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Deeana Jang
Office of Civil Rights
Department of Health and Human Services
Room 506F
200 Independence Avenue, S.W.
Washington, D.C. 20201

**Re: Title VI Prohibition Against National Origin Discrimination As It Affects
Limited English Proficient Persons**

Dear Ms. Jang:

The National Immigration Law Center (NILC), on behalf of itself and the undersigned organizations, submits these comments in response to the Office of Civil Rights (OCR) of the Department of Health and Human Services' (HHS) request for comments on its Policy Guidance: Title VI Prohibition Against National Origin Discrimination As It Affects Limited English Proficient Persons, republished in the Federal Register on August 8, 2003 (the "Guidance.") NILC is a nonprofit legal services organization that works on behalf of low-income immigrants and their families, and has a special focus on immigrant families' access to public benefits.

As we have stated in our comments on previous versions of the HHS Guidance, language assistance provided pursuant to Title VI and agency guidance makes a critical difference in ensuring that LEP individuals are not excluded from essential public services. We applaud and support OCR's long record of Title VI enforcement and its continuing efforts to assist recipients in providing access for LEP persons. It is therefore with dismay that we note the Guidance may fall short of the mark in ensuring that LEP individuals receive adequate assistance to facilitate the effective communication necessary for meaningful access. Specifically the Guidance falls below the standards set in the guidance template issued by the Department of Justice (DOJ) on June 18, 2002.¹ To ensure meaningful access to HHS programs and activities, we firmly believe that HHS must issue stronger guidance to its recipients, using the mandatory language from the DOJ template rather than language that is voluntary and unenforceable. At a minimum, HHS must conform its policy to the DOJ template and require that federally funded recipients ensure language access for limited English proficient individuals.

¹ DOJ required all heads of federal agencies to conform their guidance to that template in a July 8, 2002 memorandum from Assistant Attorney General Ralph Boyd.

Importance of Language Assistance Services

Competent interpretation and translation services are essential to enable HHS-supported programs to accomplish their purposes, as well as to protect the civil rights of LEP persons.

Language barriers often prevent LEP individuals from securing vital government services. A recent study surveyed California parents who requested, but did not complete, an application for the state's Medicaid and SCHIP programs. LEP parents were more likely to find the application difficult to understand, not to complete the application, or to miss deadlines for submitting required documentation.² Inadequate language assistance also undermines the continuity of services for eligible families, burdening family members and increasing administrative costs. A worker from the Good Samaritan Family Resource Center in San Francisco reports:

A family has children who qualify for Medi-Cal...Every couple of months this family receives notice that they've been discontinued from Medi-Cal because they haven't turned in the proper documentation. The parents are not literate and also don't have a steady income to report. Their young son has been hospitalized twice and Medi-Cal won't cover it. They tried to appeal but it must be submitted in writing in English. Now they're paying out of pocket.³

Language assistance must be provided for programs like TANF to achieve their goal of helping individuals transition to self-sufficiency. Language assistance is essential to enable LEP individuals to communicate with their case workers, to receive supportive services like child care and to participate in job readiness and vocational education services. Faduma Mohammad, a Somali refugee in Alameda, California, exhausted her TANF time limits without receiving any supportive services. She recounts:

Three months ago they called me to come in for an interview. They say I have finished my time and they are stopping help.... I asked help for finding a job. He told me all help stops....They asked me to sign these papers saying I understand. I ask what it means. They say my five years is up....In the five years they only provided money. Nothing else. No interpreter. No training. Never help finding a job.⁴

A Florida State University study found that Spanish-speaking participants in WAGES, Florida's TANF program, had more difficulty obtaining subsidized child care prior to starting work than did English speakers. LEP participants also received less support in obtaining care – English speakers were twice as likely as LEP persons to have been offered a meeting with a child care counselor.⁵ A Florida International University study found that Haitians in Dade County, Florida

² Institute for Health Policy Studies, University of California, San Francisco, *Barriers to Enrollment in Healthy Families and Medi-Cal: Differences by Language and Ethnicity*, February 2001

³ *Final Report: Survey of Barriers to Immigrants' Health Care Access*, California Immigrant Welfare Collaborative (forthcoming 2003).

⁴ Case study provided by Applied Research Center, Oakland, California

⁵ Robert E. Crew, Jr. and Joe Eyeran, *The Views of WAGES participants about Child Care in the WAGES Program*, Florida State University (undated report based on surveys conducted during August-September 1998).

were underserved by job training and placement centers, in part because of a lack of case workers who spoke their language.⁶ Participants in focus groups conducted by San Francisco's Chinese for Affirmative Action cited the need for English skills as a major barrier to participation in vocation education, while participants in focus groups conducted by the Washington, D.C. based Southeast Asian Resource Action Center and Cambodian Association of Greater Philadelphia reported that individuals who have language assistance are able to participate in job training programs and find employment.

LEP individuals are also placed at risk of sanctions because of their inability to learn about program requirements. Hmong National Development reports that only 10% of Hmong families in Wisconsin's TANF program are able to communicate with their workers. A 2000 study found that almost none of Massachusetts' welfare to work programs were able to accommodate persons who do not speak English fluently. Structured job search programs and one stop career programs were unable to accommodate non-English speakers, yet LEP persons were required to participate in such programs to obtain time limit extensions, and were penalized when language barriers prevent their full participation.⁷

In addition to burdening LEP recipients, these barriers frustrate the programs' purposes. Several studies report that LEP persons are less likely than English speakers to make successful transitions from cash assistance. A study of Los Angeles County, California 'welfare leavers' found that LEP welfare leavers had lower earnings and less stable employment.⁸ In Washington state, adults who remained on TANF were more likely than TANF leavers to live in a home where English was not the primary language.⁹ Not surprisingly, LEP individuals are disproportionately represented among persons exhausting their TANF time limits. Hmong National Development reports that 80% of persons reaching TANF lifetime limits in Santa Clara County, California are Vietnamese refugees who struggle with English, and 75% of persons reaching time limits in San Francisco County have a native language other than English.

In health care settings, communication barriers interfere with providers' ability to obtain information about symptoms, treatment and medical history, and make it more difficult for patients to understand treatment instructions. These barriers lead to increased diagnostic testing costs and other burdens on the health care system, as well as poorer outcomes for patients. A Boston Medical Center study found that the use of trained medical interpreters actually reduced the cost of providing emergency room services to LEP patients. As compared to LEP patients who did not have translator assistance, LEP individuals assisted by trained medical interpreters at the emergency room (ER) were more likely to keep follow-up appointments at medical clinics

⁶ *Relationship Between the Haitian-American Community and the Miami-Dade Welfare System*, Florida International University (Sep. 2001), available at www.fla-spp.com/frresearch.htm.

⁷ Massachusetts Department of Transitional Assistance, *After Time Limits: A Study of Households Leaving Welfare Between December 1998 and April 1999* (November 2000).

⁸ Mark Drayse, Daniel Fleming, and Peter Force, The Economic Roundtable, *The Cage of Poverty*, September 2000.

⁹ Jean Du, Debra Fogarty, Devin Hopps, and James Hu, Washington Department of Social and Health Services, *A Study of Washington State TANF Leavers and TANF Recipients: Final Report*, March 2000.

and less likely to return to the ER within 30 days after their initial visit, resulting in lower treatment costs over the 30 day period.¹⁰

Patients' right to provide informed consent before undergoing medical procedures is also undermined by a lack of language assistance. In a hearing before the California Personnel Board, a witness testified that a LEP woman from Guatemala had seen a doctor who gave her injections with no explanation. She abandoned her attempt to seek treatment.

Interpretation and translation services help anti-domestic violence, health promotion, substance abuse prevention, and other public education campaigns to succeed by ensuring that LEP individuals are included. In the important area of teen pregnancy prevention, the lack of health advice available in Spanish has been identified as one of the reasons that young Latinas have the highest teen birthrates of any major racial or ethnic group in the United States.¹¹

Providing translation and interpretation services helps agencies that serve LEP persons to operate efficiently, without the increased administrative costs that result from failed communication. For example, communication problems can cause LEP individuals to lose public benefits to which they are entitled, requiring agencies to reinstate benefits, to process duplicative applications and to participate in avoidable appeals. Greater Boston Legal Services (GBLS) has represented numerous clients who experienced denials of language access by public benefit programs that were costly for the programs as well as harmful to the clients. One LEP client had her TANF and food stamp benefits terminated because she failed to respond to a notice requesting verification of wages from former employers. The client had attempted to ask her caseworker about the notice, but could not communicate with the English-speaking worker. The client's benefits were reinstated retroactively with GBLS' assistance. Another LEP client had to reapply for TANF and food stamps after she failed to respond to an English notice requesting verification of information, requiring the agency to do a new eligibility determination. In some cases clients need to exercise their appeal rights in order to be reinstated. These needless terminations are burdensome for clients and waste scarce agency resources.

Minimum Standards for the Guidance

We support the principles expressed in the Guidance. However, we believe that they need to be expressed more forcefully to make clear that they are not merely suggestions but a roadmap to compliance with recipients' legal obligations. Specific recommendations for improving the Guidance follow.

Obligation to Provide Language Services: HHS' guidance states that after conducting the four factor test, "a recipient may conclude that different language measures are sufficient for the different types of programs or activities in which it engages, *or, in fact, that in certain circumstances, recipient-provided language services are not necessary*" (emphasis added). The highlighted language suggests HHS has confused the *level* of language services an entity may have to offer with *whether* language services must be provided at all.

¹⁰ Bernstein, J. et al, *The Use of Trained Medical Interpreters Affects Emergency Department Services, Reduces Charges and Improves Follow-Up*, Unpublished Report, Boston University School of Public Health, 2000.

¹¹ Carla Rivera, *Seeking to Help Teenage Latinas Avoid Pregnancy*, Los Angeles Times, May 19, 2002.

Section 601 of Title VI, 42 U.S.C. Sec. 2000d, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any* program or activity receiving Federal financial assistance. (emphasis added).

As the statutory language makes clear, Title VI applies to *all* federally-funded activities and programs. When a recipient accepts federal funds or participates in a federally-funded program, the recipient agrees to comply with the requirements that accompany the funds, including Title VI's non-discrimination provisions. Once the recipient has made the choice to accept federal dollars, Title VI requires that it take some action to ensure that it is not discriminating by refusing service, or offering a different type or quality of service, based on a person's national origin.

The nature and extent of the language services a recipient is required to provide will differ based on the results of the four-factor analysis explained in the Guidance. But the analysis should never lead to the conclusion that a recipient is permitted to engage in national origin discrimination. The DOJ Policy Guidance Document that introduced the four-factor analysis titled it clearly "*All Recipients Must Take Reasonable Steps To Provide Meaningful Access* (emphasis added)."¹²

All recipients should have, at a minimum, a plan for engaging a telephonic or other qualified interpreter when the recipient encounters an LEP individual. We encourage HHS to amend its guidance to delete the statement that in some cases recipient-provided language services are not necessary.

Notification to LEP Persons: The guidance states that it "may be important" to inform LEP persons of their right to an interpreter free of charge. This language is inconsistent with both the DOJ template and the realities of LEP persons' experiences. Notification is key to ensuring that LEP individuals know their right to request an interpreter and can make informed decisions about whether to do so. Even well-meaning recipients sometimes deprive LEP clients of their right to request an interpreter, believing that clients would prefer an informal interpreter to a trained professional. For example, a child protective services worker in Louisville, Kentucky resisted an advocate's attempts to convince her that she should provide an interpreter for the LEP mother of a ten year-old rape victim, explaining "My experience working with families is that they often feel more comfortable having a family member to translate."¹³

Notification plays a strong role in ensuring that providers meet the requirements of Title VI by providing needed language services. Many adverse outcomes could be avoided if LEP

¹² Policy Guidance, Enforcement of Title VI of the Civil Rights Act of 1964--National Origin Discrimination Against Persons With Limited English Proficiency, 56 Fed. Reg. 50123 (Aug. 16, 2000).

¹³ Email from Gretchen Hunt, Center for Women and Families, Louisville, KY to Gabrielle Lessard, NILC (October 16, 2003).

individuals were simply advised of their right to essential interpreter services. An employee of the Solano (California) Kids Program reports:

(There was) an uninsured child with diabetes who was not receiving care for four months due to language barriers. The consequences for this child was that it endangered her life, or her quality of life.¹⁴

We recommend that HHS amend its guidance to conform to the DOJ template by deleting “it may be important” to inform LEP persons of their right to an interpreter and substituting “it is important” or “it is essential.”

Ensuring the Competency of Interpreters: The guidance states that federal fund recipients should take “reasonable steps, given the circumstances” to determine the competency of interpreters. While HHS may simply have intended to convey an awareness that the need to respond quickly in exigent circumstances, such as health emergencies, can override the importance of assessing interpreter competency, this language suggests more flexibility than is appropriate or provided in the DOJ template.

Accurate interpretation is essential to effective communication. The use of incompetent interpreters can lead to severe consequences. For example, an Ethiopian refugee who lives in California applied for TANF after being abandoned by her sponsors. Her rights and responsibilities were presented to her in English, and her children, who knew little English, were used to interpret. She later obtained a house cleaning job and went to the welfare office to inform her employment services worker she was working. However, she did not report the income from the job on her untranslated income reporting form, and was jailed for welfare fraud and perjury.¹⁵

Only an assessment that can accurately determine an interpreter’s competency is reasonable. All interpreters must be assessed for their knowledge and skills *before* they are allowed to interpret, especially in the health care setting where the risks to a patient’s health and life are imminent and the consequences of an incorrect translation can be devastating. California Rural Legal Assistance Reports:

A Hmong man was told to sign an informed consent which he was told was to ‘cleanse’ his foot. It was for an exploratory operation with possible amputation and he came out of anesthesia to find he no longer had a foot or lower leg.¹⁶

The template issued by the Department of Justice – to which HHS guidance does not conform – states that recipients should “ensure competency of the language services provider,” without

¹⁴ *Final Report: Survey of Barriers to Immigrants’ Health Care Access*, California Immigrant Welfare Collaborative (forthcoming 2003).

¹⁵ Case study provided by Legal Services of Northern California.

¹⁶ *Final Report: Survey of Barriers to Immigrants’ Health Care Access*, California Immigrant Welfare Collaborative (forthcoming 2003).

qualification. We recommend HHS delete the qualifying language and adopt the language from DOJ's template.

Prohibiting the Use of Children as Interpreters: The guidance does not clearly prohibit the use of children as interpreters. Children cannot be expected to have the knowledge or maturity to communicate complex topics and terminology in both English and the target language. Minors are rarely competent and perhaps never appropriate interpreters. The use of children as interpreters is particularly problematic in a number of situations encountered by HHS recipients, including healthcare settings where accurate communication is critical to diagnosis and treatment, sensitive situations, such as those involving child protection and domestic violence, and situations where important rights are at stake, such as those involving potential termination of essential services or sanctions for program noncompliance.

The use of minors as interpreters is damaging to children and families. Requiring children to interpret for their parents can upset familial relationships by placing parents in a role of dependence on their children that undermines parental authority and may be contrary to the family's cultural beliefs. Many children are forced to miss school to assist their parents or other family members, compromising their opportunities to pursue ongoing education or careers that depend on academic success. Meuy Chiew Saepanh, an Oakland, California High School Senior, describes her experience interpreting for her parents as follows:

I translate meetings with the welfare caseworkers for my parents. The welfare office sends us notices giving us appointment dates, but not a specific meeting time. If I am there to complain, it takes three to four hours for someone to meet with us....As a result, I end up missing a lot of school. And if I miss too much school, the welfare office cuts our family off welfare. They call it a sanction.¹⁷

The use of children as interpreters does not ensure competent interpretation and is harmful to children and families. We strongly urge OCR to amend the Guidance to prohibit the use of minors as interpreters regardless of the beneficiary's request, except in exigent situations, such as medical emergencies, where there exists no alternative means of providing language assistance. We further urge HHS to adopt stronger language against using untrained interpreters, such as family members and friends, as interpreters.

Development of a Language Access Plan: The guidance states that federal fund recipients, after determining that they should provide language services, *may* develop a language access plan. This does not comply with the DOJ template, which uses "should" rather than "may." Using "may" in place of "should" replaces a strong recommendation that a recipient have a written plan with permission to have one. Some providers may see this language as creating a disincentive to have a plan, which, by facilitating enforcement, could be perceived as creating an additional level of accountability.

¹⁷ Case study in *Falling Through the Cracks: How California's Welfare Policy Keeps Families Poor*, Race and Public Policy Program, Applied Research Center (2003).

Recipients should be required to develop written language access plans and to make those plans, and details of their implementation, available to OCR for compliance reviews. A written language access plan is a critical component of an effective language access program. Recipients who do not have a written plan might respond to every need for language assistance on an ad hoc basis, and cannot ensure that language services are available when needed or provided in a thoughtful, efficient manner. A written plan, updated regularly, can serve as a repository of information about available language access resources and protocols for using them. It creates a vehicle for gathering and preserving institutional knowledge about providing language assistance. Especially in large entities, a written plan is essential for conveying the policies and procedures for providing language access to all staff.

The Texas Department of Human Services has recognized the importance of the consistency such a plan provides. A February 2002 Center for Public Policy Priorities report on TANF and immigrants in Texas found that offices of the Texas Department of Human Services (DHS) varied in their level of accessibility to LEP persons. The report noted that DHS has stated it is working on improvements that will standardize and enhance its current operating procedures in serving LEP persons, including standard operating procedures, worker training, provider contract language and a new LEP procedures section in the DHS Administrative Handbook.¹⁸

A written plan is also important for recipients that rarely encounter LEP persons, because it provides an important reference for staff who infrequently engage language assistance resources. Among all recipients, a written plan can be used to train staff, inform clients of their rights, and offer information to the community about how the recipient is meeting the needs of its LEP clients. HHS should strongly encourage its recipients to develop written language assistance plans, and at minimum conform its guidance to the DOJ template by substituting “should” for “may.”

Referral to Other Providers: The Guidance provides that “In some cases language services should be made available on an expedited basis while in others the LEP individual may be referred to another office of the recipient –or to another recipient--for language assistance.” The next sentence reads “In certain circumstances, pursuant to an arrangement, where there is no discriminatory intent, the purpose is beneficial and will result in better access for LEP persons, it may be appropriate for a recipient to refer the LEP beneficiary to another recipient.” It is not sufficiently clear that the transfer described in the first sentence is permitted only under the circumstances described in the second. Without this clarification, recipients could read it a blanket authorization to refer LEP individuals to culturally and linguistically competent providers without having an arrangement that protects fragile safety net providers and without making any effort to ensure meaningful access. This clarification can be accomplished by ending the first sentence after “expedited basis.”

In addition, the second sentence should be modified to limit referrals to situations where the client will not experience transportation barriers or unreasonable delays. While implicit in the

¹⁸ Bresette, et al, *TANF and Immigrants in Texas: Lessons for Reauthorization*, Center for Public Policy Priorities (February, 2002).

requirement that the referral result in better access, these additional provisions provide an important clarification.

“I Speak” Cards: We support the Guidance’s recommendation that the Census Bureau language identification flashcard posted on www.lep.gov be used to identify the languages spoken by LEP individuals. However, The Census Bureau flashcard, which is several pages long, is not an “I Speak” card as described in the Guidance. A true “I Speak” card is designed to be carried by an individual. It identifies the bearer’s language in English and informs the individual of his or her right to an interpreter in the bearer’s language. The card serves the dual purposes of identifying the bearer’s language and informing the bearer of his or her rights, increasing the potential for Title VI compliance. Pacific Asian Language Services for Health (PALS) in Los Angeles, California pioneered the development of the I Speak card, and an excellent example can be found on their web site at www.palsforhealth.org. We recommend that HHS make the PALS I Speak card or a similar card available through its web site and lep.gov, and modify the Guidance to encourage recipients and others to distribute them to LEP persons.

Enforcement: We support OCR’s continuing commitment to investigate all complaints, reports and other information indicating recipients’ non-compliance with Title VI. However, the compliance and enforcement policies discussed in the Guidance suggest that OCR’s enforcement activities will be complaint-driven. OCR should proactively monitor recipients’ compliance with their Title VI obligations, and incorporate consideration of disparate impact into these compliance efforts. Random reviews, especially coupled with a requirement that all recipients have a written plan open to OCR for inspection, could promote the efficient use of resources in this process.

We appreciate the opportunity to submit these comments. Please contact Gabrielle Lessard at (213) 639-3900 x 114 if you have any questions or need additional information. We look forward to working with OCR to improve the Guidance and implement it throughout all of HHS’ programs.

Yours truly,

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