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How to Speak American: In Search of the Real Meaning of "Meaningful Access" to Government Services for Language Minorities

Audrey Daly*

I. Introduction

In July 2004, the New York Times ran the story of Moon Chul Sun, a Korean man whose journey through the U.S. health care system ended in tragedy.¹ Mr. Moon, who spoke no English, arrived in the U.S. ten months earlier, seeking a better education for his three children.² The family lived in the New York City borough of Queens, which is home to a large Korean community.³ Mr. Moon's wife described him as happy, healthy, and strong.⁴ One Sunday, after playing in a local soccer match, Mr. Moon developed a severe headache and sought treatment at a local hospital, where a CAT scan revealed a blood build-up in his brain.⁵

Mr. Moon was transferred to another hospital where he spent three days, unable to communicate with doctors and staff.⁶ At the end of his

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2. Id.
3. Id. According to this article, there are about 62,000 Koreans in Queens. Id. Although, according to the 2000 U.S. Census, the Korean population accounts for less than 3% of the borough's total population, the borough is home to 71.8% of New York City's total Korean population. See Quick Demographic Facts for Queens Borough Public Library Service Areas, available at http://www.queenslibrary.org/pub/QuickFacts.asp (last visited Mar. 20, 2006). Queens has “the highest number of residents who consider themselves as speaking English 'not well' or 'not at all.' This accounts for approximately 13.7% of the population five years and over.” Id.
5. Id.
6. Id.
stay, a translator finally arrived to tell him that he was discharged; the
only instruction Mr. Moon received was to take Tylenol. According to
Mr. Moon's wife, the translator "spoke little Korean."

During the next month, Mr. Moon and his wife tried to communicate with doctors and hospital staff, but their attempts led to misunderstandings about test results, payment options, and follow-up appointments. Weeks after his initial discharge, Mr. Moon became seriously ill and was rushed to the hospital. After undergoing a series of surgeries for what had become a blood clot in his brain, Mr. Moon died. It is impossible to determine whether his death could have been averted if the language gap between the Moon family and hospital staff had been narrowed. However, communication difficulties unquestionably affected Mr. Moon's ability to participate in his treatment and added to his family's stress.

The difficulties faced by language minorities are not always obvious to the outside observer. In fact, people who speak only English might feel that society goes too far to accommodate limited English proficient ("LEP") persons in their own language, based on what they see in the media. Politicians have made significant efforts to appeal to LEP

7. Id.
8. Id.
9. Id. The article captures the confusion that plagued Mr. Moon during his experience:

In the arc of his 34-day journey through the medical world, Mr. Moon struggled to understand his options even as what ailed him remained a mystery to his family because of communication problems. There were confusing conversations about insurance and a staggering bill that left his family reeling. There was the option to apply for Medicaid, which was declined by the hard-working family, a decision fueled in part by pride, fear and a lack of information. There would be friends and neighbors drawn into the story, brought along to try and help the family understand exactly what the professionals were saying or concluding. In the end there would be death and anger.

Id.

10. Santora, supra note 1, at B1.
11. Id.
12. Id. Representatives of the hospitals involved said that they did everything they could to treat Mr. Moon. Id. Dr. Bruce Vladeck, a professor of health policy at Mount Sinai School of Medicine, confirmed that New York hospitals tend to be more generous than most hospitals in treating uninsured immigrant patients and that there are factors other than language that make it difficult for patients to navigate the system. Id. But Natalie Woods, who works in the State Attorney General's civil rights bureau, said that "there was no excuse for the language difficulties Mr. Moon encountered." Id.
13. Id.
individuals and communities, celebrating language differences by advertising to larger language minority groups, such as Spanish-speakers, in their primary language. LEP Citizens are encouraged to participate in the political process; in fact, since 1975, the Voting Rights Act has required that bilingual (or multilingual) ballots be used in places with significant concentrations of LEP persons. Courts have upheld that requirement, despite arguments that the provision is superfluous since naturalization is contingent upon “fluency” in English. However, the apparent support of the LEP population’s rights to participate in the political process is not mirrored in all interactions between the government and LEP persons.

In Alexander v. Sandoval, the Court held that in order to prove national-origin discrimination under Title VI of the Civil Rights Act of 1964, a plaintiff must show that an agency receiving federal funds acted with discriminatory intent in failing to provide services in another language. The plaintiff in Sandoval, who had not been allowed to take a driver’s license test in Spanish, claimed that the agency’s failure to offer the test in Spanish had a disparate impact on non-English

and politicians create the impression that the English language is threatened, when in reality most immigrants arrive in the U.S. with some knowledge of English. Even if arriving adults do not attain fluency, their children will invariably learn English and most likely will prefer it over other languages.


17. 42 U.S.C.A. § 1973aa-1a (West 2003). The Act was amended in 1975 to require states or political subdivisions in which over five percent of the voting age population consists of LEP persons within a single language minority group to conduct bilingual elections. Id. These states or subdivisions must provide bilingual voting notices, forms, instructions, assistance, and ballots in the minority language. Id.
18. See Reich v. Larson, 695 F.2d 1147, 1148 (9th Cir. 1983) (dismissing a constitutional challenge to the bilingual election requirements by a candidate who claimed that requiring translation of his election statement into Spanish violated his First Amendment rights).
19. See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001) (arising from a state policy that written driver’s license tests could only be taken in English); Almendares v. Palmer, 284 F. Supp. 2d 799 (N.D. Ohio 2003) (arising from local Food Stamp program administrator’s failure to adhere to requirement that bilingual program-related notices be sent to LEP persons receiving assistance).
22. Sandoval, 532 U.S. at 293.
speakers. In 2000, shortly before the Court decided *Sandoval*, President Clinton passed Executive Order 13,166, which requires federal agencies and recipients of federal funding to provide "meaningful access" to LEP persons. The Order was intended to compel compliance with Title VI regulations that proscribe policies and practices that have a disparate impact based on national origin. Since the Order was issued, federal departments have provided guidance on how agencies and funding recipients should implement the mandate to provide meaningful access, including directives to translate important forms and documents into other languages and provide copies to LEP persons who need them.

Given the emphasis that the federal government has begun to place on the legal obligations of funding recipients with respect to LEP persons, it is important to ensure that LEP individuals can seek a judicial remedy when they are harmed by restricted access to government services due to language differences. Although the *Sandoval* decision bars a remedy under Title VI where a plaintiff can only show disparate impact, growing emphasis on meaningful access may provide plaintiffs with some basis for showing discriminatory intent. When a recipient of federal funding knows of the obligation to provide meaningful access and refuses to undertake reasonable affirmative measures to accommodate LEP persons, courts should treat such a failure as evidence that can lead to an inference of discriminatory intent.

The purpose of this comment is to present several options to help improve access to government-funded programs and services for LEP persons. Additionally, this comment will highlight the growing influence of non-English speakers in U.S. society and present the policy reasons for ensuring that members of the non-English speaking community can access government services without being hindered by their language limitations.

Part II provides background on language issues and some of the controversy generated by these issues. Part II, Subsection A discusses

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23. Id. at 278-79.
25. Most federal departments and agencies have promulgated disparate impact regulations, and although they may contain slight textual differences, they all operate to prohibit the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R. 42.104(b)(2) (2004) (U.S. Dept. of Justice regulations). See also 45 C.F.R. 80.3(b)(2) (2004) (U.S. Dept. of Health and Human Services regulations) [hereinafter HHS regulations]; 40 C.F.R. 7.35(b) (2004) (U.S. Environmental Protection Agency regulations) [hereinafter EPA regulations].
the current status of English use in the United States, and Subsection B focuses on the movement to make English the official language of the nation and, correlative to restrict the government's use of languages other than English. Part III focuses on the current approach to language access and language-related discrimination and offers suggestions for how to improve the system for LEP individuals in the future. Part III, Subsection A provides information about existing statutes and regulations dealing with language access to government services. Subsection B explains the limitations posed by the current system, which relies almost exclusively on an administrative process for enforcing language discrimination claims. Subsection C proposes three strategies which could be implemented to achieve progress in eliminating language discrimination for LEP persons seeking access to government services: (1) cooperation to improve the administrative process; (2) litigation of select claims under the Title VI prohibition on intentional discrimination; and (3) development and support of legislation intended to ensure that LEP individuals are allowed meaningful access to services. Finally, Part IV concludes by asserting that the best way to reconcile the mixed messages sent to LEP persons living in U.S. society, which at times values and at other times rejects their language differences, is to use a combination of strategies, including the three listed above.

II. Background

A. Language Use in the United States

The idea of America as a nation of immigrants inspires pride in those whose ancestors came to the United States looking for freedom and opportunity long ago.27 However, in recent decades there has been increased controversy regarding the extent to which America should welcome persons from beyond its borders.28 Some argue that today's

27. See, e.g., John F. Kennedy, Acceptance of the New York Liberal Party Nomination (Sept. 14, 1960), available at http://www.pbs.org/wgbh/amex/presidents/35_kennedy/psources/ps_nyliberal.html (last visited Mar. 21, 2006). John F. Kennedy, a descendant of Irish immigrants, acknowledged the pride that American immigrants feel, saying, "[W]e do not feel minor. We feel proud of our origins and we are not second to any group in our sense of national purpose." Id. See also Stephen H. Legomsky, E Pluribus Unum: Immigration, Race, and Other Deep Divides, 21 S. Ill. U. L.J. 101, 106 (1997) [hereinafter Legomsky, E Pluribus Unum]. Professor Legomsky says that immigration is "a core ingredient of our national identity. Immigration is who we are as a people. We celebrate our immigrant ancestry. We are proud of it. . . . Anyone who has had the chance to visit Ellis Island, to walk through the Great Hall. . . . has felt the spirituality of the immigrant experience." Id.

immigrants choose not to assimilate as quickly as those from days past and that, by failing to do so, they are creating fractures in America's social and cultural composition. In support of their arguments, they often point to language trends, such as the increase in the number of persons who speak a language other than English in their daily lives. Between 1980 and 2000, the population of the United States grew by about twenty-five percent, but the number of Americans who spoke a language other than English at home nearly doubled. In 2000, about forty-seven million Americans (eighteen percent of all Americans over five years of age) spoke a language other than English at home. Over half of those spoke English "very well," while the remainder, about eight percent of the total population, consisted of persons who were limited in English proficiency.

For over 200 years the United States has successfully governed its ever-increasing populace without a national or "official" language. Currently, as has been the case since the founding of our country, the English language is the dominant language employed in all forms of communication in the United States; however, there are those people who believe that this dominance may be threatened as the number of non-English speaking immigrants increases. Individuals who hold this

20041122/news_1n22immig.html (last visited Mar. 21, 2006) (speculating about upcoming immigration related tensions that will surface in the political world after the 2004 election).


30. Id.


32. Id. at 2.

33. Id. at 2-3. This figure includes persons who speak English at various levels below "very well," including those who speak English "well," "not well," and "not at all." Id. The categories are taken directly from the census form, as shown by Figure 1 of the report, and they are not defined. See id. at 1.


Today America's linguistic unity, which enabled the melting-pot crucible to forge one nation out of millions of immigrants from all over the world, is under attack as never before. Record numbers of non-English speaking immigrants threaten to overwhelm the assimilative process. And instead of encouraging new immigrants to acquire the English fluency needed to succeed in our society, the policy of our government is to promote "diversity" by operating in
view often identify with a larger group, whose mission is to bring about an official declaration that a single language—English—is to be embraced by government and all citizens alike.\(^{36}\)

### B. The Movement to Make English the Official Language of the United States

During past periods of large-scale immigration in the U.S., efforts surfaced to promote English use and counteract the introduction of new communities of minority language speakers.\(^{37}\) These efforts continue today as part of a general movement known as the “English-Only” movement.\(^{38}\) The most modern subset of this movement, which focuses on promoting legal action to make English the language of the national government, is known as the “Official English” movement.\(^{39}\) In its most benign form, the Official English movement can be seen as a largely symbolic gesture—an attempt to promote the acquisition of English by immigrants and to recognize it as an element of the American identity.\(^{40}\) There is, however, a more radical objective espoused by many proponents of the movement: to eliminate the use of any language other than English by the United States government.\(^{41}\) The core ideology of proponents of English-Only or Official English seems to hinge on a fear that non-English speakers will somehow “take over” if their failure to assimilate is not met with some level of disapproval by government.\(^{42}\)

#### 1. Arguments in Support of Official English and English-Only Policies

Organizations that advocate the establishment of English as the official language and the exclusion of the government’s use of other ever growing numbers of foreign languages.

\(^{36}\) See id.

\(^{37}\) STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 272-77 (3d ed. 2002). Professor Legomsky’s note on the English-Only Movement summarizes the various contexts (i.e. government, private, and commercial speech) in which language issues arise in response to immigration trends. Id.

\(^{38}\) Id. at 273.

\(^{39}\) Id.

\(^{40}\) Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269, 346 (1992) (describing how the English-Only Movement makes appeals to preserve national unity by pointing out that English use is part of the American identity).

\(^{41}\) LEGOMSKY, supra note 37, at 275.

languages offer various arguments in support of their positions. English-Only proponents identify Canada as an example of a nation that is divided by dual language use. Economic concerns are also advanced; the English-Only proponents argue that the government would eliminate an unfair burden on taxpayers, most of whom speak English, and save money, by not providing translators, documents, or other services in a non-English speaker's language.

Yet another common argument focuses on the well-being of the immigrant or LEP person, rather than on the cultural or economic strength of the nation. This argument provides that assimilation, particularly the learning of the English language, is the key to success for new immigrants. Even if the establishment of English as the official

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43. Several non-profit organizations exist to promote the use of English and to push for legislation which would make it the official language. One of the largest groups, U.S. English, Inc., was founded in 1983 by Senator S.I. Hakaway, a U.S. Senator from California, who was an immigrant born in Canada and a naturalized U.S. citizen. Information about this group available at http://www.us-english.org (last visited Mar. 21, 2006). Other groups supporting this cause include English First, see http://www.englishfirst.org (last visited Jan. 9, 2005), and ProEnglish, see http://www.proenglish.org (last visited Mar. 21, 2006).

44. Linda Chavez, *English: Our Common Bond*, a speech presented to the Los Angeles World Affairs Council (Dec. 4, 1987). Linda Chavez stated that, "unless we become serious about protecting our heritage as a unilingual society—bound by a common language—we may lose a precious resource that has helped us forge a national character and identity from so many diverse elements.” *Id.*


We need only look to Canada to see the problems a multilingual society can bring. America's northern neighbor faces a severe crisis over the issue of language. In 1995, the predominately French speaking province of Quebec came within a few thousand votes of seceding from Canada. The secessionist Parti Quebecois ruled the province until this year. The national government must continually cater to Quebec to preserve order and maintain a cohesive government. This has spurred secessionist movements in English-speaking Western Canada on the grounds that the Canadian government favors French speakers.

*Id.*


47. See U.S. English Talking Points, at http://www.us-english.org/inc/action/talkingpoints.asp (last visited Mar. 21, 2006). U.S. English maintains that Official English legislation is pro-immigrant, citing a study that shows that English speakers earn more than non-English speakers. *Id.*

language were merely symbolic, proponents argue that this would convey the message that using English is an important part of being American, encouraging immigrants to learn English. Some would argue that an English-Only policy would do even more to encourage assimilation by employing a sort of "tough love" approach. The policy would create a disincentive for LEP persons to continue to speak in their primary language by forcing them to deal with the government in English.


Although the push to make English the official language of the United States has not resulted in action on the federal level, about half of the states have made English their official language. In order to achieve this result, these states have either enacted legislation or amended their state constitutions, often as a result of voter response to ballot initiatives. The intended effects of states' actions vary, ranging from the purely symbolic declaration of English as the official language to the mandate that no language other than English may be used by state government.

Official English and English-Only organizations likely believe that their success in promoting English as the official language in so many states will help them achieve their goals on the national level. Over the past several years, a small group of Congress-persons has consistently sought a Constitutional Amendment which would declare English as the official national language. While efforts to amend the U.S. law would "encourage immigrants, giving them an incentive to learn English and to assimilate." Id.

49. Id.

50. Id. Mujica also said, "If all government services are provided in other languages, the urgency to learn English would be gone. And without English, immigrants have little chance of obtaining decent wage-earning jobs, which statistically hurts their children's success in this country." Id.

51. Id.


53. The ProEnglish website maintains a page entitled "State Language Laws and Data," which reports the status of all states' language policies and explains how language laws were implemented, available at: http://www.proenglish.org/issues/offeng/states.html (last visited Mar. 21, 2006).

54. Id.

55. The most recent version of this proposed amendment is H.J. Res. 94, 108th Cong. (2004).
Constitution may draw attention to the cause, the likelihood of success in such an endeavor in the foreseeable future is very small due to limited support.\textsuperscript{56} Other proposals for federal legislation have greater support, but the passage of such legislation is not likely imminent.\textsuperscript{57} One of the most comprehensive pieces of relevant proposed legislation is the English Unity Act of 2003,\textsuperscript{58} which has been more successful than other, similar legislation introduced in the House of Representatives.\textsuperscript{59} This Act would make English the official language and the only language of U.S. government.\textsuperscript{60} It would also set higher standards for English fluency for persons who desire to become naturalized citizens of the United States.\textsuperscript{61} Another proposal seeks to overturn Executive Order 13,166,\textsuperscript{62} which is discussed in detail later in this comment.\textsuperscript{63} The Executive Order requires federal agencies and recipients of federal funding to provide meaningful access to LEP persons.\textsuperscript{64}

Although it seems unlikely that federal legislation to make English the official language will be successful in the near future, English-Only organizations argue that there is overwhelming public support for


\textsuperscript{57} See ProEnglish U.S. Legislation, infra note 59. Apart from enjoying only moderate support in Congress, official English laws that could alienate LEP individuals are not congruent with President Bush’s agenda. See On the Issues: George W. Bush on Civil Rights, available at http://www.ontheissues.org/Celeb/George_W_Bush_Civil_Rights.htm (last visited Mar. 21, 2006). During his presidential campaign, George W. Bush came out in favor of an English Plus approach, which promotes the preservation of an immigrant’s nativè language and culture and the provision of support for those making the transition to English proficiency.\textsuperscript{Id.}


\textsuperscript{60} Id.

\textsuperscript{61} Id. Section 164 of the bill sets forth the Uniform English Language Rule for Naturalization, which states: “All citizens should be able to read and understand generally the English language text of the Declaration of Independence, the Constitution, and the Laws of the United States made in pursuance of the Constitution.”\textsuperscript{Id.}


declaring English as the official language. While simple polls that ask only whether English should be the official language often yield nearly unanimous "yes" answers, this is not necessarily indicative of widespread support for the goals of most supporters of Official English legislation. In fact, polls that pose questions with more specific information about proposed legislation show respondents are evenly split on the issue. In general, while most Americans might support a symbolic declaration of English as the national language, far fewer support the idea of laws that make it more difficult for LEP persons to communicate with government.

3. Arguments Against Official English and English-Only Policies

Many groups oppose legislation aimed at making English the official language and restricting the use of other languages by government, and many of these groups actively promote a more inclusive brand of language policy, known as English Plus. Opponents


67. Id.

68. Id.


70. Id. The NEA, NCTE, and LULAC favor a language policy known as English Plus, which was developed in response to English-Only legislative initiatives. Id. The English Plus movement acknowledges the importance of English use in the United States, but it also stresses that LEP persons should be allowed, and even encouraged, to maintain their native tongues while learning English. See James Crawford, Issues in Language Policy: English Plus, available at http://ourworld.compuserve.com/homepages/JWCRAWFORD/engplus.htm (last visited Mar. 21, 2006). Policy measures that improve access to language classes for LEP persons, protect language diversity, and encourage monolingual English speakers to acquire a second language are also desirable according to most English Plus proponents. Id. Some states, including New Mexico, Oregon, and Washington, have enacted English Plus resolutions, which promote linguistic pluralism and reject the proposal to make
of the English-Only movement believe that history is on their side of the debate over whether English should be made the official language of the United States.\textsuperscript{71} They argue that communities with high concentrations of LEP individuals have existed in America for the past 200 years, and that over this period, the trends relating to English acquisition have remained stable.\textsuperscript{72} They maintain that the status of English as the nation’s principally used language has not changed since the founding of the United States.\textsuperscript{73} In short, they take the view that English is not “threatened” in any way\textsuperscript{74} and that giving English exclusive legal status as the American language would harm immigrants and run contrary to the principles of tolerance and respect that were so important to those individuals who created our Constitution.\textsuperscript{75}

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\textsuperscript{71} Crawford, \textit{supra} note 34. “For much of U.S. history, laissez-faire has predominated in matters of language policy. Bilingual and minority-language schooling flourished in the 19th century without prompting by federal authorities, especially in the rural expanses of ‘German America,’ as well as in communities of French, Spanish, Norwegians, Cherokees, and others.” Id. Although the U.S. has been linguistically diverse throughout its history, the lack of an official language policy did not cause significant controversy until the late twentieth century. \textit{Id.} Crawford maintains that the English-Only movement was a reaction to the national trend toward multiculturalism emerging from the 1960’s civil rights movement and becoming more popular throughout the 1980’s, a period which saw substantial growth in the immigrant population. \textit{Id.}

\textsuperscript{72} See Rachel L. Swarns, \textit{Children of Hispanic Immigrants Continue to Favor English, Study of Census Finds}, N.Y. TIMES, Dec. 8, 2004, at A26. A recent study was conducted by researchers at the State University of New York at Albany to determine if Hispanic immigrants were acquiring English at a different rate than European immigrants of the past. \textit{Id.}

Scholars say that the descendants of most European immigrants who arrived in the late 19th and 20th centuries became exclusively English-speakers within three generations... The study, which examined data from the 2000 census, found that most Hispanic-Americans were also marching steadily toward English monolingualism. The report found that 72 percent of Hispanic children who were third-generation or later spoke English exclusively. \textit{Id.} That number does not include partially or fully bilingual children. \textit{Id.}

\textsuperscript{73} See Civil Liberties Implications of “Official English” Legislation: Hearings on English as the Common Language Before the U.S. House of Representatives Committee on Economic and Educational Opportunities Subcommittee on Early Childhood, Youth and Families, 104th Cong. (Nov. 1, 1995) (statement by Edward M. Chen, staff counsel for American Civil Liberties Union of Northern California) [hereinafter ACLU Statement on Civil Liberties] (on file with the author).

\textsuperscript{74} Perea, \textit{supra} note 40, at 347.

\textsuperscript{75} ACLU Statement on Civil Liberties, \textit{supra} note 73. Chen specifically argues that legislation that would deny important services to immigrants, infringe on fundamental rights (\textit{e.g.}, the right to vote), and violate equal protection principles by discriminating against a powerless minority. \textit{Id.} He also contends that restricting the government’s ability to provide services and information to LEP persons would violate the First Amendment right to free speech. \textit{Id.}
English-Only opponents also take issue with the movement's argument that its policies will help immigrants by encouraging them to assimilate more quickly. They point to studies which show that the rate at which English is acquired by immigrants, and ultimately replaces immigrant families' primary language, has not changed significantly over the nation's history. The frequently stated proposition that immigrants of recent decades are not willing to assimilate quickly stems from a renewed sense of nativism by the dominant culture—i.e. white Anglo-Americans—which followed increases in the number and visibility of immigrants in recent decades.

English-Only opponents reject the idea that immigrants need to be forced to learn English by the removal of opportunities for assistance in their native languages. They cite waiting lists for English instruction as evidence that many immigrants realize that they will be more successful if they learn English. However, even the strongest desire to learn English will not change the fact that acquiring a new language is a slow and difficult process.

Apart from responding to the English-Only movement's principal arguments, the movement's opponents advance the idea that immigrants' individual rights would be violated and their welfare would be jeopardized if they were unable to access important government services before they learn English. The English-Only movement's push for a restriction of the government's ability to help persons who do not speak English could have a disproportionate impact on the elderly and children. It is important to consider that new immigrants need time to learn English and may be cut off from important services that they could need most during the early stages of establishing a life in the United States.

76. See, e.g., ACLU Briefing Paper Number 6, supra note 69 (stating that English-Only laws would not speed assimilation, particularly since they would do nothing to provide instruction to those who want to learn English).
77. See Swarns, supra note 72.
78. See Perea, supra note 40, at 343-44.
79. See ACLU Briefing Paper Number 6, supra note 69.
80. Id.; see also Lewelling, supra note 70 (stating that immigrants are highly motivated to learn English, which is evidenced by the "thousands of prospective ESL students who are regularly turned away because there are not enough classes to accommodate them.").
81. See Kenji Hakuta, et al., Stanford University, How Long Does it Take English Learners to Attain Proficiency?, The University of California Linguistic Minority Research Institute Policy Report 2000-1 (2000), available at: http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1001&context=lmri (last visited Mar. 21, 2006). This study indicates that students in the California schools with the most successful ESL programs in the state take three to five years to acquire oral proficiency and four to seven years to acquire academic proficiency. Id.
82. ACLU Statement on Civil Liberties, supra note 73.
83. Id.
Finally, those who oppose measures to make English the official national language argue that even if the action taken were merely symbolic, this would sanction xenophobia and would allow people to feel entitled to discriminate or harass persons who do not use English.

III. Analysis

A. Statutes and Regulations Dealing with LEP Individuals’ Access to Government Services

1. Title VI and Executive Order 13,166

Section 601 of the Title VI of the Civil Rights Act of 1964 prohibits federal agencies and recipients of federal funds ("Recipients") from discriminating based on race, color, or national origin. Recipients include state and local governments and agencies that receive federal money and private organizations that receive any direct or indirect federal funding. Section 602 of the Act empowers federal departments

84. Id.

85. See Press Release, NEA, "No" to English-Only Initiatives, supra note 69. While speaking to a congressional subcommittee about legislative initiatives calling for English-Only in schools, the National Education Association ("NEA") referred to English-Only policies as "sanctioned bigotry." Id. The NEA went on to say that "whether or not its proponents are bigots themselves, English Only gives comfort to anti-immigrant forces. These forces cloak English-Only in the rhetoric of national unity, but a federal law would, in fact, question the patriotism and make outsiders of those still learning English." Id.

86. Steven W. Bender, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, 2 HARV. LATINO L. REV. 145, 153-54 (1997). One commentator provides several examples of this phenomenon, which he calls "language vigilantism."

Within days after the adoption by voters of Colorado’s language initiative in 1988, there were incidents such as a Colorado school bus driver telling passengers that Spanish was illegal on the bus and the firing of a fast food worker who translated the menu into Spanish for a customer. Similarly, a wave of anti-Spanish language vigilantism followed the passage of Florida’s language initiative in 1988. A bank began to reject checks with amounts written out in Spanish. Latino/a tourists and residents reported that they were being told “Speak English. It’s the law now.” A Florida supermarket manager suspended a cashier for speaking Spanish, and an assistant principal told students that they could not speak Spanish at school.

Id. (citations and footnotes omitted).

87. 42 U.S.C.A. § 2000d (West 2003): “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.” Id.

88. See Department of Justice Guidance to Federal Financial Assistance Recipients
and agencies to promulgate regulations aimed at effectuating the anti-discrimination provisions of Section 601.89 One of the regulations promulgated under Section 602 indicates that Recipients may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."90 This prohibition is often referred to as a disparate impact regulation because it is intended to regulate activity that is undertaken with no intention of discriminating, but the prohibition ultimately has disproportionate effects on individuals within particular racial or national origin groups.91

For LEP individuals, inability to communicate with a Recipient may completely cut off access to services provided by that Recipient;92 in situations where some interaction is achieved, LEP persons may receive incorrect information, experience delays in service, or be subjected to poor treatment by frustrated staff.93 Since LEP adults are generally

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Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,495 (June 18, 2002). DOJ Guidance indicates that the meaningful access requirement applies to programs and activities of federal agencies as well as those who receive financial assistance from the federal government. Id. The following definition of assistance is provided:

Federal financial assistance includes grants, training, use of equipment, donations of surplus property, and other assistance... Subrecipients likewise are covered when Federal funds are passed through from one recipient to a subrecipient. Coverage extends to a recipient's entire program or activity, i.e., to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance.

Id.

90. 28 C.F.R. 42.104(b)(2) (2004). The full text of the regulation states:
A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or 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.

Id.

91. Id. Disparate impact regulations promulgated by other agencies are similar in purpose. See EPA regulations and HHS regulations, supra note 25.
93. Id.
foreign-born, the harmful effects of the communication gap are disproportionately felt by national origin minorities.

Although Recipients of federal funds can hardly be condemned for personally lacking expertise in every tongue spoken by individuals who may seek service, failure to remedy this deficiency is viewed as a practice that has a disparate impact on national origin minorities, under the Section 602 Regulations. In 2000, President Clinton issued Executive Order 13,166, which mandates that each Recipient must implement a policy that prescribes reasonable affirmative measures to provide meaningful access to LEP individuals in order to prevent discrimination under Title VI. The Executive Order states that failure to implement a language access policy is a violation of the Title VI disparate impact regulations, and, if not remedied, the violation may result in the termination of federal funding.

It may seem unfair to hold Recipients responsible for harm that could be characterized as an unfortunate but inevitable consequence of LEP individuals’ choice to live in a society whose primary language they do not share. However, it is imperative that government funds be used in a manner that honors the rights of all persons living in this country.

94. Assessment of the Total Costs and Benefits of Implementing Executive Order 13,166: Improving Access to Services for Persons with Limited English Proficiency, Report to Congress, Office of Management and Budget, at 15 (Mar. 14, 2002) [hereinafter Assessment of the Total Costs and Benefits]. Immigration data can be useful as a “rough proxy for the LEP population because immigrant status and English proficiency may be strongly (though not perfectly) correlated.” Id.

95. Id.

96. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 15, 2000); see also Lau v. Nichols, 414 U.S. 563, 568 (1974) (stating that a school district’s failure to provide instruction to Chinese-speaking students in their language denied them a meaningful opportunity to participate in the educational program, and thus, violated the regulations prohibiting disparate impact discrimination).

97. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 15, 2000). There has been one constitutional challenge to Exec.Order 13,166, which included claims that it violated the First, Fifth, Ninth, and Tenth Amendments. ProEnglish v. Bush, 70 Fed. Appx. 84 (4th Cir. 2003). The case was brought by doctors working for clinics that receive federal funding and ProEnglish, a nonprofit English-Only organization. Id. at 4-5. It was dismissed for lack of subject matter jurisdiction. Id. at 11.


99. See, e.g., ProEnglish, 70 Fed. Appx. at 84. Some private physicians who treat patients covered by Medicaid are especially frustrated by the idea of having to bear the cost of translation and interpreter services. Id.

100. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,458 (June 18, 2002). This report indicates the importance of this goal and states the need to strive for balance in implementing language access plans:

First, we must ensure that Federally-assisted programs aimed at the American public do not leave some behind simply because they face challenges
Consider the fact that immigrants contribute to the economy and the general welfare in much the same manner as do those who are U.S. citizens by birth. Then consider the fact that those contributions help fund services that have the potential to affect nearly every aspect of daily life in the U.S. An immigrant who cannot effectively access services provided by police departments, social service providers, motor vehicle licensing departments, financial institutions, hospitals, and many other recipients may suffer serious consequences, including poverty, depression, and even death.

The Executive Order did not identify specific measures to be taken by recipients as part of a language access policy, but it did direct the Department of Justice to prepare detailed guidance that was to be used by recipients who are funded through its programs. That guidance, which was published in June 2002, serves as the model that all federal departments and agencies are to use in preparing guidance for recipients funded by their own programs.

The DOJ guidance gives recipients considerable discretion in developing a plan to ensure meaningful access to LEP persons, but it clearly emphasizes that this flexible planning approach in no way communicating in English... Second, we must achieve this goal while finding constructive methods to reduce the costs of LEP requirements on small businesses, small local governments, or small non-profits that receive Federal financial assistance.

Id.


103. See, e.g., David Ferrell & Robert Lee Hotz, Ethnic Pockets Amidst a Vast Fabric of English: L.A.’s Language Enclaves Can Be Havens or Prisons, but They May Show How the World Will One Day Communicate, L.A. TIMES, Jan. 23, 2000, at A1. The article tells the story of an elderly Korean man who was picked up by police. Id. He was “lost and could not explain where he lived. He was dropped off far from home in the middle of the night, only to be robbed and beaten. He died soon afterward.” Id. A Guatemalan woman talked about feeling suicidal because she felt so alone after her three children were put in foster care when she could not explain one child’s bruise because she spoke only her native Mayan language. Id. Another man had been placed in a psychiatric ward without his family’s knowledge. Id. Unable to explain his situation, he became depressed and stopped eating. Id. Finally, an interpreter discovered the problem and found his family, who “had been looking along highways all over the region.” Id.


relieves Recipients of their obligations to act affirmatively to ensure that LEP persons will be able to benefit from their services and activities.106 The guidance instructs Recipients to consider the following four factors when developing their individual policies: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.107 Although the details of Recipients' plans may vary, it is important for Recipients to provide access for both oral and written communications.108 The DOJ Guidance recommends measures such as hiring bilingual staff, contracting and using telephonic or in-person interpreters, and translating of vital documents.109


In addition to the Title VI language access requirements promoted by Executive Order 13,166, various statutes relating to particular rights and entitlements address concerns about LEP individuals.110 Among these are the Voting Rights Act,111 the Food Stamp Act,112 and the

106. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 (June 18, 2002), states: "The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed." Id.

107. Id. at 41,459. Although agencies were allowed to make modifications to the DOJ guidance in preparing their own documents, for the sake of maintaining consistency they were encouraged to limit their modifications mainly to providing examples that were relevant to their particular agency mission. Memorandum from Ralph S. Boyd, Jr., Assistant Attorney General, U.S. Department of Justice, to Heads of Federal Agencies, General Counsels, and Civil Rights Directors (July 8, 2002), available at http://www.usdoj.gov/crt/cor/lep/BoydJul82002.htm (last visited Mar. 21, 2006). If an agency wanted to make significant modifications, such as departure from the four factor test, the agency would need to provide a written justification explaining the need for the modifications and an explanation of how the modified guidance complied with Title VI requirements. Id.


109. Id. at 41,461-64.


Federal Court Interpreter’s Act.  

Language requirements which are specifically tailored to the programs and activities governed by these statutes are included either directly in the statutory language or in regulations promulgated under these statutes.

B. Current Approaches to Achieving Meaningful Access Under Title VI

1. Title VI Administrative Complaint Process

As a result of the United States. Supreme Court’s decision in Alexander v. Sandoval, 114 which will be discussed in more detail in Section B, Subsection 2 below, individuals who believe that they have experienced discrimination under the Title VI disparate impact regulations may not bring a discrimination claim in court. 115 Currently, the sole method of enforcing meaningful access provisions under Title VI is by way of an administrative process handled by the office responsible for civil rights issues within each federal agency or department. 116 Individuals or advocates are required to file an administrative complaint with the appropriate Office of Civil Rights (“OCR”) or division of the agency that administered the program or activity or funded the Recipient who is the subject of the complaint. 117 All complaints are reviewed and investigated, and complainants do not need to show standing or meet any minimum pleading requirements to

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115. Id.
116. Id. The only enforcement procedures that exist for Section 602 are those explicitly set forth in the statute itself. Id. at 289-90. Agencies may enforce disparate impact regulations by terminating funding after notifying the Recipient of the violation and determining that compliance cannot be secured by voluntary means. 42 U.S.C.A. § 2000d-1 (West 2003). “Most federal agencies have an office that is responsible for enforcing Title VI of the Civil Rights Act. To the extent that a recipient’s actions are inconsistent with their obligations under Title VI, then such agencies will take the necessary corrective steps.” Background and Questions and Answers—October 26, 2001 DOJ Clarifying Memorandum Regarding Limited English Proficiency and Executive Order 13,166, http://www.usdoj.gov/crt/cor/lep/Oct26BackgroundQ&A.htm (last visited Mar. 21, 2006).
file a complaint.\footnote{118} Complaints are often filed by advocates, such as legal services organizations, which intervene on behalf of LEP individuals.\footnote{119} Once a complaint is reviewed, the OCR will coordinate with the Recipient to the extent necessary to secure a voluntary commitment to achieve compliance.\footnote{120} The OCR will monitor the Recipient’s planning and review its language access policy as it develops.\footnote{121} Advocates may be involved in the coordination and review as well, which is often helpful because it ensures that LEP clients’ particular concerns are represented throughout the process.\footnote{122}

While this process is focused on making progress that will ultimately benefit LEP individuals and populations in the future, it is not likely to provide immediate satisfaction to the LEP complainant who has been wronged by past acts.\footnote{123} The development and implementation of a language access policy by a Recipient may take years to achieve.\footnote{124} Although Recipients are likely to appreciate the non-adversarial nature of the administrative process, the complainant may feel that the system is flawed because it does not serve to compensate the LEP individual for any harm suffered as a result of the Recipient’s failure to provide meaningful access.

2. Limitations on Bringing Claims Under Title VI of Civil Rights Act

Around the time that Executive Order 13,166 was issued, the United States Supreme Court was deciding \textit{Alexander v. Sandoval},\footnote{125} a case that

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119. \textit{Id.}


121. \textit{Id.}

122. Telephone interview with Paul Uyehara, supra note 118; telephone interview with Sofia Memon, Staff Attorney and Language Access Project Coordinator, Community Legal Services of Philadelphia (Jan. 7, 2005).

123. See Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,466 (June 18, 2002). The process is designed to ensure that Recipients move toward future compliance, not to remedy specific past problems. \textit{Id.}

124. \textit{Id.} The policy guidance recognizes that the process may require a “series of implementing actions over a period of time.” \textit{Id.} According to one practitioner who is familiar with the process, coordination with one Recipient may last more than five years. Telephone interview with Sofia Memon, supra note 122.

would have profound effects on the ability to bring Title VI discrimination claims in court.\textsuperscript{126} \textit{Sandoval} arose out of the refusal by the Alabama Department of Public Safety to provide a driver's license test to Martha Sandoval in Spanish, her primary language.\textsuperscript{127} She claimed that the policy of providing driver's license tests exclusively in English, which was implemented after the state declared English to be its official language, had the effect of discriminating against non-English speakers on the basis of their national origin.\textsuperscript{128} The Court held that, while individuals could bring a claim for intentional discrimination under Section 601,\textsuperscript{129} they could not bring a Title VI claim for discrimination based on disparate impact.\textsuperscript{130}

The Court reached this conclusion by examining its prior cases dealing with Title VI,\textsuperscript{131} as well as the statutory language of Title VI.\textsuperscript{132} The majority relied on \textit{Regents of the University of California v. Bakke},\textsuperscript{133} which held that Section 601 of Title VI only prohibited intentional discrimination.\textsuperscript{134} Looking at \textit{Cannon v. University of Chicago}\textsuperscript{135} and the language of Section 601,\textsuperscript{136} they confirmed that Congress intended to confer a private right of action on individuals claiming intentional discrimination under this Section.\textsuperscript{137} Disparate impact regulations were promulgated under the authority given to agencies in Section 602.\textsuperscript{138} The majority reasoned that a claim based on disparate impact should not be allowed unless Congress had intended to confer a private right of action in Section 602.\textsuperscript{139} Looking at the language of Section 602, the Court held that no private right of action existed for Title VI, disparate impact regulations.\textsuperscript{140} As a result, individuals who believe that they have been subjected to discrimination based on race or national origin can bring a claim only if they allege that

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\item \textsuperscript{15} 2000).
\item \textsuperscript{126} \textit{Sandoval}, 532 U.S. at 278-79.
\item \textsuperscript{127} \textit{Id}.
\item \textsuperscript{128} \textit{Id}.
\item \textsuperscript{129} \textit{Id} at 279-80.
\item \textsuperscript{130} \textit{Id} at 293.
\item \textsuperscript{132} 42 U.S.C.A. §§ 2000d (West 2003).
\item \textsuperscript{133} 438 U.S. 265 (1978).
\item \textsuperscript{134} \textit{Alexander v. Sandoval}, 532 U.S. 275, 280 (2001) (citing \textit{Bakke}, 438 U.S. at 287).
\item \textsuperscript{135} 441 U.S. 677 (1979).
\item \textsuperscript{136} 42 U.S.C.A. § 2000d (West 2003).
\item \textsuperscript{137} \textit{Sandoval}, 532 U.S. at 279-80.
\item \textsuperscript{138} 42 U.S.C.A. § 2000d-1 (West 2003).
\item \textsuperscript{139} \textit{Sandoval}, 532 U.S. at 286-87.
\item \textsuperscript{140} \textit{Id} at 289.
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the discrimination was intentional.\textsuperscript{141}

Although the majority opinion in \textit{Sandoval} attempted to show that the Court's holding was consistent with the its Title VI jurisprudence,\textsuperscript{142} the four dissenting justices strongly disagreed, calling the result "hostile to decades of settled expectations."\textsuperscript{143} The \textit{Sandoval} decision has been the subject of extensive commentary.\textsuperscript{144} One concern that has arisen after the decision is that despite the majority opinion's statement that it assumes the promulgation of disparate impact regulations is a valid exercise of the authority vested in federal agencies by Section 602,\textsuperscript{145} some of the observations contained in the opinion create the impression that the majority is not convinced of the validity of those regulations since they do more than simply "effectuate" the provisions of Section 601.\textsuperscript{146} It is possible that disparate impact regulations would be found invalid if the question were to come before the Court in the future;\textsuperscript{147} however, at this time, the agencies have continued to enforce the regulations and indicated that they remain valid.\textsuperscript{148}

The \textit{Sandoval} decision has prompted a search for new approaches to bringing claims that might have previously been brought as Title VI disparate impact claims.\textsuperscript{149} Alternative avenues include the use of

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\item \textsuperscript{141} Id. at 293.
\item \textsuperscript{142} Id. at 282-85.
\item \textsuperscript{143} Id. at 294.
\item \textsuperscript{145} Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001).
\item \textsuperscript{146} See id. at 286 n.6 (commenting that it is strange to say that "disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 . . . when § 601 permits the very behavior the regulations forbid" (quoting dissent)). For a thorough analysis of the potential fate of disparate impact regulations, see Bradford C. Mank, \textit{Are Title VI's Disparate Impact Regulations Valid?}, 71 U. CIN. L. REV. 517 (2002).
\item \textsuperscript{147} See Mank, supra note 146, at 539-40 (concluding that the U.S. Supreme Court will likely address the question of whether or not § 602 regulations are valid in the near future, and that there is a strong argument that Congress has ratified agencies' authority to promulgate such regulations, which would support a finding of validity).
\item \textsuperscript{148} "[B]ecause Sandoval did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups . . . the Executive Order remains in force." Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,458 (June 18, 2002).
\item \textsuperscript{149} See, e.g., Derek Black, \textit{Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact}, 81 N.C.L. REV. 356 (2002)
Section 1983 and the Equal Protection Clause. Although these potential approaches are important to consider, this comment focuses only on using Title VI as a means of filing language discrimination claims that are not adequately addressed by the administrative complaint process.

Recent cases touch on what is needed to allege intentional discrimination for claims that are similar to those which were previously brought as Title VI disparate impact claims. The most recent of these cases, Almendares v. Palmer, is a federal district court case that deals directly with language access issues. The Almendares opinion was written to dispose of a Rule 12(b)(6) motion to dismiss by the defendant. The court refused to dismiss plaintiffs' Title VI claim, as detailed below, and offered its opinion of what a plaintiff’s Title VI complaint must allege in order to survive dismissal at the pleading stage. Even this minor assertion by the court may give hope to those who believed that language discrimination claims were essentially obsolete after Sandoval.

In Almendares, plaintiffs were Spanish-speaking participants in the
Food Stamp program, a federally funded program administered by states and counties. The Food Stamp Act requires the use of bilingual staff and materials in areas with large LEP populations. This requirement applied to the county where plaintiffs lived, but the county’s written communications with the plaintiffs were almost always provided in English. The plaintiffs alleged that the defendants knew about the obligation to provide bilingual services, yet failed to comply with it, resulting in harm to the plaintiffs and other non-English speakers on the basis of national origin. The Almendares court, ruling on the defendants' motion to dismiss, held that the plaintiffs had successfully pled discriminatory intent where their complaint alleged that the defendant had an obligation to provide bilingual services, the defendant knew of the obligation and chose to continue a pattern of not providing such services, and the plaintiffs were harmed because they could not understand the English materials provided to them.

The Almendares court relied on two other cases in reasoning that the defendant’s knowledge of a disparate impact is an important piece of evidence in the inquiry into discriminatory intent. In NCAA v. Pryor, the United States Court of Appeals for the Third Circuit held that plaintiffs had stated a claim for intentional discrimination when they alleged that the NCAA knew that Proposition 16, which modified scholarship eligibility criteria, would have an adverse impact on black student athletes and considered those adverse effects as part of the decision-making process which led to the adoption of the policy. Also, in South Camden Citizens in Action v. New Jersey Department of

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158. Id. at 800.
159. 7 U.S.C.A. § 2020(e)(1)(B) (West 1999). This Act provides that the State agency must "use appropriate bilingual personnel and printed material in the administration of the program in those portions of political subdivisions in the State in which a substantial number of members of low-income households speak a language other than English." Id.
161. Id. at 804.
162. Id. at 807-08.
163. Id. at 805-06 (citing Pryor v. NCAA, 288 F.3d 548 (3d Cir. 2002) and South Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot., 254 F. Supp. 2d 486 (D. N.J. 2003)).
164. Pryor, 288 F.3d 548.
165. Id. at 560-61. The NCAA argued that they adopted the policy to improve graduation rates among black student athletes. Id. The plaintiffs alleged that the NCAA wanted to achieve this goal by “screening out” more black athletes from becoming eligible for scholarships, which might raise graduation rates among those who met the eligibility requirements, but harmed those who did not. Id. at 556. The court indicated that even if they considered race in order to achieve a “laudable” or “benevolent” goal, their consideration of race with knowledge of the potential for disparate impacts could still be used to show discriminatory intent. Id. at 560-61.
Environmental Protection, a federal district court, held that the plaintiffs, members of a community largely composed of racial minorities, had stated a claim for intentional discrimination by alleging that defendants, who approved permits for placement of a cement grinding facility adjacent to their community, knew the facility would have disproportionate adverse effect on the plaintiffs, and failed to take measures to avoid those effects.

Almendares, Pryor, and South Camden Citizens all leave room for further exploration of how to apply the standard that the Supreme Court’s precedents have set for discriminatory intent to Title VI claims that were once brought using the disparate impact theory. Specifically, they may lead to an opportunity to clarify the role played by a defendant’s knowledge of disparate impacts and corresponding failure to avoid such impacts within the intent inquiry. This issue is addressed further in Section C.

C. Approaches for Improving Access for LEP Individuals in the Future

This section will consider three strategies which individuals, advocates, and policymakers can employ to improve language access for LEP persons: (1) cooperation—i.e., achieving improvements through the administrative process; (2) litigation—i.e., using Title VI to bring a claim for intentional discrimination in the language access context; and (3) legislation—i.e., developing and supporting legislation that will promote awareness and action on the language access front. The first, and potentially the most productive strategy, is to work toward improvements within the existing administrative process used to address disparate impact discrimination complaints. However, in rare cases when compliance cannot be achieved through the administrative process or when there is evidence that a Recipient acted with a discriminatory purpose, individuals may be able to succeed in a Title VI action for intentional discrimination. Finally, language access advocates and interested individuals should actively work to influence policymakers to enact legislation that will address the needs of LEP communities.

1. Cooperation: Improving the Administrative Process

Due to its post-Sandoval status as the only option for contesting

167. Id. at 497.
168. See infra, Section C, Subsection 2.
169. See infra, Section C, Subsection 1.
170. See infra, Section C, Subsection 2.
171. See infra, Section C, Subsection 3.
disparate impact discrimination, the administrative process will serve as the main channel for complaints aimed at encouraging good faith compliance with language access requirements. If the process is to run smoothly, it is necessary for federal agencies, Recipients, and language access advocates to continually assess the costs and benefits of compliance and to work toward solutions that respect the rights of LEP individuals without placing an unfair burden on Recipients with limited resources.

In a report provided to Congress in 2002, the Office of Management and Budget ("OMB"), a division of the Executive Office of the President whose mission it is to assist the President in preparing the federal budget, assessed the costs and benefits of implementing Executive Order 13,166. The report focused on the provision of services in the following four sectors to demonstrate the impacts of implementation across the social spectrum: (1) healthcare; (2) welfare; (3) transportation; and (4) immigration. Because most agencies were in the early phases of implementing Executive Order 13,166 when the study was conducted, cost estimates were calculated using data and assumptions about the types of services that could be provided.

Although Recipients may have to incur substantial total costs to implement the Order, the report shows that when the cost is divided by the number of LEP individuals served, the implementation of language services requires only a small percentage increase over the amount currently spent to serve any individual. The prospect of taking on additional expenditures to comply with Executive Order 13,166—an "unfunded mandate"—may be discouraging, particularly to smaller Recipients such as private physicians who practice independently of a large hospital. However, on balance, implementation costs may be

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172. See supra notes 114-116 and accompanying text.
174. Assessment of the Total Costs and Benefits, supra note 94.
175. Id.
176. Id. Total costs for implementation are expected to be highest for healthcare providers. Id. at 52. The annual cost for all emergency, inpatient and outpatient healthcare providers in the nation could reach $267 million. Id.
177. Id. at 3.
178. See id at 53-54. For example, the California Department of Motor Vehicles, which provides language assistance pursuant to state laws, spends approximately $2.2 million per year on language services; however, when this figure is divided by the number of LEP individuals served, it results in an additional cost of approximately 4.2 cents per person, or a cost of $2.55 to serve an LEP individual as compared to $2.51 to serve an English speaking individual. Id.
179. Id. at 63-64. Many state agencies and healthcare providers who responded to the OMB's request for public comments on the report mentioned concerns about costs and
small compared to the consequences of ignoring LEP communities by failing to implement language access measures. Recent trends in demographics have made language diversity a visible reality in many communities. In some cities, immigrants are the main source of growth, and LEP individuals comprise a large part of the population. Failure to address the needs of any large concentration in an area may have grave consequences. Imagine, for example, the public health consequences that could result if a large segment of the population in a given area were unable to access adequate health care to treat communicable diseases.

LEP individuals would benefit in several ways as a result of Recipients’ implementation of language access measures under Executive Order 13,166. Not only would they experience the intangible benefits of active participation in society and the exercise of individual rights, but they would also be able to access numerous programs and services which may have once been out of reach. These benefits will be most meaningful for linguistically isolated individuals and households.

Although the most obvious and immediate benefits flow to LEP individuals and communities, Recipients can also benefit from implementing Executive Order 13,166. Recipients should consider the positive contributions that immigrants make to the economy. Recent studies show that immigrants have made a positive impact on the U.S. economy by contributing to the labor force, helping to revitalize cities, and starting new businesses which provide additional jobs. If Recipients can view their efforts to provide language access as facilitating the future success of newer immigrants within the geographic areas they serve, they too can benefit from the long-term social and

the fact that Exec. Order 13,166 was an unfunded mandate. Id.
180. See supra notes 31-33 and accompanying text.
181. See Angie Cannon, A Nation of New Cities, U.S. NEWS & WORLD REP., Apr. 2, 2001, at 16. Immigrants were responsible for net population increases between 1990 and 2000 in cities including Boston, New York, Atlanta, and Chicago. Id. This growth helps to stem recent trends of urban population decline. Id.
182. Example provided by Sofia Memon. Telephone Interview with Sofia Memon, supra note 122.
184. See Shin, supra note 31, at 10. A linguistically isolated household is one in which no person over the age of fourteen speaks English “well” or “very well.” Id. Approximately 11.9 million people are linguistically isolated. Id.
economic benefits that ultimately flow to the larger community. In addition to the broad social and economic impacts, Recipients that have frequent or high-intensity interactions with LEP persons will likely see concrete benefits, such as a higher level of efficiency in their own operations, which will help them offset the costs of implementation.\textsuperscript{187}

Beyond educating Recipients about costs and benefits, there are other steps that the federal government, Recipients, and advocates can take to ease the transition to successful implementation of Executive Order 13,166. The OMB Report highlights two steps that the federal government should take: (1) provide uniform guidance to reduce the possibility that Recipients who receive funding through more than one agency will be confused about how to implement language access measures; and (2) facilitate the use of telephonic interpreter services by coordinating with the services and Recipients.\textsuperscript{188} The government also helps to reimburse healthcare providers for expenses associated with providing language services through a matching program under Medicaid and the State Children’s Health Insurance Program (“CHIP”).\textsuperscript{189} Matching funds are not available in all states, reducing the effectiveness of this incentive for many Recipients.\textsuperscript{190} The federal government and language access advocates should make efforts to work with states to increase awareness of the availability of these funds and encourage them to participate in the matching program.

Recipients with larger programs and budgets may benefit from hiring a language access coordinator to oversee implementation and to deal with needs as they arise.\textsuperscript{191} Often state agencies which administer federal programs will be best equipped to take the lead in implementing and monitoring language access plans to be followed by Recipients under their programs.\textsuperscript{192} A language access coordinator can work with the Recipients to ensure that they understand the requirements and have access to all the information and resources that the agency can provide.\textsuperscript{193}

Finally advocates should work within the administrative process to

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  \item \textsuperscript{187} Assessment of the Total Costs and Benefits, supra note 94 at 17.
  \item \textsuperscript{188} Id. at 57-58.
  \item \textsuperscript{189} See Letter from Timothy Westmoreland, Director of the Center for Medicare and Medicaid Services, to State Medicaid Directors (Aug. 31, 2000), available at http://www.hhs.gov/ocr/letters/LettertoStateMedicaidDirectors.pdf (last visited March 19, 2006).
  \item \textsuperscript{190} In the Right Words: Addressing Language and Culture in Providing Health Care, Grantmakers in Health (Aug. 2003), at 14, available at http://www.gih.org/usr_doc/In_the_Right_Words_Issue_Brief.pdf (last visited March 19, 2006). According to a report prepared in 2003, only nine states were using federal matching funds to reimburse Recipients for language services at that time. Id.
  \item \textsuperscript{191} Interview with Sofia Memon, supra note 122.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
\end{itemize}
cultivate good will among all participants in the language access implementation process. One way to do this is to encourage larger funding Recipients, such as state agencies that administer funds to smaller Recipients, to bear more responsibility for implementing a successful language access programs.\textsuperscript{194} Allowing too much of the burden to fall on smaller Recipients creates the risk that they will decide to reject federal funds that allow them to help lower income and LEP individuals to begin with.\textsuperscript{195} Where there is no state agency or larger funding Recipient involved, advocates should inform Recipients of grants or services offered by non-profit organizations that may be of use to them.\textsuperscript{196}

2. Litigation: Bringing a Title VI Claim for Intentional Discrimination

To many civil rights advocates the \textit{Sandoval} decision was a major disappointment. The Court's opinion seemed to close the door on several types of discrimination claims\textsuperscript{197} by requiring plaintiffs to prove discriminatory intent in an age where political correctness has trained people to keep their prejudices to themselves.\textsuperscript{198} However, a few recent lower court decisions, including the \textit{Almendares}\textsuperscript{199} case discussed previously, provide some hope by highlighting the potential for applying intentional discrimination standards to evaluate claims that would have formerly been brought as disparate impact claims.

The \textit{Sandoval} decision did not explicitly address the standard for showing discriminatory intent, but by eliminating the private cause of

\begin{footnotesize}
\textsuperscript{195} M. Alexander Otto, \textit{Lost in the Translation; What's the Real Word on the Battle Over Doctors' Providing Interpreters?} WASH. POST, June 5, 2001, at T06. The American Medical Association voiced its concern that many doctors would refuse to treat Medicare and Medicaid patients in opposition to the implementation of language access requirements under Exec. Order 13,166. \textit{Id}.
\textsuperscript{196} See, e.g., Grantmakers in Health, \textit{supra} note 190, at 22-24.
\textsuperscript{197} See, e.g., South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486 (D. N.J. 2003). In addition to language-related claims, the elimination of a disparate impact cause of action affects the viability of environmental justice claims and high stakes testing. \textit{Id}.
\textsuperscript{198} Michael Selmi, \textit{Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric}, 86 GEO. L.J. 279, 284 (1997). One commentator remarks that it has become more difficult to show discriminatory intent, saying that despite the Court's "rhetoric regarding the importance of ferreting out subtle discrimination, the Court has only seen discrimination, absent a facial classification, in the most overt or obvious situations... Whenever the Court found room to accept a nondiscriminatory explanation for a disputed act, it did so." \textit{Id}.
\end{footnotesize}
action for disparate impact claims it brought to light the need for clarity on how the discriminatory intent standard should be applied in the future. A strict application of the discriminatory intent standard would require plaintiffs to offer conclusive proof of a Recipient's subjective biases or overt admissions of ill will. A more liberal application of the discriminatory intent standard would recognize that disparate impacts that result from violations of these regulations can be highly probative of discriminatory purpose, particularly when considered along with other circumstantial evidence that supports an inference of intent.

In Washington v. Davis, the U.S. Supreme Court acknowledged that a showing of disparate impact is an important factor to be considered in determining whether invidious discriminatory intent was behind a facially neutral law. In fact, the Court had inferred discriminatory intent from disproportionate impacts on a protected class where such impacts result from a "clear pattern, unexplainable on ground other than race." However, in most cases a sufficiently clear pattern will not emerge, or the disproportionate impacts may be attributed to some non-discriminatory purpose which meets the court's approval.

Trying to determine precisely what must accompany the evidence of disproportionate impact is a difficult task. In Arlington Heights v. Metropolitan Housing Development Corporation, the Court shed some light on the potential sources of evidence that plaintiffs could use to supplement a showing of disparate impact, stating that "[D]etermining whether invidious discriminatory intent was a motivating factor requires

200. See Almendares, 284 F. Supp. 2d at 805-06 (suggesting that the standard for showing discriminatory intent may not be clear after Sandoval).

201. See, e.g., Hunter v. Underwood, in which evidence of subjective racial bias was found to have prompted a 1901 amendment to the Alabama Constitution that prescribed particular crimes that would terminate a person's right to vote. 471 U.S. 222 (1985). Legislators included various misdemeanors on the list, believing these crimes would be more likely to be committed by black persons. Id. at 226. The legislative history shows the following statement made by the president of the Constitutional Convention: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." Id. at 229.


203. Id. at 242.

204. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); see also Washington, 426 U.S. at 241-42 (referring specifically to cases in which black persons were "systematically excluded" from juries, e.g., Akins v. Texas 325 U.S. 398 (1945); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Neal v. Delaware, 103 U.S. 370 (1881)).


206. Washington, 426 U.S. at 242. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger [strict scrutiny]." Id. (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).

a sensitive inquiry into such circumstantial and direct evidence as may be available." While the inquiry must begin by looking at the disparate impact, it must also focus on the historical background of the action that caused such impact, the specific sequence of events leading to the action, and any record of legislative or administrative history. If all the evidence taken together suggests that discriminatory purpose contributed, even partially, to the decision, discriminatory intent may be inferred.

In theory, the Arlington Heights standard can be used to find discriminatory intent even where there is no obvious manifestation of a decisionmaker's subjective motivation. But subsequent cases have shown that plaintiffs still carry a weighty burden. In Personnel Administration of Massachusetts v. Feeney, the Court indicated that to show that a defendant acted with a discriminatory purpose, the plaintiff must show that the defendant chose to act "because of" the adverse impacts that the action would have on a particular group, not only "in spite of" the knowledge that such impact would result. Frequently, defendants will be able to offer non-discriminatory reasons for their harmful actions, and courts tend to accept those reasons if they appear to be logical and consistent within the factual context of the case. However, even if the defendant does provide a legitimate reason for the action, this does not eliminate the possibility that an improper discriminatory purpose was a concurrent motive or one of many motivating factors. Discrimination does not need to be the sole motive; even if it is a partial motive, it is improper.

Although many plaintiffs have failed to meet the burden of showing discriminatory intent, a few cases dealing with the equalization of

208. Id. at 266.
209. Id. at 266-68. The Court also noted that this list of objective factors was not exhaustive. Id.
210. Id.
211. Id. at 265-66.
212. See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (providing that a showing of intent requires more than a showing that the defendant knew of the adverse impacts of his or her action); Moua v. City of Chico, 324 F. Supp. 2d 1132 (E.D. Cal. 2004) (illustrating the difficulty of proving intent in cases dealing with alleged unequal provision of police services).
213. Feeney, 442 U.S. at 279.
214. Id. The Court calls the inference of discriminatory intent "a working tool, not a synonym for proof," and stated that "when, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate . . . the inference simply fails to ripen into proof." Id.
215. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 255 (1977). A discriminatory motive or purpose does not need to be the only concern. Id. It does not even need to be the "dominant" or "primary" purpose to meet the intent requirement. Id.
216. Id.
217. In fact, this is true in all three of the cases that are discussed as having set up the
municipal services demonstrate how a thorough inquiry can lead to such a finding even in the absence of a showing of decisionmakers' subjective biases. For reasons that will be explained later in this section, language access cases share some common features with the municipal services cases and should be treated similarly with respect to the evaluation for discriminatory intent.

Three of the better known municipal services cases dealt with the failures of three different Florida municipalities to provide equal services in those portions of their cities which were occupied by black residents. The plaintiffs in each case provided statistical evidence that showed large disparities in how the municipalities had conducted various improvements to public facilities, including paving of streets, construction and maintenance of drainage facilities, provision of public water service, and construction and maintenance of recreational facilities. These courts placed substantial weight on the importance of this evidence of disparate impact. In applying the Arlington Heights "sensitive inquiry" standard, the courts focused on broad historic patterns surrounding race relations within the municipalities and the municipalities' stated reasons for failing to provide services equally to black citizens.

The earliest of these three cases was Johnson v. City of Arcadia, a district court case that was decided in 1978, after Washington and Arlington Heights had set up the discriminatory intent evaluation framework. Plaintiffs in this case presented detailed statistical evidence that showed a striking difference between the quantity and quality of street conditions in white neighborhoods as compared to the street conditions in black neighborhoods. The district court held that this evidence, "coupled with historical showing of broad based racial discrimination, satisfied plaintiffs' burden" of proving discriminatory current discriminatory intent standard. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights, 429 U.S. 252; Feeney, 442 U.S. 256.

219. Id.
220. Id.
221. Id.
222. Johnson, 450 F. Supp. at 1369; Dowdell, 698 F.2d at 1186; Ammons, 783 F.2d at 988.
223. Johnson, 450 F. Supp. at 1370-72; Dowdell, 698 F.2d at 1185; Ammons, 783 F.2d at 985-87.
225. Id.
226. Id. at 1368, 1370-72.
The court relied on three main factual findings to establish the historical showing of discrimination. First, it indicated that the official city minutes dating back to 1950, showed that the city had repeatedly failed to act upon requests by black residents for improvements, although it continued to make improvements in white neighborhoods. Second, city officials knew that black neighborhoods needed attention because it had been well-documented in a neighborhood analysis prepared for the city ten years earlier. The neighborhood analysis report recommended that the city dedicate the majority of its financial resources to improving conditions in the black neighborhoods, but the city did not follow the recommendations. The third fact that helped show a historic pattern of racial discrimination was that the planning commission, which made recommendations about resource allocation and prioritization of municipal service projects, was comprised only of white members.

The next two cases were decided by the Eleventh Circuit in 1983 and 1986, respectively, and the facts of both cases were nearly identical to those of the Johnson case. In Dowdell v. City of Apopka, the court discussed the district court’s application of the Arlington Heights inquiry to find evidence of discriminatory intent. The inference of discriminatory intent based on failure to provide equal services, such as roadway paving and water lines, was reached by looking to the following three sources of objective information: (1) the magnitude of the disparity; (2) the legislative and administrative pattern of decision-making; and (3) the foreseeability of the impact.

In conducting the inquiry into the broad historical patterns, the district court had looked beyond the legislative and administrative history of the specific decisions at issue to other relevant factors. The appellate court mentioned one particular historic factor, an ordinance that restricted where black residents could live, that created racial segregation in the residential areas of the town. The court also mentioned the fact that black individuals were under-represented in administrative and

227. Id. at 1378-79.
228. Id. at 1369.
229. Id.
230. Id.
231. Id.
232. Id.
234. Dowdell, 698 F.2d at 1186.
elective positions. Since persons in these positions were responsible for decisions about which areas should receive services, it was foreseeable that there would be disparate impacts to areas populated mainly by black individuals.

Foreseeability, the third factor considered by the Dowdell court, was further broken down in the next municipal services case decided by the Eleventh Circuit, Ammons v. Dade City. In Ammons, the court retained the first three subjects of inquiry listed in Dowdell—magnitude of disparity, historic context, and foreseeability—and added a fourth factor, knowledge, to the list.

Defendants' knowledge that their actions would create disparate impacts upon black residents contributed to the finding of discriminatory intent. The Ammons court noted that the defendants knew of the conditions in the black neighborhoods and the need for paving and stormwater facilities. In Dowdell, the court had used similar evidence to support a showing of foreseeability. The Johnson court also dealt with the city's knowledge, evidenced by the neighborhood assessment provided by a contracted consultant, but it did so in the inquiry on the historic context. While the result in the three cases was the same, a separate inquiry into knowledge is desirable because it minimizes the chance that evidence so closely connected to the defendant's state of mind will escape the court's evaluation.

The courts in the three municipal services cases also looked carefully at the cities' stated reasons for failing to provide equal services in black neighborhoods. In each case there were inconsistencies that undermined the cities' arguments and showed that the reasons were pretextual. For example, in Johnson, the city of Arcadia argued that it had an unwritten policy that dead end streets were the lowest priority for

238. Dowdell, 698 F.2d at 1186.
239. Id.
240. Id.
242. Id.
243. Id.
244. Id.
245. Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); see also, Dowdell v. Apopka, 511 F. Supp. 1375, 1383 (M.D. Fla. 1981) (indicating that the city, armed with the knowledge of the disparate conditions, decided to direct funds toward improving white neighborhoods, specifically ignoring the needs of the black community, and that this was indicative of discriminatory intent).
247. Id. at 1370-72; Dowdell, 698 F.2d at 1185; Ammons v. Dade City, 783 F.2d 982, 985-87 (11th Cir. 1986).
248. Id.
paving. Since black neighborhoods had a higher percentage of dead-ends than white neighborhoods, the city argued that its prioritization policy incidentally, but unintentionally, resulted in a disparity. However, the plaintiffs' statistical evidence showed that even if this reason were legitimate, the conditions still showed an unequal application of the policy. Prior to bringing the suit, only thirty-three percent of the dead-end streets in the white neighborhoods were unpaved, as compared to about eighty-five percent of the dead-end streets in the black neighborhoods. Information that serves to undermine a defendant's stated reasons for the action that creates disparate impact may substantially aid the plaintiff in confirming that an inference of discriminatory intent is proper.

Like the municipal services cases, language access cases focus on neglect of a particular category of individuals. Unlike many other discrimination cases that deal with some form of action that adversely affects individuals of a particular race or national origin, cases involving a funding Recipient's refusal or failure to provide language access arise out of inaction. It may be more difficult to find evidence of the motives behind a passive decision not to take action that would benefit certain individuals than it is to find evidence of the motives behind a decision to take action that would harm those individuals; however, evidence of inaction must be considered as part of inquiry conducted to determine whether discriminatory intent motivated the actor.

Of course, there may be some cases where the decision not to provide language services is part of an active policy or plan to promote
the exclusive use of English. In these cases, there may be more available evidence of the decision-makers’ intent to make its services inaccessible to those who do not speak English. Even though, a Recipient may frame the intent behind implementing a policy of exclusive use of English as a desire to benefit national origin minorities by encouraging assimilation, this does not preclude an inference of discriminatory intent. Offering a seemingly “benevolent” motive for implementing a policy that has a disparate impact on the persons it is intended to help does not negate the evidence that the Recipient intended to offer a different level of service to LEP individuals.

The first challenge that a plaintiff in a language discrimination case will face is showing that there is actually a disparate impact on national origin minorities. This will be most easily accomplished in a geographic area with high concentrations of LEP persons. Although it may be difficult to show that LEP individuals suffer harm at a higher rate than English speakers, there are several facts that, if present, would support such a finding. For instance, if there are concentrations of LEP persons living in particular neighborhoods, it may be possible to show that persons in those neighborhoods do not use services offered by Recipients even though they may need them. Also, statistics may show that LEP individuals are more likely than English-speaking individuals in the same area to suffer the types of harms that a particular Recipient aims to prevent, which may be a symptom of the LEP communities’ inability to access important services. This type of information relates specifically to the disparate impact prong of the intent inquiry considered by the court in Ammons, but it is also relevant to assessing the objective foreseeability prong.

Another evidentiary deficiency that plaintiffs bringing language discrimination claims may have to overcome is the lack of an adequate record to show legislative or administrative history, as required by the second prong of the intent inquiry. Often where the government or a

256. An example of this might be a job training agency refusing to deal with clients in languages other than English, providing the justification that the individuals would need to speak English in the workplace.
257. See Pryor v. NCAA, 288 F.3d 548, 560-61 (3d Cir. 2002). Such a reason might be viewed with suspicion, as was the “benevolent” motive behind the NCAA’s decision to tighten eligibility standards with the stated goal of raising graduation rates among black athletes. See id.
258. Id.
259. See supra notes 217-253 and accompanying text. These efforts should be modeled loosely on the statistical inquiry conducted by plaintiffs in the municipal services cases. Id. Although the required data may differ, providing sufficiently detailed information will be important in showing the magnitude of the impact. Id.
260. Telephone interview with Paul Uyehara, supra note 118. A practitioner, whose work is focused on facilitating compliance among Recipients through the administrative
Recipient implements a policy of action, there is a decision-making process that is formally or informally documented, or at least familiar to various individuals involved. In language access cases, there will not likely be such a record.\textsuperscript{261} In the absence of such a record, courts should look closely at the Recipient’s actions from the time it becomes clear that the Recipient knows about the legal requirement to provide meaningful access, knows that it is in violation of the requirement, and refuses or fails to comply in the face of that knowledge.\textsuperscript{262} Any complaints that alert the Recipient of problems or attempts to compel compliance should also be considered as part of the historic record.

As emphasized by the municipal services cases, it is important to also look at the broader historic context of the action.\textsuperscript{263} Even where there is no record of the Recipient’s administrative decision-making process, there may be evidence of broad historic patterns or trends that suggest that Recipients have failed to provide services to persons of particular national origins, or to immigrants in general. Often in areas where there has been a large influx of immigrants over a period of years, there may be resistance within the community at large with respect to accepting national origin minorities.\textsuperscript{264} The resulting tension may lead Recipients to treat LEP persons poorly or to ignore their needs.\textsuperscript{265} In some cases, staff members may even make disparaging remarks about a person’s language skills which may reflect the Recipient’s beliefs concerning whether or not immigrants should be able to access their services or even to live in this country.\textsuperscript{266}

\textsuperscript{261} Id. \textsuperscript{262} See, e.g., Almendares v. Palmer, 284 F. Supp. 2003. \textsuperscript{263} Johnson v. City of Arcadia, 450 F. Supp. 1363, 1369 (M.D. Fla. 1978); Dowdell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983); Ammons v. Dade City, 783 F.2d 982, 988 (11th Cir. 1986). \textsuperscript{264} See, e.g., Jo Napolitano, Hispanics Mobilize Against Police; Blue Island Death Spurs Community to File Lawsuits, CHI. TRIB., Nov. 25, 2004, at Cl. This article provides an example of a town that is struggling with tension between a rapidly growing Hispanic immigrant population and the city’s mostly non-Hispanic police force. \textsuperscript{265} See, e.g., id. For example, Residents of Blue Island, the town discussed in the article, complain not only about police brutality but also with the city government’s aloofness and failure to be receptive to their concerns. \textsuperscript{266} Telephone interview with Sofia Memon, supra note 122. One practitioner who was interviewed by the author has represented LEP clients who were treated poorly by staff members of Recipients. \textsuperscript{Id.}
In order to be successful, a plaintiff bringing a language discrimination case will need to show that the Recipient knew of the disparate impact to LEP individuals and also knew about the requirement to provide meaningful access under Executive Order 13,166, yet failed or refused to make efforts to do so. Demonstrating the nature of defendant's knowledge has been extremely important in both the municipal services cases and in recent lower court cases, like *Almendares*, that have set the stage for former disparate impact claims to be evaluated under a discriminatory intent regime. Establishing a defendant's knowledge about legal obligations to act and failure or refusal to act in the face of foreseeable disproportionate impact may be the key to showing intent in a language discrimination case.

A federal funding recipient who knows about the Title VI requirement to provide meaningful access to language minorities and fails or refuses to do so is willfully violating a legal mandate.267 This fact should be given considerable weight in finding evidence of intent because it distinguishes the non-compliant Recipient from one who acts in a way that conforms with all legal requirements, but whose action incidentally has a disparate impact on persons protected under Title VI. This violation goes beyond deliberate indifference, which can be shown when a defendant turns a blind eye to the harmful effects of an action,268 and helps establish that the Recipient was committed to a course of action, even in the face of knowledge that such action was contrary to Title VI. Like the municipal services cases, failure to comply with Executive Order 13,166 is a failure to do what is required to treat people equally.

Perhaps the most difficult task a plaintiff would face in proving discriminatory intent would be rebutting the defendant Recipient's seemingly legitimate reasons for failing to provide language access.269

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267. See Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,458 (June 18, 2002). Because of the flexible approach to securing compliance with Title VI as mandated by Exec. Order 13,166, it is likely that a violation will not be established until some time after the administrative process has been initiated. Id. Even small steps toward compliance will show a good faith effort to comply. Id. Therefore, a violation would probably be proven if the Recipient showed an intent not to comply or simply failed to make any efforts to move toward compliance after the administrative process was initiated.

268. See, e.g., Pryor v. NCAA 288 F.3d 548, 567-68 (3d Cir. 2003) (rejecting the use of a deliberate indifference standard to show intentional discrimination).

269. Selmi, supra note 198, at 284. Observing that the Court has tended to accept the
Recipients who know of their legal obligations under Executive Order 13,166 may attribute their failure to act to one of several factors including a lack of understanding about the scope of their obligations, desire to comply with state or local English-Only mandates, and, more likely, economic or budgetary concerns about implementing an unfunded mandate.

Where a Recipient claims to lack a clear understanding of what is required to comply with Executive Order 13,166, a court should consider whether the Recipient has at least made a good faith effort to begin the implementation process. If a Recipient made some attempt to comply, even if its efforts were inadequate, the case may be more appropriately resolved within the administrative process. In fact, litigation should only be undertaken once it appears that the Recipient knows what is needed to achieve compliance and has demonstrated unwillingness or resistance toward moving in that direction.  

If a recipient expresses a desire to comply with a state or local English-Only mandate, the court should determine whether the Recipient acted with the awareness that the Executive Order applies to all Recipients, regardless of whether the laws of their state or municipality advocate a contrary course of action. A showing that the Recipient knew that the Executive Order applied to it by virtue of its receipt of federal funding would undermine the Recipient’s stated reason for non-compliance. In fact, such a finding might even lend support to the plaintiff’s argument that the Recipient intended to discriminate by choosing to align its conduct with arguably discriminatory laws and policies.

Recipients would probably be most likely to claim that they did not act because of economic concerns. Since Executive Order 13,166 is an unfunded mandate, it is likely to take time for Recipients to determine how to fit planning and implementation into their budgets. However, if a Recipient fails to move toward compliance for a prolonged period after it knows of its obligation, concerns about resource allocation might

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272. See, e.g., Assessment of the Total Costs and Benefits, supra note 94 at 62 (providing comments on Exec. Order 13,166, most of which focus on cost concerns).

not be sufficient justification for its failure. Because economic concerns are to be taken into consideration throughout the administrative process and the development and implementation of reasonable measures to provide meaningful access, they should not be considered sufficient justification for resisting compliance and continuing to harm national origin minorities.


One way to remove the barrier erected by the Court in the Sandoval decision would be for Congress to pass legislation that would explicitly provide a private right of action for Title VI disparate impact regulations. In fact, during the 108th Congress, just such a bill was introduced by Senator Edward Kennedy. The proposal, which never became law, was known as "Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004." Although one of its primary purposes would have been to effectively overturn Sandoval by creating a private right of action under Section 602 disparate impact regulations, it also included provisions for protecting older workers, providing remedies for students who have been subjected to harassment, and enhancing enforcement of the Equal Pay Act. Section 101 of the bill, which provided the findings on which the Act would have been based, made it clear that the bill's proponents believed that the Supreme Court acted in a manner contrary to Congressional intent in holding that Title VI did not provide a private right of action for disparate impact discrimination.

If a similar bill were introduced during current or future sessions of Congress, language access advocates should make efforts to support its passage. Although such a bill might not deal directly with language access issues, it would restore a valuable tool for LEP individuals who are harmed by Recipients' failure to comply with Executive Order 13,166. Moreover, the broad nature of such a bill may draw support from a wide range of civil rights advocates.

274. Id.
276. Id.
277. Id.
278. Id.
279. See, e.g., Civil Rights Coalition for the 21st Century: Special Report, http://www.civilrights.org/campaigns/civil_rights_act/ (last visited Mar. 21, 2006). A group that calls itself the Civil Rights Coalition for the 21st Century dedicated a significant section on its website to supporting the bill, presenting several individual's stories, providing links to contact legislators, and sharing information on how local activists could increase awareness for its passage. Id.
Another type of legislation that language access advocates might want to support is English Plus legislation.280 A non-binding resolution that would promote the preservation of other languages while encouraging English proficiency was introduced into the House of Representatives at the beginning of the 109th Congress by Representative Jose Serrano.281 Although it would be non-binding if enacted, the resolution clearly opposes the policies behind Official English and English-Only legislation.282 It emphasizes the importance of multilingualism to national interests and even suggests that the government should encourage U.S. residents to learn languages other than English.283 It also states that services in other languages should be offered in order to protect the health, safety, and rights of non-English speakers.284

By emphasizing the importance of promoting English acquisition by expanding educational opportunities, the English Plus resolution would likely garner the support of some legislators who are concerned about assimilation of immigrants and might otherwise turn to Official English and English-Only measures as the solution. In fact, during his time as Governor of Texas, President Bush indicated that he favors an English Plus approach to policy, as opposed to the Official English and English-Only measures supported by some of his fellow Republicans.285 Passage of a non-binding resolution may not aggressively advance the cause of providing meaningful access to language minorities, but it could be an

280. See supra note 70 and accompanying text.
282. Id.
283. Id. The bill provides that the U.S. government should:
   (1) encourage all residents of this country to become fully proficient in English by expanding educational opportunities and access to information technologies;
   (2) conserve and develop the Nation’s linguistic resources by encouraging all residents of this country to learn or maintain skills in languages other than English;
   (3) assist Native Americans, Native Alaskans, Native Hawaiians, and other peoples indigenous to the United States, in their efforts to prevent the extinction of their languages and cultures;
   (4) continue to provide services in languages other than English as needed to facilitate access to essential functions of government, promote public health and safety, ensure due process, promote equal educational opportunity, and protect fundamental rights; and
   (5) recognize the importance of multilingualism to vital American interests and individual rights, and oppose “English-only” measures and other restrictionist language measures.
284. Id.
effective means of counterbalancing legislative efforts by English-Only supporters.

IV. Conclusion

Language diversity has become a visible reality in the United States. While there are those who are distressed by this fact, it is in the best interest of society and the nation to find ways to protect the rights of all Americans, regardless of the language they speak. In order to best support LEP individuals, it is important to adopt a multi-layered approach that focuses on improving the administrative process, reviving a cause of action for enforcement of LEP individuals’ rights, and mounting and supporting legislative efforts.

In the post-Sandoval world, litigation based on language discrimination may only be available in those instances where other strategies fail to reach the problem. However, courts should be open to considering the possibility that a plaintiff was subjected to intentional discrimination and undertake a thorough inquiry to reveal any potential hidden motives held by Recipients who fail or refuse to comply with their legal obligations under Title VI as clarified by Executive Order 13,166. Knowing resistance or refusal to comply may be indicative of latent bias against immigrants and other LEP individuals based on their national origins.