QUESTIONS AND ANSWERS REGARDING THE AUGUST 16, 2010 TITLE VI LANGUAGE ACCESS GUIDANCE LETTER TO STATE COURTS

On August 16, 2010, Assistant Attorney General Tom Perez issued a language access guidance letter to state courts (Letter). The following series of questions and answers were developed to address several topics raised by state courts but not addressed directly by the letter.

Question 1: Does the definition of "court" include administrative hearing proceedings? Do the same requirements apply to the executive branch agencies responsible for conducting those hearings?

Answer:

The Letter addresses the application of Title VI of the Civil Rights Act of 1964 (Title VI) requirements to state court systems. The standards set forth in the Letter are applicable to all proceedings conducted by state courts including those considered administrative in nature. Although the Letter does not specifically address administrative adjudicative hearings conducted by state or local executive branch agencies that receive federal financial assistance, the reasoning would generally extend to them. Indeed, The Department of Justice (DOJ) Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons (Guidance) states that: "As used in this appendix, the word 'court' or 'courts' includes administrative adjudicatory systems or administrative hearings administered or conducted by a recipient." 67 Fed. Reg. 41,455 at 41,459 n.5 (June 18, 2002) (LEP Guidance).

Question 2: What are DOJ's expectations with regard to using remote interpreters, both telephonic and by video? Is it acceptable to use a close-circuit network and videoconferencing to provide interpreter services when local certified or competent interpreters are not available?

Answer:

Remote interpreting is an appropriate and reasonable alternative in a variety of circumstances. Whether remote interpreting is a reasonable method to provide court language assistance depends on those circumstances, including, for example, whether other participants to the proceeding or program are appearing remotely, the availability of qualified in-person interpreters, the quality of the remote technology, the nature and duration of the proceeding or communication, the relative quality, and cost and delay associated with the in-person and remote interpreters.

Question 3: The "second check" of a non-certified interpreter's skills discussed in Section IX C. 1 of the Guidance can be time consuming and difficult to accomplish (finding a second person who is bilingual and willing to come to court at all hours for this purpose). This process also presumes that the second person has a competence in both languages. Is this process an example of how this situation could be addressed or is it required?

Answer:

The Department of Justice (DOJ) Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient (LEP) Persons states that "this 'second check' solution may be one appropriate way of ensuring meaningful access to the LEP individual." 67 Fed. Reg. at 41,471. It is not, therefore, a requirement. What is required is that courts have an appropriate system in place to determine the qualifications of an interpreter who is not certified because the needed exams have not been devised in the relevant language. A variety of fora exist for sharing promising practices in this area, including the Consortium for Language Access in the Courts developed by your organization, the National Center for State Courts, the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, and the National Association of Judiciary Interpreters and Translators.

Question 4: Can DOJ provide additional guidance concerning what is meant by "qualified interpreters" for handling interpretation in a court's clerk's office or other court-related activities outside of the courtroom?

Answer:

Determining the appropriate qualifications needed for providing language support outside of the courtroom depends on the nature, purpose, and context of the communication. In some settings, a demonstrably bilingual court employee may provide service directly "in-language" to the LEP party or customer in a second language, without having any training or skills in interpreting. When an interpreter is called for, the needed skills and qualifications will vary according to the particular context. For example, the interpreter may not need to provide simultaneous interpretation in some office settings. And in other settings, such as a file room, the interaction may not require lengthy or complex conversations such that a telephone-based interpreter may suffice. On the other hand, interviews conducted by a monolingual court psychologist should be supported with highly skilled professional interpreters.

Question 5: If there are not qualified interpreters in less frequently used languages to assist in the provision of court-ordered mandatory services (e.g., mandatory parenting seminars, drug treatment programs, mediation, etc.), is it acceptable for the court to waive the mandatory requirements?

Answer:

Courts should diligently seek to provide language access to all LEP persons in such settings utilizing both qualified bilingual staff as well as interpreter assistance, not only as a civil rights matter, but also in the interests of the judicial system and in order to accomplish the goals of the mandatory services. Depending on the circumstances, waiving participation in mandatory court programs for LEP parties may be an acceptable interim measure under Title VI when qualified interpreters are not reasonably available, appropriate alternatives are not reasonable, and affected individuals are not harmed by the waiver.

Question 6: Footnote 6 in Section III of the Guidance states that only funds directed to the particular program or activity that is out of compliance would be terminated. Are there any other consequences for noncompliance other than losing Federal funds directed to the program that is out of compliance?

Answer:

If a court is engaging in national origin discrimination prohibited by Title VI, DOJ or another federal funding entity might first issue formal findings of such civil rights violations. If voluntary compliance cannot then be secured, DOJ could take further action, such as seeking equitable relief in court. The findings might also result in suspension of funding, or affect a recipient's eligibility to receive new grants, or it could result in a conditional award. Finally, when the subject program is a sub-recipient of federal financial assistance, the finding of non-compliance may suggest a separate Title VI violation by the recipient for failure to ensure the sub-recipient's proper use of the assistance.

Question 7: Can DOJ reconcile the differing requirements for providing court interpreters in federal courts and in the state courts?

Answer:

While Constitutional due process principles can be used in support of interpreter requirements in both federal and state courts, Title VI and implementing regulations do not apply to the federal courts because they are not recipients of federal financial assistance, being instead a branch of the federal government. Further, Executive Order 13166 also is not applicable since it applies only to the executive branch. The authority to supervise the federal courts with respect to language access resides instead with the Supreme Court and Congress.