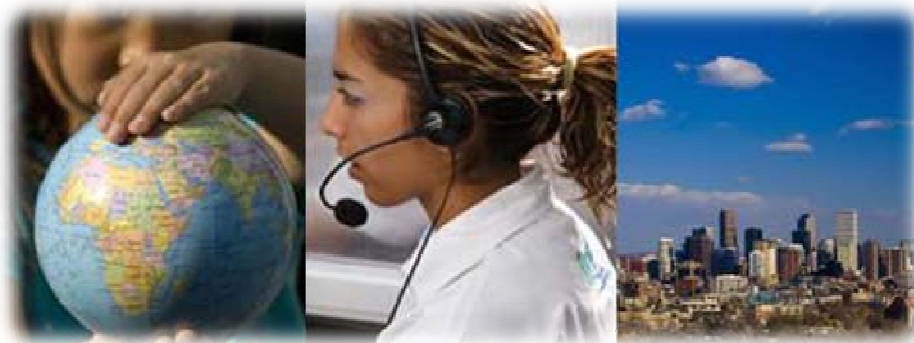


An Analysis of the Systemic Problems Regarding Foreign Language Interpretation in the North Carolina Court System and Potential Solutions



Prepared by: Emily Kirby, Sarah Long, and Sonal Raja

University of North Carolina School of Law

Immigration and Human Rights Policy Clinic

Faculty Advisor: Deborah Weissman

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Emily Kirby
Sonal Raja
Sarah Long
UNC-CH Law Students

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor of Law
Director of Clinical Programs

http://www.law.unc.edu/documents/clinical_programs/foreignlanguageinterpretationproblemsnc.pdf

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EXECUTIVE SUMMARY

The U.S. Census estimates that eight percent of North Carolinians speak a language other than English at home. Indeed, North Carolina's population has seen marked demographic shifts over the past few decades. North Carolina has witnessed a 1,000% growth rate in its Hispanic population; Hispanics now comprise almost eight percent of the state. In addition to a growing Hispanic community, North Carolina has also seen an influx of Vietnamese and Burmese populations in recent decades. While it is difficult to identify what percentage of these individuals speak a language other than English, data like the census figure above indicate the existence of a sizeable portion of the state's population that cannot communicate fully in English. This presents a challenge to North Carolina government and other institutions that seek to accommodate the state's changing identity.

As the state's Limited English Population (LEP) grows in size, so does the frequency with which these individuals must interact with the court system. Currently, there is no state statutory or administrative guarantee to a foreign language court interpreter. The right to a court interpreter for criminal defendants is grounded in the U.S. Constitution, specifically in the Sixth Amendment, and the Fifth and Fourteenth Amendment due process clauses.

North Carolina's policies and practices with regard to interpreters in the court raise a number of legal concerns. First, unlike a number of states, North Carolina has, to date, declined to issue a written mandate granting the right to an interpreter in civil proceedings, despite the fact that these cases often raise important due process issues implicated in eviction hearings, parental rights proceedings, and domestic violence cases. Second, North Carolina Administrative Office of the Courts (AOC) guidelines on court interpretation allow for the recoupment of interpreters' fees in certain cases, assessed as court costs. Third, the failure to properly implement a rigorous

program for court interpreters has resulted in haphazard interpretation practices that fail to comply with national standards and best practices and thus impact meaningful access to the courts. In addition to raising constitutional concerns, the state's failure to provide interpreters to civil litigants and its charging of some litigants for the cost of their court interpreter violates Title VI of the 1964 Civil Rights Act, which prohibits discrimination on the basis of race, color or national origin in programs receiving federal financial assistance.

The authors, through their own observations and interviews, learned of a number of issues concerning access to court interpreters and quality of court interpretation.

In the course of preparing this paper, the authors observed court proceedings in six North Carolina counties approximately three times a week for a period of three months to assess the state of court interpretation in North Carolina. They observed criminal, mixed civil and criminal, juvenile, and domestic violence courts. The authors also interviewed over thirty attorneys and judicial officials, all of whom provided firsthand knowledge of their experience with LEP litigants and the court interpreters that serve them. The authors, through their own observations and interviews, learned of a number of issues concerning access to court interpreters and quality of court interpretation. Key problems regarding access to court interpreters discussed in this paper include:

VI. Interpreters are not provided on a reliable basis for LEP litigants who speak a language other than Spanish.

VII. In some counties, interpreters are not provided for first appearances.

VIII. Indigent defendants are sometimes assessed the court interpreters' fee as court costs.

IX. Widespread confusion exists as to which party the interpreter serves.

X. Interpreters are not provided in Small Claims courts.

XI. Courts often rely on "volunteer interpreters," such as friends or family members of LEP litigants, whose qualifications are rarely evaluated.

XII. Latina/o litigants are failing to show up for court dates, and those that do are not given notice that a Spanish interpreter is available if needed.

XIII. Lack of access to court interpreters, particularly for those litigants who speak a language other than Spanish, results in delay and inefficiency in proceedings and impacts the entire court system.

Additionally, the authors have identified a number of quality issues in court interpretation currently provided to LEP litigants. In the course of their court visits, the authors have witnessed firsthand court interpretation that has failed to comply with recognized national and state guidelines. Instances in which the AOC guidelines provide inadequate standards for court interpreters have also been noted. Key quality-issue findings that represent violations of established protocol include:

- Interpreters are failing to interpret fully and accurately.
- Interpreters are summarizing what a judge and/or attorney says to a litigant and what a litigant says to a judge and/or attorney.
- Interpreters are failing to alert a judge when they are unfamiliar with a term stated in the source language and cannot interpret it into the target language.
- Interpreters are not interpreting for the court, neglecting to convey instructions from the judge such as how to enter a plea or when court will resume after recess.
- Interpreters are engaging in side conversations with litigants.
- Interpreters are addressing the court in the first person, instead of referring to themselves in third person.

As the state's Limited English Population (LEP) grows in size, so does the frequency with which these individuals must interact with the court system. Currently, there is no state statutory or administrative guarantee to a foreign language court interpreter. The right to a court interpreter for criminal defendants is grounded in the U.S. Constitution, specifically in the Sixth Amendment, and the Fifth and Fourteenth Amendment due process clauses.

The failure of court interpreters to follow protocol affects the quality of interpretation provided and create obstacles for LEP individuals who seek to access to the court system.

Individuals who are denied the opportunity to fully and accurately communicate with the court are denied meaningful access to the court.

Lastly, some North Carolina judges and attorneys appear to lack familiarity with standards and procedures for working with court interpreters. The authors' observations include:

- Some judges are addressing their comments and questions to the court interpreter instead of the LEP litigant.
- Judges are not moderating their speech patterns to accommodate a court interpreter.
- In some counties, judges are failing to introduce the interpreter to the courtroom, explain the interpreter's role, or administer an oath to an interpreter.
- On some occasions, judges are not fully evaluating the qualifications of non-certified interpreters, and are allowing friends and family members of an LEP litigant to serve as interpreters, despite conflicts of interest.
- Some attorneys fail to make arrangements for a court interpreter for their client.
- Some attorneys attempt to proceed in cases in which an interpreter is needed but is not present.

This policy report analyzes how advocates for LEP litigants can best address access and quality issues with foreign language court interpretation.

There are several policy options advocates may consider to address problems with court interpretation. These policy options are:

- Lobby for a written mandate (court or administrative order or state statute) to require the court to provide that an interpreter be appointed for an LEP litigant, witness, or interested parent or guardian of a minor child, when needed, in all civil and criminal cases at court expense.
- File a Title VI complaint against AOC with the U.S. Department of Justice.

- File a lawsuit against AOC alleging constitutional violations, namely the failure to provide court interpreters for civil LEP litigants and to provide an interpreter at state expense for all criminal defendants.
- Enter into negotiations with AOC to seek improvement in court interpretation.

These four options are evaluated against the following five criteria:

- Timeliness of action.
- Client Expense
- Political feasibility
- Legitimacy
- Effectiveness

Policy Recommendations

Based on the analysis, we recommend three options for consideration. These options, which are not mutually exclusive and are listed in no particular order, are:

- Lobby for a written mandate (court or administrative order or state statute) to require the court to provide that an interpreter be appointed for an LEP litigant, witness, or interested parent or guardian of a minor child, when needed, in all civil and criminal cases at court expense.
- File a Title VI complaint against AOC with the U.S. Department of Justice.
- Enter into negotiations with AOC to seek improvement in court interpretation.

These options were chosen as they are the most timely, legitimate, effective (including financially cost-effective), and politically feasible strategies to address quality and access problems with court interpretation. In addition, most of the recommended alternatives are non-adversarial options that do not threaten a future working relationship with AOC. Lobbying for a written mandate was chosen for recommendation in particular because it is the most comprehensive solution to the problem of limited access to court interpreters.

In addition to the recommended alternatives set forth above, this paper provides another recommended option that would complement any of the above strategies that might be used to improve access to the courts for LEP individuals. This recommended option is the formation of a statewide Task Force dedicated to improving the current limited access and variable quality of court interpretation across the state. The Task Force would implement a two-pronged approach to improving court interpretation. First, it would conduct more research on the issue in courtrooms in counties that the authors were unable to observe during the course of this project. Secondly, the Task Force would work directly with AOC to improve courtroom interpretation. The authors recommend that the Task Force set forth a mandate to address all of the problems identified above as well as in the body of this paper. This includes lobbying for a written mandate to guarantee access to court interpreters for all litigants, the most comprehensive solution the authors have identified. Additionally, the authors recommend that the Task Force pursue the following interim actions, which should not be considered an exhaustive list:

- Research and apply for grant money to improve interpreting services. Previous grantors of funds earmarked for language access issues include the Z. Smith Reynolds Foundation, the North Carolina State Bar, and the Governor’s Crime Commission.¹
- Encourage the Bar Association to implement training sessions for judges and lawyers to familiarize them with working with a court interpreter. CLE credit should be granted for these training sessions.
- Conduct surveys to measure how well judges and lawyers are aware of policies and procedures involving court interpretation.
- Create a comprehensive bench card or handbook to educate judges to replace the cursory materials currently offered online. The AOC could use as a model the 160-page “Interpreters in the Judicial System: A Handbook for Ohio Judges,” which addresses everything from establishing the need for interpreters in the court system; appointing an interpreter; waiving an interpreter; and assessing the qualifications of a court interpreter.

¹ North Carolina Court System: Interpreting Services Background, available at <http://www.nccourts.org/Citizens/CPrograms/Foreign/Default.asp>.

- Create an easily accessible interpreter complaint mechanism for LEP litigants to be posted on the AOC website.
- Invest in sound equipment for interpreters, such as Williams Sound Simultaneous Interpretation technology.
- Mandate continuing education training for court interpreters so as to keep pace with changes and improvements in the practice of court interpretation. Continuing education should cover ongoing exploration of professional conduct issues, terminology, and resources.

INTRODUCTION

In 1923, in the landmark case of *Meyer v. Nebraska*, involving foreign language instruction in schools, the Supreme Court stated that “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”² However, in the present day, nearly ninety years later, some people in the United States, including in the state of North Carolina, are still being denied equal access to the court system on the basis of their inability to communicate fluently in English. Due to the fact that there is a growing Limited English Proficient (LEP) population in North Carolina, non-English speakers are frequently obligated to interact with the court system. The largest segment of the state’s LEP population is Spanish-speaking Latinos/Hispanics. According to 2008 U.S. Census figures, Hispanics comprise 7.4% of the state’s population.³ Most of the Hispanic population growth is relatively new, occurring since the 1990s. In 1990, there were an estimated 44,000 Hispanics in North Carolina. By 2004, there were over 500,000. This represents a growth rate of over 1,000 percent, which greatly outpaces the nation-wide rate of 300 percent.⁴

In addition to a growing Latina/o community, North Carolina has also seen an influx in Vietnamese and Burmese populations in recent decades. While it is difficult to determine what percentage of these new immigrant populations speak their native language, and what percentage speak English, census data indicates that overall, eight percent of North Carolinians speak a language other than English in their homes.⁵ The most common foreign languages spoken in North Carolina are Spanish, French, Chinese, Vietnamese, Korean, Arabic, and Hmong.⁶

² *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (quoted in *U.S. v. Si*, 333 F.3d 1041, 1043 (9th Cir. 2003)).

³ United States Census Data, available at: <http://quickfacts.census.gov/qfd/states/37000.html>. Latino/Hispanic is used throughout this policy paper interchangeably with Hispanic, Latino, or Latina/o.

⁴ John D. Kasarda and James H. Johnson, *The Economic Impact of the Hispanic Population on the State of North Carolina*, Frank Hawkins Kenan Institute of Private Enterprise, Kenan-Flagler Business School, at page 10 (2006).

⁵ United States Census Data, available at: <http://quickfacts.census.gov/qfd/states/37000.html>.

⁶ See http://census.state.nc.us/static_cen00_pl_highlights.pdf.

North Carolina does not mandate a court interpreter in either a criminal or civil setting for LEP litigants. Interpreters are provided for criminal defendants, based on U.S. Constitutional guarantees of due process provided in the Fifth and Fourteenth Amendments, and the right to confrontation as provided by the Sixth Amendment. When an interpreter is provided in these cases oftentimes the services provided are inadequate. Currently, there are a number of access and quality issues with interpreters in the North Carolina court system. Through our observations, interviews, and best practice research we have identified a number of systemic problems. These issues, divided into “quality” and “access” problems, are discussed below.

The largest segment of the state’s LEP population is Spanish-speaking Hispanics. According to 2008 U.S. Census figures, Hispanics comprise 7.4% of the state’s population. Most of the Hispanic population growth is relatively new, occurring since the 1990s. In 1990, there were an estimated 44,000 Hispanics in North Carolina. By 2004, there were over 500,000. This represents a growth rate of over 1,000 percent, which greatly outpaces the nation-wide rate of 300 percent.

PART ONE: AN ANALYSIS OF THE LAW REGARDING ACCESS TO THE COURTS FOR NON-ENGLISH SPEAKERS

I. Federal Law

A. Federal Criminal Case Law

The leading case in the area of the right to an interpreter for a defendant in a criminal case is *U.S. ex rel. Negrón v. State of N. Y.*⁷ In *Negrón*, the Second Circuit Court of Appeals held that when a court is “put on notice of a defendant's severe language difficulty,” it must “make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.”⁸ The court founded this right in both “the Sixth Amendment’s guarantee of a right to be confronted with adverse witnesses”⁹ and “the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment.”¹⁰

Several other federal criminal cases provide representative examples showing the existence of a general consensus that the defendant in a criminal case has the right to an interpreter. One such case is *U.S. v. Carrion*.¹¹ In *Carrion*, the First Circuit affirmed *Negrón* and invoked the Sixth Amendment, stating that “the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered.”¹² The *Carrion* court also invoked the idea of due process and fundamental fairness, stating that “no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”¹³

⁷ U. S. *ex rel. Negrón v. State of N. Y.*, 434 F.2d 386 (2nd Cir. 1970).

⁸ *Id.* at 390-91.

⁹ *Id.* at 389.

¹⁰ *Id.* at 389 (quoting *U.S. ex rel. Negrón v. State of N. Y.*, 310 F.Supp. 1304, 1309 (D.C.N.Y. 1970)).

¹¹ *U.S. v. Carrion*, 488 F.2d 12 (1st Cir. 1973).

¹² *Id.* at 14.

¹³ *Id.*

Another case recognizing a criminal defendant's right to an interpreter is *U.S. v. Cirrincione*.¹⁴ The court provided a list of four factors to determine when due process has been denied to a defendant in the interpreter context, stating:

We hold that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact.¹⁵

The court in *Cirrincione* found that due process had not been denied to the particular defendant in this case when he was not provided an official interpreter because the trial court did review his claim of need for an interpreter and found that he was in fact able to speak and comprehend English.¹⁶

Even though it is not controversial that a non-English-speaking criminal defendant has a right to an interpreter, the issue of whether a non-indigent defendant has to pay for his or her own interpreter is less settled. Even the Second Circuit, which decided *Negrón*, has apparently not been willing to extend the right to have the state pay for an interpreter to non-indigent defendants. In a case decided three years before *Negrón* called *U.S. v. Desist*, the court found that a defendant named Nebbia, who was not indigent, did not have “an absolute right to a free simultaneous translator.”¹⁷ When the *Negrón* decision came down a few years later, the court did not specifically address the question of whether a non-indigent defendant was entitled to have an interpreter provided at government expense, but it in a footnote it did distinguish *Desist*, noting that in that case the defendant was not indigent, unlike the defendant in *Negrón*.¹⁸ *Desist*

¹⁴ *U.S. v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985).

¹⁵ *Id.* at 634.

¹⁶ *Id.* at 634-35.

¹⁷ *U.S. v. Desist*, 384 F.2d 889, 901, 903 (2nd Cir. 1967).

¹⁸ *U.S. ex rel. Negrón v. State of N. Y.*, 434 F.2d 386, 391 n.9.

has not been overruled, so therefore whether a non-indigent defendant has to pay for an interpreter is presumably still an open question in the Second Circuit.

One case that provides a more defendant-friendly holding is *Geraldo-Rincón v. Dugger*.¹⁹ In this case, the defendant had counsel who had been retained, and the attorney made a request for an interpreter at state expense, saying that his client could not pay for an interpreter.²⁰ The trial court never undertook any investigation into the defendant's financial circumstances, and simply decided that since he had the means to pay for an attorney, he also had the means to pay for an interpreter.²¹ However, the defendant did not in fact have the money to obtain an interpreter, as his retained counsel had been paid for by someone other than himself.²² The court found "that the trial judge's refusal and failure to inquire into Petitioner's need for and ability to pay for an interpreter violated his Sixth Amendment right to confrontation and his right to due process of law."²³

B. Federal Court Interpreters Act

Although there is a federal statute related to court interpreters,²⁴ it only mandates that interpreters be used in cases that were "filed by the United States in federal district courts."²⁵ Therefore, it does not provide a basis for arguing that interpreters are required within the North Carolina state court system.

¹⁹ *Geraldo-Rincón v. Dugger*, 707 F.Supp. 504 (M.D. Fla. 1989).

²⁰ *See id.* at 506.

²¹ *See id.*

²² *See id.*

²³ *Id.* at 507. Although the court in *Desist* did not require across-the-board the appointment of an interpreter at state expense regardless of indigency status, it did state that trial courts should not presume that a defendant has the ability to pay for an interpreter even if she/he as retained counsel.+

²⁴ 28 U.S.C. §§ 1827-1828 (2006).

²⁵ Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C.L.Rev. 1899, 1931 (2000).

C. Federal Civil Case Law

Federal civil case law provides some examples of court decisions holding that an interpreter is required in specific types of cases. For example, in *Augustin v. Sava*, an asylum case, the Second Circuit held that “the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated,” which entails the provision of “an accurate and complete translation of official proceedings.”²⁶

However, in *Abdullah v. INS*, the same court later reaffirmed *Augustin*,²⁷ but said that the situation at hand was different.²⁸ In *Abdullah*, the petitioners were not in a deportation hearing, but rather were challenging the lack of interpreters in INS interviews for Special Agricultural Worker status, for which they had applied.²⁹ The court said that while the workers had “a significant interest” in getting immigration status, “it is qualitatively different from the interest of one defending against criminal prosecution, deportation or exclusion.”³⁰ The court described the difference, saying that “the government has not sought out individuals with the purpose of depriving them of their liberty or expelling them from the country; rather, aliens have affirmatively petitioned the government for a status enhancement, whose validity it is their burden to establish.”³¹ The court concluded that “[i]n such a situation, it is reasonable to require petitioners to make suitable arrangements for the provision of the proof necessary to meet their burdens.”³² Although the rationale for the court’s decision is not favorable for supporting an

²⁶ *Augustin v. Sava*, 735 F.2d 32, 37 (2nd Cir. 1984). *Augustin* provides vague grounds for claiming the right to an interpreter, as the court noted that “[t]he requirements of the dupe process clause are flexible and dependent on the circumstances of the particular situation examined.”

²⁷ *Abdullah v. INS*, 184 F.3d 158, 164-65 (2nd Cir 1999).

²⁸ *Id.* at 165.

²⁹ *Id.* at 160-61.

³⁰ *Id.* at 165.

³¹ *Id.*

³² 184 F.3d at 165.

argument that all civil litigants should have a right to an interpreter, it should be noted that however, that this case arose from the lack of interpreters in INS interviews and not in a courtroom context.³³

Moreover, the *Abdullah* court provides some basis of support for at least some civil litigants having the right to an interpreter. The court notes that when courts consider claims involving due process, they are to consider the factors enumerated in *Mathews v. Eldridge*.³⁴ The court restated the Mathews factors as: “1) the interests of the claimant, 2) the risk of erroneous deprivation absent the benefit of the procedures sought and the probable value of such additional safeguards, and 3) the government's interest in avoiding the burdens entailed in providing the additional procedures claimed.”³⁵ Even though the *Abdullah* court found that an analysis of these factors came out against those seeking an interpreter in this instance,³⁶ the *Mathews* factors can potentially be applied to argue that interpreters should be required to be provided in certain high-stakes civil cases, such as eviction proceedings.³⁷ Using the *Mathews* factors to bolster arguments for the necessity of interpreters in civil cases is a starting point.

Another case that should be mentioned is *In re Morrison*, a bankruptcy case that might also be distinguished from circumstances concerning criminal or civil LEP litigants³⁸ This case involved hearing impaired debtors, and the bankruptcy court said that since there is “no constitutional right to obtain a discharge [of debts in bankruptcy], the Court can find no constitutional infirmity in denying Debtors' request for court provided interpreting services on

³³ It is worth noting that the plaintiffs did petition the U.S. Supreme Court to grant certiorari and the Court declined to consider the case. Denial of Certiorari, *Abdullah*, 529 U.S. 1066 (No. 99-1162).

³⁴ 184 F.3d at 164 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

³⁵ 184 F.3d at 164 (citing 424 U.S. at 334-35).

³⁶ 184 F.3d at 164.

³⁷ Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C.L.Rev. 1899, 1928, n.162 (2000).

³⁸ 22 B.R. 969 (N.D. Ohio 1982), reh'g. den., 26 B.R. 57 (N.D. Ohio 1982).

either due process or equal protection grounds.”³⁹ The Americans with Disabilities Act of 1990, enacted after the decision in *Morrison* might serve to obviate this holding.⁴⁰

D. North Carolina’s Provision of Interpreters

North Carolina’s Administrative Office of the Courts (AOC) specifically states in its guidelines regarding interpreters that “[t]he Judicial Branch is not authorized to provide interpreters to parties who are required to bear their own costs of representation (for example, civil and domestic litigants with some exceptions and non-indigent criminal defendants).”⁴¹

Because of the lack of strong statements in federal civil cases that an interpreter is constitutionally required for all non-English-speaking civil litigants, as well as the lack of strong statements in federal criminal cases that an interpreter should be provided at government expense for all non-English-speaking defendants regardless of the defendant’s indigency status or the type of case, federal case law invoking constitutional principles may be somewhat anemic in providing support for the argument that North Carolina must provide interpreters at state expense in all types of court cases.

However, there is another route to support the idea that North Carolina is obligated to provide interpreters to all litigants who need them—compliance with Title VI of the Civil Rights Act of 1964. Title VI will be discussed in detail later in this paper, and the arguments under Title VI are stronger than the constitutional arguments discussed above. It is still important to understand the constitutional arguments, however, as they can serve as a way to bolster a Title VI argument and show that at least in certain types of cases, the right to an interpreter at government expense can be based on more than one theory.

³⁹ *Id.* at 970.

⁴⁰ 42 U.S.C. §§ 12101-12213.

⁴¹ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.3.

II. State Law

A. State Approaches to the Right to an Interpreter in a Criminal Context

State criminal cases examined across jurisdictions present the same type of situation as federal criminal cases. There appears to be general agreement that there is a constitutional right for a criminal defendant to have an interpreter, but a lack of consensus on whose duty it is to pay for the interpreter when the defendant is not indigent.

One example of a state-level case in which a court recognized the constitutional basis for the right to an interpreter is *Columbus v. Lopez-Antonio*, grounding the right in both “[t]he fundamental right to due process accorded to criminal defendants by the Fifth and Fourteenth Amendments”⁴² and in “[t]he Sixth Amendment rights to confrontation and effective assistance of counsel.”⁴³ Another state court case recognizing the right of a criminal defendant to an interpreter is *Garcia v. Texas*, in which the court found the right based on the Sixth Amendment’s Confrontation Clause.⁴⁴

On the issue of who pays for a criminal defendant’s interpreter, one case with a defendant-friendly holding is *Louisiana v. Lopes*.⁴⁵ In this case, the court found that “the trial court erred when it denied defendant's motion for the appointment of a translator on the ground that defendant was not indigent” and that a “defendant's need for a foreign (non-English) language translator should not be conditioned upon a defendant's financial status.”⁴⁶ However, the court did say that if a defendant were ultimately found guilty, the cost of the interpreter could be assessed to him.⁴⁷

⁴²*Columbus v. Lopez-Antonio*, 914 N.E.2d 464, 465 (Ohio Mun. 2009).

⁴³ *Id.*

⁴⁴ *See Garcia v. Texas*, 149 S.W.3d 135, 136 (Tex. Crim. App. 2004).

⁴⁵ *Louisiana v. Lopes*, 805 So.2d 124 (La. 2001).

⁴⁶ *Id.* at 128.

⁴⁷ *Id.* at 129

An example of a case cutting the opposite way is *Arrieta v. State*, in which the court stated that while “[i]t is not in dispute that an indigent, non-English-speaking criminal defendant is entitled to interpreting at public expense,”⁴⁸ a non-indigent defendant must pay for this service.⁴⁹

It is also worth noting that there is a possible Equal Protection argument in states that provide an interpreter at state expense to hearing impaired individuals while denying a government provided interpreter to at least some categories of non-English-speaking litigants. The Washington Court of Appeals accepted this argument in a case called *State v. Marintorres*, stating that a statutory scheme under which hearing impaired defendants received state-provided interpreters while non-English speaking defendants had to pay for their interpreters could not survive even the lowest level of scrutiny, rational basis review.⁵⁰ The government tried to assert that its rational basis was its interest in being reimbursed for the cost of court proceedings,⁵¹ but the court clarified that under rational basis review, “the test is not whether the *law* being challenged has a rational basis; it is whether there is a rational basis for the *classification* embodied by the legislative scheme.”⁵² The only justification the state gave for its differentiation between the hearing impaired and non-English speakers was that inability to speak English is not necessarily permanent.⁵³ The court rejected this as a rational basis for treating the two groups differently, stating that non-English speakers who had only been in the country a short time and had not yet had a chance to learn English were still denied an interpreter, and also that there are ways that some hearing impaired people can learn to

⁴⁸ *Arrieta v. State*, 878 N.E.2d 1238, 1244 (Ind. 2008).

⁴⁹ *Id.* at 1245

⁵⁰ *State v. Marintorres*, 969 P.2d 501, 505 (Wash. App. Div. 2 1999)

⁵¹ *Id.* at 505-06.

⁵² *Id.* at 506.

⁵³ *See id.*

communicate without an interpreter, such as by learning to read lips.⁵⁴ The same reasoning could apply to make an Equal Protection Argument in North Carolina, since the state does provide a court interpreter at government expense to hearing-impaired litigants.⁵⁵

B. State Approaches to the Right to an Interpreter in a Civil Context

To date, although some states have looked to constitutional principles in determining whether there is a right to an interpreter in civil proceedings on a case-by-case or categorical basis, no state court has explicitly recognized a constitutional right to an interpreter in civil proceedings. States that have identified a right to an interpreter in specific contexts ground the right in constitutional guarantees of fundamental due process and equal protection. The right to an interpreter, when granted, usually takes the form of a statutory guarantee; states also provide for the right in rules, administrative regulations, and judicial directives.

Many states have created the right to an interpreter in civil cases in piecemeal fashion, granting the right only in specific contexts. Seventeen of the forty-two states surveyed as part of New York's Brennan Center for Justice (Brennan Center) Language Access Project either restrict the provision of an interpreter to certain types of civil cases, or do not recognize the right to an interpreter in any type of civil proceeding.⁵⁶ Many of the states that fail to provide a written guarantee deem the appointment of an interpreter in a civil case within the discretion of the court.⁵⁷ Some states require the appointment of an interpreter only in specific civil cases, such as small claims, divorce, custody, or termination of parental rights cases.⁵⁸ Other states have

⁵⁴ *See id.*

⁵⁵ *See* N.C. Gen. Stat. § 8B-8 (2009).

⁵⁶ Laura Abel, *Language Access in State Courts*, Brennan Center for Justice at New York University School of Law, at 11, (2009), http://www.brennancenter.org/content/resource/language_access_in_state_courts/.

⁵⁷ *See, e.g.*, Az. Rev. Stat § 12-241; Ark. Code. Ann. § 16-64-111(b)(1); Del. Super. Ct. R. Civ. Proc. 43(e); Haw. R. Civ. P. 43(f); Mich. Ct. R. § Sec 2.507(D); Nev. R. Civ. P. 43(d); Tenn. S. Ct. Rule 42 § 3(a); and Va. Code. Ann. § 8.01-384:1(A).

⁵⁸ *See, e.g.*, Cal. Fam. Code §3032 and Cal. R. Ct. 3.61(5), Conn. Super. Ct. Juv. R. 32a-6.

recognized a constitutional right to an interpreter in employment⁵⁹ and child welfare⁶⁰ contexts. Still others, namely California and Florida, have recognized a constitutional right in small claims proceedings.⁶¹ Colorado will provide an interpreter in civil proceedings that involve juvenile delinquency, truancy, protection orders involving domestic abuse, and other specified parental rights contexts.⁶² Florida recognizes a right to an interpreter only when a “fundamental right” is at stake.⁶³ States ground these rights in constitutional guarantees of fundamental due process and equal protection.

A growing number of states have established a statutory right to an interpreter in *all* civil cases, regardless of the context.⁶⁴ Indeed, twenty-five of the forty-two states surveyed by the Brennan Center have a mandatory written requirement that an interpreter be provided in all civil cases.⁶⁵

However, despite the existence of a mandate to appoint interpreters for LEP civil litigants in certain states, the Brennan Center reports that many of these states lack an established procedure to ensure compliance with the mandate, or have varying degrees of compliance in different counties or areas of the state.⁶⁶ Additionally, many states that do have a statutory right to an interpreter in all civil contexts refuse to cover the costs of the interpreter or will pay only

⁵⁹ See *Figueroa v. Doherty*, 303 Ill. App. 3d 46, 50 (Ill. App. 1999).

⁶⁰ *In re Doe*, 57 P.3d 447 (Haw. 2002) (holding that in family court proceedings where parental rights are substantially affected, parents must be provided with an interpreter).

⁶¹ See *Gardiana v. Small Claims Court*, 59 Cal. App. 3d 412 (1976) and *Caballero v. Seventh Judicial Dist. Court ex rel. County of White Pine*, 167 P.3d 415 (Nev. 2007).

⁶² Colo. Chief Justice Directive, 06-03

⁶³ See Fla. R. Jud. Admin. 2.560(b).

⁶⁴ See, e.g., D.C. § Code 2-1902(a); Ga. S. Ct., Uniform R. for Interpreter Programs I(A); App. A, Idaho Code Ann. § 9-205; Ind. Code § 34-45-1-3; Iowa Code 622A.2; Kan. Stat. Ann. § 75-4351; Ky. Rev. Stat. Ann. § 30A.410; La. Code. Civ. Proc. §92.2(A); Me. S. Jud. Ct., Admin Order JB-06-03; Md. Rule for Courts, Judge and Attorneys, Rule 16-819; Mass. Gen. Laws Ch 221C §2; Minn. Stat. §§ 546.42, 546.43; Miss. Code. Ann. §§ 9-21-71, 9-21-79; Mo. Rev. Stat. 476. 803.1; Neb. Rev. Stat. § 25-2403; N.J. Jud. Dir. #3-04, Std. 1.2; Or. Rev. Stat. § 45.-275,42; Pa. Cons. Stat. §4401; Tex. Gov. Code § 57.002; Utah Code. Ann. §78B-1-146; Washington Rev. Code §2.43.030; Wis. Stat. Ann. §§ 885.37, 885.38.

⁶⁵ Laura Abel, *Language Access in State Courts*, Brennan Center for Justice at New York University School of Law, 12, (2009), http://www.brennancenter.org/content/resource/language_access_in_state_courts/.

⁶⁶ Laura Abel, *Language Access in State Courts*, Brennan Center for Justice at New York University School of Law, 61-64, (2009), http://www.brennancenter.org/content/resource/language_access_in_state_courts/.

after determining that the litigant is unable to pay.⁶⁷ Only ten states of the 25 that grant a right to an interpreter in all civil proceedings will pay for the interpreter without charging the litigant. These states are: Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Jersey, New York, Oregon, and Wisconsin.⁶⁸

C. New York: A Model State?

In addition to mandating the appointment of an interpreter for LEP civil litigants in all contexts when an interpreter is needed,⁶⁹ the New York court system also absorbs the costs of the interpreter.⁷⁰ That is, unlike in some other states, LEP litigants are not charged—either through upfront fees or later assessment as court costs—for the provision of the interpreter.

Section 217 of the Uniform Rules for N.Y.S. Trial Courts, implemented in 2007, sets forth the court’s obligation to provide an interpreter in all court proceedings, when needed. Section 217 states: “In *all civil and criminal cases*, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand or communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, *the court shall appoint an interpreter.*”⁷¹ In no circumstances are LEP litigants assessed the cost of their interpreter.

New York, like other states that have recognized the right to an interpreter, implemented its statute to address the growing needs of a large and diverse LEP population, who were increasingly coming into contact with the court system. Currently, certified interpreters in Manhattan alone serve the following 23 languages: Albanian, Arabic, Bengali, Cantonese,

⁶⁷ *Id.* at 19.

⁶⁸ *Id.* at 20.

⁶⁹ Administrative Order of the Chief Administrative Judge of the Courts, Part 217: Access to Court Interpreter Services for Persons with Limited English Proficiency (October 16, 2007).

⁷⁰ See Appendix A5, Summary of Interviews with New York City Language Access Advocates, notes from interview with Laura Abel.

⁷¹ N.Y.S. Uniform Rules § 217.2 (2007). Emphasis added.

Croatian, Dutch, French, Greek, Haitian Creole, Hebrew, Hindi, Italian, Japanese, Korean, Mandarin, Polish, Punjabi, Romanian, Russian, Serbian, Spanish, Urdu, and Wolof.⁷² In the early 2000s, the New York State Bar prioritized the issue of providing language access to LEP litigants, forming a Task Force to push for expanded access to interpreters for what the Bar saw as a growing, underserved population. Individuals involved in lobbying efforts on Section 217 whom we spoke with in New York also indicated that the state's acknowledgment that providing language access to LEP litigants is a cost-efficient business decision was another reason why the Rule was implemented.⁷³ More on the factors and forces that led to New York's 2007 Rule can be found in an attached appendix.

D. The Right to an Interpreter in North Carolina

1. Need for Foreign Language Interpreters in the North Carolina Court System

North Carolina has a growing LEP population. As this population increases in size in North Carolina, so does the frequency with which non-English speakers interact with the court system. The largest segment of the state's LEP population is Spanish-speaking Hispanics. According to 2008 U.S. Census figures, Hispanics comprise 7.4% of the state's population.⁷⁴ In addition to a growing Hispanic community, North Carolina has also seen an influx in Vietnamese and Burmese populations in recent decades. While it is difficult to determine what percentage of these new immigrant populations speak their native language, and what percentage speak English, census data indicates that overall, eight percent of North Carolinians speak a

⁷² New York Court Interpreter Frequently Asked Questions, <http://www.nycourts.gov/courtinterpreter/faqs.shtml#3>.

⁷³ See Appendix A5, Summary of Interviews with New York City Language Access Advocates, notes from interviews with Amy Taylor and Laura Abel.

⁷⁴ United States Census Data, available at: <http://quickfacts.census.gov/qfd/states/37000.html>.

language other than English in their homes.⁷⁵ The most common foreign languages spoken in North Carolina are Spanish, French, Chinese, Vietnamese, Korean, Arabic, and Hmong.⁷⁶

2. The Right to an Interpreter in North Carolina Criminal Cases

The North Carolina Constitution does not address the right to an interpreter in criminal cases, nor have North Carolina courts or regulations established one. The right to an interpreter in criminal cases is instead grounded in the U.S. Constitution, as discussed above.

North Carolina courts have addressed the issue of court interpreters on several occasions; however, these cases do not debate the right of an LEP litigant to an interpreter but instead examine interpreter qualifications and interpreter protocol. For example, the North Carolina Supreme Court has held that trial courts have the “inherent authority” to appoint an interpreter; the court may, in its discretion, appoint an interpreter when an interpreter is deemed necessary.⁷⁷ *State v. McLellan* indicates that an interpreter is “necessary” when a “person’s normal method of communication is unintelligible to those in the courtroom.”⁷⁸ The Policies and Best Practices Manual for the use of interpreters, issued by the AOC and discussed in more detail below, also contains this standard for the appointment of an interpreter.

The North Carolina Constitution does not address the right to an interpreter in criminal cases, nor have North Carolina courts or regulations established one. The right to an interpreter in criminal cases is instead grounded in the U.S. Constitution.

⁷⁵ United States Census Data, available at: <http://quickfacts.census.gov/qfd/states/37000.html>.

⁷⁶ See http://census.state.nc.us/static_cen00_pl_highlights.pdf.

⁷⁷ *State v. Torres*, 322 N.C. 440 (1988). See also *State v. Call*, 349 N.C. 382 (1998) (finding the decision to appoint an interpreter “rests within the sound discretion of the trial court.”)

⁷⁸ *State v. McLellan*, 286 S.E. 873, 874-75 (1982).

To date, a trial court's failure to appoint an interpreter has never been deemed an abuse of discretion in North Carolina. Courts have made it clear that in addition to their authority to appoint an interpreter, they may also revoke the appointment of an interpreter, if the court deems the LEP litigant is able to communicate with the court in English without an interpreter's services. In *State v. Overton*, the trial court agreed to the appointment of an interpreter for the indigent defendant, a Thai national charged with conspiracy and various drug offenses. After observing the defendant in the courtroom, the judge revoked the appointment of an interpreter, deeming the interpreter unnecessary. On appeal, the defendant contested the revocation of the trial court's order granting him an interpreter. The appellate court cited the order revoking defendant's right to an interpreter, in which the trial court judge found that defendant had eight years of schooling relating to reading and writing in English, and he was able to confer with his attorney in English. The appeals court found that the trial court's findings supported the order denying defendant the assistance of an interpreter, and accordingly overruled his assignment of error.⁷⁹

A survey of North Carolina cases discussing the appointment of a foreign language interpreter indicate that courts are generally tolerant of deviations from interpreter protocol as embodied in state and national guidelines.⁸⁰ Appellate courts largely defer to a trial court's determination of the quality of an interpreter's services.

The North Carolina Court of Appeals has held that it is not plain error if the interpreter fails to give an oath.⁸¹ Nor does failure to provide a certified interpreter to an LEP litigant

⁷⁹ *State v. Overton*, 298 S.E. 2d 695 (1982).

⁸⁰ *See, e.g.*, Appendix B2, AOC Policies and Best Practices for Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System; Appendix B3, North Carolina Judicial Bench card on Working with Court Interpreters; Court Interpretation: Model Guides for Policy and Practice in the State Courts, State Justice Institute (1995).

⁸¹ *State v. I.O.E.*, No. COA04-825 (N.C. Aug. 16, 2005) (holding that the interpreter's failure to take an oath was not plain error in a juvenile delinquency case in which juvenile was charged with battery with a dangerous weapon).

amount to plain error.⁸² In *State v. McLellan*, the court held that an interpreter must act impersonally, repeating the witnesses' testimony exactly without embellishment or deletion.⁸³ However, in *State v. Uvalle*, in which defendant was charged with felonious assault, the court rejected defendant's claim that the trial court committed reversible and plain error by not directing the interpreter for the State to repeat exactly the question asked by the State and the answer given by the witness, despite the fact that the State had to repeatedly ask the interpreter to repeat exactly what was asked and answered. Additionally, the interpreter failed to interpret in the first person on occasion, and engaged in conversations in Spanish with the testifying witnesses without interpreting for the court what was being said. The court held that although there were numerous difficulties with the interpreter, the defendant was not impeded from confronting or cross-examining the witness or presenting his own evidence for consideration.⁸⁴

In *State v. Macias*, the Spanish-speaking defendant in a drug-trafficking case argued that the trial court erred in refusing to allow a qualified Spanish to English interpreter to introduce an alternative translation of certain documents introduced by the State, on the grounds that the failure to allow this alternative translation was a violation of defendant's state and federal constitutional rights to due process and equal protection. The State, through a Spanish-speaking police officer, had interpreted the word "papales" to mean thousands of dollars, and the defendant rejected this interpretation. On appeal, the court pointed out that defendant had ample opportunity to cross-examine the officer about his interpretation of the pertinent documents, but

⁸² In *State v. Walker*, 167 N.C. App. 110, 605 S.E. 2d 647 (2004) an uncertified Spanish interpreter was allowed to interpret for three Spanish-speaking witnesses for the State's case. On appeal, the court held that it was not plain error for an uncertified interpreter to interpret for the State's witnesses in chief.

⁸³ *State v. McLellan*, 286 S.E.2d 873, 874-75 (N.C. App. 1982).

⁸⁴ *State v. Uvalle*, 565 S.E.2d 727 (N.C. App. 2002).

failed to do so. Accordingly, since the defendant failed to raise these constitutional issues at trial, they were barred from consideration on appeal.⁸⁵

Although North Carolina cases to date, are not supportive of the right to meaningful access to the courts for LEP individuals, advocates should expect that the courts will come to recognize the importance of interpreters and the cognizable claims raised by those who are denied interpreters in either civil or criminal proceedings. All individuals must be granted access to our state courts to remedy specific violations or to enforce rights. Advocates should expect that NC state courts will recognize the significance of the judicial system as arbiter of human rights, values, and ideals all of which makes access to the courts essential. Access to full standing in the courts is considered a noble principle, one that is affirmed in both the United States and North Carolina Constitutions.

3. North Carolina Court Rules and Guidelines on Interpreters

a. Rules of Evidence

According to North Carolina Rule of Evidence 604, an interpreter is subject to the statewide Rules of Evidence. Specifically, Rule 604 states: “An interpreter is subject to the provision of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.”

b. AOC Policies and Practices

In February 2007, the AOC issued a set of practices and policies addressing the use of foreign language interpreters in the North Carolina court system. The Policies and Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System illuminate a number of interpreter-related issues that have gone unaddressed by North Carolina courts. The guidelines discuss, among other issues, the general conduct, responsibilities

⁸⁵ State v. Macias, 572 S.E.2d 875 (N.C. App. 2002).

and role of the interpreter, the appointment and removal of interpreters, ethical limitation on interpreters' conduct, and certification of interpreters.⁸⁶ Three important AOC guidelines on interpreters are examined in this section: the decision of a court to appoint an interpreter, the proper role of the interpreter in the courtroom, and the certification process for interpreters.

It is unclear whether these guidelines serve as recommendations or carry the force of law. The cover letter from Judge Ralph Walker introducing the guidelines refers to the policies as “mandatory.” Indeed, much of the language is expressed in directives to the court system and to court interpreters, mandating that the interpreter “shall” follow one practice or another. However, consequences for failure to comply with certain guidelines are not addressed. Additionally, our court observations have revealed many deviations from the mandatory protocol set forth in the Policies and Practices guidelines. These observations will be discussed in more detail in Part Two of this paper.

The AOC “encourages each district to adopt local rules governing court interpreting and translating services that are consistent with these policies and best practices.”⁸⁷ However, only nine of North Carolina’s 100 counties have adopted local rules on interpreters accessible from the AOC website. These counties are: Durham, Edgecombe, Forsyth, Franklin, Granville, Mecklenburg, Vance, Wake, and Warren.⁸⁸ Local rules on interpreters largely incorporate the AOC guidelines. For example, the Ninth Judicial District state that it incorporates the AOC guidelines into its local rules; in addition, the Ninth Judicial District provides for local accreditation of its court interpreters, sets forth a rotating schedule for when court interpreters will appear in each county criminal court in the district, and details what disciplinary actions will

⁸⁶ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System.

⁸⁷ *Id.* at Section 6.1

⁸⁸ See AOC website, Local Rules, <http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Default.asp>.

be taken against an interpreter in case of a violation of its local rules.⁸⁹ A chart indicating what counties have adopted local rules regarding interpreters, and where these rules may be accessed online, is attached as Appendix D2.

i. Determining Whether an Interpreter is Needed

As indicated above, the court may appoint an interpreter, when, in its discretion, it determines that an interpreter is necessary. The AOC guidelines state that in order to best determine whether an interpreter is necessary, the court should ask the LEP litigant “open-ended” questions that require more than a one or two word response. The AOC guidelines do not give examples of what types of questions a court should ask of a litigant in order to best determine his need for an interpreter. North Carolina, as a member of the National Consortium of State Courts, has access to a number of state bench cards, handbooks and guidelines that detail what questions a court should ask a litigant to determine whether he needs the service of an interpreter.⁹⁰

ii. Certification of Interpreters

In order to become a certified interpreter in North Carolina, one must pass a written and oral exam created by the National Center for State Courts Consortium for Language Access in the Courts (of which North Carolina has been a member since 1999) and attend an orientation and a skill building workshop. Additionally, interpreter applicants must pass a criminal background check prior to certification.⁹¹

For cases in which a Spanish-language interpreter is needed, the AOC guidelines express a preference for ‘certified’ interpreters. Specifically, the guidelines state, in bolded text: “the

⁸⁹ See Ninth District Judicial Rules, <http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Documents/956.pdf>.

⁹⁰ Materials available from National Center for State Courts Resource Guide on Court Interpretation, available at: http://www.ncsc.org/Web%20Document%20Library/IR_BrowseTopicsA-Z.aspx.

⁹¹ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, §§ 8.1-8.3.

court shall give preference to an AOC certified interpreter/translator whenever possible.”⁹² The guidelines do not indicate what kind of process is required, or expected, of a court to ensure that the court secures a certified Spanish-language interpreter when one is needed. To fill in the gaps, some districts have implemented their own procedures for securing interpreters. A February 2010 order from Judge Baddour of Judicial District 15B indicates that if attorneys anticipate the need for a foreign language interpreter they should notify judicial support staff three days in advance of the publication of the trial calendar. Attorneys must indicate what kind of interpreter they need, when the interpreter is needed, and how long their motion or trial is expected to last.⁹³

If a certified interpreter is not available, the court may use another registered interpreter from the AOC’s Foreign Language and Translating Services Registry.⁹⁴ If no certified or registered interpreter is available, the court and attorneys should avoid acting as the interpreter because of conflict of interest concerns and the potential for distraction from their duties.⁹⁵ In some cases, a volunteer interpreter may be used, after their qualifications have been evaluated.⁹⁶ The AOC guidelines elaborate on how a judge should determine if a volunteer interpreter is qualified; these considerations include the individual’s mastery of English and the foreign language, his knowledge of idioms and slang, his knowledge of legal terminology, and whether he has any experience interpreting in other contexts.⁹⁷

⁹² See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.2.

⁹³ See Appendix B5, Judge Allen Baddour of District 15B’s Order on Requesting Interpreters .

⁹⁴ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.2.

⁹⁵ *Id.* at § 3.2.

⁹⁶ *Id.* at § 3.2.

⁹⁷ *Id.* at § 3.2.

For languages other than Spanish, the court does not require the interpreter to be a certified one. The court keeps a list of registered interpreters from which interpreters in other languages should be selected.⁹⁸

iii. The Role of a Foreign Language Interpreter: Courtroom Protocol

The AOC guidelines outlining the role of the interpreter in the courtroom are expressed as mandatory directives; what the interpreter “shall” do. For example, interpreters are ordered to interpret completely and accurately and convey the tone of the statements they are interpreting. Interpreters must inform the court when they become fatigued, or if they become concerned about their ability to interpret in a particular matter due to dialect differences or personal opinions. Interpreters must not give legal advice and must not act in any capacity as an advisor or counselor. They must, at all times, limit themselves to the act of interpreting.⁹⁹ Our observations on how fully interpreters are complying with AOC protocol are discussed in Part Two of this paper.

4. Costs for a Foreign Language Interpreter in Criminal Cases

Pursuant to N.C. Gen. Stat. §7A-314(f), the court system will pay for interpreters for those LEP indigent defendants who have court-appointed counsel, and for their witnesses.¹⁰⁰ However, the AOC guidelines appear to authorize the recoupment of the interpreter’s fee as court costs.¹⁰¹ The AOC’s decision to seek recoupment is part of a growing trend in court

⁹⁸ *Id.* at § 3.2.

⁹⁹ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 4.2.

¹⁰⁰ N.C. Gen. Stat. § 7A-314(f) (2009).

¹⁰¹ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.4 (“The AOC believes that the court is authorized to assess a reasonable fee for the costs of a foreign language interpreter against any party who is required to reimburse the state for the costs of representation.”)

systems, including North Carolina, to require indigent defendants to shoulder some of the financial burden of their state-provided representation.¹⁰²

The AOC guidelines authorize the court to assess a “reasonable” fee for the cost of an interpreter to those parties who have to reimburse the state for the costs of their representation. The court may assess \$10 or the cost of the interpretation services, whichever is greater.¹⁰³ It appears that the decision to seek recoupment for the costs of an interpreter’s services is within the discretion of the judge. In the course of our research we have learned that some judges have been more active in their decision to seek recoupment from indigent defendants than others.¹⁰⁴

5. Right to an Interpreter in North Carolina Civil Cases

The North Carolina Constitution is silent on the issue of the right to an interpreter in civil cases. Unlike a number of other states, North Carolina has to date declined to institute a written mandate granting the right to an interpreter in civil proceedings. At present, no North Carolina court has grounded the right to an interpreter in civil cases in the United States Constitution, despite the fact that these cases raise important due process issues implicated in eviction hearings, parental rights proceedings, and domestic violence cases.

Currently, the state is under no obligation to provide an interpreter in civil proceedings. AOC guidelines state: “The Judicial Branch is not authorized to provide interpreters to parties who are required to bear their own costs of representation (for example, civil and domestic litigants, non-indigent criminal defendants).”¹⁰⁵

¹⁰² For a discussion on the history and efficacy of up-front fees and other court costs assessed to indigent defendants, see Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 Wm. & Mary L. Rev. 2045 (2006).

¹⁰³ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.4.

¹⁰⁴ See Appendix A4, Summary of Interviews with NC officials, notes from interviews with judges.

¹⁰⁵ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.3.

a. Costs for a Foreign Language Interpreter in Civil Cases

Civil LEP litigants that require the use of an interpreter in North Carolina courts must both provide and pay for these services themselves, with a few exceptions.

N.C. Gen. Stat. § 7A-314(f) indicates that the AOC is responsible for the cost of an interpreter for parties represented by court appointed counsel. Civil cases in which this applies include certain juvenile proceedings (abuse, neglect, and termination of parental rights), adult protective services proceedings, and parties in involuntary commitment and incompetency proceedings. Additionally, in domestic violence cases, the court will provide an interpreter without charge to the LEP petitioner.¹⁰⁶ If the civil litigant is not a party in one of the above listed cases, he is responsible for providing his own interpreter at his own cost.

However, the AOC's Policies and Practices seem to authorize the recoupment of interpreter fees, assessed as court costs, in the above cases, meaning that if the party is in fact able to pay for a portion of their representation, or the party is under 18 and their parent or guardian is able to pay a portion of their representation, they can be required to pay the greater of \$10 or the actual costs of the interpretation services provided.¹⁰⁷ N.C. Gen. Stat. § 7A. 455(1) provides that:

if, in the opinion of the court, an indigent person is able to pay a portion, but not all, of the value of legal services rendered for that person by assigned counsel, the public defender or the appellate defender, and any other necessary expenses of representation, the court shall order the partially indigent person to pay such a portion.

¹⁰⁶ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.6.

¹⁰⁷ See Appendix B2, Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.4.

The exception is domestic violence cases; in these cases, the court is statutorily barred from recouping the costs of the interpretation services from the domestic violence petitioner.¹⁰⁸

Civil LEP litigants who do not fit into one of the exceptions discussed above must provide their own interpreter, at their own expense. Pursuant to North Carolina Rule of Evidence 604, which deems an interpreter an expert, and 706, which details expert compensation, in civil cases where the LEP litigant is determined to require the services of an interpreter but fails to provide his own interpreter, the court may decide to appoint an interpreter and then later require the party to pay the interpreter's fees. In these cases, interpreters are entitled to "reasonable compensation in whatever the sum the court may allow."¹⁰⁹

6. Assessing Interpreters' Fees as Court Costs: Comparison with Procedure for the Deaf and Hearing Impaired

The procedure for assessing costs to a civil litigant or an indigent criminal litigant for the services of an interpreter should be distinguished from the procedure in cases in which the litigant is deaf or hearing impaired. North Carolina has recognized a comprehensive right to an interpreter in all civil and criminal proceedings for the deaf.¹¹⁰ These sign language interpreters are provided for the deaf or hearing impaired at state expense; the state must provide an interpreter for the deaf and hearing impaired in all cases for both indigent and non-indigent litigants. The court may not assess the costs of a sign-language interpreter to a person who is deaf or hard of hearing.¹¹¹

¹⁰⁸ See N.C. Gen. Stat. § 50B-2, which states, in pertinent part: "No court costs shall be assessed for the filing, issuance, registration, or service of protective order or petition for a protective order or witness subpoena in compliance with the Violence against Women Act."

¹⁰⁹ N.C. Rule of Evidence 706.

¹¹⁰ See N.C. Gen. Stat. § 8B (2009).

¹¹¹ See *id.*

E. North Carolina's Deficiencies with Regard to State Law

North Carolina has a number of deficiencies in foreign language court interpretation. First, it fails to provide the same legal protections for LEP litigants as other states. Unlike 25 other states, North Carolina fails to provide a written mandate—through state statute, administrative, or court order---that guarantees the right to an interpreter for a civil litigant. Another deficiency is that North Carolina allows the practice of recoupment of interpreters' fees as court costs. Though this practice varies throughout the state, and some judges are declining to assess fees, the very existence of this policy is a violation with Title VI of the 1964 Civil Rights Act. North Carolina's violations of Title VI and federal case law are discussed at other points in this paper. Lastly, North Carolina's guidelines for court interpreters fail to provide full protection for the state's growing LEP population. Deficiencies in these guidelines will be discussed in full in Part Two of this paper.

III. Title VI and Court Interpretation

A. Introduction

Language differences for limited English proficient individuals can be a barrier to accessing important benefits or services, exercising critical rights, or complying with legal obligations and responsibilities. Title VI of the Civil Rights Act of 1964 recognized these barriers and was enacted to provide protection against discrimination based on race, color or national origin under any program or activity that receives federal financial assistance.¹¹² Discrimination against individuals who are not proficient in English constitutes national origin discrimination under Title VI. In some circumstances, the inability of a limited English

¹¹² 42 U.S.C § 2000d-1(2006).

proficient (LEP) individual to access a benefit from a federally funded state agency may violate Title VI.

As this section will show, the North Carolina court system fails to provide adequate access to court interpreters for LEP litigants and has not taken reasonable steps to remedy these problems. LEP litigants are discriminated against based on their national origin and are being denied their right to services of a court interpreter under Title VI. An analysis and discussion of Title VI follows.

B. History of Title VI

In the early 1960's the government launched a campaign against discrimination based on race, color, and religion and as part of their endeavor, enacted the Civil Rights Act of 1964.¹¹³ Previous administrations had attempted to ensure that federal dollars were not being used to fund programs that fostered discrimination on the basis of race or national origin.¹¹⁴ However, Congress soon realized the need for a statute that provided for nondiscrimination to accomplish these goals. After the seminal antidiscrimination case *Brown v. Board*,¹¹⁵ the government was still providing federal funding to racially segregated agencies. In response to these aims, and motivated in part by the need to ensure that federal funding was not being provided to organizations that fostered discrimination, President Lyndon Johnson signed the Civil Rights Act

¹¹³ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division Coordination and Review (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimmanual.php#II>.

¹¹⁴ See Exec. Order No. 11063, 3 C.F.R., 652-656 (2009) (equal opportunity in housing). See also Exec. Order No. 10482, 3 C.F.R. 968 (2009) (equal employment opportunity by government).

¹¹⁵ *Brown v. Board*, 347 U.S. 483(1954) (Declared state laws establishing separate schools for blacks and whites are unconstitutional as these laws effectively deny black children equal educational opportunities).

of 1964 into law on July 2, 1964.¹¹⁶ By its enactment, Congress sought to “insure uniformity and permanence to the nondiscrimination policy.”¹¹⁷

C. Basic Overview of Title VI Relating to Language Access

The federal government has enacted civil rights laws and policies in order to provide meaningful language access to LEP individuals who are of various national origins. Title VI of the Civil Rights Act of 1964, Section 601 states: “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.”¹¹⁸ Discrimination that results from a failure to speak English is the type of discrimination prohibited by Section 601 of Title VI. Additionally, Section 602 requires federal agencies using federal funds “to effectuate the provisions of [section 601]...by issuing rules, regulations, or orders of general applicability.”¹¹⁹ Title VI, therefore, provides that agencies receiving federal financial assistance are prohibited from discriminating against or excluding individuals based on their national origin which includes LEP status. The federal government funds an array of programs that accordingly must be made accessible to LEP individuals, including the state court systems. Under Title VI, failure to ensure meaningful access to these federally assisted programs to LEP individuals could result in a violation of the Act.

¹¹⁶ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Synopsis of Legislative History and Purpose of Title VI. (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

¹¹⁷ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Synopsis of Legislative History and Purpose of Title VI (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II> (quoting 110 Cong. Rec. 6544, Statement of Senator Humphrey).

¹¹⁸ 42 U.S.C §2000d (2006).

¹¹⁹ 42 U.S.C §2000d-1 (2006).

The North Carolina court system fails to provide adequate access to court interpreters for LEP litigants and has not taken reasonable steps to remedy these problems. LEP litigants are discriminated against based on their national origin and are being denied their right to services of a court interpreter under Title VI.

D. Executive Order 13166: “Improving Access to Services for Persons with Limited English Proficiency”

On August 11, 2000, President Bill Clinton issued Executive Order 13166 entitled “Improving Access to Services for Persons with Limited English Proficiency.”¹²⁰ Under that order, every federal agency that provides financial assistance to non-federal entities must publish guidance on how their recipients can provide meaningful access to LEP individuals.¹²¹ Furthermore, the guidance that is created by each specific agency was to be submitted within 120 days of the Executive Order for review and approval by the Department of Justice.¹²² The Executive Order calls on “agencies to evaluate the particular needs of the LEP persons they and their recipients serve and the burdens of compliance on the agency and its recipients.”¹²³

E. Title VI Department of Justice Guidelines and Regulations Regarding Language Access

Executive Order 12250 designated the Department of Justice as the agency to assist with implementing adequate procedures regarding language access.¹²⁴ The Department of Justice

¹²⁰ Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 16, 2000).

¹²¹ *Id.*

¹²² See Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121, Section 2 (Aug. 16, 2000).

¹²³ Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121, Section 4 (Aug. 16, 2000).

¹²⁴ Leadership and Coordination of Nondiscrimination Law, 45 Fed. Reg. 72995 (Nov. 2, 1980). Executive Order 12250, §1-201 provides the Attorney General shall “coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws: (a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)” and “(d) 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 benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”

developed a “DOJ Implementation Plan” implementing the Executive Order 13166.¹²⁵ The purpose of the plan was to provide Department of Justice “initiatives and plans over the next twelve months to improve access to its federally conducted programs and activities by eligible individuals who are limited English proficient.”¹²⁶ The DOJ Plan for Implementation identified five important elements that a language assistance plan should entail:¹²⁷

- Assessment of LEP populations and language needs;
- Publication of written language assistance plan;
- Provision of appropriate staff training about the plan;
- Public outreach and notice of the availability of language assistance; and
- Periodic self-assessment and self-monitoring¹²⁸

DOJ incorporates each of these elements into the implementation plan working to achieve its main goal to practically reduce barriers that currently exist for limited English proficient individuals in accessing services.¹²⁹

Additionally, the Justice Department issued other guidelines and regulations to assist agencies in compliance with Title VI in specific regards to language access. The Title VI regulations forbid funding recipients from "restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program"¹³⁰ or from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or

¹²⁵ Departmental Plan Implementing Executive Order 13166, United States Department of Justice, Civil Rights Division, Coordination and Review, <http://www.justice.gov/crt/cor/lep/dojimp.php>.

¹²⁶ Departmental Plan Implementing Executive Order 13166, United States Department of Justice, Civil Rights Division, Coordination and Review, Part 1.0, <http://www.justice.gov/crt/cor/lep/dojimp.php>.

¹²⁷ Departmental Plan Implementing Executive Order 13166, United States Department of Justice, Civil Rights Division, Coordination and Review, Part 4.0, <http://www.justice.gov/crt/cor/lep/dojimp.php>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 28 C.F.R. § 42.104(b)(2)(2009).

national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."¹³¹

The Justice Department created a four factor test in order to determine whether a federal fund recipient has taken reasonable steps “to ensure meaningful access to the information and services they provide” to LEP individuals.¹³² The DOJ guidance announced the following four factors and details:

- Number or Proportion of LEP individuals: The number or proportion of individuals that will not receive benefits or services absent efforts to remove language barriers.
- Frequency of Contact with the Program: If LEP individuals must have access to recipients’ program every day, then the recipient has a greater duty to ensure language access than if such contact is infrequent and not on daily basis.
- Nature and Importance of the Program: Affirmative steps must be taken if the denial or delay of access to a program or activity to a recipient could result in life or death consequences. Recipients must consider importance of benefit to LEP individuals both in short and long term.
- Resources Available: Small recipients of federal funds with limited resources may not have to take measures as drastic to ensure language access as larger recipients.¹³³

On June 18, 2002, the Department of Justice released additional guidance, which has served as a vital tool in measuring language access policies.¹³⁴ This final policy guidance requires both oral and written language assistance services and an effective plan on language assistance for LEP persons.¹³⁵

¹³¹ *Id.*

¹³² Enforcement of Title VI of the Civil Rights Act of 1964-National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 159, 50124 (Aug. 16, 2000) (codified at 28 C.F.R. pt. 42(2009)).

¹³³ Enforcement of Title VI of the Civil Rights Act of 1964-National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 159, 50124-50125 (Aug. 16, 2000) (codified at 28 C.F.R. pt. 42(2009)).

¹³⁴ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 117(June 18, 2002).

¹³⁵ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 117, 41461-41466 (June 18, 2002).

These Title VI DOJ guidelines and regulations pertaining to access for a LEP individual clearly apply to the courts. The guidance appendix provides direction to courts on how to apply these regulations to LEP individuals.¹³⁶ According to the guidance provided regarding courts, the DOJ has specifically stated that upon application of the four factor analysis test, courts must ensure that LEP parties and witnesses receive adequate language services.¹³⁷ The guidance states that every effort should be made to provide adequate language services during motions, trials, and hearings, as well as communication between a LEP defendant and a court appointed attorney. The guidance specifically states that the use of informal interpreters including friends, family members, and others in court is inappropriate.¹³⁸ According to the guidance, courts must carefully assess whether an individual will be able to understand and communicate effectively in English, create a procedure in order to determine competency of interpreters, assess the need for language services throughout the entire litigation process including outside the courtroom, and effectively evaluate the higher contact level that LEP individuals may experience within the court, rather than just looking at the number or proportion of LEP individuals, prong 1 of the four factor analysis set out by the DOJ.¹³⁹

F. Case Law Interpreting Title VI

The purpose of Title VI is to ensure that any program receiving federal financial assistance does not misuse any portion of such funds in a manner that has the effect of encouraging or promoting discrimination.¹⁴⁰ Therefore, a violation of Title VI may be proven

¹³⁶ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 117, 41471-41472 (June 18, 2002).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

according to two different theories: intentional discrimination/disparate treatment and disparate impact/effects.

- 1. Pre- 2001

Courts have determined that in order to prove intentional discrimination an aggrieved person would need to show that similarly situated individuals are treated differently because of their race, color, or national origin.¹⁴¹ The courts then conducted an analysis under the Equal Protection Clause of the Fourteenth Amendment.¹⁴² The cases have held one must show that “a challenged action was motivated by an intent to discriminate”¹⁴³ and the recipient was aware and acted because of the individual’s race, color, or national origin. Individuals have also filed suit under a theory of disparate impact. Disparate impact may result when a recipient of federal funding uses a procedure or practice that has a disparate effect on individuals of a specific race, color, or national origin and these practice(s) do not have a “substantial legitimate justification.”¹⁴⁴

In addition to filing suit, Title VI also provides the individual with the option to file a complaint with the federal agency that funds the agency alleged to have acted discriminatorily. In order to establish a claim based on disparate impact, the complainant must show a causal

¹⁴¹ See *Alexander v. Choate*, 469 U.S. 287, 293 (1985). See also *Elston v. Talledega County Board of Education*, 997 F. 2d 1394 (11th Cir. 1993); *Guardians Association Et. Al v. Civil Service Commission of the City of New York Et. Al*, 463 U.S. 582 (1983); and *Georgia State Conference of Branches of NAACP v. Georgia*, 922 F. 2d 1403 (11th Cir. 1985).

¹⁴² See *Elston v. Talledega County Board of Education*, 997 F. 2d 1394 (11th Cir. 1993); *Guardians Association Et. Al v. Civil Service Commission of the City of New York Et. Al*, 463 U.S. 582 (1983); *Alexander v. Choate*, 469 U.S. 287, 293(1985); *Georgia State Conference of Branches of NAACP v. Georgia*, 922 F. 2d 1403 (11th Cir. 1985).

¹⁴³ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimanual.php#II> (quoting *Elston v. Talledega County Board of Education*, 997 F. 2d 1394, 1406 (11th Cir. 1993))

¹⁴⁴ *Id.* at 1407.

connection between the facially neutral policy and the adverse impact that policy has on a particular race, color, or national origin group that is protected under Title VI.¹⁴⁵

In *Lau v. Nichols*, a group of Chinese speaking students challenged a school district's policy of offering instruction only in the English language.¹⁴⁶ The Supreme Court held that such a practice violated Title VI because the school district did not provide adequate language services to those students who only spoke Chinese but not English.¹⁴⁷ The Court explained by providing information in English only, the school district discriminated against students based on national origin. The court stated, "it seems obvious that the Chinese-speaking minority receive fewer benefits than the English speaking majority from respondent's school system which denies them meaningful opportunity to participate in the education program-all earmarks of the discrimination banned by the Title VI implementing regulations."¹⁴⁸

- 2. Post -2001

In 2001, the Supreme Court shifted course in the case of *Alexander v. Sandoval* which limited the right of individuals to bring suit under Title VI for discrimination on the basis of a failure to provide language access.¹⁴⁹ In *Sandoval*, plaintiffs filed suit under Title VI challenging the Alabama Safety Department's refusal to administer a driver's license exam in any other language besides English, claiming that such refusal resulted in disparate impact on the basis of national origin discrimination.¹⁵⁰ The *Sandoval* court declared that while there is a private right of action to enforce Section 601 of Title VI based on intentional discrimination, the Act does not

¹⁴⁵ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

¹⁴⁶ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁴⁷ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁴⁸ *Lau v. Nichols*, 414 U.S. 563,568 (1974).

¹⁴⁹ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹⁵⁰ *Id.*

include a private right of action to enforce disparate impact regulations.¹⁵¹ The court determined that a private individual is limited to bringing a private action based on intentional discrimination.¹⁵² It held that the authority for enforcing violations based on disparate impact lies with the federal agency providing funding.¹⁵³ If an individual believes that an action by a state agency is producing a disparate impact on a protected group, the individual may bring this to the attention of the federal agency through filing a Title VI Complaint. Thus, the administrative complaint mechanism described above remains a viable option for individuals aggrieved by virtue of disparate impact.

G. Compliance and Enforcement of Title VI

1. Obligation to Evaluate Compliance

Federal agencies, which fund state agencies, are responsible for evaluating whether an organization is in compliance with Title VI and must take the necessary steps to enforce and obtain compliance if an organization is not in compliance.¹⁵⁴ Agencies may ensure compliance with Title VI before distributing funds as well as after funds have already been disseminated.¹⁵⁵

a. Compliance Prior to Funding

The following methods are used by federal agencies prior to awarding federal funds to ensure agencies will comply with Title VI mandates.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section: Federal Funding Agency Methods to Evaluate Compliance (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

¹⁵⁵ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section: Federal Funding Agency Methods to Evaluate Compliance (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

i. Assurances of Compliance

According to *Grove City College v. Bell*, federal agencies are entitled to secure an assurance of compliance prior to approving federal financial assistance.¹⁵⁶ If a state agency refuses to sign an assurance of compliance, the federal agency is entitled to deny assistance of federal funds as long as procedural requirements are met under 28 C.F.R § 50.3.II.A.1.¹⁵⁷ Assurances of compliance provide a basis for the supervising federal agency to file suit to enforce compliance for Title VI and remind federal funding recipients of their ongoing nondiscrimination obligations under Title VI.

ii. Data and Information Collection

Section 42.406 of the Title VI Coordination Regulations provides information regarding what data should be submitted to the enforcing federal agency prior to the granting of federal funds.¹⁵⁸ Section (d) requires that federal agencies should require the following information from prospective federal funds recipients: lawsuits filed against the state agency “alleging discrimination on the basis of race, color, or national origin;” information about any pending applications for funding requests from other federal agencies and other federal financial assistance currently in existence; a description of any civil rights compliance reviews conducted in the two years preceding application to federal agency; whether the state agency has been found to be in noncompliance with any civil rights requirement; and a written assurance by an applicant that records will be maintained and data will be provided to the federal agency according to the guidelines provided in section 42.406(d)-(e).¹⁵⁹

¹⁵⁶ *Grove City College v. Bell* 465 U.S. 574-575 (1984). *See also* 28 C.F.R § 42.407(2009).

¹⁵⁷ 28 C.F.R § 50.3.II.A.1(2009). “...the agency should defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail, the applicant should promptly be offered a hearing for the purpose of determining whether an adequate assurance has in fact been filed.”

¹⁵⁸ 28 C.F.R. § 42.406(2009).

¹⁵⁹ 28 C.F.R. § 42.406. (d)-(e)(2009).

b. Compliance Subsequent to Funding

Additionally, the following methods are used by federal agencies subsequent to awarding federal funds to ensure Title VI Compliance.

i. Selecting Targets for a Compliance Review

In *United States v. Harris Methodists Fort Worth*,¹⁶⁰ the court ruled that a Title VI compliance review constitutes an administrative search and therefore the search must be reasonable under Fourth Amendment requirements.¹⁶¹ The court set forth the following reasons to target a state agency for a reasonable Title VI compliance review: “1) whether the proposed search 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.”¹⁶² Therefore, it is important that federal agencies do not select state agencies for a compliance review randomly, but use well defined criteria and evidence to substantiate a need for a Title VI compliance review.¹⁶³

ii. Compliance Review Procedure

Title VI regulations provide that each federal agency granting federal financial assistance must create a program of maintaining compliance with those state agencies that have already received federal funding. Although the regulations provide that these compliance reviews should be in writing and include findings of fact, the regulations are silent as to how to conduct these reviews.¹⁶⁴

¹⁶⁰ U.S. v. Harris Methodist, 970 F. 2d 94 (5th Cir. 1992).

¹⁶¹ U.S. v. Harris Methodist 970 F. 2d 94 (5th Cir. 1992).

¹⁶² U.S. v. Harris Methodist, 970 F. 2d 94, 101 (5th Cir. 1992).

¹⁶³ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>. The Title VI Legal Manual provided by DOJ Civil Rights division lists out particular considerations to take into account when developing criteria for targeting compliance reviews. The manual further suggests that a decision to conduct a compliance review be set in writing and reviewed and approved by the senior civil rights management team before moving further.

¹⁶⁴ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section: Federal Funding Agency Methods to Evaluate Compliance (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>. See also 28 C.F.R §42.407(2009).

2. Complaint Enforcement Procedure

Section 42.408 of the Title VI Coordination Regulations describes the complaint procedure.

“Federal agencies shall establish and publish in their guidelines procedures for the prompt processing and disposition of complaints.”¹⁶⁵ “The investigation should include, whenever appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this subpart occurred, and other factors relevant to a determination as to whether the recipient failed to comply with this subpart.”¹⁶⁶ The regulations provide that if a federal agency does not find a violation, written notice must be provided to both the complainant and state agency.¹⁶⁷ If an investigation results in the finding of noncompliance, the federal agency must attempt to seek voluntary compliance from the state agency.¹⁶⁸

3. Seeking Enforcement through Voluntary Compliance

Under Title VI, a federal agency must first attempt to work with a state agency to obtain voluntary compliance before resorting to actions such as terminating or suspending federal financial assistance.

“Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient...or (2) by any other means authorized by law: Provided, however that no such action shall be taken until the department or agency concerned...has determined that compliance cannot be secured by voluntary means.”¹⁶⁹

Further, the DOJ Title VI regulations reinforce the importance of seeking voluntary compliance above all other means of enforcement.¹⁷⁰

¹⁶⁵ 28 C.F.R. § 42.408(a)(2009).

¹⁶⁶ 28 C.F.R. § 42.107(2009).

¹⁶⁷ 28 C.F.R. § 42.408(a)(2009).

¹⁶⁸ 28 C.F.R. § 42.107(d)(1)(2009).

¹⁶⁹ 42 U.S.C. § 2000d-1(2009).

¹⁷⁰ 28 C.F.R. § 42.411(2009).

According to the Title VI legal manual, federal agencies are responsible for gathering and maintaining substantive evidence of noncompliance of a state agency should voluntary negotiations fail to remedy the discriminatory practices.¹⁷¹ Additionally, a federal agency is to work effectively and without undue delay to obtain voluntary compliance from a state agency. According to the Title VI Coordination Regulations, “each agency shall establish internal controls to avoid unnecessary delay in resolving noncompliance, and shall promptly notify the Assistant Attorney General of any case in which negotiations have continued for more than sixty days after the making of the determination of probable noncompliance and shall state the reasons for the length of the negotiations.”¹⁷² Therefore, although voluntary compliance shall be the principle method used to obtain compliance with Title VI mandates, this method should not be used to avoid enforcement and impose sanctions.

4. Seeking Enforcement through Termination of Federal Funding

In order for a federal agency to terminate funding to a state agency, four procedural requirements must be met as outlined in the Title VI Legal Manual:¹⁷³

(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

¹⁷¹ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section: Federal Funding Agency Methods to Enforce Compliance (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

¹⁷² 28 C.F.R. § 42.411(a) (2009).

¹⁷³ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section: Federal Funding Agency Methods to Enforce Compliance, Fund Suspension and Termination (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.¹⁷⁴

Therefore, funding cannot be terminated without an official formal hearing and opportunity for hearing. The final decision to terminate funding must be approved by the federal agency head and an order must explain the basis for the noncompliance. Further, the state agency may request to have their funds restored. According to 42 U.S.C. §2000d-2, “any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to judicial review...”.¹⁷⁵

Further, federal funding may be only be taken away from the particular entity of the state agency that engaged in the discriminatory act.¹⁷⁶ This limitation was specifically included by Congress and is known as the pinpoint provision. The pinpoint provisions states, “...after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political 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.”¹⁷⁷ Through this provision, Congress intended to limit the adverse affect termination of funding can have on those that require assistance from these federally supported state agencies.¹⁷⁸

¹⁷⁴ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section: Federal Funding Agency Methods to Enforce Compliance, Fund Suspension and Termination (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

¹⁷⁵ 42 U.S.C § 2000d-2(2006).

¹⁷⁶ 42 U.S.C § 2000d-1(2006).

¹⁷⁷ 42 U.S.C. § 2000d-1(2006).

¹⁷⁸ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>. (quoting Board of Public Instruction v. Finch, 414 F. 2d 1068, 1075 (5th Cir 1969)).

H. Title VI and Administrative Office of the Courts in North Carolina

An agency is subject to Title VI regulations if it is a “recipient” of federal financial assistance and/or conducts a “program or activity.” Title VI regulations use the following definition of a “recipient:”

The term **recipient** means 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.¹⁷⁹

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.¹⁸⁰

Additionally, Title VI prohibits discrimination in any program or activity that receives federal funding. Although, Title VI did not include a definition of “program and activity”, Senator Humphrey made Congressional intention clear when it stated that “Title VI prohibitions were meant to be applied institution-wide, and as broadly as necessary to eradicate discriminatory practices supported by Federal funds.”¹⁸¹ In 1987, Congress again made clear its intention of broadening the application of the statute by passing the Civil Rights Restoration Act in order to overturn the Supreme Court decision of *Grove City*¹⁸² and widen the interpretation of “program or activity” to apply across a broader spectrum.¹⁸³ The CRRA specifies coverage as to state and local governments, changing Title VI to state:

¹⁷⁹ 28 C.F.R. § 42.102(f)(2009).

¹⁸⁰ 28 C.F.R. § 42.102(f)(2009).

¹⁸¹ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>. (quoting 110 Cong. Rec. 6544 (statement of Sen. Humphrey); see S. Re. No. 64, 100th Cong., 2d Session 5-7 (1988)).

¹⁸² *Grove City College v. Bell*, 465 U.S. 574-575 (1984).

¹⁸³ See Title VI Legal Manual, United States Department of Justice, Civil Rights Division, Coordination and Review, Section “Program or Activity” (Jan. 11, 2001), <http://www.justice.gov/crt/cor/coord/vimannual.php#II>.

For the purposes of this subchapter, the term “program or activity” and the term “program” mean all of the operations of—

- (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government;¹⁸⁴ 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.¹⁸⁵

According to these definitions and guidelines, the North Carolina AOC state court system qualifies as a “recipient” under Title VI, as it is a State public agency to which Federal financial assistance is extended directly. Further, according to the definition stated above, the AOC state court system could be classified as a “primary recipient” because it is required to receive Federal funding to carry out a program.

Additionally, through the expansion of the definition of “program or activity” through the passage of the CRRA with specific regard to State and local governments, the AOC state court system activities would be covered under Title VI and therefore must oblige by the rules and regulations implemented by Title VI.

I. North Carolina Deficiencies With Regard to Title VI

North Carolina Administrative Office of the Courts’ (AOC) failure to provide interpreters has a disparate impact on LEP individuals, a Title VI violation. AOC’s failure to take reasonable steps to provide meaningful language assistance to all LEP civil and criminal litigants amounts to national origin discrimination under Title VI. Currently, the North Carolina court system lacks a language assistance plan, a compliance plan, and a Title VI compliance officer. Although a Title

Although, the Supreme Court decision of *Grove City* narrowed the interpretation of “program or activity” and said that the prohibition on discrimination only applied to limited aspect of an institution’s operations.

¹⁸⁴ 42 U.S.C. § 2000d-4a(1)(A)(2006).

¹⁸⁵ 42 U.S.C § 2000d-4a(1)(B)(2006).

VI complaint was filed in 2006 alleging AOC's noncompliance with Title VI, in the past 5 years, AOC has not taken reasonable steps to ensure voluntary compliance with Title VI mandates.

An agency is subject to Title VI regulations if it is a "recipient" of federal financial assistance and/or conducts a "program or activity". According to these definitions and guidelines, the North Carolina AOC state court system qualifies as a "recipient" under the Title VI, as it is a State public agency to which Federal financial assistance is extended directly.

PART TWO: PROBLEMS WITH NORTH CAROLINA COURT INTERPRETATION

I. Access Problems

Limited English proficient litigants who lack access to a court interpreter are denied the opportunity to meaningfully represent themselves in court proceedings. Throughout our investigation, we observed that interpreters are often not provided on a reliable basis for LEP litigants who speak languages other than Spanish. In some counties, interpreters are not provided for first appearances. Indigent defendants are usually assessed costs of court interpreters and there is confusion as to which parties the interpreter serves. It also appears that often, no interpreter is present in certain Small Claims courts. Latina/o litigants are failing to show up for court dates, and those that do are generally not provided notice that a court interpreter is available to interpret for them. Lack of access to court interpreters not only affects the individual LEP litigant but also affects the entire judicial system due to the delay and inefficient proceedings that result.

A. Irregular Provision of Interpreters for People Who Speak Languages Other Than Spanish

A major problem confronting North Carolina courts is the lack of provision of interpreters for those who speak a language other than Spanish. We observed this in Orange County District Court in Hillsborough on Friday, February 19, 2010. At that time, there was no interpreter present for two Burmese defendants in a mixed civil/criminal domestic violence session. After some confusion about how to communicate with the two defendants in their criminal cases (each case had nothing to do with the other), the judge called the AT & T language line using the account of one of the Legal Aid attorneys present in the courtroom. The Legal Aid attorney was there representing one of the alleged victims in a civil case and thus had no obligation to provide an interpreter to the defendants, one of whom was the opposing party in a criminal matter.

Although the AOC has access to a language line for the benefit of North Carolina courts, it appeared that the judge was unaware of this and thus, used the phone and contract services between A T & T and Legal Aid of North Carolina instead of the AOC account. The burden of providing interpreters for defendants should not fall on non-profit organizations that are not responsible for providing interpreting services for the courts.

In addition to the confusion as to how to obtain an interpreter, the court seemed to lack familiarity with appropriate practices regarding the use of an interpreter. After the call was placed, both defendants, their attorneys, and the judge all crowded around the prosecution's table and using a Blackberry, the judge communicated with the interpreter on the language line. Rather than speak directly to the defendants through the interpreter, the judge directed the interpreter to ask the defendants whether they consented to have their cases continued. Proper interpreting proceedings were not followed. For example, the judge directed his words towards the interpreter and not towards the defendants, asking her to ask them whether they consented to the continuance rather than simply saying "Do you consent?" The AOC bench card for Judges emphasizes the importance of speaking directly to the LEP individual in order to meaningfully involve him in his own proceedings.¹⁸⁶

The court's lack of familiarity with appropriate use of an interpreter resulted in two defendants in unrelated cases to have their cases treated as one and the same.

Limited English proficient litigants who lack access to a court interpreter are denied the opportunity to meaningfully represent themselves in court proceedings.

¹⁸⁶ See Appendix B3, AOC bench card for Working with Court Interpreters, available at http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/2006_modelbenchcard.pdf.

The judge failed to speak directly to each defendant, instead directing his comments to the interpreter or the attorneys. Moreover, the second defendant did not receive as much of an explanation of what he was consenting to as the first. After the phone call ended, both defendants still seemed very confused. Furthermore, after the phone call ended, one of the public defenders wished to speak with her client but there was no way for her to do so because there was no interpreter present. (See affidavits of Sarah Long and Sonal Raja, hereinafter Long and Raja affidavits).

When we returned to the same court on Friday, February 26, the Public Defender's office had secured a Burmese interpreter. (See Long and Raja affidavits). However, the provision of court interpreters for Burmese-speaking individuals raises interesting issues for further investigation. Because the Burmese community is small,¹⁸⁷ having an interpreter from the community without knowing more about their professional status as an interpreter leaves open the potential of there being conflict of interest issues; due to the Burmese population's size, there is a higher possibility of the interpreter having some out-of-court connection to the litigants.

In our interview with an assistant public defender who works in juvenile court, we were informed that provision of interpreters to people speaking languages such as French, Portuguese, Laotian, Hmong, and Vietnamese, as well as to people belonging to the Degar (Montagnard) ethnic group was inadequate.¹⁸⁸ Similarly, a government attorney stated that speakers of languages such as Vietnamese and Hmong typically brought in a family member to interpret for

¹⁸⁷ A 2008 article in *The Chapel Hill News* estimated that there were about 400 Burmese people in the Triangle area. "Burmese Refugees remember 1988 uprising," *The Chapel Hill News*, Aug. 10 2008, <http://www.chapelhillnews.com/2008/08/10/16107/burmese-refugees-remember-1988.html>.

¹⁸⁸ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Assistant Public Defender.

them in DSS proceedings because of the lack of availability of court furnished interpreters who speak these languages.¹⁸⁹

B. No Interpreter Access for First Appearances

In an interview with a former assistant public defender, we were informed that there was often no interpreter present for first appearances.¹⁹⁰ In addition, an attorney from Chatham County stated that it was common for there to be no interpreter present during afternoon sessions in Chatham County.¹⁹¹ Thus, it appears that many defendants scheduled for their first appearances during a Chatham County afternoon session have appeared before the court without the benefit of an interpreter. This same Chatham County attorney also reported that an employee of the District Attorney's office occasionally interprets in the courtroom in criminal matters, thus creating the appearance of bias. In fact, on March 8, 2010 in Chatham County we observed a woman interpreting at first appearances during an afternoon session who we believe to be the person described to us by the attorney from Chatham County. In addition to the problem of bias in interpreting court proceedings, when the court uses an employee of the District Attorney's office to interpret, that person is or should be unavailable to assist in interpreting between a client and his attorney, thus limiting communication in the court and disadvantaging an LEP defendant. For example, we observed a situation where one LEP defendant needed to speak to his lawyer; however, the lawyer stated that she believed that she was not allowed to use the interpreter from the District Attorney's office, so the client was not able to communicate with her. (See Long affidavit).

¹⁸⁹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with DSS Government Official.

¹⁹⁰ See Appendix A4, Summary of Interviews with North Carolina Officials Notes from Interview with former Assistant Public Defender.

¹⁹¹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Private Attorney.

C. Charging Indigent Defendants for the Cost of Their Interpreter

According to the AOC's "Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System," judges can assess the cost of an interpreter to an indigent defendant who is found guilty.¹⁹² During our court observations, we have never observed a judge warn any indigent defendants that they might have to pay for the cost of their interpreter if they are subsequently found guilty. We might speculate that no warnings are given because judges may not adhere to the practice of charging litigants for the most common types of appearances we observed (e.g., first appearances).

However, at this point, it is difficult to determine the practice regarding the charging of defendants for interpreters and it appears that there is some inconsistency among judges on this point. One Superior Court judge stated that he does not assess the cost of an interpreter to a defendant.¹⁹³ Another Superior Court judge stated that he assesses the cost of an interpreter to defendants who are found guilty, in the same way that a defendant who is found guilty can be assessed the cost of his representation.¹⁹⁴

A District Court judge stated that he does assess the cost of an interpreter to some defendants who have been found guilty, as allowed by law in the same manner as restitution for court appointed attorney fees, costs, and fines. He stated that he makes the decision whether to charge such a defendant for the cost of his or her interpreter on a case-by-case basis after taking into consideration the defendant's economic circumstances, the nature of the charge, the character of the hearing, and to a degree, his own intuition. He mentioned that an example of a

¹⁹² See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.2 ("If the defendant is subsequently convicted, the court can assign the interpreter's fee to the defendant as costs."); § 7.4 ("The AOC believes that the court is authorized to assess a reasonable fee for the costs of a foreign language interpreter against any party who is required to reimburse the State for the costs of representation. Effective 2/1/07, the court shall assess a \$10 fee or the actual cost of the services, whichever is greater, to the defendant or other responsible party.")

¹⁹³ See Appendix A4, Summary of Interviews with North Carolina Officials Notes Interview with Judge.

¹⁹⁴ See Appendix A4, Summary of Interviews with North Carolina Officials Notes Interview with Judge.

type of case in which he might be more likely to assess a fee for the cost of an interpreter would be a DWI case in which there was hard evidence that a defendant had indeed committed the crime but in which the defendant still insisted on proceeding with a trial, which requires an expenditure of court time and resources.¹⁹⁵

D. Confusion Over Who is Entitled to a Court Interpreter

AOC Policies and Best Practices states that the court “is not authorized to provide interpreters to parties who are required to bear their own costs of representation (for example, civil and domestic litigants, non-indigent criminal defendants)” and that to do so would be “inappropriate” since the legislature has not provided funding towards this end.¹⁹⁶ However, there appears to be some confusion about this policy, and from our observations and conversations with attorneys and one interpreter, it appears that the AOC interpreter assigned to a courtroom for a session generally provides interpreting to anyone regardless of their indigency status, at least for short matters such as pleas.¹⁹⁷ Attorneys do note that they have seen occasions when the AOC provided interpreter would not interpret for a non-indigent defendant, particularly in Chatham County.¹⁹⁸ The lack of uniform practices creates confusion and sometimes leaves criminal defendants with retained counsel without an interpreter.

E. Use of “Volunteers” to Assist LEP Litigants

In a number of situations, no interpreters are provided to LEP litigants. One such situation is Small Claims court in Siler City. In Siler City Small Claims court on February 22, 2010, we observed the use of a “volunteer” interpreter, a litigant there for his own case. This

¹⁹⁵ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes Interview with Judge.

¹⁹⁶ See B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.3.

¹⁹⁷ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with two private attorneys and court certified interpreter.

¹⁹⁸ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with two private attorneys.

man offered to interpret after the magistrate asked if there was anyone in the courtroom who could assist in two separate eviction proceedings for defendants who spoke Spanish. This situation was highly problematic. This “volunteer” was not familiar with legal terminology, nor was he fluent in English. He often had side conversations with the litigant without interpreting to the court what was being stated. In each case, both litigants seemed confused after the proceedings were over. Despite this problematic scenario, the magistrate stated that she felt that there was “no real need” for an interpreter in her courtroom (See Kirby and Raja affidavits).

A related problem is the use of a family member or friend of a litigant as an interpreter. One magistrate informed us that it is common for litigants to use a family member or friend to interpret, and that sometimes a Spanish-speaking police officer is also used.¹⁹⁹ A government attorney also stated that a family member or friend is sometimes used as an interpreter in DSS cases.²⁰⁰ An attorney who frequently works with Spanish speaking client also said that she has seen family members or friends interpret at calendar call in civil court.²⁰¹

F. Hispanic Litigants Not Showing Up for Court Dates

During our visits to various courtrooms, we observed that often, people with Spanish-sounding surnames who were scheduled on the docket did not show up either in district court or in Small Claims court. (See Kirby and Raja affidavits). Perhaps this is a common problem for all litigants, regardless of language spoken. However, we recommend that additional research should be undertaken to determine whether Spanish-speaking litigants are failing to show up at a rate higher than their English-speaking counterparts because of concerns about inadequate language access and inability to communicate with the court.

¹⁹⁹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from interview with Magistrate.

²⁰⁰ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from interview with DSS Government Official.

²⁰¹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from interview with private attorney.

G. Lack of Notice of Availability of Foreign Language Interpreters In Court

In some counties, litigants are not put on notice of the availability of an interpreter to provide assistance in their case. Some counties do provide some form of notice. For example, the Hillsborough Courthouse in Orange County has a sign in Spanish posted on the metal detector exiting the courthouse, directing individuals who need a Spanish-to-English interpreter to sit in the first row of the courtroom. No other sign of this nature was observed elsewhere in the courtroom. (See Kirby affidavit). Further, no sign pertaining to interpreters or interpreter services was observed in Durham County, Chatham County, Alamance County, or the Granville County courthouses. (See Kirby, Long and Raja affidavits).

Additionally, interpreters are not easily identifiable in court because they are not wearing a name badge or any form of identification. Interpreters were observed in court, providing interpretation, but without any form of identification in Chatham County (see Raja and Kirby affidavit), Durham County Juvenile Court (see Raja affidavit), and in Alamance County (see Long and Kirby affidavits). If interpreters do not make themselves readily available for assistance and do not wear any form of identification, non-English speaking litigants are not aware that the interpreter is there to assist them. This may result in litigants not seeking the services of an interpreter when in fact they may need them.

H. Systemic Problems Within Small Claims Court

Small Claims court cases generally include civil private disputes in which large amounts of money are not at stake. These cases typically involve the collection of debts, eviction hearings, and other disputes between a landlord and tenant. Our observations indicated that interpreters in Small Claims court were not available in the counties we visited in North Carolina. (See Kirby and Raja affidavits). Litigants in Small Claims court were not provided an

interpreter in Chatham County in a number of summary ejectment hearings. The lack of an interpreter raises concerns as litigants are not given the opportunity to meaningfully represent themselves in hearings. The outcomes in cases tried in Small Claims court impact fundamental issues relating to health and well-being. LEP litigants are evicted from their homes and may be ordered to pay large sums of money without being given the opportunity to contest the claims, provide an explanation, defend their actions, or even understand the outcome and the terms of the court order.

In one Small Claims court session in Chatham County, multiple Spanish-speaking litigants were ordered evicted from their homes (See Raja and Kirby affidavits). During this session, there was no court interpreter present. The magistrate sought the assistance of another litigant who was waiting for his case to be called to interpret for the other Spanish-speaking litigants.

The assistance of the volunteer, who was neither AOC-certified nor demonstrated any capacity for interpreting, presents numerous problems. This individual was not trained regarding the rules and procedures of court interpreting in North Carolina. He summarized the information the magistrate provided to the litigant regarding the case, and failed to relay vital information to the litigant. He was not able to accurately interpret due to his lack of knowledge of the legal vocabulary involved in the eviction case.

Additionally, due to the fact that the individual interpreting was not aware of the code of conduct and ethics for foreign language interpreters provided in Section Four of the AOC Guidelines,²⁰² he was not acting in accordance with the suggested guidelines and provided unsolicited legal advice. (See Kirby and Raja affidavits). Further, the use of a public litigant as

²⁰² See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, §4.

an interpreter could present conflict of interest issues as Latina/o communities tend to be tight knit and many individuals know each other.

Members of the public volunteering to interpret during a court proceeding who have not undergone the certification process could be self interested parties who seek to or unintentionally violate the rights of the litigants they assist. Therefore, the lack of access to an interpreter in Small Claims court violates the litigant's right to meaningfully participate in the hearing and raises quality concerns.

I. Delay and Inefficiency in Court Proceedings Due to Lack of an Interpreter

The lack of a foreign language interpreter in a court proceeding can create unnecessary delays for the court system. When an interpreter is not present, the case should be continued. Continuing a case due to the absence of a court interpreter results in an unnecessary waste of time for judges, parties, and witnesses. Sometimes, the court will attempt to enlist an uncertified, likely inexperienced friend, relative, volunteer, or another attorney to provide the interpretation services. The AOC Policies and Best Practices suggest that an interpreter be appointed for entire sessions of court instead of on a case-by-case basis to improve calendar efficiency and decrease delay. However, it appears that this practice is not being followed in all counties.

Our observations suggest that the failure to have interpreters to assist those who speak languages other than Spanish is most likely to create delays in court proceedings. For example, the morning of our visit to District Court in Hillsborough, the court was unprepared for two litigants that required the services of a Burmese interpreter on two unrelated matters. Neither party's defense attorney nor the DA or ADA had requested an interpreter that morning. This resulted in lengthy discussion and delay; eventually, the court called the language line for assistance in interpreting the two separate hearings, but it appeared that no system was in place

as to how to make the phone call, what phone to use, and what party to charge for the interpreter's services (see Long and Raja affidavits).

Even Spanish-language interpreters, the most commonly certified language across the state, are not always readily available to litigants when needed. For example, in juvenile court in Durham the morning of our visit, there was no Spanish interpreter present for the mother of a juvenile charged with felony marijuana possession. The parties had to wait until an interpreter was called before the proceedings could continue (see Raja affidavit). In Pittsboro, the Spanish language court interpreter frequently exits the courtroom to assist in private discussions between litigants and their attorneys. During these periods, Spanish-speaking litigants' cases are delayed until the interpreter returns. On our visit to Pittsboro we observed one defendant wait a full half-hour between the times when his name was first called while the interpreter was absent from the courtroom, and when he was called to enter his plea with the assistance of the interpreter. This defendant was told by the court, in English, that he would have to wait until the interpreter returned, but it is unclear as to whether or not the litigant understood these instructions (see Kirby and Raja affidavits).

One Superior Court judge recently issued an order in his district addressing courtroom delays caused by the lack of a foreign language interpreter. District 15B's Judge Allen Baddour issued an order to all attorneys in his district requiring them to submit their requests for an interpreter within three business days of the publication of a trial or administrative calendar to the Judicial Support Staff for the Resident Superior Court Judges Offices.²⁰³ An attorney's request should identify the language for which an interpreter is needed and the party or witness who needs the interpreter. The attorney should note when the interpreter is needed, and whether the party requesting the interpreter is indigent. In our conversations with Judge Baddour, he

²⁰³ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Judge.

stated that he issued his order due to frustration with courtroom delays occasioned by attorneys who failed to provide interpreters or request interpreters when needed. He expressed concern for the parties and their witnesses who had taken time off of work or made other sacrifices in order to attend court, only to have their matter delayed due to the absence of a foreign language interpreter. Judge Baddour believes that his order will help expedite court proceedings involving interpreters.²⁰⁴

II. Quality Issues that Impact Access Issues

A. Introduction

When court interpreters are provided, we have witnessed firsthand problems with accurate and full interpretation and observed court interpretation that has failed to comply with recognized national and state guidelines. Quality issues with court interpretation include: failure to interpret completely and accurately, failing to interpret for the court, engaging in side conversations with litigants, failing to address LEP litigants in the first person and instead, referring to them in the third person, allowing individuals to serve as interpreters despite conflict of interest and lack of professionalism. North Carolina judges also appear to lack familiarity with standards and guidelines for working with foreign language interpreters in the court. Although the failure to completely and accurately interpret and follow protocol relates to the quality of interpretation, these matters also present obstacles to access to the courts. Individuals who are denied the opportunity to fully and completely communicate with the court are denied meaningful access to the court.

²⁰⁴ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Judge.

B. Failing to Interpret Completely and Accurately: Summarization

The National Center on State Courts' Court Interpretation Model Guide for Policy and Practice (hereinafter State Courts' Model Guide) instructs interpreters to interpret only in consecutive or simultaneous modes; in no event should the summary mode of interpretation be used.²⁰⁵ The interpreter must "interpret the original source material without editing, summarizing, deleting, or adding while conserving the language level, style, tone, and intent of the speaker."²⁰⁶ Most guidelines on interpreter's practices contain a similar instruction. The National Association of Judiciary Interpreters and Translator Canons of Practice contain this guidance: "there should be no distortion of the original message through addition or omission, explanation or paraphrasing."²⁰⁷ The AOC Policies and Best Practices guidelines instruct an interpreter to interpret "completely and accurately." In no case should interpreters "alter the statements they are interpreting."²⁰⁸

However, during a number of our court visits, we observed interpreters routinely summarizing the statements of litigants and attorneys in proceedings. We witnessed the case of one defendant in Pittsboro, North Carolina, who appeared in District Court on Driving While License Revoked, Reckless Driving, and Driving While Intoxicated Charges. The Spanish language interpreter failed to interpret completely and accurately for the defendant. While interpreting for the defendant, he summarized in Spanish only some of the statements made by the defendant's privately-retained attorney regarding the mitigating factors in the case. He also

²⁰⁵ See National Center on State Courts' Court Interpretation Model Guide for Policy and Practice at page 16, http://www.ncsconline.org/wc/publications/Res_CTInte_ModelGuidePub.pdf.

²⁰⁶ *Id* at 16-17.

²⁰⁷ National Association of Judiciary Interpreters and Translator Canons of Practice, <http://www.najit.org/ethics.html#Canon5>.

²⁰⁸ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System §4.2(a).

summarized in English only some of the statements made by the defendant to the defendant's attorney (see Kirby and Raja affidavits).

We observed the same problem in District court (Juvenile division) in Durham. We witnessed summarization by the Spanish language interpreter of testimony provided by the mother of a juvenile charged with felony drug possession. On this occasion, the interpreter failed to provide a full and accurate rendering of the proceedings, instead summarizing the statements of the judge, ADA, and the mother. At one point, the interpreter appeared confused as to how to interpret the meaning of a certain word ("treatment court") but made no attempt to clarify, and later in the proceeding appeared to stop interpreting the ADA's statements to the mother entirely (see Raja affidavit).

The most egregious case of an interpreter failing to give a full and accurate rendering of the proceedings was in Small Claims court in Siler City. In both evictions hearings held that morning, there was no court interpreter present. Because the defendant in this eviction case could not make herself understood in English, and although she asked for a continuance, the magistrate continued with the proceeding and asked the individuals who were in the courtroom whether anyone could speak Spanish. As a result, the Spanish-speaking parties had to rely on a volunteer solicited by the magistrate who agreed to help interpret. This individual was another litigant waiting in the courtroom that morning. The volunteer made a number of errors. Chief among his mistakes was his failure to interpret for the non-English speaking litigant of certain crucial aspects of her eviction case that were stated by the magistrate as part of the order entered against her, including the amount of interest that would accrue on the court's judgment against her, and the amount of court costs that she owed in addition to back-due rent.

In addition to our own observations, local attorneys and public defenders who are fluent in Spanish and can recognize interpretation errors have related to us that they have observed

interpreters summarizing proceedings.²⁰⁹ We have also heard complaints from attorneys that Burmese interpreters, in particular, tend to summarize proceedings.²¹⁰

C. Failing to Interpret for the Court

In some areas of the state, interpreters are not interpreting for the non-English speaking individuals awaiting their cases in the courtroom. They neglect to relay instructions, comments, or questions posed by the judge in English to the entire courtroom. Statements made by the judge to the courtroom often include important information, such as the time court will recommence, instructions to defendants in criminal matters regarding the entering of a plea, and whether or not the docket has been changed. The Spanish language interpreter stationed in the Graham District Courthouse on the morning of our visit failed to interpret the judge's questions posed to the courtroom, including, "Has everyone's name been called? Did anyone come in late and not hear their name called?" At the time that these questions were posed, there were several individuals that appeared to be of Hispanic descent seated in the courtroom who may have needed these instructions interpreted into Spanish (see Kirby and Long affidavits).

In Chatham County, the Spanish language interpreter frequently moves in and out of the courtroom, entering a back room to aid attorneys in private conversations with their LEP clients. This creates problems for Spanish-speaking litigants who are called to appear while the interpreter is absent. The interpreter never announces that he is leaving, or when he will return. One morning while the interpreter was absent, a Spanish-speaking defendant was called before the bench to enter a plea. He responded "need interpreter" and was told by the judge that the court would take up his case when the interpreter returned. This instruction, given in English,

²⁰⁹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with private attorney.

²¹⁰ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with assistant public defender.

was not interpreted into Spanish, and the defendant appeared visibly confused. His case was not resumed for another half-hour (see Kirby and Raja affidavits).

D. Interpreters are Interacting and Speaking with Parties without Interpreting these Conversations for the Court

Court interpreters are generally prohibited from engaging in private conversations with any party, witness or other present in the courtroom, so as to maintain professional detachment. Section 4.2(k) of the AOC guidelines states: “[f]or the duration of the proceedings, interpreters shall neither interact with nor socialize with the parties, attorneys, witnesses, jurors, presiding officials, or friends or relatives of any of these persons, except when carrying out official duties.”²¹¹

In the course of our research we witnessed interpreters engaging in conversations with litigants during a proceeding, without asking permission of the court to speak with the litigant, and without interpreting these conversations for the court. In Small Claims court in Siler City, where no interpreter is provided, an individual who was in court awaiting his own case to be called was enlisted to by magistrate to assist a non-English speaking defendant in an eviction case. While we were there, we observed this volunteer hold numerous conversations in Spanish with two different defendants for whom he served as an interpreter. Both litigants were facing eviction from their apartments. These conversations were not relayed to the court, nor did the presiding magistrate stop the interpreter and instruct him to interpret every statement made by the litigant for the court (see Kirby and Raja affidavits).

In Juvenile Court in Durham we witnessed the Spanish-language court interpreter carrying on a conversation with the mother of a juvenile charged with felony drug possession. She did not interpret these conversations for the benefit of the court (see Raja affidavit).

²¹¹ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System §4.2(k).

E. Interpreters Addressing Court Directly in the First Person

Interpreters should never use the pronoun ‘I’ to refer to themselves when speaking in a court proceeding. This is to avoid confusion during the proceeding as well as in the court record, between interpreted statements made by the litigant, and statements made by the interpreter to the court directly. The State Courts Model Guide recognizes that on rare occasions the interpreter will need to address the court. “In such instances they should make it clear that they are speaking for themselves.”²¹² The AOC Policies and Best Practices state that interpreters should limit initiated communications with the court. In every instance in which an interpreter initiates conversation with the court, the interpreter must make it clear that he is speaking on his own behalf. Section 4.2(1) states: “This is achieved by using the 3rd person- Example: The interpreter requests that the question be repeated, clarified, etc.”²¹³

It appears that some court interpreters are failing to adhere to this practice. During our visit to Alamance County, we observed the Spanish language interpreter assisting one defendant, in his plea bargain on Driving Without a License and Driving Without Insurance charges. In this case, the judge asked the defendant why he was unable to obtain insurance. His reply, through the Spanish-language interpreter, was that he “could not get insurance because I went and they would not give it to me because I did not have insurance.” The interpreter delivered this statement with a puzzled expression on his face, and then asked the judge if “I could clarify a point with him.” The interpreter did not interpret for the benefit of the LEP defendant that he was asking, on his own behalf and for his own clarification, a question for the court. The interpreter in this instance failed to use the third person in addressing the court, likely creating

²¹² See National Center on State Courts’ Court Interpretation Model Guide for Policy and Practice at page 207, http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf.

²¹³ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System § 4.2(1).

confusion for the defendant and, at the least, creating confusion in the court record (see Kirby and Long affidavits).

F. Individuals Allowed to Serve as Interpreters in Proceedings Despite Evidence of Conflicts of Interest

Interpreters must remain impartial. The State Courts Model Guide contains this instruction: “[i]nterpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.”²¹⁴ Section 4.3 of the AOC guidelines provide that the interpreters “shall not engage in conduct that gives the appearance of partiality. Interpreters must disclose any conflict of interest, however remote.”²¹⁵ Section 4.3 lists actual and apparent conflicts that may arise in the course of court interpretation, including a family member of a party serving as an interpreter, anyone with a financial interest in the proceeding serving as an interpreter, or anyone who has served in an investigative capacity for any party serving as an interpreter. An attorney who is also an interpreter should not serve in both capacities in the same matter.²¹⁶

In practice, it appears that courts are overlooking a number of circumstances where conflicts of interests between interpreters and parties to a matter may arise, perhaps due to unfamiliarity with court interpretation ethics, or for the sake of expediting a proceeding. In the course of our court visits, we witnessed several violations of Section 4.3. For example, in Small Claims court, where there is no Spanish-language interpreter present, litigants often bring along friends or family members to serve as their interpreters (see Kirby and Long affidavits). In addition to the obvious problems of the quality of interpretation provided by a non-certified,

²¹⁴ See National Center on State Courts’ Court Interpretation Model Guide for Policy and Practice at page 16, http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf.

²¹⁵ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System § 4.3.

²¹⁶ *Id.*

often unevaluated family member, using a friend or relative to serve as an interpreter also has the potential to create a serious conflict of interest.

During one visit to Siler City, none of the three Spanish-speaking litigants had brought an interpreter with them to their hearings. The presiding magistrate sought a volunteer from among the litigants. One litigant volunteered to interpret for the two remaining litigants in the courtroom. Just minutes later, he was called before the court for his own hearing, on money owed for work done on his tires (in his own proceeding, he spoke English to the magistrate). This litigant may or may not have had an interest in accepting the magistrate's plea for assistance to the courtroom; however, the mere possibility, for example, perhaps hoping for a favorable disposition in his own case, created the appearance of a conflict and one that the guidelines attempt to avoid.

In our conversations with local practitioners, we have learned of other instances of interpreters being allowed to continue with a proceeding despite an evident conflict of interest. Family members or friends sometimes serve as litigants in family court in matters relating to termination of parental rights, abuse, neglect, and abandonment in Durham.²¹⁷ One District Court Judge indicated that husbands, wives, and fiancés are sometimes called upon to serve as interpreters if a court interpreter is not present.²¹⁸ Family court hearings involve important and often extremely emotional and complicated issues of custody and parental rights, for which an accurate, unbiased rendering of the proceedings is crucial. Similarly, in domestic violence cases in some areas in the state, interpreters are interpreting for both parties in the same proceeding.²¹⁹

²¹⁷ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with DSS Government Official.

²¹⁸ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Judge.

²¹⁹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with court certified interpreter.

The Judge stated that attorneys occasionally interpret for their own clients in Orange County. In Chatham County, Assistant District Attorneys are sometimes enlisted to interpret for the courts.²²⁰ So are private practitioners.²²¹ Some attorneys we spoke with indicated that they are uncomfortable with this practice, believing they lack the necessary qualifications to serve as an interpreter, and fearing that it constitutes a violation of AOC guidelines.

An attendant aspect of an interpreter's duty to avoid conflict of interest is his obligation not to provide legal advice to litigants. The State Courts Model Guides indicate that under no circumstances may an interpreter give legal advice to a litigant. The Guides state: "Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals to whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter."²²² Section 4.2(i) of the AOC Best Practices contains a near verbatim instruction.²²³ On one occasion we witnessed what appeared to be an interpreter giving legal advice to litigants. In Siler City, at the conclusion of an eviction proceeding during which another litigant had volunteered to serve as an interpreter, we overheard what we believed to be the volunteer interpreter instructing the litigant, who had been ordered to leave her home within ten days, what she should do next.

²²⁰ *Id.*

²²¹ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with private attorney.

²²² See National Center on State Courts' Court Interpretation Model Guide for Policy and Practice at page 206, http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf.

²²³ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System § 4.2(i).

G. Lack of Interpreter Professionalism

AOC guidelines instruct interpreters to “dress in a manner that is consistent with the dignity of the proceeding of the court.”²²⁴ On at least one occasion, however, we observed an interpreter dressed in jeans (See Kirby and Raja affidavits). The majority of interpreters we observed did not wear a badge or nametag that identified them as a court interpreter.

H. The Judiciary’s Lack of Familiarity with Standards and Guidelines for Working With Foreign Language Interpreters in the Court

1. Judges Should Speak Directly to the Litigant

North Carolina judges have access to an AOC Bench Card which addresses the most frequent issues that arise in court interpreted proceedings. Judges are instructed to keep these cards with them on the bench. The Bench Card emphasizes the importance of speaking directly to the litigant, not to his or her interpreter.²²⁵ In order to meaningfully and necessarily involve the LEP litigant in her own proceedings, judges must address the litigant directly and trust that their statements and questions will be interpreted fully and accurately by the court interpreter.

However, we observed some judges who directed all questions and comments at the interpreter, and not the LEP litigant himself. Such practice creates the possibility for miscommunication and violates guidelines and standards regarding communication between the court and LEP litigants. It also tends to create the appearance that the judge was ignoring the litigant. This behavior only adds to the marginalization LEP litigants who are already disadvantaged due to their inability to speak directly to the court and in the same language as the court. We observed this problem in Siler City, where the magistrate directed many of her statements and questions to the Spanish-language volunteer while failing to speak directly to the

²²⁴ *Id* at § 4.1

²²⁵ See Appendix B3, AOC bench card, available at http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/2007_modelbenchcard.pdf.

litigant. She gave a number of directions to the interpreter to relay to the litigant, stating that the interpreter should “tell her that interest will accrue,” and to “make sure she knows that she has ten days.” (See Kirby and Raja affidavits).

We have observed how the use of language lines further can further complicate the need for a judge to address an LEP litigant directly instead of his or her interpreter. During our visit to Hillsborough, two Burmese defendants were before the court on unrelated matters. Both required the services of an interpreter but neither defendant’s attorney, nor the ADA, had requested one. Eventually, the judge and the attorneys called the AT &T language line for assistance with interpretation. The judge addressed the interpreter on the other end of the line instead of the defendant, and instructed the interpreter what he needed to tell each defendant. He did not address each defendant directly but instead spoke to the interpreter and using the third person to refer to the defendant. During the conversation, the judge directed his focus to the cell phone on the table instead of each defendant seated before him (see Long and Raja affidavits).

2. Moderate Speaking Pace to Allow Full and Complete Interpretation

When an LEP litigant is before the court, judges must make modifications to their regular speech patterns. They are instructed to slow down their pace, and speak in clear, direct phrases. The Model Guides’ instructions for judges indicate that when judges are setting the pace for interpreted proceedings, they must “not assume that the interpreter works at the same speed as the court interpreter. The court interpreter works in shorthand and does not need to transfer meaning from one language to another.”²²⁶ Judges must make modifications to their regular speech patterns must be made so as to allow an interpreter to keep pace with the proceedings and

²²⁶ See National Center on State Courts’ Court Interpretation Model Guide for Policy and Practice at page 133, http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf.

render an accurate interpretation for the litigant and for the court.²²⁷ As we observed, the Siler City magistrate spoke in a very rapid cadence without pauses, which did not allow the interpreter to convey the entirety of her instructions to the litigant. The problem of her fast speech was further compounded by the uncertified interpreter's inexperience and lack of training (see Kirby and Raja affidavits).

3. Introduction of Court Interpreter and Administration of Oath

North Carolina Judge's Bench Card instructs that the interpreter should be introduced to witnesses and the juries.²²⁸ The State Justice Institute's Model Guides also emphasizes the importance of introducing the interpreter and explaining his role. The judge's explanation should touch on the following points: that the interpreter's only function is to assist the court and the parties involved in communicating with each other, that the interpreter is forbidden from giving legal advice, that any and all questions a party has regarding the proceeding should be directed at the judge or an attorney and not at the interpreter, and that the court should be notified if a party is unable to communicate with his interpreter.²²⁹ On only one occasion in the courtrooms we observed did we witness the introduction of the interpreter and the explanation of his role in the proceedings. On no occasion did we witness a judge administer an oath to interpreter.

4. Lack of Evaluation of a Friend or Family Member Serving as Interpreter

In the event there is no courtroom interpreter, and the judge must rely on a friend or relative of a party or another volunteer to serve as the interpreter, a judge must evaluate the qualifications of an uncertified volunteer. The State Courts Model Guide suggests that before

²²⁷ See Appendix B3, AOC bench card, available at http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/2007_modelbenchcard.pdf.

²²⁸ *Id.*

²²⁹ See National Center on State Courts' Court Interpretation Model Guide for Policy and Practice at page 132, http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf.

using an untested interpreter, the judge should establish on the record that the proposed interpreter communicate effectively with the court and with the person who will receive the interpreter’s services; that the interpreter understands the Code of Professional Responsibility, and that the interpreter take the same oath administered to all certified interpreters.²³⁰

Quality issues with court interpretation include: failure to interpret completely and accurately, failing to interpret for the court, engaging in side conversations with litigants, failing to address LEP litigants in the first person and instead, referring to them in the third person, allowing individuals to serve as interpreters despite conflict of interest and lack of professionalism. North Carolina judges also appear to lack familiarity with standards and guidelines for working with foreign language interpreters in the court. Although the failure to completely and accurately interpret and follow protocol relates to the quality of interpretation, these matters also present obstacles to access to the courts. Individuals who are denied the opportunity to fully and completely communicate with the court are denied meaningful access to the court.

Section 3.2 of the AOC Best Practices sets forth what a judge must evaluate in a non-certified interpreter before allowing him or her to serve as the interpreter in a proceeding. The judge should consider, among other factors, how the person learned English, the person’s education and whether they have had any formal study of English, the person’s knowledge of idioms and slang in both languages, and whether the person has training or experience interpreting in other contexts.²³¹ In Siler City, when no interpreter was present to translate for two litigants before the court on separate eviction proceedings, the magistrate allowed another litigant to serve as the interpreter, even after he volunteered that “he was not very good, but that he would try.” The magistrate made no attempt to evaluate his qualifications, failing to pose a

²³⁰ *Id.* at 127-128.

²³¹ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System § 3.2

single question as to the volunteer's language ability or experience. She instead proceeded directly with the case (See Kirby and Raja affidavits).

III. Lawyers' Lack of Awareness on Law Regarding Court Interpretation

Based on our interviews and observations, it is not clear the extent to which attorneys are aware of the law regarding the provision and use of interpreters, and the degree to which they take their obligations to assure that their clients have the benefit of linguistic access to the courts seriously. A Superior Court judge noted that sometimes attorneys would attempt to conduct short proceedings without an interpreter or would fail to make arrangements to ensure that an interpreter would be present, and would just assume that someone would be in court to provide interpretation.²³² To remedy this problem, this judge issued an order stating that all attorneys appearing before the District 15B Superior Court must now notify the court within three days of publication of the court calendar if an interpreter will be needed.²³³

The situation we witnessed on February 19 when there was no Burmese interpreter present in Orange County evidenced confusion on the part all involved as to whose responsibility it was to provide an interpreter for the Burmese defendants. (See Long and Raja affidavits). This is evidence of the failure of the AOC to provide clear guidelines about whose responsibility it is to make sure that litigants have access to an interpreter, which causes confusion for court officers and attorneys alike.

IV. Inadequate Guidelines Provided by AOC

AOC's Policies and Best Practices are a set of guidelines based on the Model Guides for Policy and Practice in the State Courts issued by the National Center for State courts. A memorandum issued on February 1, 2007, introduced a revised version of the previous

²³² See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Judge.

²³³ See Appendix A4, Summary of Interviews with North Carolina Officials, Notes from Interview with Judge; See also Appendix B5, Copy of Order by Judge Allen Baddour.

guidelines for the use of foreign language interpreters to reflect new policies and procedures. As stated in the memo, “The purpose of these policies and best practices is to facilitate the efficient use of competent and ethical foreign language interpreters and translators in court proceedings.”²³⁴ The guidelines currently address many areas of court interpretation including: “registration and classification, appointment and scheduling, code of conduct and ethics for interpreters, best practices for court interpreters, best practices for court officials using court interpreters, compensation, certification, suspension, revocation and de-certification.”²³⁵

These guidelines provide some concrete and much-needed suggestions to standardize North Carolina court interpreting services. However, these guidelines are inadequate and do not effectively represent a system in which all individuals, whether indigent or not, a civil litigant or criminal defendant, would be granted access to a certified interpreter whom provides quality interpreting services. The following is a list of deficiencies and suggested revisions/additions to the guidelines to ensure equal and complete access and quality interpretation services in the North Carolina court system.

Section 3.1: Authority of the Court²³⁶ Although the guidelines provide basic instructions on how the court is to determine whether a litigant needs an interpreter, these guidelines are vague and lack detail. The guidelines need to provide sample questions that the court should ask the litigant, as well as establish an objective standard and procedure to measure a litigant’s English proficiency.

²³⁴ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, MEMORANDUM to Superior Court Judges, District Court Judges, Clerks of Superior Court, District Attorneys, Public Defenders, Trial Court Administrators, Trial Court Coordinators From Judge Ralph Walker, Dated February 1, 2007.

²³⁵ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, Table of Contents.

²³⁶ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.1.

Section 3.2: Appointment and Scheduling an Interpreter²³⁷ The current guidelines allow for a friend or family member to interpret in court if a number of considerations are met.²³⁸ However, a rule should be established banning non-AOC certified interpreters from interpreting. Non-AOC certified interpreters may not have as strong a command of the English language. More importantly, non-AOC certified interpreters do not have an adequate grasp of the legal terminology involved in court, or the code of conduct and ethics to which interpreters are held accountable.²³⁹

Section 3.2: Appointment and Scheduling an Interpreter²⁴⁰ The guidelines currently only say “appointing and scheduling interpreters for court shall be a *local court function*.” Further guidance needs to be detailed regarding whose responsibility it is to obtain the interpreter and ensure that an interpreter is present during the court session. The “local court function” instruction does not clearly appoint a department or individual responsible for the same interpreter.

Section 3.4: Oath²⁴¹ The current guidelines do not mandate an expansive oath but merely suggest it. It is imperative that interpreters are sworn to not just “make a true translation” but also swear to providing accurate, complete, and quality interpreting services while simultaneously

²³⁷ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.2.

²³⁸ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.2.

²³⁹ See National Center on State Courts’ Court Interpretation Model Guide for Policy and Practice, Chapter 6, available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf.

²⁴⁰ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.2.

²⁴¹ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 3.4.

following the guidelines using their best judgment and skill. Additionally, the guidelines suggest that full or half-day court interpreters do not have to be sworn in on a daily basis. However, in order to ensure that all litigants are aware of the rights to which they are entitled and the standards to which an interpreter is held accountable, it is beneficial to have the court interpreter sworn in at the beginning of each court session.

Section 6.3C: Calendar Efficiency²⁴² The guidelines suggest that entire day or half-day interpreters only assist indigent defendants or witnesses. The guidelines should mandate an entire or half-day court interpreter assist *any* litigant or witness who may need their assistance.

Section 6.3D: Courtroom Environment²⁴³ The guidelines suggest that a record of the court proceedings only be required in the most serious cases (i.e. capital cases) in case the adequacy of the interpretation is questioned. However, a record of the original statements in *all* cases where an interpreter is utilized should be kept to ensure that if a question regarding the adequacy of interpretation was raised, a record could reflect the details.

Section 6.3D: Courtroom Environment²⁴⁴ The guidelines merely state that wireless interpreting equipment could be used for simultaneous interpretation. The guidelines should mandate, or in the least, use strong language to highly encourage courts to use technology of this

²⁴² See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 6.3(C).

²⁴³ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 6.3(D)

²⁴⁴ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 6.3(D).

nature.²⁴⁵ This technology could assist the court in keeping a record of interpretations provided in all cases and allows court interpreters' mobility within the courtroom.

Section 6.3G: Translated Forms²⁴⁶ The guidelines do not require the use of translated forms but rather suggest their use. The guidelines should also encourage a move towards having all court related documents translated into the most common languages seen in that county.

Section 7.2: Responsibility of the State to Bear the Cost of a Foreign Language

Interpreter²⁴⁷ The State needs to bear the cost of a foreign language interpreter needed in all cases including criminal and civil, and regardless of whether the litigant is found to be indigent. The language should resemble that which is contained in the Americans with Disabilities Act in which interpreters are provided at the state's "expense regardless of the financial status of the person needing the interpreter and regardless of the type of case."²⁴⁸ Similar language exists in the North Carolina statute.

The guidelines do not set out a procedure to follow if an interpreter is needed for a case and that interpreter is not present or unavailable for that case at a specific time. The court should mandate that such cases be continued to a later date. The court should then take the necessary steps to ensure that an interpreter will be present on the date for which the case is set to appear.

²⁴⁵ See Appendix A5, Interviews with New York Language Access Advocates and Interpreters. New York uses equipment from a company called William Sound. Most interpreters are provided their own wireless interpreting equipment so they may use it in court proceedings to ensure efficient and quality interpretation.

²⁴⁶ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 6.3(G).

²⁴⁷ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.2.

²⁴⁸ See Appendix B2, AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System, § 7.3, Note regarding assessing costs to litigants. See also Appendix D4, Interpreters for Deaf Persons Section § 8B-2: Appointment of Interpreters in certain judicial, legislative, and administrative proceedings; removal.

The guidelines do not provide an example bench card or explain the necessity for a bench card. This bench card should list the current law on in-court interpreters and the policies and procedures that are to be followed by judges regarding interpreters. This bench card for North Carolina judges would maximize communications in an interpreted proceeding and emphasize the importance of speaking directly to the litigant, not to his or her interpreter.²⁴⁹

The guidelines do not mention anything about the necessity for continuing education classes for interpreters to allow interpreters to remain up to date with current legal issues and terminology. The guidelines should mandate continuing education for interpreters as many interpreters themselves feel they need these types of classes in order to provide quality and efficient interpretation.²⁵⁰ The guidelines should also explain the need for a training class for both attorneys and interpreters describing methods of working together for the benefit of the LEP litigant.

The guidelines do not provide guidance to ensure that litigants are put on notice about the availability of an in-court interpreter for their use. Additionally, the guidelines should require the provision of signs in each courtroom to explain what types of languages are interpreted and the procedure for obtaining the services of an interpreter.

V. Conclusion to Part Two

As discussed above, access to court interpreters is inconsistent at best in the North Carolina Court System, and in some court non-existent. Further, when interpretation is provided the quality of services are not meeting the standards set out by AOC in its Policies and Best Practices Guide, which itself provides inadequate protection for LEP individuals.

²⁴⁹ AOC has created such a bench card to assist judges in working with court interpreters. However, improvements to the bench card are needed. *See* Appendix B3, AOC Bench Card for Working with Court Interpreters, available at http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/2007_modelbenchcard.pdf.

²⁵⁰ *See* Appendix A5, Interviews with New York Language Access Advocates and Interpreters, Notes from Interview with Lionel Bajana, New York Court Interpreter.

PART THREE: OPTIONS TO ADDRESS PROBLEMS WITH COURT INTERPRETATION

I. Potential Options

We have identified four policy options that advocates can implement to address access and quality issues with North Carolina court interpreters. These options, in no order of preference, are:

- Lobby for a written mandate (administrative or court order or state statute) to require the court to provide that an interpreter be appointed for an LEP litigant, witness, or interested parent or guardian of a minor child, when needed, in all civil and criminal cases at court expense.
- File a Title VI complaint against AOC with the U.S. Department of Justice.
- File a lawsuit against AOC alleging constitutional violations, namely the failure to provide court interpreters for civil LEP litigants and to provide an interpreter at state expense for all criminal defendants.
- Enter into negotiations with AOC to seek improvement in court interpretation.

II. Evaluation of Options

A. Option One: Lobby for a Written Mandate Requiring the Provision of Interpreters

A statewide written mandate requiring the provision of an interpreter when needed for all LEP civil and criminal litigants, witnesses, and interested parents or guardians of a minor child, at court expense, would ensure that LEP individuals were uniformly provided with an interpreter. Under this mandate, LEP individuals would be provided with an interpreter regardless of their ability to pay. Litigants would not be assessed the costs of their court interpreter.

Other states have successfully implemented written mandates, whether through a statutory fix or an administrative or judicial order. Twenty-five states surveyed by the Brennan Center have a mandatory written requirement that an interpreter be provided in all civil cases.²⁵¹

²⁵¹ Laura Abel, *Language Access in State Courts*, Brennan Center for Justice at New York University School of Law at 12 (2009), http://www.brennancenter.org/content/resource/language_access_in_state_courts/. These states are:

Of these twenty-five states, ten states provide that the interpreter be provided at court expense. No costs are assessed to the litigant in these ten states: Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Jersey, New York, Oregon, and Wisconsin.²⁵²

New York's Rule 217 is an example of a comprehensive order on interpreters that could serve as a model for North Carolina legislators. The rule provides that in all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in Family Court, cannot meaningfully participate in the court proceedings, the court shall appoint an interpreter.²⁵³ Under Rule 217, the interpreter is provided at court expense, and in no instance is a litigant ever assessed the costs of their interpreter.²⁵⁴

Closer to home, North Carolina's General Statute §8B establishes the right to an interpreter for the deaf. This right is granted in all cases, and at court expense. It too could serve as a model for the General Assembly in establishing a similar right for LEP individuals.²⁵⁵

Option One would effectively address problems of access to court interpreters. It is a comprehensive approach that would cover all LEP litigants, LEP witnesses, and LEP interested parents or guardians of a minor, in civil and criminal cases, regardless of their ability to pay.

B. Option Two: File a Second Title VI Complaint with the United States Department of Justice

A violation of Title VI exists when state courts, which receive federal financial assistance, refuse to provide state court interpreters to those individuals that need them. Many states have filed complaints to the Department of Justice claiming a violation of Title VI for lack

Washington, DC; Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Mississippi, Nebraska, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Texas, Utah, Washington and Wisconsin.

²⁵² *Id.* at 20.

²⁵³ N.Y. Rule § 217.1 (2007).

²⁵⁴ *Id.*

²⁵⁵ See N.C. Gen. Stat. § 8B (2009).

of access to court interpreters.²⁵⁶ North Carolina is among these states. In order to hold the Administrative Office of the Courts of North Carolina accountable for its failure to provide access to interpreter services in court and initiate an investigation into the policies and practices regarding North Carolina state interpreters, a second Title VI complaint could be filed to the Department of Justice.

A previous Title VI complaint was filed in 2006 by a private North Carolina attorney claiming that non-English speakers, specifically Hispanics, received unequal treatment by AOC based on their national origin. The complaint also mentioned a court interpreter named Victor Jeffreys who referred to Hispanics with “derogatory and racially offensive language.”²⁵⁷ Officials from DOJ commenced an investigation and visited North Carolina to evaluate the state policy and individual courts. However, to the best of our knowledge no action or change has thus ensued from this investigation or the complaint. This complaint is still pending before the DOJ.

In order to file a Title VI complaint, a form must be mailed and sent to the Coordination and Review Section of the Civil Rights Division of the DOJ.²⁵⁸ The complaint form calls for an explanation of the circumstances surrounding the discrimination at issue, whether retaliation has occurred due to the filing of a Title VI complaint, additional contacts, remedy sought, information about previous filings, whether the agency in question receives DOJ funds, basic information, and a consent for disclosure of a name.²⁵⁹ Section investigators and attorneys of the Coordination and Review Section of the DOJ then proceed to launch an investigation under Title VI of the Civil Rights Act of 1964. If the complaint is found to be legitimate, then the Attorney

²⁵⁶ For example complaints of this nature have been seen in Maine and Indiana. *See* Appendix C3, Memorandum of Understanding between the United States of America and the State of Maine Judicial Branch. *See also* Appendix C4, Letter from Coordination and Review Section Chief Merrily Friedlander to Indiana Courts.

²⁵⁷ Keren Rivas, *Justice Department Visits Local Courts Over Language Access*, *Times-News*, Feb. 29, 2008 available at <http://www.thetimesnews.com/news/courts-10951-court-department.html>.

²⁵⁸ *See* Appendix C1, DOJ Civil Rights Division Coordination and Review Complaint form, available at <http://www.justice.gov/crt/cor/complaint2011.pdf>.

²⁵⁹ *Id.*

General will send a letter to AOC explaining they are currently in violation of Title VI and at risk of having their federal funding discontinued.²⁶⁰

This second complaint should focus on the lack of access of LEP individuals to state court interpreters constituting national origin discrimination, a violation of Title VI. The complaint should emphasize the lack of equal access to representation in criminal, domestic, juvenile, and small claims cases and further evidence of quality issues as they impact an individual's meaningful access to the courts. As noted in the letter, "[e]xamples of Title VI compliance can be found in state courts that are providing interpretation free of cost to all LEP persons encountering the system (including parents of non-LEP minors), whether it be in a criminal or civil setting, and in important interactions with court personnel, as well as providing translations of vital documents and signage."²⁶¹ Therefore, the North Carolina courts are clearly violating their duty to provide an interpreter in all legal proceedings where one may be needed.

The goal of filing a Title VI complaint is to provide DOJ with enough information about the violations occurring in North Carolina, requiring them to reinvigorate their investigation and send individuals to observe court interpreting in North Carolina state courts, who would then witness the violations themselves. The complaint process could ultimately result in DOJ contacting AOC a second time explaining to them their obligations and duties under Title VI regarding court interpreters, as well as the consequences of non-compliance involving discontinuance of federal financial assistance.

C. Option Three: Bring a Lawsuit against AOC

A third option would be to bring a lawsuit against AOC based on constitutional claims. This lawsuit could be founded on claims both for criminal defendants and for civil litigants. For

²⁶⁰ For example letter *see* Appendix C4, Letter from Coordination and Review Section Chief Merrily Friedlander to Indiana Courts.

²⁶¹ *See* Appendix C4, Letter from Coordination and Review Section Chief Merrily Friedlander to Indiana Courts.

criminal defendants, the argument could be founded on the Sixth Amendment right to confront witnesses, as well as due process arguments. For civil litigants, a lawsuit could also be based on due process claims. (Constitutional claims are discussed in Part One of this paper). This approach has the advantage of legitimacy in the sense of having a strong foundation in basic constitutional norms.

D. Option Four: Negotiate Directly with the Administrative Office of the Courts

A fourth option would involve negotiating directly with the AOC, which would entail informing AOC that sufficient basis exists to file either a Title VI complaint or a lawsuit and that such action would likely be taken if AOC did not voluntarily correct the current problems with the court interpreter system. Negotiations demonstrate a good faith effort to work to resolve the problem through discussion if possible.

E. Additional Action: Form a Statewide Task Force to Prioritize the Issue

In addition to the four options set forth above, we are providing another recommendation that would complement any other strategy that might be used to improve access to the courts for LEP individuals. We recommend the formation of a statewide Task Force to prioritize the problem of limited access and variable quality of court interpretation across the state. This coalition would implement a two-pronged approach to improve court interpretation. First, it would conduct more research on the issue, in counties and courtrooms that we were unable to observe in the course of this project. Secondly, the group would work with AOC to improve language access in the courtrooms.

Statewide task forces on court interpretation have been critical in bringing the issue to the attention of the court system. The efforts of the New York Task Force to prioritize language access in New York courtrooms proved crucial in the passage of Uniform Rule 217, which mandates the provision of a court interpreter, when needed, for all LEP litigants, witnesses, and

parents and guardians of minors, in civil and criminal cases. Prior to 2007, when Rule 217 was passed, New York provided no guaranteed access to court interpreters in civil cases. This issue came to the attention of the Women in the Courts Task Force, a committee of the New York Bar Association. The Women and the Courts Task Force was particularly concerned with the failure of the court system to provide quality court interpretation to domestic violence victims. They partnered with Justice Speaks, a coalition of language access advocates, to push for change on the issue. The group's mission was soon broadened to push for the provision of a court interpreter in all civil matters. The group held yearly forums on the issue of court interpretation, created focus groups on the efficacy of court interpreters, and surveyed judges on their use of court interpreters. They developed a close working relationship with the New York Office of Court Administration (OCA). Ultimately, their efforts resulted in Uniform Rule 217, and OCA's Five Year Action plan to improve court interpretation.²⁶²

A North Carolina Task Force on court interpretation can be organized with similar membership and with similar goals. We suggest that the following organizations be included in North Carolina's own statewide task force, due to each group's large and diverse membership, and the relevancy of language access issues to their individual missions: the North Carolina Justice Center, Legal Aid, the ACLU of North Carolina, North Carolina Advocates for Justice, and the North Carolina Equal Access to Justice Commission. The task force could also benefit from the membership of private practitioners, judges,²⁶² and an alliance with the North Carolina Bar Association. New York language access advocates received the support of New York City Mayor Michael Bloomberg; a North Carolina Task Force should attempt to enlist an ally in Governor Beverly Purdue's office. We suggest that in order for the Task Force to be most

²⁶² See Appendix B9, Court Interpreting in New York: A Plan of Action, New York Unified Court System, April 2006.

effective, a point person within each member organization be identified. This point person would be responsible for prioritizing court interpretation and educating other members on issue developments.

We recommend the Task Force conduct further field research to determine the extent of access and quality issues with interpreters in the state. Gaps in our research for this paper that could be filled in through the Task Force's efforts include: observing interpreter access in rural counties in the state, speaking with litigants affected by the issue, attending more civil court sessions, attending superior court sessions, and attending court sessions with more regularity and frequency. We estimate that to gather sufficient evidence, observers should work in court for at least six more months. Students at the New York University Law School have been regularly observing courtroom interpretation in New York State. These students fill out a standardized form during each court visit; this form instructs students to record, among other information, what type of case is being observed; defendant's country of origin; whether the defendant had trouble communicating; whether the defendant was provided effective legal counsel; and whether the interpreter was comprehensible. The form provides space for additional notes and follow-up questions. Each student is also given a how-to handbook on court observation.²⁶³ We believe they will be useful in developing comprehensive, standardized court observation procedures, should the Task Force wish to collect further data.

We recommend the Task Force set forth a mandate to address all of the problems identified in the above paper. The Task Force should pursue a judicial order, administrative rule, or state statute that would guarantee the right to an interpreter in all proceedings for LEP individuals, similar to the guarantee set forth in New York Uniform Rule 217. Additionally, we

²⁶³ See Appendix D3, NYU Court Observation Form and Guidance.

recommend that the task force work with AOC to pursue a number of other interim actions to improve court interpretation. We suggest the following actions:

- Research and apply for grant money to improve interpreting services. Previous grantors of funds earmarked for language access issues include the Z. Smith Reynolds Foundation, the North Carolina State Bar, and the Governor’s Crime Commission.²⁶⁴
- Encourage the Bar Association to implement training sessions for judges and lawyers to familiarize them with working with a court interpreter. We recommend that CLE credit be granted for these training sessions.
- Conduct surveys to measure how well judges and lawyers are aware of policies and procedures involving court interpretation.
- Create a comprehensive bench card or handbook to educate judges to replace the cursory materials currently offered online. The AOC could use as a model the 160-page “Interpreters in the Judicial System: A Handbook for Ohio Judges,” which addresses everything from establishing the need for interpreters in the court system; appointing an interpreter; waiving an interpreter; and assessing the qualifications of a court interpreter.
- Create an easily accessible interpreter complaint mechanism for LEP litigants to be posted on the AOC website.
- Invest in sound equipment for interpreters, such as Williams Sound Simultaneous Interpretation technology.
- Mandate continuing education training for court interpreters so as to keep pace with changes and improvements in the practice of court interpretation. Continuing education should cover ongoing exploration of professional conduct issues, terminology research, and resources.

III. Authors’ Recommendations

Based on our analysis, we provide the following recommendations:

- **Pursue a statewide written mandate.** This mandate would require the provision of an interpreter when needed for all LEP civil and criminal litigants, witnesses, and interested parents or guardians of a minor child, at court expense. This is the most comprehensive option to expand access to court interpretation in North Carolina. This option would provide substantive law to cite to in instances in which interpreters are denied, or costs of the interpreter are assessed. We choose to recommend this option as it is the most comprehensive solution of those proposed.

²⁶⁴ See North Carolina Court System: Interpreting Services Background, <http://www.nccourts.org/Citizens/CPrograms/Foreign/Default.asp>.

- **Negotiate with AOC.** A good working relationship and open communication with AOC is fundamental as AOC is tasked with the responsibility for the implementation of changes in policies and procedures regarding court interpretation. Advocates have a keen interest in collaborating and assisting AOC to this end. Our Best Practice research also suggest the recommendation of Option Two; New York language access advocates that we met with in the course of this project credited a good working relationship with court administration office for bringing about Rule 217, New York’s comprehensive administrative rule on the provision of interpreters in all cases when needed. We believe a similar alliance in North Carolina is possible and would help advance language access issues.
- **File a second Title VI complaint.** The filing of a Title VI complaint would reinvigorate the existing, pending complaint. The Title VI complaint should contain evidence from a number of North Carolina counties, including rural areas that were not visited in this project. Ideally, the Title VI complaint would also contain the stories of LEP litigants denied access to an interpreter, as well as direct evidence of a litigant who was assessed fees for the use of an interpreter.
- **Create a Statewide Task Force.** The Task Force should continue to gather evidence to assess access and quality issues with court interpretation in all areas of North Carolina; this evidence can then be used to file a Title VI complaint. The Task Force will also work with the Bar Association and the AOC to implement interim changes with court interpretation. As discussed above, good working relationships between a Language Access Task Force and the court’s office proved crucial in bringing change to New York State. The authors believe similar success could be achieved through the efforts of a North Carolina Task Force.

CONCLUSION

As evidenced by our observations, North Carolina is not providing equal access to the courts to LEP litigants. While there are systemic problems within the North Carolina foreign language court interpretation system, they are capable of being addressed. As the population of North Carolina continues to become more diverse, providing equal access to justice will only become more critical. Through our recommendations North Carolina can create a system which provides fair access and quality services to every North Carolinian regardless of English proficiency.