

The Human Rights Policy LAB  
University of North Carolina School of Law

## BUILDING INTEGRATED COMMUNITIES THROUGH LANGUAGE RIGHTS

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September 2015

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## EXECUTIVE SUMMARY

North Carolina demographics have shifted rapidly since the 1980s. The state has become a favored destination for immigrants, especially but not only from Mexico and Central America. From the 1990s through the mid-2000s, an expanding labor market and employer recruitment initiatives attracted new migrants to the state. The demographic shift presents opportunities to establish policies that affect the future of North Carolina in profound and permanent ways. In order to ensure the continued social and economic growth and progression of North Carolina communities, state and local governments must work to implement strategies that will successfully integrate immigrants and refugees into the population. These strategies must accommodate cultural diversity, and work to ensure that all residents have equal opportunities and equal access to state and local institutions.

This policy report aims to provide a resource for statewide entities and initiatives working to assist with immigrant integration, particularly in regard to advocacy for language access and language rights of minority populations. The report is intended to assist and augment the efforts on Building Integrated Communities (BIC), an organization whose purpose is to work with North Carolina local governments to implement integration strategies. As noted in its mission statement, the purpose of BIC is to assist local governments to

Successfully engage with immigrants and refugee populations in order to improve public safety, promote economic development, enhance communication, and improve relationships. As a result of working with BIC, local governments and diverse community stakeholders have the tools to generate locally-relevant strategies to strengthen immigrant civic engagement, linguistic achievement, and economic/educational advancement.<sup>1</sup>

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<sup>1</sup> *Building Integrated Communities*, LATINO MIGRATION PROJECT, <http://migration.unc.edu/programs/bic/> (last visited July 15, 2014).

This policy paper focuses on specific aspect of BIC's integration strategies: language access and language rights. It endeavors to participate in the initiative by fostering language access and ensuring the protection of inherent language rights to all individuals.

This report proceeds in four Sections.

#### SECTION ONE: INTERNATIONAL AND REGIONAL HUMAN RIGHTS AND LANGUAGE ACCESS

SECTION ONE outlines relevant international law and human rights norms concerning language rights. It includes various instruments of international and regional human rights law, namely international and inter-American human rights treaties. The Section starts with an overview of the international human rights treaties that the United States has signed and ratified with a focus on the provisions relevant to language rights. If state and local governments fail to implement treaty provisions, the United States cannot, as a practical matter, meet its obligations under these treaties and comply with international law. Further in regards to international human rights norms, SECTION ONE provides a summary of other persuasive, non-binding international standards.

SECTION ONE also describes the European Union's model approach to language rights and language access. The European Union (EU) has created a treaty framework based on human rights principles that promotes multilingual societies, equal citizenship, and the integration of linguistic minorities. The EU currently consists of twenty-eight Member States, three alphabets and twenty-four official languages with sixty other languages being spoken by certain groups in various regions. Over 175 nationalities make up the EU citizenry. Their success may be derived from the fact that they characterize language access to be a basic human right that is inextricably linked to an individual's cultural identity. Further, the EU has been motivated to establish extensive rights to language access as a means to promote greater economic growth and

productivity. While the various EU treaty provisions and court decisions interpreting the rights to language access may not be binding on American states, they serve as models of what can be accomplished in terms of integrated social communities. Moreover, the success of the EU in the context of such diversity demonstrates the feasibility of establishing language rights for all North Carolina residents.

## SECTION TWO: TITLE VI

SECTION TWO provides an overview of the approach that U.S. domestic law has employed in addressing issues related to language rights: a civil rights approach. This Section includes an in-depth review of Title VI of the 1964 Civil Rights Act, a statute that prohibits discrimination on the basis of national origin. Any discriminatory practices or effects that stem from an individual's lack of English fluency are considered to be discrimination on a basis of their national origin. Thus, Title VI provides protection of language rights and language access for individuals with a limited English proficiency at the domestic level.

SECTION TWO provides general information about Title VI regulations that relate to language access for persons with a limited English proficiency. Title VI obligations are binding on all entities that receive federal financial assistance, which includes federal, state, and local agencies. The Section explains the obligations of both grantors of federal funds as well as recipients of federal funds. Any agency that grants or makes sub-grants of federal funds is required to monitor its recipients. Similarly, recipient grantees or sub-grantees are obligated to report to the entity or entities that provide them with federal funds. The statute, its related regulatory scheme, executive orders, and case law discussed in this Section provide detailed guidance as to when agencies are obligated to comply with Title VI and its provisions, the language access assistance options an entity must provide to be in compliance with Title VI, and

the monitoring and enforcement process that is used to ensure recipients of federal funds are providing the requisite language access to persons with limited English proficiency.

### SECTION THREE: LANGUAGE ACCESS IN NORTH CAROLINA

SECTION THREE provides an assessment of language access in select areas: public safety, transportation, workforce and employment, and health care. The state and local agencies that operate in these areas provide services that are essential to the day-to-day well-being of persons with a limited English proficiency. These are also some of the agencies that will be in the most frequent contact with persons that have a limited English proficiency. Thus, language barriers that preclude a person with a limited English proficiency from accessing the services provided by these agencies are not only unlawful, but impair the functioning of a well-ordered community for all residents. SECTION THREE explains the importance of the agencies and their services to individuals with a limited English proficiency and the larger communities, seeks to identify current practices, and offers recommendations with regard to full and meaningful compliance. The Section also provides example protocols drawn from the effective practices used by the New York City Mayor's Office on Immigrant Affairs and offers suggestions as to how agencies and municipalities can comply with their legal obligations as efficiently and effectively as possible. This part of the section additionally provides general language access recommendations for North Carolina state and local government agencies.

The next part of SECTION THREE explains the work of the Building Integrated Communities (BIC) Initiative and efforts to foster immigrant integration into the municipality's community with an emphasis on improving language accessibility. This part of the Section begins with background information on the initiative and its goals and then examines two of BIC's municipality partnerships: High Point and Winston-Salem. It first discusses the role of

Title VI in these municipalities and their current language practices under Title VI compliance obligations. It then provides an overview of the exemplary efforts of these two cities in their partnership with BIC. These examples demonstrate the changes that can be effected when municipalities and their leaders participate in initiatives that promote language access not only as a means to achieve Title VI compliance efforts but also as a contribution to a larger effort towards community integration.

#### SECTION FOUR: SPECIAL POPULATIONS—UNACCOMPANIED MINORS

Part of this project for Building Integrated Communities and language rights focuses on a particularly vulnerable population: unaccompanied minors. SECTION FOUR focuses on this subset of BIC's initiative. Recent migration waves from Central American countries and Mexico have contributed to the state's changing demographics. Media stories about the arrival of these children have created the opportunity for communities to offer welcoming services while others have manifested distrust if not hostility with regard to their presence. Given the vulnerability of these children and their imprecise and changing or evolving legal status, communities should have the benefit of the facts of their arrival, as well as information about their rights, including language rights, as they take up residence in our communities. Thus, Section Four provides information about the background and context for the recent wave of immigrant children, information about agencies that may be required to assist them while they are in the custody of the Office of Refugee Settlement, and the services to which they may need and may be entitled once they are released to sponsors and take up residence in North Carolina's towns and cities.

It is hoped that the information in this report will create stronger, more vibrant, and more humane communities.

## INTRODUCTION

The Limited English Proficient (LEP) population in the United States has skyrocketed in recent decades, and nearly nine percent of all United States residents—approximately twenty-five million individuals—have been deemed to be Limited English Proficient.<sup>2</sup> North Carolina is no exception to this trend. Between 1990 and 2010, the LEP population in North Carolina grew from 87,000 individuals to 430,000 individuals.<sup>3</sup> This 395 percent growth rate is the second highest in the United States,<sup>4</sup> and it includes those who speak Spanish, Hindi, French, Chinese, German, and Vietnamese, among many other languages.<sup>5</sup> As of 2011, nearly twenty languages were spoken by at least five thousand people in North Carolina.<sup>6</sup>

Language can often create social, economic, and cultural divisions within populations. Language barriers represent perhaps one of the most notable obstacles that arise as foreign born residents attempt to weave themselves into the tapestry of North Carolina communities. In North Carolina, as elsewhere in the United States, persons with a limited English proficiency (LEPs)<sup>7</sup> often endure many disadvantages and are subjected to discriminatory practices. Language access is the cornerstone of integrated communities. Without the ability to communicate, LEP individuals will be unable to avail themselves of services to which they are entitled, information that is critical to their well-being, and general participation in the economic and social fabric of

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<sup>2</sup> CHHANDASI PANDYA ET AL., NAT'L CTR. IMMIGRANT INTEGRATION POLICY, MIGRATION POLICY INST., LIMITED ENGLISH PROFICIENT INDIVIDUALS IN THE UNITED STATES 1 (2011), *available at* <http://migrationpolicy.org/research/limited-english-proficient-individuals-united-states-number-share-growth-and-linguistic>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Rebecca Tippet, *Top Ten Non-English Languages Spoken in North Carolina*, CAROLINA POPULATION CTR., (Feb. 17, 2014), <http://demography.cpc.unc.edu/2014/02/17/top-10-non-english-languages-spoken-in-north-carolina/>.

<sup>6</sup> *Id.*

<sup>7</sup> ABA STANDARDS FOR LANGUAGE ACCESS IN COURTS 9 (2012) (“A limited English proficient (LEP) person is someone who speaks a language other than English as his or her primary language and has a limited ability to read, write, speak, or understand English.”).

the communities where they reside. Thus, language access for these individuals is essential in order for them to be able to enjoy the rights that they are entitled to as human beings.

The connection that language has to an individual's cultural, ethnic and national origin identity, the bias that minority language speakers can suffer when they are not proficient in English, and the necessity of effective communication for individuals to be able to exercise many of their basic rights links language accessibility to many multifaceted and complicated issues. This report will explore the best ways to improve language access and protect linguistic minorities while giving adequate consideration to these issues.

## **SECTION ONE: INTERNATIONAL & REGIONAL HUMAN RIGHTS NORMS & LANGUAGE ACCESS**

This Section introduces international human rights and legal norms related to language rights and language access and provides an overview of the various compliance issues that govern municipalities. Under international human rights law, in addition to the development of specific legal rights to language and language access, a culture-based approach is often used to address language rights issues. The focus is on the protection of language minorities and their cultural identities.<sup>8</sup> The United States and North Carolina are bound by many of these norms, while others may serve as persuasive authority, and should be considered as good guidance.

The first part of the Section describes the human rights approach to language rights in detail and explains the legal frameworks that support this approach at the international and regional levels. It proceeds by providing information about the international and regional human rights instruments that stipulate legal norms and principles related to protecting language rights. It explains how these instruments function in the international and regional systems, and to what extent they apply to the United States as binding or persuasive authority. The next part of the Section describes the merits of the culture-based approach that the human rights system provides for dealing with language rights. It does this by describing in detail a model provided by a successful multilingual society that has taken this culture-based approach: the European Union. The European Union's international model provides a positive example of the application of the culture-based approach to a society, and its successful practices provide useful guidance to other societies.

### **I. HUMAN RIGHTS NORMS AND LANGUAGE ACCESS**

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<sup>8</sup> See Gilman, *infra* note 13, at 15.

International human rights law, as defined by international human rights treaties, is a component of international law and applies to the United States. International law is binding on U.S. state and federal courts through the Supremacy Clause of the U.S. Constitution. The U.S. Supreme Court has recognized that the laws of the U.S. should be interpreted as consistent with international law whenever possible. In a federalist system like the United States, national laws are often implemented most meaningfully at the local level. Indeed, human rights treaties were written with the expectation that they would be implemented regionally and locally. If states fail to implement treaty provisions, the United States cannot, as a practical matter, meet its obligations under these treaties.

Sources of international human rights law such as treaties, which the United States has not signed, nonetheless serve as persuasive authority in U.S. courts and can bolster arguments based on domestic law. They set forth standards that agencies and especially courts might consider influential in determining the parameters of language rights. As demonstrated below, many of these human rights norms govern standards related to language access and language rights.

#### **A. International Human Rights, Human Dignity, and Language Rights**

“Human rights” refers to the “basic rights and freedoms to which all humans are entitled,”<sup>9</sup> such as the right to life and liberty, freedom of expression, and equality before the law. Human rights also consist of social, cultural and economic rights, including the right to participate in culture, the right to food, the right to work, and the right to education. Language rights are more broadly understood to ensure and protect human communication and expression. They are intrinsically linked to a person’s rights to individual consciousness and cultural identity.

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<sup>9</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter ‘UDHR’].

In addition, language access can inhibit or foster an individual's full exercise of all the other basic human rights that are listed above. The inadequate protection of language rights or provisions of language access can lead to injurious discrimination. In light of these considerations, language rights and language access are ultimately essential to the adequate protection of human dignity and human rights.

In the aftermath of World War II, the United Nations (U.N.) founding nations resolved to make the protection and promotion of human rights a priority. In 1948, the U.N. General Assembly promulgated the Universal Declaration of Human Rights (UDHR) and declared that "respect for human rights and human dignity is the foundation of freedom, justice and peace in the world."<sup>10</sup> The UDHR is considered the foundation for many human rights treaties. Over the years, a network of human rights instruments and oversight mechanisms has been established to ensure the promotion of human rights and to confront human rights violations anywhere they arise.

Many international human rights treaties and norms focus on the protection and promotion of language minorities and their cultural identity.<sup>11</sup> The UDHR, International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Economic, Social, and Cultural Rights (ICESCR), Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and other U.N. treaty bodies comprise the international laws and mechanisms that have been developed to protect human rights.<sup>12</sup> These

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<sup>10</sup> *Id.*

<sup>11</sup> *See supra* note 9.

<sup>12</sup> The United States has signed and ratified some treaties and have committed to their obligations but other treaties to which the government has not ratified still hold persuasive value as a reflection of customary international law or widely-held international norms.

instruments address directly or indirectly the importance of non-discrimination of language minorities and the promotion of language rights for all as part of their cultural identity and inherent human dignity. Although there are no international human rights treaties solely devoted to language rights, many, the majority of these human rights instruments and mechanisms deal with cultural rights and “closely connect language rights with culture.”<sup>13</sup> Human rights norms further place obligations upon “States to protect and promote the languages and cultural identity of minority language speakers.”<sup>14</sup>

Since the U.N. human rights system is the “universal” human rights law regime, its treatment of language rights best captures the approach of international human rights law to language rights.<sup>15</sup> The U.N. system contains an unambiguous expression of the “culture-based approach” to the language rights analysis that is primarily used under international law.<sup>16</sup> Under the sphere of “international human rights law, language and cultural identity are inextricably intertwined, and language rights claims must be viewed in this light.”<sup>17</sup> There are three fundamental prongs to the culture-based approach to language rights in international human rights law. First, language rights “ensure fair and proper treatment of traditionally repressed minorities.”<sup>18</sup> Fair and proper treatment further removes the potential for conflict in multiethnic communities and thus brings peace, stability and most importantly security.<sup>19</sup> Second, “language rights are intended to guarantee the general civil rights of individuals.”<sup>20</sup> The majority of human

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<sup>13</sup> Denise Gilman, *A “Bilingual” Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework*, 24 HARV. HUM. RTS. J. 1, 12.

<sup>14</sup> *Id.*

<sup>15</sup> See UDHR, *supra* note 9.

<sup>16</sup> In contrast to the international culture-based approach, the United States has generally approached the language rights’ analysis within the framework of Civil Rights, specifically the right to non-discrimination.

<sup>17</sup> See Gilman, *supra* note 13, at 11.

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 12.

rights instruments prohibit discrimination on the basis of language.<sup>21</sup> Third, language rights “seek to guarantee diversity and promotion of multiple cultural identities in a society.”<sup>22</sup> Under the culture-based approach, international human rights norms demand the opposite of obligatory assimilation, by promoting language diversity, diverse identities, and multiculturalism.

### 1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights serves as a model for domestic constitutions, laws, regulations, and policies that protect fundamental human rights. In its Preamble, it claims to be a “common standard of achievement for all peoples and all nations.”<sup>23</sup> The UDHR is a progressive instrument that aspires to “secure [the] universal and effective recognition and observance” of the human rights contained in it.<sup>24</sup> It clearly urges all States to implement the assurances of these human rights at the domestic level, and explicitly states that, “human rights should be protected by the rule of law.”<sup>25</sup> The UDHR has been and will continue to be a primary source of global human rights standards. Practically every international human rights instrument contains at least a reference to the UDHR, as do many declarations adopted unanimously or by consensus by the U.N. General Assembly.<sup>26</sup>

The UDHR covers the range of human rights in thirty articles. The first two articles lay the universal foundation of human rights: human beings are equal because of their shared essence of human dignity. Human rights are universal, not because of any State or international organization, but because they belong to all of humanity. Article 1 declares “all human beings are born equal in dignity and rights. They are endowed with reason and conscience and should

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See UDHR, *supra* note 9.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Human Rights, International Instruments: Chart of Ratifications as at 30 June 1994, Secretariat Centre for Human Rights, U.N. Doc. ST/HR/4/Rev.10 (1994).

act towards one another in a spirit of brotherhood.”<sup>27</sup> Article 2 sets out the basic principle of equality and non-discrimination with regard to the enjoyment of human rights and fundamental freedoms. It forbids “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>28</sup>

The first cornerstone of the UDHR is Article 3, which proclaims the right to life, liberty and security of a person, is a right essential to the enjoyment of all other rights. Article 22, another principle foundation, introduces economic, social and cultural rights, which are discussed in more detail in Articles 23-27. The Article sets out these rights, and states that everyone is entitled to them “as a member of society.”<sup>29</sup> It further characterizes these rights as indispensable for human dignity and the free development of personality, and indicates that they are to be realized through national efforts and international cooperation.<sup>30</sup>

Eleanor Roosevelt, Chairman of the U.N. Commission on Human Rights during the drafting of the UDHR, stated that:

Taken as a whole, the Delegation of the United States believes that this is a good document – even a great document – and we propose to give it our full support. [...] In giving our approval to the Declaration today it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms [...] This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere.<sup>31</sup>

The words from Eleanor Roosevelt clearly state that the Universal Declaration of Human Rights, while not a formal treaty, is a “global testament of humanity” giving the document persuasive

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<sup>27</sup> See UDHR, *supra* note 9, at art. 1.

<sup>28</sup> *Id.* at art. 2.

<sup>29</sup> *Id.* at art. 3.

<sup>30</sup> *Id.* at art. 22.

<sup>31</sup> Eleanor Roosevelt, Delegate, United Nations General Assembly Meeting (Dec. 10, 1948), *available at* <http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm>.

authority of the highest moral value with implications for the federal government as well as states and localities.

The Universal Declaration of Human Rights explicitly addresses language rights in Article 2, by stipulating that basic principles of equality and nondiscrimination forbid distinction on the basis of language.<sup>32</sup> However, the Universal Declaration of Human Rights is also connected to language rights by its provisions concerning human dignity. The UDHR sets forth that:

...the inherent dignity and...the equal and inalienable rights of all members of the human family [are] the foundation of freedom, justice and peace in the world... [The] peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.<sup>33</sup>

Human dignity is a fundamental right to be universally enjoyed by all persons, without discrimination on any basis. Human dignity is an important underlying principle in the language access movement, “for human dignity is quashed when an individual lacks the ability to understand or be understood in the face of rights violations,”<sup>34</sup> or when an individual does not have due regard given to their cultural identity. Furthermore, inadequate language access places limitations on an individual’s exercise of their social, economic, and cultural rights, as defined by the UDHR.

## 2. International Covenant on Civil and Political Rights

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<sup>32</sup> See UDHR, *supra* note 9 at art. 2. (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

<sup>33</sup> *Id.* at pmb1.

<sup>34</sup> Julia Alanen, *Language Access is an Empowerment Right: Deprivation of plenary language Access Engenders an Array of Grave Rights Violations*, 1 INT’L LEGAL STUDIES PROGRAM 93 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1578607](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578607).

The International Covenant on Civil and Political Rights (ICCPR) is a U.N. treaty based on the UDHR and further elaborates on the civil and political rights and freedoms listed in the UDHR.<sup>35</sup> The United States ratified the ICCPR in June 1992. By end of 2001, it had been ratified by 147 states. The ICCPR (along with the ICESCR discussed later) forms the bedrock of international legal protections of human rights, including language rights, and is one of the principle U.N. treaties that explicitly links human rights to language and cultural identity.

The ICCPR is divided into five parts; it contains fifty-three articles that cover the range of civil and political human rights recognized in international law. Part 1 recognizes the rights of all peoples to self-determination, including the right to “freely determine their political status,” pursue economic, social and cultural goals, and manage and dispose of their own resources.<sup>36</sup> Part 2 requires the rights of individuals to be recognized “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>37</sup> Part 3 lists the rights themselves.<sup>38</sup> These include rights to liberty and security, in the form of freedom from arbitrary arrest and detention;<sup>39</sup> procedural fairness in law, in the form of rights to due process, a fair and impartial trial and the presumption of innocence;<sup>40</sup> individual liberty, in the form of the freedoms of movement, thought, conscience and religion,

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<sup>35</sup> The ICCPR while signed and ratified by the United States, is not considered self-executing, and is thus subject to some debate as to whether and how it can be legally enforced. The United States has included reservations, understandings and declarations (RUDs) upon ratifying the treaty by which it has sought to render some provisions of the treaty inapplicable. However, international treaty bodies and many scholars accept the view that upon ratifying a treaty, a state party must abide by its terms and that RUDs cannot have effect if they serve to undermine the treaty.

<sup>36</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966) (effective Mar. 23, 1976) [hereinafter ‘ICCPR’].

<sup>37</sup> ICCPR, *supra* note 36, at art. 2-5.

<sup>38</sup> *Id.* at art. 6-27.

<sup>39</sup> *Id.* at art. 9-11.

<sup>40</sup> *Id.* at art. 14-16.

speech, association and assembly, family rights, the right to a nationality, and the right to privacy;<sup>41</sup> non-discrimination, minority rights and equality before the law.<sup>42</sup>

The ICCPR links language and cultural identity in the treaty's clear expression of the protection of the rights of language minorities contained in Article 27.<sup>43</sup> Article 27 of the ICCPR provides that:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>44</sup>

Article 27 further grants persons belonging to minorities the right to national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics, which they wish to maintain and develop.<sup>45</sup> In General Comment 23 to the ICCPR, the U.N. Human Rights Committee noted that Article 27 “establishes rights of minority groups, including language rights, which are distinct from other rights established in the ICCPR, such as the right to be free from discrimination on the basis of language and the right to freedom of speech.”<sup>46</sup> The Comment further states that the protections provided by this Article are intended to ensure “the survival and continued development of the cultural, religious and social identities of the minorities concerned.”<sup>47</sup>

Article 14 of the ICCPR is also significant for language rights. Article 14.1 of the ICCPR guarantees that “[a]ll persons shall be equal before the courts and tribunals,” and Article 14.3(f)

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<sup>41</sup> *Id.* at art. 25

<sup>42</sup> *Id.* at art. 26-7.

<sup>43</sup> Gilman, *supra* note 13, at 13.

<sup>44</sup> ICCPR, *supra* note 36, at art. 27.

<sup>45</sup> *Id.*

<sup>46</sup> Gilman at *supra* note 13, at 13 (The U.N. Human Rights Committee is the body charged with “interpreting the ICCPR and handling complaints of violations of the treaty.”)

<sup>47</sup> *Id.*

guarantees “the free assistance of an interpreter if he cannot understand or speak the language used in court.”<sup>48</sup> Providing assurances that all individuals will have the equal ability to understand and to be understood in the judicial system is an essential part of the very premise of civil and political rights and principles of equality. Depriving individuals of language access in the judicial realm essentially denies them the use of the justice system, leaves their fundamental interests vulnerable without the protection of the justice system, and violates the principles of non-discrimination and equality before the law.

States that have ratified the ICCPR, including the United States, are obliged to ensure that “individuals under their jurisdiction enjoy their rights; this may require specific action to correct inequalities to which minorities are subjected.”<sup>49</sup> U.S. state and local governments are subject to the ICCPR, as well as all government entities and agencies. The ICCPR also applies to private contractors who carry out government functions. At ratification of the ICCPR, the United States included a Reservation, Understanding, and Declaration (RUD). The RUD stated that the treaty “shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered” by the treaty, “and otherwise by the state and local governments” with support from the federal government for the fulfillment of the ICCPR.<sup>50</sup> This RUD demonstrates the applicability of these obligations to all levels of government.

### 3. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>51</sup> is another treaty adopted by the U.N. General Assembly and ratified by the United

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<sup>48</sup> *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/human-rights/faq-covenant-civil-political-rights-iccpr> (last updated April 2014).

<sup>49</sup> Gilman, *supra* note 13, at 13.

<sup>50</sup> Jamil Dakwar, *The International Human Rights Framework: Opportunities for Social Justice & Civil Rights Advocates*, AM. CIVIL LIBERTIES UNION (June 11, 2013), available at <http://www.ushrnetwork.org/resources-media/implementing-iccpr>.

<sup>51</sup> As with ICCPR, the U.S. position on CERD is that it is not self-executing.

States.<sup>52</sup> It prohibits policies that have a discriminatory impact on people of color, even where there is no intent to discriminate. It embodies an obligation not just to avoid policies with a discriminatory impact, but also an affirmative responsibility to take action and redress racial disparities in outcomes for people of color, both within government programs and in society at large.<sup>53</sup> The ICERD goes well beyond the requirements of U.S. domestic law.<sup>54</sup> Nonetheless, the treaty is binding on the States and the federal government under the Supremacy Clause of the Constitution. It applies to all levels of government – federal, state and local.

The ICERD emphasizes that governments shall provide equal access to public service, freedom of opinion and expression, freedom of peaceful assembly and association; and economic, social and cultural rights, equal participation in cultural activities, and access to any place or service intended for use by the general public.<sup>55</sup> Discrimination through inadequate language access is inadvertent racial discrimination, which the ICERD aims to correct by urging nation to enact legislation to combat racial discrimination. The right to cultural enjoyment and access to services that is described in the ICERD implicates a necessary protection for language rights. Individuals in minority populations that cannot communicate in the majority language are frequently prevented from accessing many public services to which they are entitled unless there are interpretation services or another available option that allows individuals to engage in meaningful communication and mutual understanding.

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<sup>52</sup> 140 Cong Rec S7634-02 (daily ed., June 24, 1994) (U.S. reservations, declarations, and understandings, ICERD).

<sup>53</sup> *The CERD Treaty and U.S. Civil Rights Law*, U.S. HUMAN RIGHTS NETWORK, [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/ushrn\\_prrac\\_cerd\\_and\\_civil\\_rights\\_comparison\\_factsheet\\_0.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/ushrn_prrac_cerd_and_civil_rights_comparison_factsheet_0.pdf) (last updated Oct. 2011).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

The Committee on the Elimination of Racial Discrimination (CERD) is a body of independent experts that monitors the implementation of the ICERD by its States Parties.<sup>56</sup> States that have signed and ratified the ICERD are obliged to submit regular reports to the Committee on how the rights are being implemented.<sup>57</sup> The Committee publishes its interpretation of “the content of human rights provisions, known as general recommendations, on thematic issues and organizes thematic discussions.”<sup>58</sup>

General Recommendation 21, issued by CERD on the right to self-determination Compilation of General Comments and General Recommendations stated that “governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country . . . .”<sup>59</sup> The Committee highlights that the protection of individual rights without discrimination on racial, ethnic, or other grounds must guide the policies of governments.<sup>60</sup> The CERD further notes in its recommendations that governments should consider “vesting persons of ethnic or linguistic groups . . . with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.”<sup>61</sup> The recommendations expressly demonstrate that CERD supports and asserts government’s role to affirmatively consider linguistic minorities and afford them their rights by providing language accessibility without discrimination.

#### 4. Other International Norms

##### a. *International Covenant on Economic, Social and Cultural Rights*

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<sup>56</sup> *Committee on the Elimination of Racial Discrimination*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cerd/> (last visited July 15, 2015).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Committee on the Elimination of Racial Discrimination*, General Recommendation 21, The Right To Self-Determination, ¶ 5, U.N. Doc. A/51/18 (1996), *reprinted in* U.N. Doc. HRI\GEN\1\Rev.6 (2003).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the U.N. General Assembly in 1966.<sup>62</sup> <sup>63</sup> The ICESCR, together with the UDHR and the ICCPR, described above, comprise what is known as, the “International Bill of Human Rights.”<sup>64</sup> The ICESCR defines a broad set of rights related to the economic, social, and cultural elements of life that states must provide to their citizens. It contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights related to just and favorable work conditions, social protection, an adequate standard of living, the highest attainable standards of physical and mental health, education, and enjoyment of cultural freedom. The ICESCR clearly states that every person is entitled to protection of their rights without discrimination based on language, national or social origin.<sup>65</sup> The treaty’s emphasis on language access demonstrates that without the ability to communicate, to be understood, and to understand, all other rights in the treaty are rendered meaningless.

The Committee on Economic, Social and Cultural Rights (CESCR) is a body of independent experts that monitors the implementation of the ICESCR by its States parties.<sup>66</sup> In 2009, CESCR issued Comment No. 20, which addressed Non-Discrimination in Economic, Social and Cultural Rights. In this comment, CESCR specifically addressed discrimination on the basis of language or regional accent. The Comment stated that disparate treatment based on

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<sup>62</sup> International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966 G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966) [hereinafter ‘ICESCR’] (entered into force Jan. 3, 1976).

<sup>63</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. On Econ. Soc. & Cultural Rts. [CESCR], Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter ICESCR].

<sup>64</sup> *International Bill of Human Rights*, UNITED FOR HUMAN RIGHTS, <http://www.humanrights.com/what-are-human-rights/international-human-rights-law-continued.html> (last visited July 29, 2015).

<sup>65</sup> See ICESCR, *supra* note 62, at art. 2.

<sup>66</sup> The Committee on Economic, Social and Cultural Rights, UNITED NATIONS HUMAN RIGHTS, (March 31, 2015), <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (last visited July 29, 2015). See also ECOSOC Res. 1985/17, Economic and Social Council Resolutions, Supp no. 1, 22d plen. meeting, U.N. Doc. E/1984/85 (1985).

language is closely linked to unequal treatment on the basis of national or ethnic origin.”<sup>67</sup> The comment addressed that language barriers impeded on enjoyment of many rights explicitly protected by the Covenant, they specifically cite Article 15, which guarantees the right to participate in cultural life. The Committee therefore recommends that “information about public services and goods, for example, should be available, as far as possible, also in languages spoken by minorities and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.”<sup>68</sup>

Although, the United States signed the ICESCR, it has not ratified it. The ICESCR thus has no legal authority in the United States or any of its municipalities. However, the ICESCR offers persuasive authority, and is influential in the interpretation of other treaties and laws, as it reflects international norms and in particular, is drawn from the UDHR.

b. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is the only U.N. instrument that addresses the special rights of persons belonging to minority groups. This Declaration not only safeguards the rights of persons belonging to minorities to contribute to the political and social stability of the State, but it also provides for the protection of the very existence and identity of minorities. The principles contained in the Declaration apply to persons belonging to minorities in addition to the universally recognized human rights guaranteed in other international instruments, such as ICCPR, CERD, and the UDHR.

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<sup>67</sup>ICESCR General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, ¶2 ) U.N. Doc. E/C.12/GC/20 (2009).

<sup>68</sup> *Id.*

Traditionally, minorities have been identified as “a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics which are different from those of the majority population.”<sup>69</sup> The plain and most accepted understanding of what is a minority is quite straightforward, “it is a group of people who believe they have a common identity, based on culture/ethnicity, *language* or religion, which is different from that of a majority group around them [emphasis added].”<sup>70</sup> The Declaration’s Preamble clearly and repeatedly states that its purpose is to ensure the protection, promotion, and realization of the rights of persons belonging to national or ethnic, religious, and linguistic minorities, as these rights are defined by international human rights instruments.<sup>71</sup>

The Declaration contains Articles that directly protect linguistic minorities from differential treatment and emphasizes that language rights are intended to guarantee the general civil rights of individuals.<sup>72</sup> It accordingly requires States to protect and promote the rights of persons belonging to minorities.<sup>73</sup> The Declaration establishes the government’s responsibility to foster minority languages by requiring governments not only to protect the “linguistic identity of minorities” but also to “encourage conditions for the promotion of that identity.”<sup>74</sup> It further requires States to implement measures that “enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs.”<sup>75</sup>

This includes language rights and language access for those who do not speak the majority

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<sup>69</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992), <http://www.un.org/documents/ga/res/47/a47r135.htm>.

<sup>70</sup> See CLIVE BALDWIN ET AL., *MINORITY RIGHTS GROUP INTERNATIONAL, MINORITY RIGHTS: THE KEY TO CONFLICT PREVENTION 2* (2007).

<sup>71</sup> See U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

language. When minorities are able to use their own languages, benefit from services, and take full part in the political and economic life of the communities where they live, they can begin to achieve the full human status that majorities take for granted, which is the goal of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The United States has not signed nor ratified the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Although the Declaration has no legally binding force on the United States or any of its state or local governments, it contains persuasive authority as it reflects international norms and the reflections of the global community.

### **B. Inter-American System**

The Inter-American System is one of the three regional systems for the protection of human rights, and is responsible for monitoring and ensuring implementation of human rights guarantees in the thirty-five independent countries of the Americas that are members of the Organization of American States (OAS).<sup>76</sup> The United States is a member and therefore has obligations to comply with the various binding documents.

The Inter-American Commission on Human Rights also engages in a range of human rights monitoring and promotion activities, while the Court may issue advisory opinions on issues pertaining to the interpretation of the Inter-American instruments at the request of an OAS organ or Member State.<sup>77</sup> The OAS has made it its mission to promote cultural development and to achieve justice and peace. In order to achieve these goals the OAS has created, signed and enforced the American Declaration of the Rights and Duties of Man and the

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<sup>76</sup> *Inter-American Human Rights System*, INT'L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional/inter-american-system/> (last visited July 15, 2015).

<sup>77</sup> *Id.*

American Convention on Human Rights. Both of these international instruments address language rights and have persuasive influence in the global context and in the United States.

### 1. OAS Charter

In 1951, the Charter of the Organization States, which entered into force established the Organization of American States. The OAS focuses on the fundamental rights of individuals without discrimination on the bases of race, nationality, creed or sex. This framework led to the establishment of the Inter-American Commission on Human Rights, the American Declaration on the Rights and Duties, and the American Convention on Human Rights.<sup>78</sup> The basic principles of human rights, noted in the provisions of Article 2 of the OAS Charter, bear on language rights. As noted above, language rights and language access enhances cooperation and collaboration, assures the ability of individuals to protect their rights, and promotes cultural identity; these principles are all embodied in the Charter's provisions.

### 2. American Declaration of the Rights and Duties of Man

In 1948, the American Declaration of the Rights and Duties of Man (American Declaration) was adopted by OAS Member States.<sup>79</sup> During the development of the American Declaration, the OAS Member States acknowledged that “the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness...”<sup>80</sup> The OAS further added that “[t]he American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a

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<sup>78</sup> *Who We Are*, ORG. OF AM. STATES, [http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp) (last visited July 15, 2015).

<sup>79</sup> American Declaration of the Rights and Duties of Man, May 2, 1948, Ninth Conference of American States, Acts and Documents 289 (1953) [hereinafter American Declaration].

<sup>80</sup> *Id.*

certain state, but are based upon attributes of his human personality.”<sup>81</sup> The intention of the American States was to create a guide for the protection of the rights of “man” based on their shared condition as human beings.

The Preamble of the American Declaration notes that “since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.”<sup>82</sup> By granting the right to have and develop one’s own culture, it provides for the right of people to keep and maintain their own language. Article XIII grants the right for every person to “take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.”<sup>83</sup> Additionally, the American Declaration affirms the duty to regard culture and all cultural attributes with the highest respect. Providing a person with basic services in the language they understand is one method that promotes respect and ensures the dignity of human beings of diverse cultures. Furthermore, it allows for equal treatment, a protection guaranteed under the American Declaration, regardless of the language that a person speaks.

The American Declaration is not a legally binding treaty; however, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights hold it to be a source of binding international obligations for the Member States of the OAS.<sup>84</sup>

### 3. American Convention on Human Rights

The American Convention on Human Rights (American Convention) established a framework and system of personal liberty and social justice based on respect for the essential rights of all persons. Twenty-five of the thirty-five states in the OAS have ratified the American

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Convention, thereby contracting to observe the twenty-six rights it enumerates. The United States is not a State Party to the American Convention, and has not accepted the jurisdiction of the Inter-American Court on Human Rights. It is debated whether or not the American Convention still has binding effect on the United States as an OAS Member and a participant in the Inter-American system, since the Inter-American system has accepted the provisions of the American Convention as enforceable principles. Nevertheless, it is well accepted that the American Convention has persuasive authority in the United States.

The American Convention's enumerated rights include: the right to life, humane treatment, freedom from slavery, personal liberty, a fair trial, privacy, assembly, property, and freedom of religion.<sup>85</sup> The American Convention sets forth the rights protected and empowers two bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to monitor, to implement, and to enforce those rights.<sup>86</sup>

Article 1 of the American Convention contains the general principle of nondiscrimination by granting that all persons, within the jurisdiction of the American states signed onto, and ratified, to the convention, protection of any discrimination on the bases of “race, colour, sex, *language*, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition [emphasis added].”<sup>87</sup> Article 8 of the Convention grants the right of “every person accused of a serious crime has the right to be presumed innocent” and “the right of the accused to be assisted without charge by a translator or interpreter, if he does not *understand or does not speak the language of the tribunal or court* [emphasis added].”<sup>88</sup> This provision

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<sup>85</sup> See generally Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter ‘American Convention’].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at art. 1.

<sup>88</sup> *Id.* at art. 8.

protects linguistic rights to the extent required by considerations of due process. The American Convention addresses language rights in these two contexts, echoing other international instruments nondiscrimination based on language and requiring language access for every person accused of a criminal offense that does not speak the majority language.

## II. THE EUROPEAN UNION AND LANGUAGE ACCESS

The European Union provides inspiring examples of the utilization of international human rights principles to expand language rights and language access. Since World War II, international treaties and other legal instruments focusing on regional and minority languages, as well as the speakers of such languages, have multiplied on the world stage.<sup>89</sup> In the European Union (EU) specifically, as a “multicultural entity composed of other multicultural entities,” an emerging policy of protecting the inherent linguistic diversity of its member states and citizens exemplifies the ever-growing cultural norms upon which the EU is built: “unbiased coexistence.”<sup>90</sup> The proliferation of the EU’s support for cultural and language diversity has not been instantaneous, but rather gradual, consisting of landmark court cases as well as an intricate treaty framework.

The EU’s commitment to extending language rights is manifested in gradually emerging judicial developments. For example, the European Court of Justice, in *Criminal Proceedings against Horst Otto Bickel and Ulrich Franz*, did not solidify its progressive stance in regards to language rights protection until 1998.<sup>91</sup> In this case, the court’s noteworthy precedent required a country who had granted its own citizens the right to have criminal proceedings conducted

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<sup>89</sup> Parry, R. Gwynedd, *History, Human Rights and Multilingual Citizenship: Conceptualising the European Charter for Regional or Minority Languages*, 61 N. IR. LEGAL Q. 329, 330 (2010).

<sup>90</sup> *Id.* at 330-31.

<sup>91</sup> *Id.* at 331; Case C-274/96, *Proceedings against Horst Otto Bickel and Ulrich Franz*, 1998 E.C.R. I-7637 [hereinafter Horst and Ulrich].

against them in a particular language to extend this language access right to foreign citizens.<sup>92</sup> While the court's decision was limited in scope, i.e., it granted language access to citizens and foreign individuals only for the minority languages already admitted in courts of the host nation,<sup>93</sup> it was a first step in recognizing that linguistic minorities have certain rights that ought to be protected by EU member countries.<sup>94</sup>

In addition to court cases, Europe's treaty developments have also expanded the rights to full language access.<sup>95</sup> These developments include the European Charter of Fundamental Rights, the Council of Europe's Framework Convention for the Protection of National Minorities, as well as the Council of Europe's European Charter for Regional and Minority Languages.<sup>96</sup> While the EU model is not flawless or complete, it has significantly advanced language rights and serves as a model for what can be achieved in the United States and North Carolina specifically. Building Integrated Community partners and similar initiatives would be well-served to become acquainted with the protocols and practices to determine what might be adapted and adopted here at home.

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<sup>92</sup> Gwynedd, *supra* note 89, at 331.

<sup>93</sup> Christopher A. Kern, *English as a Court Language in Continental Courts*, 5 ERASMUS L. REV. 187, 206-07 (2012).

<sup>94</sup> See Horst and Ulrich, *supra* note 91.

<sup>95</sup> Gwynedd, *supra* note 89, at 331.

<sup>96</sup> *Id.* at 329-32.



comparison to other international protections for language rights, the ECRML more fully promotes multilingual societies, equal citizenship, and the integration of linguistic minorities.<sup>101</sup>

The ECRML focuses only on linguistic rights and requires the implementation of specifically defined measures, which are documented in Part III of the charter.<sup>102</sup> Within Part III, Articles 8 through 14 “specify obligations for states in the fields of education,<sup>103</sup> law,<sup>104</sup> public administration,<sup>105</sup> media,<sup>106</sup> culture and economic and social life”.<sup>107</sup> Parties to the charter must implement at least half of the approximately seventy obligations contained in the document.<sup>108</sup> The document is flexible in that states can choose freely among the multitude of obligations and does not require immediate compliance with the obligations, but rather supports gradual change.<sup>109</sup> This flexibility has been criticized as providing too much discretion to member states. However, in order to enact any change in Europe’s “complex and diverse linguistic landscape,” flexibility may be an advantage, if not a necessity.<sup>110</sup>

In order to hold parties to the charter accountable, the ECRML consists of a monitoring system where, under Article 15, states must provide a report regarding the fulfillment of their obligations under the charter no later than one year after ratification.<sup>111</sup> Article 15 also requires parties to provide follow-up reports every three years after this initial report has been submitted.<sup>112</sup> The reports are then reviewed by independent experts who subsequently submit

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<sup>101</sup> Gwynedd, *supra* note 89, at 329.

<sup>102</sup> *Id.* at 332.

<sup>103</sup> European Charter for Regional or Minority Languages, art. 8, *opened for signature* Nov. 5, 1992, E.T.S. No. 148, 2044 U.N.T.S. 575 [hereinafter ‘ECRML’].

<sup>104</sup> *Id.* at art. 9.

<sup>105</sup> *Id.* at art. 10.

<sup>106</sup> *Id.* at art. 11.

<sup>107</sup> *Id.* at art. 12-13.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Gwynedd, *supra* note 89, at 333.

<sup>112</sup> RENATE KICKER & MARKUS MÖSTL, STANDARD-SETTING THROUGH MONITORING? THE ROLE OF COUNCIL OF EUROPE EXPERT BODIES IN THE DEVELOPMENT OF HUMAN RIGHTS 38 (2012).

their conclusions to the Council of Ministers<sup>113</sup> after also considering information from organizations in the state representing regional and minority language speakers and in person “on-the-spot-visits.”<sup>114</sup> This reporting process is the sole procedure for monitoring states— “[t]he ECRML makes no provision for either individual or inter-state complaints,” making it a “non-judicial mechanism.”<sup>115</sup> Consequently, the monitoring process is not without its flaws—a country that does not comply is merely given a list of recommended actions.<sup>116</sup> Nevertheless, the process is important for the protection of language rights because it allows member countries to be held *publicly accountable* for the obligations imposed by the ECRML.<sup>117</sup>

The provisions in the ECRML are very detailed and pro-active<sup>118</sup> and cover a range of obligations with regard to regional and minority languages.<sup>119</sup> First and foremost, Article 1(a) explicitly defines what regional and minority languages are for the purpose of the instrument— “languages which are ‘traditionally used within a given territory of a State’ by nationals of the State who form a group that is ‘numerically smaller than the rest of the State’s population.’”<sup>120</sup> Such languages, to fall under this definition, cannot be the same as the official languages of the country, a form of dialect of the official languages, or the “languages of migrants.”<sup>121</sup>

In regards to education under Article 8, the ECRML requires countries to make available education at various levels “in the relevant regional or minority language,” as well as to “ensure the teaching of the history and the culture . . . reflected by the regional or minority language.”<sup>122</sup>

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<sup>113</sup> Gwynedd, *supra* note 89, at 333.

<sup>114</sup> KICKER & MÖSTL, *supra* note 112.

<sup>115</sup> HUMAN RIGHTS MONITORING MECHANISMS OF THE COUNCIL OF EUROPE 155 (Gauthier De Beco ed., 2012).

<sup>116</sup> See KICKER & MÖSTL, *supra* note 112, at 37.

<sup>117</sup> Gwynedd, *supra* note 89, at 333.

<sup>118</sup> *Id.*

<sup>119</sup> HUMAN RIGHTS MONITORING MECHANISMS OF THE COUNCIL OF EUROPE, *supra* note 115, at 153.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> ECRML, *supra* note 103.

Additionally, Article 9 emphasizes linguistic necessity rather than linguistic equality and requires states “to allow speakers of the minority language to use [that language] in court and tribunal hearings.”<sup>123</sup> Moreover, such a right to use the minority language in court does not only apply to parties to the case, but also witnesses.<sup>124</sup> Specifically for criminal cases, the ECRML requires proceedings to be conducted in the requested minority language through interpreters and translation, guaranteeing an accused the basic human right to speak in the language of his or her choice.<sup>125</sup>

The covenant also refers to public services in Article 10 and requires “administrative authorities to use the regional or minority languages,”<sup>126</sup> provide interpretation services, and recruit or train public officials to comply with the language obligations.<sup>127</sup> Article 11 relates to the media and requires parties to “ensure the creation of at least one radio station and one television channel in the regional or minority language” and to “guarantee [the] freedom of direct reception of radio and television broadcasts from neighbouring countries in a language used in identical or similar form to a regional or minority language.”<sup>128</sup> Moreover, Article 12 “encourage[s] types of expression and initiative specific to regional or minority languages and foster[s] the different means of access to works produced in these languages.” Finally, Article 13 relates to economic and social life by requiring states “to eliminate from their legislation any provision prohibiting or limiting without justifiable reasons the use of regional or minority languages in documents relating to economic or social life, particularly contracts of employment, and . . . technical documents.”<sup>129</sup>

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<sup>123</sup> Gwynedd, *supra* note 89, at 333.

<sup>124</sup> *Id.*

<sup>125</sup> There are also similar provisions regarding administrative and civil proceedings. *Id.* at 333-34.

<sup>126</sup> ECRML, *supra* note 103, at art. 10.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at art. 11.

<sup>129</sup> *Id.* at art. 13.

## 2. The Oslo Recommendations

The Oslo Recommendations derive from a number of legally binding international instruments: the ICCPR, the Copenhagen Document on the Human Dimension of CSCE<sup>130</sup>, the 1992 UN Declaration, the Council of Europe's Framework Convention for the Protection of National Minorities, and the ECRML.<sup>131</sup> While the above instruments provide a general foundation of rights upon which the Oslo Recommendations are based, the Oslo Recommendations contain more precise language to better interpret these other instruments' general, and often vague requirements regarding language rights.<sup>132</sup>

The Oslo Recommendations focus first on the basic issue of identity with protections for individuals' names and the addresses where such people live.<sup>133</sup> Recommendation 1 states that "persons belonging to national minorities have the right to use their personal names in their own language according to their traditions and linguistic systems."<sup>134</sup> The Recommendation goes on to state that such names should be officially recognized and used by public authorities who shall display local names, street names and other topographical indications in the minority language when a significant amount of that language's speakers demand such displays.<sup>135</sup>

In addition to matters pertaining to language and identity, the Oslo Recommendations also declare that every person has the basic right to use whatever language he or she chooses when "professing and practising his or her own religion,"<sup>136</sup> and that people have the right to

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<sup>130</sup> Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki* (Aug. 1, 1975), available at <http://www.refworld.org/docid/3dde4f9b4.html> (last visited July 29, 2015).

<sup>131</sup> Asbjørn Eide, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities: An Overview*, 6 INT'L J. ON MINORITY & GROUP RTS. 319, 324 (1999).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 325.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

associate with others, in their preferred language, through NGOs, associations, and other organizations.<sup>137</sup> The recommendations go further to recognize that state protection is required to fully guarantee such language rights: “[t]he State may not discriminate against these entities on the basis of language nor shall it unduly restrict the right of these entities to seek sources of funding from the State budget, international sources or the private sector.”<sup>138</sup> The state is not only prohibited from discriminating, but also has an affirmative duty to support cultural or social activities undertaken by national minorities.<sup>139</sup>

In the context of the media, Recommendations 8 and 9 grant national minorities the right to “establish and maintain their own minority language media.”<sup>140</sup> Again, the state is a major focus of the Recommendations, as the state regulation of media must be objective and non-discriminatory.<sup>141</sup> The programming media must be impartial, and content editors should be independent persons who speak the minority language as well.<sup>142</sup> In the economic realm, under Recommendation 12, national minorities must be able to operate their private enterprises in a minority language,<sup>143</sup> with the only exception to this general rule being that the official language may be required when “a legitimate public interest” that relates “to the protection of workers or consumers . . . in dealings between [an] enterprise and governmental authorities” can be demonstrated.<sup>144</sup>

The degree of language protection that is required under Recommendations 13, 14, and 15 is somewhat flexible in regards to contacts with administrative authorities and public services.

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<sup>137</sup> *Id.* at 325-26.

<sup>138</sup> *Id.* at 326.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

The extent of language services such authorities must provide depends on the number of minority language speakers present in a given area.<sup>145</sup> In areas where there are a large number of national minorities who also express a desire for language access, “persons belonging to [the] national minority shall have the right to acquire civil documents and certificates both in the official language or languages of the State and in the language of the national minority in question from regional and/or local public institutions.”<sup>146</sup> Furthermore, in localities with high numbers of national minorities, administrative authorities must provide public services in the minority language through adequate recruitment and training programs.<sup>147</sup>

### 3. The Amsterdam Treaty

The Treaty of Amsterdam is unique in the sense that it amends the Maastricht Treaty as well as the Treaties Establishing the European Communities and Certain Related Acts.<sup>148</sup> “[L]anguage is a raw material” in the EU, and the Amsterdam Treaty recognizes the “principle of the equality of official and working languages.”<sup>149</sup> Adopted by EU member states in 1997 and entered into force in 1999,<sup>150</sup> this document requires “[e]very citizen of the Union [to be able to] write to any . . . institutions or bodies referred to” in the treaty “in one of the languages mentioned in Article 248 and [to] have an answer in the same language.”<sup>151</sup> While these words do not provide as much protection for language access or linguistic diversity as the other treaties

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<sup>145</sup> This is relevant to the United States’ Title VI four-factor test, which also considers the number of linguistic minorities in a given area. *Id.* at 326-27.

<sup>146</sup> *Id.* at 327.

<sup>147</sup> *Id.*

<sup>148</sup> Treaty of Amsterdam, European Union, Oct. 2, 1997, O.J. C 340/1 (1997) (amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts) (entered into force May 1, 1999).

<sup>149</sup> WENDY J. ANDERSON, THE PHRASEOLOGY OF ADMINISTRATIVE FRENCH: A CORPUS-BASED STUDY 10 (2006).

<sup>150</sup> *About CSDP – The Treaty of Amsterdam*, EURO. EXTERNAL ACTION SERV., [http://eeas.europa.eu/csdp/about-csdp/amsterdam/index\\_en.htm](http://eeas.europa.eu/csdp/about-csdp/amsterdam/index_en.htm).

<sup>151</sup> Treaty of Amsterdam, *supra* note 148, at art. 8.

previously mentioned, this simple statement does in fact represent a “symbolic recognition of national sensitivities.”<sup>152</sup>

In addition to the fact that a multitude of languages are mentioned in Article 248, which provides EU citizens with a high probability of being able to use their language of choice in writing to EU institutions, the treaty was also required to be “drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages,” with an acknowledgment that “the texts in each of these languages [are] equally authentic.”<sup>153</sup>

#### 4. Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (CFR) “sets out a whole range of civil, political and social rights enjoyed by the EU’s citizens,” and “is divided into six chapters: Dignity, Freedom, Solidarity, Equality, Citizenship and Justice, and covers everything from workers' social rights to bioethics and the protection of personal data.”<sup>154</sup> Although many of the rights contained in the charter can be found in other documents, the CFR is significant in that it brings many of these rights together in one document.<sup>155</sup> For language rights purposes, Article 21 prohibits “[a]ny discrimination based on . . . sex, race, colour, ethnic or social origin, genetic features, *language*, religion or belief, political or any other opinion, *membership of a national minority*, property, birth, disability, age or sexual orientation.”<sup>156</sup> As a legally binding instrument, EU citizens can use the language of Article 21 “to challenge any decision taken by

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<sup>152</sup> Theodora Kostakopoulou, *European Union Citizenship as a Model of Citizenship Beyond the Nation State*, in POLITICAL THEORY AND EUROPEAN UNION 158 (Michael Nentwich & Albert Weale eds., 1998).

<sup>153</sup> Treaty of Amsterdam, *supra* note 148, at art. 15.

<sup>154</sup> *Q&A: Charter of Fundamental Rights*, BBC NEWS (July 16, 2007, 18:53 GMT), <http://news.bbc.co.uk/2/hi/europe/6225580.stm>.

<sup>155</sup> *Id.*

<sup>156</sup> Charter of Fundamental Human Rights of the European Union, art. 21, O.J. C 364/1 (2000) [hereinafter ‘CFR’] (emphasis added).

EU institutions, or by member state[s] implementing EU law”<sup>157</sup> that has infringed on the right to be free from discrimination based on “language” or “membership of a national minority.”<sup>158</sup>

### **B. The European Court of Human Right’s Influence on Language Access**

The European Court of Human Rights (ECHR) oversees the implementation of the European Convention for the Protection of Human Rights and fundamental freedoms which was adopted in 1950 and subsequently entered into force in 1953.<sup>159</sup> The convention deals with a number of rights and liberties including the right to life, freedom, and security; respect for private and family life; freedom of expression; freedom of thought, conscience and religion; fair trials in civil and criminal cases; and prohibits the death penalty; torture or inhuman or degrading treatment; slavery and forced labor; and discrimination.<sup>160</sup>

Specifically, in regards to language rights, the convention protects a person’s “right to respect for his private and family life, his home and his correspondence” in Article 8, to freely express himself under Article 10, to be informed “in a language which he understands, of the reasons for his arrest and the charge against him” under Article 5, to be informed “in a language which he understands . . . of the nature and cause of the accusation against him” at trial under Article 6, and for “the enjoyment of the rights and freedoms set forth in [the] [c]onvention [to] be secured without discrimination on any ground such as sex, race, colour, *language*, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” under Article 14.<sup>161</sup>

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<sup>157</sup> Q&A: *Charter of Fundamental Rights*, *supra* note 154.

<sup>158</sup> CFR, *supra* note 156.

<sup>159</sup> *A Convention to Protect Your Rights and Liberties*, COUNCIL OF EUROPE, <http://human-rights-convention.org>.

<sup>160</sup> *Id.*

<sup>161</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S No. 5, 213 U.N.T.S 221 (1950) (emphasis added).

The European Court of Human Rights has, in interpreting the convention, “recognised an, ‘emerging international consensus . . . [regarding] the special needs of minorities and an obligation to protect their security, identity, and lifestyle.’”<sup>162</sup> Within several years, the court has created precedent for linguistic minorities and foreign citizens under various rights protected by the convention:<sup>163</sup> the protection of names, prisoners’ language rights, freedom of expression, as well as language rights in the educational and political contexts. While such case law deals with fact-specific scenarios, the court’s rulings exemplify a gradual move towards enhanced protection for linguistic minorities - a move that can inspire and create similar change back home in the United States.

#### 1. Protection of Names

Although Article 8 of the European Convention on Human Rights does not directly deal with the national identity and languages as manifested in the names of individuals, the European Court of Human Rights has held that names “fall within the scope of the right to private life.”<sup>164</sup> Specifically, the court has emphasized the importance of an individual’s right to be linked to his or her family, to be identified, as well as to have a name that allows for communication and the creation of relationships.<sup>165</sup> Through various cases, the court has generally protected a parent’s right to name his or her child, the right for a person to change his or her name, as well as a person’s chosen linguistic form of his or her name under Article 8 of the European Convention on Human Rights (ECHR).<sup>166</sup>

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<sup>162</sup> Duncan Wilson, *A Critical Evaluation of the First Results of the Monitoring of the Framework Convention on the Issue of Minority Rights in, to and Through Education*, in *FILLING THE FRAME: FIVE YEARS OF MONITORING THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES* 171 (2004).

<sup>163</sup> COUNCIL OF EUROPE RESEARCH DIVISION, *CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 13 (2011), available at [http://www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf).

<sup>164</sup> *Protections of Names Under Article 8 ECHR*, ECHR ONLINE, <http://echr-online.com/art-8-echr/private-life/name>.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

To provide protection for the linguistic form of names, the court has “recognize[d] that amendments to the name as a consequence of its adjustment to another alphabet, another language, or due to grammatical requirements may interfere with the right to private life under Article 8 [of the] ECHR.”<sup>167</sup> However, the court has not afforded complete protection in this area due to its acknowledgment that states have a certain interest in promoting the official language as well as requiring official documents to be in line with “grammatical and orthographic requirements of [the] language.”<sup>168</sup> Nonetheless, even with such restrictions, the court’s holdings provide an excellent example of realizable change.<sup>169</sup>

The court has furthermore provided protection to parents’ rights to name their children as they wish.<sup>170</sup> Specifically, the court has held that “[t]he denial of a request to register a certain name is an interference with the right to private life, [unless] justified pursuant to Article 8 para 2.”<sup>171</sup> For example, in *Johansson v. Finland*, authorities refused to register a couple’s child under the name they requested based on the Finnish Name Act which prohibits the acceptance of names that are “incompatible with domestic naming practice.”<sup>172</sup> The court ruled that Finland was in clear violation of Article 8 of the ECHR, making a strong statement that the right to name a child is a parent’s basic human right.<sup>173</sup>

Furthermore, the ECHR, in *Burghartz v. Switzerland*, found a violation of Article 14, which prohibits discrimination based on a couple’s request to change their names.<sup>174</sup> In that case, a recently married couple decided to use the last name of the wife, who was a German

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

citizen, as the family name with the addition of the husband's name, who was a Swiss citizen, in accordance with German law.<sup>175</sup> Although Swiss authorities denied this registration request, the court held that Swiss authorities could not refuse to register the couple under their chosen name just because the law in Switzerland “did not provide a basis for a male spouse to add his original name to the family name” as German law does.<sup>176</sup> The case's significance lies in the court's assumption that an individual's choice of name and surname is a linguistic minority's basic human right—“[n]ames and surnames constitute a means of identifying persons within their families and the community, and as such are an inseparable part of private and family life.”<sup>177</sup>

The spelling of forenames has also been challenged. In 2001, Güzel Erdagöz brought an action in Turkey in order to rectify the spelling of her forename.<sup>178</sup> The basis of her claim was her assertion that she had always been called Gözel instead of Güzel by friends and family.<sup>179</sup> The Turkish court refused her claim, holding that “the spelling that the applicant wished to use was based on regional pronunciation and did not appear in the dictionary.”<sup>180</sup> Erdagöz took her case to the ECHR, alleging that her name had been “Turkicised” and that this was discrimination based on language and membership of the Kurdish minority group.<sup>181</sup>

The ECHR staunchly agreed with Erdagöz, unanimously holding that a violation of Article 8 in the European Convention on Human Rights, protecting the “right to respect for private and family life,” had occurred, meaning that an examination under Article 14, which

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> LANGUAGE RIGHTS REVISITED – THE CHALLENGE OF GLOBAL MIGRATION AND COMMUNICATION 48 (Dagmar Richter, et al. eds., 2012).

<sup>178</sup> LATIF TAS, LEGAL PLURISM IN ACTION: DISPUTE RESOLUTION AND THE KURDISH PEACE COMMITTEE 60 (2014).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

prohibits discrimination based on language, was not necessary.<sup>182</sup> This exemplified an important recognition by the court that fundamental family rights are linked to language rights.<sup>183</sup>

## 2. Language Rights of Prisoners

The European Court of Human Rights has also recognized the need to protect the right of prisoners to correspond freely in their chosen language under Article 8 of the convention in *Mehmet Nuri Özen and others v. Turkey*.<sup>184</sup> In that case, prison authorities refused to send prisoners' letters to certain addresses due to their inability to understand the Kurdish language and failure to translate into Turkish.<sup>185</sup> The court ruled that such interference with an applicant's form of communication was in violation of the law under Articles 8 and 14,<sup>186</sup> and the "right to respect for private and family life correspondence."<sup>187</sup> The court based its holding on the ground that there was "no legal basis for the refusal to dispatch prisoners' letters written in Kurdish," and in effect, broadened its previous "restrictive case-law on the issue."<sup>188</sup> The court formerly held in *Senger v. Germany* that German authorities' decision to prevent Russian letters from being sent to a prisoner who had dual German and Russian Nationality from an author who also had dual nationality was "necessary for the prevention of disorder and crime."<sup>189</sup> Again, even though the holding in *Mehmet* was not a huge leap in terms of linguistic rights, it represents a small step that the United States can model its own court decisions after.

## 3. Right to Freedom of Expression in One's Own Language

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> BERNADETTE RAINEY ET AL., JACOBS, WHITE & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 408 (6<sup>th</sup> ed. 2014).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*; DLS, *Mehmet Nuri Ozen and Others -v- Turkey*; ECHR 11-Apr-2011, SWARB.CO.UK (Jan. 28, 2015 8:21AM), <http://swarb.co.uk/mehmet-nuri-ozen-and-others-v-turkey-echr-11-apr-2011/>.

<sup>187</sup> Ayça Söylemez, *Turkey Convicted of Banning Kurdish in Prison*, BIANET.ORG, <http://www.bianet.org/english/world/155310-turkey-convicted-of-banning-kurdish-in-prison>.

<sup>188</sup> COUNCIL OF EUROPE RESEARCH DIVISION, *supra* note 163, at 14.

<sup>189</sup> *Id.*

Linguistic rights have also been protected under Article 10 of the European Convention on Human Rights in *Ulusoy and Others v. Turkey*,<sup>190</sup> where the court deemed it to be a violation of the right to freedom of expression to ban the Kurdish production of a play in a municipal building.<sup>191</sup> In this case, the applicants acted as part of a theater group wishing to perform a Kurdish-language production of a play and were refused authorization for this performance by the Regional Governor's Office.<sup>192</sup> The court based its holding on the fact that "[t]he ban on staging the play had amounted to an interference with the applicants' right to freedom of expression," therefore, the interference "could not be considered necessary in a democratic society."

#### 4. Linguistic Rights in Education

Although Article 2 of Protocol No. 1, granting the right to education, does not directly deal with language rights or even "specify the language in which education must be conducted in order [for] the right to education [to] be respected," the court has in fact developed case law protecting language rights in the educational arena.<sup>193</sup> For example, in *Irfan Temel and Others v. Turkey*, eighteen students were suspended from a university for two terms as a result of their request to introduce optional Kurdish language classes.<sup>194</sup> The ECHR extended Article 2 of Protocol No. 1, which merely upholds a person's right to education, in order to protect the students' requests to become educated in other languages.<sup>195</sup> Similarly, in *Cyprus v. Turkey*, the court found a violation of Article 2 of Protocol No. 1, "in respect of Greek Cypriots living in

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<sup>190</sup> *Ulusoy and Others v. Turkey*, European Court of Human Rights, App. No. 34797/03 (2007).

<sup>191</sup> COUNCIL OF EUROPE RESEARCH DIVISION, *supra* note 163, at 14.

<sup>192</sup> *Ulusoy and Others v. Turkey* - 34797/03, GLOBE24H CASELAW, <http://caselaw.echr.globe24h.com/0/0/turkey/2007/05/03/ulusoy-and-others-v-turkey-2723-34797-03.shtml>.

<sup>193</sup> COUNCIL OF EUROPE RESEARCH DIVISION, *supra* note 163, at 14.

<sup>194</sup> *Id.* at 15.

<sup>195</sup> *Id.*

northern Cyprus in so far as no Greek-language secondary-school facilities were available to them, after having completed their primary schooling in Greek language.”<sup>196</sup>

#### 5. Linguistic Rights in Political or Institutional Contexts

The ECHR has also vindicated language rights in to political and institutional contexts. In the case of *Podkolzina v. Latvia*,<sup>197</sup> the court connected the right to free elections under Article 3 of Protocol No. 1 with linguistic rights.<sup>198</sup> In *Podkolzina*, a member of the Russian-speaking minority was eliminated from a list for parliamentary elections for the sole reason that the candidate was not sufficiently fluent in the official language.<sup>199</sup> The court’s decision was far from “reach[ing] an opinion on the choice of the working language of a national parliament,” because its holding was based on the elimination procedure’s incompatibility with the convention’s fairness and legal certainty requirement.<sup>200</sup> Nonetheless, the ECHR took a step in the right direction, and at the minimum, recognized that the right to free elections could not be compromised by the practice of striking a candidate for failing to have adequate knowledge of the country’s official language.

#### C. Mercator Network

One additional way in which the EU has focused on language access is through the Mercator European Network of Language Diversity Centres.<sup>201</sup> This project is funded by the EU and aims to “connect[] multilingual communities across Europe, promot[e] knowledge sharing and facilitate structured exchange of best practice[s] and cutting edge initiatives through

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<sup>196</sup> *Id.*

<sup>197</sup> *Podkolzina v. Latvia*, App. No. 46726/99, 2002-II Eur. Ct. H.R. (2002).

<sup>198</sup> COUNCIL OF EUROPE RESEARCH DIVISION, *supra* note 163, at 15.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Platform Members: Mercator European Network of Language Diversity Centres*, POLIGLOTTI4.EU, [http://www.poliglotti4.eu/php/about/platform\\_members2.php?doc\\_id=54&lg=en](http://www.poliglotti4.eu/php/about/platform_members2.php?doc_id=54&lg=en).

its programme of activities.”<sup>202</sup> The network’s goal is to improve language vitality through the analysis of “language visibility as well as cultural, economic and social opportunities for language use”<sup>203</sup> and to “elaborate different strategic tools in order to help to transform the conceptual formulation of, and social response to, the current linguistic arrangements.”<sup>204</sup>

The project consists of diverse participants, including academic language experts, policy-makers, grass roots organizations, media experts, international law experts, students, civil society, and a multitude of others.<sup>205</sup> In turn, these participants present and discuss important topics including “the analyses of minority language in education, the interconnection and independencies between the media and minority languages, and the role of legislation in enhancing linguistic diversity.”<sup>206</sup>

With its achievements summarized in annual reports, the Mercator Network has strengthened the notion that the diverse languages of Europe must be maintained while enhanced cooperation among experts representing various minority groups allows for superior best practices knowledge as well as effective solutions.<sup>207</sup> An example of such cooperation includes powerful lobbying with a demand for more information on language diversity and access, as well as connections between the Network and several projects operating on a European scale.<sup>208</sup> These projects include the “Multilingual Early Language Transmission (MELT), the project on Bilingualism, Identity and the Media (BIM), the project Poliglotti4.eu, and the project Language Rich Europe.”<sup>209</sup> Remarkably, the European Commission has taken notice of the Mercator

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *The Mercator Network of Language Diversity Centers*, EDUCATION, AUDIOVISUAL AND CULTURE EXECUTIVE AGENCY, [http://eacea.ec.europa.eu/lp/projects/public\\_parts/documents/languages/lan\\_nw\\_143518\\_mercator.pdf](http://eacea.ec.europa.eu/lp/projects/public_parts/documents/languages/lan_nw_143518_mercator.pdf).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

Network's expertise and events to become better informed about trends in minority language rights.<sup>210</sup>

### **III. RECOMMENDATIONS BASED ON INTERNATIONAL & REGIONAL HUMAN RIGHTS PRINCIPLES**

Deprivation of language rights undermines human dignity and exacerbates minorities' innate vulnerabilities. Additionally, it harms society as a whole by impeding the efficacy of essential institutions i.e. healthcare and judicial systems, and ultimately causes the marginalization of minority populations. Although the recognition of an individual's right to non-discrimination is an important part of fostering language rights and language access, North Carolina state and local governments must also provide language access and language rights in order to protect basic human rights of minority populations, improve relationships between different cultural identities, and efficiently integrate its communities. This policy report urges local governments to utilize the human rights principles and international legal norms described in this section in efforts to expand language rights and promote language access initiatives. Furthermore, it encourages state and local governments to consider the EU's characterization of language as a basic human right consider, and the successful model that the EU provides, as a guide for language access initiatives.

#### **A. Applying Human Rights Principles at Home**

Human rights will almost always be a local, state, national, and international concern. An effective way that state and local legislatures can work towards equal language access for all their residents is recognizing the value of framing local concerns through a human rights lens.<sup>211</sup> State and local governments have a unique and distinguishable role in ensuring that the United

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

States complies with its international human rights obligations and meets the standards set by international human rights norms. States have the capacity to implement these international norms at the local level and to advocate for federal support and coordination of these efforts. States can also contribute to compliance enforcement by “promoting the development and use of other accountability structures at the federal, state, and local levels for human rights compliance.”<sup>212</sup>

However, the benefit of a human rights approach to local government decision-making extends much further than its contribution to U.S. compliance with international human rights obligations. The human rights framework is premised on the understanding of all human rights as interconnected. Thus, this framework offers a unifying approach to multifaceted issues such as language access and language rights for diverse immigrant populations. “Premised on the core human rights principles of dignity and equality for all, human rights assessments foster a deliberative approach to government decision-making, ensuring that government action enhances equality and addresses discrimination in all its forms.”<sup>213</sup> “Using human rights as a baseline, governments place equality, dignity and opportunity at the center of decision-making.”<sup>214</sup> Indeed, a number of jurisdictions in the United States have already begun to analyze proposed policies and decisions in light of human rights principles.<sup>215</sup> Taking a human rights approach at state and local levels can add much value to local decisions:

(1) **Measure Impact:** Human rights standards can serve as benchmarks to measure the potential impact of existing and proposed policies and programs and help identify the barriers to reaching intended beneficiaries, and steps to overcome them.

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<sup>212</sup> Columbia Law School Human Right’s Institute, *Using Human Rights Assessments in Local Governance*, HUMAN RIGHTS AT HOME CAMPAIGN (Aug. 2014), available at [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/iaohra\\_toolkit\\_9.11.14\\_reduced.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/iaohra_toolkit_9.11.14_reduced.pdf).

<sup>213</sup> *Id.* at 2.

<sup>214</sup> *Id.* at 7.

<sup>215</sup> *Id.* at 6-7.

(2) Foster Equal Outcomes: The human rights framework allows governments to develop a clearer picture of how policies may affect different communities to ensure that basic needs such as housing and education are met for all.

(3) Focus on Prevention Rather than Redress: Human rights assessments help governments estimate how policies impact marginalized groups and address structural causes of inequality through proactive measures.<sup>216</sup>

If state and local governments take this approach to protecting the rights of their residents, it will enhance efforts to address discrimination and foster equality.

The approach recognizes the value of creating communities of inclusion, promoting human dignity, and protecting language rights at all levels of government. It creates a strong foundation from which to advance language access initiatives across the spectrum of agencies that provide public services. Ultimately, municipalities have the authority to apply human rights principles in their decision-making process. In doing so, it will promote dignity, fairness and equality for all people, and produce better outcomes for communities, as has been shown by the European Union's example.

### **B. The European Union Model for Advancing Language Rights as a Basic Human Right**

The European Union provides “a powerful symbol of the [] aspiration to be united in diversity.”<sup>217</sup> It has, through its various initiatives, created bridges to other individuals and has “open[ed] access to other countries and cultures, promoting mutual understanding” through the facilitation of “access to services and rights, and [by] contribut[ing] to solidarity through enhanced intercultural dialogue and social cohesion.” The United States and the European Union are both becoming increasingly diverse regions and will only benefit from modeling

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<sup>216</sup> *Id.* at 3.

<sup>217</sup> *Linguistic Diversity*, EUROPEAN COMM'N, [http://ec.europa.eu/languages/policy/linguistic-diversity/index\\_en.htm](http://ec.europa.eu/languages/policy/linguistic-diversity/index_en.htm).

language access strategies after one another's successes while learning from and building on each other's failures.

The EU currently consists of over “500 million citizens, 28 Member States, 3 alphabets and 24 official languages” with 60 other languages being spoken by certain groups in various regions.<sup>218</sup> Additionally, over 175 nationalities make up the EU citizenry.<sup>219</sup> Analogously, the rise of language diversity is increasingly present in the United States as a result of continued immigration, language education, and other impetuses.<sup>220</sup> While language access in the United States has long followed the approach of ensuring immigrants' learning of English, “[t]he preservation of immigrant languages” will “increase linguistic diversity in the” United States since “more than 55.4 million people [already] speak a language other than English in the home.”<sup>221</sup> Spanish is the fastest growing minority language in the United States, however, other languages that are gaining momentum include Chinese, Farsi, and Arabic.<sup>222</sup> Notably, such languages “promise to be important languages of the future, in everything from politics to trade.”<sup>223</sup>

In addition to the similarities between the European Union and the United States, the EU model provides greater language access for minority language speakers than current law and initiatives in the United States. While Title VI of the United States Code prohibits discrimination on the grounds of race, color, or origin, and in effect, precludes discrimination based on Limited English Proficiency (LEP), the EU model characterizes language access to be a

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *The Rise of Language Diversity in the United States*, ACCREDITED LANGUAGE SERVS. (July 6, 2011), <http://www.alsintl.com/blog/language-diversity-united-states/>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

*basic human right.* In the EU, the protection of this basic human right does not depend on whether an entity receives federal funding—its protection comes with simply being born. Most importantly, the EU model promotes unity in a way that the United States melting pot has not yet achieved. EU citizens are beginning to no longer define themselves by their national identity or language, but rather as a piece of diversity within a united group. In the United States, however, linguistic minorities continue to be considered outsiders as we continue to glance over the attributes such speakers bring to the table. Modeling our own practices, through federal, state, or local initiatives, after the ones mentioned in this section has the potential to transform the United States from an unconnected, heterogeneous mix of individuals to a group of Americans that are uniquely dissimilar but mesh together to form a single, cohesive mixture.

## SECTION TWO: TITLE VI

Growing numbers of linguistic minorities means that countless individuals could face language barriers in the United States that preclude them from gaining access to necessary programs and services, create nearly insurmountable obstacles to comply with the law in various situations, and prevent them from participating socially, economically, or politically in the communities in which they reside. In contrast to the culture-based approach to these issues related to language access and language rights shown in Section One, the efforts thus far in the United States have attempted to protect language rights using an approach grounded in civil rights. This Section examines the controlling U.S. federal law related to language rights and language access: Title VI of the 1964 Civil Rights Act. Title VI applies to all federal agencies and any state or local agencies that receive federal financial assistance. This Section articulates the language access obligations that Title VI cements in domestic law, who must comply with these obligations, how to meet them, and how they are enforced.

Title VI of the 1964 Civil Rights Act prohibits discrimination based on race, color, or national origin by entities that receive federal financial assistance.<sup>224</sup> Under Title VI and its regulations, a person also may not be discriminated against because they are proficient in the English language due to their national origin. In certain circumstances, a federally financed entity's failure to make their services accessible to persons with a limited English proficiency (LEPs) constitutes national origin discrimination under Title VI.<sup>225</sup> This Section will provide an overview of Title VI and its accompanying regulations. It will discuss the background of Title VI, the relationship between Title VI and language access, and the extent to which Title VI

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<sup>224</sup> 42 U.S.C. § 2000d (2009).

<sup>225</sup> *Limited English Proficiency Frequently Asked Questions*, LEP.GOV, [http://www.lep.gov/faqs/faqs.html#Four\\_Title\\_VI\\_Regs\\_FAQ](http://www.lep.gov/faqs/faqs.html#Four_Title_VI_Regs_FAQ).

provides protection for language rights and ensures language accessibility at state and local levels. A thorough understanding of Title VI can help to assure that agencies and municipalities to which it applies are in compliance with the law, and can assist with the development of meaningful language access initiatives. Thus, this Section endeavors to detail how Title VI may function as a legal mechanism to improve language access.

Racial turmoil in the 1950s and 1960s led to a national outcry for federal intervention to end practices of racial discrimination, which culminated in the Civil Rights Act of 1964. In advocating for its enactment, President John F. Kennedy reasoned that “simple justice” compelled the notion that “public funds, to which all taxpayers of all races contribute,” should not be allowed to be spent in a way that “encourages, entrenches, subsidizes, or results in racial discrimination.”<sup>226</sup> Prior attempts had been made to accomplish these goals in various sectors, including several Executive Orders requiring equal opportunity in housing,<sup>227</sup> employment,<sup>228</sup> and the military.<sup>229</sup> However, by 1964, Congress recognized that uniform, across-the-board policies were necessary. Thus, the Civil Rights Act was signed into law on July 2, 1964.<sup>230</sup>

Title VI, the most contested provision of the Act, had four principle motives: First, there were federal statutes still on the books that provided federal funds to racially segregated programs, and there was some ambiguity as to whether the landmark school desegregation case of *Brown v. Board of Education*<sup>231</sup> invalidated these statutes.<sup>232</sup> After Title VI, there was no question that these statutes had been invalidated. Second, it would firmly establish the authority

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<sup>226</sup> H.R. Misc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).

<sup>227</sup> Exec. Order No. 11,063, 3 C.F.R. § 652-56 (1962) *amended in* Exec. Order No. 12,259, 3 C.F.R. § 307 (1981).

<sup>228</sup> Exec. Order. No. 10,479, 3 C.F.R. § 61 (1949 – 1953).

<sup>229</sup> Exec. Order. No. 9981, 3 C.F.R. § 722 (1942 – 1948).

<sup>230</sup> See CIVIL RIGHTS DIVISION, FEDERAL COORDINATION AND COMPLIANCE SECTION, U.S. DEPARTMENT OF JUSTICE, TITLE VI MANUAL (2001), *available at* <http://www.justice.gov/crt/about/cor/coord/titlevi.php>.

<sup>231</sup> See *Brown v. Board of Education*, 349 U.S. 294 (1955).

<sup>232</sup> TITLE VI LEGAL MANUAL, *supra* note 230.

of federal agencies and entities to ban discrimination within their own programs.<sup>233</sup> Third, it would provide consistency and uniformity in all programs and activities that receive federal financial assistance.<sup>234</sup> Lastly, it would cut down on unnecessary, costly, slow-moving litigation involving discrimination.<sup>235</sup>

## **I. TITLE VI & LANGUAGE ACCESS**

Title VI provides in Sec. 601 that “[n]o 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.”<sup>236</sup> The Act further authorizes federal departments and agencies to promulgate regulations aimed at effectuating the anti-discrimination provisions of Section 601.<sup>237</sup> All entities that receive financial assistance from federal agencies and departments must comply with Title VI’s anti-discrimination provisions and regulations in order to maintain funding. Under Title VI’s anti-discrimination provisions, the failure to reduce language barriers that preclude LEP persons from having meaningful access to federally funded services, activities, etc. is viewed as a practice that has a disparate impact on national origin minorities.<sup>238</sup> Thus, discrimination in intent or effect based on a person’s inability to speak English proficiently violates the national origin provision of Title VI.

### **A. When Does Title VI Apply?**

A preliminary step to understanding the specific requirements and obligations that Title VI places on state and local agencies is a determination of whether or not Title VI is applicable

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> 42 U.S.C. § 2000d (2009).

<sup>237</sup> Audrey Daly, *How to Speak American: In Search of the Real Meaning of “Meaningful Access” to Government Services for Language Minorities*, 110 PENN ST. L. REV. 1005, 1018-19 (2006).

<sup>238</sup> *See id.* at 1020.

to that entity. As stated above, all federally funded entities must be in compliance with Title VI in order to receive or continue receiving federal funds. For the most part, it is readily apparent to an agency when they have Title VI compliance obligations. Nonetheless, it is important to have a clear understanding of the Title VI terminology that defines the scope of the statute.

A “recipient” of federal funds is an entity that receives federal financial assistance and operates a “program” or “activity” and is therefore subject to Title VI regulations.<sup>239</sup> Recipients may be categorized as either “prime recipients” or “subrecipients.” A prime recipient is an entity that receives a grant directly from the federal government.<sup>240</sup> A subrecipient is an entity that receives a sub-grant from the prime recipient under the federal grant, and is accountable to the prime recipient for the use of the federal funds provided by the sub-grant.<sup>241</sup> Local and state recipient agencies may receive financial assistance directly from the federal government, or from a sub-grant of federal financial assistance from a state entity that received it for the purpose of passing it down to that local agency. Many agencies receive multiple grants, which may include a mix of grants they receive directly from the federal government and ones received as sub-grants.

Official regulations governing Title VI define “recipient” as

any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.<sup>242</sup>

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<sup>239</sup> See TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>240</sup> *Federal Funding and Transparency Act: Questions and Answers*, U.S. DOT, <https://www.fhwa.dot.gov/transparencyact/qandas.htm> (last visited July 23, 2015).

<sup>241</sup> *Id.*

<sup>242</sup> 28 C.F.R. § 42.102(f) (2009).

The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.<sup>243</sup>

Federal funds or other forms of federal financial assistance that subject an entity to Title VI is not limited to just money or grants. Federal financial assistance includes:

- (1) Grants and loans of Federal funds,
- (2) The grant or donation of Federal property and interests in property,
- (3) The detail of Federal personnel,
- (4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and
- (5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.<sup>244</sup>

“Program or activity” created one source of ambiguity, as it was not defined by the statute. In the 1984 Supreme Court case *Grove City College v. Bell*,<sup>245</sup> the Court narrowed how Title VI applied by limiting its reach to only the specific operations in an institution or entity that received federal funding.<sup>246</sup> Congress overturned *Grove City* three years later by enacting the Civil Rights Restoration Act (CRRA). As one legislator noted, “Title VI prohibitions were meant to be applied institution-wide, as broadly as necessary to eradicate discriminatory practices supported by federal funds.”<sup>247</sup> The CRRA broadened the meaning of “program or activity” to what Congress had originally intended when it enacted Title VI.<sup>248</sup> Under the CRRA, the phrase “program” now means

- (A) a department, agency, special purpose district, or other instrumentality of a

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<sup>243</sup> *Id.*

<sup>244</sup> 28 C.F.R. § 42.102(c).10 (2009).

<sup>245</sup> *Grove City College v. Bell*, 465 U.S. 574, 575 (1984).

<sup>246</sup> *Id.*

<sup>247</sup> *See id.* (quoting statement of Sen. Humphrey); S. REP. NO. 64, 100th Cong., 2d Sess. 5-7 (1988).

<sup>248</sup> *See* TITLE VI LEGAL MANUAL, *supra* note 230.

State or of a local government;<sup>249</sup>

or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; any part which is extended Federal Financial assistance.<sup>250</sup>

The use of the word “persons” similarly was a source of ambiguity. It was left uncertain to whom the statute applied under the provision that “persons” may not be discriminated against due to their race, color, or national origin. Courts have not stipulated specifically how “person” is defined in a Title VI context, but the Supreme Court has addressed the scope of the term “person” in the context of the Fifth and Fourteenth Amendments.<sup>251</sup> *Plyler v. Doe*<sup>252</sup> held that “persons” included undocumented aliens for purposes of the Fifth and Fourteenth amendments, and because these rights are analogous to rights under Title VI, the term “persons” is not limited to U.S. citizens for the purposes of Title VI.<sup>253</sup> Thus, “persons” or individuals may bring a Title VI action under specified circumstances, but Title VI likely does not apply to other entities such as cities or instrumentalities of the state.<sup>254</sup>

Another technical matter involves the precise locations where the statute is applicable. The language of Title VI states that no person shall be discriminated against “in the United States” on the basis of race, color, or national origin by any agency that receives federal financial assistance. Whether “United States” includes territories of the United States has not been determined in a Title VI context, but cases under the Fifth and Fourteenth Amendments have

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<sup>249</sup> 42 U.S.C. § 2000d-4a(1)(A) (2006).

<sup>250</sup> 42 U.S.C. § 2000d-4a(1)(B) (2006).

<sup>251</sup> *See, e.g., Mathews v. Diaz*, 426 U.S. 67 (1976).

<sup>252</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>253</sup> *Id.* at 210-11. *See also Mathews v. Diaz*, 426 U.S. 67 (1976); TITLE VI LEGAL MANUAL, *supra* note 230 (providing further explanation why undocumented persons are assumed to be covered under Title VI).

<sup>254</sup> *See United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986) (precluding Alabama State University from filing a Title VI claim due to lack of standing).

addressed the issue.<sup>255</sup> *District of Columbia v. Carter*<sup>256</sup> held that territories are not states and are thus not subject to the Fourteenth Amendment.<sup>257</sup> However, *In re Naturalization of 68 Filipino War Veterans*<sup>258</sup> held that Fifth Amendment equal protection rights do apply to U.S. territories. Because Title VI is “at least coextensive with the Fifth and Fourteenth Amendments,” construing Title VI “to apply to the States yet not to territories would be inconsistent with its contextual underpinnings, as well as congressional intent that Title VI be interpreted broadly to effectuate its purpose.”<sup>259</sup>

## **B. Executive Orders**

In terms of language access, Title VI and its regulations require recipients to take reasonable steps to ensure that LEP individuals have access to their program or activity and to remedy any language gaps that may preclude these individuals from having meaningful access. Recipients may not discriminate, in intent or effect, against individuals based on their LEP status.<sup>260</sup> ***Thus, state and local entities that receive any financial assistance from the federal government, including but not limited to police departments, fire departments, planning and zoning departments, emergency services, and city or county utilities must provide meaningful language access to LEP persons.***<sup>261</sup> Failure on the part of these programs and agencies to reduce language barriers and provide language access to LEP individuals could constitute national origin discrimination in violation of the Civil Rights Act. To foster language access

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<sup>255</sup> See TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>256</sup> *District of Columbia v. Carter*, 409 U.S. 418, 424 (1973).

<sup>257</sup> *Id.*

<sup>258</sup> *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 940-41 (N.D. Cal.1975) (citing *Balzac v. Puerto Rico*, 258 U.S. 298, 312-13 (1922)).

<sup>259</sup> TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>260</sup> *Limited English Proficiency Frequently Asked Questions*, LEP.GOV, *supra* note 225.

<sup>261</sup> Exec. Order No. 12,250, 3 C.F.R. § 298 (1981).

rights in accordance with Title VI, two significant executive orders have been issued that affect LEP groups.

1. Executive Order 12250

On November 4, 1980, President Jimmy Carter signed Executive Order 12250: “Coordination of Grant-Related Civil Rights Statutes.”<sup>262</sup> It provided that the implementation of laws regarding discrimination on the basis of race, color, national origin, sex, disability, or religion is a function of the Department of Justice (DOJ).<sup>263</sup> Specifically, Executive Order 12250 tasked the Attorney General with “coordinat[ing] the implementation and enforcement by executive agencies of various nondiscrimination provisions” of Title VI and “any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.”<sup>264</sup> The Attorney General was responsible for developing standards and guidelines for compliance reviews, recording and reporting, and coordinating between agencies.<sup>265</sup> These responsibilities were redelegated to the Assistant Attorney General for Civil Rights,<sup>266</sup> and coordination efforts, application, and enforcement fall under the Civil Rights Division of the Department of Justice.<sup>267</sup>

2. Executive Order 13166

Twenty years later, on August 11, 2000, President Bill Clinton signed Executive Order 13,166: “Improving Access to Services for Persons with Limited English Proficiency.”<sup>268</sup> The

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<sup>262</sup> TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>263</sup> *Id.*

<sup>264</sup> *See* Exec. Order No. 12,250, *supra* note 261.

<sup>265</sup> *Id.*

<sup>266</sup> Exec. Order No. 12,250, *supra* note 261.

<sup>267</sup> TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>268</sup> Exec. Order No. 13,166, 28 C.F.R. § 401-415 (2000).

Executive Order was written “to improve 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 (LEP). . . .”<sup>269</sup> Its ultimate goal was to ensure that services funded by the federal government were being made accessible to LEP persons. The Order tasked each federal agency with improving LEP accessibility at the departmental level, as well as ensuring that all entities to which the federal agency provided financial assistance do the same.<sup>270</sup> To assist federal agencies, the Order also charged the Department of Justice with the responsibility of issuing a general guidance document, known as the Policy Guidance Document, “which sets forth compliance standards that recipients must follow to ensure the programs and activities they normally provide in English are accessible to LEP persons.”<sup>271</sup> This document also functions as the DOJ’s LEP Guidance for recipients who receive financial assistance from the DOJ.

Executive Order 13,166 required each federal agency to “prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons.”<sup>272</sup> Additionally, the Order stipulated that each agency disbursing federal financial assistance must provide a Title VI LEP Guidance modeled after the DOJ LEP Guidance tailored, but tailored to that agency’s recipients. “The agency-specific LEP guidance shall detail how the general standards established in the [DOJ Policy Guidance Document] will be applied to the agency’s recipients.”<sup>273</sup> Thus, recipients may use these LEP Guidances to determine their obligations under Title VI and ensure that their language access practices comply with Title VI and its regulations.

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<sup>269</sup> *Id.*

<sup>270</sup> Memorandum from Eric Holder, Attorney General, to the Heads of Department Components (June 28, 2010) (“Language Access Obligations Under Executive Order 13,166”), *available at* [http://www.lep.gov/13166/language\\_access\\_memo.pdf](http://www.lep.gov/13166/language_access_memo.pdf).

<sup>271</sup> Exec. Order No. 13, 166, *supra* note 268.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

### C. Title VI LEP Guidance

This part of the section will focus on Title VI general compliance standards. As previously explained, the DOJ Policy Guidance sets forth general Title VI compliance standards for recipients of federal financial assistance. Although each federal agency providing financial assistance provides an agency-specific guidance, by mandate they are all consistent with the DOJ Policy Guidance with respect to general standards. This is necessary because some recipients may receive federal funds from multiple federal agencies. Since there are so many federal and federally-funded programs and activities with varying needs and capabilities, the compliance standards allow recipients a certain degree of flexibility in planning and implementing their LEP policies. The standard for compliance is individualized and fact-dependent for each recipient so that they may address the specific needs of the LEP population that they serve. Recipients are required to take reasonable steps to ensure meaningful access to information and services that they provide. The Policy Guidance sets forth a four-factor analysis to determine “reasonableness” based on the recipient’s particular circumstances. It also examines language assistance requirements and options that will constitute “meaningful access”.

#### 1. Four-Factor Analysis

The four factors to determine the reasonableness of a recipient’s language access practices include:

- (1) [T]he number or proportion of LEP persons in the eligible service population;
- (2) the frequency with which LEP individuals come in contact with the program;
- (3) the nature and importance of the program, activity, or service provided by the program to people’s lives; and
- (4) the resources available to the grantee/recipient and costs.”<sup>274</sup>

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<sup>274</sup> See, e.g., Department of Commerce LEP Guidance, 68 Fed. Reg. 14180, 14183 (2003).

Balancing these four factors allows an agency to determine the extent of its obligations under Title VI to provide LEP services to ensure that it remains in compliance. Federal agencies disseminating funds will use the same four-factor test when conducting a review to determine whether or not a recipient is in compliance.<sup>275</sup> The oversight agency will look at whether the recipient entities have taken reasonable steps to provide language access to LEP immigrants on a case-to-case basis.<sup>276</sup> For example, in taking the second factor into consideration, the agency would analyze how often it came into contact with a particular language group, and “the more frequent the contact. . .the more likely that enhanced language services in that language are needed.”<sup>277</sup> The more important an agency’s services to citizen’s lives (i.e. transportation, healthcare, housing), or the more that citizens are compelled to be in contact with the agency (i.e. the police/law enforcement), the more critical it is that LEP individuals are able to access that service. The particular strategies utilized depend on the frequency of need and size of the population being served. It is also worth noting that under the four-factor test,<sup>278</sup> the more federal funding and resources that an agency receives, a higher degree and more meaningful compliance is expected from the agency.

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<sup>275</sup> Four factor test: (1) Proportion of the general public served or likely to be encountered by the program or Department – The greater the number of LEP individuals, the more likely it is that language services are required. (2) Frequency of contact with the general public dictates the level of contact and likelihood that language services are required. (3) Nature and importance of the program, activity or service – The more important the program the greater the need for language services; i.e., Will denial or delay of service have serious or life-threatening consequences? Does government make the program compulsory? (4) Resource availability will be dependent upon the size and budget of the Department, which, in effect, will deem what is reasonable.

<sup>276</sup> KAN. DEP’T OF HEALTH & ENV’T, POLICY GUIDANCE: TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AS IT AFFECTS PERSONS WITH LIMITED ENGLISH PROFICIENCY, <http://www.kdheks.gov/olrh/download/LEPHHSguide.pdf> (last visited July 15, 2015).

<sup>277</sup> *Id.* (This means that the steps that would be “reasonable for a recipient that serves an LEP person on a one-time basis [would] be very different than those expected from a recipient that services LEP persons daily.”).

<sup>278</sup> The fourth factor states that “Resource availability will be dependent upon the size and budget of the Department which, in effect, will deem what is reasonable.”

Recipients should complete a four-factor analysis to determine the needs of the LEP population it serves and what language assistance services are appropriate.<sup>279</sup> There are two language assistance options that recipients must provide: oral and written. Recipients should provide an appropriate mix of oral and written language assistance options. The four-factor analysis should determine the correct mix of language services that is necessary and reasonable for that recipient.

## 2. Oral Language Assistance

The DOJ Policy Guidance describes the oral language assistance options that recipients may use. Services that recipients may choose to provide include hiring bilingual staff members, providing staff interpreters, contracting interpreters, or using telephone line interpreters.<sup>280</sup> The Guidance also explains what is considered to determine whether an oral language assistance practice is appropriate and provides meaningful access as required by Title VI and its regulations based on the recipient's circumstances. The main considerations to ensure adequacy are timeliness and competency.<sup>281</sup>

The recipient must ensure the competency of interpreters, and bilingual staff must be competent in the skill of interpreting as well.<sup>282</sup> A competent interpreter does not necessarily need a formal certification. However, competency requires an interpreter to be proficient in both languages, knowledgeable about specialized terms or concepts in both languages, and understand the confidentiality and impartiality incumbent to their

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<sup>279</sup> DOJ Policy Guidance Document, 67 Fed. Reg. 41,455, 41,464 (2002), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2002-06-18/pdf/02-15207.pdf>.

<sup>280</sup> *Id.* at 41,462.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

role as an interpreter. Further, recipients should consider the timeliness of the interpreter service. This proves to be less of an issue with staff interpreters, but may be more relevant in the case of contracted interpreters that may need to be dispatched to the location upon request. Timeliness requires that language assistance be available “at a time and place that avoids effective denial of the service, benefit, or right or imposition of undue burden or delay.”

Timeliness may also present an issue for a recipient using bilingual staff to provide language access options. Hiring bilingual staff is a very cost-efficient option, and it could be the best option in agencies that encounter a lower number of LEP individuals.<sup>283</sup> However, they only provide an appropriate option if they are able to complete their job duties and fulfill the recipient’s language access obligations under Title VI.<sup>284</sup> If bilingual staff members prove unable to meet all of the language assistance obligations of the recipient, the recipient should use another option.

### 3. Written Language Assistance

The primary obligation that recipients have in regards to written language assistance is the translation of vital written materials into the language used by each frequently encountered LEP group.<sup>285</sup> The DOJ Policy Guidance provides some considerations to determine what documents constitute “vital” written materials: the importance of the program, information, encounter or service involved and the consequence that may result to the LEP person.<sup>286</sup> For instance, the Department of Human and Health Services Title VI LEP Guidance provides the

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 41,463.

<sup>286</sup> *Id.*

example of a hospital intake form for its recipients.<sup>287</sup> If an LEP individual cannot indicate what drug allergies they have due to a language barrier, it could have significant effects on that individual's health. Thus, forms of that nature are considered vital written materials.

The DOJ Policy Guidance also discusses which LEP language groups should be provided written language assistance. It provides that a recipient should “provide written translations of vital documents for each eligible LEP language group that constitutes five percent or 1000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.”<sup>288</sup> However, if there are not enough people in an LEP language group to satisfy either of those criteria, the recipient may provide “written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials free of cost.”<sup>289</sup>

#### 4. LEP Plans

Recipients must implement an LEP policy or LEP plan that prescribes its affirmative measures to ensure meaningful access of its services to LEP individuals. Once a recipient has completed a four-factor analysis to determine what language services are reasonable and appropriate for its program or activity, the LEP Guidance directs recipients to develop a written plan on language assistance for LEP persons (“LEP plan”). Although, in some circumstances, it may not be necessary for the LEP plan to be written. The LEP plan provides a “framework for the provision of timely and reasonable language assistance.”<sup>290</sup> Furthermore, it is the most efficient way for the recipient to document their compliance with Title VI language access

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<sup>287</sup> DHHS LEP Guidance, 68 Fed. Reg. 47,311, 47,313 (2003), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2003-08-08/pdf/03-20179.pdf> .

<sup>288</sup> DOJ Policy Guidance, *supra* note 279, at 41,463.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 41,464.

requirements.<sup>291</sup> The LEP Guidance provides five helpful steps to design an LEP plan using the information provided above:

- (1) Identify LEP individuals who need language assistance;
- (2) Language Assistance Measures: ways in which language assistance will be provided;
- (3) training staff;
- (4) providing notice to LEP persons – let LEP persons know that those services are available and that they are free of charge;
- (5) monitoring and updating LEP plan – determine on ongoing basis whether new documents, programs, services, and activities need to be made accessible for LEP individuals.<sup>292</sup>

## **II. TITLE VI COMPLIANCE & ENFORCEMENT**

It is just as important for all recipients of federal funding to recognize and understand Title VI processes as it is to understand their Title VI compliance obligations and how they are monitored and enforced. Entities that receive federal funds as grantees or sub-grantees are monitored by the agency or agencies from which they received such funding. Federal agencies that distribute financial assistance to prime recipients are the oversight agencies that are responsible for monitoring the prime recipient's compliance. Prime recipients that distribute federal funds to subrecipients are responsible to monitor those agencies to which they have allotted funds. What follows is additional information about the oversight, monitoring, and enforcement system used to ensure compliance, but it is not meant to be an exclusive explication of Title VI enforcement mechanisms.

### **A. General Compliance Measures**

The federal agencies that issue federal financial assistance to recipients are ultimately responsible for determining whether that recipient is in compliance with Title VI and enforcing

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<sup>291</sup> *Id.* at 41,464.

<sup>292</sup> *Id.* at 41,464-65.

such compliance, including whether or not they are carrying out their oversight responsibilities if they allot funds to subrecipient(s).<sup>293</sup> Some general notes on oversight:

- The Federal Compliance and Coordination Section (FCCS) within DOJ provides assistance and oversight to agency civil rights offices in their enforcement work on Title VI compliance. “Agencies that administer federally assisted programs are required to submit reports to FCCS that describe their past year’s performance and upcoming plans to implement Title VI..”<sup>294</sup>
- Most departments carry out their responsibilities for civil rights enforcement (for Title VI compliance) by (i) defining the roles of the civil rights offices to which responsibilities are delegated, and (ii) requiring that the agency institute an oversight mechanism to ensure that divisions with delegated authority fulfill their civil rights enforcement responsibilities.<sup>295</sup>
- An agency may receive federal funding from more than one federal source. Therefore, there can be concurrent enforcement jurisdiction by more than federal and state funding agency. For example, many courts get federal money from U.S. DHHS as well as DOJ.

Compliance measures by the federal agency may take place both before and after the agency issues assistance to the recipient.

#### 1. Compliance Prior to Receiving Federal Funds

*Grove City College* established the procedure for compliance prior to an entity receiving federal financial assistance.<sup>296</sup> The case held that the federal agency issuing assistance to the recipient is entitled to an ***assurance of compliance***, which the recipient is required to sign, averring that it will comply with Title VI obligations.<sup>297</sup> Should the recipient refuse to sign the assurance of compliance, the agency issuing financial assistance may refuse to award such assistance, assuming it gives the recipient notice of the noncompliance and an opportunity to be

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<sup>293</sup> TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>294</sup> Memorandum from Thomas E. Perez, Assistant Attorney General to Federal Funding Agency Civil Rights Divisions (August 19, 2010), *available at* [http://www.justice.gov/crt/about/cor/titlevi\\_memo\\_tp.pdf](http://www.justice.gov/crt/about/cor/titlevi_memo_tp.pdf).

<sup>295</sup> [1 A BLUEPRINT FOR CIVIL RIGHTS ENFORCEMENT] U.S. COMMISSION ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? (2002).

<sup>296</sup> *Grove City College v. Bell* 465 U.S. 574, 575 (1984). *See also* 28 C.F.R. § 42.407 (2009).

<sup>297</sup> 28 C.F.R. §§ 41.5(a)(2), 42.407(b) (2009).

heard, among other requirements.<sup>298</sup> The assurance of compliance also provides a basis for the federal agency to file a lawsuit against the recipient to enforce compliance with Title VI. In such a lawsuit, the federal agency does not actually have to prove discrimination at the hearing following a refusal to sign, and instead must only show that the potential recipient refused to sign the assurance of compliance.<sup>299</sup>

Prior to receiving federal financial assistance, recipients must also provide certain information to the issuing agency.<sup>300</sup> The Title VI Coordination Regulations provide examples of such data, which may include lawsuits filed against the recipient regarding discrimination; information about other funding requests the recipient has made; information regarding civil rights compliance reviews within the last two years; whether the recipient has ever been found to be noncompliant in any civil rights requirements; and a written assurance that the recipient will keep records and data to provide to the agency issuing the assistance.<sup>301</sup>

## 2. Maintaining Compliance

Title VI regulations stipulate that a federal agency granting federal financial assistance to a recipient must create a system of maintaining compliance after assistance has been issued. Such a system may include a post-fund investigative review of the entity, which review must be reasonable under the Fourth Amendment as set forth in *U.S. v. Harris Methodist*.<sup>302</sup> *Harris*

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<sup>298</sup> 42 U.S.C. § 2000 (d-1); 28 C.F.R. § 50.3 II.A.1.

<sup>299</sup> *Grove City*, 465 U.S. at 575.

<sup>300</sup> 28 C.F.R. § 42.406 (2009).

<sup>301</sup> 28 C.F.R. § 42.406 (d)-(e) (2009).

<sup>302</sup> *United States v. Harris Methodist*, 970 F. 2d 94 (5th Cir. 1992). In *Harris*, the United States brought a declaratory judgment action against a hospital, claiming that it was allowed to investigate staff privileges at the facility for Title VI compliance. The proposed investigation was initiated by the Department of Health and Human Services, which “appended an expansive request for information” to the notification of its investigation of the hospital. This request included all documents naming the ethnic identities of every person involved in the physician credentialing process at the hospital. The 5th Circuit held that, because the hospital received federal funds, HHS could conduct an appropriate compliance review, but the compliance review had to be “reasonable.” In the instant case, the proposed search was too broad and “did not meet Fourth Amendment standards of reasonableness,” particularly because there was no information suggesting that the hospital regularly carried out discriminatory practices in violation of Title VI. The Court’s holding suggests that selection of a target for a Title VI compliance

*Methodist* held that a reasonable Title VI compliance review should take into account: “1) whether the proposed search (e.g., investigative request for information regarding compliance) is authorized by statute; 2) whether the proposed search is properly limited in scope; 3) how the administrative agency designated the target of the search.”<sup>303</sup> These determinations provide a method for compliance that avoids recipients being chosen randomly by federal agencies and allow the federal agencies to use established criteria in deciding whether a recipient should be subject to a reasonable Title VI review.

## **B. Administrative Enforcement Procedure**

The method of enforcing Title VI language access obligations is an administrative process.<sup>304</sup> In federal agencies, all determinations of compliance are handled by the office responsible for civil rights issues, generally the Office for Civil Rights (OCR), within the federal agency.<sup>305</sup> In the event that funding is received from multiple federal entities, there may be Title VI enforcement jurisdiction by more than one entity, i.e. the recipient is subject to investigation by several agencies concurrently. In the event of a local agency receiving a sub-grant, the grantee or primary recipient is responsible for reviewing compliance.

Because a recipient may receive federal funding directly from federal agencies or through state agencies, the administrative enforcement process is not exclusively conducted by federal agencies. Each state government or agency administering a continuing program for itself and other recipients must establish and publish procedures for prompt processing and disposition of

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review will be reasonable if it is based either on (1) specific evidence of an existing violation, (2) a showing that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment],” or (3) a showing that the search is “pursuant to an administrative plan containing specific neutral criteria.”

<sup>303</sup> *Harris Methodist*, 970 F. 2d at 101.

<sup>304</sup> Daly, *supra* note 237, at 1023.

<sup>305</sup> Daly, *supra* note 237, at 1023; 28 C.F.R. §42.407 (2005).

complaints.<sup>306</sup> Where a federal agency requires or permits certain recipients such as state agencies to process Title VI complaints, the federal agency shall ensure that the recipients' complaint procedures are consistent with Title VI regulations.<sup>307</sup> For these state and local agencies that have their own administrative process, they are also responsible for providing reports of complaints and compliance results to the federal agencies that provide them financial assistance. The administrative enforcement generally proceeds in three steps: (1) complaint investigations, (2) compliance reviews, (3) and voluntary compliance agreements.<sup>308</sup>

### 1. Filing Administrative Complaints

The process begins when an administrative complaint is filed against a recipient alleging that the recipient's language access practices have a discriminatory impact on LEP individuals. Anyone who believes that an agency that receives federal funding has discriminated against an LEP person can file a complaint directly to that agency.<sup>309</sup> As mentioned above, many state or local agencies have their own systems for handling complaints. Complaints may also be made directly to the federal agency providing assistance or to the DOJ's Federal Coordination and Compliance Section.<sup>310</sup> The person filing the complaint need not be a victim of the alleged discrimination. However, the complaint must be filed within 180 calendar days of the date of the alleged discrimination.<sup>311</sup> The LEP Guidance for each federal agency generally sets out how to file the complaint within its administrative system. It is usually filed with the agency's Office of

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<sup>306</sup> 28 C.F.R. §42.410 (2005).

<sup>307</sup> 28 C.F.R. §42.408(c) (2005).

<sup>308</sup> DOJ Policy Guidance, *supra* note 279, at 41,466.

<sup>309</sup> 42 U.S.C. § 2000(d) (2009) (Coordination and Implementation of Provisions, 4-401), *available at* <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21-subchapV.pdf>.

<sup>310</sup> *Federal Coordination and Compliance Section*, DEP'T OF JUSTICE (last visited July 14, 2015), <http://www.justice.gov/crt/about/cor/complaint.php>.

<sup>311</sup> *How to File a Discrimination Complaint with the Office for Civil Rights*, DEP'T OF EDUC. (last visited July 14, 2015) <http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf>.

Civil Rights (OCR), the division of the agency that administered the program or activity, or the recipient that is the subject of the complaint.<sup>312</sup>

## 2. Voluntary Compliance Efforts

After a complaint is received, a complaint investigation and compliance review is conducted. The agency conducting the review must notify the recipient or sub-recipient in writing of whether or not the review determined that they were in compliance. In the event of a violation, Title VI requires the monitoring agency to attempt to secure a voluntary commitment to compliance from the recipient agency.<sup>313</sup>

Title VI requires that a concerted effort be made to persuade any noncomplying applicant or recipient voluntarily to comply with Title VI. Efforts to secure voluntary compliance should be undertaken at the outset in every noncompliance situation and should be pursued through each state of enforcement action. Similarly, when an applicant fails to file an adequate assurance or apparently breaches its terms, notice should be promptly given of the nature of the noncompliance problem and of the possible consequences thereof, and an immediate effort made to secure voluntary compliance.<sup>314</sup>

The OCR, or the equivalent office that handles civil rights issues at a state or local agency, typically coordinates the voluntary compliance agreement.<sup>315</sup> Since voluntary compliance is the most desirable outcome, recipients are provided a lot of flexibility and support throughout the voluntary compliance efforts. Monitoring agencies typically allow very reasonable timetables for compliance, assist the recipient in strategizing cost-effective ways to come into compliance, and provide technical assistance at all stages of the investigation.<sup>316</sup> The agency's OCR monitors the recipient's planning process and reviews its LEP policy as it develops.<sup>317</sup>

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<sup>312</sup> Daly, *supra* note 237, at 1023.

<sup>313</sup> 42 U.S.C. § 2000d-1(2009).

<sup>314</sup> 28 C.F.R. § 50.3 I.C (2009).

<sup>315</sup> See Daly, *supra* note 237, at 1024.

<sup>316</sup> See DOJ Policy Guidance, *supra* note 279, at 41,466.

<sup>317</sup> Daly, *supra* note 237, at 1024.

Agencies that provide federal financial assistance to recipients are responsible for gathering and maintaining evidence of that recipient's noncompliance in the event that attempts toward a voluntary compliance agreement fail.<sup>318</sup> If prime recipients or sub-recipients are unable to resolve an LEP complaint through their own administrative process, the grievance may be forwarded to the state or federal funding agency. In the event that a recipient's language access practices continue to have a discriminatory impact on LEP individuals in violation of Title VI, the federal agency providing assistance should either initiate fund termination or refer the matter to the Department of Justice. To initiate fund termination, the federal agency must take four procedural steps:

(1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.<sup>319</sup>

Thus, a recipient's funding cannot be terminated unless a formal hearing occurs and the allegedly noncompliant recipient has an opportunity to be heard.

Additionally, federal funding may only be terminated for the specific entity of the recipient agency that engaged in the discriminatory act or practice.<sup>320</sup> Congress explicitly mandated this by statutory provision, called the "pinpoint provision," requiring that once a hearing has occurred

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<sup>318</sup> See TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>319</sup> See *id.*

<sup>320</sup> 42 U.S.C. § 2000d-1(2006).

and a finding of noncompliance has been made “such termination or refusal shall be limited to the particular entity, or part thereof, or other recipients as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof in which such noncompliance has been so found.”<sup>321</sup>

### C. Title VI Language Access Claims in Court

For the most part, the administrative process is the only means of enforcing the language access obligations of Title VI. LEP individuals or LEP groups that believe a recipient’s practices had a discriminatory impact on them because of their lack of English proficiency may not bring a private claim in state or federal court based on this allegation.<sup>322</sup> However, this has not always been the case. The seminal Supreme Court case for language access under Title VI was *Lau v. Nichols*,<sup>323</sup> a 1974 class action suit filed on behalf of Chinese-speaking students in a San Francisco school district that did not provide supplemental English instruction to non-English speaking students. The school district was a recipient of federal funds.<sup>324</sup> In *Lau*, the Supreme Court held that the school district violated Title VI by failing to provide students of a particular national origin with the same opportunity to obtain an education as it did for other students in the same school system.<sup>325</sup> The applicability of *Lau* is not limited to an educational context. Its central holding is a principle that applies broadly to all programs or activities that receive federal assistance and provide services to the public: ***failure to address the needs of LEP persons in terms of equal access to services may constitute illegal discrimination based on national origin under Title VI.***<sup>326</sup>

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<sup>321</sup> 42 U.S.C. § 2000d-1(2006).

<sup>322</sup> See Daly, *supra* note 237, at 1023.

<sup>323</sup> Lau v. Nichols, 414 U.S. 563 (1974).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 568.

<sup>326</sup> See TITLE VI LEGAL MANUAL, *supra* note 230.

Since *Lau*, Title VI complaints and litigation has generated a number of influential cases involving claims of discrimination based on language access practices. After *Lau*, LEP litigants could allege national origin discrimination based on a claim of intentional discrimination i.e. a recipient intentionally and knowingly denied LEP person(s) meaningful access to their services, or based on a claim of a disparate or discriminatory impact i.e. a recipient's conduct, although perhaps not intending to deny LEP individuals access, nevertheless had disparate or discriminatory impact on an LEP person or LEP language group.

In order to bring a claim under an intentional discrimination theory, an individual must prove that the "challenged action was motivated by an intent to discriminate" on the part of the recipient.<sup>327</sup> To prove intent to discriminate pursuant to Title VI, a claimant may include evidence such as statements by decision-makers, the events leading up to the allegedly discriminatory decision, deviation from standard procedures, or a history of discriminatory conduct.<sup>328</sup> However, direct proof that the recipient was aware of the claimant's race, color, or national origin and was motivated to act due to claimant's race, color, or national origin may be unavailable. In this instance, an intentional discrimination claim may be supported using the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>329</sup> Using the *McDonnell Douglas* framework, an agency investigating the claim must first determine whether the claimant has established a prima facie case for discrimination. A prima facie case will typically include: 1) that the claimant was a member of a protected class; 2) that the claimant applied and was eligible for a federally assisted program; 3) that despite eligibility, the claimant was rejected; and 4) that the recipient selected applicants of the complainant's

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<sup>327</sup> *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

<sup>328</sup> *See Arlington Heights v. Metro. Hous. Redevelopment Corp.*, 429 U.S. 252, 266-68 (1977) (evaluating intentional discrimination claim under the Fourteenth Amendment).

<sup>329</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

qualifications, or that the program remained open and the recipient accepted applications from applicants with the complainant's qualifications.<sup>330</sup> Once a prima facie case has been established, the agency investigating the discrimination claim must then ask the recipient whether it had a legitimate, nondiscriminatory motive for the action it took, which cannot be a pretext for discriminatory conduct.<sup>331</sup>

In the past, under a disparate or discriminatory impact theory for a Title VI claim, a claimant could also file suit by showing that a recipient of federal assistance used a "neutral" practice that had a disparate or discriminatory impact on individuals of a specific race, color, or national origin, and that the practice did not have a "substantial legitimate justification."<sup>332</sup> "Substantial legitimate justification" means that the practice was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission."<sup>333</sup> If a "substantial legitimate justification" is found, it would then be determined whether there was a less discriminatory alternative.<sup>334</sup> Additionally, the complainant could file a claim with the agency that funded the allegedly discriminatory recipient under Title VI. To establish a disparate impact claim using this method, the complainant had to show a causal connection between neutral policy and the adverse impact that the policy had on a protected group.<sup>335</sup>

However, the Supreme Court's 2001 decision in *Alexander v. Sandoval*<sup>336</sup> splintered from previous case law regarding Title VI claims brought under the disparate impact theory. In that case, the plaintiff, Martha Sandoval, brought a Title VI claim against the Director of the

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 802.

<sup>332</sup> See TITLE VI LEGAL MANUAL, *supra* note 230 (quoting *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993)).

<sup>333</sup> *Alexander v. Sandoval*, 532 U.S. 731 (2001).

<sup>334</sup> *Elston*, 997 F.2d at 1407.

<sup>335</sup> See TITLE VI LEGAL MANUAL, *supra* note 230.

<sup>336</sup> *Alexander*, 532 U.S. at 731.

Alabama Department of Public Safety (DPS) and others. The Alabama DPS, a recipient of federal grants, administered driver's license tests only in English. The complaint did not claim that the DPS intentionally discriminated against LEP persons, but rather claimed a Title VI violation based on the discriminatory impact of the testing policy on LEP persons.<sup>337</sup> The Supreme Court ultimately held that private individuals could not bring a private action to enforce Title VI under a claim that was based on a disparate or discriminatory impact theory.<sup>338</sup> Thus, after *Alexander v. Sandoval*, a private individual may only bring a private action to enforce Title VI based on a claim of intentional discrimination. ***Enforcing violations based on disparate or discriminatory impact lies with the federal agency that provides funding.*** Therefore, the Court held that any individual who wants to allege a Title VI violation based on disparate or discriminatory impact must file a Title VI claim with the federal agency that provides assistance to the allegedly discriminatory recipient.<sup>339</sup>

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<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> See TITLE VI LEGAL MANUAL, *supra* note 230.

### SECTION THREE: LANGUAGE ACCESS IN NORTH CAROLINA

The LEP population in North Carolina has increased dramatically over the last fifteen years. According to 2010 census data, the Latino population in North Carolina has increased 110 percent between 2000 and 2010.<sup>340</sup> Eight percent of North Carolinians speak a language other than English at home.<sup>341</sup> Access to state and county public safety departments, sheriff's offices, departments of transportation, workforce development offices, and health and human services departments, among other government agencies, are crucial for this growing sector of the population. This Section reviews some of the current language access practices of state and local government agencies in North Carolina that are obligated to comply with Title VI. It examines the issues that LEP persons face, assesses how the current practices attempt to address the needs of LEP individuals in terms of access to resources and services within their community, and provides recommendations aimed at both Title VI compliance and improving language accessibility as a general matter.

The Section then goes on to assess two particular municipalities that have partnered with the Building Integrated Communities (BIC) initiative. The BIC initiative involves comprehensive plans to help municipalities further integrate their communities. This Section will focus predominantly on the language achievement aspect of the initiative. The discussion of each municipality begins by identifying the Title VI compliance obligations of each municipality and then proceeds to discuss the language access practices within the municipalities. It closes by discussing the partnership of each municipality with BIC, how the partnership augments efforts

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<sup>340</sup> Deborah Weissman, *Undocumented Immigrants and Access to the Courts*, N.C. STATE BAR J. 20 (Fall 2012).

<sup>341</sup> *Id.* at 23.

toward improvement in language access practices in the municipalities, and their implementation of best practices in language access with the help of the BIC partnership. The Section concludes by discussing recommendations to implement or improve the language access practices within local and state government agencies based on the best practices of initiatives such as Building Integrated Communities and other successful initiatives.

## **I. ASSESSMENT OF LANGUAGE ACCESS PRACTICES IN NORTH CAROLINA**

“The difficulties faced by language minorities are not always obvious to the outside observer.”<sup>342</sup>

This part of the section examines select state agencies in North Carolina that act as the primary recipients of various sources of federal financial assistance which in turn distribute these funds to state and local sub-recipients. These select categories of services include: public safety, transportation, workforce and employment, and health care. These services provided by state and local agencies rank high on the critical/non-critical continuum; it is essential that LEP individuals are able to access these services.

### **A. Public Safety**

The North Carolina Department of Public Safety (N.C. DPS) works to reduce crime and provide plans for disaster and emergency response throughout the state.<sup>343</sup> The N.C. DPS receives federal financial assistance and, therefore, must comply with Title VI obligations.<sup>344</sup> Numerous local offices operate under the N.C. DPS umbrella and receive federal financial assistance through the N.C. DPS as subrecipients, including Law Enforcement, Victim Services,

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<sup>342</sup> See Daly, *supra* note 237, at 1006.

<sup>343</sup> *Department of Public Safety*, N.C. Dep’t of Public Safety, <https://www.ncdps.gov/Index2.cfm?a=000003> (last visited April 15, 2015).

<sup>344</sup> *Crime Victims Compensation – Budget*, N.C. DEP’T OF PUBLIC SAFETY (last visited April 13, 2015), available at <https://www.nccrimecontrol.org/Index2.cfm?a=000003,002144,000016,000161>.

and Emergency Management.<sup>345</sup> Many law enforcement or emergency response services that do not receive money as a sub-grantee of N.C. DPS instead receive it directly from a federal agency as a prime recipient, including county sheriff departments and many county fire or rescue squads. Thus, most entities responsible for local law enforcement or emergency services in North Carolina County must comply with Title VI language access requirements.<sup>346</sup>

## 1. Issues Faced By LEP Persons

### a. *Law Enforcement*

It is imperative that police and local law enforcement utilize language access practices that enable LEP individuals to understand their rights and to access police assistance. However, many LEP individuals may feel uncomfortable calling 911 or the police department because they do not have a level of English proficiency sufficient to communicate their reason for contact. The inability to access or communicate with law enforcement is at the very least a safety hazard, and in many instances it is a matter of life or death. Language barriers could preclude LEP individuals from having meaning access to police services when they are victims of or witnesses to criminal activity.

Domestic violence among immigrant women is one social issue that provides a disturbing example of just how meaningless access to police services is for LEP individuals when the law enforcement agency does not employ adequate language access practices. Language barriers may preclude victims of domestic violence from reporting an assault, seeking protective

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<sup>345</sup> *Sheriff's Office*, FORSYTH CNTY SHERIFF'S OFFICE, <https://www.co.forsyth.nc.us/Sheriff/> (last visited April 15, 2015) (Victim Services reimburses those who have suffered medical expenses and lost wages as a victim of a crime in North Carolina.) (Emergency Management creates disaster response plans and educates North Carolina residents on severe weather and other potential safety threats.); *State Summary: North Carolina*, USASPENDING.GOV, <https://www.usaspending.gov/transparency/Pages/StateSummary.aspx?StateCode=NC&fiscalyear=2015> (last visited July 24, 2015).

<sup>346</sup> *State Summary: North Carolina*, USASPENDING.GOV, <https://www.usaspending.gov/transparency/Pages/StateSummary.aspx?StateCode=NC&fiscalyear=2015> (last visited July 24, 2015).

measures, or understanding their options if they fear deportation – all of which severely exacerbate their vulnerability to violence.<sup>347</sup> In many domestic violence cases, as one researcher has found, “it is not at all unusual to find an immigrant victim...[who]...may speak no English and have no person with whom they can communicate other than their abusers.”<sup>348</sup> In a survey of battered immigrant women, thirty-one percent of victims reported that police spoke only to other people on the scene instead of the victim herself – including eleven percent of victims reporting that the police communicated only with the abuser.<sup>349</sup> Two-thirds of victims reported that the police made no effort to get an interpreter.<sup>350</sup>

One study reveals the story of an LEP woman separated from her children for six months after police were called to her home for a dispute with her domestic partner. She was unable to explain the situation to the police in English; police transferred her to an immigrant detention center and her children were sent to foster care instead of to an aunt who was willing to take them in.<sup>351</sup> Another report prepared by the Houston Language Bank describes a fourteen-year-old LEP teenager, sold into marriage in her home country and brought to the United States by the abusive husband. Each time she attempted to escape, the husband’s relatives spoke on her behalf as ‘interpreters’ to conceal the situation from the police. She endured this abuse for years before she was rescued.<sup>352</sup>

#### b. *Emergency Management*

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<sup>347</sup> Rosie Hidalgo, *Crossroads: The Intersection of Immigrant Enforcement and the Child Welfare System*, 64 JUV. & FAM. CT. J. 35, 40 (2013), available at [http://www.ncjfcj.org/sites/default/files/Synergy16-1\\_0.pdf](http://www.ncjfcj.org/sites/default/files/Synergy16-1_0.pdf).

<sup>348</sup> Leslye Orloff et. al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 93 (2003), available at [http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/u-visa-crime-fighting-tool-and-protection-for-immigrant-crime-victims/RSRCH\\_ImmVictims\\_Battered\\_ImmWomen\\_Police.pdf](http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/u-visa-crime-fighting-tool-and-protection-for-immigrant-crime-victims/RSRCH_ImmVictims_Battered_ImmWomen_Police.pdf).

<sup>349</sup> *Id.* at 71.

<sup>350</sup> *Id.* at 74.

<sup>351</sup> Hidalgo, *supra* note 347, at 35-36.

<sup>352</sup> Ted Wang, *Eliminating Language Barriers for LEP Individuals: Promising Practices from the Public Sector*, GRANTMAKERS CONCERNED WITH IMMIGRANTS & REFUGEES 17 (2009), available at <http://www.houstonlanguagebank.org/docs/EliminatingLanguageBarriersforLEPIndividuals.pdf>.

c.

Studies have established that LEP individuals “are disproportionately at risk during emergencies and disasters. LEP individuals face unique challenges as they are less likely to be able to understand most emergency communications unless information is disseminated in languages other than English.”<sup>353</sup> For example, when Hurricane Katrina struck New Orleans in 2006, the Federal Communication Commission’s emergency alert systems sent out broadcasts in English only. Latino and Vietnamese populations in New Orleans “had little to no advance warning that this country’s worst natural disaster in recent history was at their doorstep.”<sup>354</sup>

In 2009, the Northwest Preparedness and Emergency Response Research Center at the University of Washington conducted a study on sample populations of LEP language groups.<sup>355</sup> A moderator elicited the participants’ experiences and thoughts regarding use of public emergency systems and their perceived level of preparedness in case of an emergency.<sup>356</sup> Participants indicated that they would ask other people, such as their child or a relative that was more proficient in English, to call 911 or the police for them in the case of an emergency.<sup>357</sup> One participant stated: “our daily lives... depend on our apartment manager [who speaks English]. One day we heard someone scream loudly outside of our unit. We were scared to death. We do not speak English and only two of us [in the building] are Chinese....”<sup>358</sup> An LEP individual’s need to wait for someone else to make a 911 call could exacerbate the danger of an emergency situation. The authors of the study recommended that government agencies make

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<sup>353</sup> Mei Po Yip et. al., *The Role of Self-Efficacy in Communication and Emergency Response in Chinese Limited English Proficiency (LEP) Populations*, 14 HEALTH PROMOTION PRAC. 400, 401 (2013).

<sup>354</sup> In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, EB Docket No. 06-119, *available at* <http://mmtconline.org/lp-pdf/EAS-Comments-080706.pdf> (last visited April 1, 2015).

<sup>355</sup> 14 HEALTH PROMOTION PRAC. at 401. The study consisted of four focus groups of Mandarin and Cantonese speakers.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 404.

<sup>358</sup> *Id.* at 405.

emergency preparedness information available in multiple languages, with brochures or announcements that will adequately communicate the urgency and seriousness of various emergency situations to LEP individuals.<sup>359</sup>

A study of Asian and Latino LEP communities in Southern California, where life-threatening wildfires are common, reveals the level of risk to which a local fire department may expose its LEP residents when the fire department lacks bilingual responders and bilingual emergency alerts.<sup>360</sup> Fire departments often rely on community members to convey emergency preparedness advice to residents in their own languages.<sup>361</sup> Emergency preparedness (for example, having a disaster kit and a pre-planned family meeting place) is important because rescue services may not arrive immediately, and family members may become separated during a fire or other disaster.<sup>362</sup> However, if these community members cannot fully summarize the disaster readiness recommendations, do not tell everyone in their community, or are not fully bilingual, LEP persons are disserved. Lack of bilingual emergency alerts also places LEP persons at risk, because they may not be able to understand information necessary to save their lives in a dangerous situation. One LEP person in the study aptly described the risk to public safety when emergency information is only broadcast in English:

“[If] there is a big fire, you need to follow where the fires are going, how many people have been evacuated, how many firefighters were sent to the site... [without emergency alerts in one’s own language] you might misunderstand the directions. Say the government wants you to go east, but you go west instead[?]”<sup>363</sup>

Similarly, it is very important for LEP persons to be able to communicate with local fire

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<sup>359</sup> *Id.* at 406.

<sup>360</sup> ANN BESSIE MATHEW AND KIMIKO KELLY, DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES 6 (Tomas Rivera Policy Inst. 2008), *available at* [http://trpi.org/wp-content/uploads/archives/DISASTER\\_REPORT\\_Final.pdf](http://trpi.org/wp-content/uploads/archives/DISASTER_REPORT_Final.pdf).

<sup>361</sup> *Id.* at 18.

<sup>362</sup> *Id.* at 21.

<sup>363</sup> *Id.* at 27.

departments and firefighters who are first responders. First responders often rely on bilingual family members – who in many instances are children – to provide interpretation.<sup>364</sup> Relying on minors to interpret in emergencies puts that minor and LEP persons in the household at extreme risk – a child may not know the appropriate words or have an appropriate level of psychological development to be able to communicate with firefighters in an emergency. Furthermore, a child may be too traumatized by an emergency situation to tell first responders what happened, or may not have adequate knowledge of which facts are important (for example, a small child may not know the difference between a grease fire and an electrical fire, or how a fire started).

## 2. Current Language Access Practices

The N.C. DPS has made efforts to improve language access across the spectrum of services that it provides for its most concentrated LEP language groups. For example, it has made its crime safety website, NCCrimecontrol.com, available in Spanish.<sup>365</sup> In addition, the emergency preparedness website, ReadyNC.com, has recently been translated into Spanish.<sup>366</sup> According to Keith Acree, Communications Officer at the N.C. DPS, the agency works with LEP individuals and focuses on emergency preparedness.<sup>367</sup> N.C. DPS also provides a small number of prison system forms for inmates available in Spanish,<sup>368</sup> and the N.C. DPS contracts with a phone translation service, although it is not used frequently.<sup>369</sup>

The main challenges in providing access for LEP individuals are the lack of sufficient financial resources, and the insufficient numbers of qualified individuals available to translate

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<sup>364</sup> *Id.* at 6.

<sup>365</sup> *Departamento de Seguridad Pública*, N.C. DEP'T OF PUBLIC SAFETY, <https://www.nccrimecontrol.org/index2.cfm?a=000001,002936> (last visited April 14, 2015).

<sup>366</sup> *ReadyNC*, N.C. DEP'T PUBLIC SAFETY, <http://readync.com/SP/index.html> (last visited July 14, 2015).

<sup>367</sup> Telephone interview with Keith Acree, Communications Officer, N.C. Department of Public Safety (March 16, 2015).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

documents. Mr. Acree noted, “There always seems to be something that we need in Spanish that we don’t have in Spanish.”<sup>370</sup> The N.C. DPS employs one part-time translator (fifteen to thirty hours per week) on a contract, grant-funded basis.<sup>371</sup> She is responsible for the recent translation of the ReadyNC.com website into Spanish with emphasis on emergency management preparedness and recovery information.<sup>372</sup> She also issues press releases in Spanish and answers phone calls from Spanish speakers who have questions about a public safety issue.<sup>373</sup>

At an even more local level, the Forsyth County Sheriff’s Department reports that it primarily uses its Spanish-speaking staff to serve as interpreters between LEP individuals and the department.<sup>374</sup> Some handouts and brochures on victim rights, community policing, and crime prevention initiatives are also available in Spanish.<sup>375</sup> As with the NC DPS, the greatest obstacles are the lack of financial resources and lack of bilingual personnel.<sup>376</sup> Forsyth County offers compensation initiatives for employees who are fluent in a second language, but these incentives are nominal.<sup>377</sup> Forsyth County Chief Deputy Brad Stanley stated that the Sheriff’s Department “want[s] to be an agency that is representative of the community that we serve.”<sup>378</sup> The Department must also consider qualifications of interpreters - if there is a victim or a suspect in a criminal matter, the person who is interpreting must be qualified and recognized by the courts.<sup>379</sup>

Phone messages left with the Randolph and Davidson County Sheriffs’ Offices were not

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<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> Telephone interview with Brad Stanley, Chief Deputy, Forsyth County Fire Department (April 1, 2015).

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

returned. After initially making contact with the Guilford County Sheriff's Office, follow-up phone messages regarding LEP access were not returned.

### 3. Recommendations

In regards to the Latino community, government agencies could benefit LEP persons by making sure that sufficient funds are allocated to provide required language access, facilitating grassroots communication in local communities, placing Spanish language announcements on television and radio in case of emergency, and distributing simple police contact and emergency preparedness materials with a limited number of key messages. Agencies should meet with focus groups to determine how to best communicate with local communities. Suggested questions for focus groups include:

- Who would you trust to talk to you about emergencies?
- What is the best way to get information about an emergency to you and your family?
- Do you have a family emergency plan?
- What is the best way to get information about an emergency to your community?
- What materials do you think would be most helpful in your community?<sup>380</sup>

In other parts of the United States, some city police departments have issued directives to overcome some of the above-mentioned issues. Philadelphia Police Department Directive 71 mandated language access by hiring multilingual personnel and interpretation services.<sup>381</sup> The directive instructs police not make assumptions about a person's primary language (for example, a Central American LEP individual could speak Spanish or any of a number of indigenous

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<sup>380</sup> Oliva Carter-Pokras, *Emergency Preparedness: Knowledge and Preparedness of Latin American Immigrants*, 18 J. HEALTH CARE FOR POOR & UNDERSERVED 465, 477-79 (2007).

<sup>381</sup> Catherine E. Wilson, *Collaboration of Nonprofit Organizations with Local Government for Immigrant Language Acquisition*, 42 NONPROFIT & VOLUNTARY SECTOR Q. 963, 969 (2013).

Central American languages), instructs police to provide Miranda warnings in a suspect's primary language, creates the title of PPDAl (Philadelphia Police Department Authorized Interpreter) for individuals who have passed required training, connects 911 callers with PPDAls, and implements the use of Language Identification Cards. The Department also uploaded twenty-two translated commonly used documents to its website (such as a complaint report, a towed vehicle notice, a notice of rights in domestic abuse, and a warning notice) in Arabic, Cambodian, Chinese, Korean, Russian, Spanish, and Vietnamese.<sup>382</sup>

The Summit-Lorain Project, a collaborative effort between the City of Lorain, Ohio and Summit County, Ohio, provides an inspirational blueprint for city police and county sheriff language access plans using limited resources. Initiated in March 2003, the project "got underway with abundant goodwill and no funding." Prior to Summit-Lorain, the only existing service was interpretation for the deaf. The language access plan provides guidance for a model LEP policy, with a "points of interaction" chart outlining LEP needs in various situations of interaction between LEP individuals and the police. The project was organized around two committees, one responsible for research and one responsible for finding funding.<sup>383</sup> It was the first national project to create a model of best practices for police and public officials in other jurisdictions.<sup>384</sup>

A potential resource for both police and emergency services is LanguageLine.com, a phone and video interpretation service offered in over two hundred languages.<sup>385</sup> However, without sufficient and necessary allocation of resources, the cost may be prohibitive for many

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<sup>382</sup> PHILA. POLICE DEP'T, DIRECTIVE 71, LIMITED ENGLISH LANGUAGE PROFICIENCY (2005), *available at* [www.lep.gov/resources/PhilaDirective71\\_1.pdf](http://www.lep.gov/resources/PhilaDirective71_1.pdf) (last visited April 1, 2015).

<sup>383</sup> Summit-Lorain Project 14-15.

<sup>384</sup> *Isabel Framer*, OHIO LATINO AFFAIRS COMM'N, <http://ochla.ohio.gov/Portals/0/Documents/BoardFraemerBio.pdf> (last visited April 7, 2015).

<sup>385</sup> *See generally Enabling Communication, Empowering Relationships*, LANGUAGELINE SOLUTIONS, <http://www.language.com> (last visited April 1, 2015).

agencies except in emergency circumstances. LanguageLine.com, formerly known as the AT&T Language Line, markets itself as an industry solution for governments.<sup>386</sup> The service was created by a former police officer to meet the needs of public safety personnel facing language barriers.<sup>387</sup> LanguageLine interpreters have extensive 911-operator experience.<sup>388</sup> LanguageLine offers phone interpretation, video interpretation, and translation of documents, websites, and other multimedia. The company has experience supporting the Department of Homeland Security, disaster response, social services, 911 and emergency dispatches, labor/employment entities, protective services, and the courts.<sup>389</sup> Local police and emergency services departments may be able to avail themselves of federal or state grants to cover costs, or pool their resources to negotiate a better price under one contract.<sup>390</sup>

## **B. Transportation**

The North Carolina Department of Transportation (N.C. DOT) is charged with providing safe, efficient service for methods of transport in North Carolina, such as highways, the rail system, and public transit, and also oversees the North Carolina Department of Motor Vehicles (NC DMV).<sup>391</sup> The NC DOT is one of the state's largest government agencies and encompasses transportation planning, education initiatives, and mobility and safety initiatives.<sup>392</sup> The NC DMV oversees issues related to motor vehicles and driving in North Carolina, including driver's

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<sup>386</sup> See *Government*, LANGUAGELINE SOLUTIONS, <http://www.language.com/solutions/industries/government-interpretation/> (last visited April 1, 2015).

<sup>387</sup> *Company History*, LANGUAGELINE SOLUTIONS, <http://www.language.com/company/history/> (last visited April 1, 2015).

<sup>388</sup> *Quality Interpreters*, LANGUAGELINE SOLUTIONS, <http://www.language.com/wcu/quality-interpreters/> (last visited April 1, 2015).

<sup>389</sup> *Government*, *supra* note 386.

<sup>390</sup> Chris Gosnell, Community Risk Reduction for the Non-English-Speaking Population of the Okolona Fire Protection District: Leading Community Risk Reduction (Sep. 2004) (unpublished research project, National Fire Academy) at 43, available at <http://www.usfa.fema.gov/pdf/efop/efo37391.pdf> (last visited April 7, 2015).

<sup>391</sup> *About*, N.C. DEP'T OF TRANSP., <http://www.ncdot.gov/about/> (last visited April 15, 2015).

<sup>392</sup> *Department of Transportation*, N.C. DEP'T OF TRANSP., <http://www.ncdot.gov/download/about/structure/NCDOTOrgChart.pdf> (last revised June 30, 2015).

licenses, plates, insurance, titles, and registration.<sup>393</sup> The N.C. DOT is a recipient of federal financial assistance, and many of its component divisions such as the N.C. Department of Motor Vehicles (N.C. DMV), are also either recipients or sub-recipients. Thus, department language access practices must comply with Title VI obligations.<sup>394</sup>

### 1. Issues Faced by LEP Persons

Immigrants are 2.5 times more likely to travel by public transit than non-immigrant individuals.<sup>395</sup> LEP immigrants are especially likely to use public transportation in the United States.<sup>396</sup> If an LEP individual does not have access to a car, public transit may be their only method of getting around. Moreover, many immigrants may not qualify for drivers' licenses, making public transportation even more of an important service. It is important that language barriers do not preclude LEP persons from using public transportation systems that may be their own means of getting around or even their livelihood.

The lack of language accessibility in the public transportation system could prevent an LEP individual from going to work, completing daily tasks, seeking necessary services including health care, attending school, and otherwise being involved in his or her local community. LEP persons face specific challenges when navigating public transportation, such as understanding route maps, understanding transit schedules, or not being able to ask bus drivers or transit conductors questions about how to get to their destination in English. Addressing the needs of

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<sup>393</sup> *Vehicle Services*, N.C. DEP'T OF TRANSP., <http://www.ncdot.gov/dmv/vehicle/> (last visited April 15, 2015).

<sup>394</sup> *NC DOT Sources of Funds 2013-14 by Major Funding Source*, N.C. DEP'T OF TRANSP. <http://www.ncdot.gov/download/about/finance/2014SourcesofFundspiechart.pdf> (last visited April 14, 2015).

<sup>395</sup> Evelyn Blumenberg, *Moving In and Moving Around: Immigrants, Travel Behavior, and Implications for Transport Policy*, 1 TRANSPORTATION LETTERS at 4, available at <http://uctc.net/research/papers/892.pdf> (last visited April 15, 2015).

<sup>396</sup> Daniel G. Chatman and Nicholas Klein, "Immigrants and Travel Demand in the U.S.: Implications for Transportation Policy and Future Research," 13 PUB. WORKS MGMT. & POL'Y 312, 312 (2009).

LEP communities is a major concern for local public transit agencies.<sup>397</sup> It is an agency's responsibility to actively seek out ways to better serve LEP persons, by anticipating the travel demands of various groups, including the LEP and immigrant populations.<sup>398</sup>

It is also important for LEP persons to have language access to driver education and driver's license services. It makes no difference if an LEP individual has access to a car, if they are unable to apply for a driver's license at the state DMV. Furthermore, fostering automobile ownership among LEP immigrant populations can boost local economies. According to a study of immigrant populations in Los Angeles, foreign-born adults with cars had a greater likelihood of being employed compared to adults without cars.<sup>399</sup> Moreover, one study demonstrated that immigrants appear to be more likely to carpool, a more 'green' and energy-efficient method of travel.<sup>400</sup>

## 2. Current Language Access Practices

The N.C. DOT has made its DMV Driver's Handbook and various administrative forms (such as vehicle title instructions, lapse of auto insurance forms, and driver's license application instructions) available in Spanish.<sup>401</sup> The NC DMV has contracted with a translation service in Cary, North Carolina to translate certain brochures into Spanish, such as notices related to the 2013 "Tag and Tax Together" initiative.<sup>402</sup> However, Spanish is currently the only language

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<sup>397</sup> *Transit Agency Compliance with Title VI: Limited English Proficiency Requirements*, 97 RES. RESULTS DIG. 1, 1 (Jan. 2011), available at [http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp\\_rrd\\_97.pdf](http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rrd_97.pdf).

<sup>398</sup> Jarrett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CAL. L. REV. 1131, 1164 (2013). See also Chatham & Klein, *supra* note 396 at 312.

<sup>399</sup> KAREN LUCAS ET AL., *AUTO MOTIVES: UNDERSTANDING CAR USE BEHAVIOURS* 231 (2011).

<sup>400</sup> *Id.* at 235. See Ali Modarres, *Immigrants are Greening our Cities, How About Giving Them A Break?*, NEWGEOGRAPHY (August 11, 2009), available at <http://www.newgeography.com/content/00958-immigrants-are-%E2%80%98greening%E2%80%99-our-cities-how-about-giving-them-a-break> (last visited April 15, 2015), for further information on green transportation among immigrant communities.

<sup>401</sup> See North Carolina Department of Motor Vehicles, "Formas En Español," available at <http://www.ncdot.gov/dmv/espanol/> (last visited April 14, 2015). See also North Carolina Department of Motor Vehicles, *2014 Manual de Conductores*, N.C. DOT, available at [http://www.ncdot.gov/download/dmv/handbooks\\_ncdl\\_spanish.pdf](http://www.ncdot.gov/download/dmv/handbooks_ncdl_spanish.pdf) (last visited April 14, 2015).

<sup>402</sup> *Id.*

besides English that is available at NC DMV locations.<sup>403</sup> According to an interview with Brian Smith, Communications Manager at the N.C. DMV, various N.C. DMV locations use bilingual staff to offer oral language assistance for Spanish-speaking LEP individuals. The DMV Call Center also has bilingual staff to answer questions from Spanish-speaking callers.<sup>404</sup>

### 3. Recommendations

As with all agencies, the N.C. DOT must assure that it allocates sufficient funds to meet its obligations under Title VI. LEP plans to provide language access in transportation agencies have included initiatives such as posting multilingual trip information in train and bus stations and on the internet, providing pictures at stations instead of language-dependent communication, providing multilingual recorded announcements, hiring multilingual office staff and drivers/conductors, and advertising in media venues serving LEP communities. It is essential that notice is provided of whatever language assistance options are available, so that LEP persons are aware that they can access the agency's information or services. For example, in a New Jersey research study, LEP focus group participants were unaware that the New Jersey transit system offered a toll-free multilingual phone line because its existence had not been advertised in multiple languages.<sup>405</sup> Transit agencies should hold public meetings and provide translated material at those meetings.<sup>406</sup>

Innovative methods for transit agencies to discern LEP needs include census analysis to see where LEP groups are populated. For example, the Delaware Valley Regional Planning Commission has identified census tracts of minority, disabled, impoverished, or car-less

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<sup>403</sup> *Id.*

<sup>404</sup> Telephone interview with Brian Smith, Communications Manager, N.C. Department of Motor Vehicles (April 13, 2015).

<sup>405</sup> Rongfang Liu & Hindy Schachter, *Mobility Needs of Immigrants with Limited English Proficiency in New Jersey*, 5 J. IMMIGRANT & REFUGEE STUD. 89, 104 (2007).

<sup>406</sup> *See Yan, supra* note 398, at 1149.

households to use targeted outreaches in order to improve local transit for these populations.<sup>407</sup>

Agencies should also conduct surveys of LEP individuals in order to best serve LEP populations, asking questions such as:

- What form of public transit do you usually use (bus, subway, rail, etc.)?
- Why do you use the transit system (to go to work, to go grocery shopping, to go to school, for recreation, etc.)?
- How can we improve your understanding of travel information?

### **C. Workforce and Employment**

The N.C. Division of Workforce Solutions ('N.C. Workforce'), a subset of the N.C. Department of Commerce (N.C. DOC), provides placement assistance for job seekers in North Carolina and helps employers find qualified job candidates.<sup>408</sup> N.C. Workforce helps boost the North Carolina economy by promoting job retention, higher earnings, strong occupational and educational skills, and competitive businesses. N.C. Workforce also provides career readiness training for job seekers and occupational training for current workers.<sup>409</sup> The North Carolina Department of Labor (N.C. DOL) administers minimum wage, maximum hour, wage payment, and occupational safety regulations for the workforce.<sup>410</sup> The N.C. Division of Workforce Solutions, N.C. DOC, and N.C. DOL are recipients of federal financial assistance, and must maintain language access practices that provide their services in compliance with Title VI.

#### **1. Issues Faced By LEP Persons**

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<sup>407</sup> *Id.* at 1164.

<sup>408</sup> *About Us*, N.C. DIV. OF WORKFORCE SOLUTIONS, <https://www.nccommerce.com/workforce/about-us> (last visited April 15, 2015).

<sup>409</sup> *Initiatives*, N.C. DIV. OF WORKFORCE SOLUTIONS, <https://www.nccommerce.com/workforce/about-us/plans-policies-reports-initiatives/initiatives> (last visited April 15, 2015).

<sup>410</sup> *About Us*, N.C. DEP'T OF LABOR, <http://www.nclabor.com/agprogs.htm> (last visited April 15, 2015).

The challenges faced by LEP persons in the workplace are “extraordinarily complex in terms of the social, cultural, educational, [and] motivational factors.”<sup>411</sup> The employment needs of LEP individuals are diverse – there are 2.7 million college-educated immigrants in the United States whose talents are underutilized in unskilled or semi-skilled positions.<sup>412</sup> For many, language barriers may prevent them from navigating a job search on their own. Other cultural factors may also lead to LEP persons to not seek help regarding their employment. For example, women coming from countries where only men are permitted to pursue higher education or work outside the home may be unsure how to seek employment after arriving in the United States.<sup>413</sup> In addition to difficulty finding job placement, the experience of LEP persons in the workforce is notable for the higher rates of work-related injuries, underreporting of unsafe work conditions, lack of willingness to apply for unemployment benefits, and difficulty finding job placement.

In workplaces requiring manual labor, “due to their limited language proficiency or restricted network of social support, immigrant populations are more likely to be at risk for work-related injury and illness.”<sup>414</sup> LEP workers may have increased chance of workplace injury because of difficulty reading warnings, safety manuals, or instructions; indeed, these circumstances have been identified in North Carolina where language barriers have led to increased rates of injuries of workers without sufficient English-speaking skills.<sup>415</sup> On the other

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<sup>411</sup> See INST. FOR WORK & THE ECON., THE INTEGRATION OF IMMIGRANTS IN THE WORKPLACE 2 (2015), available at [http://www.workandeconomy.org/images/The\\_Integration\\_of\\_Immigrants\\_in\\_the\\_Workplace\\_Pre-publication\\_Release\\_7-31-06.pdf](http://www.workandeconomy.org/images/The_Integration_of_Immigrants_in_the_Workplace_Pre-publication_Release_7-31-06.pdf).

<sup>412</sup> See Lin, *infra* note 414, at 383.

<sup>413</sup> DAVID KAZ, SEATTLE JOBS INITIATIVE, INVESTING IN EFFECTIVE EMPLOYMENT AND TRAINING STRATEGIES FOR ENGLISH LANGUAGE LEARNERS: CONSIDERATIONS FOR THE CITY OF SEATTLE AND OTHER LOCALITIES 20 (Jan. 2014), available at [http://www.seattlejobsinitiative.com/wp-content/uploads/SJI\\_ELL\\_Report\\_1.13.14.pdf](http://www.seattlejobsinitiative.com/wp-content/uploads/SJI_ELL_Report_1.13.14.pdf).

<sup>414</sup> Chia-Yu A. Lin et. al., *Work Organization and Its Effects on Health of Chinese Workers with English as a Second Language: A Qualitative Approach*, 28 J. OF WORK 379, 380 (2007). See Joanne Scharer, *How Well is it Working?*, News & Observer (Raleigh, N.C.), Aug. 15, 1999, at 21A (reporting that inexperienced Latino workers are especially at risk of fatal occupational injuries due to the language barrier and the prevalence of Latinos in high risk jobs).

<sup>415</sup> *Id.* at 380-81.

hand, LEP persons may simply not know about their rights to a safe workplace due to language barriers.<sup>416</sup> To exacerbate this problem, LEP workers may underreport unsafe work conditions due to fear of reprisal/backlash from employers, and the anticipation of economic uncertainty if their job is lost.<sup>417</sup> In a study of the Latino community in Long Island, the Long Island Hispanic Coalition reported that “many unscrupulous employers...threaten to fire their Latino employees and/or have them deported when they try to voice their rights in the workplace. As a result, immigrant workers are exploited and discriminated against.”<sup>418</sup> LEP persons in unsafe or unfair work environments may feel trapped in these circumstances. In a Canadian study of Chinese ESL (English as a Second Language) workers with diverse job types (stocking/warehouse, scientist, retail sales, insurance sales, health care) found that many of the workers surveyed had an attitude of “resignation” toward unsafe workplaces.<sup>419</sup> Language barriers exacerbate these circumstances.

Regarding applications for unemployment assistance, multilingual access to documents and forms is essential for LEP persons to access this benefit. Courts’ attitudes toward LEP individuals’ access to employment assistance has changed over time. In the 1973 case *Guerrero v. Carleson*,<sup>420</sup> the California Supreme Court ruled that an LEP individual who missed hearings due to his inability to comprehend an English-language notice had no due process right to a bilingual notice.<sup>421</sup> Although *Guerrero* is still good law in California, more recently, courts have

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<sup>416</sup> *Id.* at 387.

<sup>417</sup> *Id.* at 380.

<sup>418</sup> *Id.* at 382-83.

<sup>419</sup> See e.g., TEXAS WORKFORCE SOLUTIONS, LEP GUIDE FOR WORKFORCE PROFESSIONALS 34 (Anson Green ed., Texas Workforce Commission 2007), available at <http://www.twc.state.tx.us/files/partners/lep-guide-workforce-professionals-twc.pdf> (last visited April 7, 2015).

<sup>420</sup> *Guerrero v. Carleson*, 9 Cal.3d 808 (Cal. 1973).

<sup>421</sup> The court ruled that a welfare office was allowed to terminate benefits when the non-English-speaking plaintiff had not received notices because they were in English. See Mary Gillespie and Cynthia Schneider, *Unemployment Compensation and Procedural Issues: Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs?* 29 U. MICH. J.L. REF. 333, 362 (1996).

ruled that under Title VI LEP individuals are entitled to notices in languages they can understand. For example, in *Wai Po Leung vs. Employment Department*,<sup>422</sup> the Oregon Court of Appeals ruled that the plaintiff should be able to get unemployment benefits despite his late filing, because his inability to timely file was caused by an inability to understand the English language notice. The Court determined that “good cause for a late hearing request will exist when an LEP person has not been given language assistance in violation of the department's LEP policies in the context of the department's obligation under federal law to provide persons with limited English proficiency meaningful access to the unemployment insurance program.”<sup>423</sup>

## 2. Current Language Access Practices

The N.C. Workforce has an LEP Job Seekers Program, run by an LEP Coordinator.<sup>424</sup> According to an interview with Diane Smith, Manager of the Applicant Services Unit, the LEP Job Seekers Program provides technical assistance to Workforce offices across North Carolina as they assist LEP individuals in finding work.<sup>425</sup> The Program’s goal is to provide the same level of service to LEP persons as to English-speaking persons in terms of supplying job leads and referrals.<sup>426</sup> The Program primarily deals with Spanish-speakers, but it has also assisted speakers of such languages as Hmong and French.<sup>427</sup> The Coordinator herself is fluent in Spanish, and the Program has bilingual staff members across the state who are fluent in various languages.<sup>428</sup> When an LEP individual comes to a Workforce office, calls, or contacts it online, they will be directed to someone in the office who speaks the appropriate language.<sup>429</sup> If no one in the office

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<sup>422</sup> *Wai Po Leung v. Emp’t Dep’t.*, 340 P.3d 62 (Or. Ct. App. 2014).

<sup>423</sup> *Id.* at 68.

<sup>424</sup> *Limited English Proficiency*, N.C. DEP’T OF COMMERCE, <https://www.nccommerce.com/wf/job-seekers/limited-english-proficiency> (last visited April 14, 2015).

<sup>425</sup> Telephone interview with Diane Smith, Unit Manager, Applicant Services, N.C. Workforce (April 8, 2015).

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

speaks the particular language, the office will contact someone in another N.C. Workforce office, or will use an interpretation service.<sup>430</sup>

The LEP Job Seekers Program attempts to refer LEP individuals to a place of employment where a supervisor or manager ideally speaks their language.<sup>431</sup> Referrals are usually made to blue-collar labor jobs in construction, landscape, electrical, or plumbing.<sup>432</sup> If the individuals need help with unemployment insurance, the Program directs them to appropriate contact people in the Division of Employment Security.<sup>433</sup> The biggest challenge to the program is availability of financial resources - the program operates on a shrinking federal budget with no specific money set aside for LEP initiatives.<sup>434</sup>

The N.C. DOL offers a Spanish version of its website.<sup>435</sup> According to Dolores Quesenberry, Director of Communications at the N.C. DOL, the department's outreach to LEP individuals consists mostly of safety training for Spanish-speaking construction workers.<sup>436</sup> The N.C. DOL is also a critically important agency for LEP individuals who are so frequently subjected to wage theft. The department did not respond to emails requesting further information regarding their LEP initiatives.

### 3. Recommendations

In regards to state and local economies, "competitive advantages will go to those states and localities that realize the full potential of their immigrant workforces by transforming the current

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* Many LEP persons may also be highly skilled and possess professional degrees. Diane Smith noted that in her experience N.C. Workforce works with these individuals less frequently because they may receive employment guidance from outside sources.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Programa de Apoyo y Servicios para Los Trabajadores y Empleadores Hispanos*, N.C. DEP'T OF LABOR, [http://www.nclabor.com/spanish\\_site/index\\_spanish.htm](http://www.nclabor.com/spanish_site/index_spanish.htm) (last visited April 14, 2015).

<sup>436</sup> Telephone interview with Delores Quesenberry, Director of Communications, N.C. Department of Labor (March 12, 2015).

surplus of lower-skilled workers into the higher-skilled workers and entrepreneurs that their economies require.”<sup>437</sup> State and local government LEP workforce programs are essential to meet the economic needs of communities with high LEP populations. The Institute for Work and the Economy has identified seven elements of a successful workforce training program for LEP persons. In order to be successful, a program must be integrated between the employer, workers, and the community. Strategies must be components of a broader range of initiatives supporting the entire workforce (both LEP and non-LEP persons). Workers with valid foreign professional competencies should be able to pursue careers in their fields after demonstrating proficiency, if necessary. LEP programs should support adult education, support the fair application of existing labor laws, and continually monitor and improve the program’s initiatives. The program should also be local or state government based because local programs are likely to have the greatest success.<sup>438</sup>

Initiatives for LEP job training programs include implementing training which combines language skills, job skills training, and the “soft skills” required for workplace interactions.<sup>439</sup> Some groups advocate a sequential program (first learning English, then learning job skills),<sup>440</sup> whereas others advocate a completely integrated approach. Workforce training for LEP persons should build upon past training i.e. if the person had a certain degree in their home country, the job training program should help them get the corresponding U.S. licenses/certifications. Local governments and agencies should consider offering training opportunities with flexible

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<sup>437</sup> ROBIN SPENCE, ECON. MOBILITY CORP., SOUND INVESTMENTS: BUILDING IMMIGRANTS’ SKILLS TO FUEL ECONOMIC GROWTH 1 (Dec. 2010), *available at* [http://economicmobilitycorp.org/uploads/mobility-sound\\_investments.pdf](http://economicmobilitycorp.org/uploads/mobility-sound_investments.pdf).

<sup>438</sup> *See* INST. FOR WORK & ECON., *supra* note 411, at 3-4.

<sup>439</sup> HEIDE WRIGLEY ET AL., CTR. FOR LAW & SOC. POLICY, THE LANGUAGE OF OPPORTUNITY: EXPLAINING EMPLOYMENT PROSPECTS FOR ADULTS WITH LIMITED ENGLISH SKILLS 2 (2003), *available at* <http://files.eric.ed.gov/fulltext/ED481481.pdf>.

<sup>440</sup> *Id.* at 16.

schedules, since participants may be currently holding various part-time jobs or have other family caretaking responsibilities.<sup>441</sup> Additionally, Workforce programs can consult with ESL professors from local colleges, representatives and liaisons from the area's major employers, cooperate with existing community initiatives, and help connect LEP persons in need of financial assistance with Temporary Assistance for Needy Families (TANF) or other assistance programs.<sup>442</sup> Federal Workforce Investment Act (WIA) funding may also be available.<sup>443</sup>

Model programs for LEP workforce development include the Washington Integrated Basic Education and Skills Training (I-BEST), which combines community college ESL courses with workforce training,<sup>444</sup> and the Washington ORIA (Office of Refugee and Immigrant Assistance) LEP Pathway Program. The LEP Pathway Program receives funding for employability assessments, job readiness training, ESL courses, job search assistance, skills training, and job retention assistance. It serves LEP adults that receive TANF or another form of assistance.<sup>445</sup> Local and state governments may also model workforce training programs after those implemented by nonprofit agencies. For example, in the Center for Employment Training Program in San Jose, CA, most participants are Latino LEP individuals. The program increased earnings by forty-five percent for the control group over a two and a half year follow-up period. Participants enter job training with ESL integrated directly into the training. The program is only considered completed once participants secure employment, and students are eligible to receive Pell grants.<sup>446</sup> In the Chicago Manufacturing Technology Bridge Program, operated by *Instituto del Progreso Latino* (IdPL) in Chicago, participants earn college credits and learn workplace

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<sup>441</sup> *Id.* at 22.

<sup>442</sup> See KAZ, *supra* note 413, at 32-33.

<sup>443</sup> See SPENCE, *supra* note 437, at 1.

<sup>444</sup> See KAZ, *supra* note 413, at 36.

<sup>445</sup> *Id.* at 31.

<sup>446</sup> WRIGLEY, *supra* note 439 at 16.

English related to manufacturing. Participants also receive counseling, case management, job placement and job retention assistance.<sup>447</sup> IdPL is the largest Latino-serving Workplace Development program in Illinois and also offers the *Carreras in Salud* program (helping LEP persons gain RN, CAN, and LPN positions) and the *Mujer Avanzando* program (helping Latina single mothers achieve career goals and become homeowners).<sup>448</sup>

Local governments may benefit from a “strengths-based” approach toward their immigrant populations, focusing on particular abilities and positive traits uniquely offered by immigrant communities.<sup>449</sup> According to the Economic Mobility Corporation,<sup>450</sup> immigrants are thirty percent more likely to start their own business than their U.S.-born counterparts.<sup>451</sup> Since immigrants have often successfully surmounted many obstacles in order to arrive in the United States, they may be more comfortable taking risks (including business risks). Also, recent immigrants may be used to supporting themselves and their families through self-employment due to a lack of good jobs in their home countries.<sup>452</sup> This tendency toward entrepreneurship spurs job creation and strengthens local economies.<sup>453</sup> When local governments make their regulations on small businesses accessible to LEP individuals, this helps LEP business owners understand government rules and ordinances so that they can properly run their small business, thus supporting local economies. Finally, it is the responsibility of N.C. Workforce to allocate sufficient funds to meet its obligations under Title VI.

#### **D. Health Care**

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<sup>447</sup> *Id.* at 26.

<sup>448</sup> *Workforce Development*, INSTITUTO DEL PROGRESO LATINO, [http://idpl.org/idpl\\_workforce\\_dev.html](http://idpl.org/idpl_workforce_dev.html). (last visited April 7, 2015).

<sup>449</sup> See TEXAS WORKFORCE SOLUTIONS, *supra* note 419, at 11, 20.

<sup>450</sup> Economic Mobility Corporation is a nonprofit organization whose focus is to promote upward mobility for the less advantaged.

<sup>451</sup> See SPENCE, *supra* note 437, at 1.

<sup>452</sup> *Id.* at 60.

<sup>453</sup> *Id.* at 1.

“The North Carolina Department of Health and Human Services (N.C. DHHS) is responsible for ensuring the health, safety and well-being of all North Carolinians. This department offers health and wellness programs and services throughout the state.”<sup>454</sup> The NC DHHS is made up of thirty divisions and offices, composed of four areas: health, human services, administration, and support. In addition, the department oversees fourteen facilities, including developmental centers and psychiatric hospitals, among others.<sup>455</sup> The three divisions within N.C. DHHS that have the most expenditure are the Division of Medical Assistance (Medicaid),<sup>456</sup> Division of Social Services,<sup>457</sup> and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. Health care agencies in North Carolina that are recipients of federal financial assistance or sub-recipients through N.C. DHHS, or provide services that are federally-funded, must offer language assistance options that will ensure compliance with Title VI and its regulations.

### 1. Issues Faced By LEP Persons

The right to health is a fundamental to human right.<sup>458</sup> The accessibility of health care services to individuals is tantamount to this basic right. Whether access to these services is guaranteed very much depends on the language access policies of local health care agencies, which are central to the day-to-day well-being of the LEP immigrants.<sup>459</sup> Lack of language access in health

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<sup>454</sup> *Overview*, N.C. DHHS, <http://www.ncdhhs.gov/about/overview> (last visited July 15, 2015).

<sup>455</sup> Sarah Curry, *Funding Health Care in the N.C. Budget*, CAROLINA J. ONLINE (Oct. 17, 2014), [http://www.carolinajournal.com/articles/display\\_story.html?id=11470](http://www.carolinajournal.com/articles/display_story.html?id=11470).

<sup>456</sup> Medicaid is a medical insurance program for low-income individuals and families.

<sup>457</sup> It includes areas of adult services, child care, child support, energy assistance, financial assistance, food and nutrition services, health coverage and child welfare.

<sup>458</sup> This was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

<sup>459</sup> This paper takes the viewpoint that without meaningful accessibility, which requires the delivery of services in a language understood by the patient and thus assures a dialogue between patient and service provider that is fully understood by both, accessibility of healthcare services would remain a right without substance or usefulness.

care services has multiple adverse consequences for LEP families and their communities. Language barriers may make it less likely that LEP individuals attempt to access health care services. Studies have found that LEP persons have greater obstacles when establishing a regular source of primary care and are less likely to receive preventive services.<sup>460</sup> One national survey of Spanish-speaking LEP patients revealed that they were significantly less likely than patients proficient in English to obtain medical care in various areas of preventive services including mental health, influenza vaccinations and mammograms.<sup>461</sup> These preventive services are not only critical to the well-being of the individual patient but help to avoid the spread of diseases and lower medical costs overall.

In situations where LEP individuals do attempt to access health care services, language barriers may detrimentally affect the quality of health care received. Thus, these individuals will not have equal access to health care services as are provided to English proficient individuals. Miscommunication between patients and health care providers is a problem frequently reported, often with dire consequences. The inability to efficiently communicate can significantly affect the doctor-patient relationship. As one study reported:

[C]ommunication between providers and patients is critical for discussing issues such as diagnoses, treatment plans, medication adherence, and disease management techniques. A Robert Wood Johnson Foundation survey found that 94 percent of providers cite communication as a top priority in delivering quality care. Over 70 percent reported that language barriers compromise the patient's understanding of treatment advice and their disease, increase the risk of complications, and make it harder for patients to explain their symptoms.<sup>462</sup>

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<sup>460</sup> *Importance of Language Services*, ROBERT WOOD JOHNSON FOUND., <http://www.rwjf.org/content/dam/supplementary-assets/2008/06/overview-of-language-services.pdf> (last visited July 15, 2015).

<sup>461</sup> *Id.*

<sup>462</sup> AAPCHO, HEALTH CENTERS: IMPROVING HEALTH CARE ACCESS FOR LIMITED ENGLISH PROFICIENT PATIENTS (2004), *available at* [http://www.aapcho.org/resources\\_db/health-centers-improving-health-care-access-for-limited-english-proficient-patients](http://www.aapcho.org/resources_db/health-centers-improving-health-care-access-for-limited-english-proficient-patients).

Miscommunication due to lack of interpreter services results in increased medical errors, and disparities in health outcomes. The case of thirteen year-old Gricelda Zamora provides one troubling example that reveals the consequences that may result when a hospital fails to provide an interpreter. Gricelda's Spanish-speaking parents were told, without the aid of an interpreter, to bring her back to the hospital immediately if her symptoms worsened, and otherwise to follow up with a doctor in three days. However, what her parents understood from the conversation that occurred without the benefit of an interpreter was that they should wait three days to see the doctor. After two days, with Gricelda's condition deteriorating, they felt they could no longer wait, and rushed her back to the emergency department. Doctors discovered she had a ruptured appendix. She was airlifted to a nearby medical center in Phoenix, where she died a few hours later.<sup>463</sup>

The lack of translated health-related materials can also significantly contribute to the deterioration of the quality of health care services. Every individual has numerous rights associated with their receipt of health care services. Most people are aware of many of these rights because of the dissemination of written information and brochures. However, if these documents are not translated, LEP individuals cannot access this information. In sum, the lack of language access lowers the understanding of patients and inhibits their ability to communicate with their health providers, which in turn worsens the quality of healthcare service they receive.

## 2. Current Language Access Practices

In 2002, preliminary findings of a compliance review conducted by the U.S. DHHS OCR indicated that NC DHHS and its subsidiary agencies were not meeting language access obligations under Title VI. N.C. DHHS subsequently entered into a Voluntary Compliance

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<sup>463</sup> See Alice Chen, *The Legal Framework for Language Access in Healthcare Settings: Title VI and Beyond*, 22 J. GEN. INTERNAL MED. 362-367 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2150609/>.

Agreement, which has significantly influenced the current language access practices at local health care agencies throughout the state. As part of the agreement, NC DHHS published a set of standards in its Title VI Summary.<sup>464</sup> The Summary mirrors many of the policies outlined in the DHHS LEP Guidance. It “provides for a range of oral language assistance options,<sup>465</sup> notice to LEP persons of the right to language assistance at no cost, periodic training of staff... and the translation of written materials.”

a. *Oral Language Assistance*

Federally funded health facilities must provide oral interpretation services free of charge for patients who request it.<sup>466</sup> N.C. DHHS current policy states, “Under no circumstances shall the local entity require the applicant/recipient to pay for bilingual/interpretive services.”<sup>467</sup> “NC DHHS maintains a hotline with bilingual staff to serve Spanish clients.” The Department also has access to a contract with Telelanguage, Inc., a phone interpreter service, to provide services to individuals who speak languages other than Spanish or English.<sup>468</sup> The Department provides an additional hotline service specific for HIV/AIDS “NC DHHS: HIV - Am I Infected?” in Spanish.<sup>469</sup> DHHS has some bilingual staff at various local health care agencies throughout the state. The actual number of bilingual staff in local agencies is unknown. It is important to note that many bilingual staff members serve in other positions in the agency and their interpreter

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<sup>464</sup> *Title VI Summary*, N.C. DHHS (2001), available at [http://info.dhhs.state.nc.us/olm/manuals/dhs/pol-30/man/Title\\_VI\\_Summary.pdf](http://info.dhhs.state.nc.us/olm/manuals/dhs/pol-30/man/Title_VI_Summary.pdf).

<sup>465</sup> For example, providers should hire bilingual staff, contract interpreters and staff interpreters, and telephone interpreter lines.

<sup>466</sup> 42 U.S.C. § 2000d (2009).

<sup>467</sup> *DHHS Language Access Policy*, N.C. DHHS, [http://info.dhhs.state.nc.us/olm/manuals/dhs/pol-30/man/Title\\_VI\\_Language\\_Access1.htm](http://info.dhhs.state.nc.us/olm/manuals/dhs/pol-30/man/Title_VI_Language_Access1.htm) (last visited July 29, 2015).

<sup>468</sup> N.C. DIV. OF SOC. SERVS., NORTH CAROLINA AND ROUND 3 OF THE CFSR: WHAT AGENCIES NEED TO KNOW 16 (2015), available at <http://fcrp.unc.edu/pdfs/cfsr.pdf>.

<sup>469</sup> *HIV/AIDS Information for Individuals and Families*, N.C. DHHS, <http://epi.publichealth.nc.gov/cd/hiv/individuals.html> (last visited July 29, 2015).

duties are often in addition to their primary responsibilities. These individuals are not listed as interpreters, but as bilingual staff or volunteers.

In North Carolina, it is possible for medical providers to be reimbursed by Medicaid for the cost of providing an interpreter when a Medicaid-eligible customer receives medical care.<sup>470</sup> That being said, undocumented immigrants who are defined as “non-qualified aliens” are not eligible for Medicaid assistance or enrollment;<sup>471</sup> thus, the cost of the interpreting services will not be reimbursed under these circumstances.

b. *Written Materials*

In addition to oral language assistance, the N.C. DHHS current policy echoes the DHHS LEP Guidance that requires that “[e]ach division/facility/school shall ensure that vital documents<sup>472</sup> are translated into Spanish and made available to local entities.” N.C. DHHS has developed a standard Title VI complaint form available in both Spanish and English.<sup>473</sup> NC DHHS provides a variety of informational brochures on their website in both English and Spanish, including NC Prescription Drug Coverage<sup>474</sup>, and Four Programs that Help Pay Your Medical Expenses.<sup>475</sup> It also provides translated public health educational materials for LEP

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<sup>470</sup> *Appendix C: Interpreter Services*, N.C. DHHS,

[http://info.dhhs.state.nc.us/olm/manuals/dsb/ILS/man/Appendix\\_C.htm](http://info.dhhs.state.nc.us/olm/manuals/dsb/ILS/man/Appendix_C.htm) (last updated April 2013).

<sup>471</sup> Billy Ball, *Immigrants Denied Mental Health Services*, INDYWEEK (March 20, 2013),

<http://www.indyweek.com/indyweek/immigrants-denied-mental-health-services/Content?oid=3428766> (reporting on on immigrants being denied mental health services in Charlotte and explaining how undocumented immigrants are not eligible to receive reimbursements through Medicaid).

<sup>472</sup> Vital Documents – These forms include, but are not limited to, applications, consent forms, letters containing important information regarding participation in a program; notices pertaining to the reduction, denial, or termination of services or benefits, the right to appeal such actions, or that require a response from beneficiary notices advising LEP persons of the availability of free language assistance, and other outreach materials.

<sup>473</sup> *See Title VI- Limited English Proficiency*, N.C. DEP’T HEALTH & HUMAN SERVS.,

<http://www2.ncdhhs.gov/dss/lep/index.htm> (last visited July 14, 2015).

<sup>474</sup> *See Su Guia sobre la Cobertura de Medicare de los Medicamentos Recetados*, CENTROS DE SERVICIOS DE MEDICARE Y MEDICAID, <http://www.medicare.gov/Pubs/pdf/11109-S.pdf> (last visited July 15, 2015).

<sup>475</sup> *See 4 Programas que Pueden Ayudarle a Pagar sus Gastos Medicos*, CENTROS DE SERVICIOS DE MEDICARE Y MEDICAID, <http://www.medicare.gov/Publications/Pubs/pdf/11445-S.pdf> (last visited July 15, 2015).

individuals online, including information about dental health and first aid.<sup>476</sup> Other informative materials are made available to schools in Spanish, such as brochures about communicative diseases.<sup>477</sup> Additionally, in December 2013, the Department introduced its Spanish version of a travel guide, ACCESS North Carolina, (*ACCESO Carolina Del Norte*). The guide assists LEP persons with disabilities who wish to travel throughout North Carolina and provides details on the accessibility of nearly four hundred tourist sites across North Carolina.<sup>478</sup>

N.C. DHHS has also translated most official forms, including application forms for important health care programs. For example, the Department provides translated application forms for Health Check Program, an important Medicaid program, as well as programs such as N.C. Health Choice for Children and Child Support Services, which provide free or low-cost health coverage. Spanish applications for these and other programs are made available at local department of social services.<sup>479</sup> Similarly, the Department also provides the Patient Authorization Form (to Permit Use and Disclosure of Health Information) in Spanish.<sup>480</sup> As a general matter, all brochures and application forms disseminated by N.C. DHHS are reportedly applicable in all N.C. counties. Since LEP individuals receive the services at local county health departments (i.e., FCDPH), these county health agencies are also providing NC DHSS translated documents as well as translated versions of documents unique to their facilities.

c. *Forsyth County Public Health Department – A Sample Local Health Care Agency*

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<sup>476</sup> However, not all the materials have been translated into Spanish. *See generally North Carolina Division of Public Health*, N.C. DEP'T OF HEALTH & HUMAN SERVS., <http://www.ncdhhs.gov/dph/oralhealth/education/> (last visited July 15, 2015).

<sup>477</sup> This is generally limited to current urgent topics, such as ebola.

<sup>478</sup> Stan Deatherage, *DHHS Unveils Spanish Travel Guide for Individuals with Disabilities*, N.C. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 9, 2013, 6:17 PM), <http://beaufortcountynow.com/post/9886/dhhs-unveils-spanish-travel-guide-for-individuals-with-disabilities.html>.

<sup>479</sup> The application form is accessible from the N.C. DHHS website at on <http://info.dhhs.state.nc.us/olm/forms/dma/dma-5063.pdf>

<sup>480</sup> The form can be found on [http://publichealth.nc.gov/lhd/pohr/DHHS-4056-PatientAuthorization\(English-Spanish\).pdf](http://publichealth.nc.gov/lhd/pohr/DHHS-4056-PatientAuthorization(English-Spanish).pdf).

N.C. DHHS is the prime recipient of federal funds that it disburses among subsidiary local agencies. N.C. DHHS is responsible for all subsidiary local agencies to which federal funds are sub-granted, and as such is required to review the language access practices of subrecipient county health departments, such as the Forsyth County Department of Public Health (FCDPH). In addition to its individualized language access practices, the language access practices of local health departments that are subsidiaries of N.C. DHHS must also mirror the N.C. DHHS Title VI Policy in their provision of health care services. FCDPH is one example and is presented as a sample local health care agency.

FCDPH provides a number of oral language assistance options for LEP residents. As an example, FCDPH offers Pregnancy and Families with Young Children (Birth to 5) Resources in Spanish, which include: (1) Breastfeeding Classes, (2) Infant Feeding Class that teaches proper positioning of breastfeeding and (3) Pumping, Storage and Formula Class. Currently, the Forsyth County Department of Social Services (FCDSS) is providing language interpreter services to all customers in need, free of charge, as required by Title VI.<sup>481</sup> Additionally, the Community Health Clinics of FCDPH in Winston-Salem provides their services in English, Spanish and other languages if needed. For example, FCDPH offers an HIV/STD Counselling and Testing Clinic, which offers its services in both Spanish and English and residents can request their appointment be conducted in Spanish.<sup>482</sup> Furthermore, a number of local organizations provide different public health-related human services that are accessible to and relied upon by LEP communities. Work Family Resource Center (WFRC) is a child care resource in the area that

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<sup>481</sup> *Free Onsite Interpreter Services*, FORSYTH CNTY. DIV. OF SOC. SERVS., [https://www.forsyth.cc/DSS/Documents/language\\_interpreter.pdf](https://www.forsyth.cc/DSS/Documents/language_interpreter.pdf) (last visited July 29, 2015).

<sup>482</sup> These clinics provide consultations for STD testing and treatment, including conventional HIV blood testing. *Forsyth County Dept. Of Public Health, STD TESTING & TREATMENT* (May 14, 2013), <http://stdtestingtreatment.com/forsyth-county-dept-of-public-health-at-799-n-highland-ave-winston-salem-nc-27102/>.

provides its services in both Spanish and English.<sup>483</sup> The Forsyth County WIC (Women Infants & Children) Program serves English and Spanish speaking clients with a bilingual staff.

Although these language assistance options are commendable language access practices, for purposes of this report, it could not be demonstrated that the FCDPH offers much by way of Spanish translation for its own documents like press releases and health brochures. Further investigation is needed to confirm that appropriate language access information from the county health department and whether the agency is in compliance with Title VI.

Aside from this example, it appears that most local health care agencies still do not have any bilingual staff serving LEP individuals. This deficiency is compounded by the fact that these agencies tend not to contract with interpreters to provide interpretation services although such services are often reimbursed by the federal government.<sup>484</sup> Moreover, many state and local agencies that provide health care services may not have sufficient awareness of their legal obligations to provide language access services at no cost. In the previous compliance review, in some instances it was found that health care agencies "effectively denied the services" because no interpreter was available. In other instances, local agencies often required LEP clients to bring their own interpreters, a policy that violates Title VI.

### 3. Recommendations

Underfunding has been the key obstacle to providing adequate interpretive services for local agencies. North Carolina must endeavour to secure sufficient funding for state and local health care agencies in order to properly care for LEP persons and to comply with Title VI.

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<sup>483</sup> *About WFRC*, WORK FAMILY RES. CTR., <http://www.workfamilyresource.org/about-wfrc/> ("The majority of the agency's funding comes from the Child Care and Development Block Grant through the NC Division of Child Development.).

<sup>484</sup> Interpreter services are fully reimbursed by federal government. Local agencies often do not have use local or state funds to pay for interpreters.

North Carolina health care agencies suffer a shortage of funding that would help to improve and expand language access practices. Of concern, North Carolina receives less funding in the health care sector compared to other states according to the state budget in 2013.<sup>485</sup> With regard to public health services, N.C. DHHS was instructed to cut 160 of the program's approximately 800 positions and close four of the sixteen centers. As a result of the state's refusal to expand the Medicaid coverage, it is estimated that has lost \$51 billion in federal funding and reimbursement.<sup>486</sup> The loss of federal funds has meant that state agencies responsible for providing health care services must prioritize their services to those areas with the highest caseloads in rural and underserved areas of the state to the detriment of other regions and populations.<sup>487</sup> It has also meant that there may be fewer federal recipient agencies with Title VI obligations.

While finding payment sources for interpreters is critically important for compliance, health care agencies can also provide other acceptable oral language assistance options by hiring bilingual staff or providers who can work directly with the Latino population. N.C. DHHS can help to ensure oral language access and seek out or incentivize bilingual providers and staff members.<sup>488</sup> Special recruitment efforts are needed to recruit bilingual and bicultural staff, and to encourage Latino youth to seek health care professions. Under the state personnel system, state agencies can increase salaries for bilingual staff by five percent.<sup>489</sup> Although this option is available, it is not always used, and similar systems are not always available at the local level.

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<sup>485</sup> Rose Hoban & Holly West, *Health and Human Services Budget – The Losers*, N.C. HEALTH NEWS, July 26, 2013, <http://www.northcarolinahealthnews.org/2013/07/26/health-and-human-services-budget-the-losers/>.

<sup>486</sup> Jennifer Thomas, *N.C.'s Lack of Medicaid Expansion Projected to Cost \$51B by 2022*, CHARLOTTE BUS. J. (Aug. 7, 2014, 5:26 PM), <http://www.bizjournals.com/charlotte/blog/health-care/2014/08/n-c-s-lack-of-medicaid-expansion-projected-to-cost.html>.

<sup>487</sup> See *supra* note 485.

<sup>488</sup> N.C. PUB. HEALTH, PUB. HEALTH TASK FORCE, NORTH CAROLINA PUBLIC HEALTH IMPROVEMENT PLAN 5 (2008), available at [http://publichealth.nc.gov/taskforce/2008/improvement\\_plan\\_2008.pdf](http://publichealth.nc.gov/taskforce/2008/improvement_plan_2008.pdf).

<sup>489</sup> *Id.*

To improve written language assistance, N.C. DHHS should expand its collection of translated documents and materials, as well as improve the quality of translation. For example, birth certificates, when written in Spanish, are often not translated in English in a precise way. Inaccurate identifying information not only leads to confusion in patient records, but likely circulates outside the healthcare system and affects the population database.<sup>490</sup>

Practices identified around the state and elsewhere as effective ways of improving language access services in the realm of health care may provide useful guidance. One example is Duke's Organization of Interpreter Services.<sup>491</sup> Duke University's International Patient Services (IPS) office provides interpreter services to Duke Hospital and seventeen outlying clinics. Providers call a central number to request interpretation services immediately or to schedule services for a later time. Interpreter services can also be provided over the phone. Medical interpreters for a variety of different languages, including Spanish, Arabic, French, German, and Mandarin, are available both during and after business hours.<sup>492</sup> One interpreter remains on duty after hours and on the weekends, and a backup interpreter works from home. Training is a central part of the interpreter services provided at Duke. IPS provides extensive training to all new interpreters. In addition, IPS provides a "Bridging the Gap" course each year that teaches interpreter skills, cultural competency, communication skills, advocacy skills, and professional development.

Similarly, North Carolina should consider adopting practices developed in New York City, which has implemented one of the most effective structures for Title VI compliance in

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<sup>490</sup> During a meeting held on April 15, 2015 at the University of North Carolina Chapel Hill attended by various agencies working with LEP populations, agency representatives expressed concerns that medical documents are often translated wrongly, particularly for birth certificates.

<sup>491</sup> LATINO HEALTH TASK FORCE, N.C. INST. OF MED., N.C. LATINO HEALTH (2003).

<sup>492</sup> *Id.*

health care services. The Mayor’s Office of Immigrant Affairs (MOIA) is responsible for implementing and reviewing the Title VI compliance by the city agencies. MOIA developed a set of strategies on the Title VI compliance for city healthcare providers. They include a strategy called “plain language,”<sup>493</sup> translation of legal documents, the dissemination of information to the public through a press release in different languages, and the availability of telephonic interpretation.<sup>494</sup> Translated documents include forms and applications, as well as letters and insurance information. City agencies offer regular training to the staff regarding to language access services. Good practices within the healthcare services include the introduction of “I speak...” cards, healthcare hotlines that answer all kinds of questions in different languages, and a developed complaint channel that is comprised of self-reporting systems, secret shoppers,<sup>495</sup> and reports from health care consumers.

#### **E. Further Recommendations Applicable To All Title VI Agencies**

North Carolina agencies that serve LEP persons should investigate recommendations, models, and best practices in order to provide the best services to this population and to ensure compliance with its legal obligations. Many of the following recommendations are based on practices developed by the New York City Mayor’s Office of Immigrant Affairs (NYC MOIA) which has been recognized as a model government agency with regard to serving the varied LEP population within its jurisdiction.

##### **1. Translate Brochures and Forms in Plain Language**

The NYC MOIA now requires that all city agencies draft translated documents at the

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<sup>493</sup> Meeting between UNC Law students and the New York City Mayor’s Office of Immigrant Affairs (March 24, 2015). Plain language is a strategy and technique for good professional writing that conveys information clearly. NYC has used plain language to achieve the Administration’s language access goals.

<sup>494</sup> *Id.* Telephonic interpretation services at twenty-four offices across the agency through a contracted vendor, which is currently Language Line. Interpretation services are available for more than 170 languages.

<sup>495</sup> *Id.* The oversight agency sends anonymous individuals who pretend to be LEP individuals and access the language access services the local agencies offer.

average reading level of communities they are intended to assist.<sup>496</sup> If translated documents are written at too high a level, this prevents access to services regardless of the language in which it is written. The NYC MOIA is currently investigating ways to ensure best practices in this regard.<sup>497</sup> North Carolina agencies should follow this example and translate brochures and forms in plain language, and at a reading level that is accessible to all speakers of that language in the communities they serve.

## 2. Complete Regular Internal Assessments

No matter the location or level (state or county), agencies should conduct internal assessments, involve community members, consider new plans in light of institutional capability, and attempt to get the best quality translation possible (machine translated documents often contain errors).<sup>498</sup> Internal assessments and interdepartmental work groups prevents a “piecemeal approach”<sup>499</sup> and helps to avoid the problem of a common failing of LEP efforts – the tendency to “reinvent the wheel in each locality”<sup>500</sup> instead of comparing efforts to those in other jurisdictions. Successful language access policies have buy-in from management, a written policy, good institutional resources, effective use of technology, an agency staff culture supporting language access, and ongoing monitoring of the language access plan.<sup>501</sup>

Assessments can be conducted with assistance from members of the community. In the NYC MOIA, best practices include a ‘Secret Shopper’ system of evaluating agencies’ accessibility to LEP persons.<sup>502</sup> Members of the community with limited English proficiency

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<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> Catherine Dyksterhouse Foca, *Ensuring Communication: Providing Translation and Interpretation Services*, 68 POPULAR GOV'T 35, 38-39 (2003), available at <http://sogpubs.unc.edu/electronicversions/pg/pgwin03/article5.pdf>.

<sup>499</sup> *Id.* at 38.

<sup>500</sup> See Wang, *supra* note 352, at 19.

<sup>501</sup> See Wilson, *supra* note 381, at 978.

<sup>502</sup> Meeting between UNC Law students and the New York City Mayor’s Office of Immigrant Affairs, March 24, 2015.

visit various government agencies and ask for assistance, then fill out reports detailing their experiences.<sup>503</sup> The NYC MOIA then gives each agency a grade based in part on the Secret Shoppers' feedback.<sup>504</sup> Such an approach could be used by community groups to evaluate various North Carolina agencies – for example, sending LEP representatives to various agency offices, or asking LEP representatives to call various agency offices, to determine whether LEP persons visiting the agency are effectively served.

### 3. Consider Cost-Efficient Strategies to Maximize Language Access Resources

Money may appear to be a barrier to LEP plans. However, many LEP plans can be implemented with relative ease. For example, police departments can require officers to keep sheets of paper with Miranda rights in various languages in their police vehicles. Agencies can create a master list of bilingual employees. Departments seeking bilingual employees can offer a stipend for individuals fluent in target languages.<sup>505</sup> The City of Monterey Park, CA mailed paper “Language Identification Cards” to each household in its jurisdiction along with the water bill. Residents can carry the card with them and show it inside a local government agency if they need to communicate but cannot say the English name of the language/dialect they speak.<sup>506</sup> As one study found, the costs of addressing language challenges, at least in regards to law enforcement, “may not be as high as some police administrators believe.”<sup>507</sup>

With regard to the issue of resources it is important to note that the Department of Justice

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<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> Christine Brenner, *Nuevos Residentes and Local Government Language Accessibility*, 12 J. PUB. MGMT. & SOC. POL'Y 29, 43 (2006), available at [www.jpmsp.com/volume-12/vol12-iss2-NuevosResidentes-Brenner](http://www.jpmsp.com/volume-12/vol12-iss2-NuevosResidentes-Brenner).

<sup>506</sup> David Jung and Noemi Gallardo, *Language Access Laws and Legal Issues: A Local Official's Guide*, 10 HASTINGS RACE AND POVERTY L.J. 31, 61 (2013).

<sup>507</sup> Bharathi A. Venkatraman, *Lost in Translation: Limited English Proficient Populations and the Police*, POLICECHIEF (2006), available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=861&issue\\_id=4200](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=861&issue_id=4200)  
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recognizes that resources are limited in many communities. However, in 2009, an assistant Attorney General stated that “even in tough economic times, assertions of lack of resources will not provide carte blanche for failure to provide language access... [l]anguage access is essential and is not to be treated as a ‘frill’ when determining what to cut in a budget.”<sup>508</sup>

#### 4. Develop an Internal Agency Culture Conducive to Language Rights

Local governments should know and emphasize in their communities that language access policies are not simply a service for some, but a service to all people.<sup>509</sup> Language access benefits the local community and the local government. When government agencies “can view their efforts to promote language access as facilitating the future success of newer immigrants within the geographic areas they serve, [agencies] too can benefit from the long-term social and economic benefits that ultimately flow to the larger community.”<sup>510</sup> Agencies should promote a culture valuing language rights, since “motivation, often driven by a single individual [at an agency], seems to be the key determinant of a serious effort at LEP accessibility.”<sup>511</sup>

Agencies should consider partnering with local nonprofit organizations. Nonprofits can use their expertise in community outreach and local governments can work to create a welcoming political environment for immigrant issues.<sup>512</sup>

#### 5. Website Development

Successful implementation of a language access plan includes providing the public with ready access to multilingual versions of a government agency’s website.<sup>513</sup> Websites allow local governments to “take the government to the people;” however, “if a website and a share of the

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<sup>508</sup> See Jung & Gallardo, *supra* note 506, at 43.

<sup>509</sup> See Wilson, *supra* note 381, at 974.

<sup>510</sup> See Daly, *supra* note 237, at 1031.

<sup>511</sup> ED DOWNEY, E-GOVERNMENT WEBSITE DEVELOPMENT: FUTURE TRENDS AND STRATEGIC MODELS 46 (2010).

<sup>512</sup> See Wilson, *supra* note 381, at 965.

<sup>513</sup> See Nadia Rubaii-Barrett & Lois Recasino Wise, *Language Minorities and the Digital Divide: A Study of State E-Government Accessibility*, J. PUB. MGMT. & SOC. POL’Y 5, 7 (2006).

population operate in different languages, the site fails in at least a portion of its mission.”<sup>514</sup> As of 2010, numerous U.S. cities and counties’ websites were in need of significant improvement in LEP accessibility.

Local government agencies in North Carolina can refer to the City of Tampa’s website, which has won numerous awards for its site organization and bilingual availability.<sup>515</sup> The website has a prominent search bar with “*En Español*” at the top. Information most relevant to Tampa residents (news and notices, emergency alerts, calendar, maps) are prominent on the page. The site links to mobile apps on Facebook, Twitter, Instagram, YouTube, Foursquare, and Flickr. It features a description of each department’s responsibilities, so that anyone can understand the structure of the city government. Clicking the “*En Español*” button links the user to Google and Bing mechanical web translation services.

A research study on LEP accessibility conducted by the University of Texas and Valdosta State University found that ninety-five percent of city and county websites across eleven states scored below “2” on a 0-6 point scale.<sup>516</sup> The study listed best practices for agencies regarding their Internet presence, indicating that agencies should prioritize webpage development.<sup>517</sup> Websites should be easily readable, with links at the top of the page.<sup>518</sup> Links to multilingual versions of the website should be printed in the applicable language (for example, a link to a

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<sup>514</sup> DOWNEY, *supra* note 511, at 37.

<sup>515</sup> The City of Tampa site won third place in the “Digital Cities Survey, Best in the Web” from the Center for Digital Government, and was rated an “A+” by the National Policy Research Council Excellence in E-Government Project in 2009. *Id.* at 40-41.

<sup>516</sup> *Id.* at 39-40, 42. On the sliding scale, a score of “0” indicated a placeholder website that was not user-friendly even in English. A score of “1” indicated a functional English-only website, “2” indicated a site with Spanish on one page but only English on subsequent pages, “3” indicated a site with machine-translated Spanish (many errors), “4” indicated a site in fluent Spanish on some linked pages, “5” indicated a site in fluent Spanish requiring manual download of forms, and “6” indicated a site in fluent Spanish with forms linked within a database.

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

Spanish version of the page should read “*En Español*” instead of “In Spanish”).<sup>519</sup> On a state or county website, departments such as police, emergency, utilities (water service) and housing should take priority in the order of translation.<sup>520</sup> The site should have a site map and a search function.<sup>521</sup> Additionally, agencies should consult with focus groups before implementing changes to the website and elicit feedback on changes to the website.<sup>522</sup>

## **II. ASSESSING BEST PRACTICES: BUILDING INTEGRATED COMMUNITIES IN NORTH CAROLINA**

Building Integrated Communities (BIC) is a statewide initiative that partners with municipalities in North Carolina to help their local governments engage with immigrant and refugee populations in order to generate and implement community integration plans and strategies.<sup>523</sup> The community agencies that partner with BIC drive their own initiatives, on a small and large scale. BIC begins the process by facilitating meetings between city leaders in the partner municipality and local immigrants. As part of the integration planning process, BIC provides the municipality with a community needs assessments, research on local demography, and blueprints of the best practices and lessons learned from other municipalities. BIC’s goals are not to direct change or provide direct services or programs but rather to facilitate collaboration, provide resources, and share ideas about how best to engage immigrant populations.

BIC recognizes that “all communities are different, with their own histories, relationships, and local actors playing an important role in influencing outcomes.”<sup>524</sup> Therefore, in each partner municipality, the BIC team focuses on creating locally relevant strategies unique

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<sup>519</sup> *Id.*

<sup>520</sup> *Id.*

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Building Integrated Communities*, LATINO MIGRATION PROJECT, <http://migration.unc.edu/programs/bic/> (last visited July 16, 2015).

<sup>524</sup> *Id.*

to its LEP and immigrant populations. The municipalities define their own goals and strategies for integration in their respective communities. BIC and the community team have at least a three-year commitment to their partnership to pursue their integration strategies and achieve their goals.<sup>525</sup> Municipalities that partner with BIC commit to providing “financial resources and significant and sustained time to enhancing immigrant integration. Specifically, mayors, city managers and representatives of all city agencies will participate in the planning process.”<sup>526</sup> Again, it is a process of engaging local immigrants, refugees, and their leaders. It aims to address the particular community needs identified, as well as fostering cross-cultural relationships.

BIC’s comprehensive purpose is to successfully integrate immigrant and refugee populations into local communities. Toward that end, one of the initiative’s areas of strategic focus is linguistic access. In regards to language access plans, BIC’s partnerships espouse the belief that language rights are crucial to many other human rights, and are crucial to almost all social services for LEP people. Not only is it necessary to comply with the mandates of Title VI, but language access allows for dignity and inclusion of all people in integrated communities.

This Report reviews progress and practices related to language rights and language access in two BIC partner municipalities, the cities of Winston-Salem and High Point. These cities are continuously working towards further improvements in integrating their communities, and provide helpful blueprints of the BIC process. The outstanding efforts of these two partner municipalities may serve as a guide to help other communities plan and implement similar initiatives. Moreover, they have continued to assess their needs and deficiencies and to identify problems and ways to remedy them, which is indicative of a best practice in and of itself.

### **A. High Point**

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<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

## 1. BIC Initiative

In order to gauge High Point's commitment to improved language access, it is first necessary to situate its efforts within a larger initiative to create a welcoming municipality for immigrants and LEP persons. The city of High Point joined the BIC initiative in February 2011.<sup>527</sup> High Point's BIC initiative is a collaborative effort, involving the participation of the BIC team, the Human Relations Department and other city staff, immigrant community leaders and community stakeholders.<sup>528</sup> The Human Relations Commission of High Point (HRC) is the agency that spearheads the BIC immigration integration initiative and serves as High Point's primary representative.<sup>529</sup> The larger goal of participating in the initiative "was to examine challenges that immigrants experience and take comprehensive steps to address these challenges."<sup>530</sup> As part of its partnership with BIC, High Point developed an ambitious action plan with sixteen distinct sub-points. High Point's BIC initiative, as directed by HRC, involves all city agencies, along with many community shareholders. In regards to language rights, its goal is to enhance immigrant access to information about city services and programs.<sup>531</sup>

To start the planning process, the BIC team conducted research on the demographic characteristics of High Point's local communities.<sup>532</sup> Part of this research focused on LEP residents of High Point, including their level of proficiency in English, country of origin, and location in the community.<sup>533</sup> The BIC team presented this research, along with best practices identified by the BIC staff after reviewing local immigrant integration policies across the

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<sup>527</sup> LATINO MIGRATION PROJECT, BUILDING INTEGRATED COMMUNITIES: HIGH POINT, NORTH CAROLINA (2013), available at [http://migration.unc.edu/files/2013/03/HP-Report\\_3102014.pdf](http://migration.unc.edu/files/2013/03/HP-Report_3102014.pdf).

<sup>528</sup> *Id.* at 4.

<sup>529</sup> *Id.* at 2.

<sup>530</sup> *Id.* at 1.

<sup>531</sup> *Id.* at 27.

<sup>532</sup> *Id.* at 2.

<sup>533</sup> *Id.* at 8-9, 13.

nation,<sup>534</sup> at a series of workshops and meetings that the initiative facilitated as part of the planning process. The participants utilized these resources provided through the initiative to agree upon desired outcomes of the initiative and specific strategies to implement – forming a community action plan.<sup>535</sup>

One desired outcome was to improve communication between immigrants and city agencies. Participants focused part of their efforts on making city communications and materials accessible for immigrant populations.<sup>536</sup> They identified the need to make resources available for LEP residents so that they could participate in the community.<sup>537</sup> Thus, some parts of the sixteen-point action plan to enhance immigrant integration focused specifically on language access. “Action items included the City’s adoption of a direct Spanish information line to avoid miscommunication, translation of utility statements [into Spanish], and disseminating existing translated materials through the city website.”<sup>538</sup>

A few of the more notable programmatic initiatives include the High Point Student Human Relations Commission, bus tours of the city for immigrants and refugees to enhance knowledge of the community layout and transportation system, ride-alongs with the fire and police departments to encourage relationships and a sense of trust with public safety officials, a Spanish information telephone prompt with options, a meeting of religious leaders (Interfaith Affairs Committee) to foster religious and cultural understanding, and a cross-cultural sports and recreation program. The HRC has enlisted the participation of other organizations in its work with the BIC initiative, including the Community Development and Housing Department, the

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<sup>534</sup> *Id.* at 2.

<sup>535</sup> *Id.*

<sup>536</sup> *Id.* at 4.

<sup>537</sup> *Id.* at 32.

<sup>538</sup> *Id.* at 22.

Department of Transportation, Parks and Recreation, and the Police Department. The organizations have attended meetings for High Point’s BIC initiative, where the goals for immigration integration are articulated and refined.<sup>539</sup>

HRC coordinates the High Point Festival of Cultures, which is a bi-annual “cultural exchange between immigrants and non-immigrants.”<sup>540</sup> This provides agency staff with the opportunity not only to celebrate diversity and language, but also to offer information about fair housing and other human services. HRC also coordinates LEP-friendly events with Front Porch Conversations, a Summer Swim Program for low income children, and Annual High Point World Religions Forum, to name a few. A few of the notable participants in the High Point BIC initiative are Guilford County Schools, Salvation Army, High Point Housing Authority and Housing Coalition, and High Point University.

Although the initiative is ongoing, the BIC team has already provided additional research to High Point in order to evaluate and assess the implementation of its strategies. By December 2013, the number of languages that the transit materials were translated into had increased and so had immigrants’ access to public transit. Additionally, the researched noted an increase in knowledge among the immigrant population about the community and city services.<sup>541</sup> More generally, the evaluation showed that between September 2011 and October 2013, “[a]pproximately 1100 High Point residents participated in ongoing initiatives identified as action items” in the community plan towards immigrant integration.<sup>542</sup> These initiatives included a newly formed international advisory committee and interfaith affairs committee, the festival of cultures, cultural enrichment class, fire station tours for immigrants, and bus tours provided for

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<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 27.

<sup>542</sup> *Id.* at 39.

immigrants and other residents.<sup>543</sup> High Point's partnership with the BIC initiative has already begun to transcend language barriers in its efforts to integrate immigrants into the community.

## 2. Title VI Compliance

The High Point city government is a Title VI primary recipient, and all of the government departments within the city organization of High Point must comply with Title VI to maintain federal funding. A list of city departments that receive federal funding includes: Community Development & Housing, Parks and Recreation, the Police and Fire Departments, Public Services, and Electric Utilities. Additionally, High Point receives some of the federal funding to affirmatively further fair housing efforts. Departments that provide information and services relating to public safety, outreach, and fair housing have been identified as the most likely to encounter immigrants and LEP individuals. Therefore, to the extent that such departments that provide these services fall within the purview of the authority of the city, they have been targeted for efforts to improve language access. More specifically, city agencies such as Emergency Services, Transportation Department, Utilities Department, Public Works, and the Planning and Zoning Department have a high priority level in the city's language access initiative.<sup>544</sup>

The Human Relations Department (HRD) of High Point is responsible for monitoring Title VI compliance for all city departments. The department itself provides three main services to its residents: Civic Engagement Programming, Fair Housing and Equal Employment Advancement, and Multiculturalism and Diversity Training and also sponsors eight major programs.<sup>545</sup> High Point has only two employees in HRD to oversee the compliance of its city departments with regards to Title VI. Many cities have two to three times the number of

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<sup>543</sup> *Id.* at 23-24.

<sup>544</sup> *Id.*

<sup>545</sup> Al Heggins, *Human Relations*, CITY OF HIGH POINT, <http://www.highpointnc.gov/hr/> (last visited July 16, 2015).

employees to monitor compliance with Title VI throughout their city. Moreover, the HRD does not have the authority to initiate Title VI complaints if staff finds a violation. Instead, if a person seeking services from an agency believes that their Title VI rights have been violated, they would be required to initiate a complaint process and would have to come to the HRD to file a complaint. Notwithstanding the lack of sufficient resources and authority, High Point's HRD has actively engaged with many departments and agencies about Title VI compliance. As a result, many departments in High Point have developed their own LEP policy and there is a citywide process that has been put in place by the HRD.<sup>546</sup> Additionally, HRD does provide outreach and educational opportunities about their monitoring responsibilities and agency obligations in regards to Title VI.<sup>547</sup>

### 3. Language Access Practices

Many city agencies are currently responding to the needs of the High Point LEP population. The High Point Fire Department responds to community groups who periodically request safety programs for LEP individuals, for example, Burmese, Vietnamese or Spanish-speaking people. The Fire Department then conducts the programs with interpreters where they are requested.<sup>548</sup> The Fire Department also makes informational handouts available in multiple languages and distributes them through local schools and churches. Additionally, every fire truck is provided with Spanish translation books.<sup>549</sup>

Fair housing has been a significant issue for LEP/Latino residents. High Point has helped to improve the Fair Housing Program to benefit immigrants. High Point's Human Relations

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<sup>546</sup> For more information, please see

<sup>547</sup> TRANSIT SYSTEM, CITY OF HIGH POINT, TITLE VI PROGRAM, *available at* [http://www.highpointnc.gov/hi-tran/docs/1064\\_City\\_of\\_High\\_Point\\_Title\\_VI\\_Program\\_2014\\_04\\_21\\_\\_\\_Complete.pdf](http://www.highpointnc.gov/hi-tran/docs/1064_City_of_High_Point_Title_VI_Program_2014_04_21___Complete.pdf) (last visited July 28, 2015).

<sup>548</sup> *Id.*

<sup>549</sup> *Id.* at 27.

Department disseminates information about the responsibilities and rights of tenants and landlords, provides educational opportunities about fair housing, and offers a mediation service for settle housing disputes.<sup>550</sup> HRD also celebrates National Fair Housing Month throughout April, during which it offers many educational programs about the right to fair, safe, and affordable housing and provides all residents including LEP persons opportunities to participate in panel discussions.<sup>551</sup>

In addition to the Fire Department and the city's Fair Housing Program, efforts have improved some agency websites so that they are available in different languages. For example, the Housing and Transportation Departments provide access to information in different languages on their public websites for LEP residents. As of this writing, it does appear that they are the only agencies providing language access translation.

High Point's efforts have been notable and their commitment to language access for LEP individuals demonstrates that progress in the city will continue. HRD has observed that there is room for improvement with regard to a number of agencies and city services and activities. They want to improve language access on their own department's website, as well as the websites of the departments in the city. They have expressed some concerns with ongoing deficiencies in fair housing and disability issues involved with fair housing that impact LEP persons and as a result of their assessment, are considering ways to improve agency processes and services. Strategic financial planning and the prioritizing of resources have been a challenge for High Point agencies. Each department prioritizes their own budget, but often require compliance monitoring from a city entity with authority to direct them as to how to meet their

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<sup>550</sup> *Human Relations*, CITY OF HIGH POINT, NORTH CAROLINA, <http://www.highpointnc.gov/hr/programs.cfm> (last visited July 16, 2015).

<sup>551</sup> High Point Human Relations Department, *Programming Descriptions*, CITY OF HIGH POINT, NORTH CAROLINA, <http://www.highpointnc.gov/hr/programs.cfm> (last visited July 16, 2015).

obligations. Notwithstanding the challenges, city officials charged with Title VI oversight have observed significant improvements, particularly with the Housing and Transportation Departments, both of which that have been actively seeking to improve the provision of services to the LEP population. A strategic plan will go in place soon to facilitate better compliance.

## **B. Winston-Salem**

### **1. BIC Initiative**

Winston-Salem's efforts to integrate LEP persons, like High Point, can be discerned through its decision to join with the BIC. Winston-Salem became a BIC partner in 2014. The Human Relations Department serves as the lead organizer for the city's BIC partnership.<sup>552</sup> Winston-Salem's general goals as part of the BIC initiative are to undertake a needs assessment and improve communication with LEP individuals through the consolidation of information about services. As part of the language access plan that it has created through its partnership with BIC, it seeks to provide LEP individuals with equal access to resources and services "in high-impact lifestyle areas such as fair and affordable housing choice, education, healthcare, and transportation."<sup>553</sup> Winston-Salem's language access strategies implemented as part of the initiative will focus much of its attention on Latino communities; however all immigrant populations will be included. Based on demographic research provided by the BIC team, the Human Relations Department determined that the Hispanic-Latino population in Winston-Salem, which constitutes 14.7 percent of the demographic, is the largest LEP group.<sup>554</sup>

The Winston-Salem Human Relations Department has also sought to engender community participation in the collaborative efforts from other local groups, including

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<sup>552</sup> *Winston-Salem BIC Partnership "Cheat Sheet"*, CITY OF WINSTON-SALEM, available at <http://www.cityofws.org/Portals/0/pdf/human-relations/BIC%20Cheat%20Sheet.pdf> (last visited July 15, 2015).

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

organizations that focus on immigrant population.<sup>555</sup> The Hispanic League, Wake Forest University, Hispanic Interaction, the Indo-U.S. Cultural Association, Second Harvest Food Bank, Winston-Salem/Forsyth County Schools, Forsyth Technical Community College, and Novant Health are a few entities that are also partnering in Winston-Salem's initiative.<sup>556</sup> As part of the language access initiative, the Human Relations Department developed and continues to coordinate an annual cultural festival with bilingual staff to attract LEP local residents and to communicate with immigrants about language rights and federally funded services that are accessible to them. Illiteracy was an issue for many of those in attendance, beyond having a limited spoken command of the English language. In addition to partnering with local community organizations, the Human Relations Department has established working relationships with county and state-level entities that are key to the well-being of LEP residents including Winston-Salem/Forsyth County Schools, Legal Aid, and the Department of Social Services.<sup>557</sup>

Winston Salem's participation in the BIC initiative is still its earlier stages. The first year consists predominantly of the planning process. Thus, the city will no doubt continue to improve its language access practices over the coming years. It is the hope of this report that the information provided herein concerning language rights, legal obligations, and best practices can be utilized by BIC in its partnership with Winston-Salem, as well as by similar initiatives, to improve language rights and language access for immigrant communities.

## 2. Title VI Compliance

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<sup>555</sup> See *Outreach*, *supra* note 577.

<sup>556</sup> Allen-Abraha Interview, *supra* note 558.

<sup>557</sup> *Id.*

The city of Winston-Salem is a Title VI recipient; it is a prime recipient of federal funds and also receives federal funds as a sub-recipient through N.C. DPS and N.C. DOT.<sup>558</sup> Each city department is responsible for complying with Title VI. As such, the City of Winston-Salem has developed an official LEP Policy.<sup>559</sup> The LEP policy identifies the city departments that have the most frequent contact with the general public based on city data. This data has identified Spanish-speakers as the predominant LEP group with whom these departments interact. It is critical that the various city entities provide language assistance options that allow Spanish-speaking individuals to access their services.

The Winston-Salem departments that have been identified as having significant interaction with LEP persons include: Emergency Services, Police, Fire Inspections, Utilities, Human Relations, Housing Neighborhood Development, Neighborhood services, Planning, Transportation, Inspections, Community and Business Development, City Link<sup>560</sup>, Recreation and Parks, Marketing and Communications, and more.<sup>561</sup> The city LEP policy encourages these departments to hire multilingual employees, translate documents into Spanish, and offer pay incentives to bilingual staff members.<sup>562</sup>

The city has delegated authority for LEP compliance to the city's Human Relations Department.<sup>563</sup> According to the city's LEP policy, the Human Relations Department accepts

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<sup>558</sup> Telephone interview with Wanda Allen-Abraha, Director, Human Relations Department, City of Winston-Salem (February 25, 2015).

<sup>559</sup> *Limited English Proficiency Policy*, CITY OF WINSTON-SALEM (last visited July 14, 2015), <http://www.cityofws.org/departments/human-relations/fair-housing-landlord-tenant-lep-enforcement/limited-english-proficiency-policy>.

<sup>560</sup> *Departments*, CITY OF WINSTON-SALEM, NORTH CAROLINA, <http://www.cityofws.org/departments> (last visited July 23, 2015) ("City Link centralizes access to city information and services through one, easy-to-remember phone number.").

<sup>561</sup> Human Relations Dep't, *Limited English Proficiency Policy and Procedures*, CITY OF WINSTON-SALEM, NORTH CAROLINA at 6, <http://www.cityofws.org/Portals/0/pdf/human-relations/LEP%20Policy%20and%20ProceduresR.pdf> (last visited July 23, 2015)..

<sup>562</sup> *Id.* at 3.

<sup>563</sup> *Id.*

and investigates complaints from LEP residents of Winston-Salem who believe that they have been unable to access city services or programs due to a limited proficiency in English.<sup>564</sup> The policy appoints the Human Relations Department Director as the LEP Compliance Coordinator.<sup>565</sup> The Coordinator works with city departments and provides technical assistance to ensure that their language access practices are in compliance with Title VI.<sup>566</sup> The Human Relations Director and LEP Compliance Coordinator, while not responsible for providing departments with translation or interpretation services, maintains a network of qualified community resources for referral to city departments.<sup>567</sup>

### 3. Current Language Access Practices

The Human Relations Department in Winston-Salem “educates, provides, facilitates, promotes, anticipates, studies, and recommends programs, projects, feedback, and actions for the elimination of discrimination in any and all fields of human relationships.”<sup>568</sup> The department endeavors to “(1) Study problems of discrimination in any or all fields of human relationship and encourage fair treatment and mutual understanding among all ethnic groups in the city; (2) Promote equality of opportunity for all citizens; (3) Provide channels of communication among all ethnic groups; and (4) Encourage the employment of qualified people of all ethnic groups.”<sup>569</sup>

The Human Relations Department monitors compliance with Title VI among the city’s agencies and has found that most agencies are generally compliant, but also identifies deficiencies and monitors for improvement. The Department works to identify reasonable steps that city agencies should undertake to improve language accessibility and studies best practices

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<sup>564</sup> *Id.*

<sup>565</sup> *Id.*

<sup>566</sup> *Id.* at 5.

<sup>567</sup> *Id.*

<sup>568</sup> See *Human Relations*, CITY OF WINSTON-SALEM, N.C., <http://www.cityofws.org/departments/human-relations> (last visited July 16, 2015).

<sup>569</sup> See *id.*

from other locales to determine what protocols the city should adopt in order to provide language access and comply with federal law. The staff provides LEP plans, maintains a list of interpreters and translators in various language for use by city agencies, provides information about how to use interpreters and translators and what written information and materials should be translated into Spanish, and has also developed a television program to make sure that Spanish speaking community is aware that services are offered in various departments.

The majority of the departments have an efficient strategy for making information accessible to LEP residents, whether through an interpreter or translator or otherwise. However, there is an open dialogue between Human Relations Department and the city departments to continue improving practices and ensuring Title VI compliance. For example, the Department of Information Systems and the Department of Marketing and Communications have been identified as agencies that should monitor language access for Spanish speakers.<sup>570</sup> Additionally, in 2013, the Human Relations Department worked with Winston-Salem's Department of Transportation to ensure that they had sufficient written, translated resources.<sup>571</sup>

Winston-Salem's Department of Transportation (DOT) advertises in Spanish-speaking radio news about public meetings for road projects. The DOT also provides Spanish interpreters at their public meetings, and translates their brochures into Spanish, although there is no official monitoring of what or how much they translate for the LEP population at these meetings. The Human Relations Department is working to implement similar practices in the Planning and Zoning Department, having identified it with the need for LEP access to public meetings.<sup>572</sup>

The Information Systems and Marketing and Communication Departments are

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<sup>570</sup> Interview with Wanda Allen-Abraha, *supra* note 558.

<sup>571</sup> *Id.*

<sup>572</sup> *Id.*

responsible for review of city's internet presence and what translated materials are available in it.<sup>573</sup> The city's public website provides a page with materials translated in Spanish.<sup>574</sup>

Although Spanish versions of each individual department webpage are not available, the Spanish webpage is readily accessible from the city's main page, and it provides Spanish versions of documents from a number of different city departments, such as the police department, emergency services, and the department of housing and urban development.<sup>575</sup> In addition to those documents, the Spanish page includes links to information on current topics made available in Spanish, translated informational brochures, and provides a link to information about the city's Spanish-speaking show that brings LEP Hispanic residents vital information on city services and city government initiatives.<sup>576</sup>

The Fire and Police Departments provide information and one-on-one training about language access and LEP awareness. These efforts are critical as it is particularly important for the immigrant population to be able to connect to departments responsible for public safety and to develop a sense of trust and foster positive interactions with law enforcement and emergency services. While the Winston-Salem Fire Department currently has no specific LEP initiatives, they strategically send Spanish-speaking firefighters into Spanish-speaking communities in the event of an emergency. Towards this end, the Winston-Salem Police Department has a partnership with the Human Relations Department in an initiative called Trust Talks.<sup>577</sup> This initiative facilitates one-on-one conversations between the police and the community in a safe environment. The goal of the initiative is to establish better lines of communication and trust

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<sup>573</sup> See *Limited English Proficiency Policy*, *supra* note 561, at 6.

<sup>574</sup> *En Espanol*, City of Winston-Salem, North Carolina, <http://www.cityofws.org/home-center/en-espanol> (last updated July 21, 2015).

<sup>575</sup> *Id.*

<sup>576</sup> *Id.*

<sup>577</sup> *Outreach*, CITY OF WINSTON-SALEM, N.C., <http://www.cityofws.org/departments/human-relations/outreach#TuComunidad> (last visited July 23, 2015).

between police officers and members of the community.<sup>578</sup> There are currently plans to have a Trust Talk specifically for the immigrant community.

The city's LEP policy as it relates to fair housing law is also significant. Fair Housing has been a significant issue for immigrants and LEP residents in Winston-Salem. The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) "prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin."<sup>579</sup> Limited English proficiency often makes residents vulnerable to exploitative practices when applying for and securing housing. Winston-Salem's fair housing ordinance is substantially equivalent to the federal Fair Housing Act.<sup>580</sup> In effect, within the jurisdiction of the city of Winston-Salem, the Human Relations Commission/Department is a U.S. Department of Housing and Urban Development (HUD) Fair Housing Access Program (FHAP) partner that enforces the local fair housing ordinance, investigates allegations, and makes reasonable cause determinations of fair housing law violations based on national origin and/or limited English proficiency in residential housing transactions.<sup>581</sup> This is one of Human Relations' core areas of responsibility, which also complements the BIC partnership.

Human Relations provides fair housing outreach and education for LEP and new immigrant residents. It participated in the Fair Housing Project, which assists and represents those who have experienced discrimination in housing.<sup>582</sup> The department is planning an

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<sup>578</sup> *Id.*

<sup>579</sup> *The Fair Housing Act*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/progdesc/title8](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8) (last visited July 16, 2015).

<sup>580</sup> Email from Wanda Allen-Abraha, Human Relations Director, City of Winston-Salem, to Deborah Weissman, Professor of Law, UNC School of Law (July 30, 2015, 4:37 EST) (on file with author).

<sup>581</sup> *Id.*

<sup>582</sup> *Fair Housing Project*, LEGAL AID NC, <http://www.fairhousingnc.org/links/fair-housing-working-group/> (last visited July 16, 2015).

educational video series about the tenant/landlord mediation program in English and Spanish.<sup>583</sup> Additionally, Human Relations is partnering with the Legal Aid of North Carolina Fair Housing Project on conducting Fair Housing testing in Winston-Salem. Fair Housing testing will serve as an important resource for gauging potential discriminatory practices that infringe on the housing rights of those who are in the protected class of national origin (which includes foreign-born residents).

The Human Relations Department also works in conjunction and partners with the Housing Authority of Winston-Salem (HAWS) to ensure language accessibility for housing matters. HAWS is another critical department for language accessibility. HAWS is a prime recipient of federal funds and is directly responsible to the federal agencies from which it receives assistance for compliance with Title VI and the Fair Housing Act.<sup>584</sup> HAWS provides interpreter services and translators to LEP individuals to ensure that they are fully informed about their right to nondiscrimination in the housing arena and to enhance their knowledge of remedy and recourse if they do suffer housing discrimination. In addition, Human Relations has a bilingual staff member that provides Spanish translations in regards to housing matters.<sup>585</sup>

### **C. Conclusion**

High Point and Winston-Salem are only two cities that have determined to create city-wide practices to integrate immigrants, newcomers, and LEP persons and which have emphasized language access as a key strategy to accomplish such integration. Since 2010, BIC has partnered with the cities of Greenville and High Point, and Orange County. More recently,

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<sup>583</sup> WINSTON SALEM HUMAN RELATIONS DEP'T, STRATEGIC ACTION PLAN 2012-2014 (2011), *available at* <http://www.cityofws.org/portals/0/pdf/human-relations/StrategicActionPlanFinal2012-14.pdf> .

<sup>584</sup> *See State Summary*, *supra* note 346.

<sup>585</sup> *Human Relations Department*, CITY OF WINSTON-SALEM, N.C., <http://www.cityofws.org/portals/0/pdf/human-relations/>.

the cities of Winston-Salem and Sanford have joined as partner municipalities of the initiative. BIC partners have received various awards, including the NC AARP (American Association of Retired Persons) Multi-Cultural Award. Alvena Heggins, BIC partner and Human Relations Director for the City of High Point, received the White House Champions of Change Award in 2013 for her efforts to help immigrants integrate socially, linguistically and civilly. BIC's Anisha Steephen received the 2013 Impact Award<sup>586</sup> for her research in facilitating innovative immigration integration practices among BIC's partner municipalities.

Many state and county agencies in North Carolina have invested substantial effort into LEP initiatives by hiring bilingual staff, translating key forms and brochures, and making their services available to the Spanish-speaking community in particular. These efforts are to be applauded; however, there is further work to be done. In order to eschew any and all forms of discrimination against LEP persons on the basis of English-language ability, agencies must establish services equally accessible to LEP persons. By continuing the initiatives which are already underway, partnering with community groups in order to add to their present efforts, and pooling resources in order to implement LEP initiatives frugally, North Carolina state and county agencies will take steps in the right direction towards full compliance with Title VI and Executive Order 13166. Furthermore, these efforts will not only aid North Carolina governments in compliance with federal law, but work towards integrating North Carolina communities and reaching a unity that has been observed in model multilingual societies.

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<sup>586</sup> The Impact Award is given to graduate students who are serving North Carolina.

## SECTION FOUR: SPECIAL POPULATIONS – UNACCOMPANIED MINORS

This Section discusses unaccompanied minors, a vulnerable LEP population with increasing numbers in the United States in general, and North Carolina in particular. This often unseen but increasingly present population reveals the importance of the Building Integrated Communities project and demonstrates why towns and cities must adopt and adapt to changing demographics as a way to maintain social integrity and human dignity. While the services these children are eligible for vary, as do their service providers' obligations, these children have a heightened need for language access and must be treated with dignity.

The phenomenon of a dramatically increasing number of children arriving at the United States/Mexico border unaccompanied by a parent or guardian in recent years has been referred to as the “surge.”<sup>587</sup> These children are coming for many interrelated reasons, among them violence, gang recruitment, unrest, and poverty.<sup>588</sup> Under U.S. law, if the child is from a country other than Mexico or Canada, she must be granted entry until she has a chance to have her case heard before an immigration judge.<sup>589</sup> During that interim period, the child will first be cared for by the U.S. Office of Refugee Resettlement (ORR), but ultimately (almost always) placed with a sponsor, who is very often a parent or other family member.<sup>590</sup> This Section describes the access to services these children will need and to which they have a right during a particularly difficult period of transition and uncertainty. This Section also addresses the rights to language access with respect to those services.

### I. BACKGROUND AND CONTEXT

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<sup>587</sup> See LISA SEGHETTI ET AL., CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2 (2014), available at <http://fas.org/sgp/crs/homsec/R43599.pdf>.

<sup>588</sup> See *infra* Part I.B of this Section.

<sup>589</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 122 STAT. 5044, Pub. L. 110-457, 110<sup>th</sup> Congress (Dec. 23, 2008) [hereinafter TVPRA 2008]; 8 U.S.C. § 1232.

<sup>590</sup> See *infra* Part II.B. of this Section.

## A. Who are Unaccompanied Children?

The term “unaccompanied alien child” (UAC) is a legal term that refers to a child who:

- (A) has no lawful immigration status in the United States;
- (B) has not attained 18 years of age; *and*
- (C) with respect to whom [either]
  - (i) there is no parent or legal guardian in the United States; *or*
  - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.<sup>591</sup>

Almost all the UACs come from Mexico and the Central American countries of Honduras, El Salvador, and Guatemala, known collectively as the “Northern Triangle.”<sup>592</sup> In 2014, UACs from the Northern Triangle countries accounted for about three quarters of the UACs apprehended at the border, up from just seventeen percent in 2009, when over eighty-two percent were Mexican.<sup>593</sup> The overall numbers point to a relatively steady number of Mexican UACs since 2009.<sup>594</sup> However, the numbers (the proportional increase) from the Northern Triangle account almost entirely for the “surge,” tripling between 2009 and 2012, and then increasing five-fold between 2012 and 2014, a 1500 percent increase over the five year period from that region.<sup>595</sup>

Most UACs are boys (seventy-six percent in 2014) and teenagers between the age of thirteen and seventeen (eighty-four percent in 2014).<sup>596</sup> However, the proportion of those twelve

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<sup>591</sup> 6 U.S.C. § 279(g)(2) (emphasis added).

<sup>592</sup> See SEGHETTI ET AL., *supra* note 587, at 3 (“Nationals of Guatemala, Honduras, El Salvador, and Mexico account for almost all unaccompanied alien children apprehended at the Mexico-U.S. border.”).

<sup>593</sup> See *id.* Total Mexican UACs in 2009: 16,114; in 2012: 13,974; in 2104: 15,634. Total Northern Triangle UACs in 2009: 3,304; in 2012: 10,146; in 2014: 51,704. See Southwest Border Unaccompanied Alien Children, U.S. Dept. of Homeland Security (DHS), U.S. Customs and Border Patrol (CBP), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

<sup>594</sup> *Id.*

<sup>595</sup> See SEGHETTI ET AL., *supra* note 587, at 3. See also DHS, CBP, Southwest Border Unaccompanied Alien Children, *supra* note 593.

<sup>596</sup> Jens Manuel Krogstad et al., *At the Border, A Sharp Rise in Unaccompanied Girls Fleeing Honduras*, PEW RESEARCH CTR. (July 25, 2014), <http://www.pewresearch.org/fact-tank/2014/07/25/at-the-border-a-sharp-rise-in-unaccompanied-girls-fleeing-honduras/>; Jens Manuel Krogstad et al., *Children 12 and Under are Fastest Growing Group Of Unaccompanied Minors at U.S. Border*, PEW RESEARCH CTR. (July 22, 2014),

and under has been increasing (sixteen percent in 2014 was up from only nine percent in 2013).<sup>597</sup> Similarly, the proportion of girls has increased significantly (twenty-four percent in 2014 was up from seventeen percent in 2013).<sup>598</sup> Honduras specifically accounts for the highest proportion in both of these demographic groups, where from 2013 to 2014, the proportion of girls rose from thirty-one percent to forty percent, and children under thirteen went from twenty percent to twenty-nine percent.<sup>599</sup>

## B. Why Do They Come?

These children do not always have a single motive for emigrating. While family unification and economic opportunity remain important factors, violence and fear have been rapidly increasing motivations for these children, and are most often reported as the dominant reason for their leaving their home countries.<sup>600</sup>

Central America and Mexico have been unstable for decades.<sup>601</sup> Mexico has experienced some of the worst drug cartel and related violence over the last decade,<sup>602</sup> and while the violence in Mexico has plateaued or even declined, in some parts of the country, it still remains extremely

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<http://www.pewresearch.org/fact-tank/2014/07/22/children-12-and-under-are-fastest-growing-group-of-unaccompanied-minors-at-u-s-border/>.

<sup>597</sup> *Id.*

<sup>598</sup> See *A Sharp Rise in Girls Fleeing Honduras*, *supra* note 596.

<sup>599</sup> *Id.*; *Children 12 and Under are Fastest Growing Group of Unaccompanied Minors*, *supra* note 596.

<sup>600</sup> See, e.g., Elizabeth Kennedy, *No Childhood Here: Why Central American Children are Fleeing Their Homes*, AM. IMMIGR. COUNCIL (July 14, 2014),

[http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf). In a report based on interviews of Salvadoran children who had fled their homes and been deported by Mexican authorities before reaching the U.S., when asked why they left their home, 59% of boys and 61% of girls list one of those factors as a reason for their emigration. *Id.* Only 35% report family unification as a factor. *Id.* at 3. More rural children report economic opportunity as a factor (40%), while more urban children report fear of gangs (as high as 90% in some areas). *Id.* at 2-3.

<sup>601</sup> Nick Miroff & William Booth, *Mexico's Drug War Is At A Stalemate As Calderon's Presidency Ends*, WASH. POST, Nov. 27, 2012, [http://www.washingtonpost.com/world/the\\_americas/calderon-finishes-his-six-year-drug-war-at-stalemate/2012/11/26/82c90a94-31eb-11e2-92f0-496af208bf23\\_story.html](http://www.washingtonpost.com/world/the_americas/calderon-finishes-his-six-year-drug-war-at-stalemate/2012/11/26/82c90a94-31eb-11e2-92f0-496af208bf23_story.html) (reporting on the more than 60,000 deaths between 2006 and 2012).

<sup>602</sup> See Joanna Penn, *Linking Income Inequality and Violent Crime: Data from Mexico's "Drug War"*, JOURNALIST'S RESOURCE (Sep. 4, 2014), <http://journalistsresource.org/studies/international/conflicts/linking-income-inequality-violent-crime-data-mexico-drug-war> ("While the number of drug-related homicides has [recently declined,] violence remains endemic in parts of Mexico.").

dangerous and lawless and even worsened, particularly around the border regions.<sup>603</sup> While poverty and political instability have plagued the Northern Triangle for many years, the increased presence, power, and influence of mostly narcotics trade-related transnational gangs has caused the Northern Triangle to experience even greater crime and instability of the past several years.<sup>604</sup> Honduras has had the highest murder rate in the world since 2010.<sup>605</sup> El Salvador has the fourth highest murder rate (recently down from number 2).<sup>606</sup> Guatemala has the fifth highest murder rate.<sup>607</sup> In both Central America and Mexico, the governments' are often unable to curb the violence, and in many other cases complicit and corrupt and thus unwilling to protect the population.<sup>608</sup> Although fleeing their homes is generally a last resort, these factors have been key to the "surge" of increasing numbers of children choosing to flee.<sup>609</sup>

### C. How Do They Come?

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<sup>603</sup> Jeremy Bender & Armin Rosen, *Mexico's Drug War Is Entering A Dark Phase*, BUS. INSIDER, Oct. 24, 2014, <http://www.businessinsider.com/mexicos-drug-war-is-entering-a-dangerous-phase-2014-10> (reporting on recent arrests of high level drug kingpins as well as recent drug-related killings of students in western Mexico).

<sup>604</sup> See Ethan Freeman, *Drugs and Violence Underscore U.S. Influence in Honduras*, INTER PRESS SERV, June 28, 2012, <http://www.ipsnews.net/2012/06/drugs-and-violence-underscore-u-s-influence-in-honduras/>. See also Salima Koroma, *Honduras President: The War on Drugs Is Causing the U.S. Immigration Problem*, TIME, July 15, 2014, <http://time.com/2989332/immigration-war-drugs/> (reporting that Honduran President Hernandez blames the U.S. drug war and anti-cartel efforts in Mexico for the recent rise in Honduras).

<sup>605</sup> See UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), GLOBAL STUDY ON HOMICIDE 2013: TRENDS, CONTEXT, DATA 126, 146 (Mar. 2014), [http://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf).

<sup>606</sup> *Id.* at 33-34.

<sup>607</sup> *Id.*

<sup>608</sup> See Bender & Rosen, *supra* note 603. See also JESSICA JONES & JENNIFER PODKUL, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA, WOMEN'S REFUGEE COMMISSION (2012), available at <http://womensrefugeecommission.org/forced-from-home-press-kit> ("[Children] expressed the view that, while the police in Honduras and El Salvador have always been corrupt, they are now effectively controlled by the gangs in varying degrees."); Óscar Martínez, *The Macho Cops of Honduras*, N.Y. TIMES, Mar. 7, 2014, [http://www.nytimes.com/2014/03/08/opinion/hondurass-macho-cops.html?\\_r=0](http://www.nytimes.com/2014/03/08/opinion/hondurass-macho-cops.html?_r=0) (reporting on police corruption at the highest levels in Honduras).

<sup>609</sup> See Kennedy, *supra* note 600, at 2-4 (discussing fear of violence as the top factor in children fleeing El Salvador).

Children and their families often must pay human smugglers (“coyotes”) thousands of dollars to get them to the U.S. border.<sup>610</sup> They travel by car, bus, and even on top of freight trains. The trip is extremely dangerous and many have died.<sup>611</sup> It may take months, and food and water are often scarce. For many, the trip is often unsuccessful. They may be apprehended by Mexican authorities and returned home long before reaching the United States.<sup>612</sup> Along the way they are often victims of crimes, including rape, robbery, trafficking, and other exploitation.<sup>613</sup> Most simply turn themselves in to Border Patrol as soon as they arrive at the border.<sup>614</sup>

#### **D. What is Their Immigration Status?**

These children are presumed to be removable (deportable) when they arrive at the border and encounter Customs and Border Protection (CBP) Officers, and most are detained.<sup>615</sup> However, if they are unaccompanied, and from a country other than Mexico, under the Trafficking Victims Reauthorization Protection Act of 2008 (TVRPA 2008), they are not subject

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<sup>610</sup> Fault Lines Digital Team, *Coyote: 'If you turn yourself in to immigration, there is no problem'*, AL-JAZEERA (Sep. 10, 2014), <http://america.aljazeera.com/watch/shows/fault-lines/FaultLinesBlog/2014/9/10/coyote-if-you-turnyourselfintoimmigrationthereisnoprobem.html> (interviewing a former coyote about how much he charged for children which was still thousands but often less because they only had to get them to the border, not across).

<sup>611</sup> Wilson Sayre, *Riding 'The Beast' Across Mexico to the U.S. Border*, NPR (June 5, 2014), <http://www.npr.org/blogs/parallels/2014/06/05/318905712/riding-the-beast-across-mexico-to-the-u-s-border>.

<sup>612</sup> See *id.* See also Kennedy, *supra* note 600, at 6 (noting that all her interviewees had been deported from Mexico).

<sup>613</sup> Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POLICY INST. (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>. See also Damien Cave & Frances Robles, *Smuggled Girl's Odyssey of False Promises and Fear*, N.Y. TIMES, Oct. 5, 2014, <http://www.nytimes.com/2014/10/06/world/americas/a-smuggled-girls-odyssey-guatemala-migration-abduction.html> (“The human export industry in the region is now worth billions of dollars, experts say, and it has become more ruthless and sophisticated than ever, employing a growing array of opportunists who trap, rape and rob from the point of departure to the end of the road.”).

<sup>614</sup> AMERICAN IMMIGRATION COUNCIL: IMMIGRATION POLICY CENTER, CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER 4 (2014) [hereinafter CHILDREN IN DANGER], <http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border>.

<sup>615</sup> SEGHETTI ET AL., *supra* note 587, at 4.

to *immediate* removal.<sup>616</sup> Mexican children, on the other hand, must be screened for trafficking and fear of persecution, but are otherwise immediately turned back without a hearing.<sup>617</sup> Under “expedited removal,” adults are screened for fear of persecution and otherwise removed without a hearing.<sup>618</sup>

An initial determination is usually made by CBP or Immigration and Customs Enforcement (ICE) that a child is a UAC and is thus subject to the certain protections under TVPRA 2008, and other protections under the Homeland Security Act (HSA) and the Flores Settlement of 1997 which refers to a binding agreement entered into by the United States in a case brought to protect the rights of immigrant children.<sup>619</sup> Once a child is determined to be a UAC, that designation stays with the child throughout the course of immigration proceedings (for immigration purposes), regardless of whether he or she is reunited with a parent in the interim. The designation requires only that at the time of determination, the child did not have a parent available.<sup>620</sup>

TVPRA 2008 guarantees that a UAC will actually get a hearing and requires that CBP transfer them to the care and custody of the ORR at the Department of Health and Human Services (DHHS) within seventy-two hours of apprehension.<sup>621</sup> ORR takes the child into its

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<sup>616</sup> TVPRA 2008, *supra* note 589; 8 U.S.C. § 1232. Although unaccompanied children from Canada are in the same situation as those from Mexico, the political realities render the circumstances for Canadian children all but irrelevant.

<sup>617</sup> 8 U.S.C. § 1225.

<sup>618</sup> 8 U.S.C. § 1232(b)(3).

<sup>619</sup> SEGHETTI ET AL., *supra* note 587, at 5; TVPRA 2008, *supra* note 589; Homeland Security Act of 2002, 116 Stat. 2135, Pub. Law 107–296, 107th Congress (Nov. 25, 2002). *See Flores v. Reno*, No. CV 85-4544-RJK(Px) Stipulated Settlement Agreement at 11 (C.D. Cal. Jan. 17, 1997) [hereinafter Flores Agreement]. The Flores Agreement protects all undocumented immigrant children from unnecessary detention by requiring they be in the “least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.” The Flores Settlement further laid out a hierarchy or prioritization for placement sponsorship for unaccompanied minors, favoring family reunification. *See also infra* note 698 and accompanying text (discussing the placement priority categories).

<sup>620</sup> 6 U.S.C. § 279(g)(2).

<sup>621</sup> 6 U.S.C. § 279; 8 U.S.C. § 1232(b)(3).

custody and care until the child is placed with a sponsor, who is usually a family member.<sup>622</sup>

The child will be issued a notice to appear in immigration court, and will be given a chance at that time to ask to be able to apply for relief from removal.<sup>623</sup> The child is released with the understanding that she must appear in immigration court for a determination as to whether she can remain lawfully in the United States.<sup>624</sup>

It is estimated that forty percent of UACs are eligible for some form of relief.<sup>625</sup> There are several forms of humanitarian-based immigration relief a child might be eligible for:

- Asylum: A child who cannot or is unwilling to return to his or her “country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” will be given a chance to have his or her case heard by a USCIS (United States Citizenship and Immigration Services) Immigration Officer in a non-adversarial interview.”<sup>626</sup>
- Special Immigrant Juvenile Status (SIJS): A child whose unification with *at least one parent* “is not viable due to abuse, neglect, abandonment, or a similar basis;” return to the child’s home country is not in the child’s “best interest”; and the child is not in the custody of a parent.<sup>627</sup>
- U-Visa: A child may be eligible if he or she “has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity,” has information regarding the crime and is helpful in having the authorities prosecute.<sup>628</sup>
- T-Visa: A child may be eligible if he or she “is or has been a victim of a severe form of trafficking in persons.”<sup>629</sup>

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<sup>622</sup> 6 U.S.C. § 279(b)(1).

<sup>623</sup> NAT’L IMMIGRANT JUSTICE CTR., UNACCOMPANIED IMMIGRANT CHILDREN (2014), *available at* <https://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Policy%20Brief%20-%20Unaccompanied%20Immigrant%20Children%20FINAL%20Winter%202014.pdf> (noting that many times the initial notice to appear is not instated until after arrival to ORR custody, or even after release).

<sup>624</sup> ORR, ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 2.2.5 (Jan. 30, 2015) [hereinafter ‘ORR Guide’], *available at* <http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied>.

<sup>625</sup> OLGA BYRNE & ELISE MILLER, VERA INST. FOR JUSTICE, CTR. ON IMMIGRATION & JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 4 (Mar. 2012) [hereinafter VERA REPORT], *available at* <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

<sup>626</sup> 8 U.S.C. § 1158; 8 U.S.C. § 1101(a)(42)(A).

<sup>627</sup> 8 U.S.C. § 1101(a)(27)(J).

<sup>628</sup> 8 U.S.C. § 1101(a)(15)(U).

<sup>629</sup> 8 U.S.C. § 1101(a)(15)(T).

SIJS and asylum visas are the most common forms a UAC may be eligible for. SIJS status is the fastest form of relief, and ORR can petition for it, although the child is generally out of ORR custody and care by the time it is granted.<sup>630</sup>

The child remains subject to removal proceedings while final determination of her status awaits adjudication in the courts or USCIS office. Once she is granted status, she is no longer under a removal order. However, if he or she is not granted some form of status relief, a final removal order will be instated and the child will be removable at any time. Some children are ordered removed in absentia if they do not appear for court at the designated time.<sup>631</sup> This happens usually when a child does not have legal counsel to help them with the process.<sup>632</sup>

One critical issue affecting UACs is whether they can access counsel to assist them in seeking appropriate immigration relief. Under TVPRA 2008, DHHS is required to “ensure, to the greatest extent practicable . . . that all unaccompanied alien children [who pass through or remain in its custody] have counsel to represent them in legal proceedings.”<sup>633</sup> While DHHS does not appoint counsel, it works with organizations that provide access low cost and free legal representation. Studies show that those in ORR custody have a rate of around seventy percent represented, while those outside of ORR have representation thirty-two percent of the time, and less than one percent stay in ORR long enough to see his or her case through to status change.<sup>634</sup>

## II. WHAT RIGHTS DO UACs HAVE AS THEY MOVE THROUGH THE SYSTEM?

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<sup>630</sup> A SIJS claim must be fully adjudicated within 180 days of filing. *See e.g.*, TVPRA 2008, *supra* note 589; 8 U.S.C. § 235(d)(2).

<sup>631</sup> Richard Gonzales, *Immigration Courts 'Operating in Crisis Mode,' Judges Say*, NPR (Feb. 23, 2015), <http://www.npr.org/2015/02/23/387825094/immigration-courts-operating-in-crisis-mode-judges-say>.

<sup>632</sup> *Id.*

<sup>633</sup> 8 U.S.C. § 1232(c)(5) (emphasis added).

<sup>634</sup> VERA REPORT, *supra* note 625, at 24, 27 (noting that while 70% of those in ORR custody are represented, less than 1% remain in ORR long enough to have status change before either placement or removal).

This Part discusses the rights of UACs as they move through the system of various government agencies and are ultimately most often released and then placed in a non-governmental living situation with a sponsor for the remainder of her immigration proceedings. The rights and services she is afforded depend on the stage of her custody, and this Part addresses those differences. The two primary contexts addressed are a UAC's rights while in ORR care and custody, and UAC's rights once released.

Virtually all of the UACs entering the United States are from Latin America and do not speak English and are thus considered Limited English Proficient (LEP).<sup>635</sup> While most speak Spanish, many do not speak it fluently and primarily speak an uncommon indigenous language, for example.<sup>636</sup> Depending on a UAC's pending status and situation, her rights to services and government benefits will vary. However, regardless of the type of services for which she is eligible, she has a right to access them in her own language under when required by Title VI of the Civil Rights Act (Title VI).<sup>637</sup> Title VI states that “[n]o 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.”<sup>638</sup> Discrimination on the basis of “national origin” includes failure of a recipient to “take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.”<sup>639</sup> Title VI does not have any requirement that the person be documented, only that they be in the United States;<sup>640</sup> therefore UACs are covered. ORR, as a part of DHHS

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<sup>635</sup> *Fact Sheet: Unaccompanied Alien Children Program*, ADMIN. FOR CHILDREN & FAMILIES (last updated Nov. 2014) [hereinafter ORR Fact Sheet], available at [https://www.acf.hhs.gov/sites/default/files/orr/fact\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet.pdf).

<sup>636</sup> Telephone interview with Tatyana Delgado, Managing Attorney, Legal Services Program, U.S. Committee for Refugees and Immigrants, Arlington, VA, March 18, 2014.

<sup>637</sup> Title VI, 42 U.S.C. § 2000d.

<sup>638</sup> *Id.*

<sup>639</sup> See Exec. Order 13,166, *supra* note 268. See also *Lau v. Nichols*, 414 U.S. 563 (1974); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>640</sup> Title VI, 42 U.S.C. § 2000d (2009).

of the Federal Government, and all its service providers (as recipients of federal funding) discussed in Part II are all obligated to follow Title VI, while the in-kind non-profit community service providers described in Part II.C.2 are only obligated if they receive federal funding of any type.<sup>641</sup>

### **A. Customs and Border Patrol Screening**

As stated above, CBP is charged with screening a child to determine her nationality and whether she is a UAC. If the child fits the criteria, and is from a country other than Mexico or Canada, the law requires that she be transferred to ORR custody within seventy-two hours.<sup>642</sup> During this time, CBP also conducts a health screening “for visible and obvious health issues [such as] lice, rashes, diarrhea, and cough . . . .”<sup>643</sup> During the “surge,” the CDC was also called upon to assist.<sup>644</sup> “Children must be considered ‘fit to travel’ before they are moved from the border patrol station to an ORR shelter,” where they receive further medical screening and care, including vaccinations.<sup>645</sup>

In 2014, due to overcrowding and delayed stays in CBP facilities, DHHS opened several interim facilities where children were sent and remained while they were between CBP custody

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<sup>641</sup> *Id.* See Sec. II for a full discussion of the ways that entities may be considered “recipients for purposes of Title VI obligations.

<sup>642</sup> TVPRA 2008, *supra* note 589. This time period was not always followed during the “surge.” DHHS, Statement by Sylvia M. Burwell, Secretary U.S. DHHS on Unaccompanied Children before Committee on Appropriations United States Senate, July 10, 2014, <http://www.hhs.gov/asl/testify/2014/07/t20140710b.html>; *see also* LIRS, Unaccompanied Alien Children U.S. Law & Policy Background—Protecting The Best Interests Of All Children, LIRS.org [hereinafter LIRS Backgrounder], <http://lirs.org/wp-content/uploads/2014/07/UAC-Law-and-Policy-FINAL.pdf> (noting that children have been staying in CBP custody for 7-14 days during the “surge”).

<sup>643</sup> ORR, *Unaccompanied Children Frequently Asked Questions*, ADMIN. FOR CHILDREN & FAMILIES, [hereinafter ORR UAC FAQ], <http://www.acf.hhs.gov/unaccompanied-children-frequently-asked-questions>.

<sup>644</sup> *Unaccompanied Children at the Border*, CTR. FOR DISEASE CONTROL (CDC) (last updated Aug., 14 2014), <http://emergency.cdc.gov/children/unaccompanied/> (“CDC understands that people may have concerns about issues related to unaccompanied children from Central America who are crossing into the United States. The U.S. Department of Health and Human Services (HHS) and Department of Homeland Security (DHS) are leading the humanitarian response, which includes housing, feeding, and providing necessary medical evaluation and treatment to protect public health. In support of HHS and DHS activities, CDC is providing consultation on medical screening, surveillance, and public health response when requested.”). *See also* ORR UAC FAQ, *supra* note 643.

<sup>645</sup> *Unaccompanied Children at the Border*, *supra* note 644.

and the ORR shelter from where placements are made.<sup>646</sup> These facilities are technically less restrictive settings than CBP detention, but other than medical care and other basic needs, children did not receive the same services as they would in ORR care, as described below. While their stay in CBP custody is brief, and the services limited, CBP must still comply with Title VI language rights.<sup>647</sup>

### **B. UAC Rights While in the Custody and Care of ORR**

Because most UACs are Mexicans who, once screened for trafficking or fear of persecution are immediately returned home, not all UACs apprehended are transferred to ORR custody and care. Compared to border apprehensions UACs, where Mexican, Honduran, Salvadoran, and Guatemalan children are relatively evenly represented, among those who enter ORR custody, only two percent are Mexican, and the rest are relatively evenly represented among the other three nationalities.<sup>648</sup> This indicates the impact of the TVPRA's restriction against expedited removal of UACs from non-contiguous countries compared to the basic, if not minimal screening of Mexican children who are more frequently returned to their country of origin and denied an opportunity to apply for immigration relief.

Nevertheless, with the demographic shift, ORR has seen a massive increase in overall numbers of UACs referred to ORR in recent years.<sup>649</sup> Referrals increased more than four-fold between 2012 and 2014, to more than 57,000.<sup>650</sup> Monthly referrals show an even more dramatic rise, never exceeding 1,000 before 2012, to over 10,000 in June of 2014.<sup>651</sup> Corresponding to

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<sup>646</sup> *Id.*

<sup>647</sup> 42 U.S.C. § 2000d.

<sup>648</sup> ORR Fact Sheet, *supra* note 635 (providing the following percentages: Honduras (34%); Guatemala (32%); El Salvador (29%); Mexico (less than 2%), and other countries (less than 3%)).

<sup>649</sup> *Id.*

<sup>650</sup> *Id.*

<sup>651</sup> SEGHETTI ET AL., *supra* note 587 at 9.

this rise in referrals has been a decrease in the average length of stay in ORR custody and care, dropping from sixty-one days in 2010 to twenty-nine days in 2014.<sup>652</sup>

### 1. ORR's Mission and Responsibilities

The ORR mission and mandate with respect to UACs falls within its general organizational purpose:

ORR/ Division of Children's Services/Unaccompanied Children program provides unaccompanied children [UACs] with a safe and appropriate environment as well as client-focused highest quality of care [tailored to each UAC in order to] to maximize the child's opportunities for success both while in care, and upon discharge from the program to sponsors in the U.S. or return to home country, to assist them in becoming integrated members of our global society.<sup>653</sup>

To that end, and consistent with its legal obligations, ORR states that it “[treats] all children in its custody with dignity, respect and special concern for individual needs, [and] considers the best interests of the child in all placement decisions.”<sup>654</sup>

The Homeland Security Act, in assigning ORR the custody and care of UACs, specifies certain duties ORR's Division of Children's Services for which they are responsible with respect to providing children services.<sup>655</sup> ORR must

“coordinat[e] and implement[] the care and placement of [UACs] who are in Federal custody by reason of their immigration status . . . [,] ensur[e] that the interests of the child are considered in [these] decisions and actions . . . [and]

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<sup>652</sup> ORR Fact Sheet, *supra* note 635.

<sup>653</sup> *Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs> (last visited July 16, 2015).

<sup>654</sup> See Flores Agreement, *supra* note 619; TVPRA 2008, *supra* note 589; ORR Fact Sheet, *supra* note 635; 6 U.S.C. § 279(b)(1)(B).

<sup>655</sup> 6 U.S.C. § 279(b)(1). At the time of the Act, § 279(b)(1)(A) required Congress to work to ensure counsel, which was later done in the TVPRA 2008 to a degree. § 279(b)(1)(A); TVPRA 2008, *supra* note 589 (requiring DHHS to “ensure, to the greatest extent practicable . . . that all unaccompanied alien children [who pass through or remain in its custody] have counsel to represent them in legal proceedings”). The Act further specifies other duties to UACs which are less directly related to providing services, including: “compiling, updating, and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for [UACs]; . . . maintaining statistical information and other data on [UACs] for whose care and placement the Director is responsible . . . ; . . . [and] collecting and compiling statistical information from the Department of Justice, the Department of Homeland Security, and the Department of State on each department's actions relating to [UACs].” § 279(b)(1)(I), (J), and (K).

implement[] policies with respect to [their] care and placement.”<sup>656</sup> Placement includes parental reunification when appropriate.<sup>657</sup> In the interim, ORR must “identify[] a sufficient number of qualified individuals, entities, and facilities to house [UACs].”<sup>658</sup> ORR must “oversee[] the infrastructure and personnel of [these] facilities . . . [as well as conduct] investigations and inspections of [the] facilities and other entities in which [UACs] reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements.”<sup>659</sup>

## 2. ORR Care Providers

As the above enumerated duties emphasize, while in ORR care and custody, the key concerns are the needs of the children while in custody and assuring their appropriate placement once they are released from ORR custody. Under the Flores Agreement and TVPRA 2008, UACs in the custody and care of ORR “shall be promptly placed in the least restrictive setting that is in the best interest of the child.”<sup>660</sup> Under this guidance, ORR contracts and enters into cooperative agreements with public and non-profit state-licensed shelters,<sup>661</sup> most of which are close to the border where they are apprehended.<sup>662</sup> These “care provider facilities” “must meet ORR requirements to ensure a high level of quality of care.”<sup>663</sup> These facilities are meant to “provide a continuum of care for children,” and include foster care, group homes, shelter

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<sup>656</sup> 6 U.S.C. § 279(b)(1)(A), (B), and (D). ORR must “mak[e] placement determinations for all [UACs] who are in Federal custody by reason of their immigration status” and implement those placements. *Id.* § 279(b)(1)(C)-(D)

<sup>657</sup> 6 U.S.C. § 279(b)(1)(H).

<sup>658</sup> 6 U.S.C. § 279(b)(1)(F).

<sup>659</sup> 6 U.S.C. § 279(b)(1)(G), (L).

<sup>660</sup> 8 U.S.C. § 1232(b)(2); 8 U.S.C. § 1362(c)(2)(A); TVPRA 2008, *supra* note 589; Flores Agreement, *supra* note 619.

<sup>661</sup> 8 U.S.C. § 1522(d)(2); Flores Agreement, *supra* note 619 (“The Director [of DHHS] is authorized to provide assistance, reimbursement to States, and grants to and contracts with public and private nonprofit agencies, for the provision of child welfare services, including foster care maintenance payments and services and health care, furnished to any refugee child . . . who is [UAC] . . . until the month after the child attains eighteen years of age . . . .”).

<sup>662</sup> ORR Fact Sheet, *supra* note 635; ORR Guide, *supra* note 624 § 3.3.1; *About Unaccompanied Children's Services*, ORR, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>.

<sup>663</sup> *About Unaccompanied Children's Services*, *supra* note 662.

facilities, staff secure or secure care facilities, residential treatment centers, or other special needs facilities.<sup>664</sup>

a. *Language Rights and ORR Services*

ORR requires most care provider staff are required to be bilingual in Spanish and English.<sup>665</sup> As contractors with the federal agency DHHS and ORR, in accordance with Title VI, ORR’s care providers must provide all services “in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied child.”<sup>666</sup>

Care providers must provide the following “minimum” services:<sup>667</sup>

- Food, beverages, bathing facilities, clothing, shoes, and hygiene products
- Classroom education appropriate to the age and developmental level of the child<sup>668</sup>
- Reasonable right to privacy
- Individualized needs assessment and individual service plan
- Mental health, medical, and dental services
- Socialization and recreational activities
- Counseling: individual and group
- Facilitation of identification of family members in the U.S. and contact and visitation with family, where possible<sup>669</sup>
- Access to legal services<sup>670</sup>

In accordance with, and beyond its Title VI obligations, ORR demands cultural and language sensitivity of its care providers.<sup>671</sup> Recognizing that these UACs “entering ORR custody come from a wide array of cultures, practices, languages, and beliefs,” ORR requires its

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<sup>664</sup> ORR Guide, *supra* note 624, § 1.1 (“The Director [DHHS] shall attempt to arrange for the placement under the laws of the States of such unaccompanied refugee children, who have been accepted for admission to the United States . . . as soon as possible after[] their arrival in the United States. During any interim period while such a child is in the United States . . . but before the child is so placed, the Director shall assume legal responsibility (including financial responsibility) for the child, if necessary, and is authorized to make necessary decisions to provide for the child's immediate care.”) *See also* 8 U.S.C. § 1522(d)(2)(B)(ii).

<sup>665</sup> OFFICE OF REFUGEE RESETTLEMENT, 93.676, RESIDENTIAL SERVICES FOR UNACCOMPANIED ALIEN CHILDREN 5 (2014), *available at* [http://www.acf.hhs.gov/grants/open/foa/files/HHS-2015-ACF-ORR-ZU-0833\\_0.pdf](http://www.acf.hhs.gov/grants/open/foa/files/HHS-2015-ACF-ORR-ZU-0833_0.pdf).

<sup>666</sup> Title VI, 42 U.S.C. § 2000d; ORR Guide, *supra* note 624, § 3.3.

<sup>667</sup> Flores Agreement, *supra* note 619; ORR Guide, *supra* note 624, § 3.3.

<sup>668</sup> “The Secretary of Education is authorized to make grants, and enter into contracts, for payments for projects to provide special educational services (including English language training) to refugee children in elementary and secondary schools where a demonstrated need has been shown.” 8 U.S.C. § 1522(d)(1).

<sup>669</sup> Flores Agreement, *supra* note 619; ORR Guide, *supra* note 624, § 3.3.

<sup>670</sup> TVPRA 2008, *supra* note 589; Flores Agreement, *supra* note 619; ORR Guide, *supra* note 624, § 3.3.

<sup>671</sup> Title VI, 42 U.S.C. § 2000d; ORR Guide, *supra* note 624, § 3.3.7.

care providers to have “cultural awareness and systems in place to support the cultural identity and needs of each unaccompanied child.”<sup>672</sup> ORR further requires that they:

make every effort possible to provide comprehensive services and literature in the native language of each unaccompanied child; provide onsite staff or interpreters as needed; and allow unaccompanied children to communicate in their preferred language when they choose. All ORR required documents provided to unaccompanied children must be translated in the unaccompanied child’s preferred language, either written or verbally. Translation services should be used when no written translation (assuming the child is literate) or onsite staff or interpreters are available.<sup>673</sup>

i) Case Managers

To assist in many of its key duties, ORR has Case Managers who coordinate UAC assessments, complete individual service plans, make release or transfer recommendations, and coordinate such release children from ORR custody.<sup>674</sup> In these duties, Case Managers work in concert with Case Coordinators, who work for non-governmental organizations and “act as a local ORR liaison” in the release process.<sup>675</sup> Case managers “also ensure all services for children and youth are documented and maintain case files for unaccompanied children.”<sup>676</sup> Additionally, they conduct home visits and coordinate Post Release Services for a limited number of at-risk children. Case managers are required to speak Spanish fluently because the vast majority of UACs speak Spanish.<sup>677</sup>

b. Case Planning

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<sup>672</sup> *Id.*

<sup>673</sup> ORR Guide, *supra* note 624, § 3.3.7.

<sup>674</sup> ORR Guide, *supra* note 624, § 2.3.2 (“In carrying out the [DHHS] Director's responsibilities [to provide for the care and placement of UACs], the Director is authorized to enter into contracts with appropriate public or private nonprofit agencies under such conditions as the Director determines to be appropriate.”).

<sup>675</sup> *Id.*

<sup>676</sup> *Id.*

<sup>677</sup> ORR, ADMIN. FOR CHILDREN & FAMILIES, HHS-2014-ACF-ORR-ZU-0632, POST RELEASE AND HOME STUDY SERVICES FOR UNACCOMPANIED ALIEN CHILDREN 5 (2013), [http://www.acf.hhs.gov/grants/open/foa/files/HHS-2014-ACF-ORR-ZU-0632\\_0.pdf](http://www.acf.hhs.gov/grants/open/foa/files/HHS-2014-ACF-ORR-ZU-0632_0.pdf).

Under federal law, the Case Plans which Case Managers coordinate for UACs in ORR custody and care “must, at a minimum, address the following elements:

- (1) Family reunification;
- (2) Appropriate placement of the unaccompanied child in a foster home, group foster care, residential facility, supervised independent living, or other setting, as deemed appropriate in meeting the best interest and special needs of the child.
- (3) Health screening and treatment, including provision for medical and dental examinations and for all necessary medical and dental treatment.
- (4) Orientation, testing, and counseling to facilitate the adjustment of the child to American culture.
- (5) Preparation for participation in American society with special emphasis upon English language instruction and occupational as well as cultural training as necessary to facilitate the child's social integration and to prepare the child for independent living and economic self-sufficiency.
- (6) Preservation of the child's ethnic and religious heritage.”<sup>678</sup>

All of these services must be provided in a language the child understands.<sup>679</sup>

### c. *Health Care*

According to ORR, “[c]are provider facilities’ case management teams use standardized screening tools to assess children for mental health and victims of trafficking issues.”<sup>680</sup> A child in ORR custody and care is entitled to receive more thorough health screening and health care services than the cursory screening by CBP.<sup>681</sup> As needed, they are vaccinated and if found to have communicable diseases, they are separated from other children and treated.<sup>682</sup> Children receive additional, more thorough medical screening and vaccinations at ORR shelter facilities.<sup>683</sup> While they are in ORR custody, UAC healthcare is fully paid by the federal government.<sup>684</sup>

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<sup>678</sup> 45 C.F.R. § 400.118(b).

<sup>679</sup> Title VI, 42 U.S.C. § 2000d.

<sup>680</sup> ORR Guide, *supra* note 624, § 3.1.

<sup>681</sup> ORR Fact Sheet, *supra* note 635.

<sup>682</sup> *Id.*

<sup>683</sup> *Id.*

<sup>684</sup> *Id.*

Despite ORR obligations, researchers have expressed concerns about the adequacy of health screening, especially mental health screening. In a 2001, the United States Conference of Catholic Bishops (USCCB) conducted a study in which about eighty-five percent of UACs reported having “some type of traumatic experience prior to entering ORR custody.”<sup>685</sup> The study found that UACs “with a diagnosed mental health disorder” had “steadily increased” between 2008 and 2011 from thirteen percent to thirty-eight percent, half of whom came from Honduras.<sup>686</sup> The report also revealed that children experienced continued trauma when transferred from ORR where they had just begun to establish relationships, to integrate into an unfamiliar country and culture, even if that transition was to a family member.<sup>687</sup> A separate in depth study by numerous psychiatry experts found that twenty percent of UAC have post-traumatic stress disorder (PTSD).<sup>688</sup>

As discussed below in Part II.C, ORR coordinated post release services for mental healthcare are not legally required, and are only provided as ever-changing funding levels allow.<sup>689</sup> As noted above, the mission of ORR includes “maximiz[ing] the child's opportunities for success both while in care, and upon discharge from the program to sponsors in the U.S. . . . , to assist them in becoming integrated members of our global society.”<sup>690</sup> This disconnect

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<sup>685</sup> THE CHANGING FACE OF THE UNACCOMPANIED ALIEN CHILD: A PORTRAIT OF FOREIGN-BORN CHILDREN IN FEDERAL FOSTER CARE AND HOW TO BEST MEET THEIR NEEDS, U.S. CONFERENCE OF CATHOLIC BISHOPS: MIGRATION & REFUGEE SERVS. 8[hereinafter USCCB Study] (2012), *available at* [http://www.usccb.org/about/children-and-migration/unaccompanied-refugee-minor-program/upload/A-Portrait-of-Foreign-Born-Children-in-Federal-Foster-Care-and-How-to-Best-Meet-Their-Needs\\_USCCB-December-2012.pdf](http://www.usccb.org/about/children-and-migration/unaccompanied-refugee-minor-program/upload/A-Portrait-of-Foreign-Born-Children-in-Federal-Foster-Care-and-How-to-Best-Meet-Their-Needs_USCCB-December-2012.pdf).

<sup>686</sup> *Id.* at i (“The study also found a steady increase in reported substance use from 17 percent of the study sample in fiscal year 2008 to 33 percent in fiscal year 2011. Children reported using substances to alleviate mental health symptoms such as depression; however, none of the children received a formal diagnosis of substance abuse or dependence.”).

<sup>687</sup> *Id.* at 10.

<sup>688</sup> Julia Huemer et al., *Mental Health Issues in Unaccompanied Refugee Minors*, 3 CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 21 (Apr. 2009), *available at* <http://www.capmh.com/content/pdf/1753-2000-3-13.pdf>.

<sup>689</sup> See TVPRA 2008, *supra* note 589; see also *infra* text accompanying notes 707-708.

<sup>690</sup> See *Unaccompanied Children's Services*, *supra* note 653.

between mission, legal mandate, and funding highlights a key area where ORR is not provided with the tools it needs to effectively “maximize” these children’s “opportunities for success” and “integration.”

d. *Placement and ORR Release*

Aside from providing the care services described above, ORR care providers, generally through Case Managers, facilitate “safe and timely release to family members or other sponsors that can care for them,” as required by the Flores Agreement duty of prompt placement “in the least restrictive setting appropriate to the minor's age and special needs [so long as it] ensure[s] the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others.”<sup>691</sup> Average stays in ORR custody dropped in 2014 to 29 days, due in part to a “streamlin[ing of] its placement process.”<sup>692</sup>

Case managers are required to do the following before a sponsor is authorized:

- “interview prospective sponsors;
- require prospective sponsors to complete a ‘Authorization for Release of Information’
- conduct background checks on all prospective sponsors;
- coordinate fingerprint checks of the FBI database for non-parental sponsors, or for parental sponsors where there is a documented risk to the safety of the child, the child is especially vulnerable, or the case is being referred for a mandatory home study; and
- coordinate a check of the immigration Central Index System in some cases.”<sup>693</sup>  
(While a sponsor’s immigration status is inquired into, it is not used to deny placement.)<sup>694</sup>

Case Managers weigh many factors when evaluating family members and other potential sponsors, including the “linguistic and cultural background of the child or youth and the sponsor, including cultural, social, and communal norms and practices for the care of children.” Other

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<sup>691</sup> Flores Agreement, *supra* note 619.

<sup>692</sup> Statement by DHHS Secretary Burwell, *supra* note 642.

<sup>693</sup> *About Unaccompanied Children's Services*, *supra* note 662; SEGHELLI ET AL., *supra* note 587.

<sup>694</sup> ORR Guide, *supra* note 624, § 2.5.2 (“ORR does not disqualify potential sponsors on the basis of their immigration status. ORR does seek immigration status information, but this is used to determine if a sponsor care plan will be needed if the sponsor needs to leave the United States; it is not used as a reason to deny a sponsor’s application for release of an unaccompanied child.”).

factors include the “nature and extent of the sponsor’s previous and current relationship, [if any,] with the child or youth and the child’s family” and “[t]he sponsor’s motivation for wanting to sponsor the child or youth.” Case managers consider the child’s views, and her parent’s or legal guardian’s “perspective on the release to the identified potential sponsor” (where the parent or legal guardian has designated a sponsor). They further consider a “sponsor’s understanding of the unaccompanied child’s needs,” her “plan to provide adequate care, supervision, access to community resources, and housing,” and her “understanding of the importance of ensuring the . . . child’s presence at all future hearings or proceedings, including immigration court proceedings.” The Case Manager must individually consider the “child’s current functioning and strengths in relation to any risk factors or special concerns,” some of which may require or justify Post-Release Services.<sup>695</sup> Finally, and perhaps most importantly, Case Managers assess potential “sponsor’s strengths, resources, and mitigating factors in relation to any risks or special concerns of the child or sponsor . . . .”<sup>696</sup> In some cases, Case Managers conduct home visits if the child has special needs or “if safety is in question.”<sup>697</sup>

The Flores Agreement outlines the following preference ranking for sponsor types: (1) a parent, (2) a legal guardian, (3) an adult relative, (4) an adult individual or entity designated by the child’s parent or legal guardian, (5) a licensed program willing to accept legal custody, or (6) an adult or entity approved by ORR.<sup>698</sup> Approximately eighty-five to ninety percent of UACs

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<sup>695</sup> ORR Guide, *supra* note 624, § 2.4.1 (Risk factors considered include whether “children or youth who are victims of human trafficking; are a parent or are pregnant; have special needs, disabilities or medical or mental health issues; have a history of criminal, juvenile justice, or gang involvement; or a history of behavioral issues.”).

<sup>696</sup> *Id.* (Sponsor risk factors assessed include “a criminal background, history of substance abuse, mental health issues, or domestic violence and child welfare concerns.”)

<sup>697</sup> *Unaccompanied Children's Services*, ORR, *supra* note 662.

<sup>698</sup> Flores Agreement, *supra* note 619. ORR Guide, *supra* note 624, § 2.2.1 (grouping potential sponsors in categories: Category 1: Parent or legal guardian; Category 2: An immediate relative: a brother, sister, aunt, uncle, or grandparent; Category 3: Other sponsor, such as distant relatives and unrelated adult individuals; and Category 4: No sponsors identified.).

are released to family for the remainder of the court proceedings, for which a sponsor must sign a form expressly affirming they understand the child must appear in court.<sup>699</sup>

In preparation for release from ORR custody, care providers work with the child and sponsor so that they can plan and prepare for the child's future needs. They "assess the sponsor's ability to access community resources" and when necessary, help access "services for the child."<sup>700</sup> While this preparation is not always adequate and is not necessarily followed up upon, it generally helps children with initial integration and service access, especially with school and other easily accessible community resources.<sup>701</sup> Nevertheless, children's needs are not always met once they are released. If a child's placement with a sponsor who ultimately is unsuccessful and this comes to the attention of ORR, she may then be placed through a state's Child Protective Services. Once placed, a child almost never returns to ORR custody.<sup>702</sup>

### **C. Rights to Services Once Released from ORR Care and Custody**

#### **1. Post-Release Services**

For certain "at-risk" categories of UACs, ORR offers post-release services. Case managers coordinate "individualized packages of services to UACs and their sponsors depending on their unique needs."<sup>703</sup> ORR requires service providers, who are generally non-profit organizations to comply with and exceed their Title VI obligations as government contractors by requiring them to "coordinate or administer all of the following minimum required services listed for each assigned UAC in a manner that is sensitive to the age, culture, religion, native language, sexual orientation, and individual needs of each UAC:" safety, legal services, guardianship,

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<sup>699</sup> LIRS Backgrounder, *supra* note 642; ORR Fact Sheet, *supra* note 635.

<sup>700</sup> ORR Guide, *supra* note 624, § 2.8.1.

<sup>701</sup> Interview with Sam Solomon, Policy Analyst, New York City Mayor's Office of Immigrants' Affairs (March 24, 2015).

<sup>702</sup> Telephone interview with Amy Schafer, Program Officer, Post Release Services U.S. Committee for Refugees and Immigrants (April 24, 2015).

<sup>703</sup> ORR, Post Release and Home Study Services for Unaccompanied Alien Children, *supra* note 677, at 4.

education, medical services, mental health services.<sup>704</sup> Post-release services, which when provided must also conform to Title VI language obligations, may also include:

- “Home visits and family preservation services
- Ongoing psycho-educational support and opportunities to foster community integration
- Systems advocacy and education to overcome barriers to services to include enrolling in public school, ensuring access to individual service plans in school to include ESL courses and tutoring, and finding affordable and bilingual health care providers
- Identification of resources to support the family in meeting basic needs
- Connection to community supports, whether places of worship, ethnic community, and/or support groups
- Continuous assessment of child safety and well-being
- Referring children to low cost or pro bono immigration legal assistance and educating children and their families about immigration processes
- Convening, supporting, and encouraging interdisciplinary panel to discuss cases, as needed”<sup>705</sup>

Post-release services collaborative between ORR and shelter staff planning begins before the UAC is released from ORR custody in so that services are in place once the UAC is released.<sup>706</sup>

TVPRA 2008 requires that prior to release, ORR must determine whether a home-study is necessary.<sup>707</sup> If a home-study is required, post-release services “shall” be provided. The less than ten percent of cases where a home-study, and thus post-release services, must be provided include: “[when] a child [] is a victim of a severe form of trafficking in persons, a special needs child with a disability . . . , a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child’s health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.”<sup>708</sup> The

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<sup>704</sup> *Id.*; Title VI, 42 U.S.C. § 2000d.

<sup>705</sup> *Id.*

<sup>706</sup> ORR, Post Release and Home Study Services for Unaccompanied Alien Children, *supra* note 677, at 4.

<sup>707</sup> TVPRA 2008, *supra* note 589.

<sup>708</sup> *Id.* See Americans with Disabilities Act, 42 U.S.C. § 12102(2) (1990) definition of “disability” for purposes of determining home visit necessity.

services listed above are generally provided for six months, but may be provided longer or shorter periods upon ORR’s determination.<sup>709</sup> Post-release services, however, are voluntary, and a sponsor must first consent and may decline them or withdraw consent at any time.<sup>710</sup>

While children for whom a home visit is done will receive post-release services automatically, ORR is further “authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.”<sup>711</sup> In cases such as where “additional assistance is required to connect the child and sponsor to needed resources post-release” or where the child has “special needs and would benefit from additional services,” “the case *may* be referred for post-release only services.”<sup>712</sup> A referral for post-release services is dependent on the sponsor’s ability to provide “for the UAC’s physical and/or mental well-being.”<sup>713</sup> The availability of these services fluctuates depending on funding.<sup>714</sup> In determining whether a UAC will be considered for post-release services, ORR considers whether the child:

- “has a medical condition
- [displays] evidence of mental health/emotional concerns/trauma
- presents a risk of suicide or self-harming behaviors
- [has] cognitive or developmental delays
- [has a] history of residential treatment and/or psychiatric placements
- [has] ambivalence toward and limited relationship between the UAC and sponsor
- [has a] history of substance abuse
- [has] behavioral issues
- [has had] past or [has] present gang-involvement

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<sup>709</sup> ORR Guidance, *supra* note 624, at 2.7.2.

<sup>710</sup> *Id.*

<sup>711</sup> TVPRA 2008, *supra* note 589 (“The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.”).

<sup>712</sup> ORR, Post Release and Home Study Services for Unaccompanied Alien Children, *supra* note 677, at 1, 3-4 (emphasis added).

<sup>713</sup> *Id.* at 3-4.

<sup>714</sup> LIRS/USCCB, Post-Release Services: Family Preservation Services for Immigrant Children Released from Federal Custody: Frequently Asked Questions (FAQ)s [hereinafter LIRS/USCCB, Post-Release Services], <http://www.rcusa.org/uploads/pdfs/LIRS-and-USCCB-Post-Release-Services-FAQs-Final.pdf>.

- [is] pregnant or parenting”<sup>715</sup>

Post-release services are funded through ORR and the federal government and thus they must be administered in accordance with Title VI, just as ORR itself must adhere to the requirements with respect to language access.<sup>716</sup> However, precisely where post-release services are the most critical—identification of local resources—is where language access becomes an often insurmountable barrier. Post-release service providers must network in each community to find service providers that meet a given child’s needs—a process which is far from uniform.<sup>717</sup> As discussed below in Part II.C.2, the children are generally ineligible for government funded services.<sup>718</sup> Thus, while most private agencies in the mental health setting, for example, are otherwise often willing to offer low cost services to vulnerable children, in many communities there very few bilingual therapists, and they do not have the interpretive capacity to offer the needed services in a language the child understands;<sup>719</sup> and as they are private, they are not subject to Title VI.<sup>720</sup> Accordingly, even with post-release services such as local resource identification and coordination, these children may still not get what they need.

Concerns have been raised both that post-release services are too restrictively and scarcely offered and, conversely, that they are used invasively. First, when they are not offered, that leaves open the possibility that a child may not get what she needs, or worse, has been placed with a bad sponsor with whom there will be no follow up. On the other hand, if post-release services are offered in the case of an undocumented parent sponsor, the parent may feel unduly obligated to accept the services and further subjected to unnecessary oversight. The

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<sup>715</sup> ORR, Post Release and Home Study Services for Unaccompanied Alien Children, *supra* note 677, at 3-4.

<sup>716</sup> Title VI, 42 U.S.C. § 2000d.

<sup>717</sup> Furthermore, every agency which provides post-release services through ORR works differently. Amy Schafer interview, *supra* note 702.

<sup>718</sup> *See infra* Part II.C.2.

<sup>719</sup> Interview with Amy Schafer, *supra* note 702.

<sup>720</sup> Title VI only applies when federal funding is involved. *See* Title VI, 42 U.S.C. § 2000d.

greater concern during the “surge” seems to be that more services are needed, not less. This is primarily reflective of a lack of resources more than a lack of need.<sup>721</sup>

Finally, while attorney referral and other assistance in order to provide UACs with free or reduced cost legal services are considered “post-release services” as discussed in this Part, the legal representation itself is a distinct service not subject to the same limited situations and need assessments described above. All of these children need access to counsel, and the government is required by the TVPRA to ensure access to legal representation “to the greatest extent practicable.” As explained in Part I, however, in reality this far from assures universal access, as only about one third of released children secure legal counsel. Accordingly, while demand outpaces supply, legal services are among the rights of all released children referred to in Part II.C.2 below. Many of the same organizations that contract with ORR for Case Management and post-release services also contract with ORR/DHHS and other federal agencies, including the Dept. of Justice, to provide legal representation.<sup>722</sup> In addition, municipalities as well as privately funded non-profit organizations have committed resources to legal representation for UACs.<sup>723</sup>

## 2. Rights of Children Released Without Post-Release Services

Eighty to ninety percent of UACs do not receive post-release services.<sup>724</sup> Once released from ORR custody, they are no longer eligible for any services through DHHS, ORR, or any

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<sup>721</sup> Tatyana Delgado, *supra* note 636; Sam Solomon, *supra* note 701.

<sup>722</sup> Stephanie Francis Ward, *Federal Government Announces \$9M in Funding for Unaccompanied Minors' Counsel*, A.B.A.J. (Oct. 1, 2014), available at [http://www.abajournal.com/news/article/federal\\_government\\_announces\\_9\\_million\\_in\\_funding\\_for\\_unaccompanied\\_minors](http://www.abajournal.com/news/article/federal_government_announces_9_million_in_funding_for_unaccompanied_minors); ORR website (noting that they have provided grants to cover 2,600 cases)

<sup>723</sup> *Id.* (citing San Francisco allocating \$2.1 million); Press Release, New York City Council (Sep. 23, 2014), <http://council.nyc.gov/html/pr/092314um.shtml> (citing New York City allocating \$1.9 million); Services, Immigrant Justice, Legal Services of the Southern Piedmont, <http://www.lssp.org/services/immigrant-justice/> (citing Charlotte, NC area services).

<sup>724</sup> LIRS/USCCB, Post-Release Services, *supra* note 714. The numbers are always fluctuating.

contracting organization (legal representation being a separate, essentially unrelated service).

These children have no legal immigration status while awaiting final pendency of their removal proceedings or grant of some form of relief. Therefore, like most undocumented immigrants, they are considered “not qualified” for most federal “public benefits,” such as public health benefits, public housing, food stamps, supplemental security, or other social welfare programs.<sup>725</sup> However, as long as federal funds are not used, states and municipalities are free to add access to additional services irrespective of immigration status.<sup>726</sup> The general ineligibility for federally funded public benefits is subject to following exceptions:

- Free public education for grades K-12<sup>727</sup>
- School lunch and breakfast programs<sup>728</sup>
- Emergency medical care through Medicaid, provided she otherwise meets the eligibility requirements (includes childbirth)<sup>729</sup>
- Immunizations for immunizable diseases and testing for and treatment of symptoms of certain communicable diseases<sup>730</sup>
- Short-term, noncash, in-kind emergency disaster relief<sup>731</sup>
- Non-governmental programs, services, or assistance that deliver in-kind services at the community level such as soup kitchens, crisis counseling and intervention, short term shelter, mental health services, and child and adult protective services<sup>732</sup>

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<sup>725</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (Aug. 22, 1996); and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRIRA”), enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3008 (Sept. 30, 1996). About half the states have added at least some services to fill the gap left by federal law. NILC Overview at 1. Applicants for T-Visa are eligible for most federal benefits. TVPRA 2008, *supra* note 589.

<sup>726</sup> Tanya Broder & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NAT’L IMMIGR. LAW CTR. 3 (2011), available at <http://www.nilc.org/overview-immeligfedprograms.html>.

<sup>727</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>728</sup> NILC Benefits Brief at 3; *Federal Benefits Available To Unauthorized Immigrants*, National Conference of State Legislatures, Feb. 24, 2014 [hereinafter NCSL Benefits Brief], <http://www.ncsl.org/research/immigration/federal-benefits-to-unauthorized-immigrants.aspx>.

<sup>729</sup> 42 U.S.C. § 1396b(v). This does not include organ transplants.

<sup>730</sup> NILC Benefits Brief, *supra* note 726, at 3; *Federal Benefits Available To Unauthorized Immigrants*, National Conference of State Legislatures, Feb. 24, 2014 [hereinafter NCSL Benefits Brief], <http://www.ncsl.org/research/immigration/federal-benefits-to-unauthorized-immigrants.aspx>.

<sup>731</sup> NILC Benefits Brief, *supra* note 726, at 3; NCSL Benefits Brief, *supra* note 730.

<sup>732</sup> NILC Benefits Brief, *supra* note 726, at 3; NCSL Benefits Brief, *supra* note 730.

States vary significantly in what services are offered without regard to immigration status.<sup>733</sup> Provided the person fits the financial eligibility requirements, the following is available to anyone in North Carolina:

- Special Supplemental Nutrition Program for Women, Infants and Children (WIC)<sup>734</sup>
- States have several options to provide medical coverage for prenatal care for unborn children who meet other program eligibility criteria<sup>735</sup> (North Carolina provides limited presumptive Medicaid)<sup>736</sup>

Some states do not require immigration status inquiry for children under 19 to receive state provided non-emergency medical coverage.<sup>737</sup> North Carolina requires a social security number for a child to receive state health coverage.<sup>738</sup> All of the above mentioned services must be provided in ways that are linguistically accessible to LEP UAC's assuming that the service provider is a recipient of federal funds.<sup>739</sup>

### III. NORTH CAROLINA AND UACS

Of the 57,496 UAC referrals ORR received in 2014, 53,518 children were released to sponsors; of those, nearly half were in the south, and 2,064 were released in North Carolina.<sup>740</sup> ORR releases county data for counties that receive fifty or more UACs. More than half of all the UACs placed in North Carolina in 2014 were from just three counties: Mecklenburg, Wake, and

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<sup>733</sup> NILC Benefits Brief, *supra* note 726.

<sup>734</sup> Welfare law § 742 (8 U.S.C. § 1615). All U.S. states have opted to offer WIC. NILC Benefits Brief, *supra* note 726, at 3.

<sup>735</sup> Rachel Fabi, *Undocumented Immigrants in the United States: Access to Prenatal Care*, HASTINGS CTR. (last updated September 29, 2014), <http://www.undocumentedpatients.org/issuebrief/undocumented-immigrants-in-the-united-states-access-to-prenatal-care/>.

<sup>736</sup> Family and Children's Medicaid MA-3245 Presumptive Eligibility for Pregnant Women, N.C. DHHS, <http://info.dhhs.state.nc.us/olm/manuals/dma/fcm/man/ma3245-01.htm>. The coverage ends on the last day of the month when it was applied for if an actual Medicaid application is not filed.

<sup>737</sup> For example, New York, Illinois and California.

<sup>738</sup> *Child Health Insurance: Eligibility*, N.C. HEALTHY START FOUND., <http://www.nhealthystart.org/public/childhealth/eligibility.htm> (last updated May 5, 2015).

<sup>739</sup> Title VI, 42 U.S.C. § 2000d.

<sup>740</sup> ORR, *Unaccompanied Children Released to Sponsors by State*, ADMIN. FOR CHILDREN & FAMILIES, <http://www.acf.hhs.gov/programs/orr/programs/ucs/state-by-state-uc-placed-sponsors> (last visited July 16, 2015).

Durham.<sup>741</sup> Different towns and counties have had different reactions to their arrival. Three counties, Brunswick, Rowan, and Surry, issued negative resolutions stating their general disapproval with allowing these children in the country, declaring that these children “will have an adverse effect on [their] local school district educational funding, resources, campus security, public health and safety, as well as county resources” and stating their unwillingness to welcome them into their county;<sup>742</sup> none of these counties appear on the list of counties receiving at least fifty children. On the other hand, Durham County, which received more than 215 UACs in 2014 took the lead in issuing a resolution expressing its “commitment to welcome unaccompanied children from Latin America and expresses its support for local government departments as well as Durham’s churches, businesses and non-profit agencies in their efforts to provide services to these children,” encouraging its “City staff to work in concert with other agencies as they pursue resources for support of these children;” and urging “all Durham residents, businesses and government entities to make unaccompanied children welcome in [their] city.”<sup>743</sup> Many organizations around the state have begun work to help provide services and help integrate these children into their new communities, including Compassion Advocacy Network in Charlotte (CAN), and El Centro Hispano community center, Catholic Charities, Carolina Outreach, Church World Service and El Futuro in the Triangle.

#### **IV. BEST PRACTICES: NEW YORK CITY**

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<sup>741</sup> North Carolina published data includes the following counties and totals: Burke County: 55; Duplin County: 54; Durham County: 215; Guilford County: 63; Mecklenburg County: 683; Sampson County: 62; Wake County: 250; Wayne County: 71. *Id.*

<sup>742</sup> Resolution on Re-settling of Illegal Immigrants Including Unaccompanied Minors, Rowan County, Aug. 18, 2014, *available at* <http://agenda.rowancountync.gov/AttachmentViewer.ashx?AttachmentID=939&ItemID=706>.

<sup>743</sup> Resolution Concerning Unaccompanied Migrant Children in Durham, Jan. 5, 2015, <http://www.southerncoalition.org/wp-content/uploads/2015/01/Final-Proposed-Durham-Resolution.pdf>.

The state of New York welcomed more than 5,000 unaccompanied minors in 2014.<sup>744</sup> The City of New York (NYC) is working diligently to help these children integrate into the community as successfully as possible under the challenging circumstances. As an initial matter, New York is distinct in several ways from other cities and states. First, the state of New York provides health coverage to children under 19 irrespective of immigration status.<sup>745</sup> Second, NYC has a system of resources and service providers which is unparalleled, is organized in an accessible multilingual online and physical guide, and laws extremely welcoming to immigrants and newcomers. Furthermore, the NYC Mayor's Office of Immigrants' Affairs has a policy analyst who specializes on addressing these issues.<sup>746</sup> Third, NYC is historically a city of immigrants, where currently half of the residents speak a have language other than English at home.<sup>747</sup> Nevertheless, NYC has been doing some things that may be able to be replicated or modified for smaller communities with fewer resources, different laws, and less of a history and culture of welcoming immigrants.

ORR does not communicate explicitly with the communities in which it places children. In fact, they only publish data on counties with more than 50 children placed to ensure anonymity and guard against possible discrimination and hostility in smaller communities. This makes the job of contacting these children for providing information about available services challenging. Because of their status, however, each child is released upon a promise to appear in court, and that information is publicly available. NYC "finds" these children at court and through advocates who inform the children and their sponsors of "community clinics" where

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<sup>744</sup> Unaccompanied Children Released to Sponsors by State, *supra* note 740.

<sup>745</sup> See *Child Health Plus: Who is Eligible?*, N.Y. HEALTH DEP'T, [http://www.health.ny.gov/health\\_care/child\\_health\\_plus/who\\_is\\_eligible.htm](http://www.health.ny.gov/health_care/child_health_plus/who_is_eligible.htm) (last visited July 16, 2015).

<sup>746</sup> Sam Solomon, *supra* note 701. His insights contribute significantly to this Part.

<sup>747</sup> *Constituent Facts & Maps*, N.Y.C. MOIA (2013), <http://www.nyc.gov/html/imm/html/news/stats.shtml>.

more in-depth information about available services will be available. They set up “community clinics” where UACs and their families can learn about services including legal services, schooling, health care, and food banks. These clinics are set up in churches and community centers where there are significant populations of immigrants from Central America. Of course, not all children appear for court, but most do.<sup>748</sup>

New York schools have many counselors, nurses, and even psychologists in and accessible through their school systems for the children if they need them.<sup>749</sup> NYC also advertises the community clinics through the schools.

According to Sam Solomon, policy analyst at the NYC Mayor’s Office, legal representation is the biggest barrier to providing stability and integration for these children because it is the key to securing a sense of permanence. Without lawful immigration status, these children will eventually either be deported or live in the shadows. While many children have mental health needs from earlier trauma, they have ongoing anxiety until they have a sense of stability. This instability manifests itself in school and other areas of the child’s life. The children and their families are less concerned with some other issues, including education and routine health care, when legal status is up in the air. Therefore, NYC has taken a multi-pronged approach of having as many services available as possible, but focusing more intensely on what they see as the more pressing need of legal counsel. When a child secures counsel, the attorney often takes on a larger role of not only legal advocate but a sort of case manager, helping the

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<sup>748</sup> Sam Solomon, *supra* note 701. *See also Upcoming Community Clinics*, N.Y.C. MOIA, <http://www.nyc.gov/html/imm/html/recently-arrived/upcoming-clinics.shtml>.

<sup>749</sup> *See Guidance and School Counseling*, N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/StudentSupport/GuidanceandCounseling/default.htm> (last visited July 16, 2015).

child and her family access other community resources.<sup>750</sup> This happens throughout the country already.<sup>751</sup> The key is providing the attorneys.

In sum, as more unaccompanied children settle in North Carolina, providing them with the services they need to survive, integrate, and ultimately succeed is critical. Whether a child remains for only six months and is removed, or whether a child is granted immigration relief and eventually becomes a permanent member of our society, they must be treated with dignity.

While some organizations around the state are working to identify and serve these children, much more needs to be done to ensure these children are not marginalized moving forward. A holistic approach to serving these children seems key to this mission. First, the more access to legal representation, the better the chance for stability, which is essential to any child's overall wellbeing. Second, these children must have access to any other available services in their communities, whether it be through schools, churches, or non-profit organizations. This not only requires identifying these services, but also identifying the children who need them. Finally, each of these services must be provided in a language the child understands.

Title VI applies to certain service providers that interact with these children, such as schools, hospitals, any ORR administered services, as well as some of the attorneys who work with these children. However, because of their status, many of these children rely on non-profit organizations and community resources that are chronically underfunded to begin with. Thus, there is not only a lack of language access, there is a lack of resources for these children in the first place. Herein lies the challenge for advocates: supporting these children while they are in legal limbo as best as possible with minimal resources so that they can be engaged and productive members of their communities as soon as possible. Moving forward, the earlier these

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<sup>750</sup> Sam Solomon, *supra* note 701.

<sup>751</sup> Tatyana Delgado, *supra* note 636.

children can come out from the shadows and the margins of society, the better for communities as a whole.

## CONCLUSION

The services of state and local agencies – such as police services, public transportation, health and emergency services, and programs for members of the workforce – may not be accessible to those who do not understand or speak English. The inability to communicate with a local agency can cause an LEP individual to be completely cut off from access to that agency’s services, experience delays in receiving services, receive incorrect information, or be subject to poor treatment if staff becomes frustrated.<sup>752</sup> An LEP individual who is unable to sufficiently communicate with important agencies including law enforcements, health services, consumer finance institutions, and departments of motor vehicles suffer many serious consequences in their day-to-day lives.<sup>753</sup> Thus, language access is a very serious issue that it is important to address. Additionally, the identification of particular concerns related to the vulnerability and rights of unaccompanied minors set out in Section Four of this report sheds light on an important, emerging issue in the realm of language access. Moreover, providing language access is the law.

With the United States becoming increasingly more heterogeneous, it is vital that language rights are characterized as basic human rights—the ability to communicate and the ability to maintain one’s identity are both fundamental to human dignity. This report encourages language access initiatives to consider the international human rights norms set forth in Section One in their efforts to improve language accessibility. Language is connected to an individual’s cultural and ethnic identity. In order to better understand how greater language access benefits minority language speakers, this report uses models from European collaborative entities that should and could be used with regard to language rights and language access to guide our own efforts. The focus on non-discrimination that is employed by the Title VI approach is too limited

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<sup>752</sup> *Id.* at 1019.

<sup>753</sup> *Id.* at 1021 (noting that they “may suffer serious consequences, including poverty, depression, and even death”).

to deal with the full range of multifaceted and complicated issues that arise in the language arena. The non-discrimination approach need not be necessarily replaced by the culture-based approach. This report simply suggests that the use of human rights principles and norms may augment current U.S. law and its ability to effectively address complicated language rights issues. If nothing else, international practices based on human rights principles provide persuasive and helpful models for consideration.

Title VI compliance is still undeniably an important mechanism in U.S. domestic law that protects language rights and promotes language access initiatives. Title VI compliance obligations have already provided a great impetus for state and local government agencies to develop strategies to assist with the improvement of language accessibility for LEP populations. These include partnering with non-profit agencies, printing documents and brochures in multiple languages, contracting with interpreters or translation services, and hiring multilingual staff. It is the goal of this report to provide information about Title VI in order to aid in the continued efforts of state and local agencies to improve language accessibility, to increase awareness of how Title VI applies to individual entities, and how to determine what language access requirements Title VI requires of those entities.

Both the international human rights norms and Title VI requirements discussed in this report can be utilized by language access initiatives such as BIC. BIC partner municipalities incorporate language access as part of their pursuit towards an integration-focused community planning. This process is both collaborative and inclusive, and allows for greater conversation with immigrant and LEP populations. Such a process acknowledges the dignity and value of immigrants and newcomers, and encompasses a wider breadth of basic rights and cultural protection for minority language speakers as the community seeks to include them. Through

partnership with the BIC initiative, this policy report endeavors to further enable and promote practices to foster language access and ensure the protection of inherent language rights that are applicable to all individuals.

It is the hope of this authors of this report that the information provided about human rights principles and the EU model will broaden views on how to approach language rights, that the explanation of Title VI requirements will improve language access by assisting with compliance issues, and that the best practices of the BIC initiative will provide successful examples of how cities can break down language barriers and work towards fully integrated communities to the benefit of all residents.

## GLOSSARY OF ACRONYMS

<b>Acronym</b>	<b>Definition</b>
AARP	American Association of Retired Persons
BIC	Building Integrated Communities
BIM	Bilingualism, Identity and the Media
CAN	Compassion Advocacy Network
CBP	Customs and Border Protection
CDC	Center for Disease Control
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights
CRRA	Civil Rights Restoration Act
CSCE	Conference for Security and Cooperation in Europe
DHHS	Department of Health and Human Services
DMV	Department of Motor Vehicles
DOC	Department of Commerce
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DPS	Department of Public Safety
ECHR	European Charter of Human Rights
ECRML	European Charter for Regional and Minority Languages
ESL	English as a Second Language
FBI	Federal Bureau of Investigation
FCDPH	Forsyth County Department of Public Health
FCDSS	Forsyth County Division of Social Services
FCCS	Federal Compliance and Coordination Section
HAWS	Housing Authority of Winston-Salem
HRC	Human Relations Commission
HRD	Human Relations Department

<b>Acronym</b>	<b>Definition</b>
HSA	Homeland Security Act
ICCPR	International Covenant on Civil and Political Rights
ICE	Immigration and Customs Enforcement
ICERD	International Convention on Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
LEP	Limited English Proficiency
MELT	Multilingual Early Language Transmission
MOIA	Mayor's Office of Immigrant Affairs
OAS	Organization of American States
OCR	Office of Civil Rights
ORIA	Office of Refugee and Immigrant Assistance
ORR	Office of Refugee Resettlement
PPDAI	Philadelphia Police Department Authorized Interpreter
PTSD	Post-Traumatic Stress Disorder
RUD	Reservation, Understanding and Declaration
SIJS	Special Immigrant and Juvenile Status
TANF	Temporary Assistance for Needy Families
TVRPA	Trafficking Victims
UAC	Unaccompanied Alien Child
UDHR	Universal Declaration of Human Rights
USCCB	United States Conference of Catholic Bishops
USCIS	United States Citizenship and Immigration Services
WFRC	Work Family Resource Center
WIA	Workforce Investment Act
WIC	Woman, Infants and Children



**APPENDIX A**  
**CITY OF HIGH POINT TITLE VI COMPLAINT PROCEDURES**

The complaint procedures outlined herein apply to the City of High Point and other primary recipients and sub- recipients of Federal financial assistance. These procedures cover discrimination complaints filed under Title VI of the Civil Rights Act of 1964, Civil Rights Restoration Act of 1987, Section 504 of the Rehabilitation Act of 1973, and other nondiscrimination authorities relating to any program, services, or activities administered by the City and its sub-recipients (e.g., transit systems, MPOs, universities, and counties), consultants, and contractors.

The City will make every effort to obtain early resolution of complaints at the lowest level possible. Complaints of alleged discrimination will be investigated by the complainant's selected appropriate authority as outlined below. The option of informal mediation meeting(s) between the affected parties and the OCR staff may be utilized for resolution. Upon completion of each investigation, the OCR staff will inform every complainant of all avenues of appeal.

**PURPOSE**

The purpose of the discrimination complaint procedures is to describe the process used by the City for processing complaints under Title VI of the Civil Rights Act of 1964, related statutes and authorities.

**FILING OF COMPLAINTS**

3. **Applicability** – The complaint procedures apply to the beneficiaries of the City's programs, activities, and services, including but not limited to the public, contractors, subcontractors, consultants, and other sub- recipients of federal and state funds.
  
4. **Eligibility** – Any person or class of persons who believes that he/she has been subjected to discrimination or retaliation prohibited by any of the Civil Rights authorities, based upon race, color, sex, age, national origin, or disability may file a written complaint with City's Human Relations Department. The law prohibits intimidation or retaliation of any sort. The complaint may be filed by the affected individual or a representative and must be in writing.
  
5. **Time Limits and Filing Options** – A complaint must be filed no later than 180 calendar days after the following:
  - The date of the alleged act of discrimination; or
  - The date when the person(s) became aware of the alleged discrimination; or
  - Where there has been a continuing course of conduct, the date on which that conduct was discontinued or the latest instance of t

Title VI complaints may be submitted to the following entities:

- **City of High Point** Human Relations Department, 211S. Hamilton Street, High Point, NC 27260; 336.883.3124 TDD: 336.883.8517
- **North Carolina Department of Transportation**, Office of Civil Rights, Title VI/EO Contract Compliance Section, 1511 Mail Service Center, Raleigh, NC 27699-1511; 919-508-1830 or toll free 800-522-0453
- **US Department of Transportation, Departmental** Office of Civil Rights, External Civil Rights Programs Division, 1200 New Jersey Avenue, SE, Washington, DC 20590; 202-366-4070

**Federal Highway Administration**, Office of Civil Rights, 1200 New Jersey Avenue, SE, 8<sup>th</sup> Floor, E81-314, Washington, DC 20590, 202-366-0693 / 366-0752

**Federal Highway Administration**, North Carolina Division Office, 310 New Bern Avenue, Suite 410, Raleigh, NC 27601, 919-747-7010

**Federal Transit Administration**, Office of Civil Rights, ATTN: Title VI Program Coordinator, East Bldg. 5<sup>th</sup> Floor – TCR, 1200 New Jersey Avenue, SE, Washington, DC 20590

**Federal Aviation Administration**, Office of Civil Rights, 800 Independence Avenue, SW, Washington, DC 20591, 202-267-3258

- **US Department of Justice**, Special Litigation Section, Civil Rights Division, 950 Pennsylvania Avenue, NW, Washington, DC 20530, 202-514-6255 or toll free 877-218-5228

6. **Format for Complaints** – Complaints shall be in writing and signed by the complainant(s) or a representative and include the complainant’s name, address, and telephone number. Complaints received by fax or e-mail will be acknowledged and processed. Allegations received by telephone will be reduced to writing and provided to the complainant for confirmation or revision before processing. Complaints will be accepted in other languages including Braille.
7. **Complaint Basis** – Allegations must be based on issues involving race, color, national origin, sex, age, or disability. The term “basis” refers to the complainant’s membership in a protected group category. Allegations against transit entities must be based on issues involving only race, color, or national origin.

Protected Categories	Definition	Examples
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Race	An individual belonging to one of the accepted racial groups; or the perception, based usually on physical characteristics that a person is a member of a racial group	Black/African America, Hispanic/Latino, Asian, American Indian/Alaskan Native, Native Hawaiian/Pacific Islander, White
Color	Color of skin, including shade of skin within a racial group	Black, White, light brown, dark brown, etc.
National Origin	Place of birth. Citizenship is not a factor. Discrimination based on language or a person's accent is also covered by national origin	Mexican, Cuban, Japanese, Vietnamese, Chinese
Sex	Gender	Women and Men
Age	Persons of any age	21 year old person
Disability	Physical or mental impairment, permanent or temporary, or perceived	Blind, alcoholic, para-amputee, epileptic, diabetic, arthritic

Complainant Notification

1. When a complaint is received, the Human Relations Department will provide written acknowledgment to \_\_\_\_\_ the Complainant, \_\_\_\_\_ days by registered mail.
2. If the complaint is complete and no additional information is needed, the complainant will be sent a \_\_\_\_\_ ~~letter of~~ acceptance along with a Consent/Release form.
3. If a complaint is deemed incomplete, additional information will be requested, and the Complainant will \_\_\_\_\_ ~~30 business~~ days to submit the required information. Failure to do so may be considered good cause for a determination of no investigative merit.
4. Within 15 business days from receipt of a complete complaint, the Human Relations Department will determine its jurisdiction in pursuing the matter and whether the complaint has sufficient merit to warrant investigation. Within ten (10) days of this decision, the Human Relations Department will notify the Complainant and Respondent, by registered mail, informing them of the disposition.

- a. If the decision is not to investigate the complaint, the notification shall specifically state the reason for the decision.
  - b. If the complaint is to be investigated, the notification shall state the grounds of the City's jurisdiction, while informing the parties that their full cooperation will be required in gathering additional information and assisting the investigator.
5. If the complaint is incomplete, the Complainant will be contacted in writing or by telephone to obtain the additional information. The complainant will be given 15 business days to respond to the request for additional information.
6. The Complainant will be notified that CITY will attempt to resolve complaints within 180 days after CITY has accepted the complaint for investigation.

## **APPENDIX B**

### **CITY OF WINSTON-SALEM LEP POLICES AND PROCEDURES**

#### **I. Commitment Statement**

The City of Winston-Salem is committed to improving the accessibility of services to persons with Limited English Proficiency (LEP) and to developing and implementing a system that gives LEP persons “meaningful access” to the City of Winston-Salem’s programs and services. The City of Winston-Salem has adopted the goal of improving Hispanic Relations, as per the City Council’s Strategic Plan. As a result, the City of Winston-Salem has delegated authority for an LEP Compliance Coordinator (the Human Relations Director) within the Human Relations Department.

#### **II. Purpose**

This policy sets forth the basic requirements and procedures intended to ensure City of Winston-Salem government takes reasonable steps to consistently meet its legal obligation of language access requirements in compliance with Title VI and E.O. 13166.

#### **III. Background**

Congress enacted Title VI of the Civil Rights Act of 1964 to ensure federal money is not used to support discrimination on the basis of race or national origin in government activities. Section 601 states: “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.” Neither Title VI, nor its implementing regulations discuss linguistic access per se; however, the courts have consistently found a close connection between national origin and language.

In 2000, the President signed Executive Order (E.O.) 13166 mandating all federal agencies and recipients of federal financial assistance take reasonable steps to ensure meaningful access to their programs to limited English proficient (LEP) individuals. These individuals may be entitled to language assistance with respect to a particular type of service, benefit, or encounter.

The City of Winston-Salem receives federal funding in support of programs, services, and activities through the following all departments receiving federal funding. The City also receives special federal grants or appropriations from time to time to undertake capital projects.

#### **IV. Definitions**

- A. ***Limited English Proficiency (LEP) Person:*** An LEP individual is defined as someone who does not speak English as a primary language and has a limited ability to read, write, speak or understand English.

- B. ***Federal Financial Assistance:*** Includes but is not limited to, grants and loans, grants or donation of federal property, the detail of federal personnel, the sale, lease or permission to use federal property at little or no cost, and any other federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.
- C. ***“Four Factor” Test:*** The US Department of Justice in 2002 issued LEP Guidance that articulated a starting point for achieving Title VI compliance. Affected City Departments should use the Four Factor test to determine the “reasonable steps” they should implement in order to be Title VI compliant. The four factors that should be balanced are:
1. **Proportion of the general public served** or likely to be encountered by the program or Department – The greater the number of LEP individuals, the more likely it is that language services are required.
  2. **Frequency of contact** with the general public dictates the level of contact and likelihood that language services are required.
  3. **Nature and importance of the program, activity or service** – The more important the program the greater the need for language services; i.e., Will denial or delay of service have serious or life-threatening consequences? Does government make the program compulsory?
  4. **Resource availability** will be dependent upon the size and budget of the Department which, in effect, will deem what is reasonable.

***D. Title VI - Section 601 of the Civil Rights Act of 1964***

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.

***E. Executive Order 13166 of the Civil Rights Act of 1964***

Federal agencies and recipients of federal financial assistance must take reasonable steps to ensure meaningful access to their programs to limited English proficient individuals who are five (5) percent of the total population or 1000 individuals, whichever is less.

***F. Who is Limited English Proficient or LEP?***

Persons who do not speak English as their primary language, who have a limited ability to read, write, speak, or understand English. These individuals may be entitled to language assistance under Title VI of the Civil Rights Act of 1964, with respect to a particular type of service, benefit, or encounter.

***G. “Reasonable Steps to Ensure Meaningful Access”***

The standard of “reasonable steps to ensure meaningful access” was designed by The US Department of Justice in 2002 to be a flexible, fact- dependent, starting point in an agency assessment of LEP persons eligible to be served or likely to be encountered by the program, the frequency of contact, nature or importance of the program, activity or service provided, and resources available.

The City of Winston-Salem had a population of approximately **224,000** according to Census 2000. Four and one-half percent (4.5%) of the population was Latino or Hispanic.

To date, City efforts, under the “reasonable steps” standard, have meant providing meaningful access to Spanish speaking LEP individuals. Such efforts include having multi-lingual translations for the City’s website, hiring multi-lingual employees, translating documents into Spanish, airing a Spanish city services-based television show, and offering pay incentives to employees who learn and/or use fluent Spanish during the normal course of their work duties.

#### ***H. “Voluntary Compliance”***

The U.S. Department of Housing and Urban Development (HUD) has required that all agencies receiving federal funds to submit voluntary compliance plans consistent with expectations from the federal government. The City of Winston-Salem has met this requirement by including the designation of a staff person to serve as agency specific LEP coordinator, specifically the Human Relations Department Director, to ensure rights and due process for LEP individuals.

#### **V. Procedures**

**All City Departments that receive federal funding should have in place a written Limited English Proficiency (LEP) Plan based upon the “four factor” test.**

The elements of an LEP Plan are:

- a. Identifying LEP individuals who need language assistance
- b. Identifying ways in which language assistance will be provided
- c. Training staff
- d. Providing notice to LEP individuals
- e. Monitoring and updating the LEP Plan

Helpful websites to aid and assist in developing the written LEP include:

[www.lep.gov](http://www.lep.gov)

<http://www.usdoj.gov/crt/cor/> <http://www.hhs.gov/ocr/index.html>

<http://www.hud.gov/offices/fheo/promotingfh/lep.cfm>

<http://epa.gov/civilrights/lepaccess.htm>

[http://www.usdoj.gov/crt/lep/guidance/guidance\\_index.html](http://www.usdoj.gov/crt/lep/guidance/guidance_index.html)

#### **A. LEP Guidance**

Affected Departments, depending on budget restrictions and feasibility, are encouraged to explore a range of strategies to communicate with multi-lingual customers, such as identifying staff persons capable of serving as interpreters, contracting with outside interpreters, using telephonic interpreter services (i.e., AT & T Language Line), and/or engaging community volunteers. Interpreting is a complex task and requires skills different from those needed for translation. Caution and consideration should guide the use of informal interpreters due to concerns regarding competence, confidentiality, and conflicts of interest.

Affected Departments are encouraged to explore a range of strategies to provide for written language assistance or the translation of vital documents, including providing “on-site” interpretations of vital documents or brainstorming suitable alternatives to written documents. A document is considered vital if it contains information that is critical for obtaining federal services, benefits, or is required by law.

## **B. LEP Resources Available**

The LEP Compliance Coordinator (Human Relations Director) in the Human Relations Department is responsible for examining all City services, providing outreach to the growing LEP community, and interfacing with all City Departments to help ensure meaningful access to LEP clients and customers. The LEP Compliance Coordinator is able to assist and support Departmental staff in assessing their specific needs and preparing a draft LEP document. The LEP Compliance Coordinator performs the role of resource and advocate for effective plan development.

The LEP Compliance Coordinator also coordinates the Spanish Language Assessment Tool used by hiring Departments in conjunction with normal Human Resources processes to evaluate the Spanish language proficiencies of prospective employees whose jobs may require or prefer bi-lingual abilities, or current employees who may be called upon by the Department to assist their Spanish-speaking customers or clients.

The LEP Compliance Coordinator *is not* unilaterally responsible for directly providing translation or interpretation services to City Departments. The LEP Compliance Coordinator *is* responsible for identifying and maintaining a network of qualified community resources for referral to City Departments.

Human Resources can provide guidance and support in the recruitment, retention and professional development of bi-lingual staff (staff fluent in two languages) or staff with specific skills (certifications, credentials) in translation/interpretation assistance.

## **C. LEP Enforcement**

While planning is an important part of ensuring that reasonable steps are being taken to provide meaningful access to LEP individuals seeking services, benefits, or information, there is no blanket requirement that the plans themselves be submitted to federal agencies providing federal financial assistance. In certain circumstances, such as in complaint

investigations or compliance reviews, recipients may be required to provide to federal agencies a copy of any plan created by the recipient.

Most federal agencies have an office that is responsible for enforcing Title VI of the Civil Rights Act. The Coordination and Review Section (COR) of the Civil Rights Division of the Department of Justice has taken the lead in coordinating enforcement.

#### **D. City Services and Public Signage**

The Neighborhood Services Department contracted for a Hispanic Community Survey to be conducted in 2008 that would assess how City services are perceived and utilized by Hispanic residents. This report also identified gaps in service for those with a language barrier. Recommendations included developing consistent design standards and contracting for expert translation services. The Report has been provided to Neighborhood Services and Human Relations. The results of the survey will assist in the responsibility for on-going improvements in the elimination of language barriers as the City continues to construct or renovate new facilities. Technical support and assistance to the Department is available through the Human Relations Department. Also, while not specifically addressed within Title VI legislation, the City of Winston-Salem may choose to utilize signage that is written in Spanish, as needed.

#### **E. City Web Pages**

Again while not specifically addressed within Title VI legislation, the City of Winston-Salem, through its Information Systems and Marketing and Communications Departments, should assume responsibility for review of its official internet presence and how critical information on essential services for Spanish speakers, and future target languages, can be provided in a creative, concise, cost-effective manner on the web. Technical support and assistance to the Department is available through the Human Relations Department.

#### **F. LEP Critical Services**

**The following LEP Critical Services City Departments** fall under the “reasonable steps to ensure meaningful access” standard based on the receipt of federal funding and/or their significant interaction with the general public:

1. Emergency Services
2. Police
3. Fire
4. Inspections
5. Utilities
6. Human Relations
7. Housing Neighborhood Development
8. Neighborhood Services
9. Economic Development

10. City Link
11. Marketing and Communications
12. Winston-Salem Transit Authority
13. Department of Transportation
14. Stormwater
15. Streets
16. Vegetation Management
17. Recreation and Parks
18. Information Systems
19. Planning

All City departments, with technical assistance and support from Human Relations, are required to be conscious as circumstances change to continue and evaluate potential barriers to programs and services.

Under Title VI, any City department that receives grants and loans from the federal government should have in place a written plan for identifying LEP individuals and including language assistance measures.

#### **G. LEP Policy Goals**

1. Oral Information (Language Assistance)
2. Written Information (Translation of Vital Written Materials)
3. Electronic Information (Web Pages)
4. Signage (Within Publicly Accessible Buildings maintained/Administered)
5. Staff Training
6. Outreach

#### **VI. Evaluating City performance under the LEP Policy Goals**

- A. Contact the LEP Critical Services departments regarding their oral/written translation capabilities.
- B. Review foreign language translations on the City website (IS Department, Marketing and Communications Department).
- C. Conduct a field audit of bi-lingual building signage, as needed.
- D. Review current practices and explore new measures in staff training and outreach.
- E. Utilize the comprehensive Hispanic Community Survey results of how Hispanic residents view City services.

#### **VII. Policy and Plan Implementation Recommendations**

- A. Continue offering participating employees increased options for skills improvement, tuition reimbursement, or incentive pay based on their Spanish language skills. (Human Relations; Human Resources)
- B. List expert, professional contractors or trainers available to provide Spanish language translation and interpretation services on the City intranet site. (IS; Human Relations)
- C. Provide department directors with mandatory Title VI Training beginning in FY 2009-2010. (City Attorney's Office, Human Resources)
- D. Incorporate an LEP overview into management/supervisory training for departments receiving federal funds. (City Attorney's Office, Human Resources)
- E. Re-evaluate bi-lingual or multi-lingual hiring policy and related recruitment incentives as part of the overall update of the Personnel Ordinance. (Human Resources)
- F. Clarify individual City departmental responsibilities versus those of Human Relations under Title VI, Executive Order 13166.
  - 1. Each federal grant recipient expected to have an LEP plan.
  - 2. Human Relations LEP Compliance Coordinator serves as a resource/advocate for plan development.
- G. Use the Spanish Language Resource Liaison (Human Relations Specialist) in assessing barriers to language interpretation and understanding for users of City services.
- H. Use telephonic translation and/or bi-lingual employees as an asset to City Link.
- I. Encourage the Critical Service departments to utilize their state or national affiliates as resources to present and provide appropriate document translations as needs arise.
- J. Complete a review of the City website to ensure the effectiveness of Spanish translation.
- K. Use bi-lingual signage on display at various work sites, as needed.
- L. Use results of the Hispanic Community Survey of how Hispanic residents view City services and use findings to increase understanding and motivate improvements. Continue to draw upon the survey to better develop outreach, communications, and city services. (City Departments)
- M. Although Title VI and E.O. 13166 specifically obligate only those City Departments that directly receive federal funding, the fundamental philosophy and practice of the City of Winston-Salem is that **all City Departments** should strive to take reasonable steps to ensure meaningful access to their programs, activities, and services by LEP individuals.

## **Outline of LEP Grievance Process**

- I. Intake
  - A. Jurisdiction and Standing
    - 1. City Code
    - 2. Federal Laws
    - 3. Mediation
  - B. Complaint Form
    - 1. Required Information
    - 2. Required Signatures
  - C. Record Keeping/Filing
    - 1. Case Tracking System
    - 2. Storage and Files
- II. Notification
  - A. Content of Notification Letter
  - B. Time Frames/Deadlines
- III. Processing
  - A. Documentation
    - 1. Contract Agreements
    - 2. Photographs
    - 3. Public Information
      - a. Police Reports
      - b. Tax Records
    - 4. Releases/Consent Forms
  - B. Interviews
    - 1. Identifying Witnesses
    - 2. Witness Statements
  - C. Investigation Timeline
    - 1. 45-Day Turnaround
    - 2. Exception to 45-Day Turnaround
- IV. Final Determination and Case Closure
  - A. Findings of Fact
  - B. Mediation Agreements
  - C. Recommendation from the Director
  - D. Final Determination Notification from the City Manager
  - E. Case Closure Form
- V. Levels of Appeal
  - A. City Manager
  - B. Attorney

## LEP Grievance Process

**The following policy reflects the LEP grievance process procedures for complaints filed with the Human Relations Department:**

- I. Intake
  - A. Jurisdiction and Standing

A Limited English Proficiency complaint is a complaint that is based on a citizen's right reasonable access to city-related services, grants, donations, properties, or programs that are funded in whole or in part by federal funding. The Human Relations Department is authorized to advise complainants regarding their rights and to investigate complaints based on a violation of reasonable access. It is the responsibility of the Human Relations Department to consult with potential complainants via telephone or in person regarding such complaints.

1. Jurisdictional Basis under the Winston-Salem City Code

The Human Relations Department will determine the jurisdiction of the complainant's concerns by assessing whether the concerns fall within the realm of the Winston-Salem City Code. The Human Relations Department has the jurisdiction to assist complainants regarding the following limited English proficiency issues:

- a. ***A Limited English Proficiency (LEP) Person*** is defined as someone who does not speak English as a primary language and has a limited ability to read, write, speak or understand English.
    - b. ***Federal Financial Assistance*** includes but is not limited to, grants and loans, grants or donation of federal property, the detail of federal personnel, the sale, lease or permission to use federal property at little or no cost, and any other federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.
    - c. ***The "Four Factor" Test***, as issued by the US Department of Justice in 2002, articulated a starting point for achieving Title VI compliance and is adopted by the City of Winston- Salem. Affected City Departments should use the Four Factor test to determine the "reasonable steps" they should implement in order to be Title VI compliant. The four factors that should be balanced are:
      - i. **Proportion of the general public served** or likely to be encountered by the program or Department – The greater the number of LEP individuals, the more likely it is that language services are required.

- ii. **Frequency of contact** with the general public dictates the level of contact and likelihood that language services are required.
- iii. **Nature and importance of the program, activity or service** will be determined by the importance of the program in relationship to the need for language services.
- iv. **Resource availability** will be dependent upon the size and budget of the Department which, in effect, will deem what is reasonable.

## 2. Federal Laws

- a. ***Title VI - Section 601 of the Civil Rights Act of 1964*** 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.
- b. ***Executive Order 13166 of the Civil Rights Act of 1964*** Federal agencies and recipients of federal financial assistance must take reasonable steps to ensure meaningful access to their programs to limited English proficient individuals who are five (5) percent of the total population or 1000 individuals, whichever is less.

## 3. Mediation

Based on the delegating authority of the Human Relations Director, a Human Relations Specialist (also, “Specialist”) will advise the complainant and respondent of his/her option to mediate the complaint. The mediation will remain available to the parties throughout the investigative process.

The Human Relations Specialist will implement mediation only after both the complainant and respondent have agreed to it. Such an agreement must be in writing and signed by both parties (see the attached template for Mediation Agreements).

The Mediation Agreement will set forth the terms and conditions of any and all mediation sessions that will be entered into by the parties. The Human Relations Specialist will preside over the mediation sessions and set the rules of protocol. Each party will be allowed to speak, uninterrupted, while the other party listens. Afterwards, the Specialist will ask the opposite party to repeat the

key points the other party made. Then, the Specialist will communicate the key points made by both parties. The Specialist will then encourage resolution by asking for proposed solutions from both parties and negotiating the proposals until a final resolution is achieved. Once a final resolution is achieved, the Specialist will note the proposals and record them in a Conciliation Agreement. If mediation fails, landlords and/or tenants may pursue legal action through court or a private attorney. Both parties may refuse to mediate at anytime during the mediation process.

## B. Complaint Form

The LEP Complaint Form (see the attached LEP Complaint Form) will be completed by the complainant. It is not the practice of the Department to process anonymous complaints. The complainant must write the exact basis for filing the complaint. The complaint must be filed within one year of the allegation. The complaint must also write the dates, locations, and witnesses for all issues noted in the complaint. The complainant must also write the remedy that is sought as a result of filing the complaint. A copy of the complaint form will be made available to the respondent, upon request, and any other city administrators/officials who have a legitimate need to know. Otherwise, the Human Relations Department will deem the complaint form and other information. The LEP Complaint Form must include the notarized signature of the complainant.

### 1) Case Tracking System

The Human Relations Department will track all LEP complaints through an internal tracking system. This system will be maintained by the Human Relations Administrative Secretary. The Administrative Secretary will generate a report that reflects all LEP Complaints. This report will be shared with the City Manager's Office and the City Attorney's Office, as needed.

### 2) Storage and Files

All documents pertaining to an LEP complaint will be put into a complaint file created by the Human Relations Specialist or Human Relations Administrative Secretary. Files will be organized and stored based on the fiscal year in which the LEP complaint was filed.

## II. Notification

### A. Content of Notification Letter

The Human Relations Director will mail each complainant and respondent a notification letter regarding the filing of the LEP complaint. The Human Relations Administrative Secretary will mail the notification letter by certified mail, return receipt requested.

At a minimum, the content of the notification letter will include:

1. the name of the complainant;
2. the name of the respondent;
3. the date the complaint was filed;
4. the basis of the complaint;
5. the name of the Human Relations Specialist assigned to investigate the complaint;
6. any deadlines within which the parties have to respond;
7. the availability of mediation as a means for resolution;
8. any appeal rights available to both parties; and
9. contact information for the Human Relations Specialist.

B. Time Frames/Deadlines

1. Deadlines for Parties' Responses

The complainant and respondent will have five (5) business days within which to respond to any requests for information or requests for interviews. Failure of the complainant or respondent to respond within this prescribed time will result in the possible closure of the complaint. Any requests for extensions of this five (5) day response time must be made to the Human Relations Specialist via writing or telephone call within the first five (5) day response time. The Specialist will confer with the party requesting the extension to determine a reasonable extended date. The Specialist will convey the request for extension to the opposite party in writing within three (3) days of the agreed upon extended date.

III. Processing

A. Documentation

The Human Relations Department will seek to gather documentation pertaining to the complaint in order to identify, request, retrieve, and collect all relevant, factual evidence pertaining to the filed complaint.

1. Contract Agreements

The Human Relations Specialist will request a copy of the written contract or other binding agreement immediately upon receiving the written LEP complaint form from the complainant. The Specialist will examine the agreement to assess the terms and conditions of the agreement as well as other pertinent information.

2. Photographs

The Human Relations Specialist may deem it necessary to take photographs of objects or areas that are relevant over the course of the investigation. These photographs may be used by the Specialist to analyze the credibility of asserted evidence.

### 3. Public Information

During the discovery process, the Human Relations Specialist will retrieve copies of relevant documents that are available, as per the NCGS § 132 (the Public Records Law), the Federal Freedom of Information Act, and/or other venues of public record. Such information may include, but will not be limited to criminal and civil records, sex offender records, inspection records, police reports, and tax records. The Human Relations Specialist may obtain this information by requesting it from the respective agencies or by accessing the information on the Internet.

### 4. Releases/Consent Forms

The complainant or respondent may sign a waiver that will authorize the Human Relations Specialist to obtain information that is only available upon the consent of the complainant or respondent. The complainant or respondent may also sign a release or consent form that would authorize the Human Relations Specialist to access medical information that the complainant or respondent deems necessary for a thorough investigation. Such waivers, consent forms, or releases must be witnessed by a Human Relations staff member in addition to the investigating Human Relations Specialist. The complainant, witness, and authorizing party will sign and date the waiver, consent form, or release in order for it to be deemed fully executed.

## B. Interviews

The Human Relations Specialist will advise all interested parties that the investigation, including information shared and investigation questions/answers, should be treated confidentially in order to maintain the integrity and credibility of the investigation.

### 1. Identifying Witnesses

The Human Relations Specialist, with the assistance of the complainant and respondent, shall identify witnesses who have information relevant to the filed complaint. The Specialist will compile the list of witnesses and contact each one, via written letter or telephone, for an interview. Upon interviewing the witnesses, the Specialist will make the witnesses aware of the nature of the complaint and the names of the complainant and respondent, unless it has been communicated by the complainant or respondent that his or her safety and welfare will be at risk.

## 2. Witness Statements

The Human Relations Specialist will prepare a list of witness questions. The Human Relations Specialist will confer with the Human Relations Director to ensure that the questions will be unbiased and will not lead the witness in his or her answers to the questions. The Human Relations Specialist will advise the witness that the questions and answers are confidential and should not be shared with anyone during the course of the investigation. The complainant and respondent are not privy to knowing the exact questions and answers posed to the witnesses. Documented responses from each witness will be treated as confidential information.

## C. Investigation Timeline

### 1. 45-Day Turnaround

The Human Relations Specialist will advise the complainant and respondent that he will make every reasonable effort to ensure that the housing complaint investigation is completed and closed within 45 (forty-five) business days from the original complaint filing date.

### 2. Exception to the 45-Day Turnaround

In the event that the investigation takes longer than 45 (forty-five) business days, the Specialist will advise the complainant and respondent as to the reasons for the delay and the approximate date it will be completed. If the complainant or respondent objects to the extended deadline, he or she must notify the Human Relations Director in writing within five (5) business days after receiving the notice from the Human Relations Specialist.

## IV. Final Determination and Case Closure

### A. Findings of Fact

The Human Relations Specialist will prepare a final report in which he analyzes the unbiased findings of fact as they pertain to the housing complaint. The report will include the complaint form, discovery items, witness statements, and other relevant documentation. This report will be submitted to the Human Relations Director for final review and determination.

### B. Mediation Agreements

The Conciliation Agreement (see attached Mediation Agreement template) will set forth the terms and conditions of the actual mediation sessions. Both parties will sign and date the Mediation Agreement. Afterwards, the Specialist and the Human Relations Director will sign and date the Mediation Agreement. A copy of

the fully-executed Mediation Agreement will be shared with the complainant and respondent. The Specialist will also retain a copy for the Commission's files. Once all interested parties have signed the Mediation Agreement, it will be deemed fully executed and the case file will be closed.

C. Recommendation from the Director

At the conclusion of the Final Report, the Human Relations Specialist will recommend to the Human Relations Director an unbiased, neutral investigative assessment based on the facts collected during the investigation. The Human Relations Director will independently assess the evidence and facts reported in the final report. The Director will advise the Specialist if there are areas in the investigation that need further examination or analysis. The Director will also consider the credibility and objectivity of the evidence gathered and witnesses interviewed in making the final determination. The final determination will be based on the Winston-Salem City Code and other relevant laws and ordinances.

D. Final Determination Notification from the Director

The final determination and the basis of the determination will be articulated in a determination letter from the Director to the complainant and respondent. The notification letter will also include any appeal rights available to the parties. The Director's determination letter will represent the final decision on behalf of the Human Relations Department.

E. Case Closure Form

Upon the acceptance of the final investigation report by the Director and the Director's letter of determination to the parties, the case will be deemed closed by the Human Relations Commission. The Human Relations Specialist will complete a case closure form that will become a part of the housing complaint file. The form will indicate the basis of the complaint, how the complaint was resolved, and the dates that notification letters were mailed. The form will be signed and dated by the Specialist and the Director.

V. Levels of Appeal

A. City Manager's Office

If the complainant or respondent wishes to appeal the final decision made by the Human Relations Director, he or she may file such an appeal with the City Manager. If the complainant or respondent wishes to appeal the final decision of the City Manager, he or she may consult with a private attorney for further review and/or investigation.

***This policy shall be reviewed and updated as needed by the City Manager and City Attorney.***