must understand what such access requires in order to implement, evaluate, monitor, and enforce its language access policies and procedure. Furthermore, as at least one OCR decision²⁶ has suggested, we urge OCR to require that recipients have cultural sensitivity training programs for their staff. (See Sections I(7) and II(C)(5)(b) below regarding cultural competency training.)

Summary:

(e) **Monitoring (65 Fed. Reg. 52769)** - OCR also notes that it is crucial for a recipient to monitor its LEP program, at least annually, to assess the current LEP makeup and needs of its service area, the effectiveness of the policies, whether the staff is knowledgeable about the policies, and whether the sources and arrangements for assistance are still current and viable. The Guidance identifies feedback from clients and advocates as one element likely to ensure meaningful access. It also suggests that compliance with Title VI is more likely when the recipient regularly monitors its language assistance program, makes changes when necessary, and periodically trains its staff.

Comments: We concur that regular monitoring is a necessary component of any effective language assistance program, but OCR should include a requirement for community input into the assessment and monitoring process, such as soliciting input from a Community Advisory Committee/Board. We would also recommend that the results of an annual assessment be made available to a recipient's clients/patients, both to identify problems and to seek assistance from the community in implementing a successful limited English proficiency program. Finally, in order to determine whether there is an underutilization of a recipient's services among eligible persons in particular ethnic or LEP communities, an effective plan should be developed for outreach to those communities to notify them of the availability of the recipient's services.

Summary:

4. **OCR's Assessment of Meaningful Access (65 Fed. Reg. 52769)** - This section reiterates the standard by which OCR will evaluate compliance with Title VI: Failure to take the steps outlined in Section II(C)(3) will not necessarily mean that the recipient has failed to provide meaningful access to LEP clients. OCR will consider the factors listed in Section II(C)(2) and

²⁶ *In re* Wisconsin Department of Health and Social Services, OCR Case No. 05927001 (June 8, 1994).

provides three examples on how meaningful access will be assessed by OCR.²⁷

Summary:

5. *Interpreters* (65 Fed. Reg. 52769) - The Guidance discusses two recurring issues related to interpreter services:

(a) Use of Friends, Family and Minor Children as Interpreters (65 Fed. Reg. 52769)

- If recipients require, suggest, or encourage an LEP person to use friends, minor children, or other family members as interpreters, they may be vulnerable to liability under Title VI. Such use causes problems such as breaches of confidentiality, reluctance of the LEP person to communicate personal information, and inadequate or inaccurate interpretation which can have serious and/or life-threatening consequences.

1) The OCR Guidance allows the use of a family member or friend if the LEP person is informed of his/her right to free interpreter services and declines such service, as long as the effectiveness of services is not compromised or the LEP person's confidentiality is not violated.

2) If the LEP person elects to have her/his family member or friend act as the interpreter, the Guidance advises the recipient to document the offer and declination in the LEP person's file. It further recommends that the recipient nonetheless provide a trained interpreter to sit in on the encounter to ensure accurate interpretation.

' **Comments:** While we are very pleased that OCR is cognizant of the dangers of using untrained interpreters and has included language which discourages the use of friends, minors or family members as interpreters, we do not feel that it provides adequate clarification on the use of minors. Researchers have identified a number of problems with the use of untrained interpreters, such as omissions, additions, substitutions, volunteered opinions, and semantic errors that can seriously distort care. The friend, family member or minor is likely to be untrained in medical terminology, uncomfortable discussing certain medical conditions, and untrained in interpreter ethics.

' However, the distinction between the use of a family member or friend versus a minor is not discussed in the Guidance. There is no mention of the particular problems posed by using children to interpret for their parents. It does not adequately acknowledge that many of the identified problems are exacerbated when the interpreter is a minor. In addition to the problems pointed out in the Guidance, the use of minors could upset familial relationships, or hierarchies deeply rooted in the person's culture, and is particularly problematic in the areas of gynecology, reproductive health, sexuality transmitted diseases, and mental health treatment. We strongly

²⁷ As this provision is a repeat of prior requirements, we have do not here reiterate previously discussed concerns.

urge OCR to amend the Guidance to prohibit the use of minors as interpreters regardless of the beneficiary's request, unless it is an emergency medical situation with no alternative means of providing language assistance.

Summary:

(b) Competence of Interpreters (65 Fed. Reg. 52769-70) - To ensure effective services, the recipient must use competent interpreters, which does not necessarily mean formal certification as an interpreter, but requires more than self-identification as bilingual.

1) Competency means:

- demonstrated proficiency in both English and the other language;
- orientation and training which 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's programs or activities;
- sensitivity to the LEP person's culture and a demonstrated ability to convey information in both languages, accurately.

2) The recipient must ensure that its interpreters are trained and demonstrate competency as interpreters.

' **Comments:** We applaud OCR's requirement that all of the recipient's interpreters be competent and trained. Unfortunately, we believe that there is only one state, Washington, which offers certification for medical interpreters. There are currently efforts to develop certification programs in California, Massachusetts, Minnesota, and New York, and nationally by the National Council of Interpreters in Health Care ("NCIHC.") The areas of competency outlined in the Guidance are generally consonant with NCIHC and other professional medical interpreter associations. However, we would recommend that the recipient's training program be more than an orientation, but rather offer a minimum of 40 hours of training, which is the average length of programs well-regarded by professional medical interpreters. The interpreters should be assessed for their knowledge and skills before they are allowed to interpret in a medical setting. It cannot be assumed that a nurse, physician or other staff who speaks two languages will be sufficiently familiar with medical terms and concepts in both languages. Typically, bilingual individuals may only have conversational skills, which, would result in problems similar to those encountered with untrained family or friends. Too often, recipients rely heavily on bilingual staff who are untested and may not afford true language access.

' We would encourage the inclusion of an additional requirement that interpreters be "culturally competent," as well as linguistically competent. Although the LEP Guidance includes the need to be sensitive to the LEP person's culture, we would urge OCR to require cultural competency training of a recipient's interpreters, as well as its staff, and an evaluation of such competence. Moreover, we believe that the Guidance should include a definition of cultural

competence.²⁸

Summary:

6. Examples of Frequently Encountered Scenarios (65 Fed. Reg. 52770) - The Guidance provides nine examples of commonly encountered policies and practices that are likely to violate Title VI based on OCR's experience in enforcing that statute for the last 30 years.

' **Comments:** We find this section extremely useful to illustrate recurring types of problems which LEP persons face when seeking health care services and to provide real life instances where a violation of Title VI will be found.

D. Promising Practices (65 Fed. Reg. 52770-71)

Summary: Various recipients have found unique and innovative ways to provide language assistance to the LEP community, and OCR provides valuable technical assistance to recipients who are interested in learning about promising practices such as the following:

1. TEMPS²⁹
2. Language Banks³⁰

²⁸ One possible definition, found in the report of the Office of Minority Health, "Assuring Cultural Competence in Health Care: Recommendations for National Standards and An Outcomes-Focused Research Agenda, Part One: Recommendations for National Standards for Culturally and Linguistically Appropriate Services (CLAS) in Health Care," December 15, 1999, p.14, is: "Cultural and linguistic competence is a set of congruent behaviors, attitudes and policies that come together in a system, agency or among professionals that enables effective work in cross-cultural situations. 'Culture' refers to integrated patterns of human behavior that include the language, thoughts, communications, actions, customs, beliefs, values and institutions of racial, ethnic, religious or social groups. 'Competence' implies having the capacity to function effectively as an individual and an organization within the context of the cultural beliefs, behaviors and needs presented by consumers and their communities."

²⁹ "Technology Enhanced Medical Interpretation System" is a state of the art medical interpretation system where the provider and patient communicate using wireless remote headsets while a trained, competent interpreter, located in another room, provides simultaneous interpretation to the provider and patient. This reduces delays and eliminates the need for the interpreter to travel from one facility to another.

³⁰ In various parts of the country, community language banks have been created by community organizations and providers that train, hire and dispatch competent interpreters to participating facilities, reducing the need for on-staff interpreters for less commonly needed languages. These banks are usually non-profits and charge reasonable rates.

3. *Language Support Office*³¹
4. *Multi cultural Delivery Project*³²
5. *Pamphlets*³³
6. *Use of Technology*³⁴
7. *Telephone Information Lines*³⁵
8. *Sign age and Other Outreach*³⁶

E. Model Plan (65 Fed. Reg. 52771)

Summary: OCR provides the components of a model program which any hospital or social service agency which serves a significant and diverse LEP population can institute to ensure meaningful access to LEP beneficiaries:

1. A formal written language assistance program;
2. Identification and assessment of the languages that are likely to be encountered and estimation of the number of LEP persons in the service area;

³¹ A state social services agency has established an “Office for Language Interpreter Services and Translation” to test and certify all in-house and contract interpreters, provide agency-wide support for translation of forms, client mailings, publications and other written materials into non-English languages, and monitor the policies of the agency and its vendors that affect LEP persons.

³² Another county has established a “Multicultural Delivery Project” designed to help immigrants and other LEP persons find a bilingual person, usually a community outreach worker, to assist them through the county health and social service system, with the help of a multicultural advisory committee.

³³ One hospital has created pamphlets in several languages entitled “While Awaiting the Arrival of an Interpreter,” to facilitate basic communication between the patients and staff. Rather than a replacement for an interpreter, it is intended to aid the LEP patient’s comfort level while waiting for services.

³⁴ Some recipients use their internet and/or intranet capabilities to store translated documents online which can be easily retrieved as needed.

³⁵ Recipients have established telephone information lines which instruct callers in their own language on how to leave a recorded message that will be answered by someone who speaks the caller’s language.

³⁶ They have also provided information about their services, benefits, eligibility requirements and the availability of free language assistance in the 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 the LEP community; (c) placing flyers and signs in the offices of community-based organizations that serve large LEP populations, and (d) establishing information lines in appropriate languages.

3. Posting of signs in areas of public contact in different languages informing the LEP person of his/her right to free interpreter services and inviting her to identify herself as needing language assistance;
4. Use of “I speak” cards so patients can identify their primary languages;
5. Requiring the staff to record the language needs of the client in his/her record;
6. Employment of sufficient bilingual staff in the appropriate languages in patient and client contact positions who are competent and trained as interpreters;
7. Contracts with interpreting services that can provide competent interpreters in the appropriate language in a timely manner;
8. Formal arrangements with community groups for competent and timely interpreter services by community volunteers;
9. An arrangement with a telephone language line;
10. Translation of application forms, instructional, informational and other key documents into appropriate non-English languages, as well as provision of oral document interpretation assistance for those persons whose language does not exist in written form;
11. Procedures for effective telephone communication between staff and LEP persons, including instructions for staff on how to access interpreters;
12. Notice to and training of all staff, particularly patient and client staff, about the recipient’s Title VI obligations and its language assistance policies;
13. Insertion of notices in appropriate languages about the LEP person’s right to free interpreters and other language assistance in brochures, pamphlets, manuals and other public information materials, and to staff;
14. Notice to the public regarding the language assistance policies and procedures, and notice to and consultation with community organizations that represent LEP groups, regarding problems and solutions, including standards and procedures for using their members as interpreters;
15. 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 Title VI complaint with HHS; and
16. Appointment of a senior level employee to coordinate the language assistance program and to ensure regular monitoring of the program.

▪ **Comments:** These last two sections are most useful and practical for recipients as they provide clear, creative ideas to address their Title VI obligations. This part also points out several components that have not been previously discussed, such as the complaint process and the appointment of a senior level staff member to oversee the language assistance program. These two components should be required of all language assistance plans, as should other provisions, including the need for a written policy, identification and assessment of language needs of an LEP client, training of staff, notice to the public of the right to free interpreter services, written translations of certain materials, procedures to engage competent interpreters. Further, we recommend providing additional details of a model complaint process. One such recommendation could include the involvement of a public or community advisory committee, which could help develop and implement a process to resolve complaints or disputes regarding any cultural or linguistic access problems which arise. Moreover, in addition to the appointment

of a senior level employee to coordinate the LEP program, we would urge the creation of a department that is charged with ensuring the provision of language access services if the recipient is sufficiently large.³⁷

F. Compliance and Enforcement (65 Fed. Reg. 52771-72)

Summary: The Guidance notes that the recommendations in the model plan are not exhaustive and that recipients have considerable flexibility in determining how to comply with their Title VI obligations. Recipients are not required to use all of the listed methods, but they must establish and implement language assistance policies and procedures that meet Title VI's requirement to provide meaningful access to LEP persons.

1) Title VI regulations govern OCR's Title VI enforcement efforts, which include complaint investigations, compliance reviews, efforts to secure voluntary compliance and technical assistance.

2) If a complaint is filed against a recipient, OCR will investigate the complaint. If there is a finding of noncompliance, OCR will inform the recipient in writing of the basis of its determination through a Letter of Finding that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance.

3) OCR must attempt to secure voluntary compliance through informal means, and cannot seek the termination of funds until it has engaged in voluntary compliance efforts and determined that compliance cannot be secured voluntarily.

4) During these negotiations, OCR will propose reasonable timetables for achieving compliance and will consult with and assist the recipients in exploring cost-effective ways to achieve compliance, by:

- a) sharing information on potential community resources;
- b) increasing awareness of emerging technologies; and
- c) sharing information on how other recipients have addressed the language needs of diverse populations;

5) If the matter cannot be resolved informally, OCR must secure compliance through:

- a) the termination of federal assistance after the recipient has been given an opportunity for an administrative hearing;

³⁷ A Resolution Agreement signed on July 17, 2000 between OCR and Maine Medical Center illustrates the elements of a model plan and can be obtained from our website: www.healthlaw.org under "What's New." This excellent agreement will provide the reader practical and detailed guidelines for a strong language assistance policy and procedure.

- b) referral to DOJ for injunctive relief or other enforcement procedures, or
- c) any other means authorized by law.

6) OCR will focus its compliance efforts primarily on larger recipients such as hospitals, managed care organizations, state agencies and social services organizations that have a significant number or percentage of LEP persons eligible to be served or likely to be directly affected by the recipient's program. Generally, compliance can be met by using the wide range of language options outlined in Section II(C)(3.)

7) Despite OCR's focus on larger recipients, other recipients are not relieved of their Title VI responsibilities and OCR has a legal obligation under HHS regulations to promptly investigate all complaints alleging a violation of Title VI.

8) Smaller recipients, such as sole practitioners, those with limited resources, and recipients who serve small numbers of LEP persons on an infrequent basis will have more flexibility in meeting their obligations to ensure meaningful access.

' **Comments:** The Guidance makes it clear that there is much flexibility in meeting a recipient's Title VI legal requirements, especially for smaller recipients. The last paragraph in this section appears to be redundant of prior paragraphs and simply reiterates previous discussions. We would recommend deleting it.

' There is a critical lack of any requirement for recordkeeping and data collection in the Guidance, which will make monitoring compliance difficult, if not impossible. We therefore urge the Guidance to recommend that the recipient maintain a centralized recordkeeping system that assures the ready availability of data that includes the race and ethnicity of patients/clients served at its facilities, and the primary language of such LEP persons. One source for guidance on the collection of race and ethnicity data can be found in the revised Office of Management and Budget (OMB) standards for Maintaining, Collecting and Presenting Federal Data on Race and Ethnicity, at 65 Fed. Reg. 58782, 58788 (October 30, 1997.)³⁸ Such data should include the number of LEP complaints, their resolution, any census data upon which the recipient has based its determination to provide written translations of documents, the number of LEP persons, by language group, who received the recipient's services in each department during the year, the number of LEP patients for whom interpreter services were used, by language group, and within each language group by source of interpreter used and the name of the interpreter, the recipient's expenditures for interpreter services, by language group, and a report on staff training, including the date of the training, the name and affiliation of the trainer, and the names and categories of the individuals in attendance. By recommending uniform data collection by recipients, racial disparities in health care will be more adequately addressed.

³⁸ The revised OMB standards establish new race and ethnicity reporting categories replacing prior directives.

G. Technical Assistance (65 Fed. Reg. 52772)

Summary: OCR has extensive experience from 30 years of enforcing Title VI and can provide substantial technical assistance to recipients seeking to implement an effective language assistance program.