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Re: Comments to DHS Component Draft Language Access Plans

Dear Ms. Mack:

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

We respectfully submit these comments to the Department of Homeland Security ("DHS") Office for Civil Rights and Civil Liberties ("CRCL") regarding the release of draft Language Access Plans from the Department's component agencies.

Fulfilling the requirements of Executive Order 13166 is critical to immigrant communities, and it is important for DHS to see through the lengthy process of improving the delivery of language services for diverse communities that come into contact with the components. We write to submit recommendations on the next step of DHS's Language Access Plan implementation, by providing recommendations on the component draft Language Access Plans.

General comments covering all components' draft Language Access Plans

A. Consistency in key terms across components

In order to ensure language access services are provided uniformly across DHS, it is vital that the Key Terms defining who is determined to be limited English proficient, which services are provided, and how they are provided through meaningful access, be adopted universally across components. Throughout the component plans, nearly half do

not include definitions of key terms,¹ and among those that do there are important differences in definitions, including who is defined as having Limited English Proficiency, and the definitions of bilingual, interpretation, and translation.

We urge all DHS components to adopt the Key Terms drafted by CRCL, which incorporate the Key Terms from the DHS Language Access Plan with additional language added,² and to include as well a definition of “Meaningful Access” from the U.S. Department of Justice’s Language Access Plan. The inclusion of meaningful access is necessary to ensure that assistance is provided accurately, timely, and effectively without cost to the LEP individual and that the assistance is not significantly restricted, delayed or inferior compared to services provided to English-proficient individuals. Components should have the ability to include additional Key Terms in component-specific language access plans as needed, but each plan should include the fundamental Key Terms provided in the CRCL draft plan.

B. Inclusion of Best Practices and Examples

In coalition comments submitted to CRCL on the development of the DHS Language Access Plan released in 2012, multiple organizations recommended the inclusion of examples and best practices similar to those included in the DOJ Language Access Plan.³ The importance of including examples and best practices, specific to DHS, in the language access plan and trainings resulting from these plans is crucial to the success of the plans. Examples and best practice recommendations give employees real-life comparisons to allow them to put the standards into use more effectively. Best practices, in particular, help willing agency personnel to avoid reinventing the wheel. Accordingly, we reiterate those requests for inclusion of best practices and examples.

Specifically, the draft component plans should provide examples, using the model of DOJ’s Language Access Plan, of immigration enforcement and detention scenarios that require adoption of LEP procedures, including investigatory stops, custodial interviews and interrogation, and jail processing. The appropriate components should outline a model of best practices and training for all individuals, including state and local LEAs, who contribute to immigration enforcement. In so doing, the plans should take as a *minimum* starting point the standards outlined in the appendix to DOJ’s plan specifically addressing state and local LEAs.⁴

The consistency of using universal key terms across components, and the inclusion of best practices and examples in these plans, and in training originating from the draft plans, will ensure that LEP individuals are treated equally throughout DHS and that those implementing LEP policies are clear on their responsibilities.

2. Comments on ICE draft Language Access Plan

We provide the following comments and recommendations to further improve these services.

A. Availability of LEP materials and services in all ICE facilities

¹ The following components do not define key terms used in the draft plans: Federal Emergency Management Agency, DHS Office of Inspector General, Federal Protective Services, Transportation Security Administration, and Office of the Citizenship and Immigration Services Ombudsman.

² <http://www.dhs.gov/xlibrary/assets/crcl/crcl-dhs-language-access-plan.pdf>

³ Comments to Proposed Policy Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Department of Homeland Security, 75 Fed. Reg. 34,465 (June 16, 2010), *available at* <http://www.probono.net/nlaan/library/attachment.176383>.

⁴ For detailed information on these recommendations please see the Comments cited above.

The expanded use of “I Speak” materials including the planned placement of posters in all ICE facilities, as well as the availability of the ICE Detainee Handbook in multiple languages, are welcome developments. ICE should place I Speak posters in all facilities without delay and take steps to make translated detainee handbooks available in all facilities.⁵

B. Incorporation of HHS and DOJ Guidance to health services language access plan

Given the lethal consequences that inadequate language access for medical care can have, ICE’s language access plan should add a cross-reference to the Department of Health and Human Services’ guidance for health care providers, and discuss and promote DOJ’s “Planning Tool” for departments of corrections as containing best practices for immigration detention facilities’ LEP services.

Under the American Public Health Association’s standards, “[i]t is the institution’s responsibility to maintain communication with the prisoners; therefore, personnel must be available to communicate with prisoners with language barriers.”⁶ Yet the draft ICE plan, unlike the DOJ plan, does not exhort detention facilities “providing health services [to] refer to the Department of Health and Human Services’ guidance regarding health care providers’ Title VI and Title VI regulatory obligations.”⁷ Nor does it suggest that immigration detention facilities consult DOJ’s LEP “Planning Tool” for departments of corrections, which addresses health care protocols among others.⁸

In contrast to the lack of detail provided in the DHS guidance and ICE draft plan, the DOJ guidance explicitly discusses obligations relating to detention of LEP individuals. For example, it provides that “law enforcement agencies should evaluate their ability to communicate with the LEP arrestee about his or her medical condition. Because medical screening questions are commonly used to elicit information on the arrestee’s medical needs . . . it is important for law enforcement agencies to consider how to communicate effectively with an LEP arrestee at this stage.” 67 Fed. Reg. at 41469. DHS should use the DOJ guidance as a *minimum* starting point for providing detailed guidance for operators of ICE contract detention facilities.

The reference and incorporation of HHS and DOJ guidance will guarantee adequate language services are provided when individuals are receiving medical services in ICE facilities. We encourage the inclusion of HHS and DOJ guidance in final plans by components that provide any type of health services.

C. Data Collection and Quality Assurance

ICE reports that it is now able to collect extensive and detailed statistical data about LEP interactions with ICE and state or local LEAs. In order to further improve the data collection process, this data should be made promptly and easily accessible to the public on ICE’s website.

D. Training for employees who interact with LEP individuals

⁵ Currently ICE has made its translated detainee handbook “widely available”. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DRAFT LANGUAGE ACCESS PLAN 12 (Sept. 3, 2014) In order to ensure that the appropriate translated handbook is available regardless of location these translations should be in all facilities.

⁶ American Public Health Association, Task Force on Correctional Health Care Standards, “Standards for Health Services in Correctional Institutions.” (2003), 27.

⁷ 67 Fed. Reg. at 41470.

⁸ DOJ, Coordination and Review Section, LEP Initiative, Civil Rights Division, “Planning Tool: Considerations or Creation of a Language Assistance Policy and Implementation Plan for Addressing Limited English Proficiency in a Department of Corrections.” Available at http://www.lep.gov/resources/LEP_Corrections_Planning_Tool.htm

In some of our organizations' 2010 comments we recommended concrete instruction be provided, especially for state and local LEAs, on standards for interaction with LEP persons. ICE has taken steps to provide such training, including in the 287(g) program, providing an initial training to Designated Immigration Officers (DIO) at the Federal Law Enforcement Training Center, and instructing DIOs on language access responsibilities, including identifying LEP individuals and working with interpreters. ICE has also included a requirement in memoranda of agreement (MOAs) providing that the state or local entity receive training on, inter alia, the requirement to request and provide interpreters as needed and to document each use of an interpreter by name. In addition, ICE has coordinated with CRCL on language access briefings for local and state LEAs, and ODCR is planning to facilitate the deployment of training material, technical assistance, and resources for ICE personnel on all aspects of language-access responsibilities.

We recommend that the above-mentioned trainings include fleshed-out examples involving immigration enforcement and detention that are specific to the day-to-day interactions that ICE personnel have with LEP individuals.

3. Comments on CBP draft Language Access Plan

The CBP plan is lacking in details and commitments in nearly all aspects of its draft plan. Indeed, the CBP plan may be more fairly characterized as a statement of intention to develop a plan, rather than an actual plan. Given the length of time that these plans have been in development, we expected more progress and we provide the following recommendations to improve CBP's language access plan.

A. Language Access Procedures and Protocols

CBP is required to establish the language access procedures or protocols that staff should follow to provide language services to LEP persons encountered in their daily activities. This includes both interactions with staff and the language access materials and resources that are provided.

CBP needs to make clear in its language access plan the policy and procedures for use of interpreter and translation services, as well as the protocol for law enforcement personnel when LEP individuals are encountered. Simply stating that a policy exists within the Office of Field Operations (OFO) or that there are plans to institute a protocol for law enforcement interaction with LEP individuals is not adequate. These policies and protocols should be explained in detail and provided in the language access plan. Moreover, the plan should explicitly reference and lay out CBP's 2012 Guidance on Providing Language Assistance to Other Law Enforcement Organizations.⁹

We are also concerned about the availability of forms, in particular those relating to removal procedures, in multiple languages, including Spanish, as well as the availability of translation services. On August 18, 2014, DHS entered into a Settlement Agreement concerning voluntary return practices in the Border Patrol's San Diego Sector, and the geographic area covered by ICE's San Diego and Los Angeles Field Offices.¹⁰ Included in the settlement agreement are the requirements that each individual given the opportunity to elect voluntary return oral advisals, in a language he or she understands, before they are allowed to request a disposition on Form I-826.¹¹ The settlement also provides training for agents on

⁹ Memorandum from David V. Aguilar, Deputy Commissioner (Nov. 21, 2012), *available at* <http://foiarr.cbp.gov/streamingWord.asp?i=1233>

¹⁰ Lopez-Venegas v. Johnson (Aug. 18, 2014) (Settlement Agreement), *available at* <https://www.aclu.org/immigrants-rights/lopez-venegas-v-johnson-settlement>.

¹¹ *Id.* at 17.

these provisions of the settlement. Additionally any individual eligible applying for class membership shall have any non-English language documents submitted with the application translated through certified English language translations.¹²As part of the language access plan, CBP should incorporate these requirements nationwide.

We urge CBP to ensure that these types of forms are available in languages other than English, to meet the needs of LEP persons.

Finally, CBP must urgently remedy the inability of LEP persons to file complaints in a language other than English. CBP must make clear what steps it is taking to encourage the filing of such complaints and commit to a timeline for catching up to law enforcement best practices. As the largest law enforcement agency in the country, one with tens of thousands of Spanish-speaking employees, CBP must embrace LEP outreach rather than continuing to give it short shrift.

B. Data Collection and Quality Assurance

Currently CBP does not track its use of language services, nor does the agency track the languages spoken by LEP individuals encountered by CBP personnel. The only part of CBP that has a system to track the languages spoken by LEP individuals apprehended and/or detained is the Office of Border Patrol. Data collection that is extensive, detailed, and accessible to the public is needed component-wide to ensure that adequate and proper language-access services are provided. In the draft language access plan CBP states that it will begin to track its use of language services by FY 2014. Additional details are needed as to how this process will occur, what type of data will be collected, and how this data will be provided to the public. Vague and ambiguous language of “exploring the possibility” of developing systems to track languages spoken by LEP individuals encountered by CBP personnel is not acceptable for a language access plan.

CBP currently proposes a self-inspection program providing an annual self-assessment of language access programs to determine agency compliance with the LEP plan. This type of self-assessment is not an adequate oversight mechanism.

At a minimum, CBP should adopt a plan similar to that of ICE to use identifiable data metrics to measure the quality of services provided in order to ensure accountability for CBP. In addition, a quality assurance program based on sampling and spot-checks to determine whether LEP individual’s interactions resulted in satisfactory communication, should be implemented.

C. Training for employees who interact with LEP individuals


As discussed above in the ICE comments, the importance of training cannot be overstated. Where ICE has taken steps to develop and outline training for all ICE employees who interact with LEP individuals, CBP has only provided one sentence on its training plans: this states CBP’s intent to “develop a plan to train all CBP employees involved in providing language access services regarding the requirements of this Plan and their specific roles and responsibilities.” No additional details regarding the training’s content or how the trainings will be provided are included.

CBP’s size and scope relative to the rest of DHS mean a language-access plan with greater attentiveness, detail, and clear commitments is urgently needed from CBP.

¹² *Id.* at 11.

Thank you for your consideration of these comments. If you have any questions regarding these comments please contact Chris Rickerd, Policy Counsel, 202-675-2339/crickerd@aclu.org or Tyler Ray, Legislative Assistant, 202-675-2324/tray@aclu.org.

Sincerely,



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