



ALAN WILSON
ATTORNEY GENERAL

April 03, 2017

Mr. Kevin A. Shwedo
Executive Director
South Carolina Department of Motor Vehicles
P.O. Box 1498
Blythewood, South Carolina 29016

Dear Mr. Shwedo,

Attorney General Alan Wilson has referred your letter to the Opinions section regarding the South Carolina Department of Motor Vehicles' ("SCDMV") obligation to translate materials under Title VI of the Civil Rights Act and Executive Order No. 13166, 65 Fed. Reg. 50,121 (Aug. 11, 2000). Your letter describes SCDMV's question as follows:

Executive Order 13166...ordered recipients and sub-recipients of federal assistance to take reasonable steps to ensure meaningful access to their programs and activities by [Limited English Proficiency] LEP persons. Recipients are expected to conduct a four-factor analysis to prevent discrimination based on national origin. The four-factors are:

1. Number (Demography) - The number or proportion of LEP person eligible to be served or likely to be encountered by the agency's programs, services or activities.
2. Frequency - The frequency with which LEP individuals come in contact with agency programs, services or activities.
3. Nature - The nature or importance of the program, activity, or service provided by the agency to the LEP population.
4. Resources - Identify the resources available to the agency and the overall costs to provide LEP assistance.

Under Title VI and Executive Order 13166, at what point (statistically speaking) does the South Carolina Department of Motor Vehicles (SCDMV) need to translate items such as the written knowledge test and produce items such as skills test flash cards (to indicate driving actions such as "Turn Left," "Parallel Park," etc.)?

For example, for 2015 the population of South Carolina was estimated to be 4,608,658 persons, with 5,165 (0.001% of the population) being of Russian ancestry of which 2,725 speak English "very well" and 2,330 (0.0005% of the population) speak English less than "very well." Based on numbers such as this, does the SCDMV need to translate items such as the written knowledge test and produce items such as skills test flash cards?

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Law/Analysis

Your letter requests an interpretation of federal guidance and an application to a particular set of facts. We regret that such an inquiry is beyond the scope of this Office's opinions. This Office's policy regarding such a request is as follows:

As we stated in a prior opinion, "the question of the applicability of federal law to a particular situation is a factual matter which is beyond the scope of an opinion of this Office." Op. S.C. Atty. Gen., May 8, 1989. See also, Op. S.C. Atty. Gen., March 6, 2008 ("consistent with the policy of this Office, we do not interpret federal statutory law or regulations.") In such matters, this Office defers to the federal agency charged with the interpretation of the federal statute or regulation in question.

Op. S.C. Atty. Gen., 2009 WL 2406409, at *2 (July 24, 2009); see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons."); Ops. S.C. Atty. Gen., 2012 WL 469994 (January 6, 2012) (directing detailed information on applicability of federal guidelines regarding brew-on-premises facilities to the United States Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau); 2015 WL 1382881, at *1-2 (March 16, 2015) ("[T]his Office would defer to the administrative agency for reasonable interpretation of its statutes and regulations... Therefore, we suggest you check with each appropriate agency for their interpretation."). SCDMV provided this Office with further clarification that it receives federal funding from following the U.S. Department of Homeland Security ("DHS") and the U.S. Department of Transportation ("DOT"). Accordingly, we advise SCDMV to refer to published guidance from both DHS and DOT regarding federal fund recipient responsibilities concerning LEP persons and to further inquire with each agency if there are alterations to the guidance under the new administration.

While this Office cannot offer an opinion which applies federal law to a particular set of facts, we will provide a summary of the law and relevant agency guidance. Title VI of the 1964 Civil Rights Act states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d. On August 11, 2000, President Clinton issued Executive Order No. 13166 "to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in the English proficiency (LEP)." In relevant part, Section 3 provides:

Each agency providing Federal financial assistance shall draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients. The agency-specific guidance shall take into account the types of services provided by the recipients, the individuals served by the recipients, and other factors set out in the LEP Guidance.... Following approval by the Department of Justice, each agency shall publish its guidance document in the Federal Register for public comment.

Id.

Executive Order No. 13166 references a contemporaneous U.S. Department of Justice (“DOJ”) policy guidance “address[ing] the application to recipients of federal financial assistance of Title VI’s prohibition on national origin discrimination when information is provided only in English to persons who do not understand English.” Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123-01 (August 16, 2000). As noted in your letter, the DOJ’s guidance lists (1) the number or proportion of LEP persons in the eligible service population, (2) the frequency with which LEP individuals come in contact with the program, (3) the importance of the service provided by the program, and (4) the resources available to the recipient as factors to be considered in assessing what reasonable steps recipients are required to take to ensure “meaningful” access to LEP individuals. *Id.* The Guidance states that it should be viewed as a “general framework” by which federal agencies develop guidance documents for their own recipients.

DOT and DHS have published recipient guidance policies¹ which note that the standard of “reasonable steps to ensure meaningful access to their programs and activities by LEP persons” is “designed to be... flexible and fact-dependent.” 70 Fed. Reg. 74091, 76 Fed. Reg. 21760. Your question pertains to translation of a written knowledge test and the production of items in a language other than English. Both agencies’ guidance documents state that after applying the four-factor test, the recipient “may determine that an effective LEP plan for its particular program or activity includes the translation of vital² written materials into the language of each frequently encountered LEP group eligible to be served and/or likely to be affected by the recipient’s program.” *Id.* (emphasis added). The guidance documents state that a recipient’s obligation to provide written translations is “determined by the recipient on a case-by-case basis, looking at the totality of the circumstances in light of the four-factor analysis.” 70 Fed. Reg. 74095, 76 Fed. Reg. 21764. Therefore, whether any particular item is required to be translated for a LEP population is a factual inquiry which this Office cannot address in an opinion.

However, the guidance documents do provide a “safe harbor” to ensure recipients “greater certainty that they comply with their obligations to provide written translations in languages other than English.” *Id.* The safe harbor “means that if a recipient provides written translation under these circumstances, such action will be considered strong evidence of compliance with the recipient’s written translation obligations” under Title VI. 70 Fed. Reg. 74095, 76 Fed. Reg. 21764. To fall within the safe harbor, recipients must take the following actions:

- a. The ... recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or,

¹ The following policy guidance documents issued by DOT and DHS are provided as attachments for your reference. Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74087-02 (December 14, 2005); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 76 Fed. Reg. 21755-02 (April 18, 2011).

² Whether a document is “vital” depends on “the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.” 70 Fed. Reg. 74095, 76 Fed. Reg. 21764.

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b. If there are fewer than 50 persons in a language group that reaches the five percent trigger in the above, the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

76 Fed. Reg. 21765; see also 70 Fed. Reg. 74095. The safe harbor provisions only apply to written translations, and do not alter a recipient's obligation to provide oral translations. Id. Under the scenario provided in your letter, the population of Russian ancestry individuals who speak English less than "very well" exceeds the safe harbor threshold published in both the US DOT and DHS guidance documents. These guidance documents state that in such a scenario, SCDMV would need to provide written translation of vital documents to such a LEP language group if SCDMV would like the greater compliance assurance of the safe harbor. 70 Fed. Reg. 74095, 76 Fed. Reg. 21765.

Nonetheless, both guidance documents note that failure to provide written translations under the circumstances outlined in the "safe harbor" would not necessarily mean SCDMV is out of compliance with Title VI and Executive Order 13166. Id. Rather, SCDMV's efforts to provide meaningful access to LEP populations would be measured under the four factor analysis described above.

Again, this Office defers to a federal agency's reasonable interpretation of the federal statutes or regulations which it administers. While we have provided a summary of the law and relevant regulations published in the Federal Register, we renew our recommendation to contact the agencies which provide federal funding to SCDMV to determine whether there are areas of noncompliance and potential steps to correct such noncompliance.

Conclusion

This Office strongly encourages SCDMV to contact the federal agencies which provide it with federal funding as they are the entities Executive Order No. 13166 charges with developing recipient guidance. We regret that we cannot offer more assistance regarding SCDMV's Title VI compliance obligations as a recipient of federal funds. It is this Office's long standing policy to defer to a federal agency's interpretation of its own regulations. As a courtesy, we have provided citations to relevant U.S. Department of Transportation and U.S. Department of Homeland Security guidance published in the Federal Register. However, as these guidance documents were published under prior federal executive administrations, we renew our suggestion to contact the agencies to determine if there has been a change to the guidance or for clarification on specific Title VI compliance obligations.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General