U.S. Department of Justice

Civil Rights Division

Assistant Attorney General
950 Pennsylvania Avenue, NW - RFK
Washington, DC 20530

APR 14 2009

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EXECUTIVE #1
APR 20 2009
ATTORNEY GENERAL

The Honorable W.A. Drew Edmondson
Attorney General of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105

Dear Mr. Edmondson:

Our office is aware that legislators in Oklahoma are seeking to send an English-only constitutional amendment to voters for ratification. If enacted, the amendment generally would seek to require that "[o]fficial actions of the state government be taken only in the English language." We are writing to advise you that implementation of this amendment may conflict with Oklahoma's obligations to protect the civil rights of limited English proficient (LEP) persons.

Many state, county, and local jurisdictions receive, either directly or indirectly, federal financial assistance from the Department of Justice (DOJ) or other federal agencies. As you know, recipients of federal financial assistance must comply with various civil rights statutes, including Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq.* (Title VI), which prohibits discrimination on the basis of race, color, and national origin. Specifically, Title VI states that no person 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." Title VI further provides that each federal department and agency empowered to extend federal financial assistance must promulgate regulations that effectuate the purpose of Title VI and obtain assurances of nondiscrimination from the recipients of its financial assistance.

Under DOJ regulations implementing Title VI, recipients of federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by LEP persons. *See* 28 C.F.R. § 42.104(b)(2). As the Department noted in our *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,* 67 Fed. Reg. 41,455, 41,457 (June 18, 2002) (*LEP Guidance*):

> In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C.

2000d and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law.

The proposed amendment that passed the Oklahoma House in mid-March (HJR 1042) acknowledges that government use of languages other than English may be required by federal law and would permit use of other languages in such situations. The House proposal further defines "federal law" to exclude, among other things, Executive Order 13166, "unless and until federal or state courts have held [it] to be mandatory and binding on the state." *Id.* As the *LEP Guidance* noted, the Executive Order, reprinted at 65 Fed. Reg. 50,121 (August 16, 2000), did not create new obligations on recipients of federal financial assistance to ensure meaningful access to their programs or activities; that is, the state's obligation to abide by Title VI's bar to discrimination on the basis of national origin against LEP individuals is not dependent on the Executive Order. This Title VI obligation to LEP individuals is long-standing. In *Lau v. Nichols*, 414 U.S. 563 (1974), which addressed the obligation of a school system receiving federal financial assistance to provide language-based assistance to an LEP community, the U.S. Supreme Court held that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national origin discrimination. For this reason, the proposed exclusion of the Executive Order from the definition of "federal law" has no practical effect. As *Lau* makes clear, the obligation to provide meaningful access to LEP individuals is mandatory and binding on the state.

The bill, which is now pending in the state Senate, includes a definition of "federal law" that includes only the "express language of the Constitution of the United States, federal laws, or binding and statutorily authorized federal regulations requires the use of a language other than the American dialect of English." OK HJR 1042 § 1.B.3 (Floor Substitute, Mar. 11, 2009). As discussed above, Title VI, federal regulations implementing Title VI, and the *LEP Guidance* require Oklahoma agencies and other recipients of federal financial assistance to take reasonable steps to provide meaningful access to the LEP individuals they encounter or who are in the eligible service area (including LEP parents and guardians of any minor, whether the minor is LEP or not).

Moreover, the President issued the Executive Order in large part to underscore and provide renewed emphasis on the importance of providing "access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency." The Executive Order further sets forth an obligation that federal agencies "draft title VI guidance" describing how each will make certain that their recipients provide for such access to LEP individuals. The *LEP Guidance* makes clear that the criteria for use in determining when to provide LEP individuals with meaningful access to federally-supported programs and services "are the same criteria DOJ will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations." 67 Fed. Reg. at 41,457.

In order to assist agencies in determining the extent and type of language services needed to meet the legal standard of providing meaningful access to LEP individuals, the *LEP Guidance* recommends considering four factors. These factors take into account that recipients are asked to make increasingly difficult decisions on how to allocate scarce resources. The factors are:

(1) The number or proportion of LEP persons in the eligible service population;

(2) The frequency with which LEP individuals come into contact with the program;

(3) The importance of the program or activity to the LEP person (including the consequences of lack of language services or inadequate interpretation and/or translation); and

(4) The resources available to the recipient and the costs.

Moreover, this nondiscrimination requirement – including rules applicable to the provision of services to the LEP population – applies notwithstanding state adoption of English-only constitutional amendments or English-only laws or ordinances. The *LEP Guidance* addresses this issue specifically, noting that "some recipients operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be subject to Federal nondiscrimination requirements, including those applicable to the provision of Federally assisted services to persons with limited English proficiency." *Id.* at 41,459. State agencies and other entities in Oklahoma that receive federal financial assistance thus would be precluded by federal law from abiding by an English-only requirement where it conflicts with their obligations under Title VI.

For your convenience, we have enclosed the *LEP Guidance*. We also direct your attention to the Federal Interagency website on limited English proficiency, www.lep.gov, to find useful information on language access issues.

The Justice Department has an abiding interest in securing full compliance with the language access requirements of Title VI. The Civil Rights Division welcomes requests for technical assistance from its recipients of federal financial assistance, and works with recipients to create language assistance plans and cost-effective strategies to ensure meaningful access for LEP individuals. Please feel free to contact Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, at (202) 307-2222 for more information or assistance on this matter.

Sincerely,

Loretta King
Acting Assistant Attorney General

Enclosure