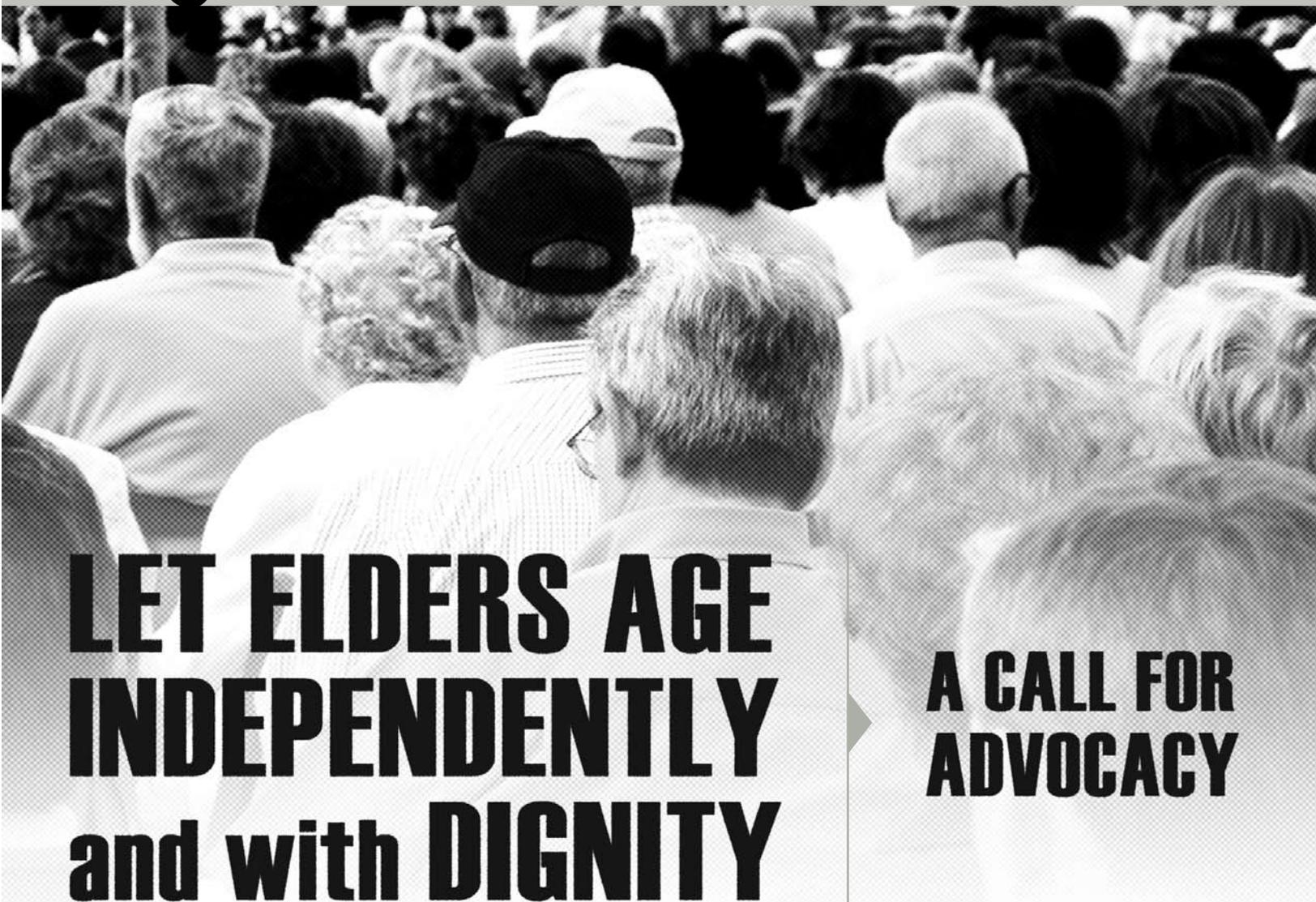


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**LET ELDERS AGE
INDEPENDENTLY
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What You Need to Know About Advocacy for Limited-English-Proficient Elders

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When legal services were established as mandated services under Title III of the Older Americans Act in 1975, the impact of renewed immigration under the landmark 1965 immigration legislation was only beginning to be felt and was all but invisible to most of those providing services to older Americans. Since then, the American population has changed significantly, becoming much older and far more diverse, with immigrant groups spreading to all parts of the country. One positive result has been a proliferation of initiatives aimed at securing meaningful access to a wide range of services for individuals who are limited-English-proficient (LEP). However, in large measure, these initiatives have focused on issues affecting younger populations.¹ Although more attention is now paid to LEP issues for older people, such issues still receive far less attention than LEP issues in education or children's health.

Even in the elder advocacy community, many are unaware of the extent of the need for services to LEP elders. For example, in 2003, the latest year for which data are readily available, 38 percent of Supplemental Security Income (SSI) applicants 65 and older asked to be interviewed in a language other than English, despite the broad restrictions on immigrant eligibility for SSI imposed by the 1996 welfare legislation.² While we have no comparable national data on older applicants for Medicaid, we can reasonably assume that the percentage would be similar. Many LEP elders arrive in the United States at an advanced age, often coming as refugees fleeing extreme hardship or sponsored by their children for family reunification. These LEP elders are

¹See, e.g. *Lau v. Nichols*, 414 U.S. 563 (1974) (access to educational opportunities).

²Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. See also Social Security Administration, Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency, www.ssa.gov/multilanguage/LEPPlan2.htm (last visited Aug. 19, 2008).

not likely to participate in the workforce or have children in school—two of the more common sources of exposure to the English language and the dominant culture. They are thus much less likely to be familiar with American customs or with available services than their younger counterparts. And learning another language in old age is simply more difficult than when one is young.³

Here we give a brief overview of the language-access laws and policies that most affect older people, the obligations of programs providing legal services to older clients, and an illustration of how the Social Security Administration, an agency with significant contact with LEP clients, handles language-access issues.

I. Title VI Civil Rights Obligations and Other Legal Authority

Federal law and regulations, as well as legal services program rules and some state laws, have special language-access protections for LEP elders.

A. Title VI, Executive Order, and Federal Agency Guidance

Title VI of the Civil Rights Act of 1964 is the cornerstone of language-access advocacy. A far-reaching statute, it provides that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”⁴ Regulations promulgated pursuant to Title VI clarify that the prohibition

against discrimination based on national origin includes discrimination based on language, including LEP.⁵ The regulations apply to all federal-agency-grantor-or-subgrant recipient public and private entities, including most organizations dealing with health and human services, community development, education, housing assistance, employment programs, vocational rehabilitation, parks and transportation, or law enforcement as well as legal services.⁶ However, note that the direct provision of services by a federal agency is not covered under Title VI because federal agencies are not considered to be “receiving federal financial assistance.”⁷

Executive Order 13166, signed by Pres. Bill Clinton in 2000 and reaffirmed by the Bush administration in 2002, requires federal agencies to meet the needs of LEP individuals more substantially by implementing a system to ensure meaningful access to those agencies by LEP persons.⁸ The executive order relies on concurrently issued LEP guidance from the U.S. Department of Justice, which sets compliance standards that programs receiving federal funds must follow.⁹ Programs failing to provide required services to LEP individuals are in violation of Title VI and its implementing regulations. The Justice Department guidance provides a four-factor framework to assess when LEP assistance is required and what assistance is appropriate:

- the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;

³See, e.g., Ella L. Newport, *Maturational Constraints on Language Learning*, 14 *COGNITIVE SCIENCE* 11 (1990).

⁴42 U.S.C. 2000(d) (2005).

⁵Limited-English-proficient individuals (LEPs) are those “who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English . . .” (Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons 68 Fed. Reg. 47311, 47313 (Aug. 9, 2003)).

⁶For a more thorough list of federally assisted programs that must not discriminate against LEP individuals and thus yield fertile arenas for advocacy efforts, see Civil Rights Division, U.S. Department of Justice, Possible Federal Sources of Assistance to Federally Assisted Programs or Activities, www.usdoj.gov/crt/cor/federalfundingsources.htm (last visited Aug. 19, 2008).

⁷*Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983).

⁸Exec. Order No. 13166, reprinted in 65 Fed. Reg. 50119 (Aug. 16, 2000).

⁹Enforcement 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 (Aug. 16, 2000), revised by 67 Fed. Reg. 41455 (June 18, 2002).

- how frequently LEP individuals come in contact with the program;
- the nature and importance of the program, activity, or service to individual lives; and
- costs and the resources available to the program.

The executive order also requires each federal agency to develop a plan, subject to Justice Department approval, applying the general standards of the Justice Department LEP guidance to the federally assisted programs that the federal agency administers.¹⁰

The U.S. Department of Health and Human Services (HHS) reissued its LEP guidance in 2003.¹¹ HHS requires all federally assisted programs under its aegis, including all Administration on Aging Title III programs, to evaluate the needs of LEP individuals through a four-factor analysis similar to the Justice Department's. HHS also discusses five elements common to effective language-access programs:

- an assessment of language needs, including languages likely to be needed, points of contacts, and helpful resources;
- development of a comprehensive language assistance plan and a written policy;
- training of staff, including management staff;
- notice to LEP persons of their right to free assistance; and
- ongoing monitoring and updating of language assistance plan and policies.

B. Legal Services and LEP Obligations

Many legal aid attorneys and advocates serving the elderly may be unaware that federal laws other than Title VI may require them to provide appropriate language assistance to the elderly LEP populations in their communities. The American Bar Association (ABA) has adopted its own standards relating to language access. A brief overview of this arena, including federal law and related guidance and the aspirational standards of the legal profession, follows.

LSC Act and Older Americans Act. Legal services agencies serving the elderly may receive their funding from a variety of sources, each of which may have separate legal or contractual requirements relevant to serving LEP clients.

The Legal Services Corporation (LSC) must comply with the Justice Department guidance discussed above and with LSC's own statute. The LSC's enabling Act, originally passed in 1974, contains a statutory requirement that LSC provide services to LEP clients: "In areas where significant numbers of eligible clients speak a language other than English as their principal language, the Corporation shall, to the extent feasible, provide that their principal language is used in the provision of legal assistance to such clients...."¹²

In order to carry out this mandate more effectively, LSC issued detailed guidance and a program letter for LSC-funded programs in 2004.¹³ The provisions include standards of service to LEP clients; such standards are expected of programs to be in compliance with LSC contracts.

¹⁰The executive order also requires agencies responsible for federally conducted programs to prepare a plan to improve access to their programs and activities by eligible LEP persons consistent with the Justice Department LEP guidance, even though these programs are not covered by Title VI. The plans for federally conducted programs are not subject to Justice Department approval. Moreover, the executive order makes clear that the requirement is not intended to create any right or benefit and is not enforceable. For a list of specific agency guidance and related documents, see Limited English Proficiency: A Federal Interagency Website, Federal Agency LEP Guidance & Language Access Plans, www.lep.gov/guidance/guidance_index.html (last visited Aug. 19, 2008); see also U.S. Department of Justice, Agency-Specific Materials, www.usdoj.gov/crt/cor/agency.htm (last visited Aug. 19, 2008).

¹¹See *supra* note 5.

¹²Legal Services Corporation Act of 1974, § 1006(a), Pub. L. No. 93-355, 88 Stat. 378, 381 (codified as amended at 42 U.S.C. § 2996).

¹³See Letter from Helaine M. Barnett, President, Legal Services Corporation, to LSC Program Directors (Dec. 6, 2004), www.lsc.gov/program/pl/pl2004-2.pdf.

LSC programs must assess LEP needs and resources in their service areas; create written program policies on staff recruitment and training, the use of interpreters and translators, agency outreach, and translated materials; and continuously oversee LEP efforts. LSC has a website page on the LEP policies and plans of many programs.¹⁴

The Older Americans Act authorizes Administration on Aging Title III funding. Older Americans Act-funded legal services programs are also under separate mandates to provide language-access services. Because the Administration on Aging is an HHS agency, Administration on Aging grantees are subject to HHS' extensive LEP guidance, mentioned above. The Older Americans Act itself allows for distribution of federal funds from the Administration on Aging to state agencies, which in turn give them to local area agencies on aging to distribute to local legal services programs. The Act was amended in 2006 specifically to add "older individuals with limited English proficiency" to the list of targeted subsets within "older individuals in greatest economic need" and "older individuals in greatest social need" that are deserving of special attention and preference for services.¹⁵ State service plans must include this targeting preference, and area agencies on aging must include objectives relating to services to LEP communities in each contract with Title III legal assistance providers.¹⁶ Older Americans Act regulations also specifically require local legal services providers to "demonstrate the capacity to provide legal assistance

in the principal language spoken by clients in areas where a significant number of clients do not speak English as their principal language."¹⁷

ABA Standards. The ABA revised its Standards for the Provision of Civil Legal Aid in August 2006.¹⁸ The standards are an aspirational guidance to all legal services advocates, regardless of funding. Standard 4.6, passed in 2006, provides that "[a] provider should assure that all language groups within its low income communities have access to its services and should assist persons using its services in their primary language."¹⁹ The commentary on this standard is worth reviewing since it sets forth the importance of meaningful access to LEP individuals and additional guidelines relating to the quality of staff fluency and interpretation services. A companion standard on cultural competence is also worth reviewing (see Standard 2.4).²⁰

Resources and Best Practices for Compliance. Given the mandates that apply to legal aid providers in reaching out to and serving LEP individuals, all legal services entities should be developing LEP service plans and policies and monitoring them on a regular basis. Both those who are just beginning to develop such plans and those who have implemented plans but are evaluating and monitoring for effectiveness can avail of resources. The LSC website has many, including model plans and tools for assessment.²¹ The National Asian Pacific American Bar Association has a report with a number of best practices and recommendations specific

¹⁴See Legal Services Corporation, Resource Information, www.lri.lsc.gov (last visited Aug. 19, 2008).

¹⁵Older Americans Act Amendments of 2006, § 305, Pub. L. No. 109-365, 120 Stat. 2522, 2539 (codified at 42 U.S.C. 3025(a)(1)(E)).

¹⁶*Id.* § 307, 42 U.S.C. § 3027(a)(15-16); § 306, 42 U.S.C. § 3026 (a)(4)(A)(i)(I)(bb).

¹⁷45 C.F.R. § 1321.71(5) (2008).

¹⁸STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID (2006), www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf.

¹⁹*Id.* at 166.

²⁰*Id.* at 56.

²¹See *supra* note 18.

to legal services offices.²² The Administration on Aging website has a number of helpful resources.²³

C. State and Local Law and Regulations

State and local law and regulations may include significant protections for LEP individuals.²⁴ California, for example, has a law that prohibits the state or a state-funded agency from denying full access to services based on ethnic group identification, specifically including language, and requires agencies to ensure that alternative communication services are available for interpretation and translation except where it would create undue hardship.²⁵ California's Dymally-Alatorre Bilingual Services Act requires state and local agencies to employ bilingual workers, translate material, and conduct ongoing surveys relating to services for certain "threshold" languages spoken by 5 percent or more of the population served.²⁶

II. Social Security Administration

Of all federal agencies, the Social Security Administration has by far the most contact with the LEP population. This is most pronounced in the SSI program in which almost four in ten applicants 65 and older request to be interviewed in a language other than English.

For the most part, the Social Security Administration, as a federal agency providing direct services to LEP individuals, is

not covered by the language-access requirements of Title VI.²⁷ One major exception to this is in the area of disability determinations, carried out under contract with state agencies, which are thus recipients of federal financial assistance subject to Title VI. Disability is determined for eligibility for Social Security Disability Insurance and the SSI disability program, applicants for which are all under 65. Since the welfare law changes of the 1990s, however, most noncitizens are also required to demonstrate that they meet the Social Security Administration disability standard in order to qualify for SSI, even if they are older than 65. Thus a substantial number of LEP individuals applying for SSI must go through disability determination at state agencies. Yet the Social Security Administration does not have an LEP plan approved by the Justice Department of Justice, as required by Executive Order 13166, for its federally assisted programs, although the agency does have an LEP plan for its federally conducted programs. The agency generally applies the latter to the state agencies doing the disability determinations.²⁸

The Social Security Administration's approach to language-access problems is somewhat paradoxical. On the one hand, it has an exemplary policy with respect to agency interpreter services, ensuring that an interpreter is provided "to any individual requesting language assistance," regardless of how few people speak the language in question.²⁹ The agency has a variety of informational publications

²²THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, INCREASING ACCESS TO JUSTICE FOR LIMITED ENGLISH PROFICIENT ASIAN PACIFIC AMERICANS: REPORT FOR ACTION (2007), www.napaba.org/uploads/napaba/IncreasingAccessMay07.pdf. See also ASIAN PACIFIC AMERICAN LEGAL CENTER, EXPANDING LEGAL SERVICES: SERVING LIMITED ENGLISH-PROFICIENT ASIANS AND PACIFIC ISLANDERS (2003), www.apalc.org/pdffiles/ELS_Web.pdf.

²³Administration on Aging, www.aoa.gov (last visited Aug. 19, 2008).

²⁴For a comprehensive look at state-law provisions in the health context, see JANE PERKINS & MARA YOUDELMAN, SUMMARY OF STATE LAW REQUIREMENTS ADDRESSING LANGUAGE NEEDS IN HEALTH CARE (2008), www.healthlaw.org/library/attachment.121084.

²⁵CAL. GOV'T CODE § 11135 (2008).

²⁶*Id.* § 7290 (2008).

²⁷See *supra* note 8.

²⁸Social Security Administration, Program Operations Manual System (POMS) DI 23040.001, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0423040001>; DI 23045.001, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0423045001> (2008).

²⁹*Id.* at GN 00203.011, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200203011>. See also Social Security Administration, Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency, www.ssa.gov/multilanguage/LEPPlan2.htm (last visited Aug. 19, 2008).

in Arabic, Armenian, Chinese, Farsi, French, Greek, Haitian-Creole, Italian, Korean, Polish, Portuguese, Russian, Spanish, Tagalog, and Vietnamese. These materials are available on the Social Security Administration's website through its Multilanguage Gateway.³⁰ The agency has a good number of informational audiotapes in Spanish for Spanish speakers with visual impairments.³¹ A high percentage of recent hires have been bilingual. The agency conducts language-specific training for its bilingual employees on interviewing in Spanish, Vietnamese, Navajo, Chinese, Polish, Russian, Tagalog, German, French, Haitian-Creole, Italian, Korean, Arabic, and Portuguese.

On the other hand, in the arena of written notices, the Social Security Administration's policy is extremely poor. The agency gives only a limited number of notices in Spanish and has no notices whatsoever in any other language. Although the agency has long stated that it has a long-range plan for giving automated notices in other languages, no timetable or date has been specified. Even though the

agency has a very good policy on interpreter services, the implementation and internal monitoring of this policy is anything but stellar, with a great deal of variation in the extent to which local offices follow the national interpreter policy.



Although federal law, program rules, state laws, and agency policies have come a long way to improve services for LEP elders, there is still considerable room for improvement and advocacy. In many cases, Title VI and other legal requirements are not widely known, even to legal services advocates. Additional funding may be needed to attain significant progress in some areas, as in upgrading the Social Security Administration's antiquated computer system to enable automated notices in other languages better. Nonetheless, progress toward better LEP access is still possible in an era of fiscal constraints if advocates continually work to improve both the services of others and their own services to LEP elderly clients.

³⁰See Social Security Administration, Social Security Information in Other Languages, www.ssa.gov/multilanguage (last visited Aug. 19, 2008).

³¹Yet at the same time the Social Security Administration steadfastly refuses to give notices in an accessible format for people with visual impairments in any language. See, e.g., *American Council of the Blind v. Astrue*, No. C 05-4696 MJJ, 2008 WL 1858928, 130 Soc. Sec. Rep. Serv. 154 (N.D. Cal. April 23, 2008).

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