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Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs? The Need for Bilingual Services

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This Article examines the need for interpreters and translated written materials in unemployment compensation programs for those claimants who do not read, understand, or speak English well or at all. Thousands of employable persons in the United States do not read, understand, or speak English. These persons may be unable to receive unemployment compensation benefits or may receive delayed benefits solely because they are unable to comprehend English. The authors examine how ten states with substantial populations of limited-English-proficient speakers have provided these persons access to their state's unemployment compensation programs. The authors find varying practices among the states in serving the limited-English-proficient population. They suggest that the failure of state unemployment compensation agencies to serve limited-English-proficient persons is a violation of federal civil rights laws and federal unemployment insurance laws and may be a violation of constitutional guarantees to due process. Courts generally have not been receptive to due process challenges to a state agency's failure to provide bilingual services. The authors posit, however, that almost all of these cases rely on a poorly reasoned California state court decision that should be reexamined in light of several critical factors that have emerged in the last twenty-five years. In conclusion, the authors propose a model program for state unemployment compensation agencies designed to ensure that limited-English-proficient persons have equal access to unemployment compensation programs.
state unemployment compensation agencies fail to provide materials in languages other than English, to hire bilingual personnel, or even to ensure that translation services are provided at adjudicatory hearings. The result is that many limited-English-proficient (LEP) and non-English-proficient (NEP) claimants do not receive the compensation to which they are entitled, and many others experience delays in receiving benefits—delays not suffered by English-proficient claimants.

A substantial number of LEP and NEP persons are in the work force. Approximately twenty-two million potential workers between the ages of eighteen and sixty-four speak a language other than English at home.1 Almost five million of these persons have reported that they do not speak English well or at all.2 Spanish speakers account for the largest group of LEP persons in the United States. Nearly 3.5 million, or thirty percent, of the 11.5 million persons aged eighteen to sixty-four who say they speak Spanish at home claim limited English proficiency.3

Federal laws and court decisions have protected the rights of NEP persons in the workplace.4 For example, LEP and NEP workers may have the right to receive bilingual materials from their unions and to have translators present at union meetings.5 Federal law also requires that, in certain jurisdictions, bilingual ballots and voting materials must be provided.6

2. Id.
3. Id.
5. Zamora v. Local 11, Hotel Employees and Restaurant Employees Int'l Union, 817 F.2d 566, 569 (9th Cir. 1987) (finding that a union violated the Labor Management Relations Act by refusing to provide a qualified translator at monthly membership meetings when 48% of its membership spoke only Spanish); Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, 453 F.2d 1018, 1023 (9th Cir. 1972) (involving a cause of action for breach of the duty of fair representation alleging that a union refused to translate collective bargaining agreement and to provide bilingual liaison when a “very substantial” number of members were unable to communicate in English).
6. 42 U.S.C. § 1973a(a)–(b), (b)(3) (1994) (prohibiting a state from providing voting materials only in the English language if more than five percent or more than 10,000 citizens of voting age are members of a single-language minority and are LEP).
Unemployment records are not kept for various linguistic groups, but they are kept for various ethnic origins. A General Accounting Office study reports that Hispanics risk job loss at a rate at least fifteen percent higher than that of comparable Whites and at least forty-three percent higher than Asians.\footnote{U.S. GEN. ACCOUNTING OFFICE, EQUAL EMPLOYMENT OPPORTUNITY: DISPLACEMENT RATES, UNEMPLOYMENT SPELLS, AND REEMPLOYMENT WAGES BY RACE 14 (1994).} Once unemployed, the average period of time off the job for Hispanic workers is ten weeks.\footnote{Id. at 15.} United States Department of Labor (USDOL) statistics indicate that 11.8% of Hispanics over age twenty were displaced between January 1987 and January 1992.\footnote{BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, DISPLACED WORKERS, 1987–91, at 3, tbl. 3 (1993) (unpublished data prepared in connection with the General Accounting Office’s study, on file with the University of Michigan Journal of Law Reform).} Recent data indicate that in 1993, 10.6% of all Hispanics were unemployed, compared to a national average of 6.8%.\footnote{See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 1993, at 5 tbl. 1 (1994).} Yet many unemployed Hispanic workers are not receiving unemployment compensation benefits. A 1991 study, which reviewed 1989 unemployment data, found that unemployed Hispanic workers were less likely to receive unemployment compensation benefits than their non-Hispanic counterparts.\footnote{MARION E. NICHOLS ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, UNEMPLOYMENT INSURANCE IN STATES WITH LARGE HISPANIC POPULATIONS 6 (1991).} In 1989, fewer than one in five unemployed Hispanic workers received unemployment compensation benefits in an average month.\footnote{Id.} Assuredly, many of these individuals have limited proficiency in English that significantly affects their dealings with state unemployment compensation systems.

This Article examines the need for bilingual services in the administration of the unemployment compensation program. Part I explains how the unemployment compensation system works and describes how a claimant who is unable to communicate well—or at all—in English is denied full access to the program. Part II describes how the USDOL has failed to ensure that state agencies administering unemployment compensation programs provide bilingual services despite the obligations imposed on the USDOL by Title VI of the Civil
Rights Act of 1964\textsuperscript{13} and the federal unemployment compensation laws.\textsuperscript{14} Part II also describes how ten states with substantial populations of LEP and NEP speakers—Arizona, California, Colorado, Florida, Illinois, Massachusetts, New Jersey, New Mexico, New York, and Texas—have provided such services in administering their unemployment compensation programs in the face of the lack of guidance from the USDOL. Part III contrasts how two other federal agencies, the United States Department of Health and Human Services and the United States Department of Agriculture, have tried to ensure that LEP and NEP persons participate fully in the Aid to Families with Dependent Children and the Food Stamp programs.

Part IV of this Article argues that Title VI requires state agencies administering unemployment compensation programs to ensure that LEP and NEP persons enjoy equal access to unemployment compensation programs. Part IV also reviews the cases challenging failure to provide bilingual services and argues that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires non-English language notice and translation at administrative hearings in at least some situations.

Finally, Part V proposes a model program for state employment service agencies administering unemployment compensation programs designed to ensure that all unemployed workers, whatever their language proficiency, receive at least "partial replacement of wages . . . to enable [them] 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief.'"\textsuperscript{15}

I. THE UNEMPLOYMENT COMPENSATION SYSTEM

State offices administer the unemployment compensation program pursuant to federal law and regulations. The federal law creating the unemployment compensation program provides financial incentives to states to administer their

\textsuperscript{15} California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 131 (1971) (citation omitted).
programs under plans approved by the USDOL.\textsuperscript{16} The federal law's tax credit provisions for employers\textsuperscript{17} is another incentive that has encouraged all states, the District of Columbia, the Commonwealth of Puerto Rico, and the American Virgin Islands to enact unemployment compensation laws.\textsuperscript{18}

Determining eligibility for unemployment benefits and administrative review of eligibility determinations involves a three-tiered process under the laws of most states.\textsuperscript{19} A claims examiner makes an initial determination of eligibility based on a written application,\textsuperscript{20} supplemented by a telephone or in-person interview with the claimant and, usually, a written or telephone communication with the employer.\textsuperscript{21} An appeal may be taken from the initial determination by the claimant, the employer, or, in at least some states, the state agency.\textsuperscript{22} A referee or designated official of an appeal tribunal decides the appeal at an evidentiary hearing during which conventional rules of administrative procedure apply.\textsuperscript{23} Such an appeal is usually limited to the evidentiary record made at the hearing and written argument. Thereafter, a state court may review the administrative determination.\textsuperscript{24} Generally, state judicial

\begin{itemize}
    \item \textsuperscript{17} 26 U.S.C. §§ 3302-3303.
    \item \textsuperscript{18} NATIONAL EMPLOYMENT LAW PROJECT, INC., LEGAL SERVICES GUIDE TO FEDERAL UNEMPLOYMENT COMPENSATION LAW AND ISSUES 6 (1984) [hereinafter NELP GUIDE].
    \item \textsuperscript{19} See, e.g., ARIZ. REV. STAT. ANN. §§ 23-671 to -733 (1995); FLA. STAT. ch. 443.151(3)(a), (4)(b), (4)(c) (1995); N.J. STAT. ANN. § 43:21-6(b)(1), (c), (e) (West 1991).
    \item \textsuperscript{20} E.g., ARIZ. REV. STAT. ANN. § 23-773(A) (1995); FLA. STAT. ch. 443.151(3); N.J. STAT. ANN. § 43:21-6(b)(1). Some states are contemplating, or already are using, telephone intake procedures. See Unemployment Insurance Program Letter No. 35-95, 60 Fed. Reg. 55,607 (1995) (providing advice to states regarding issues relating to telephone or other electronic methods of processing unemployment insurance claims).
    \item \textsuperscript{21} NELP GUIDE, supra note 18, at 15.
    \item \textsuperscript{22} E.g., ARIZ. REV. STAT. ANN. § 23-773(B); FLA. STAT. ch. 443.151(4)(b); N.J. STAT. ANN. § 43:21-6(c).
    \item \textsuperscript{23} E.g., ARIZ. REV. STAT. ANN. § 23-674; FLA. STAT. ch. 443.151(4)(b); N.J. STAT. ANN. § 43:21-6(c). In many states the decision of the referee or other official may then be appealed to an administrative appellate tribunal. E.g., ARIZ. REV. STAT. ANN. § 23-773; FLA. STAT. ch. 443.151(4)(c); N.J. STAT. ANN. 43:21-6(c). For example, in Arizona the appeals board has several options as to handling the appeal. One option allows the appeals board to take additional evidence, rehear the matter, or review the hearing decision on the basis of the record. ARIZ. REV. STAT. ANN. § 23-672(C). In New Jersey, the Board of Review may limit review to the record or take new evidence. N.J. STAT. ANN. § 43:21-6(c).
    \item \textsuperscript{24} E.g., FLA. STAT. ch. 443.151(4)(e); N.J. STAT. ANN. § 43:21-6(h); ARIZ. ADMIN. CODE R6-3-1505(C) (1995).
\end{itemize}
review is confined to the record and is limited to questions of law or a determination of whether the findings of fact by the administrative agency are supported by "substantial evidence." With few exceptions, each appeal in the process of administrative and judicial review must be taken within the time prescribed by state statute or regulation. The time periods for filing administrative appeals are typically very short, rarely more than ten to twenty days.

The problems that LEP and NEP unemployment compensation program claimants face when applying for benefits arise at each step of the system. Probably the most significant barrier to participation in the unemployment compensation program occurs when LEP or NEP claimants are asked to complete an English-only application form in an office with no bilingual staff, or at a location away from the office. The claimants must either (1) give up; (2) attempt to muddle through the application and the interview; or (3) rely on a friend or relative to translate the form and interpret for them at the unemployment office. The LEP or NEP claimant who simply gives up loses the chance to receive benefits. The claimant who tries to complete an application by himself or with the assistance of an unqualified translator may fail to respond to certain questions on the application, resulting in a denial of benefits, or the claimant may inadvertently answer

25. For example, in Arizona, judicial review is limited to the record "unless the court orders otherwise." ARIZ. ADMIN. CODE R6-3-1505(C). In New Jersey, the statute does not appear to limit review to the record. See N.J. STAT. ANN. § 43:21-6(e).

26. See NELP GUIDE, supra note 18, at 15.

27. For example, in Arizona an interested party has 15 calendar days after notice of the initial determination is mailed to appeal the determination, ARIZ. REV. STAT. ANN. § 23-773(B), 15 days from the date of mailing to appeal an appeals tribunal decision, id. § 23-671(D), and 30 days from the mailing of the Appeals Board decision to seek judicial review, id. § 23-672(F). In Florida, a party has 20 days from the date of mailing to appeal an initial determination or an appeal referee decision, FLA. STAT. ch. 443.151(3), (4)(b)(3), and 30 days from the rendition of the appeals commission order to seek judicial review, FLA. R. APP. P. 9.110(b). In New Jersey, the claimant or an interested party has 10 days from the mailing of the decision to appeal an initial determination or an appeals tribunal decision, N.J. STAT. ANN. § 43.21-6(b)(1), (c), and 45 days to seek judicial review of a Board of Review decision, [7 St. L. Regs. Explanations] Unempl. Ins. Rep. (CCH) ¶ 2020, at 33,318 (Nov. 19, 1991).


29. A 1994 survey by the National Employment Law Project, Inc., shows that legal services advocates in only seven of the 25 states responding to the survey reported that bilingual staff was regularly available for non-English speaking claimants in their local offices. Survey responses are on file with the University of Michigan Journal of Law Reform [hereinafter NELP Survey].
certain questions incorrectly, leading to fraud or overpayment claims. Similar results may occur when the LEP or NEP claimant does not understand questions posed by office staff. Asking a bilingual friend or family member for assistance does not guarantee that the claimant will receive the proper benefits. The friend or family member, often a child, may misinterpret due to unfamiliarity with some of the terms on the application form or terms used by office staff.\textsuperscript{30}

Those unemployed LEP and NEP workers who succeed in filing an application often receive in the mail an English-only notice of determination advising them that their applications either have been denied or will be denied if they do not supply further information by some specified date.\textsuperscript{31} Most states strictly limit the period in which an appeal from the denial may be filed.\textsuperscript{32} Many claimants miss the appeal deadline because they cannot understand the notice.\textsuperscript{33} Asking a friend or family member to translate the notice may also make the claimant miss appeal deadlines if the friend or family member mistranslates the notice.\textsuperscript{34}

A claimant who receives benefits usually must file a periodic “continuing claim form” by mail, verifying that he is still eligible for benefits and, in most cases, describing attempts to seek work.\textsuperscript{35} Officials may use this information to determine that a claimant is no longer eligible for benefits or that a claimant who has received benefits has become retroactively

\textsuperscript{30} See, e.g., Flores v. National Seal Co., Referee Decision, No. 92-S-13 (Or. Dept. of Human Resources, Employment Div. Jan. 23, 1992). The case involved an illiterate LEP claimant who asked an English-speaking friend to complete the application and was denied benefits because the friend improperly characterized the claimant’s reason for separation. \textit{Id.} at 1. The hearing officer found that the misrepresentation was not willful under Oregon law and thus a disqualification was not appropriate. \textit{Id.} at 2.


\textsuperscript{32} \textit{See supra} note 27.

\textsuperscript{33} The failure of the state unemployment compensation program to provide bilingual services has been raised most often in the context of litigation challenging the dismissal of an appeal on timeliness grounds, where the challenger claims that the English-only notice of his appeal rights caused the delay in filing the appeal. \textit{See} Pabon v. Levine, 70 F.R.D. 674 (S.D.N.Y. 1976); Alonso v. Arabel, 622 So. 2d 187 (Fla. Dist. Ct. App. 1993); Hernandez v. Department of Labor, 416 N.E.2d 263 (Ill. 1981); Rivera v. Board of Review, 606 A.2d 1087 (N.J. 1992).

\textsuperscript{34} \textit{See} Hernandez, 416 N.E.2d at 264; DaLomba v. Director of the Div. of Employment Sec., 337 N.E.2d 687, 688 (Mass. 1975).

\textsuperscript{35} \textit{E.g.}, FLA. STAT. ch. 443.091(1) (1995); N.J. STAT. ANN. § 43:21-4(a) (West Supp. 1995).
ineligible. In such instances, a claimant is said to have an overpayment, which must be returned to the state. If the claimant does not understand the notice of overpayment, he may lose the opportunity to contest the overpayment itself and suffer the consequences.

Another significant problem for the LEP and NEP claimant is the quality of interpretation available at adjudicatory hearings. In some cases, an interpreter may be supplied by the state agency, but the interpreter may be untrained or inadequately trained. An untrained interpreter hinders the claimant’s presentation of his case and the claimant’s ability to cross-examine adverse witnesses. The claimant cannot challenge the employer’s testimony if an important nuance is lost when the interpreter paraphrases what is said. The failure to translate verbatim also renders the claimant’s and the witnesses’ testimonies less effective. Summary interpretation sacrifices consistency of the story, detail of the presentation, and the conviction that can be demonstrated by the individual’s choice of words—factors that go to the credibility of the claimant or witness. Further, the ability of the claimant or witness to create rapport with the hearing examiner is

36. See supra note 35.
37. See, e.g., ARIZ. REV. STAT. ANN. § 23-787 (1995); FLA. STAT. ch. 443.151(6)(b) (1995); N.J. STAT. ANN. § 43:21-16(d) (West Supp. 1995). Other consequences may follow as well. The claimant may be disqualified from future benefits for some period of time or, under some circumstances, face the possibility of criminal prosecution for fraud. ARIZ. REV. STAT. ANN. §§ 23-778, 785 (1995) (defining fraud as knowingly providing false information or knowingly failing to disclose material facts with intent to obtain benefits); FLA. STAT. ch. 443.071, .101(6); N.J. STAT. ANN. §§ 43:21-5(g)(1), :21-16 (West 1991 & Supp. 1995).
38. This situation also has occurred with some frequency. See, e.g., Claimant’s Written Argument at 1–2, In re Review of Referee Decision: Maria Luisa Valencia, No. 91S-2181 (Or. Dep’t of Human Resources, Employment Div. App. Bd. filed June 6, 1991).
39. See, e.g., Claimant’s Brief at 1, In re Review of Referee Decision: Gabriel Medina-Lara, No. 93-S-1343 (Or. Dep’t of Human Resources, Employment Div. App. Bd. filed July 6, 1993) (arguing that a decision upholding a denial of benefits was based on inadequacy of interpretation and transcription of the record made during the first-tier hearing, during which the interpreter paraphrased the claimant’s testimony rather than translating it verbatim, thereby preventing the claimant from speaking directly to referee); Defendant’s Amended Answer with Affirmative Defenses and Counterclaims at 3–4, Mattson v. Tiscareño, No. CV 91-0156 (Cir. Ct. Or. filed Feb. 19, 1991) (alleging that the Spanish-speaking employee of the plaintiff, who helped the NEP claimant complete an English application form, failed to translate the entire form, assuming that the claimant was a United States citizen).
sacrificed when that individual is treated as a third party rather than as someone to be addressed directly.40

More common than the problem of inadequate translation is the failure of the state agency to supply any interpreter at all, thereby forcing the claimant to depend on a relative, friend, or other layperson for assistance.41 In the extreme case, the claimant may be required to provide his own interpreter but only one deemed "proficient" by the adjudicator.42 In other cases the lay interpreter may not be fluent in both languages and, as a result, may misinterpret critical information. The layperson is also unlikely to understand terms of art. Additionally, an interpreter furnished by the claimant may have her impartiality questioned, especially if the interpreter has not sworn to translate the proceedings truthfully.43

Finally, a hearing decision written only in English poses additional problems even for those LEP and NEP claimants who may have received translation assistance at the hearing. The LEP and NEP claimant may not know anyone who can translate the decision for them. Or, if he asks a friend or family member to translate, the translation may be poor and the claimant might miss important information. Consequently, it will be very difficult, if not impossible, for the LEP and NEP claimant to make an informed decision as to whether to appeal an adverse hearing decision.44

In each of the situations described above, LEP and NEP claimants receive inconsistent and typically inadequate services from the state agency. At worst, the claimant may not receive unemployment compensation benefits to which he is

40. See, e.g., Michael B. Shulman, Note, No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants, 46 VAND. L. REV. 175, 185–86 (1993) (noting that because the record contains the interpreter's words, not the defendant's, the defendant cannot later correct an interpreter's error by pointing to the record and showing what she [the defendant] actually said).

41. An interpreter was routinely provided in only nine of the 20 states responding to one survey. NELP Survey, supra note 29. Even those states, however, may not avoid the problems associated with amateur interpreters. For example, although Massachusetts law provides that hearings shall not proceed without an interpreter when a party cannot communicate effectively in English, MASS. REGS. CODE tit. 801, § 1.03(8)(b) (July 1, 1993), the Department of Employment and Training policy on the use of interpreters "encourages claimants who cannot effectively communicate in English to bring an interpreter with them . . . to any administrative hearing." Id. tit. 430, § 4.18.

42. See CONN. AGENCIES REGS. § 31-237-57(a) (1988).

43. See Shulman, supra note 40, at 189–90.

44. The problem is compounded because most states allow little time to appeal an adverse hearing decision. See supra note 27 and accompanying text.
entitled. At best, the claimant may experience delays in receiving benefits and receive a different level of services than do English-proficient claimants.

II. THE USDOL AND STATE POLICIES

Neither federal law governing USDOL regulations nor federal directives establish uniform standards governing the states' obligations to LEP and NEP claimants. However, general USDOL regulations promulgated under Title VI of the Civil Rights Act of 1964\(^45\) may help to determine these requirements.\(^46\) These regulations provide that

\[ \text{[a] recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.} \]\(^47\)

Another USDOL regulation suggests that when benefits are not equally available to certain nationality groups the state may take special steps to ensure that its services become widely available to the group not receiving equal benefits.\(^48\) Finally, regulations prohibit state unemployment compensation offices from denying any service or benefit, providing a service or benefit in a manner different from those provided to others under a given program, or denying an individual the


\(^{46}\) For further discussion of the applicability of Title VI to the provision of bilingual services in the unemployment compensation program, see infra Part IV.H.


\(^{48}\) See id. § 31.3(b)(7)(ii).
opportunity to participate in a program through the provision of services different from those afforded others on the grounds of national origin.\textsuperscript{49}

Although the USDOL has not given states specific guidance with regard to providing bilingual services, the USDOL Unemployment Insurance Service has interpreted federal law to require states to ensure that "[i]ndividuals who may be entitled to unemployment compensation are furnished such information as will reasonably afford them an opportunity to know, establish, and protect their rights under the unemployment compensation law of such State."\textsuperscript{50} Additionally, "[t]he agency must include in written notices of determinations furnished to claimants sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal."\textsuperscript{51}

The lack of USDOL regulations specifically addressing the provision of bilingual services is puzzling because the United States Department of Justice (DOJ) has instructed federal agencies to publish guidelines "where such guidelines would be appropriate to provide detailed information on the requirements of title VI."\textsuperscript{52} One DOJ regulation provides:

Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program . . . needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.\textsuperscript{53}

\textsuperscript{49.} \textit{Id.} § 31.3(b)(1)(i), (ii), (vi).
\textsuperscript{51.} \textit{Id.} (emphasis added). The Social Security Act also requires state unemployment compensation laws to provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3) (1994). By way of regulations, the USDOL has provided relatively little guidance to the states as to the procedures that constitute a "fair hearing" under the Act. \textit{See} 20 C.F.R. § 650.3 (1995).
\textsuperscript{52.} 28 C.F.R. § 42.404(a) (1995).
\textsuperscript{53.} \textit{Id.} § 42.405(d)(1). This regulation applies to the USDOL. \textit{See id.} § 42.401.
The USDOL has admitted that it is aware of its obligation to ensure that state agencies administering unemployment compensation programs comply with Title VI. For example, in May 1994, Secretary of Labor Robert Reich acknowledged in a letter to the Congressional Hispanic Caucus that state agencies "must adhere to existing regulations implementing Title VI" and then paraphrased the DOJ regulation cited above. The Caucus had complained about the use of English-only notices in the unemployment compensation program and had suggested that the USDOL require notice to be given in languages other than English in locations where five percent or more of the population speaks a language other than English. The USDOL declined to implement the suggestion, later claiming to a group of low-income worker advocates that "current regulations and Federal oversight insure that information in languages other than English is available [in the states]."

This lack of guidance from the USDOL results in different practices among the states. In the states with large LEP and NEP populations, the provision of bilingual services is inconsistent at best. Some of the states reviewed in this Article make an effort at least to address the needs of Spanish-speaking claimants. Only California, however, even attempts to meet the needs of other non-English language groups.

Of the states reviewed, only California has comprehensive legislation mandating the provision of bilingual services to

54. Letter from Robert Reich, Secretary of Labor, to The Honorable José E. Serrano and the Congressional Hispanic Caucus 1 (May 31, 1994) (on file with the University of Michigan Journal of Law Reform). USDOL representatives also acknowledged their obligations under Title VI to a group of low-income worker advocates who had sent them a "briefing book" summarizing various complaints. See NATIONAL EMPLOYMENT LAW PROJECT, INC., EMPLOYMENT TASK FORCE, BRIEFING BOOK: U.S. DEP'T OF LABOR OVERSIGHT AND REFORM OF THE UNEMPLOYMENT COMPENSATION PROGRAM (1994); Unemployment Ins. Serv., U.S. Dep't of Labor, Actions to Consider with Respect to NELP's Recommendations, transmitted by Memorandum from the National Employment Law Project, Inc., to UC Briefing Book Contributors (Sept. 22, 1994) [hereinafter USDOL Response] (on file with the University of Michigan Journal of Law Reform).

55. Letter from The Honorable José E. Serrano, Chairman, Congressional Hispanic Caucus, to Robert Reich, Secretary of Labor 1 (Nov. 10, 1993) (on file with the University of Michigan Journal of Law Reform).

56. Letter from Robert Reich to The Honorable José E. Serrano and the Congressional Hispanic Caucus, supra note 54, at 1. The Secretary of Labor stated that he intended to seek guidance from the Justice Department. Id.

57. USDOL Response, supra note 54.

58. See infra notes 69, 72, 85, 89, 96 and accompanying text.
LEP and NEP claimants. The Dymally-Alatorre Bilingual Services Act\(^5\) requires that bilingual services be provided at any state agency office where five percent or more of the people served by the office cannot communicate effectively in English.\(^6\) Bilingual services include the use of bilingual employees\(^7\) as well as written materials—including forms, applications, questionnaires, letters, or notices—in languages other than English.\(^8\) If the state agency does not provide translated materials, it must provide assistance to LEP and NEP claimants to ensure that they understand the English form, letter, or notice.\(^9\) There must be enough bilingual staff employed to provide the same level of services to non-English-speaking claimants as to English-speaking claimants.\(^10\) Every two years, state agencies must conduct a survey of each local office to determine the number of bilingual employees, the languages they speak other than English, and the number and percentage of non-English-speaking people served by each local office.\(^11\)

California also requires the Unemployment Insurance Appeals Board to provide language assistance at adjudicatory hearings.\(^12\) The state bears the cost of providing an interpreter, certified by the state, if the administrative law judge or hearing officer so directs; otherwise the claimant bears the cost.\(^13\) California also permits the filing of a late appeal if good cause is shown, although the law does not specify language difficulties as good cause.\(^14\)

Two states, Texas and New Jersey, have statutes addressing bilingual services for Spanish-speaking claimants only. The Texas statute provides that all essential unemployment

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60. Id. § 7296.2.
61. Id. § 7292.
62. Id. § 7295.4. California law requires that “standard information employee pamphlets concerning unemployment . . . insurance programs” must be available in Spanish and English. CAL. UNEMP. INS. CODE § 316 (West 1986). The California unemployment agency provides most forms in Spanish and English, many in Chinese, and some in other languages as well. TRANSLATION UNIT, CALIFORNIA EMPLOYMENT DEV. DEP'T, EDD'S FORMS AVAILABLE IN LANGUAGES OTHER THAN ENGLISH 1 (1990) (on file with the University of Michigan Journal of Law Reform). The interpreter request form is in 13 languages. See id.
63. CAL. GOV'T CODE § 7295.4.
64. Id. § 7286.4.
65. Id. § 7299.4.
66. Id. § 11501.5.
67. Id. § 11513(d).
68. See CAL. UNEMP. INS. CODE §§ 1328, 1330, 1334 (West 1986).
compensation forms and instructional information must be available in Spanish and that interpreters must be available for all persons whose primary language is Spanish. Further, state policy treats an unemployment compensation office's failure to send a Spanish-language notice to an identified Spanish speaker as no notice at all. Therefore, the time period for filing an appeal does not begin to run until a Spanish-language notice is sent. The New Jersey statute limits its application to Spanish-speaking agricultural workers. The statute provides that the state labor department shall make bilingual forms available "for all Spanish speaking agricultural workers applying for or receiving [unemployment compensation] benefits." The statute also requires the state labor department to maintain a permanent staff of Spanish language interpreters to assist farm workers "in interpreting language in connection with matters involving any Federal, State, county or local governmental agency." Non-farm worker unemployment compensation offices attach a Spanish tag line to notices which provides information about appeal rights.

Bilingual workers are not always available, however. The labor department provides interpreters at administrative hearings, although claimants are frequently told to bring their own. If a claimant appears without an interpreter, the department arranges for one by phone. The state recognizes a good cause exception to the late filing of an appeal for inability to understand an English-language notice.

The remaining states have no statutes regarding bilingual services for unemployment compensation but do provide varying levels of bilingual services. For example, Massachusetts has developed an extensive bilingual services program for unemployment compensation claimants and employment

70. Telephone Interview with Stephen Yelenosky, Attorney, Advocates, Inc. (Feb. 9, 1995).
71. Id.
73. Id. § 43:21-11.1(b).
74. Id. § 34:9A-7.2.
75. Telephone Interview with Keith Talbot, Attorney, Camden Regional Legal Services, Farmworker Division (Feb. 8, 1995).
76. Id.
77. Id.
78. Id.
services customers. All forms are available in Chinese, Haitian Creole, Portuguese, Spanish, and Vietnamese, and legal notices are in English but contain an advisory in six to eight languages that the notice is important and should be translated. Offices serving a substantial number of LEP and NEP claimants attempt to employ bilingual staff. Local offices can obtain emergency interpretation services by seeking an interpreter from a list of volunteer bilingual personnel employed by the state unemployment compensation agency or by using AT&T Language Line® services. Finally, the state contracts with an interpreter service agency to provide interpretation services at administrative hearings in fifty-four languages.

Colorado and Arizona employ bilingual workers and will provide interpreters at administrative hearings. In both states, however, claimants request interpreters on a form written only in English. Neither state provides individualized Spanish-language notices—only a tag line instructing the claimant to call the unemployment compensation office for further information.

Illinois hires Spanish-speaking workers who assist with unemployment compensation applications, at least in northern Illinois. All notices contain a tag line in Spanish advising the claimant that the notice is important. Appeal rights are explained in Spanish on the notice, with a suggestion that the

80. Telephone Interview with Marisa de la Paz, Director of Multi-Lingual Services, Massachusetts Department of Employment and Training (Mar. 7, 1995).
81. Id.
82. Id.
83. Id.
84. Id.
85. Telephone Interview with Michele Besso, Attorney, Colorado Rural Legal Services, Denver, Colo. (Feb. 9, 1995); Telephone Interview with Carmen Salgado Garcia, Paralegal, Community Legal Services Farmworker Program, Tolleson, Ariz. (Feb. 9, 1995).
86. Telephone Interview with Michele Besso, supra note 85; Telephone Interview with Carmen Salgado Garcia, supra note 85. Arizona does provide a number of preprinted notices and forms in English and Spanish. Letter from James B. Griffith, Assistant Director, Division of Employment and Rehabilitation Services, Arizona Department of Economic Security, to Cynthia G. Schneider, Staff Attorney, Migrant Legal Action Programs, Inc. (July 17, 1995) (on file with the University of Michigan Journal of Law Reform).
87. Telephone Interview with Vince Beckman, Attorney, Illinois Migrant Legal Assistance Project, Chicago, Ill. (Feb. 9, 1995).
88. Id. In the interview, Mr. Beckman said that he believes that tag lines are provided. Id.
claimant go to an unemployment office if the claimant does not understand the notice. However, the state does not provide interpreters at administrative hearings.

Florida serves as a striking example of a state that does not provide non-discriminatory services to non-English-speaking unemployment compensation claimants. While Creole- and Spanish-speaking unemployment office workers are available in the Miami area, other offices do not always have bilingual workers available. Forms and notices are only in English, and the state does not provide a good cause exception for failing to file a timely hearing request due to failure to comprehend an English-only notice. Although interpreters are provided at administrative hearings, the initial determination notice, which informs the claimant about appeal procedures, is only in English.

New Mexico attempts to meet the needs of Spanish-speaking claimants by employing Spanish-speaking staff at all local offices, although that Spanish-speaking staff may not always be available. The state provides many other services as well. Local offices present films on claimant rights and responsibilities in Spanish. Program informational materials are available in Spanish. The notice of the monetary determination has explanations, instructions, and appeal rights written in both English and Spanish. Interpreters are available for administrative hearings in New Mexico. The "notice of

89.  Id.
90.  Id.
91.  Telephone Interview with Greg Schell, Attorney, Florida Rural Legal Services (Feb. 9, 1995).
92.  Id.
95.  See Telephone Interview with Greg Schell, supra note 91; Interview with Rose O'Leary, supra note 94.
96.  Letter from Jimmy R. Sanchez, Unemployment Insurance Bureau Chief, State of New Mexico Department of Labor, to Cynthia G. Schneider, Staff Attorney, Migrant Legal Action Programs, Inc. (June 29, 1995) (on file with the University of Michigan Journal of Law Reform).
98.  See Letter from Jimmy R. Sanchez to Cynthia G. Schneider, supra note 96, at 1.
99.  Id.
100. Id.
101. Id.
appeal" form, however, which is used to request an interpreter, is printed only in English.\textsuperscript{102} Decisions of the Appeals Tribunal and the Board of Review advise claimants of the importance of the notice in English and Spanish, and they instruct claimants to see the local office if they do not understand the document.\textsuperscript{103}

As a result of a 1983 consent decree, New York provides bilingual services to Spanish-speaking claimants.\textsuperscript{104} Under the terms of the consent decree, bilingual workers must be available in local offices serving a large Spanish-speaking population.\textsuperscript{105} At offices that have Spanish-speaking staff, the staff translates all notices into Spanish.\textsuperscript{106} At offices where Spanish-speaking staff are not available, all Spanish language notices contain instructions in Spanish explaining how to obtain a translation.\textsuperscript{107} The state provides interpreters at administrative hearings.\textsuperscript{108}

This review of ten states' practices regarding the provision of bilingual services illustrates the failure of the USDOL to provide guidance to states on the issue despite DOJ regulations requiring the USDOL to publish such guidance.\textsuperscript{109} Although no state that we reviewed failed to provide any bilingual services, the range of services varied greatly among the states. One can only surmise that, as states make half-hearted efforts to ensure that LEP and NEP claimants have access to

\textsuperscript{102} Telephone Interview with Jimmy R. Sanchez, Unemployment Insurance Bureau Chief, State of New Mexico Department of Labor (July 20, 1995). The New Mexico unemployment compensation office notes that most often the local office completes the form for the claimant and makes the determination whether an interpreter is needed at the hearing. \textit{Id.}

\textsuperscript{103} See Letter from Jimmy R. Sanchez to Cynthia G. Schneider, \textit{supra} note 96, at 1.


\textsuperscript{105} Consent Decree, Barcia v. Sitkin, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), 18 (S.D.N.Y. Mar. 2, 1983).

\textsuperscript{106} See Barcia, 865 F. Supp. at 1028 & n.18.

\textsuperscript{107} \textit{Id.} In 1993, plaintiffs in \textit{Barcia} filed a motion for contempt in response to defendants' failure to comply with various provisions of the consent decree. See \textit{id.} at 1017. The court subsequently clarified its earlier opinion holding that defendants must translate handwritten entries on preprinted Spanish notice forms into Spanish when the office employs "adequate" Spanish-speaking staff and must provide interpreters who are capable of simultaneous translation at hearings. See \textit{id.} at 1029. Defendants have appealed the court's finding on the notice issue. Letter from Jerome M. Solomon, Associate Counsel, New York Department of Labor, to Cynthia G. Schneider, Staff Attorney, Migrant Legal Action Programs, Inc. 1 (July 18, 1995) (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{108} See Barcia, 865 F. Supp. at 1030.

\textsuperscript{109} See \textit{supra} notes 52–53 and accompanying text.
unemployment compensation benefits, these persons will encounter substantial barriers to their participation in the unemployment compensation program.

III. THE PRIORITIES OF OTHER FEDERAL AGENCIES

In contrast to the USDOL, other federal agencies have taken steps to ensure that services are provided to language minorities in a non-discriminatory manner. The Secretary of Health and Human Services (HHS) has promulgated Title VI regulations almost identical to those of the USDOL. The HHS enforcement record, however, is very different.

The HHS Office of Civil Rights (HHS-OCR) consistently has taken the position that state agencies that receive federal funds and do not provide bilingual services violate Title VI. HHS has, for the most part, resolved these matters by settlement. In the most recent example, HHS-OCR agreed with the Massachusetts Department of Public Welfare to resolve various complaints concerning services to LEP individuals in programs funded under Title IV of the Social Security Act. During its investigation, HHS-OCR informally advised the state agency that it had obtained evidence indicating probable violations of Title VI and of HHS regulations. Probable violations included posting signs directing LEP persons to bring interpreters with them when seeking benefits; oral and written instructions to LEP applicants directing them to provide their own interpreters; obtaining and acting on inaccurate information about LEP persons' eligibility because the English-speaking state agency staff tried to conduct an interview when an interpreter was needed but not provided; burdening community agency organizations with requests to act as interpreters; and other violations surrounding the state agency's failure to communicate effectively with LEP

113. Id. at 3.
persons. HHS-OCR noted the need for clearer LEP policies and procedures, additional bilingual staff and interpreter resources, and translated materials. The resolution agreement contained a detailed plan describing the steps that the state agreed to take to remedy these problems.

The Food Stamp Program, administered by the United States Department of Agriculture (USDA), provides state agencies with federal funds to administer an income transfer program. The USDA has made significant efforts to ensure compliance with its regulations regarding the provision of bilingual services. Under the Food Stamp Act, the USDA promulgated regulations that specifically address the provision of bilingual services in local food stamp offices. These rules require a food stamp office serving approximately 100 single-language minority households to provide bilingual services. The rules define "bilingual services" to include the provision of bilingual staff or interpreters and the provision of program information materials, application materials and notices in languages other than English.

The USDA has instructed local offices that compliance with a state agency’s Title VI obligations towards LEP persons will be measured by

114. Id. at 3–4.
115. Id. at 6–11.
116. Id. at 6–13. For other examples of HHS-OCR Title VI enforcement activity, see Letter from Dewey E. Dodds, Director, Office for Civil Rights, Region III, to Frank Beal, Secretary, Pennsylvania Department of Public Welfare (May 13, 1977) (on file with the University of Michigan Journal of Law Reform) (describing a 1977 finding that various Philadelphia public welfare agency offices discriminated against Hispanics by forcing them to bring their own interpreters, failing to have adequate bilingual public contact services in some offices, and having no policy concerning the use of Spanish-language forms and letters); Letter from Floyd L. Pierce, Director, Office for Civil Rights, Region IX, to Andrew I.T. Chang, Director, Hawaii Department of Social Services and Housing (Aug. 29, 1980) (on file with the University of Michigan Journal of Law Reform) (discussing a 1980 finding that the Hawaii Department of Social Services and Housing failed to implement a 1979 corrective action plan regarding the provision of bilingual services to non-English and limited-English-speaking persons by failing to have sufficient bilingual staff and failing to translate program informational materials); Letter from Carmen Palomera Rockwell, Regional Manager, Office for Civil Rights, Region X, to Maria Gutierrez, Complainant (Aug. 15, 1990) (on file with the University of Michigan Journal of Law Reform) (discussing a 1990 finding that the Oregon Department of Human Resources' Adult and Family Services Division failed to offer bilingual staff or interpreters to clients and did not produce forms and notices in languages other than English).
118. Id. §§ 2011–2032 (1994).
120. 7 C.F.R. § 272.4(b)(3)(i).
121. Id. § 272.4(b)(1).
compliance with the Food Stamp Program's bilingual services regulations. In the recent past, for example, USDA reviewers have monitored states' compliance with these bilingual service rules as part of their civil rights compliance reviews and their reviews of food stamp offices' compliance with the Food Stamp Program's regulations.

A. Legal Standards: Title VI

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in federally assisted programs. State unemployment compensation offices receive federal funds in their role as the administrators of the unemployment insurance program. These funds pay for program benefits and for state administrative costs.

In 1974, the United States Supreme Court, in Lau v. Nichols, examined the application of Title VI to language discrimination. In Lau, the Court reviewed whether a school system's failure to provide non-English-speaking Chinese American students with either English language instruction or other adequate instructional procedures denied these students a meaningful opportunity to participate in a public education program in violation of Title VI. The Court anchored its opinion to the regulations and guidelines promulgated by the federal educational agency, regulations identical to the USDOL's current antidiscrimination regulations. The Court held that the Chinese-speaking students received fewer benefits than the English-speaking majority students,

123. Memorandum from Joseph H. Pinto, Acting Director, Program Accountability Division, Food and Nutrition Service, United States Department of Agriculture, to Regional Food Stamp Program Directors (June 30, 1993) (on file with the University of Michigan Journal of Law Reform).
125. Id. § 501 (1994).
126. Id.
128. Id. at 564.
129. Id. at 566-67.
130. Id. at 566-67.
denying them a "meaningful opportunity to participate in the educational program." This denial, said the Court, had "all [the] earmarks of the discrimination banned by the regulations."

Although Lau made it clear in 1974 that language discrimination falls within Title VI, it was not until nine years later that the Court decided the degree of evidence needed to uphold a Title VI claim. In Guardians Association v. Civil

132. 414 U.S. at 568.
133. Id. Lau did not address the issue of whether language-based discrimination is equivalent to national origin discrimination, although the Court's decision certainly proceeded on that assumption. See id. The United States Court of Appeals for the Ninth Circuit is the only court that has recognized language discrimination as national origin discrimination. See Yniguez v. Arizonans for Official English, 42 F.3d 1217 (9th Cir. 1994), aff'd, 69 F.3d 920 (9th Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1316 (1996); Gutierrez v. Municipal Court of Southeast Judicial Dist., 838 F.2d 1031 (9th Cir. 1989), vacated as moot, 490 U.S. 1016 (1989); Olgues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986), cert. granted, 481 U.S. 1012, vacated as moot, 832 F.2d 131 (9th Cir. 1987).

The Supreme Court has stated that language discrimination may be analogized to race discrimination. See Hernandez v. New York, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."); see also Hernandez v. Texas, 347 U.S. 475 (1954) (holding that the systematic exclusion of persons of Mexican descent from a jury deprived a criminal defendant of Mexican descent of his constitutional guarantee to equal protection).

Courts' approaches to accent discrimination cases are also instructive. Consider, for instance, the Title VII case of Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990), in which the Ninth Circuit recognized that accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job.

Id. at 596. See also Carino v. University of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980 (6th Cir. 1980). But see Frontera v. Sindell, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (upholding the use of an English-only civil service exam by refusing to characterize the issue as nationality or race discrimination); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (holding that language discrimination is not subject to a higher level of scrutiny under equal protection analysis).

134. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 590-91 (1983). In a divided opinion, this decision also addressed whether a private litigant may raise a discrimination claim under Title VI. Id. at 593-95, 600-03. A majority of the Court appeared to recognize a private right of action under Title VI for declaratory and injunctive relief. Announcing the opinion of the Court, Justice White, joined by Justice Rehnquist, argued that "relief in private actions [under Title VI] should be
Service Commission, a majority of the Court, writing in separate opinions, took the position that a Title VI claim under the implementing regulations does not require a showing of intent but merely a showing of the disparate impact described in the regulations.

The Supreme Court reaffirmed this holding and clarified its opinion several years later in a case brought under § 504 of limited to declaratory and injunctive relief. "Id. at 598. Four other Justices asserted that the court should also allow compensatory relief. Id. at 625 (Marshall, J., dissenting); id. at 636 (Stevens, J., joined by Blackmun and Brennan, JJ., dissenting). A private right of action against a federal agency charged with administering federal funds rather than against a state agency exists under Title VI in very limited circumstances when the federal government has funded a specific project. Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam) (finding a private right of action when the plaintiff also alleged that the federal agency had "consciously and expressly" abdicated enforcement of its duties); Gautreaux v. Romney, 448 F.2d 731, 740 (7th Cir. 1971) (finding a private right of action when the plaintiff also alleged that the agency acquiesced or actively participated in discriminatory practices), aff'd, 425 U.S. 284 (1976); Shannon v. United States Dep't of Hous. and Urban Dev., 436 F.2d 809, 817, 820 (3d Cir. 1970) (finding a private right of action when the plaintiff also alleged that the agency used improper procedures for approving funded programs); Hardy v. Leonard, 377 F. Supp. 831, 840 (N.D. Cal. 1974) (finding a private right of action where the plaintiff also alleged that the agency had wrongly refused to pursue further action when efforts to achieve voluntary compliance failed). These cases sanction situation-specific actions against federal agencies.

The United States Supreme Court has pointed lower courts away from broad-gauge actions against federal enforcement agencies. See Cannon v. University of Chicago, 441 U.S. 677, 715 n.51 (1979) (addressing the respondent's contention that Title IX and Title VI should receive the same construction and opining that Title VI is "more conducive to implication of a private remedy against a discriminatory recipient" and "less conducive to implication of private remedy against the Government [as well as the recipient] to compel the cutoff of funds"). Accordingly, the United States Court of Appeals for the District of Columbia Circuit did not allow a broad scale enforcement action against several federal agencies in the same case. Women's Equity Action League v. Cavazos, 906 F.2d 742, 749 (D.C. Cir. 1990). Further, courts have not allowed an action under Title VI against a federal agency seeking termination of federal funding, Abramson v. Bennett, 707 F. Supp. 13, 16 (D.D.C. 1989), or against a federal agency for compensatory damages, Dorsey v. United States Dep't of Labor, 41 F.3d 1551, 1554–55 (D.C. Cir. 1994).


136. Guardians Ass'n, 463 U.S. at 607 n.27 (identifying the various positions of the Justices). Justices Stevens, Brennan, and Blackmun agreed that a violation of the statute requires proof of discriminatory intent but dissented, arguing that petitioners only had to show discriminatory effects to prove a violation because the regulations promulgated under the statute appropriately incorporate an "effects" standard. Id. at 645. Justices White and Marshall took the view that a Title VI violation does not require a showing of intent. Id. at 584 n.2. Justice Powell also found intentional discrimination a prerequisite to any valid Title VI claim and joined Part II of the Court's opinion holding valid Title VI regulations forbidding unintentional, impact discrimination. Id. at 607, 610.
the Rehabilitation Act of 1973. In reaching the issue of whether claims under § 504 require proof of discriminatory animus, the Court reexamined its holding in Guardians because Title VI served as the model for § 504. A unanimous Court reiterated the framework for Title VI claims that resulted from the multiple opinions in Guardians:

First, the [Guardians] Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

At least six circuits have explicitly recognized that a cause of action premised on Title VI regulations does not require proof of discriminatory intent. Courts identify the elements of a disparate impact claim under Title VI by referring to cases decided pursuant to Title VII of the Civil Rights Act of 1964. The plaintiff must first show by a preponderance of the evidence that a facially neutral, federally aided administrative action has a disproportionate effect on a group protected by Title VII. A plaintiff must show only that the "statistical disparities [are]..."
sufficiently substantial [to] raise such an inference of causation. The burden of persuasion then shifts to the defendant to prove a substantial legitimate justification for its practice. If the defendant carries this rebuttal burden, the burden shifts back to the plaintiff, who can still prevail if he is able to show that the defendant's proffered justification is a pretext for discrimination. Valid evidence of pretext includes a showing that comparably effective alternative practices exist which would result in less disproportionality. The ultimate burden of proving illegal discrimination remains with the plaintiff.

Certainly the "facially neutral" action of administering the unemployment compensation program only in English would ensure that LEP and NEP claimants were unable to participate in the program. While the impact of the facially neutral action on LEP and NEP claimants may be clear, however, the degree of impact that a plaintiff must show before a court will order relief under Title VI is less clear. In Pabon v. Levine, the court found that the plaintiffs, non-English-speaking persons who claimed they were unlawfully deprived of unemployment insurance benefits because they were not proficient in English, properly raised a claim under Title VI. Adopting the Tenth Circuit's "substantial group" test, the court left for trial the issue of whether a sufficient number of individuals were being deprived of Title VI's protections to warrant a claim for relief.

144. Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417-18 (11th Cir. 1985) (analyzing the justification of a respondent in a Title VI action in light of the state's cases interpreting a Title VII defendant's burden regarding the showing of a business necessity).
145. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (holding that plaintiff must be afforded fair opportunity to show defendant's stated reason was pretextual).
149. Id. at 677.
150. See Serna v. Portales Mun. Sch., 499 F.2d 1147, 1154 (10th Cir. 1974) (holding that "only when a substantial group is being deprived . . . will a Title VI violation exist").
151. Pabon, 70 F.R.D. at 677.
In sum, Title VI serves as a potent weapon for LEP and NEP unemployment compensation claimants who can demonstrate that they have been denied unemployment compensation benefits or subjected to continued delay, inconvenience, or expense in securing unemployment compensation benefits because of the state's refusal to provide bilingual services.152

B. Constitutional Due Process Claims

Most bilingual assistance cases brought under Title VI also have alleged a constitutional violation that has not been decided by the courts.153 By contrast, most state court cases deciding challenges to an agency's failure to provide bilingual assistance have relied on state or federal constitutional grounds.154 Unemployment compensation applicants whose claims for unemployment insurance are denied also have raised the issue of constitutional guarantees in the context of interpreting the unemployment compensation program's

152. Most of the cases brought in federal court to challenge the failure of a state agency to provide bilingual services have settled. These cases all raised a claim under Title VI of the Civil Rights Act, as well as other claims. See, e.g., Stipulation, Agreement of Settlement and Consent Order, Reyes v. Thompson, No. C91-303 (W.D. Wash. Mar. 4, 1991) (involving a class action challenge to the failure of the state social services agency to provide bilingual services in the administration of its public assistance programs); Consent Decree, Barcia v. Sitkin, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC) (S.D.N.Y. Mar. 2, 1983) (settling a class action challenge to, inter alia, limited availability of translators at unemployment compensation hearings); DeJesus v. Crosier, No. C.A. 75-486-G (D. Mass. June 28, 1981) (resolving a class action challenge to a state's failure to provide bilingual services to Spanish-speaking unemployment compensation claimants); Consent Decree, Burgos v. Illinois Dept' of Children and Family Servs., No. 75 C 3974 (N.D. Ill. Jan. 14, 1977) (ending a class action challenge to a failure of the state agency to provide bilingual services in the administration of its child welfare programs); Settlement and Stipulation to Dismissal, Asociacion Mixta Progresista v. United States Dept' of Health, Educ., and Welfare, No. C 72-882 SAW (N.D. Cal. Jan. 19, 1976) (settling a class action challenge to the failure of defendants to provide bilingual services to Mexican-Americans in the administration of its social service programs); Consent Decree, Perdomo v. Trainer, No. 74C2972 (N.D. Ill. Oct. 17, 1976) (involving a class action challenge to the failure of defendants to provide bilingual services in the administration of its public assistance programs); Settlement and Stipulation of Dismissal, Pabon v. Levine, No. 75 Civ. 1067 (S.D.N.Y. Oct. 12, 1976) (resolving a challenge to the failure of the state labor department to provide bilingual services in the administration of its unemployment compensation program).


154. See infra note 164 and accompanying text; see infra note 184.
statutory provision that requires states to provide an "[o]ppportunity for a fair hearing, before an impartial tribunal."\textsuperscript{155}

Courts have not been receptive to these claims. Many state and federal judges have ruled against LEP and NEP claimants who have argued that a state agency denied them due process by failing to provide them with written notices in their primary languages, assistance from bilingual employees or translators, or interpreters at hearings.\textsuperscript{156} Courts have been even more hostile to requests that agencies provide such services as a general matter, whether the plaintiff premises the asserted right on due process or equal protection grounds.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{155} 42 U.S.C. § 503(a)(3) (1994); see Cosby v. Ward, 843 F.2d 967, 982 (7th Cir. 1988) (noting that a failure to meet constitutional standard of due process also violates the "fair hearing" clause of § 503(a)(3)); Ross v. Horn, 598 F.2d 1312, 1318 n.4 (3d Cir. 1979) (equating constitutional due process standards to the § 503(a)(3) fair hearing provision), cert. denied, 448 U.S. 906 (1980); cf. United States v. Florida East Coast Ry. Co., 410 U.S. 224, 244–45 (1973) (using constitutional due process concepts to interpret the term "hearing" as used in the Interstate Commerce Act).

\item Judicial due process decisions also influence administrative and legislative choices. See 2 KENNETH C. DAVIS & WILLIAM J. PIERCE, ADMINISTRATIVE LAW TREATISE § 9.1 (3d ed. 1994).

\item \textsuperscript{156} E.g., Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (stating that giving notice in English to persons who speak, read, and write only Spanish is reasonable and thus not a denial of due process); Alonso v. Arabel, Inc., 622 So. 2d 187, 188 (Fla. Dist. Ct. App. 1993) (recognizing that, although multilingual notices may be desirable, their use is not a due process requirement); Alfonso v. Board of Review, 444 A.2d 1075, 1077 (N.J. 1982) (asserting that the decision whether and how to provide translation is best left to the other branches of government); Hernandez v. Department of Labor, 416 N.E.2d 263, 266 (Ill. 1981) (barring an untimely appeal for denial of unemployment benefits where a non-English-speaking claimant received adequate notice of denial in English but inaccurate translation of its contents); DaLomba v. Director of Div. of Employment Sec., 337 N.E.2d 687, 690 (Mass. 1975) (holding that it was not the intent of unemployment legislation to make notice in English insufficient as to illiterates and all non-English-speaking persons).

But see Rivera v. Board of Review, N.J. Dept of Labor, 606 A.2d 1087, 1092 (N.J. 1992) (deciding that the nature of notice required by the due process clause depends on the actual context in which notice is being given); Hollis v. Tanner, 341 S.E.2d 290, 292–93 (Ga. Ct. App. 1986) (finding a due process requirement that written notice be reasonably calculated to enable a claimant to protect her rights may be violated when the agency knows of a claimant's illiteracy); Mascorro v. Employment Div., 689 P.2d 1326, 1327–28 (Or. Ct. App. 1984) (finding that a LEP claimant is entitled to an interpreter under state law requiring interpreters for "handicapped" persons).

\item See, e.g., Soberal-Perez v. Heckler, 717 F.2d 36, 42 (2d Cir. 1983) (dismissing a class action against the Social Security Administration partly because the Secretary's failure to provide Spanish language services is not an equal protection violation where there was no showing that information procedures in Spanish-speaking areas are inadequate), cert. denied, 466 U.S. 929 (1984); Kuri v. Edelman, 491 F.2d 684, 687 (7th Cir. 1974) (involving a class action based, in part, on the Fourteenth Amendment against a welfare department); Carmona, 475 F.2d at 739
\end{itemize}
However, most of the later cases are not well-reasoned and instead follow, with little analysis, such earlier cases as the 1973 California Supreme Court opinion in Guerrero v. Carleson.\footnote{158}

1. Guerrero and Its Progeny—The seminal case in this area, Guerrero v. Carleson, involved welfare benefits, not unemployment compensation.\footnote{169} Although criticized by commentators,\footnote{160} courts have regularly cited the Guerrero opinion on the issue of a governmental agency's obligation to provide bilingual services.\footnote{161} The Guerrero plaintiffs sought to enjoin state and local welfare agencies from terminating welfare benefits to recipients whom the defendant agencies knew to be literate in Spanish but not English. The plaintiffs maintained that the agencies should give notice to the recipients in their primary language.\footnote{162} The court characterized the "sole issue" presented as whether the United States Constitution compels welfare authorities to prepare such notices of agency action in Spanish.\footnote{163} Over Justice Tobriner's strong dissent, the court answered the question in the negative.\footnote{164} The court found that using Spanish-language notices was "desirable," but it did "not rise to the level of a constitutional imperative."\footnote{165} In reaching its conclusion, the court articulated themes that recur in subsequent cases.

(affirming a district court order granting a motion to dismiss a class action based on the Due Process Clause because of the "additional burdens" that multilingual notice would impose on "California's finite resources"); Guerrero v. Carleson, 512 P.2d 833 (Cal. 1973) (dismissing both due process and equal protection claims of a class action against a welfare department on the basis that multilingual notice in this case may extend to any and all official communications required to satisfy due process), cert. denied, 414 U.S. 1137 (1974). A discussion of the possible equal protection claims is outside the scope of this Article.

\footnote{158. 512 P.2d 833 (Cal. 1973), cert. denied, 414 U.S. 1137 (1974).}
\footnote{159. Id.}
\footnote{162. See 512 P.2d at 833.}
\footnote{163. Id.}
\footnote{164. Id.}
\footnote{165. Id.}
The plaintiffs' principal due process argument was based on the maxim articulated in *Mullane v. Central Hanover Bank & Trust Company* that "[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The plaintiffs in *Guerrero* argued that, under *Mullane* and its progeny, they were entitled to the form of notice most likely to apprise them of their right to a fair hearing—in their case, notice in Spanish, their primary language. They also referred to the general statement in *Goldberg v. Kelly* that timely and adequate notice is a component of the fair hearing required by the Due Process Clause of the United States Constitution before termination of welfare benefits.

The *Guerrero* court agreed that *Mullane* and its progeny controlled. It framed the issue, however, as whether the English-language notice was sufficient, under the circumstances, to put the plaintiffs on notice that they ought to have it translated in a timely fashion and whether obtaining such a translation would be feasible. Relying on arguments that would recur in later cases, the court ruled for the defendants. It prefaced its decision by declaring that the "[t]he United States is an English speaking country" and that English is the language of state government. The English-only policy would further that goal by encouraging NEP persons to learn English. Second, the court decided that the appearance of the notices in question indicated that they were official notices requiring prompt attention, referring to the fact that the notice was on official county agency letterhead, was

167. Id. at 314.
168. See, e.g., Covey v. Town of Somers, 351 U.S. 141 (1956) (holding that the means employed in giving notice of tax lien must be such as one desirous of actually informing person to be notified might reasonably use).
169. 512 P.2d at 834-35. The plaintiffs also made an equal protection argument. *Id.* at 837.
171. 512 P.2d at 834.
172. *Id.* at 834-35.
173. *Id.* at 835-36.
174. See supra note 161 and accompanying text.
175. 512 P.2d at 833.
176. *Id.* at 835.
177. *Id.* at 836.
“obviously an official communication, with boxes checked and blanks filled in by hand,” and that each document was “dated and signed by a social worker or similar departmental representative.” Third, the court found that it was reasonable to assume that NEP recipients had developed “a reliance on bilingual persons who can translate for them when necessary” or that, in “contemporary urban society,” they had “access to a variety of such sources of language assistance,” including friends and family, immigrant assistance groups or ethnic organizations, welfare rights groups, and legal aid offices. Fourth, the court articulated its fear that a ruling for the plaintiffs would, in effect, cause economic ruin to the state by requiring that many notices, including summonses, be in not only Spanish but “any other language . . . in which a non-English-speaking recipient of such assistance was known to be literate, regardless of how small that language group might be.” The court did not explicitly balance the interests of the parties as was done in Goldberg v. Kelly, but the reference to the potential cost to the state if it granted relief could be seen as implicit balancing. The dissent, by contrast, did frame the issue in terms of the relative interests of the parties, writing that “the issue turns on the relative importance of adequate notice to the welfare recipient and the corresponding burden to the [welfare] departments in printing the notice in Spanish.” The dissent found that Spanish-language notices should be required because such notices entail a minimal burden to the state but are “crucial” to the recipients.

178. Id.
179. Id.
180. Id. at 837–38. These comments appear in the part of the opinion discussing the plaintiffs' "desultory" equal protection claim. Id. The court also cites Carmona v. Sheffield, 325 F. Supp. 1341 (N.D. Cal. 1971), in which a California federal district court dismissed a class action challenging, on equal protection grounds, what the court characterized as the practice of the California employment security agency of "conduct[ing] its affairs" in English. Id. at 1342. In a one-page opinion, the district judge in Carmona referred to the plaintiffs' claim as "staggering" in its "breadth and scope" and one which, if adopted, "would virtually cause the processes of government to grind to a halt." Id. The United States Court of Appeals for the Ninth Circuit affirmed, also in a one-page opinion. Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973). The appellate court also dismissed plaintiffs' due process claim, finding the English-only policy reasonable and stating that it could not say that there was a "relatively easy means of providing a more adequate form of notice." Id. at 739.
181. 397 U.S. 254, 263 (1970) (holding that the extent of process due an individual depends on whether the individual's interest in avoiding grievous loss outweighs the governmental interest in summary adjudication).
182. Guerrero, 512 F.2d at 841.
183. Id.
Other state supreme courts that have dealt with cases brought by individual unemployment compensation claimants who claimed to have filed untimely appeals because they did not understand the English-language notice, have chiefly followed the lead of the California Supreme Court in *Guerrero.*

Two federal court decisions also are frequently cited in cases involving bilingual notices. Although not dealing with unemployment insurance notices, these two cases conclude that there is no due process right to a bilingual notice.

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184. For example, the court in *DaLomba v. Director of the Division of Employment Security,* 337 N.E.2d 687, 691 (Mass. 1975), applied a principle enunciated in a companion case, *Commonwealth v. Olivo,* 337 N.E.2d 904, 909 (Mass. 1975), that a notice is not constitutionally deficient if it would put a reasonable person on notice that an accurate translation was necessary. In *DaLomba,* the claimant relied on a neighbor's faulty translation of correspondence that she received from the unemployment compensation office. 337 N.E.2d at 688. Relying on *DaLomba* and *Guerrero,* the Illinois Supreme Court denied the appeal of another NEP unemployment compensation claimant who also relied on a friend's faulty translation and subsequently filed an untimely appeal. *Hernandez v. Department of Labor,* 416 N.E.2d 263 (Ill. 1981). Building and relying on these decisions in addition to *Guerrero,* the New Jersey Supreme Court held that "in an English-speaking country, requirements of 'reasonable notice' are satisfied when the notice is given in English." *Alfonso v. Board of Review,* 444 A.2d 1075, 1077 (N.J. 1982). Two judges dissented in *Alfonso,* finding that the burden on the state of providing a Spanish-language notice did not outweigh the benefits to an individual of receiving a notice that he could understand. *Id.* at 1078–79 (Wilentz, C.J., joined by Pashman, J., dissenting). Ten years later, the New Jersey Supreme Court retreated somewhat from the views expressed in *Alfonso.* See *Rivera v. Board of Review,* 606 A.2d 1087 (N.J. 1992). *Rivera* involved a Puerto Rican migrant farmworker who neglected to file a timely appeal of an unemployment benefit overpayment notice because the department sent the notice to his home in Puerto Rico while he was still working in the United States. By the time he received the notice and had it translated, the deadline for filing the appeal had expired. *Id.* at 1089. The court found that "the notice periods and practices applied by the Department . . . were inadequate to protect [petitioner's] due-process rights." *Id.* The most recent and sparsely reasoned case in this line is *Alonso v. Arabel,* 622 So. 2d 187 (Fla. Dist. Ct. App. 1993), rejecting claims by non-English-speaking claimants who had filed untimely appeals after receiving English-language notices. The *Alonso* court rebuffed the claimants' due process arguments, deciding instead to "join those states which have rejected this argument," citing all the cases mentioned in this footnote except *Rivera.* *Id.* at 188.


186. *In Soberal-Perez,* a class action challenging the failure of the Social Security Administration to provide forms in Spanish, the court adopted the analysis of the Massachusetts court in *Olivo,* 337 N.E.2d at 909–10, finding that in-hand service of an English-language notice is sufficient to put a reasonable person on notice to seek further inquiry. 717 F.2d at 43. In *Vialez,* the plaintiff challenged an English-only eviction notice. 783 F. Supp. at 110–11. The Housing Authority disputed that the notice was only in English. *Id.* at 110. The court rejected plaintiff's due process argument, appearing to adopt *Olivo*'s reasoning that a claimant has a duty to make a reasonable inquiry and that English-language notices are always sufficient. *Id.* at 119–21.
2. A Reexamination of Guerrero—Although these decisions are certainly an impediment to establishing broad due process rights for the LEP or NEP claimant, they are not an absolute barrier to obtaining judicial relief. A reexamination of these cases is long overdue, especially in light of several critical factors that have emerged during the last twenty-five years. These factors demand a closer examination of the LEP or NEP claimant's due process rights. They also require a more sophisticated examination of the role of English in our society, the increasing number of immigrants and ethnic minorities in the United States, the fact that at least some unemployment compensation offices provide some bilingual services, and the diminished availability of community resources to provide translation services. If Guerrero were decided today, the result would likely be different; even if the holding were the same, the reasoning would have to change.

The Guerrero court was concerned that a decision for the plaintiffs would impose unlimited obligations on the state, that "any and all official communications to the public required to satisfy due process of law, whether it be summonses, citations, subpoenas, tax forms, delinquency or eviction or foreclosure notices, [or] announcements of public hearings" would have to be translated. The court also appeared to believe that translation would be required into any language "in which a non-English speaking recipient of such assistance was known to be literate, regardless of how small that language group might be." In other words, the court assumed that, once it found that notice in other languages was required in any situation, it would have to order that all notices be provided in all languages in all situations. In short, there was no concept of balancing.

This inattention to balancing may have occurred because Guerrero was decided shortly after the United States Supreme Court's decision in Goldberg v. Kelly, when notions of due process were at their most expansive. After Goldberg and Guerrero, the United States Supreme Court articulated in

187. 512 P.2d at 838.
188. Id.
190. See Laurence H. Tribe, American Constitutional Law § 10.19, at 760–61 (2d ed. 1988) (explaining that cases since Goldberg "have exhibited tendencies toward a narrowed understanding" of substantive due process).
Mathews v. Eldridge\textsuperscript{191} the three-part balancing test now used by federal courts to analyze due process claims.\textsuperscript{192} Had the Guerrero court realized that it could provide a more limited remedy—e.g., tag lines or translation of important forms only in languages used by large numbers of recipients—it might have decided the case differently. Significantly, the dissent in Guerrero, which did engage in a balancing test\textsuperscript{193} and recognized the flexible and fact-specific nature of due process protections,\textsuperscript{194} would have ruled for the plaintiffs.\textsuperscript{195} In part, the plaintiffs would have prevailed because the dissent recognized that limited relief was appropriate: translation of one notice, the notice of reduction or termination of benefits,\textsuperscript{196} into one language, Spanish.\textsuperscript{197} The dissent also recognized that whether due process required translation of other official documents containing information about the reduction or termination of benefits would be decided on a case-by-case basis and that the balancing of interests might lead to a different result under different circumstances.\textsuperscript{198}

Another flaw in Guerrero and the cases that follow is their uncritical assertion that English is the official language of the United States and that notice in English is thus always constitutionally adequate.\textsuperscript{199} Such assertions are often accompanied by statements that a failure to provide bilingual

\textsuperscript{191} 424 U.S. 319 (1976).
\textsuperscript{192} Id. at 335. The court identified the three factors to be balanced: the individual's interest; the risk of error in using the distorted procedure; and the government's interest, including the administrative burden. Id.; see also United States v. James Daniel Good Real Property, 114 S. Ct. 492, 501–04 (1993) (using the Mathews test to analyze the constitutionality of an ex-parte pre-hearing seizure of real property in civil forfeiture proceedings).
\textsuperscript{193} 512 P.2d at 840–41 (Tobriner, J., dissenting).
\textsuperscript{194} Id. at 840 (arguing that "what is due process depends on the circumstances . . . [and] varies with the subject matter and the necessities of the situation." ) (quoting Sokol v. Public Util. Comm'n, 418 P.2d 265, 270 (Cal. Sup. Ct. 1965)).
\textsuperscript{195} Id. at 843.
\textsuperscript{196} Id. at 841.
\textsuperscript{197} Id. at 842 (arguing that "in view of the fact that a significant number of California residents speak and read only Spanish and that defendants recognize this fact . . . the burden of printing the challenged forms in Spanish would be comparatively light").
\textsuperscript{198} Id.
\textsuperscript{199} See Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971) ("For historical reasons too well known to require review herein, the United States is an English speaking country.") aff'd, 475 F.2d 738 (9th Cir. 1973); Guerrero, 512 P.2d at 835; Commonwealth v. Olivo, 337 N.E.2d 904, 911 (Mass. 1975); DaLomba v. Director of the Div. of Employment Sec., 337 N.E.2d 687, 689 (Mass. 1975).
services will encourage the claimant to learn English.\textsuperscript{200} In fact, the United States currently has no official language.\textsuperscript{201} Moreover, there is little, if any, evidence to support the proposition that the failure of a government agency to provide bilingual notices operates as an effective incentive to learn English.\textsuperscript{202} Most empirical studies conclude that non-English speakers want to learn English but find it difficult to do so.\textsuperscript{203}


\textsuperscript{201} See Yniguez v. Arizonans for Official English, 42 F.3d 1217, 1224 n.9 (9th Cir. 1994), aff'd, 69 F.3d 920, 927 n.10 (9th Cir. 1995) (en banc), cert. granted, 64 U.S.L.W. 3635, 3639 (Mar. 25, 1996); Alfonso, 444 A.2d at 1083 n.11 (Wilentz, C.J., dissenting); Valerie A. Lexion, Note, Language Minority Rights and the English Language Amendment, 14 Hastings Const. L.Q. 657, 658 (1987). The English-only movement has resulted in a recent reexamination of the historical record. See Yniguez, 42 F.3d at 1224 n.9; see also Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 Harv. C.R.-C.L. L. Rev. 293, 296–99 (1989); Lexion, supra, at 658–61.

\textsuperscript{202} The opinions cite no authority to support the proposition that English-only notices serve as an incentive. See, e.g., Guerrero, 512 P.2d at 836 ("The government may . . . reasonably assume that [non-English speakers] experience strong and repeated incentives . . . to learn the English language . . . .") (emphasis added).

\textsuperscript{203} As the dissent pointed out in Alfonso, "No such incentive [to learn English] is needed, for every day of their lives provides Hispanic-Americans with innumerable, often devastating reminders of their disadvantaged position resulting from the language barrier they face." 444 A.2d at 1085 (Wilentz, C.J., dissenting). See also ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 202–09, 212–21, 298 (1990) (noting, for example, that 50% of foreign born Mexicans used only their native language, and that native language (non-English) monolingualism is associated with recent immigration, age, working class (vs. entrepreneur or professional) status, and living in ethnic enclaves); Siobhan Nicolau & Rafael Valdivieso, Spanish Language Shift: Educational Implications 317–19 in LANGUAGE LOYALTIES, A SOURCEBOOK ON THE OFFICIAL ENGLISH CONTROVERSY (James Crawford ed., 1992) (noting that living in a rural as opposed to an urban area contributes to an individual's remaining monolingual). Adult immigrants are also hampered by the lack of available English as a Second Language (ESL) classes. PORTES & RUMBAUT, supra at 202 (citing a figure of 40,000 turned away from ESL classes in Los Angeles Unified School District in 1986 alone); Nicolau & Valdivieso, supra at 320.

Finally, Guerrero wrongly articulated a rule, refined in later cases, that an NEP person who receives an English-language notice that looks "official" is on notice to have the notice translated in a timely fashion. Implicit in this "rule" is the assumption that sources of translation are readily available. Neither the rule nor the assumption is necessarily true today. The "duty to inquire" principle rests on the assumption that the physical appearance of the English-language notice, or something else about the transaction between the claimant and the state unemployment agency, indicates to the claimant that this piece of paper is important: that it is "official." Indicia of "official appearance," according to the court in Guerrero, included the fact that the notice was on letterhead (presumably with a state or county seal), was personally addressed to the recipient, had boxes checked and blanks filled in by hand, and was signed by a social worker. In other words, this notice must have been sent out before the computer revolution, when printed stationery was still commonly used. The equivalent welfare form used in California today is either a partially preprinted form, with individual information variously handwritten or typed in, or an entirely computer-generated form. No forms are on letterhead or bear a state or county seal. The notices are mailed in window envelopes that usually, but not always, have the name and address of the sending agency but, again, no seal. They are not signed by any human being. Many unemployment


205. Guerrero, 512 P.2d at 836.

206. See id.; see also DaLomba v. Director of the Div. of Employment Sec., 337 N.E.2d 687, 691 (Mass. 1975) (holding that an "official" letter from a state agency was sufficient where petitioner had initiated prior contact with that agency); cf. Commonwealth v. Olivo, 337 N.E.2d 904, 909 (Mass. 1975) (holding that an "official" order by a constable, presumably in uniform, was sufficient to put a reasonable person on notice that the order was important and, if not understood, required translation).

207. Guerrero, 512 P.2d at 836. The notion that a non-English-speaking person can tell an "official" document by appearance has been the subject of skeptical comment. Alfonso, 444 A.2d at 1080 n.4 (Wilentz, C.J., dissenting).

208. Exemplars of Notice of Action forms are on file with the University of Michigan Journal of Law Reform.

209. Exemplars are on file with the University of Michigan Journal of Law Reform. See also Telephone Interview with Joel Abramson, Social Services Supervisor, San Francisco County Department of Social Services (Jan. 15, 1996); Telephone
insurance notices in California are also entirely computer-printed on continuous-feed paper by a dot matrix printer. Notices sent out by government agencies no longer look as "official" as they did in the 1970s. To the extent that Guerrero rests on the appearance of government notices, it is no longer valid in many states.

Furthermore, sources of translation are not necessarily available. The Guerrero court observed only that, "in contemporary urban society the non-English speaking individual has access to a variety of ... sources of language assistance." The situation may be quite different in isolated rural areas or in Puerto Rico, where Spanish is the predominant language. Seeking translations from friends and family is fraught with danger, as illustrated by the experiences of claimants who have had notices mistranslated by lay people. One court noted that, because of a lack of funding, foreign language assistance programs became increasingly unavailable as long ago as 1982. Fourteen years later, there is even less money available, and the assumption that an NEP welfare or

Interview with Elena Ackel, Senior Attorney, East Los Angeles Office, Legal Aid Foundation of Los Angeles (Jan. 15, 1996); Telephone Interview with Ricardo Cordova, Attorney, California Rural Legal Assistance (Mar. 16, 1995).

210. Exemplars are on file with the University of Michigan Journal of Law Reform. See also Interview with M. Gloria Hernandez, Community Worker, California Rural Legal Assistance Migrant Farmworker Project, in Fresno, Cal. (Mar. 13, 1995). Recent unemployment insurance notices have been sent out on paper with a water-mark-type agency identification beneath the computer writing, as a result of threatened litigation. Interview with Cynthia L. Rice, Attorney, California Rural Legal Assistance, in Santa Rosa, Cal. (Mar. 16, 1995).

211. 512 P.2d at 836.


214. See Alfonso, 444 A.2d at 1080 (Wilentz, C.J., dissenting).

215. Legal services organizations, for example, have less than half the resources they had in 1980, when federal funding was at its high point. NATIONAL LEGAL AID & DEFENDER ASS'N, LEGAL SERVICES: THE UNMET PROMISE 10 (1994) (on file with the University of Michigan Journal of Law Reform). There were only 119 more neighborhood law offices in 1994 than in 1967, despite the increase in the poverty population. Id. at 4, 8. In California today, there are about 10,000 poor people per legal services attorney, versus 5000 poor people per legal services attorney in 1980. ACCESS TO JUSTICE WORKING GROUP, STATE BAR OF CALIFORNIA, AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA 9, 23 (Draft Report for Public Comment) (June 1995) (on file with the University of Michigan Journal of Law Reform). Welfare rights organizations have virtually
unemployment compensation claimant can easily obtain an accurate translation on short notice is not valid.\(^{216}\)

Finally, legislative and policy changes have undercut the Guerrero court's concern about the potentially unlimited reach of a decision premised on the due process rights of non-English speakers. In many places, many government services are provided in at least some other languages, most often in Spanish.\(^{217}\) The most striking example is in the area of voting. As previously noted, the Guerrero court feared that ruling for the plaintiffs would lead to an order requiring the state to provide bilingual voting materials.\(^{218}\) The California Supreme Court had refused to order Spanish-language ballots and election materials two years before in Castro v. California.\(^{219}\) In 1975, however, shortly after Guerrero was decided, Congress amended the federal voting rights act to require that bilingual ballots be provided in any jurisdiction where more than five percent of citizens of voting age are members of a single language minority and are LEP.\(^{220}\)

3. The Due Process Rights of Unemployment Insurance Claimants in Light of Supreme Court Precedent—As discussed above, courts that have determined that non-English-speaking unemployment insurance claimants are not constitutionally entitled to some form of notice in their primary languages have relied on the outdated analysis of the subject in Guerrero v. Carlson.\(^{221}\) A reexamination of the issue, with reference to

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\(^{216}\) Recent attention has been given to the difficulties inherent in obtaining an accurate translation even from professional interpreters. See Susan Berk-Seligson, The Importance of Linguistics in Court Interpreting, 2 LA RAZA L.J. 14 (1988).

\(^{217}\) In California, the Dymally-Alatorre Bilingual Services Act requires state agencies to provide bilingual services and notices. CAL. GOV'T CODE §§ 7290–7299.8 (West 1995); see supra notes 43–49. This requirement may be due in part to the increased numbers of LEP and NEP persons in the population, as discussed supra Introduction. In addition, as discussed supra Part II, most agencies provide at least some services in Spanish.

\(^{218}\) 512 P.2d at 833, 837 (Cal. 1973).

\(^{219}\) 466 P.2d 244, 258 (Cal. 1970).


\(^{221}\) Supra Part III.B.1.
Supreme Court cases decided since 1972, suggests that, in at least some circumstances, NEP claimants have a constitution-
al right to bilingual assistance. The constitutional right to notice and hearing\textsuperscript{222} and the statutory right to a fair hearing\textsuperscript{223} entitle the LEP claimant to receive adequate notice advising him of governmental decisions, appeal rights, and impending hearings. The claimant also has a right to a fair adjudicatory hearing, which he is entitled to attend, and at which he may present evidence and cross-examine adverse witnesses.\textsuperscript{224} The meaningful notice requirement may entitle an LEP claimant to notices in a language he can understand or to assistance in translating notices. Similarly, the LEP claimant may require the assistance of an interpreter in order to exercise his right to present his case at a hearing or to cross-examine adverse witnesses.

There is no doubt that an unemployment insurance recipi-
ent has an interest in receiving benefits that is protected by the due process clause. As the Supreme Court stated recently, "Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."\textsuperscript{225} Numerous state and federal courts have held, directly or indirectly, that the right to receive unemployment insurance benefits is a property interest protected by the due process clause.\textsuperscript{226}

a. Notice—The Supreme Court has, on several occasions, addressed the importance of notice in the due process context.

The classic description remains that enunciated in *Mullane v. Central Hanover Bank & Trust Company*:\textsuperscript{227}


\textsuperscript{223} 42 U.S.C. § 503(a)(3) (1994). Whether the statutory fair hearing requirement has been met is tested by constitutional standards. See Ross v. Horn, 598 F.2d 1312, 1318 n.4 (3d Cir. 1979), cert. denied, 448 U.S. 906 (1980).


\textsuperscript{226} E.g., Cosby v. Ward, 843 F.2d 967, 982 (7th Cir. 1988) ("[I]t is well-settled that claimants' receipt of unemployment insurance benefits is a property right."); Wilkinson v. Abrams, 627 F.2d 650, 664 (3d Cir. 1980); Ross, 598 F.2d at 1317; Rivera v. Board of Review, 606 A.2d 1087, 1090 (N.J. 1992); Perry v. Department of Employment and Training, 523 A.2d 1242, 1243 (Vt. 1987); AFL-CIO v. California Employment Dev. Dep't, 152 Cal. Rptr. 193, 198 (Cal. Ct. App. 1979); see also Goldberg, 397 U.S. at 261–62 (1970); cf Atkins v. Parker, 472 U.S. 115, 128 (1985) (holding that a statutory entitlement, such as food stamps, is a form of property protected by the due process clause).

\textsuperscript{227} 339 U.S. 306 (1950).
An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.\textsuperscript{228}

In \textit{Mullane}, the Court held that notice given by a trust through publication in a newspaper was invalid when it could provide notice by mail to those persons whose names and addresses were in its files.\textsuperscript{229} The Court stated that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."\textsuperscript{230}

The Supreme Court also has explained that although a particular notice procedure has been acceptable historically, it is not necessarily sufficient for due process purposes. In \textit{Greene v. Lindsey},\textsuperscript{231} for example, the Court struck down a Kentucky statute permitting service of an eviction action by posting on the property,\textsuperscript{232} finding that tenants did not receive actual notice because the posted notice was removed in a "not insubstantial" number of cases.\textsuperscript{233} Even though posted notice might be adequate in "most cases,"\textsuperscript{234} the Court said that it had to "look to the realities of the case" before it in order to reach a decision.\textsuperscript{235} Doing so, the Court found that

\begin{quote}

it is clear that, in the circumstances of this case, merely posting notice . . . does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting . . . results in a failure to provide actual notice to the tenant concerned . . . . Under these conditions, notice by posting . . . cannot be considered a "reliable
\end{quote}

\begin{footnotes}
228. \textit{Id.} at 314 (citations omitted); \textit{see also} Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (reiterating the importance of timely notice).
229. 339 U.S. at 319.
230. \textit{Id.} at 315.
232. \textit{Id.} at 446.
233. \textit{Id.} at 450 n.4 (internal quotation marks omitted).
234. \textit{Id.} at 452.
\end{footnotes}
means of acquainting interested parties of the fact that their rights are before the courts.\textsuperscript{236}

The Court emphasized that due process does not necessarily require personal service but that it might require mailing notice as a supplement to posting.\textsuperscript{237}

Finally, the Court has reiterated that the Constitution also requires that notice inform the recipient about what is going to happen and what he can do about it. \textit{Memphis Light Division v. Craft}\textsuperscript{238} is illustrative. The issue in \textit{Memphis Light} was "whether due process requires that a municipal utility notify the customer of the availability of an avenue of redress . . . should he wish to contest a particular charge."\textsuperscript{239} The Court recognized that due process is a "flexible" concept\textsuperscript{240} but none-the-less held that the "skeletal" notice that Memphis Light sent to delinquent customers was constitutionally defective because it did not tell customers how to protest bills.\textsuperscript{241} The

\textsuperscript{236} \textit{Id.} at 453–54 (citations omitted) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).
\textsuperscript{237} \textit{Id.} at 455–56.
\textsuperscript{238} 436 U.S. 1 (1978).
\textsuperscript{239} \textit{Id.} at 13.
\textsuperscript{240} \textit{Id.} at 16 n.15 (citing Morissey v. Brewer, 408 U.S. 471, 481 (1972) and Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).
\textsuperscript{241} \textit{Id.} at 14 n.15. The lower federal courts also have invalidated governmental notices for failure to explain clearly and adequately how to challenge a government action. \textit{E.g.}, Padilla-Agustín v. INS, 21 F.3d 970, 976 (9th Cir. 1994) (holding the notice used by INS constitutionally inadequate for not clearly advising an alien that the reviewing board could summarily dismiss his appeal for inadequate specification of the reasons for the appeal and referring to the fact that the "alien [was] representing himself and ha[d] language difficulties"); Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990) (invalidating the form notice sent by the Social Security Administration to persons whose applications for disability had been denied where the notice told appellants that they had 60 days to request reconsideration “through any social security office” but did not explain how to do so or that failure to request reconsideration meant that the decision would be final).

Courts have also invalidated on due process grounds unemployment insurance notices challenged as inadequate by English speakers. In Cosby v. Ward, 843 F.2d 967 (7th Cir. 1988), the court found that the procedure used by the state unemployment insurance office to evaluate the adequacy of a claimant’s work search violated due process, because the agency did not advise claimants of the “rule of thumb” used to evaluate the adequacy of the search or advise that they were being summoned to the agency office to respond to doubts about the adequacy of their job searches. \textit{Id.} at 983. In Shaw v. Valdez, 819 F.2d 965 (10th Cir. 1987), the court invalidated a procedure whereby claimants were notified of a hearing to determine their eligibility for benefits but not of the factual or legal questions at issue at the hearing. \textit{Id.} at 968–70. The court referred to the statutory and constitutional rights to a fair hearing as “indistinguishable.” \textit{Id.} at 970 n.7.
Court emphasized the fact that the utility sent the notice to "thousands of customers of various levels of education, experience, and resources," maintaining that "[l]ay consumers . . . should be informed clearly." 242

An application of these standards to the unemployment compensation case of an LEP claimant leads to the conclusion that notice in English is not constitutionally adequate. 243 English-only notice is by no means the form of notice most likely to apprise the claimant of, for example, his appeal rights, as required by Mullane and Green. A person "desirous of actually informing" 244 the claimant would send a notice the claimant could read. Absent a tag line in a language he can understand, such notice does not even make the claimant aware that the document he received must be translated. An English-language notice probably will not provide timely notice to the LEP or NEP claimant given that the claimant does not actually receive the notice until he manages to get it translated. There is evidence that an English language notice "fail[s] to provide actual notice" in "a significant number of instances." 245 In sum, an English-language notice is not adequate for an LEP or NEP claimant.

The inquiry does not end at this point, however. Rather, the question now becomes whether the state's refusal to provide bilingual notices is justified. This inquiry requires examination under the three-part analysis of Mathews v. Eldridge. 246

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242. Memphis Light, 436 U.S. at 14 n.15. The Court also looked at the circumstances of a recipient of notice in Covey v. Town of Somers, 351 U.S. 141, 146–47 (1956), in which service on a person known to be incompetent, without a guardian, and unable to understand the notice was held unconstitutional, and in Robinson v. Hanrahan, 409 U.S. 38, 40 (1972), where the Court found service of an automobile forfeiture notice on the owner at an address where the vehicle was registered was unconstitutional where the state knew that owner was in jail and could not get to his residence.

243. The same constitutional requirements apply to oral notice as to written notice. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (finding that a tenured public employee was entitled to either oral or written notice of the charges against him); Goss v. Lopez, 419 U.S. 565, 581 (1975) (finding that a student was entitled to oral or written notice of the charges against him). This discussion will emphasize written notice, because that seems to be the more common problem.


245. Cf. Greene v. Lindsey, 456 U.S. 444, 453 (finding that posting a notice on an apartment door does not satisfy due process because in a significant number of instances such posting fails to provide actual notice).

246. 424 U.S. 319, 335 (1976).
b. The Mathews Test—Under Mathews, a proper due process analysis must consider

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.247

Applying this test to the situation of the LEP or NEP unemployment insurance claimant leads to the conclusion that, at least in some situations, some form of bilingual notice or assistance may be required by the due process clause. The claimant has a great interest in receiving benefits in a timely fashion, and there is a substantial likelihood that errors will be made if appropriate language services are not provided.

As to the claimant's interest, "the significance of [unemployment compensation] benefits to claimants whose 'source of steady income which supports family, health and home has disappeared ... cannot be overstated.'"248 It is especially important that such benefits be paid in a timely fashion.249 The claimant may risk more than loss of benefits, however. He also may face the possibility that he will have to repay benefits he has already collected (and most likely spent)250 or suffer the penalty for making a fraudulent statement of disqualification from receipt of future benefits.251 Clearly, a claimant must be able to understand communications from, and communicate clearly with, the unemployment office.

The risk of erroneous deprivation is great, as illustrated by the situations of the hapless claimants whose unsuccessful appeals were discussed in Part II. The risk of error would be

247. Id.
249. Cf. California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 130-33 (1971) (discussing the importance of paying unemployment insurance benefits as soon as possible after job loss).
251. See e.g., CAL. UNEMP. INS. CODE § 1260 (West 1986 & Supp. 1996) (providing for penalties of up to 10 weeks of disqualification for claimants who make false statements to obtain benefits).
decreased significantly if certain basic forms and notices were translated into languages spoken by a substantial number of claimants and if bilingual workers were available in locations serving LEP or NEP claimants. And despite protests to the contrary, the burden on the government appears minimal. As described by the Chief Judge of the New Jersey Supreme Court:

The burden on the state to provide foreign language notice of appeal is composed of a number of factors. The state must determine what language the claimant speaks. This may involve training its personnel to elicit this information from applicants for benefits. It must acquire a translation of the salient material—usually very little—into the claimant’s language, and communicate this translated information to the applicant. These requirements amount to dollar expenditures and a degree of continuing vigilance on the part of state personnel to ensure that applicants are properly notified of their right to appeal adverse claims.

This burden is especially insignificant given that many state agencies already translate many forms at least into Spanish, if not other languages. Surely, it would be little trouble to ensure that translated forms included those most important to the unemployment compensation claimant. Indeed, many states already have tag line notices in multiple languages. The LEP claimant is entitled to have important notices conveyed to him in a language that he can understand. The

252. For example, initial applications and instructions, continuing claim forms, notices of determination and of appeal rights, and explanatory booklets explaining program rules and regulations would seem to be the minimum.
254. California has translated unemployment insurance notices into several languages, see supra note 62, and the state welfare department routinely provides Notices of Action in Spanish, Cambodian, Chinese, and Vietnamese. See Letter from Bruce Wagstaff, Deputy Director, Welfare Programs Division, California Department of Social Services, to All County Welfare Directors, Notice No. I-58-95 (Dec. 11, 1985) (on file with the University of Michigan Journal of Law Reform); supra notes 59–68 and accompanying text. The court in Alfonso listed dozens of forms translated into Spanish. 444 A.2d at 1081 n.7; see also Hernandez v. Department of Labor, 416 N.E.2d 263, 267 (Ill. 1981) (noting that in Illinois notices are routinely sent in Spanish).
burden to the state of providing such notices is slight, and translation of notices would go far toward ensuring accurate decisions.

c. Interpreters—Besides notice, the claimant is also constitutionally and statutorily entitled to a fair hearing. Two essential components of a fair hearing, as the term is used in the constitutional sense, are: (1) the right to be present and to present evidence, and (2) the right to confront, or cross-examine, one's opponent. Unfortunately, the LEP or NEP claimant who comes to a hearing without an interpreter, or who has an inadequate interpreter, can exercise neither right effectively, if at all. Without an interpreter to help her communicate, the claimant may as well not be at the hearing. But is such a hearing so unfair as to constitute a denial of due process?

In a criminal case, the answer may often be yes. In United States ex rel. Negron v. New York, the United States Court of Appeals for the Second Circuit held that a non-English-speaking criminal defendant who was not provided with an interpreter during his trial was denied his constitutional right to confrontation and cross-examination as well as his right to consult his lawyer about the conduct of the proceedings. Without an interpreter, the court commented, the proceedings must have seemed to the defendant like "a babble of voices." He was, in effect, not present at the trial, let alone able to assist in his defense. As another court commented, "Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered."

257. Much has been written recently on the function of interpreters and the need for better training. See, e.g., Berk-Seligson, supra note 216, at 47–48; Guadalupe Valdés, When Does a Witness Need an Interpreter? Preliminary Guidelines for Establishing Language Competence and Incompetence, 3 LA RAZA L.J. 1, 27 (1990); Shulman, supra note 40, at 184–87, 191–95; see also Bill Piatt, Attorney as Interpreter: A Return to Babble, 20 N. Mex. L. Rev. 1, 8–16 (1990) (positing that it may be unethical for counsel to play such a dual role).
258. 434 F.2d 386 (2d Cir. 1970).
259. Id. at 389.
260. Id. at 388. Negron was actually better off than many NEP and LEP claimants because he did receive occasional summaries of the witnesses' testimony. Id.
261. United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974). Later cases have indicated, however, that non-native English speakers do not have an automatic right to an interpreter, e.g., Hrubec v. United States, 734 F. Supp. 60, 67 (E.D.N.Y. 1990), and that trial judges are to be given
The Negron court, however, did not base its holding that the indigent defendant was constitutionally entitled to an interpreter solely on the Sixth Amendment. The court also stated that Negron's trial "lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment." In other words, the court recognized that the need for an interpreter may implicate Fourteenth Amendment due process considerations as well.

Although there are few cases outside the criminal context dealing with interpreters, at least three courts have suggested that due process may require the appointment of an interpreter for a party in an administrative proceeding in order to insure a fair trial. In Gonzales v. Zurbrick, for example, the court reviewed a deportation proceeding where the alien claimed that the interpreter at a hearing had been so inadequate that she had not understood the testimony of an important government witness. Because it was a habeas corpus proceeding, the United States Court of Appeals for the Sixth Circuit was limited to considering whether "the alien was accorded a full and fair opportunity to be heard or ... whether there was absent any element deemed essential to due process." The court found that such an element was absent, specifically that the alien had been denied her opportunity to cross-examine the witness whose testimony she could not understand. Failure to provide her with a competent interpreter made the hearing so unfair as to constitute a denial of due process.

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262. See Negron, 434 F.2d at 389.
263. Id. (quoting the opinion of the trial judge).
264. 45 F.2d 934 (6th Cir. 1930).
265. Id. at 935-36.
266. Id. at 936 (citations omitted).
267. Id. at 937.
268. See id.; see also Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984) (finding that procedural rights granted by immigration laws and "very likely" by due process were violated where the translation at the exclusion hearing for an asylum applicant was "nonsensical," accuracy of translation was subject to "grave doubt," and the alien misunderstood the nature and finality of the proceeding). But see El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 752-53 (9th Cir. 1991) (finding facially valid a Board of Immigration Appeals policy giving immigration judges the discretion to determine which portions of deportation/exclusion proceedings need to be translated and remanding the case to determine whether discretion was invalid as applied).
The Wisconsin Supreme Court has also agreed that due process may require appointment of an interpreter in an administrative proceeding, at least under a state law subjecting such proceedings "to the full and fair hearing due process provisions." In *Kropiwka v. Department of Industry*, the court reviewed a state fair employment agency decision on a claim by an employee that "his lack of fluency in the English language prevented him from being afforded a full and fair hearing of his . . . claim against his employer and, therefore he was denied due process of law." The court noted that it was within a trial judge's discretion to rule that an interpreter was necessary in order to satisfy due process requirements, but the court ultimately held that the particular employee had been able to communicate in English, and thus failure to appoint an interpreter for him was not an abuse of discretion.

Finally, the reasoning used by the California Supreme Court in *Jara v. Municipal Court* suggests that an interpreter may be necessary in an administrative proceeding. In *Jara*, the court held that the state had no obligation to pay for an interpreter for an indigent defendant in a municipal court civil case. The court relied, in part, on the fact that the party had an attorney, leaving him "in no worse position than the numerous represented litigants who elect not to be present in court at all." The court in *Jara* did suggest that the result might have been different if the party did not have an attorney. The court distinguished an earlier case, *Gardiana v. Small Claims Court*, which held on statutory grounds that, when one of the parties does not speak English, the small claims court should appoint and, if necessary, compensate an interpreter. In discussing *Gardiana*, the

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270. Id. at 884.
271. Id. Most of the court discussion concerned criminal cases such as United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970) and United States v. Carrion, 488 F.2d 12 (1st Cir. 1973). Id. at 884-86.
272. Id. at 887-88.
274. Id. at 95–96.
275. Id. at 96.
276. Id. at 96–97.
277. Id. at 96 (contrasting *Jara* with cases heard in small claims court, where an NEP party cannot rely on an attorney to interpret and guide the proceedings).
Jara court emphasized the importance of the small claims court setting to its understanding of the Gardiana ruling:

[In small claims court], [t]he parties are usually their own witnesses and frequently the only ones. It is apparent that unless the non-English speaking party has an interpreter he is effectively barred from access to the small claims proceedings. By way of contrast, appellant possesses an attorney capable of fully representing him in the municipal court proceeding . . . .

The unemployment insurance claimant faces a hearing more like that in small claims court than in a trial court. She most likely does not have an attorney, and the hearing is much less formal than the usual court proceeding. She almost certainly is her own witness. Without an interpreter, she cannot really participate in the hearing. As with translation of written materials, provision of an interpreter would significantly reduce the risk of error in the hearing's result. Also, as with translation of written materials, the state's interest in not providing an interpreter is purely monetary.

C. A Statutory Basis for Bilingual Assistance

The Social Security Act requires that states administer their unemployment programs to ensure "full payment of unemployment compensation when due." In a 1971 case, California Department of Human Resources Development v. Java, the United States Supreme Court avoided deciding a constitutional due process claim by ruling that a state procedure, which suspended benefits to claimants when their employer appealed from an initial determination of eligibility, violated the "when due" provisions of the Act. The Court reached this conclusion after reviewing the legislative history of the unemployment compensation laws and found that it

280. Id.
clearly demonstrated a desire to give the unemployed worker a partial wage replacement as soon as possible, both to avoid resort to welfare and to put money into the economy at a time when it is needed to stabilize consumer purchases.\footnote{Id. at 131–34.} Courts also have relied on the “when due” clause to overturn some state program procedures that have resulted in long delays in payment of benefits.\footnote{See Phillips v. Dawson, 393 F. Supp. 360 (W.D. Ky. 1975); Wheeler v. Vermont, 335 F. Supp. 856 (D. Vt. 1971).}

Courts have yet to apply the principle of \textit{Java} in the context of language services and administrative hearings. The court in \textit{Carmona v. Sheffield}\footnote{475 F.2d 738 (9th Cir. 1973).} rejected, albeit summarily, the contention that failure to translate notices for monolingual recipients violated the “when due” provision of the Social Security Act.\footnote{Id. at 739.} Nevertheless, perhaps the state agency’s failure to provide appropriate services to LEP or NEP recipients could result in such systematic and widespread delays in receipt of benefits as to violate the “when due” requirements.\footnote{Cf. Cosby v. Ward, 843 F.2d 967, 982 (7th Cir. 1988) (finding delays in payment of unemployment compensation claims but remanding for determination as to whether they were so systematic and widespread as to violate “when due” requirements).}

### IV. A MODEL PROGRAM

State unemployment compensation offices are not consistently meeting their legal obligation to provide equal services to LEP and NEP claimants. Guidance from the USDOL, in the form of minimum standards to ensure that persons of limited English proficiency receive nondiscriminatory services, is needed.\footnote{The USDOL has authority to issue regulations or guidelines to enforce Title VI and to enforce the fair hearing requirement of the Social Security Act. See 28 C.F.R. § 42.403(a) (1995) (requiring federal agencies to issue regulations implementing Title VI); 42 U.S.C. § 503(a)(1) (1994) (requiring states to adopt “such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due”) (emphasis added). Further, compliance with bilingual service requirements should be a part of the quality control program. See 20 C.F.R. § 602.1–.43 (1995).} These standards should provide unemployment compensation offices that do not serve a substantial number...
of LEP and NEP persons with the flexibility to develop a plan to begin serving them. On the other hand, offices serving a substantial number of LEP and NEP persons should take additional steps to meet the needs of this population. The following sections detail provisions that USDOL standards should include.

A. Definition of Offices Serving a Substantial Number of Limited-English-Proficient Persons

USDOL standards should require state unemployment compensation programs to provide bilingual services, including program informational materials, eligibility forms and notices, and staff, when an unemployment compensation local office service area includes either 100 persons, or five percent or more of the population aged eighteen to sixty-five, who speak a single language other than English. If it has not already done so, each state should define the geographic area served by each local unemployment compensation office to ensure that all parts of the state are covered. The state should be required to prepare all standard forms and program informational materials used in the unemployment compensation program in any non-English language spoken by five percent or more of the LEP or NEP population of the state or five percent or more of the persons served by the state unemployment compensation program, whichever is less.290

290. State agencies that have settled bilingual services lawsuits have agreed to varied approaches in order to trigger the mandate for providing bilingual services. In a New York consent decree, the parties agreed that the percentage of bilingual staff must be equal to or greater than the percentage of LEP claimants filing claims during a one-month period. Consent Judgment and Decree, Barcia v. Sitkin, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), 19 (S.D.N.Y. Mar. 2, 1983). In California, one court adopted the five-percent trigger. Settlement and Stipulation to Dismissal, Asociacion Mixta Progresista v. United States Dep't of Health, Educ., and Welfare, No. C 72-882 SAW, at 4, 8 (N.D. Cal. Jan. 19, 1976). Other settlements simply list the offices that must employ bilingual staff. See, e.g., Consent Decree, Burgos v. Illinois Dep't of Children and Family Servs., No. 75 C 3974, at 8 (N.D. Ill. Jan. 30, 1977) (listing the numbers of bilingual employees to be hired for particular offices); Consent Decree, Perdomo v. Trainor, No. 74 C 2972, at 5 (N.D. Ill. Oct. 17, 1976) (listing the location of "Spanish-ancestry/Spanish-language offices"). In Washington, one court established three language groups with a level of services different for each group. Settlement Agreement, Nava v. Washington Employment Sec. Dep't, No. 93-2-00654-1, at 3 (Super. Ct. Thurston County, Wash. Aug. 4, 1994). The settlement agreement provided that language groupings would be periodically modified. See id. at 10.
The proposed five-percent trigger for bilingual services compliance is the same as that used under the 1975 amendments to the Voting Rights Act, which prohibits states and political subdivisions from providing voting materials only in English. To ensure bilingual services in unemployment offices serving smaller populations, the 100-person trigger is proposed. This trigger is also used in the Food Stamp Program to mandate compliance with the program's bilingual services requirement.

B. Needs Assessment Surveys

Each state unemployment compensation agency should be required to determine the need for bilingual services in each of its office's service areas. This study should include collection of data regarding the LEP and NEP population in the service area. At a minimum, the agency should obtain data from the United States Bureau of the Census, state and local planning agencies, local school districts, community groups and agencies in the private sector serving LEP and NEP persons, and organizations representing such persons. This needs evaluation study should be done soon after the publication of USDOL standards and should be reevaluated periodically.


293. Such needs assessment surveys were described in Settlement Agreement, Nava, No. 93-2-00654-1, at 10, and Consent Decree, Barcia, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899, at 18–20 (RLC).
C. Identification of LEP and NEP Claimants

Unemployment compensation offices should be required to implement a system, consistent with their internal office procedures, that reasonably ensures the proper identification of LEP and NEP claimants as early as possible in the unemployment compensation application process. Once the agency determines that a person needs bilingual services, the agency should provide that person with bilingual services throughout the individual's participation in the unemployment compensation program. Early identification of LEP and NEP claimants will avoid delays in the application process and later in the hearing process.

D. Bilingual Forms and Notices

USDOL standards should require that agencies post signs in the waiting area of each unemployment compensation office informing LEP and NEP claimants that non-English-language services and forms are available and that the denial of unemployment compensation benefits or a delay in receiving benefits because of the person's limited English proficiency is a civil rights violation. Further, the signs should describe procedures for filing a civil rights complaint. The agency should post signs in all languages spoken by a substantial number of LEP and NEP persons in the office's service area.

Unemployment compensation offices should be required to provide all informational materials, forms, and notices in languages spoken by a substantial number of LEP and NEP claimants. Offices not serving a substantial number of LEP

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294. Some settlement agreements explain how LEP applicants and recipients for services are to be identified. See, e.g., Stipulation, Agreement of Settlement and Consent Order, Reyes v. Thompson, No. C91-303, at 5–6 (W.D. Wash. Mar. 12, 1991); Consent Decree, Burgos, No. 75 C 3974, at 20–21.


296. Many settlements have contained similar provisions. See, e.g., Stipulation, Agreement of Settlement and Consent Order, Reyes, No. C91-303, at 6–7 (requiring
and NEP persons should be expected to devise a plan detailing how they will communicate written information to an LEP and NEP person should the need arise. For example, on any notice given to an LEP or NEP claimant, these offices could attach a "tag line" in the claimant's primary language advising the claimant of a telephone number to call for translation of the document. If the communication from the unemployment compensation office is time-sensitive, this fact should be prominently noted in the claimant's primary language on the material that the unemployment compensation office sends.

E. Unemployment Compensation Office Bilingual Staff

USDOL standards should require unemployment compensation offices serving a substantial number of LEP or NEP

that forms requesting information or requiring a response from the client that involve denial, termination, or reduction of benefits, or forms that advise the client of a reduction, denial, or termination of benefits be fully translated; Consent and Judgment Decree, Barcia, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), at 17–18 (calling for the agency to prepare all pre-printed forms and notices in English and Spanish and to translate any handwritten entries into Spanish for Spanish-surnamed clients); Consent Decree, Burgos, No. 75 C 3974, at 13 (requiring the Spanish translation of a number of described informational materials and any written communications with the client); Consent Decree, Perdomo v. Trainor, No. 74 C 2972, at 9–10 (N.D. Ill. Oct. 17, 1976); Settlement and Stipulation to Dismissal, Asociacion Mixta Progresista, No. C 72-882 SAW, at 8 (requiring the translation of all necessary forms and written materials used in communicating with applicants and recipients of county aid and service programs); Settlement Agreement, Nava, No. 93-2-00654-1, at 6–7 (describing the informational material and notices that must be translated into other languages). The settlement in Nava also contained provisions covering the translation of forms used to initiate an appeal or review of adjudicative hearing orders. Settlement Agreement, Nava, No. 93-2-00654-1, at 3–6.

297. In Stipulation, Agreement of Settlement and Consent Order, Reyes, No. C91-303, at 7, the court required defendants to "establish a standardized procedure to provide a translated notice" to persons not speaking one of the six most common languages identified in the settlement.

298. In Settlement Agreement, Nava, No. 93-2-00654-1, at 8, the settlement required that the agency add a tag line to notices to persons not comprehending one of the major languages identified in the complaint. This tag line would instruct the claimant in his language that the enclosed document was important and that, if needed, the agency would provide a free interpreter to translate the document. Id. at 5.

299. For example, the Pennsylvania unemployment compensation referee's office mails a card to persons who have requested a hearing; the card asks whether the person needs an interpreter at the hearing. The interpreter request form is in English. The outside of the card states in Spanish, Vietnamese, Laotian, and Korean that this notice is important, affects the claimant's rights or obligations and should be translated immediately. Request form is on file with the University of Michigan Journal of Law Reform.
persons to employ qualified bilingual staff, in a ratio determined by the number of LEP and NEP claimants served by the local office, in all languages spoken by a substantial number of LEP or NEP claimants. Offices not serving a substantial number of LEP or NEP persons should be required to devise a plan for meeting their language needs. Such a plan could use a centralized interpretation system, perhaps using telephone interpreters.

USDOL standards should specifically prohibit unemployment compensation offices from requiring claimants either to provide their own interpreter or to pay for the services of an interpreter. The state agency also should be discouraged from relying on the services of volunteer interpreters or community agencies. If, however, after being informed that a qualified interpreter is available, a claimant nevertheless specifically requests that a family member or friend serve as an interpreter, such a request should be granted.

In Settlement and Stipulation to Dismissal, Asociacion Mixta Progresista, No. C 72-882 SAW, at 12, the court called for the state to develop language skills criteria in each language that is the primary language of a substantial number of LEPs for use by all county welfare department public contact positions. The settlement also called for cultural awareness training for all county welfare department employees to ensure that LEPs will not be denied equal access to service because of their different cultural background. Id. at 15. In Stipulation, Agreement of Settlement and Consent Order, Reyes, No. C91-303, at 16–18, the court required the development and use of testing procedures to be used to evaluate the language competence of all interpreters and bilingual workers and described areas that must be covered during training sessions.

In Consent Judgment and Decree, Barcia v. Sitkin, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), at 19 (S.D.N.Y. Mar. 2, 1983), the court established a formula to determine whether the number of bilingual staff adequately meets claimants' language needs. Other settlements, such as Consent Decree, Burgos v. Illinois Dep't of Children and Family Servs., No. 75 C 3974, at 8 (N.D. Ill. Jan. 14, 1977), and Consent Decree, Perdomo v. Trainor, No. 74 C 2972, at 7–8 (N.D. Ill. Oct. 17, 1976), listed the offices that must employ bilingual staff and the number of bilingual employees to be hired by those offices. In Settlement and Stipulation to Dismissal, Asociacion Mixta Progresista v. United States Dep't of Health, Educ., and Welfare, No. C 72-882 SAW, at 9–16 (N.D. Cal. Jan. 13, 1976), the court described affirmative efforts that must be made to ensure that county welfare departments employ a sufficient number of bilingual staff in public contact positions.

Several commercial telephone interpretation services are currently available. For example, AT&T offers interpretation services in 140 languages.
F. Administrative Hearing Interpreters and Administrative Hearing Decisions

USDOL standards should mandate that interpreters be provided at all administrative hearings involving an LEP or NEP claimant. These services should be provided either by employing or contracting with competent interpreters. Interpreters should be assigned to hearings where the case has been coded for non-English documents by the local office, where the party has requested an interpreter, or where the hearing officer determines that an interpreter is necessary. Parties should be notified in their primary language of their right to interpretation before a hearing.

The interpreter should be required to provide simultaneous or consecutive translation of the entire hearing and should also be able to translate written materials for the claimant, including documentary evidence and the state office claimant file, if necessary. Hearing officers should be trained to work with interpreters.

At the very least, the agency should provide a cover sheet to the hearing decision in the NEP or LEP person's primary language. This cover sheet should explain that the enclosed

303. At issue in Consent Judgment and Decree, Barcia, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), was Spanish translation assistance at administrative unemployment compensation hearings. The settlement provided that Spanish translators will be provided when requested. If no translator is requested prior to the hearing and it appears that translation assistance is necessary, the settlement further provides that the hearing will be rescheduled until a translator is present. The settlement provided that the entire hearing proceeding must be translated as well as all “relevant parts” of documentary evidence introduced into the record. See id. at 15-16.

304. The use of a cover sheet in the claimant's primary language was adopted in Settlement Agreement, Nava v. Washington Employment Sec. Dep't, No. 93-2-00654-1, at 5 (Super. Ct. Thurston County, Wash. Aug. 4, 1994). According to the settlement, at the hearing, the claimant shall receive the interpreter's telephone number. Id. at 8. The claimant should contact the hearing interpreter for an oral interpretation of the initial order. Id. The settlement further required that the state defendant investigate the cost of providing taped oral translations of hearing decisions, which can be mailed to LEP hearing claimants or played over the telephone. Id. at 8-9. The parties in Nava continue to discuss other methods to ensure that LEP claimants receive adequate translations of their hearing decisions. Interview with Elizabeth Schott, Nava Plaintiffs' Co-counsel, in Washington, D.C. (June 6, 1995). In Consent Judgment and Decree, Barcia, Nos. 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), at 18, the settlement called for local unemployment compensation offices to translate
decision is important and affects the individual’s claim for benefits. It should further explain appeal procedures and provide information for translation assistance.

G. Measures to Remedy Adverse Impacts Resulting from Failure to Provide Bilingual Services

USDOL standards should prohibit states from denying a claimant unemployment compensation benefits or otherwise penalizing a claimant solely because the claimant failed to take action to challenge a denial by timely requesting a hearing or because the claimant failed to fulfill another requirement because of the claimant’s limited English proficiency. Remedial measures that might be taken include tolling time limits until the state provides the claimant with an explanation of the time limit or other requirement in his primary language, or providing for a good cause exception for LEP and NEP claimants who, because of their limited English proficiency, have not complied with filing or other deadlines.

H. Integrating Title VI Requirements and Other USDOL Operations

The USDOL should integrate Title VI language compliance procedures in the unemployment compensation program into its other activities. For example, the USDOL should consider language issues when awarding special grants or approving pilot programs. In particular, the USDOL should ensure that states retain or develop the capacity to generate forms and notices in languages other than English and to identify and track LEP and NEP claimants when states automate claims processing and payment systems.

hearing decisions for Spanish-speaking parties on the day the individual appears at the local office requesting assistance or within a reasonable time thereafter. The settlement further provided that the time for filing any appeal shall be tolled until such translation is provided. Id. at 17–18.

305. In Settlement Agreement, Nava, No. 93-2-00654-1, at 9, the settlement called for the state defendant to promulgate regulations to identify limited English proficiency as a factor in determining the excusability prong of the test for good cause.
CONCLUSION

There are increasing numbers of limited- and non-English-speaking persons in the work force, and such persons function in society despite their linguistic differences, yet when these workers try to access the unemployment compensation system—a system to which they have contributed—they often find themselves faced with an almost exclusively English-speaking world. While some states try to provide LEP and NEP workers equal access to state unemployment compensation programs, others do nothing.

State programs are all bound by Title VI which requires that linguistic minorities be provided equal access to services. The USDOL is required to ensure that state programs comply with Title VI guarantees but, in practice, it exercises little oversight and provides no guidance. Other federal agencies, by contrast, make efforts to ensure that LEP and NEP persons have access to programs they administer.

The USDOL is also required to ensure that states provide a fair hearing to unemployment compensation applicants, and claimants have an independent constitutional right to notice and hearing before the government may deprive them of a benefit such as unemployment compensation. LEP and NEP persons, however, routinely receive notices that they cannot read and attend "hearings" in which they cannot participate in a meaningful way, resulting in deprivations that may reach the level of a constitutional violation.

The situation can and should be remedied. The USDOL and state employment agencies must implement programs to ensure that limited- and non-English-speaking persons receive the unemployment compensation benefits to which they are entitled.