

# Enforcing Language Access Rights: Trends and Strategies

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**E**qual access to governmental activities is necessary. In large part people with limited English proficiency do not have equal access. In this article we suggest some strategies and offer examples of programs working to achieve more access. We review the federal law on language access and describe some programs' advocacy to maximize such access.

Jane Perkins discusses recent federal court trends on the enforceability of federal obligations to provide language access. Mary R. Mannix describes advocacy efforts to secure language access in public benefit programs and a new Welfare Law Center project which aims to ensure that welfare agencies and private contractors delivering welfare and related services provide language access. Jack Daniel and Wanda Hasadsri describe California Rural Legal Assistance's strategies based on state law.

## I. Language Access Responsibilities Under Federal Civil Rights Laws

For over thirty years, civil rights policies at the federal level have required national-origin minorities to have meaningful language access. These policies stem from Title VI of the Civil Rights Act of 1964, which says: "No person in the United States shall, on 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."<sup>1</sup>

Title VI does not address enforcement by private citizens. However, from the enactment of the law until 2001, courts, Congress, federal agencies, federal fund recipients, and private individuals assumed that victims of Title VI violations had two independent remedies: an administrative complaint filed with the relevant federal agency or a lawsuit to challenge either intentional discrimination or actions which reflect disparate treatment or have a disparate impact under the Title VI regulations.<sup>2</sup>

In 2001 the U.S. Supreme Court issued a 5-to-4 decision that upset these long-standing assumptions. The case, *Alexander v. Sandoval*, involved a challenge to the Alabama Safety Department's refusal to administer driver's examinations in a language other than English.<sup>3</sup> A majority opinion held that private individuals had no implied right of action to enforce the Title VI regulations in court.

<sup>1</sup>Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2004).

<sup>2</sup>The regulations of a number of federal agencies, issued at Title VI's enactment, prohibit federal fund recipients from "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin." 28 C.F.R. § 42.104(b)(2) (2004) (U.S. Department of Justice); see, e.g., 45 C.F.R. § 80.3(b) (2003) (U.S. Department of Health and Human Services); 49 C.F.R. § 21.5(b)(2) (2003) (U.S. Department of Transportation).

<sup>3</sup>*Alexander v. Sandoval*, 532 U.S. 275 (2001) (Clearinghouse No. 51,706).

Not surprisingly, this decision quickly altered the legal landscape. First, private enforcement of Title VI against organizations and individuals was limited to situations where intentional discrimination could be shown. Intentional discrimination can be difficult to prove. Second, *Sandoval* called into question private individuals' rights to enforce the Title VI regulations against state actors through 42 U.S.C. § 1983, which provides for a cause of action to individuals when the state deprives them of rights guaranteed by the Constitution or federal laws.<sup>4</sup> Third, *Sandoval* raised questions about the continued viability of the Title VI regulations. The majority assumed for purposes of the case that the regulations were valid. However, it noted "considerable tension" between the statute, which, it said, prohibits only intentional discrimination, and the disparate impact regulations, which proscribe activities that the statute permits.<sup>5</sup>

*Sandoval* raises questions about whether Title VI extends to discrimination on the basis of primary language. Thirty years ago, in *Lau v. Nichols*, the Court held that the San Francisco school district violated Title VI when it failed to provide adequate instruction for children of Chinese ancestry who did not speak English.<sup>6</sup> The Court found it "obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority . . . which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations."<sup>7</sup>

The *Sandoval* majority acknowledged *Lau's* interpretation of the statute, but it gave this portion of *Lau* no weight.<sup>8</sup> While the majority did not question *Lau's* conclusion that Title VI prohibited discrimination on the basis of language, recent lower court cases call this premise into question.<sup>9</sup>

Despite the Supreme Court's rollback of civil rights, federally funded entities have received more guidance on how to ensure meaningful language access. The White House, U.S. Department of Justice, and other federal agencies have issued guidelines outlining procedures to provide access to persons with limited English proficiency.

#### A. Executive Order 13166

On August 11, 2000, Pres. Bill Clinton issued Executive Order 13166, entitled *Improving Access to Services for Persons with Limited English Proficiency*.<sup>10</sup> The executive order's reach is extensive, affecting all federally conducted and federally assisted programs and activities. The Bush administration affirmed its commitment to the order.

Executive Order 13166 has two major initiatives: it requires each federal agency granting federal funding to draft Title VI guidance specially tailored to its recipients; and it requires all federal agencies to meet the same standards as federal fund recipients in assuring meaningful access to persons with limited English proficiency.<sup>11</sup> In carrying out the order, "agencies shall ensure that stakeholders,

<sup>4</sup>42 U.S.C. § 1983 (2004). See, e.g., *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001) (Clearinghouse No. 53,759) (refusing to allow enforcement of Title VI regulations pursuant to § 1983).

<sup>5</sup>*Sandoval*, 532 U.S. at 282.

<sup>6</sup>*Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>7</sup>*Id.* at 568.

<sup>8</sup>*Sandoval*, 532 U.S. at 285.

<sup>9</sup>See *ProEnglish v. Bush*, 70 Fed. App. 84, 2003 U.S. App. LEXIS 9397 (4th Cir. May 14, 2003), dismissing as not ripe for review, Civ. No. 02-CV-356-A (E.D. Va. filed March 12, 2002) (Clearinghouse No. 55,320) (arguing that federal policies improperly equate language with national origin when Title VI does not).

<sup>10</sup>Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 16, 2000).

<sup>11</sup>Each federal agency was to have developed and begun to implement a compliance plan by July 29, 2002. See, e.g., Letter from Ralph F. Boyd Jr., Assistant Attorney General, Civil Rights Divisions, U.S. Department of Justice, to Heads of Federal Agencies, General Counsels and Civil Rights Directors (July 8, 2002), at [www.usdoj.gov](http://www.usdoj.gov). Most agencies did not meet the deadline. See [www.usdoj.gov/crt/cor/13166.htm](http://www.usdoj.gov/crt/cor/13166.htm).

such as [persons with limited English proficiency] and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input.”<sup>12</sup>

## B. Justice Department Guidelines

Executive Order 13166 designates the Justice Department as the lead federal agency with the responsibility for guiding other agencies on language access. Simultaneously with Executive Order 13166, the Justice Department issued general policy guidance to federal agencies that grant federal financial assistance. The guidance announced four factors for determining the extent of a federal fund recipient’s Title VI obligations to assist persons with limited English proficiency:

- The number or proportion of individuals who have limited English proficiency and could not access services without efforts to remove language barriers.
- The frequency with which individuals with limited English proficiency contact the federally assisted program.
- The nature and importance of the program to beneficiaries.
- Available resources and cost considerations.<sup>13</sup>

Additional Justice Department guidance, adopted on June 18, 2002, for recipients of financial assistance has become a benchmark against which to measure agencies’ language access policies.<sup>14</sup> The recipient guidance makes the following major points:

- State and local “English-only” laws do not excuse federal fund recipients from

complying with Title VI and agency guidance.<sup>15</sup>

- While the standard is designed to be “flexible and fact-dependent,” the starting point for determining meaningful access remains an individualized assessment that balances the four factors originally announced in the Justice Department general guidance.
- Oral language services—interpretation—may be needed. Interpreters should demonstrate proficiency in communicating information in both English and the other language, have knowledge in both languages of specialized terms, and follow confidentiality and impartiality rules.
- “When oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the [person with limited English proficiency].”<sup>16</sup> However, after receiving this offer, the person with limited English proficiency should generally be permitted to use family members or friends to interpret if this arrangement is appropriate.
- Written language services—translation—may be needed for “vital” documents. The need to translate written documents should be determined on a case-by-case basis. However, the following “safe harbor” activities are strong evidence of the recipient’s compliance: (1) written translations of vital documents for each language group that constitutes 5 percent or 1,000 individuals, whichever is less, of the population served or likely to be served; or (2) if fewer than fifty persons are in a language group that reaches the 5 percent trigger, the recipient does not translate vital documents but gives

<sup>12</sup>65 Fed. Reg. 50,121.

<sup>13</sup>Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency: Policy Guidance, 65 Fed. Reg. 50123–25. The guidance does not create obligations beyond those already mandated by law. *Id.* at 50121–22.

<sup>14</sup>Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455–57 (June 18, 2002).

<sup>15</sup>*Id.* at 41459.

<sup>16</sup>*Id.* at 41462.

written notice in the group's primary language of the right to receive competent oral interpretation of those documents, free of cost.<sup>17</sup>

- After completing the four-factor analysis and deciding what language assistance services are appropriate, recipients should develop an implementation plan. Five elements for a language access policy and effective implementation plan are suggested: (1) identifying individuals who have limited English proficiency and need assistance; (2) deciding on the ways to provide language assistance; (3) training staff; (4) notifying persons with limited English proficiency; and (5) monitoring and updating the policy.

Recognizing that compliance will take time, the Justice Department will look favorably on intermediate steps that recipients take.<sup>18</sup>

## II. Strategies to Ensure Access to Public Benefits

According to the U.S. Census Bureau, the proportion of the population that does not speak English very well grew from 6.1 percent in 1990 to 8.1 percent in 2000, and the number of linguistically isolated households in which no person aged 14 or over speaks English at least "very well" grew to 4.4 million households.<sup>19</sup> For low-income individuals with limited English proficiency, whether welfare agencies provide services in languages other than English, as required by federal law, may determine whether they receive desperately needed cash assis-

tance, Medicaid, and food stamps and related services to help them secure employment.<sup>20</sup>

Reports from legal advocates indicate that many welfare agencies have a long way to go to ensure that individuals with limited English proficiency receive language-appropriate services. Moreover, the increasing role of private contractors in delivering critical welfare-to-work and related services presents additional challenges. These entities may not be aware of their legal obligations. Too often private contractors are not responsive to public and consumer advocacy and input. Numerous vendors may deliver welfare services, increasing the entities that advocates must monitor. State and local agency oversight of contractors may be weak.<sup>21</sup>

Given the historic racial and ethnic discrimination that has permeated welfare administration, legal aid programs and community groups should consider advocacy on this issue strongly.<sup>22</sup> Because federal court litigation to enforce agencies' obligations to serve individuals with limited English proficiency has become difficult, advocates may want to consider state-law claims as well as non-litigation strategies. Depending on local circumstances, a multifaceted strategy may be necessary.

### A. Advocacy Before the Office for Civil Rights

Within the federal agencies, an office for civil rights is often designated to receive

<sup>17</sup>*Id.* at 41463-64.

<sup>18</sup>*Id.* at 41466.

<sup>19</sup>HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS 2000, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 3, 10 (2003). For a review of studies regarding the Temporary Assistance for Needy Families program and individuals with limited English proficiency, see SHAWN FREMSTAD, CENTER ON BUDGET AND POLICY PRIORITIES, IMMIGRANTS, PERSONS WITH LIMITED PROFICIENCY IN ENGLISH, AND THE TANF PROGRAM: WHAT DO WE KNOW? (2003), available at [www.cbpp.org/pubs/welfare03.htm](http://www.cbpp.org/pubs/welfare03.htm).

<sup>20</sup>Civil Rights Act of 1964, *supra* note 1. See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47311 (Aug. 8, 2003) (U.S. Department of Health and Human Services). The federal Food Stamp Act and implementing regulations also require states to provide bilingual services. 7 U.S.C. § 2020(c), (e) (2003); 7 C.F.R. §§ 272.4(b), 272.5(b)(4) (2004).

<sup>21</sup>For a discussion of privatization and its implications for advocacy, see generally 35 CLEARINGHOUSE REVIEW 491-676 (Jan.-Feb. 2002) (special issue on the implications of privatization on low-income people).

<sup>22</sup>See generally Henry A. Freedman, *The Welfare Advocate's Challenge: Fighting Historic Racism in the New Welfare System*, 36 CLEARINGHOUSE REVIEW 31 (May-June 2002).

and investigate complaints. For example, within the U.S. Department of Health and Human Services (HHS), the Office for Civil Rights is the agency charged with enforcing Title VI. The regulations provide that the Office for Civil Rights can decide to initiate investigations on its own, but it must respond to complaints filed by an individual.<sup>23</sup> The federal regulations require that when investigating complaints the office attempt resolution of the matter through settlement. If settlement is not reached, HHS can terminate federal funding to the program that is out of compliance or ask the Justice Department to sue for compliance.<sup>24</sup> Individuals and their advocates should learn about their regional offices for civil rights because, for the most part, complaints are filed and resolved there.

Advocacy before the Office for Civil Rights of the relevant federal agency has its advantages and disadvantages, and advocates report varying experiences with individual regional offices for civil rights, including dissatisfaction with the offices' process.<sup>25</sup> These offices can be uneven in the degree of their enforcement activities and the time frames in which they complete investigations. But there has been some recent good news. In the fall of 2003 California advocates won a comprehensive resolution of their 1999 complaint to the HHS Office for Civil Rights. The complaint charged that the Los Angeles County welfare agency denied equal access to individuals with limited English proficiency by, among other misdeeds, not providing adequate bilingual staff and interpreters or translated materials and by steering non-English-speaking and non-Spanish-speaking individuals to the least desirable welfare-to-work activities. The county agreed to take numerous remedial steps, including establishing a com-

munity advisory board and a central coordinating office to oversee development and implementation of a comprehensive language policy; adopting policies to promote meaningful access to employment and training programs; creating new programs in vocational skills for individuals with limited English proficiency; and reporting on an ongoing basis to the Office for Civil Rights.<sup>26</sup>

## B. Negotiations with State and Local Agencies

State and local welfare agencies may be willing to work with advocates to develop a language access policy. The federal guidance puts agencies on notice of their obligations and the elements of an adequate language access plan. Many agencies likely are well aware of their shortcomings and the need to come into compliance. In Arizona, for example, the agency's failure to translate all of its public benefit notices into Spanish was but one glaring sign of its noncompliance. In 2002 the Welfare Law Center, the Morris Institute for Justice, and Southern Arizona Legal Aid's negotiations with this welfare agency resulted in the agency's prompt adoption of a twelve-step corrective action plan. The plan included assessment of the language diversity of the state's low-income population; development of posters with "I speak" cards to alert clients to free translation services; development of a form to assess clients' language needs; translation of all notices and forms into Spanish; development of a notice in multiple languages advising clients how to get notices translated into other languages; revisions of the language assistance policy; and staff training. Ensuring the agency's continued progress will require ongoing monitoring. Nevertheless, the negotiations achieved real results for clients.

<sup>23</sup>45 C.F.R. § 80.8 (2003).

<sup>24</sup>*Id.* See 42 U.S.C. § 2000d-1 (2004).

<sup>25</sup>See Randal S. Jeffrey et al., *Drafting an Administrative Complaint to Be Filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 35 CLEARINGHOUSE REVIEW 276 (Sept.–Oct. 2001).

<sup>26</sup>Resolution Agreement between the Office for Civil Rights, U.S. Department of Health and Human Services Region IX, and the Los Angeles County Department of Public Social Services, Complaint 09-00-3082 (Oct. 2003) (on file with Welfare Law Center).

### C. State and Local Legislation

Advocates may want to consider seeking state or local legislation that defines more precisely the obligations of welfare agencies to ensure meaningful language services. For example, in late 2003, as part of their multifaceted strategy, New York City advocates won enactment of city council legislation specifying the steps that the welfare agency must take to provide language services. Among other provisions, the legislation requires keeping records of the provision of these services, applies to agency contractors, and prescribes agency contract terms aimed at securing contractors' compliance with the law's provisions.<sup>27</sup>

### D. Advocacy by Grassroots Groups

Community groups that serve low-income individuals with limited English proficiency can play an important role in exposing agency failures and securing changes in policies and practices. In New York City a community survey by Make the Road by Walking documented community complaints about the local welfare agency and recommended improvements, including the need for services for non-English speakers.<sup>28</sup> With colleagues in the city, Make the Road by Walking has been actively involved in language access advocacy including a successful Office for Civil Rights complaint, successful litigation to enforce food stamp bilingual requirements, and advocating city council legislation.<sup>29</sup>

When low-income Idaho families, especially families of color, reported denials of benefits in the Children's Health Insurance Program, Idaho Community Action Network launched a campaign to determine whether the program was discriminating against minorities. Its test-

ing project uncovered discrimination against Latino families; it uncovered, among others, a lack of translators, hostile treatment, and burdensome verification requirements. Idaho Community Action Network publicized its findings and secured reforms, including a simplified application process and a Spanish application form. Enrollment of children in the Children's Health Insurance Program and Medicaid increased after this campaign.<sup>30</sup>

### E. Welfare Law Center Project

The Welfare Law Center is stepping up its efforts across the country to ensure that welfare agencies and private contractors delivering welfare and related services comply with their obligations to ensure access for individuals with limited English proficiency. Beginning in September 2004, an Equal Justice Works fellow, Erin Oshiro, will work on this project along with senior center staff. The center will partner with local advocates to develop and implement advocacy strategies; identify and publicize advocacy efforts, resources, and model policies and practices; and promote communication among advocates addressing these issues through a listserv and other means, where appropriate, such as conference calls. The center welcomes inquiries from advocates about advocacy efforts and collaborating.

### III. State-Law-Based Strategies of California Rural Legal Assistance

Given the practical hurdles inhibiting direct enforcement in federal court of the rights of persons with limited English proficiency to access basic services, California Rural Legal Assistance is developing and implementing alterna-

<sup>27</sup> Equal Access to Human Services Act of 2003, New York City Admin. Code § 8-1001 – 8-1011.

<sup>28</sup> Make the Road by Walking, System Failure: Mayor Giuliani's Welfare System is Hostile to Immigrant and Poor New Yorkers (1999) (on file with Welfare Law Center) (summary available at [www.maketheroad.org](http://www.maketheroad.org)).

<sup>29</sup> *Ramirez v. Giuliani*, 99 Civ. 9287 (BSJ) (S.D.N.Y. Sept. 5, 2001) (stipulation and order of settlement) (Clearinghouse No. 52,785).

<sup>30</sup> For a description of this campaign, see APPLIED RESEARCH CENTER, WORTHWHILE WELFARE REFORMS (2001), at [www.arc.org/Pages/ArcPub.html#warp](http://www.arc.org/Pages/ArcPub.html#warp).

tive strategies for enforcement. We are only in the beginning stage of our enforcement strategies, and we expect setbacks. However, we feel that we have an initial tactical approach which, with inevitable modification, will help our clients achieve the access they deserve.

California Rural Legal Assistance staff, clients, and boards identified language access as a critical issue, in part because of regional demographics. California has a large number of people with limited English proficiency. According to the 2000 census, in California 12.4 million persons (aged 5 or over) speak a language other than English at home. This is over 26 percent of the national population with limited English proficiency.<sup>31</sup> In some of the communities that California Rural Legal Assistance serves, the population with limited English proficiency is much greater than for the state as a whole.<sup>32</sup>

The numbers and percentages in California are growing. Last year the number of children with limited English proficiency in California public schools rose to approximately 1.6 million students from the 1.3 million in 1995.<sup>33</sup> The percentage of people speaking a language other than English at home in California grew from 31.5 percent in 1990 to 39.5 percent in 2000, from 8.7 million people to 12.4 million people.<sup>34</sup>

Those with limited English proficiency suffer grave consequences when agencies

do not provide appropriate interpretation and translation services. For example, interpretation and translation insufficiency is a barrier to the provision of health care.<sup>35</sup> A lack of linguistic and cultural competence led to the illegal imprisonment of a Laotian woman in the Fresno County jail for over ten months when she supposedly was "recalcitrant" in her participation in the California Health Department's tuberculosis control program.<sup>36</sup> Because of a Fresno surgeon's failure to provide adequate interpretation, a Hmong man was not informed that his foot was going to be amputated.<sup>37</sup> He did not learn of the amputation until he woke up from the surgery and his son asked him where his foot had gone. The extent and long history of the adverse effect of limited language access are reflected in prose, poetry, cinema, and song.<sup>38</sup>

California Rural Legal Assistance has been filing administrative complaints in individual cases with both state and federal agencies. We also initiate litigation because court enforcement is a key and indispensable part of the advocacy effort to ensure equal language access. We continue to bring cases in federal court when we have an independent federal claim (e.g., under the Fair Housing Act or equal protection clause) and the state claims arise from the same facts as the federal claims.<sup>39</sup> Given current federal jurisprudence, we rely on state-law theories as well. Although not all of our state-law

<sup>31</sup>All census figures are taken from the U.S. Census Bureau website, <http://factfinder.census.gov>.

<sup>32</sup>E.g., in Lost Hills, California, 93 percent of the population speaks a language other than English at home. In Mendota, California, the figure is 82 percent, and in Huron, California, 87 percent of the population falls in this category.

<sup>33</sup>CALIFORNIA DEPARTMENT OF EDUCATION, ENGLISH LEARNERS IN CALIFORNIA PUBLIC SCHOOLS (2004), available at <http://dq.cde.ca.gov/dataquest/ASPGraph2.asp?Level=State>.

<sup>34</sup>*Id.*

<sup>35</sup> See e.g., G. Vega et al., *Gaps in Service Utilization by Mexican Americans with Mental Health Problems*, AMERICAN JOURNAL OF PSYCHIATRY 156:6 (1999); THE CALIFORNIA ENDOWMENT, UNEQUAL HEALTH. UNEQUAL TREATMENT: WHAT DATA TELL US ABOUT HEALTH GAPS IN CALIFORNIA (2003), available at [www.causecommunications.org/pdf/tce\\_brochure1.pdf](http://www.causecommunications.org/pdf/tce_brochure1.pdf); several articles available on National Health Law Project website, [www.healthlaw.org/race.shtml#ling](http://www.healthlaw.org/race.shtml#ling).

<sup>36</sup>*H.S. v. County of Fresno*, No. CIV-99-001020 (E.D. Fresno Aug. 21, 2000) (order approving settlement) (\$1.2 million settlement, a soul-cleansing ceremony, and written apology from the board of supervisors).

<sup>37</sup>*Cha v. Community Medical Centers*, No. 03 CE CG 01781 SJK (Cal. Super. Ct. Fresno County filed June 3, 2003).

<sup>38</sup>MARTIN ESPADA, ALABANZA: NEW AND SELECTED POEMS 1982-2002 (2003) (Espada was a legal aid lawyer); BALLAD OF GREGORIO CORTEZ (Metro Goldwyn Mayer 1982).

<sup>39</sup>Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2002); U.S. CONST. amend. XIV, § 1.

theories are available to advocates in other states, similar theories may be available.<sup>40</sup> State courts tend to have fewer jurisdictional barriers to standing, private cause of action, and remedies than those articulated by the U.S. Supreme Court in its recent series of cases limiting the availability of civil rights remedies. And California has specific laws that require language access.

### A. State Laws Requiring Interpretation and Translation

The Dymolly-Alatorre Bilingual Services Act requires most state and local agencies to provide translation and, where certain percentages of populations served have limited English proficiency (5 percent for state agencies, a "substantial number" for local agencies), to have sufficient bilingual personnel to ensure the provision of information and services in the language of the non-English-speaking person.<sup>41</sup>

California Government Code Section 11135 is sometimes referred to as California's Title VI equivalent.<sup>42</sup> In fact, it provides for more expansive rights than Title VI (even before *Sandoval*). It prohibits class-based discrimination under any programs or activities that receive direct or indirect state financial assistance or support. One protected class is "color or ethnic origin identification," defined as "the possession of the racial, cultural or linguistic characteristics common to a racial, cultural or ethnic group or the country or ethnic group from which a person or his or her forebears originated."<sup>43</sup> Although not yet interpreted by the court, this definition should eliminate the problem considered in *Sandoval* of whether limited English

proficiency is a sufficient proxy for national origin to provide protection.

Prohibited practices under the regulations including the failure "to take appropriate steps to ensure that alternative communication services are available to ultimate beneficiaries."<sup>44</sup> Thus recipients of state funding have an affirmative duty. Discriminatory effect, not just intent, is prohibited.<sup>45</sup> The obligation to provide language access applies to state, local, and private actors. County hospitals provide services to our clients, as do private hospitals. All have some obligation to provide language access; enforcement varies by the nature of the entity.

### B. Enforcement Mechanisms When Defendants Are State Actors

When defendants are state actors, language access obligations can be enforced through a writ of mandate or taxpayer injunction.

**Writ of Mandate.** If a governmental entity fails to provide equal language access in violation of state or federal law, a state writ can be used to challenge the agency's policy.<sup>46</sup> These writs challenge the actions of an agency invested with express powers and duties, such as the duty to provide interpretation. A writ can be based on the offending entity having (1) taken an action that is contrary to its express "ministerial" and nondiscretionary duties; (2) failed to fulfill a duty or exercise its discretion when compelled to do so under law; or (3) abused its discretion when exercising its power. A failure to provide required interpretation would meet all these tests.

<sup>40</sup>See JANE PERKINS ET AL., ENSURING LINGUISTIC ACCESS IN HEALTH CARE SETTINGS: LEGAL RIGHTS AND RESPONSIBILITIES app. D (2d ed. 2003).

<sup>41</sup>Dymolly-Alatorre Bilingual Services Act, CAL. GOV'T CODE §§ 7290-7297 (2004).

<sup>42</sup>CAL. GOV'T CODE §§ 11135-11139.5 (2004).

<sup>43</sup>*Id.* § 11135(a); CAL. CODE REGS. tit. 22, § 98210(b) (2004).

<sup>44</sup>CAL. CODE REGS. tit. 22, § 98211(c).

<sup>45</sup>*Id.* § 98101(i), (j).

<sup>46</sup>CAL. CIV. PROC. CODE § 1085 (2004).



A writ can compel the performance of an act that is specifically required by the law, such as providing interpretation.<sup>47</sup> A writ can compel an agency to cease acting in a manner inconsistent with the law and begin implementing practices that are consistent with the law. It is available also to force an administrative agency to act in a manner consistent with the statute that it is charged with enforcing.<sup>48</sup> The writ issues upon a showing that an official or government agency refused to exercise or abused its discretion in performing an act mandated by statute.<sup>49</sup> The writ can force the correction of a policy that interprets a law or regulation in a manner inconsistent with the statute that the agency is enforcing.<sup>50</sup> Policies that have been issued and disseminated but not yet applied may be challenged through a writ without waiting for someone to suffer from the policy's application.<sup>51</sup>

The writ has standing requirements: the petitioner must be "beneficially interested." The petitioner must demonstrate that she is in the class of persons to whom the legal duty is owed.<sup>52</sup> Broader standing is available to raise questions of public policy or right.<sup>53</sup>

**Taxpayer Injunction.** A citizen taxpayer may get an injunction prohibiting the illegal expenditure of public monies.<sup>54</sup>

The taxpayer need not have suffered injury and may assert rights under state and federal law.<sup>55</sup> Our suits against public agencies assert that the use of money without providing interpretation is an illegal expenditure because the use violates state or federal laws that obligate the defendants to provide interpretation.<sup>56</sup>

### C. Enforcement Through Unfair Competition Law When Defendants Are Private Actors

The California Unfair Competition Law is a mechanism for enforcing the language access obligations of private actors.<sup>57</sup> Many states have unfair competition laws, but the nature and scope of available remedies and standing requirements vary widely among the states. In California the unfair competition law is a strong tool for enforcement.

A violation of state or federal law or regulations (e.g., one mandating interpretive services) is a violation of California's unfair competition law and may be enjoined.<sup>58</sup> The broad reach of the unfair competition law encompasses acts that are done in the course of business and are unfair or fraudulent, including "anything that can properly be called a business practice and that at the same time is forbidden by law."<sup>59</sup> It permits a cause of action if an act or practice violates a law, "be it civil or criminal, feder-

<sup>47</sup>We have taken the position that this includes violations of the federal regulations prohibiting disparate effect by recipients of federal financial assistance.

<sup>48</sup>*Los Angeles Taxpayers Alliance v. Fair Political Practices Committee*, 14 Cal. App. 4th 1214 (1993).

<sup>49</sup>*Kentfield v. Reclamation Board*, 137 Cal. App. 675 (1934); *Morris v. Williams*, 67 Cal. 2d 733, 737 (1967).

<sup>50</sup>*Timmons v. McMahon*, 235 Cal. App. 3d 512, 517-18 (1991).

<sup>51</sup>*Planned Parenthood Affiliates v. Van De Kamp*, 181 Cal. App. 3d 245, 262 (1986).

<sup>52</sup>*Carsten v. Psychology Examining Committee of Board of Medical Quality Assurance*, 27 Cal. 3d 793, 797 (1980).

<sup>53</sup>*Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 100-101 (1945).

<sup>54</sup>CAL. CIV. PROC. CODE § 526a (2004).

<sup>55</sup>*Blair v. Pitchess*, 5 Cal. 3d 258, 269 (1971); *Mendoza v. County of Tulare*, 128 Cal. App. 3d 403, 415 (1982); *Los Altos Property Owners Association v. Hutcheon*, 69 Cal. App. 3d 22, 29 (1977).

<sup>56</sup>E.g., *Mata v. Employment Development Department*, No. 504352 (Cal. Super. Ct. San Francisco County filed July 2, 2004) (alleging lack of interpreters for medical evaluations in determining eligibility for the state disability insurance program).

<sup>57</sup>CAL. BUS. & PROF. CODE §§ 17200-17210 (2004).

<sup>58</sup>*Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th 553, 561-63 (1998).

<sup>59</sup>*Barquis v. Merchants Collection Association*, 7 Cal. 3d 94, 113 (1972).

al, state, or municipal, statutory, regulatory, or court-made.”<sup>60</sup>

Standing requirements are minimal. The unfair competition law permits actions for injunctions by “any person acting for the interests of itself, its members or the general public,” namely, private attorneys general.<sup>61</sup> The plaintiff need not be personally injured or aggrieved and may sue to obtain relief for others.<sup>62</sup> This should permit injunctive relief for languages other than that spoken by the plaintiff.

Courts consistently have interpreted the language of the unfair competition law liberally to stop anticompetitive business practices and to protect the public from fraudulent, deceitful, and illegal acts.<sup>63</sup> The state legislature has repeatedly expanded both the definition of prohibited activities and the scope of injunctive relief to permit courts to enjoin ongoing wrongful business conduct in “whatever context such activity might occur.”<sup>64</sup> Although California’s unfair competition law does not overcome an “absolute bar” to an action, *Sandoval* is not, we argued, an absolute bar because it is based upon federal jurisdictional matters.<sup>65</sup> *Sandoval* did not bar enforcement of the regulations by federal agencies, nor did it bar direct enforcement of the statute itself by private parties: *Sandoval* barred private parties from enforcing the regulations in federal court. Therefore violations of Title VI regulations should be enforceable under the unfair competition law as well as any violation of state law.

#### D. Enforcement Methods Available Against All Defendants

Whether defendants are state actors or private actors, a plaintiff can enforce language access obligations under Section 11135 or a third-party-beneficiary theory and, in a health care context, an informed-consent tort theory or a theory of negligence per se.

**Section 11135.** When a California appellate court ruled that Section 11135 created no private right of action, the legislature amended the statute to allow specifically for private enforcement through injunctive relief.<sup>66</sup> As discussed above, the law’s mandate to provide equal access applies both to the state and to recipients of state financial assistance. “Recipient” means anyone who regularly employs five or more persons and who receives state support in certain minimal amounts.<sup>67</sup>

**Third-Party Beneficiaries.** Most recipients of federal financial assistance, including Medicaid, sign contracts to provide services. The contracts include requirements to provide language access.<sup>68</sup> Under California law these may be enforceable by our clients as third-party beneficiaries.<sup>69</sup> We have not asserted this theory to date.

**Informed Consent Torts.** A lack of competent interpretation resulting in the failure to get informed consent to a medical procedure can result in a tort. State law determines the existence of the tort and whether it lies in battery or negligence, but most jurisdictions allow suits

<sup>60</sup>*Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838–39 (1994).

<sup>61</sup>CAL. BUS. & PROF. CODE § 17204.

<sup>62</sup>*Stop Youth Addiction*, 17 Cal. 4th at 561.

<sup>63</sup>*Committee on Children’s Television Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 209–10 (1983).

<sup>64</sup>*Id.*

<sup>65</sup>*Stop Youth Addiction*, 17 Cal. 4th at 561.

<sup>66</sup>CAL. GOV’T CODE § 11139 (2004).

<sup>67</sup>CAL. CODE REGS. tit. 22, § 98010 (2004).

<sup>68</sup>See PERKINS ET AL., *supra* note 40, apps. E–F. Other contracts with state Medicaid agencies contain similar provisions and should be available under your state’s public records act.

<sup>69</sup>CAL. CIV. CODE § 1559 (2004); *Shell v. Schmidt*, 126 Cal. App. 2d 279 (1954).

for damages in such cases.<sup>70</sup> In California a battery occurs when a medical provider obtains consent of the patient to perform one type of treatment and performs a substantially different treatment.<sup>71</sup>

**Negligence Per Se from Violation of Statute or Gratuitous Undertaking.** State law varies on when a duty is owed to a patient, but under California law (following the Restatement of Torts doctrine), a duty of care can arise because of the statutory or regulatory obligation to provide interpretation.<sup>72</sup> If defendants claim that they are not obligated to provide interpretation but still did so, they are still under an obligation, under California law, to use care in doing so.<sup>73</sup>

■ ■ ■

Enforcing the rights of persons with limited English proficiency will be as challenging as it will be important in the coming years. We cannot wait for the challenge to go away: the number of persons in need of language access to basic services is rising. We must devise and implement strategies that maximize our clients' rights to access as soon as possible.

#### Additional Resources

- [www.lep.gov](http://www.lep.gov): a website containing federal guidelines and resources on federal policies governing language access.
- NATIONAL HEALTH LAW PROGRAM, ENSURING LINGUISTIC ACCESS IN HEALTH CARE SETTINGS: LEGAL RIGHTS AND RESPONSIBILITIES (2d ed. 2003), available at [www.healthlaw.org](http://www.healthlaw.org).
- THE ACCESS PROJECT & NATIONAL HEALTH LAW PROGRAM, LANGUAGE SERVICES ACTION KIT (2003), available at [www.healthlaw.org](http://www.healthlaw.org).
- The federal rights listserv administered by Lauren Saunders at [saunders@nslc.org](mailto:saunders@nslc.org), providing insightful analyses of federal rights enforcement.
- The limited-English-proficiency listserv currently administered by Kathy Poulus Minott at [lep@maine.rr.com](mailto:lep@maine.rr.com).

<sup>70</sup>For full discussion of this theory, see W.E. Shipley, *Liability of Physician or Surgeon for Extending Operation or Treatment Beyond That Expressly Authorized*, 56 A.L.R. 2d 695 (2003); Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery*, 74 TEMPLE LAW REVIEW 355 (2001); PERKINS ET AL., *supra* note 40, § 3.24.

<sup>71</sup>*Cobbs v. Grant*, 8 Cal. 3d 229, 239 (1972).

<sup>72</sup>*Satterlee v. Orange Glenn School District*, 29 Cal. 2d 581, 588 (1947); RESTATEMENT (SECOND) OF TORTS § 286 (1965).

<sup>73</sup>*Perry v. Sullivan*, 219 Cal. 384, 389 (1933).