

William & Mary Journal of Race, Gender, and Social Justice

Volume 23 (2016-2017)
Issue 2 *William & Mary Journal of Women and
the Law*

Article 7

January 2017

“Meaningful Access” Demands Meaningful Efforts: The Need for Greater Access to Virginia State Courts for Limited English Proficient Litigants

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Carolyn Harlamert, *“Meaningful Access” Demands Meaningful Efforts: The Need for Greater Access to Virginia State Courts for Limited English Proficient Litigants*, 23 Wm. & Mary J. Women & L. 337 (2017), <https://scholarship.law.wm.edu/wmjowl/vol23/iss2/7>

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“MEANINGFUL ACCESS” DEMANDS MEANINGFUL
EFFORTS: THE NEED FOR GREATER ACCESS TO
VIRGINIA STATE COURTS FOR LIMITED ENGLISH
PROFICIENT LITIGANTS

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INTRODUCTION

“Central to the notion of due process is the idea that court users must be able to participate meaningfully in their own case.”¹ In the United States, over twenty-five million people are considered limited

1. Laura K. Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593, 602 (2013).

English proficient (LEP).² A LEP individual is defined as an individual that speaks a language other than English as his or her primary language and has a limited ability to read, write, speak, or understand English.³ In court, this means that LEP litigants are only able to protect their rights if they have the assistance of an interpreter.⁴ Interpreters fulfill the critical duty of placing LEP litigants on equal footing with English-speaking litigants.⁵ Without an interpreter, these individuals are unable to plead their case to a judge, communicate with court clerks, or even converse with their attorney.⁶

LEP litigants constitute “an essential component of a functional and fair justice system.”⁷ Since 1990, the LEP population has almost doubled in the United States,⁸ leading to more LEP litigants and an increase in language access issues. In particular, state courts throughout the United States often fail to provide certified interpreters and translated documents to LEP litigants in civil suits.⁹ This failure not only denies individuals a fundamental right to access state courts, but also presents dire consequences for LEP litigants.¹⁰ Litigants who are unable to understand court documents and proceedings cannot protect themselves from domestic violence by obtaining a protective order, properly defend themselves in divorce

2. Deena Jang, *Providing Language Access in the Courts: Working Together to Ensure Justice*, U.S. DEP'T OF JUST. (Mar. 11, 2014), <https://www.justice.gov/opa/blog/providing-language-access-courts-working-together-ensure-justice> [<https://perma.cc/79BDKE7M>].

3. *Frequently Asked Questions*, LIMITED ENGLISH PROFICIENCY, http://www.lep.gov/faqs/faqs.html#One_LEP_FAQ [<https://perma.cc/W6VVFVBHQ>]; see also 67 Fed. Reg. 41455-01, 41457 (June 18, 2002) [hereinafter DOJ Policy Guidance].

4. See LAURA ABEL, LANGUAGE ACCESS IN STATE COURTS, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW 13 (July 4, 2009).

5. Chic Dabby & Cannon Han, *Resource Guide for Advocates & Attorneys on Interpretation Services for Domestic Violence Victims* 1, 1 (Aug. 2009), <http://www.api-gbv.org/files/Interpretation.Resource.Guide-APIIDV-7.2010.pdf> [hereinafter Dabby].

6. See ABEL, *supra* note 4, at 3 (finding that “[t]he number of people who spoke a language other than English at home increased by 38% in the 1980’s and by 47% in the 1990’s.”).

7. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A., STANDARDS FOR LANGUAGE ACCESS IN COURTS, 1 (Feb. 2012), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf [hereinafter STANDARDS FOR LANGUAGE ACCESS].

8. Jang, *supra* note 2.

9. Cf. Brenda K. Uekert et al., *Serving Limited English Proficient (LEP) Battered Women: A National Survey of the Courts’ Capacity to Provide Protection Orders* 1, 3 (June 30, 2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/216072.pdf> (discussing a court’s inability to provide interpreters for LEP persons seeking protection orders).

10. Nancy K. Lemons, *Access to Justice: Can Domestic Violence Courts Better Address the Need of Non-English Speaking Victims of Domestic Violence*, 21 BERKELEY J. OF GEN., L. & JUST. 38, 46 (2013) (arguing that failing to provide an interpreter “undermin[es] the overall commitment within the U.S. to mak[e] courts the preferred avenue for dispute resolution, rather than self-help, vendettas, or other non-legal methods.”).

proceedings, or successfully argue to obtain custody of their children.¹¹ By failing to provide free language services to all civil LEP litigants many state courts are violating federal law.¹² Title VI of the Civil Rights Act of 1964 (Title VI), Executive Order 13,166 (Executive Order) and their implementing regulations require recipients of federal financial assistance to ensure “meaningful access” for LEP individuals.¹³ Unfortunately, many state courts throughout the United States still fail to adequately comply with these federal language access regulations, despite significant improvements made by a number of states.¹⁴

In order to guarantee meaningful access for all civil LEP litigants, states and the Department of Justice (DOJ) need to take meaningful steps to ensure compliance with federal language access regulations in state courts. This Note will discuss the problems LEP litigants face in state courts throughout the United States, with a particular focus on the operation of Virginia’s Language Access Plan in the Juvenile and Domestic Relations District Courts (J&DR courts). This Note will propose possible improvements to ensure greater access to Virginia state courts for civil LEP litigants. It will first start by explaining the legal obligations state courts have in ensuring meaningful access to all LEP litigants and how compliance with these regulations is monitored. It will then discuss some of the language access issues faced by civil LEP litigants attempting to access state courts, focusing particularly on LEP domestic violence victims seeking protection orders. It will next describe Virginia’s language access services in the J&DR courts and detail how they still fall considerably short from complying with federal language access regulations, despite recent attempts to improve them. I will then conclude by proposing possible solutions to remedy the shortcomings of Virginia’s language access services.

11. ABEL, *supra* note 4, at 3.

12. *Id.* at 1.

13. See 42 U.S.C.A. § 2000d (West 2006) [hereinafter Title VI]; Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000) [hereinafter Executive Order 13,166]; DOJ Policy Guidance, *supra* note 3; see also MICHAEL L. ALSTON, OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF JUSTICE, COMPLIANCE REVIEW REPORT FOR THE SUPREME COURT OF VIRGINIA AND THE FAIRFAX COUNTY JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT (DOCKET NO. 09-OCR-0191) AND THE FAIRFAX COUNTY COURT SERVICES UNIT (DOCKET NO. 10-OCR-0001) 2 (Sept. 16, 2011) [hereinafter ALSTON].

14. Compare NAT’L LANGUAGE ACCESS ADVOCATES NETWORK, *Language Access Problems Among DOJ’s State Court Grantees* (Feb. 2, 2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/FactSheet.LA-StateCourts.pdf>, with ABEL, *supra* note 4, at 4; Laura K. Abel & Matthew Longobardi, *Improvements in Language Access in the Courts, 2009 to 2012*, 46 CLEARINGHOUSE REV. 334, 335–40 (2012) [hereinafter Longobardi].

I. FEDERAL LANGUAGE ACCESS REGULATIONS AND STATE COURT OBLIGATIONS

A. Overview of Federal Language Access Laws and Regulations

Title VI of the Civil Rights Act of 1964 requires federal funding recipients to ensure that “no person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination” and requires federally funded state courts to provide interpreters in all civil cases.¹⁵

In 2000, President Clinton reiterated the scope of Title VI protection in Executive Order 13,166, which requires programs to provide improved access to “persons who, as a result of national origin, are limited in their English proficiency.”¹⁶ “[Executive Order] 13166 specifically directed federal agencies to publish guidance on how both they and the recipients of their financial assistance can provide ‘meaningful access’ to LEP persons.”¹⁷ Pursuant to Executive Order 13,166 the Department of Justice issued policy guidance (the DOJ guidance) to all agencies receiving federal funding, including state courts.¹⁸ The DOJ guidance noted that the “failure to provide meaningful access to services for LEP applicants may be discrimination on the basis of national origin.”¹⁹ The guidance then outlined a “flexible” four-part balancing test for determining whether federal funding recipients must provide interpreters based on

- (1) [t]he number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people’s lives; and (4) the resources available to the grantee/recipient or agency and costs.²⁰

Title VI also imposed certain “minimal requirements” on state court systems that receive federal funding.²¹ The DOJ interpreted Title

15. Abel, *supra* note 1, at 611 (quoting 42 U.S.C. § 2000d (2006)).

16. Deborah A. Morgan, Comment, *Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women*, 54 AM. U.L. REV. 485, 499 (2004) (quoting Exec. Order No. 13,166, 3 C.F.R. 289 (2000)).

17. STANDARDS FOR LANGUAGE ACCESS, *supra* note 7, at 26.

18. DOJ Policy Guidance, *supra* note 3, at 41455.

19. Morgan, *supra* note 16, at 500.

20. DOJ Policy Guidance, *supra* note 3, at 41459.

21. ABEL, *supra* note 4, at 9–10 (citing Letter from Loretta King, Deputy Assistant Attorney General, to Director of State Court and/or State Court Administrator (Dec. 1, 2003)) (noting that the DOJ’s minimal requirements for language access programs in

VI as requiring state courts to provide interpreters *in all civil matters* and at *no cost* to the litigant.²² The DOJ further issued memoranda requiring all recipients of federal funding to create “language access plans” outlining how they would comply with the guidelines required under Executive Order 13,166 and Title VI.²³

B. State Courts Compliance with Federal Language Access Regulations

Currently, all fifty states have language access plans for their state court systems, indicating that all state courts receive at least some form of federal funding and are thus required to comply with Title VI regulations.²⁴ Unfortunately, the mere creation of a language access plan does not guarantee compliance. As of 2012, only about half of the states were in compliance with the requirement to provide interpreters in all civil cases, and an even smaller number of those states were in compliance with the requirement not to charge litigants for the cost of interpreters.²⁵

state courts that receive federal funding include: (A) interpreters must be provided in criminal and civil matters for “LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present . . .”(B) [l]itigants must not be charged for the services of an interpreter used to interpret courtroom proceedings; (C) [s]tates must ensure that the interpreters they provide are competent; (D) [j]udges and other court personnel who come into contact with LEP litigants or witnesses must know when and how to use interpreters; (E) [. . .] LEP individuals must receive the same treatment as other court participants. Courts have an obligation to avoid undue delays in court proceedings because of the need to procure the services of an interpreter.”).

22. Abel, *supra* note 1, at 611 (citing the DOJ Policy Guidance, *supra* note 3, at 41470–71) (emphasis added); *see also* ABEL, *supra* note 4, at 14.

23. *But see* DOJ Policy Guidance, *supra* note 3, at 41455–41456.

24. *Language Access Programs by State*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Language-access/Resources-for-Program-Managers/LAP-Map/Map.aspx> [<https://perma.cc/CU9P3N6A>].

25. Abel, *supra* note 1, at 612; ABEL, *supra* note 4, at 11 (finding that “at least 17 states either lack a statewide mandate or require the provision of interpreters in only some types of civil proceedings. In states without a statewide mandate, the decision whether to provide interpreters usually is left up to individual courts, some of which do provide interpreters in some proceedings and some of which do not provide interpreters at all.”); *see also* Commission on Domestic Violence, *State Statutes Requiring the Provision of Foreign Language Interpreters to Parties in Civil Proceedings*, A.B.A. (June 2007), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/ForeignLanguageInterpretersChartJune07.authcheckdam.pdf> [hereinafter *State Statutes*] (identifying which states provide interpreters in civil matters and how payment is allocated); NAT’L LANGUAGE ACCESS ADVOCATE NETWORK, *Language Access Problems Among DOJ’s State Court Grantees* (Feb. 2, 2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/FactSheet.LA-StateCourts.pdf> [hereinafter LANGUAGE ACCESS ADVOCATE NETWORK] (stating that 46% of the 35 states surveyed in The Brennan Center’s study allow courts to deny interpreters in some or all civil cases).

However, a majority of states, including Virginia, do have state statutes that provide foreign language interpreters to parties in civil proceedings.²⁶ By passing these statutes, “states have reaffirmed the important rights at stake in civil proceedings which adjudicate critical legal matters such as protection from abuse; child custody and support; dependency; termination of parental rights; eviction; and eligibility for unemployment compensation, worker’s compensation, and public benefits.”²⁷ Notwithstanding these interpreter statutes, only twenty-one states make interpreter appointment *mandatory* in *all* civil proceedings.²⁸ The majority of remaining states, including Virginia,²⁹ make the appointment of an interpreter discretionary.³⁰ This type of discretionary appointment can be highly problematic.³¹ Judges are not qualified to determine an individual’s language proficiency and should not be required to do so without proper training.³² Discretionary interpreter appointment not only tasks the judge with the responsibility of determining whether an individual is LEP and requires an interpreter, but also provides no guarantee that the judge is informed about or willing to comply with Title VI regulations.³³

Despite the fact that many states fail to comply with the minimal requirement from the DOJ guidance to provide an interpreter in all civil matters, an even greater problem is the alarming number of states that impose the cost of an interpreter on LEP litigants.³⁴ This includes a vast number of those states that actually do mandate interpreters in all civil proceedings.³⁵ The American Bar

26. *See State Statutes, supra* note 25; *see also, e.g.*, VA. CODE ANN. § 8.01-384.1:1(A) (West 2011) (stating “[i]n any trial, hearing or other proceeding before a judge in a civil case in which a non-English-speaking person is a party or witness, an interpreter for the non-English-speaking person *may* be appointed by the court.”) (emphasis added).

27. STANDARDS FOR LANGUAGE ACCESS, *supra* note 7, at 24.

28. *State Statutes, supra* note 25 (emphasis added).

29. VA. CODE ANN. § 8.01-384.1:1(A) (West 2011) (“an interpreter for the non-English-speaking person *may* be appointed by the court.”) (emphasis added).

30. *State Statutes, supra* note 25.

31. *See* Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 609–10 (1999).

32. *Id.* at 610 (arguing that “[t]he fact that judges, rather than expert linguists, are required to make such determinations, shows that the Wisconsin legislature does not understand the constitutional implications of the appointment of an interpreter for a defendant, nor the linguistic issues involved in deciding whether to appoint an interpreter.”).

33. *See id.*

34. *See State Statutes, supra* note 25.

35. *Id.* (highlighting the states that mandate interpreters in all civil matters, but still impose costs on litigants, including Arkansas, California, Georgia, Maine, Maryland, Missouri, Utah, and Washington); *see also* VA. CODE ANN. § 8.01-384.1:1(B) (West 2011) (“The amount allowed by the court to the interpreter *may, in the discretion of the court*, be assessed against either party as a part of the cost of the case and, if collected, the same shall be paid to the Commonwealth.”) (emphasis added).

Association appropriately notes in its Language Access Standards that “fees imposed upon LEP persons have the strong potential to chill recourse to the courts and inhibit the use of language access services that are necessary or beneficial to the fair administration of justice.”³⁶

C. Enforcement of Federal Language Access Regulations

There are clearly significant issues that LEP litigants face when trying to access state courts. However, the DOJ does attempt to monitor state courts’ compliance with language access regulations.³⁷ Of those states that fail to comply with language access regulations by failing to provide interpreters in all civil proceedings, as of 2012 a number of them were either “under investigation by the DOJ for Title VI violations or had agreed to extend interpreting services to civil cases as the result of a DOJ investigation.”³⁸

If a recipient of federal funding fails to comply with the Title VI obligations, the DOJ has the power to terminate the recipient’s funding.³⁹ However, this extreme course of action is a last resort for the federal government.⁴⁰ Before terminating the recipient’s funding, the DOJ is first required to advise the recipient of its failure to comply and attempt to negotiate a voluntary agreement to remedy the failed compliance.⁴¹ However, before any of these potential consequences arise, an individual or organization must first file a complaint with the DOJ Office for Civil Rights (OCR) to alert them of a recipient’s failure to provide adequate language access.⁴² After a complaint is filed, OCR is then required to investigate the complaint.⁴³

36. STANDARDS FOR LANGUAGE ACCESS, *supra* note 7, at 34.

37. Longobardi, *supra* note 14, at 335–36.

38. Abel, *supra* note 1, at 612; *see also* Longobardi, *supra* note 14, at 335 (stating that “[a]s of December 2011, the Justice Department was investigating or monitoring language access in seven state court systems,” including Alabama, Colorado, North Carolina, Rhode Island, and California).

39. 42 U.S.C.A. § 2000d-1 (West 2006); 28 C.F.R. § 42.108(b) (2011). Section 602 of Title VI requires a hearing on the record before funding can be terminated. 42 U.S.C.A. § 2000d-2 (West 2006).

40. 42 U.S.C.A. § 2000d-1 (West 2006).

41. *Id.* (stating that “no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”).

42. Jessica Rubin-Wills, *Language Access Advocacy After Sandoval—A Case Study of Administrative Enforcement Outside the Shadow of Judicial Review*, 36 N.Y.U. REV. L. & SOC. CHANGE 465, 489 n.129 (2012) (citing 28 C.F.R. § 42.107(b) (2011) stating that “[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this subpart may by himself or by a representative file with the responsible Department official or his designee a written complaint.”).

43. *Id.* at n.130 (citing 28 C.F.R. § 42.107(c) (2011) “[t]he responsible Department official . . . will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply.”) (ellipsis in original).

“If the recipient is found to be out of compliance with the language access regulations, the agency will inform the recipient in writing of the steps that must be taken.”⁴⁴ Unfortunately, these investigations take years to conduct due to limited resources,⁴⁵ which poses a serious enforcement problem, as they are the only way to administratively address the denial of language access rights under Title VI.⁴⁶

Recently, the Obama Administration “heightened [its] commitment to language access enforcement.”⁴⁷ In 2011, then-Attorney General Eric Holder “reaffirmed the federal government’s commitment to language access” and “directed agencies to establish working groups, update their language access plans, and prepare guidance for funding recipients.”⁴⁸ Currently, the DOJ’s Civil Rights Division’s Federal Coordination and Compliance Section coordinates language access compliance, reviewing agencies’ plans and maintaining a centralized website with language access resources.⁴⁹

Although administrative enforcement is the only realistic process available to enforce Title VI regulations, LEP advocates have found this process to be both beneficial and unfortunately flawed.⁵⁰ One benefit to this type of administrative enforcement is that once a language access complaint is filed, the idea of a possible DOJ investigation can incentivize a federal funding recipient to voluntarily change its practices or negotiate changes with the DOJ and LEP advocates.⁵¹ However, a fundamental shortcoming of this type

44. *Id.*

45. See Longobardi, *supra* note 14, at 342 (providing examples of multiple language access complaints filed with the DOJ in California, North Carolina, and Alabama that were still awaiting investigations).

46. Rubin-Wills, *supra* note 42, at 478–82 (noting that in *Alexander v. Sandoval* the Supreme Court held that Title VI does not give individuals a private right of action to enforce language access protections, and that apart from filing an administrative complaint, the only form of judicial review for a private right of action under Title VI is by proving intentional discrimination against an LEP individual, which is an extremely high bar to meet since “[l]anguage access claims typically focus on a funding recipient’s failure to provide certain services, and it can be especially hard to show a discriminatory motive when the plaintiff is challenging inaction rather than action.”); see also *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). But see *Almendaes v. Palmer*, 284 F. Supp. 2d 799, 807–08 (N.D. Ohio 2003) (finding that the high bar of proving “discriminatory intent” is not impossible to overcome, holding that a group of Spanish speakers who claimed that Ohio’s food stamp program violated Title VI successfully established discriminatory intent after arguing that the defendants knew they were required to provide Spanish translations, failed to do so, and knew the plaintiffs would be harmed by their failure).

47. Rubin-Wills, *supra* note 42, at 487.

48. *Id.*; see also Memorandum from Eric Holder, Attorney Gen., to Heads of Fed. Agencies, General Counsels, and Civil Rights Heads (Feb. 17, 2011).

49. Rubin-Wills, *supra* note 42, at 487–88.

50. *Id.*

51. *Id.* at 488–89 (noting that the administrative enforcement process places an emphasis on collaboration, which is beneficial to attorneys filing administrative complaints because all parties involved have incentives to reach negotiated settlements that have

of administrative remedy is that “the threat to terminate federal funding is rarely exercised,”⁵² and “the longer agencies go without exercising this power, the more recipients will view it as an empty threat and the less leverage the federal government will have over funding recipients.”⁵³ Still, the strong incentives the federal government has to keep these federally funded programs functioning as well as the recipients’ incentives to comply with Title VI or risk losing necessary funding, encourage both parties to create “voluntary compliance plans” to ensure necessary reforms for LEP communities.⁵⁴

In addition to the DOJ’s initiatives to crack down on state court language access compliance, the DOJ along with the American Bar Association and the National Center for State Courts (NCSC) have also provided valuable guidance and resources to states courts to facilitate the implementation of effective language access plans.⁵⁵ In 2014, the DOJ published *The Language Access Planning and Technical Assistance Tool for Courts*.⁵⁶ The DOJ developed this most recent tool “in response to requests for technical assistance from courts and others involved in planning and implementing measures to improve [LEP] language assistance services in courts”⁵⁷ By creating this tool, the DOJ “intended to facilitate planning to supplement and support the growing body of technical assistance and other resources developed by the American Bar Association, the National Center for State Courts, and other national, state, and local entities.”⁵⁸ The positive involvement of these organizations, along

the ability to result in “comprehensive plans that increase access for large numbers of LEP individuals” and because it enables lawyers to make changes “without filing complaints, by going directly to funding recipients and using the federal government’s written guidance to educate [them] . . . about the steps they should be taking to ensure language access.”).

52. *Id.* at 489.

53. *Id.* at 490.

54. Rubin-Wills, *supra* note 42, at 491.

55. See Federal Coordination and Compliance, Civil Rights Division, *Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs*, U.S. DEP’T OF JUST. (May 2011), http://www.lep.gov/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf; STANDARDS FOR LANGUAGE ACCESS, *supra* note 7, at 2; Access to Justice, *About Us*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Language-access/About-us.aspx> [<https://perma.cc/C7D8U8MR>] (noting that the Council of Language Access Coordinators (CLAC) “is a partnership of member states [including Virginia] that has pooled financial and other resources to develop, maintain and administer court interpreting exams to support states’ court interpreter certification programs and other language-access services.”).

56. Fed. Coordination & Compliance, Civil Rights Div., *Language Access Planning & Technical Assistance Tool for Courts*, U.S. DEP’T OF JUST. 1 (Feb. 2014), http://www.lep.gov/resources/courts/022814_Planning_Tool/February_2014_Language_Access_Planning_and_Technical_Assistance_Tool_for_Courts_508_Version.pdf.

57. *Id.* at 1.

58. *Id.*

with the DOJ Guidance, highlights a nationwide awareness of LEP language barriers in state courts and a willingness at both the state and federal level to remedy these problems.

II. STRUGGLES FACED BY LEP LITIGANTS IN STATE COURTS

The ability to understand court proceedings and communicate with a judge and counsel are essential to meaningful participation.⁵⁹ State courts' limited awareness of language access services, as well as state courts' failure to provide these services at no cost to LEP litigants illustrate two of the most significant barriers faced by LEPs trying to access state courts.⁶⁰

A. Lack of State Court Awareness Regarding Language Access Services

LEPs cannot meaningfully access state courts if judges and court personnel fail to appoint professional interpreters to all LEP litigants.⁶¹ The fate of LEP litigants "is often left to the vagaries of each state's domestic judicial understanding of the need for interpreters, the role of interpreters, and the subtleties of language interpretation."⁶² Judges and other court personnel "must know how to determine whether a party or witness needs the assistance of an interpreter, whether a particular interpreter is competent, and how to use interpreters effectively."⁶³

A national survey conducted by the National Center for State Courts in 2006 found that "[a]cross the board, courts did not have the capacity to provide interpreters for LEP persons seeking assistance with issues related to protection orders."⁶⁴ After asking courts and community-based organizations "to assess how well the court addressed the language assistance needs of protection order petitions,"⁶⁵ the study found that respondents ranked interpreter

59. Abel, *supra* note 1, at 602.

60. *See id.*; Lemons, *supra* note 10, at 41 (discussing the costs of professional interpreters).

61. Uekert et al., *supra* note 9, at 8.

62. Brian A. Shue, *Rights to Language Assistance in Florida: An Argument to Remedy the Inconsistent Provisions of Court Interpreters in State and Federal Courts*, 6 FIU L. REV. 387, 398 (2011) (quoting Luz M. Molina, *Language Access to Louisiana Courts: A Failure to Provide Fundamental Access to Justice*, 10 LOY. J. PUB. INT. L. 1, 2 (2008)).

63. ABEL, *supra* note 4, at 31.

64. Uekert et al., *supra* note 9, at 3.

65. *Id.* at 7.

services as the most significant factor affecting language assistance.⁶⁶ The study identified three specific gaps in interpreter services: (1) failure to provide interpreters during the filing stage of protection orders; (2) quality and timeliness of interpretation services is dependent on the LEP’s native language, and (3) “courts vary *considerably* in their use of qualified interpreters.”⁶⁷ The study noted that most courts try to secure a certified interpreter for court hearings, but that when it comes to completing a protection order application, LEP petitioners typically have to secure their own language assistance.⁶⁸

In 2013, the Center for Court Innovation and the National Center for State Courts conducted a needs assessment of courts, government agencies, and community-based organizations to “gauge the status of language access services for litigants in domestic violence, sexual assault, dating violence, and stalking cases.”⁶⁹ Despite the nearly seven-year gap since the 2006 study, the 2013 needs assessment again identified a significant concern in “the low level of knowledge among practitioners both inside and outside the courts about language access plans and procedures for reporting deficiencies in interpreter or translation services.”⁷⁰

These studies illustrate how state courts continue to suffer from a lack of awareness on language access services as well as a failure to understand the individual, situational, and structural impediments experienced by LEP protection order petitioners.⁷¹ The fact that courts continue to lack sufficient knowledge not only on how to report deficiencies in language services, but also on how and when to provide the services generally indicates states’ failure to properly train and monitor courts on language access policies and obligations. As the National Center for State Courts suggest, “[t]his lack of awareness suggests that courts should engage in greater outreach in developing and publicizing language access plans and protocols for monitoring the quality of language access services.”⁷²

66. *Id.* at 8.

67. *Id.* (emphasis added).

68. *Id.* at 74.

69. NAT’L CTR. FOR STATE COURTS, *Effective Court Communication: Assessing the Need for Language Access Services for Limited English Proficient Litigants in Domestic Violence, Sexual Assault, Dating Violence, and Stalking Cases 2* (2015), <http://ncsc.contentdm.oclc.org/cdm/ref/collection/accessfair/id/373> [<http://perma.cc/SZN58YSR>] [hereinafter *Effective Court Communication*].

70. *Id.*

71. Morgan, *supra* note 16, at 499.

72. *Effective Court Communication*, *supra* note 69, at 2.

B. Failure to Provide Free Interpreter Services

Even if a court successfully provides a LEP litigant with a professional interpreter, the question of who pays for the service remains problematic. The DOJ has emphasized that, “[c]ourt systems that charge interpreter costs to LEP persons impose an impermissible surcharge on litigants based on their English language proficiency.”⁷³ Currently, nationwide uniformity in payment policies fails to exist among state courts,⁷⁴ despite the Title VI requirement for state courts receiving federal funding to provide *free* interpreters in all civil proceedings.⁷⁵

For LEP protective order petitioners, the cost of hiring a certified interpreter can be particularly burdensome. In the United States, at least one in three women and one in four men have suffered some form of domestic violence.⁷⁶ Although domestic violence is blind to socioeconomic class, it is most prevalent among low-income populations.⁷⁷ Immigrant communities, from which most LEP litigants come, are statistically more impoverished than non-immigrant communities.⁷⁸ For over a decade the number of LEP battered women has increased, as immigration from non-English-speaking countries to the United States has continued to rise.⁷⁹ LEP battered women face unique challenges due to language, cultural, and social barriers.⁸⁰ Because of these challenges, LEP battered women struggle to become financially independent from their abusers.⁸¹ Thus, LEP battered women seeking protective

73. Letter from Merrily A. Friedlander, Chief, Dep’t of Justice Civil Rights Div’n Coordination & Review Section, to Lilia G. Judson, Executive Director, Ind. Sup. Ct. Div’n of State Ct. Admin. 2 (Feb. 4, 2009) (on file with author).

74. Shue, *supra* note 62, at 415. *See generally State Statutes*, *supra* note 25 (discussing interpreter payment laws in state courts).

75. Abel, *supra* note 1, at 611 (emphasis added).

76. Michele C. Black, et al., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION 2 (2011).

77. Lemons, *supra* note 10, at 42 (noting that “many recipients of welfare are presently or formerly victims of domestic violence.”).

78. *Id.*

79. *Id.* at 40 (finding that “[t]he Census . . . predicts that by 2020, [Hispanics] will comprise 17.8% of the population, and by 2050, will make up almost one quarter of the total U.S. population.”).

80. Katerina Shaw, *Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 CARDOZO J.L. & GENDER 663, 685–87 (2009).

81. *Id.* at 687.

orders are likely unable to afford the cost of interpretation services.⁸²

As discussed earlier in this Note, many states statutorily mandate free interpreter appointment in civil matters.⁸³ However, in many states, including Virginia, these statutory requirements are often not implemented due to insufficient resources.⁸⁴ States are then confronted with the problem of where to draw the line for providing interpreter waivers to LEP litigants.⁸⁵ In most states, indigent LEPs, those living below the federal poverty level, usually form the baseline for who receives a free interpreter waiver.⁸⁶ However, providing free interpreters only to indigent litigants is not a sufficient benchmark for providing meaningful access. Income guidelines are set for the *extremely* poor and “many victims of domestic violence do not qualify for a free interpreter, especially if they have any type of employment.”⁸⁷

Moreover, LEP litigants must first be aware of their ability to receive free interpreter services.⁸⁸ In many domestic violence cases, “no one informs the victim . . . that she might qualify for a free interpreter,” so the victim usually fails to request one.⁸⁹ Sadly, “[t]he concern [in charging LEP litigants with interpretation costs] extends beyond the burden of having to shoulder a payment that other litigants need not shoulder”⁹⁰ There is a real concern that by imposing interpretation costs on LEP litigants they will “abstain from requesting interpreters, and judges [will] abstain from appointing them.”⁹¹ Thus, similar to the outreach mentioned to improve courts’ awareness of language access services, courts and LEP advocates must engage in outreach efforts to LEP communities to inform LEPs of their language access rights.⁹²

82. Lemons, *supra* note 10, at 42.

83. *See State Statutes*, *supra* note 25 (describing states with interpreter payment laws).

84. Lemons, *supra* note 10, at 47, 47 n.67 (citing Arkansas, California, Indiana, Iowa, Kansas, Kentucky, Nebraska, Oregon, Texas, and Virginia as states with statutes that require free professional interpreters, but fail to enforce their statute).

85. *Id.* at 47–48.

86. *Id.* at 48 (finding that in some states “the state periodically adjusts its income guidelines for fee waivers and may set the bar significantly below the federal poverty level.”).

87. *Id.*

88. *Id.*

89. *Id.*

90. ABEL, *supra* note 4, at 16.

91. *Id.* at 17.

92. *See Effective Court Communication*, *supra* note 69, at 2 (explaining that “[o]utreach should extend to service providers and other agencies to assist in publicizing the availability of court language access services.”).

III. LANGUAGE ACCESS ISSUES IN VIRGINIA'S JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS

In Virginia, the Juvenile and Domestic Relations District Courts (J&DR) are responsible for issuing family abuse protective orders,⁹³ and thus are particularly vulnerable to language access issues.⁹⁴ In 2013, “51,019 emergency protective orders were issued by magistrates and judges across the Commonwealth to protect the immediate health and safety of victims and their family members.”⁹⁵ In Virginia, nearly fifteen percent of the population speaks a language other than English at home.⁹⁶ Among those individuals, over thirty percent are considered LEP, meaning they report an ability to speak English less than “very well.”⁹⁷ Thus, without language assistance, these individuals are effectively precluded from meaningful participation in a judicial proceeding in Virginia courts.⁹⁸ Over the years, Virginia has made considerable efforts to comply with Title VI and

93. VA. DEPT. OF CRIM. JUST. SERVS., *Protective Orders in Virginia A Guide for Victims* 1–2 (June 2012), <https://www.dcs.virginia.gov/victims/documents/protectiveordersguide.pdf> (clarifying that “family abuse protective orders” can be requested through the intake office for the Juvenile and Domestic Relations District Court, but that “[a]ll other requests for protective orders that do not meet the definition of family or household member (including but not limited to dating or same-sex partners who do not live together) are made through the General District Court.”). This Note focuses on protective orders in Virginia J&DR courts, although there does not appear to be any significant distinction between the treatment of “family abuse” LEP protective order petitioners in J&DR courts and “all other” LEP protective order petitions in Virginia General District Courts. *Id.* at 2–4 (discussing the three types of protective orders available in both court divisions).

94. See ALSTON, *supra* note 13, at 3.

95. Kenneth T. Cuccinelli, Att’y Gen. of Va., 2013 ANNUAL REPORT, DOMESTIC AND SEXUAL VIOLENCE IN VIRGINIA ii (2014).

96. Camille Ryan, *Language Use in the United States: 2011*, AMERICAN COMMUNITY SURVEY REPORTS 11 (Aug. 2013), <https://www.census.gov/prod/2013pubs/acs-22.pdf>; see also *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Virginia: 2009–2013*, AMERICAN CMTY. SURVEY, <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html> [<https://perma.cc/8T4HUKQQ>] (finding that other than English, Spanish is the most commonly spoken language in Virginia, with 218,073 out of 506,650 Spanish speakers identifying as LEP (speak English less than “Very Well”); followed by Korean with 29,903 LEPs, Vietnamese with 26,071, Chinese with 22,901, Arabic with 12,198, Tagalog with 12,031, Persian with 8,174, and Urdu with 7,223.).

97. Ryan, *supra* note 96, at 11 (finding that of the 7,588,188 individuals age 5 and over in Virginia, 1,132,310 spoke a language other than English at home and that among those individuals, 62.8% spoke English “very well,” 20.1% spoke English “well,” 13.4% spoke English “not well,” and 3.7% spoke no English at all).

98. Cf. CAL. COMM’N ON ACCESS TO JUSTICE, *Language Barriers to Justice in California* 1 (Sept. 2005), <http://www.svcls.org/media/1880/language%20barriers%20to%20justice%20in%20california.pdf>.

its implementing regulations.⁹⁹ However, Virginia still has work to do before full compliance is realized.¹⁰⁰

A. Virginia’s Language Access Plan and Title VI Compliance

In 2003, pursuant to Executive Order 13,166 and Title IV, the Virginia legislature approved Virginia’s Language Access Plan.¹⁰¹ The Plan applies to all Virginia state courts, including J&DR courts, and is meant to serve “as a resource for judges, clerks, court administrators, magistrates, attorneys, interpreters, and others” on how to deal with various issues that arise when using interpreters in court proceedings.¹⁰² In 2008, Virginia’s Office of the Executive Secretary (OES) of the Supreme Court of Virginia, which provides administrative support for all of the courts in the Commonwealth of Virginia,¹⁰³ initiated a staff interpreter program, providing language interpreting services to Virginia’s highest volume courts.¹⁰⁴ In 2009, the OES collaborated with the DOJ to revise its language access plan to improve language access to Virginia courts.¹⁰⁵ In revising its language access plan, OES looked to the guidelines and best practices standards and manuals from a number of other states.¹⁰⁶ More recently, in September 2013, the Supreme Court of Virginia established the Virginia Access to Justice Commission.¹⁰⁷ The Commission’s mission “is to promote equal access to justice in Virginia, with particular emphasis on the civil legal needs of Virginia residents.”¹⁰⁸ In the 2013 State of the Judiciary Message, the Honorable Cynthia D. Kinser explained, “[i]n simple terms, access

99. See Dep’t of Judicial Servs., Office of the Executive Secretary, *SERVING NON-ENGLISH SPEAKERS IN THE VIRGINIA COURT SYSTEM: GUIDELINES FOR POLICY AND BEST PRACTICE 1-1 to -3* (Rev. Mar. 2015) (outlining Virginia’s Language Access Plan as required by the DOJ under Title VI) [hereinafter *VIRGINIA LANGUAGE ACCESS PLAN*].

100. See ALSTON, *supra* note 13, at 34–38 (detailing the DOJ’s recommendations to the Office of the Executive Secretary after completing an investigation which found that Fairfax County’s J&DR courts were not in compliance with Title VI).

101. *VIRGINIA LANGUAGE ACCESS PLAN*, *supra* note 99, at 1-1.

102. *Id.*

103. See ALSTON, *supra* note 13, at 3 (describing the OES as “a component of the Supreme Court of Virginia, [which] provides administrative support for all of the courts and magistrate offices within the Commonwealth of Virginia. This administrative support includes training and education of all judicial employees, budget and payroll services, human resources, planning, and information technology.”).

104. *VIRGINIA LANGUAGE ACCESS PLAN*, *supra* note 99, at 1-1.

105. *Id.* at 1–2.

106. *Id.* at 5-3 (citing court interpretation resources created by the judiciaries of Minnesota, Oregon, New Jersey, and Washington).

107. Press Release, Supreme Court of Virginia, Supreme Court of Virginia Establishes Access to Justice Commission (Sept. 13, 2013) (on file with author).

108. *Id.*

to justice means that courts must be accessible to every person who desires or is required to use them.”¹⁰⁹ The Commission meets quarterly, and is currently in the process of studying other court websites that use technology to promote access to justice for self-represented litigants by providing “online availability of court forms and instructions, including forms translated into plain English (sixth grade level) and other languages.”¹¹⁰ A number of states have created Access to Justice Commissions aimed at addressing a “state’s often-fragmented system for providing access to civil justice as a whole.”¹¹¹ Thus, on a policy level, Virginia has demonstrated a strong commitment to language access reform.

B. Language Access Concerns in Virginia Courts

However, despite Virginia’s attempts to improve the state courts’ language access policies, there are still language access concerns within many Virginia courts, including those areas that serve some of the highest volume of LEP litigants in the state.¹¹² For example, in Fairfax County, where a substantial percentage of protective order petitioners are LEP individuals, a Family Law attorney from Northern Virginia shared a vivid example where the Petitioner wrote her affidavit so poorly in her native language that the translation of the document, and therefore the granting of her protective order, was delayed.¹¹³ In the meantime, her abuser attacked her again.¹¹⁴ Sadly, this scenario is easily preventable, and Fairfax County has

109. OFFICE OF THE EXECUTIVE SECRETARY, SUPREME COURT OF VIRGINIA, VIRGINIA 2013 STATE OF THE JUDICIARY REPORT 9 (Chris Wade et. al. eds., 2013). “Access to justice is realized through such things as pro bono legal services, *foreign language interpreters*, appropriate accommodations for anyone with a disability, and rules and procedures, including forms that make navigating the judicial system easier for pro se litigants.” *Id.* (emphasis added).

110. Donald W. Lemons, Chief Justice of Va. Sup. Ct., State of the Judiciary Address 14–15 (May 12, 2015) (transcript available at http://www.courts.state.va.us/courts/scv/state_of_the_judiciary_address.pdf) [hereinafter Judiciary Address].

111. *Access to Justice Commissions*, A.B.A., http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html [<https://perma.cc/78JZB2P2>].

112. Marisol Bello & Paul Overberg, *Growing Pains: Multicultural explosion rattles residents*, USA TODAY (Nov. 10, 2014), <http://www.usatoday.com/story/news/nation/2014/11/10/northern-virginia-diversity-race/18079525> [<https://perma.cc/MF6E8HSV>] (stating that the Hispanic and Asian populations in the Northern Virginia counties of Fairfax, Arlington, and Prince William “account for 32% of the 1.8 million people in the three counties”).

113. Email from Family Law Attorney in Northern Virginia (Oct. 15, 2015, 05:46 EST) (on file with author); see also *Demographics*, FAIRFAX CTY. ECON. DEV. AUTHORITY, <http://www.fairfaxcountyeda.org/facts-and-figures/demographics> [<https://perma.cc/PSE8JV3M>] (finding that 37.8% of the Fairfax County population age five or older spoke a language other than English at home).

114. Email from Family Law Attorney in Northern Virginia, *supra* note 113.

begun to take steps to ensure that this situation is unlikely to happen again.

Fortunately, some of these language access issues have not gone unnoticed by the DOJ. In 2011, the DOJ Office of Civil Rights (OCR) announced that Virginia courts, particularly the language services within the juvenile justice system of Fairfax County, were not fully in compliance with Title VI.¹¹⁵ After a thorough investigation, the OCR published the results of its investigation in a compliance report (Fairfax Compliance Report).¹¹⁶ The Fairfax Compliance Report pointed out a number of areas within Fairfax County’s Juvenile Justice Services that were not in compliance with Title VI.¹¹⁷ During the course of the OCR’s investigation, several additional LEP individuals notified the OCR, expressing concerns regarding inadequate language assistance services in other Virginia courts:

One Spanish-speaking LEP individual told the DOJ that when the individual appeared at the Hanover General District Court in February 2010 for a hearing, the court told the individual that an interpreter was not available and that the individual would have to return in a few months when an interpreter would be present. The individual also alleged that the court provided the individual with an information sheet that was in English and did not provide any translation or interpretation of this document. The DOJ also learned of another . . . instance where the clerk’s office of the Alexandria Circuit Court allegedly told an LEP individual’s attorney that the court only provides interpreters during criminal proceedings and does *not* provide interpreters during civil proceedings.¹¹⁸

These examples described in the Fairfax Compliance Report illustrate that Virginia, like other state courts across the country, face serious Title VI compliance issues by failing to provide interpreters in all civil matters, failing to avoid undue delays caused by language services, and failing to provide translations of vital court documents.¹¹⁹

115. ALSTON, *supra* note 13, at 3 (“In regard to the limited scope of our review, we conclude that the OES, the JDRDC, and the CSU are not fully in compliance with the requirements of Title VI and the Safe Streets Act, although each agency is taking steps to provide LEP persons with meaningful access to its juvenile justice services.”).

116. *Id.* at 1 (emphasizing the extremely limited scope of the investigation, which covered only the provision of juvenile justice services, for LEP juveniles and families focusing on the agencies’ operations, programs, activities, and services that relate to the juvenile justice system up to, but not including, the adjudication stage).

117. *Id.* at 34–39 (providing various recommendations to remedy compliance issues).

118. *Id.* at 34 (emphasis in original).

119. *See* ABEL, *supra* note 4, at 9–10, 39 n.25 (noting that the DOJ’s requirements for Title VI federal funding recipients include providing interpreters in all civil matters, avoiding undue delays, and providing translations of vital court documents).

In the Fairfax Compliance Report, the OCR recommended that the OES “undertake a review of its human and capital resources to assess how well it is responding to the needs of the LEP populations in Fairfax County.”¹²⁰ The recommendations emphasized that despite the limited scope of the report, the OCR “strongly recommend[ed] that the OES implement [their] recommendations throughout the [entire] Virginia judicial system.”¹²¹

After publishing the Fairfax Compliance Report, the OES was quick to cooperate with many of the OCR’s recommendations.¹²² Moreover, in the Fairfax Compliance Report, the OCR recommended that “[o]ne part of this review should include gathering feedback from the local LEP service population in Fairfax County, along with local organizations and associations representing LEP juveniles and families of juveniles, on how the OES can provide more effective language assistance services at the [J&DR courts].”¹²³ After the OCR investigation, the Fairfax J&DR Court took meaningful steps to improve their procedure for filing a protective order for LEP petitioners.¹²⁴

In Fairfax County, and most counties throughout Virginia, for an English-speaking individual the procedure for filing a “preliminary protective order” for family abuse in the J&DR Court begins with the Petitioner completing an Intake Sheet, which is submitted to the Intake Clerk to begin the intake process.¹²⁵ The Petitioner is then asked to read a series of documents containing information about protective orders, and to complete a Respondent Description Sheet.¹²⁶ In addition to completing these forms, the Petitioner must also write an affidavit, a written statement describing the abusive event.¹²⁷ The forms must then be completed and returned to the Intake Clerk, who then notifies the Intake Officer.¹²⁸ Once the forms are completed, the Intake Officer presents the petition to a judge, who then determines whether to issue the preliminary protective order.¹²⁹ If the judge issues the preliminary order, a court date is set within fifteen days and the respondent is served with

120. ALSTON, *supra* note 13, at 24.

121. *Id.* at 34 (emphasis added).

122. *See id.* at 36, nn.44–47 (identifying various modifications and updates adopted by OES after the DOJ’s investigation).

123. *Id.* at 24.

124. Telephone Interview with Family Law Attorney in Northern Virginia (Nov. 20, 2015).

125. DOMESTIC RELATIONS SERVICES, FAMILY ABUSE PROTECTIVE ORDER PACKET, 1 (2014), http://www.fairfaxcounty.gov/courts/jdr/documents/ppo_packet.pdf.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

notice of the hearing.¹³⁰ For an English-speaking petitioner this process could be completed within a matter of hours, but for an LEP petitioner this process would take at least twenty-four to forty-eight hours to complete due to the need for translation services.¹³¹

Previously in Fairfax County, LEP petitioners were required to follow the same steps as an English-speaking petitioner to file for a preliminary protective order, only with the additional requirement of obtaining a certified English translation of his or her affidavit.¹³² This translation, which is a service provided by the court and required under Title VI, would normally take the court roughly twenty-four to forty-eight hours to complete, but could take longer.¹³³ As illustrated in the earlier example provided by the Family Law attorney from Northern Virginia, during this translation time the abuser might find out about the protective order and lash out at the Petitioner, or the petitioner might second guess her decision to go through with the petition and ultimately not return to the court once the translation is complete.¹³⁴

Realizing the need for reform, Fairfax County judges and LEP advocates worked together to create a more efficient and inclusive process for LEP protective order petitioners.¹³⁵ The Fairfax County J&DR Court now provides LEP petitioners with the option to go before the judge and provide oral testimony with the assistance of an interpreter, instead of requiring them to rely on a translated written affidavit.¹³⁶ Advocates for LEP litigants in Fairfax County view this change as a hopeful sign because it increases access to protective orders for LEP litigants, and thus protects them from further domestic abuse.¹³⁷

Another significant barrier faced by LEP litigants accessing Virginia state courts is Virginia’s so-called “English-only” law. Under Virginia law, English is the official language of the Commonwealth.¹³⁸ Based on this law, documents filed with the court can only be in

130. *Id.*

131. Telephone Interview with Family Law Attorney in Northern Virginia, *supra* note 124.

132. *Id.*

133. *Id.* (stating that in one case it took up to five days to obtain the translated affidavit).

134. *Id.*

135. *Id.*

136. FAMILY ABUSE PROTECTIVE ORDER PACKET, *supra* note 125, at 2 (advising Petitioners who do not read or write in English that if they choose to write an affidavit, it will need to be translated and “may delay the Court’s response”).

137. Telephone Interview with Family Law Attorney in Northern Virginia, *supra* note 124.

138. VA. CODE ANN. § 1-511 (West 2005) (“English shall be designated as the official language of the Commonwealth [of Virginia].”).

English.¹³⁹ The rule of accepting documents only in English, which includes protection orders and custody agreements, is both a Virginia requirement and the national norm.¹⁴⁰ This rule creates a compliance issue for LEP litigants because “LEP petitioners and respondents walk out of the courtroom with an English-language protection order that they cannot read.”¹⁴¹ Even though an interpreter is able to assist the parties with the terms of the order at the hearing, the litigants have no written confirmation in their native language of the terms of the order.¹⁴² Thus, the compliance issue arises when an LEP abuser violates a protection order because he cannot understand it.¹⁴³ Although, the impact of this English-only rule is much broader than the scope of this Note is able to address,¹⁴⁴ it is still important to include on the list of language access issues facing LEP litigants in Virginia.

C. Failure to Effectively Monitor and Enforce Virginia’s Language Access Plan

The OES most recently revised its Language Access Plan in March 2015.¹⁴⁵ However, the mere modification of a Language Access Plan does not guarantee compliance at the individual court level. Currently, Virginia lacks an effective monitoring and enforcement system to ensure compliance with Title VI.¹⁴⁶ The Department of Judicial Services (DJS), a branch of the OES, “is responsible for ongoing monitoring of the language access plan,”¹⁴⁷ and “serves as

139. Cf. Uekert et al., *supra* note 9, at 73 (noting that “[o]nly a handful of courts, such as the Eleventh Circuit Court in Miami-Dade County [Florida] and the Washington DC Superior Court have translated protection orders into non-English languages.”).

140. VA. CODE ANN. § 1-511 (West 2005); Uekert et al., *supra* note 9, at 73.

141. Uekert et al., *supra* note 9, at 73.

142. *Id.*

143. *Id.*

144. See Mariann M. Atkins, *Making It “Official”: A Constitutional Analysis of Oklahoma’s Official English Amendment*, 46 TULSA L. REV. 477, 477–78 (2011); Josh Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 KAN. L. REV. 669, 669, 672 (2009).

145. VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at E-2. A number of the OCR’s recommendations can be found in this revised Plan. See *id.* at 1-1. However, the Plan’s revision history notes that the policies for “designating individuals within each court to coordinate language access services; [c]ontacting OES if in need of additional language access resources; [. . .] receiving and processing complaints about language access services; [and] [. . .] posting notice that free language access services are available” were only added to the plan in March 2015. *Id.* at E-2.

146. ALSTON, *supra* note 13, at 38 (finding the OES complaint procedure, designed to ensure Title VI compliance by allowing individuals to file complaint regarding language services, insufficient).

147. VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 1-3.

the liaison between the judicial system’s administrative offices and the Virginia courts”¹⁴⁸ Within DJS, the Foreign Language Services Division is tasked with the mission “to assist LEP individuals in overcoming language limitations so that they may have full access to the judicial system.”¹⁴⁹ Virginia’s Language Access Plan explains that the role of this division, currently comprised of the Director of DJS, one Foreign Language Coordinator, and local staff interpreters in select counties,¹⁵⁰ expanded from the provision of language services to include “mentoring local certification candidates, reaching out to [LEP] communities, reviewing data about these populations, administering certification training and testing, processing payment vouchers, and evaluating and counseling contract interpreters.”¹⁵¹ Virginia’s revised Language Access Plan also identifies numerous “future projects” that this division hopes to accomplish, including “[e]xpand[ing] remote interpretation support for courts with fewer language resources” and “[c]ollect[ing] additional empirical data about the impact of the use of interpreters during cases.”¹⁵² However, based on the limited information found in Virginia’s Language Access Plan, as well as on OES’s official website, it is unclear how much assistance DJS and the Foreign Language Services Division are actually providing to LEP litigants.¹⁵³

After the Fairfax Compliance investigation, the OES did take the OCR’s recommendation to post a survey on its website for “local agencies and community organizations designed to assess how the OES can provide more effective language services.”¹⁵⁴ However, nearly six years later, there is no available report or publication by the OES indicating the results or use of this survey. The survey, which is still available on the OES’s Foreign Language Services Division’s website, asks targeted questions about the respondent’s

148. ALSTON, *supra* note 13, at 3.

149. *Id.* (adding that “[t]o further this mission, the [Foreign Language Services Division] administers a foreign language certification program for individuals who wish to serve as interpreters in the Virginia courts and establishes standards for the provision of language services throughout the courts.”).

150. *Foreign Language Services Organizational Chart*, VA.’S JUDICIAL SYS., <http://www.courts.state.va.us/courtadmin/aoc/djs/resources/flsorgchart.pdf>. Virginia’s Language Access Plan asserts that “this division provides interpretation and sight translation services, certifies and hires high quality interpreters, and sets and maintains the highest professional standards for the provision of language services.” VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 1-2.

151. VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 1-2.

152. *Id.* at 1-2 to -3.

153. *See, e.g., Foreign Language Services*, VA.’S JUDICIAL SYS., <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/interpreters/home.html> [<https://perma.cc/P6LZTG6K>] (providing general information about foreign language services).

154. ALSTON, *supra* note 13, at 24 n.28.

experiences with language access services in Virginia courts.¹⁵⁵ However, the survey fails to require respondents to identify themselves or their organization; meaning anyone who visits the Foreign Language Services Division's website is able to take this survey anonymously.¹⁵⁶ By allowing individuals to complete the survey anonymously, the OES can neither verify the accuracy of the responses nor follow up with the respondent to gain more information regarding the potential language access issues addressed in the survey. The anonymity of the survey coupled with the unavailability of any OES publication discussing the survey results, makes the OES's survey look less like a serious effort to become informed about language access issues and implement greater oversight, and more like an attempt to satisfy the OCR's recommendation prior to the publication of the Compliance Report.¹⁵⁷ Although Virginia's Language Access Plan outlines the role of DJS and the Foreign Language Services Division, and provides a general procedure for filing language access complaints, readers are still left confused on *how* and *if* the OES actually monitors and enforces the provisions outlined in Virginia's Language Access Plan.¹⁵⁸

IV. RECOMMENDATIONS TO IMPROVE LANGUAGE ACCESS IN VIRGINIA COURTS

Virginia, specifically the OES, has done a commendable job transforming its Language Access Plan into a comprehensive set of guidelines for judges, court personnel, interpreters and advocates, including making a concerted effort to implement many of the DOJ's recommendations set forth in the Fairfax Compliance Report. However, LEP litigants still face significant issues accessing Virginia state courts. Revisiting the DOJ's "minimal requirements" as a benchmark for determining suitable solutions, the recommendations addressed below focus primarily on the DOJ's "minimal requirements" (1) to not charge LEPs for language services used in civil proceedings; (2) to guarantee that judges and court personnel

155. *Survey of Local Agencies and Community Organizations, Foreign Language Services*, VA.'S JUDICIAL SYS., <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/interpreters/home.html> [<https://perma.cc/WHG7HYE9>] (follow "survey" hyperlink; then complete survey questions by selecting "next").

156. *Id.*

157. See ALSTON, *supra* note 13, at 24 n.28 (stating that "[i]n the OES' Response to the Draft Report, the OES said that it has posted on the OES' website a survey for local agencies and community organizations designed to assess how the OES can provide more effective language services.").

158. See VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 1-3, 3-11, 7-5 to 6.

know when and how to use interpreters; and (3) to avoid undue delays in court proceedings caused by the need for language services.¹⁵⁹

A. Virginia Should Provide Free Language Services to All LEP Litigants

Lack of resources is a frequently cited reason for courts’ failure to provide free language services to LEP litigants.¹⁶⁰ In a letter to State Chief Justices and State Court Administrators, Former Assistant Attorney General for the Civil Rights Division, Thomas Perez, appropriately emphasized that “[l]anguage services expenses should be treated as a basic and essential operating expense, not as an ancillary cost.”¹⁶¹ Recognizing that many state and local courts struggle with budgetary constraints, the DOJ Guidance acknowledged that recipients could “consider the costs of the [language] services and the resources available to the court as *part* of the determination of what language assistance is reasonably required in order to provide meaningful LEP access.”¹⁶² However, the DOJ *expects* that when LEP litigants require interpretation services that state courts will provide interpreters at *no cost* to the litigant.¹⁶³ Moreover, in the Fairfax County compliance report, the DOJ recommended that “the OES should stress that language assistance services must be free of charge”¹⁶⁴

Interestingly, Appendix C of Virginia’s Language Access Plan actually includes a copy of the DOJ’s guidance letter laying out the expectation that state courts provide free interpreter services to LEPs.¹⁶⁵ However, despite this expectation and the DOJ’s direct recommendation to OES, Virginia’s Language Access Plan still fails to specify when language assistance services will be free of charge.¹⁶⁶ Instead, under Chapter 8 entitled “Payment of Court Interpreters,” Virginia’s Language Access Plan provides “guidelines” to “(1) facilitate the efficient use of qualified foreign language interpreters in court proceedings; (2) assist courts in setting fair and reasonable rates of compensation; and (3) promote uniformity in interpreter

159. ABEL, *supra* note 4, at 9–10.

160. See Letter from Thomas E. Perez, Assistant Atty. Gen., to State Courts 3–4 (Aug. 16, 2010) (adding that “[b]udgeting adequate funds to ensure language access is fundamental to the business of the courts.”) [hereinafter Perez Letter].

161. *Id.* at 3.

162. *Id.* at 4 (emphasis added).

163. *Id.* at 2 (emphasis added).

164. ALSTON, *supra* note 13, at 35.

165. VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at C-1 to -5.

166. See *id.* at 8-1.

payment rates and policies throughout the state.”¹⁶⁷ Yet, none of these “guidelines” address when the court will pay for interpreter services.¹⁶⁸ Rather, the chapter begins by pointing the reader to Virginia’s applicable statutes regarding payment of foreign language interpreter appointments in criminal and civil cases.¹⁶⁹ In civil cases, Virginia’s statute for foreign language interpreter payment gives judges the discretion to assess the cost of an interpreter “against either party as a part of the cost of the case”¹⁷⁰ Thus, judges are allowed and frequently do impose the cost of an interpreter on LEP litigants.¹⁷¹ As discussed previously in this Note, imposing the cost of an interpreter on LEP litigants can have devastating consequences.¹⁷²

In states like Virginia, where state laws grant the court discretion to impose the cost of an interpreter against either party, it is unrealistic to assume that all courts will enforce and implement the DOJ’s Title VI requirement to provide free interpreters to all LEP litigants.¹⁷³ Thus, by upholding state statutes that permit judicial discretion in allocating interpreter costs in civil matters, Virginia state courts will likely never be able to realize full compliance with Title VI.

If Virginia aims to achieve full compliance with Title VI, the legislature should amend the provision in the foreign language interpreter statute, which gives the court discretion to impose interpreter costs on LEP litigants. Virginia should look to states like Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Jersey, New York, Oregon, and Wisconsin where state law mandates that the government is solely responsible for the appointment and payment of interpreters in all civil cases.¹⁷⁴

167. *Id.*

168. *See id.* (failing to address when or how an LEP litigant might qualify for a waiver based on economic status, such as indigent litigants).

169. *Id.*

170. VA. CODE ANN. § 8.01-384.1:1(B) (West 2006) (“The amount allowed by the court to the interpreter *may, in the discretion of the court*, be assessed against either party as a part of the cost of the case and, if collected, the same shall be paid to the Commonwealth.”) (emphasis added).

171. *Contra* ALSTON, *supra* note 13, at 4. It can be inferred from the plain language in Chapter 8 of Virginia’s Language Access Plan that courts in Virginia are not required to pay for the cost of an interpreter. *See* VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 8-3 to -4 (stating under Section 3 entitled “Other Policy Suggestions Related to Interpreter Compensation” that “[w]hen the court is paying for the interpreter’s services, the court shall contact interpreters to schedule court appearances.”) (emphasis added).

172. *See* ABEL, *supra* note 4, at 1.

173. *Cf.* VA. CODE ANN. § 8.01-384.1:1(B) (West 2006) (“The amount allowed by the court to the interpreter *may, in the discretion of the court*, be assessed against either party as a part of the cost of the case and, if collected, the same shall be paid to the Commonwealth.”) (emphasis added).

174. *See* ABEL, *supra* note 4, at 19.

Cost imposition is not only a financial burden on LEP litigants, but also raises serious due process and fairness concerns. The Brennan Center for Justice appropriately highlights the Philadelphia Bar Association’s proposal that “[b]ecause certified court interpreters are required for the court to operate efficiently and fairly, their costs should be borne by the court system just as other operating costs such as judicial salaries, court staff, security, computers and paper.”¹⁷⁵ Although not impossible to achieve, this type of statutory and procedural change would undoubtedly impact Virginia’s finances. One immediate critique of this type of major policy change is that Virginia citizens would have to shoulder the cost of interpreter services through increased taxes. Although increasing taxes presents one way to offset the cost of providing free interpreter services to LEP litigants, it is not the only solution. Virginia also has the ability to apply for additional federal grants to assist in the cost of language services.¹⁷⁶ Virginia should not limit grant applications to language access specific grants, but rather apply for a wide array of grants.¹⁷⁷ If awarded a non-language access grant, the state could then engage in a comprehensive review of the state’s budget to reallocate funds to language access services, as suggested in the Fairfax Compliance Report.¹⁷⁸ Moreover, Virginia could reach out to other states that already have laws and policies in place to absorb the cost of interpreter services to gain insight and advice on how to effectively implement a fiscal change of this magnitude.

Discernibly, any framework to offset the cost of not charging litigants for language services will require a rigorous collaborative effort from Virginia’s legislature, judiciary and LEP advocates. However, by establishing the Access to Justice Commission, Virginia has demonstrated its commitment to provide justice for all Virginians, particularly the most underserved, including LEP litigants.¹⁷⁹ Thus, to follow through on that commitment, Virginia should provide LEP litigants with the same free access afforded to all English-speaking court users.

175. *Id.* at 16 (quoting PHILA. BAR ASSN., LANGUAGE ACCESS TASK FORCE, COMMENTS ON PROPOSED RULES OF JUDICIAL ADMINISTRATION ON COURT INTERPRETING 11 (June 2008)).

176. See *Access to Justice, Grant Information*, U.S. DEP’T OF JUST., <https://www.justice.gov/atj/grant-information> [<https://perma.cc/49VNMW2V>].

177. See *Business and Grants*, U.S. DEP’T OF JUST., <https://www.justice.gov/business> [<https://perma.cc/NAX66Z8B>] (providing a comprehensive list of all grants provided by the DOJ).

178. ALSTON, *supra* note 13, at 24.

179. See *Virginia Access to Justice Commission*, VA.’S JUDICIAL SYS., <http://www.courts.state.va.us/programs/vajc/home.html> [<https://perma.cc/FUA7CADJ>].

B. Virginia Should Require Courts to Participate in Continuous Language Access Training

“Leadership from the courts, law enforcement, legal services professionals, interpreters, federal agencies, funders, state administrators, and victim service agencies have to demonstrate political will in advocating for and applying pressure to implement language access and systems change.”¹⁸⁰ Thus, OES is tasked with the duty to inform individuals both inside and outside the judiciary on language access services.¹⁸¹ In the Fairfax Compliance Report, the DOJ emphasized that “the OES Guidelines should clearly explain that all court personnel have an obligation under Title VI to ensure that LEP parties, witnesses, or parents or guardians of juveniles have meaningful access to court services in *all* court proceedings and programs, whether criminal or civil.”¹⁸² Virginia and other state courts’ “lack of awareness [regarding Title VI compliance and procedures] suggests that courts should engage in greater outreach in developing and publicizing language access plans and protocols for monitoring the quality of language access services.”¹⁸³ The “Training and Maintenance” section of Virginia’s Language Access Plan states that “OES periodically trains judicial officers and court staff” on the Plan, but that these particular trainings only occur when “new judicial staff begin employment, at annual conferences, and during scheduled judges’ trainings.”¹⁸⁴ However, additional support is available to clerks’ offices through DJS, if required.¹⁸⁵ Based on this information, it does not appear that all courts and judges are required to engage in continual language access training, nor does Virginia’s Language Access Plan provide details regarding the types of training DJS provides. To ensure judges and court personnel are aware of language access services and obligations, the OES should require courts to engage in regular language access training. The OES should also publish the content of the trainings, training materials, dates held, trainers, and names and positions of attendees.¹⁸⁶

180. API IDV, RESOURCE GUIDE FOR ADVOCATES & ATTORNEYS ON INTERPRETATION SERVICES FOR DOMESTIC VIOLENCE VICTIMS 3 (2009).

181. See ALSTON, *supra* note 13, at 35.

182. *Id.* (emphasis in original).

183. *Effective Court Communication*, *supra* note 69, at 2. “Outreach should extend to service providers and other agencies to assist in publicizing the availability of court language access services.” *Id.*

184. VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 1-3.

185. *Id.*

186. See Memorandum of Agreement Between The United States of America & The Colo. Jud. Dep’t, DEP’T OF JUST. NO. 171-13-63 3-4 (June 28, 2011) (requiring the Colorado Judicial Department to publish semi-annual reports to the DOJ with detailed information documenting the efforts made to implement its newly created Language Access Directive, including the information listed above regarding judicial training).

C. Virginia Courts Should Work to Innovate Procedures to Avoid Unnecessary Delays in Language Access Services

It is in the best interest of Virginia’s judiciary and LEP litigants for Virginia to continue to innovate its language services practices and procedures with the goal of avoiding undue delays to LEP court users.¹⁸⁷ By innovating language access practices and procedures courts can save money, time, and judicial resources, thus improving judicial efficiency.¹⁸⁸ These innovations can come in various forms, such as working with the Virginia Legislature to change Virginia’s English-only law to ensure greater compliance with translated documents filed with the court or by increasing the use of technology in the courtroom to minimize the cost of interpreters.¹⁸⁹

Modernizing the Virginia Judiciary’s website is a critical innovation necessary to avoid undue delays in language access services. In his 2015 State of the Judiciary Address, Chief Justice Donald W. Lemons announced that Virginia’s Access to Justice Commission is currently in the process of studying other courts’ websites that use technology to promote access to justice for self-represented litigants by providing “online availability of court forms and instructions, including forms translated into plain English ([six]th grade level) and *other languages*”¹⁹⁰ Virginia should use Colorado’s Judicial Branch website as a model for modernizing its website.¹⁹¹ The Colorado Judicial Branch innovated its website after reaching a Memorandum of Agreement with the DOJ, following a Title VI investigation.¹⁹² Colorado’s website provides comprehensive language access information and is easily accessible to LEP users.¹⁹³ Colorado’s Office of Language Access page is available in English and Spanish, and provides information on how to request an interpreter, how to file a language access complaint, as well as how to download all court forms and instructions in English or Spanish.¹⁹⁴

187. See Abel, *supra* note 1, at 637.

188. *Id.* (arguing that federal courts would save significant money by innovating their language services which would “reduce the risk of error and the inevitable appeals that follow.”).

189. Cf. Uekert et al., *supra* note 9, at 73 (noting that some courts have translated protection orders and informational brochures into languages other than English).

190. Judiciary Address, *supra* note 110, at 14–15 (emphasis added).

191. See COL. JUDICIAL BRANCH, <https://www.courts.state.co.us> [<https://perma.cc/6VREVNNE>].

192. See Memorandum of Agreement, *supra* note 186, at 1.

193. COL. JUDICIAL BRANCH, *supra* note 191 (including a sign in the bottom right-hand corner of the homepage that lists multiple languages in their native spellings to signal LEP users to the Office of Language Access page).

194. *Office of Language Access*, COL. JUDICIAL BRANCH, <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=interp> [<https://perma.cc/L9U4UW29>].

However, if Virginia lacks the motivation to voluntarily innovate its procedures, LEPs and advocates should strongly consider the alternative approach of filing complaints with the DOJ. As discussed previously, the threat of a DOJ investigation, such as the one conducted in Fairfax County, has the unique ability of incentivizing courts to modify their procedures to ensure greater compliance.¹⁹⁵ This approach can elicit a collaborative effort between courts and LEP advocates to come up with efficient and effective procedures to eliminate language access barriers, as was illustrated in the changes made to the affidavit requirement for LEP protective order petitioners in Fairfax County.

CONCLUSION

Since the issuance of Executive Order 13,166, Virginia has made a significant effort to provide meaningful access to LEP litigants in civil cases. Virginia's commitment to provide LEPs meaningful access to state courts is evident through the creation and recent revision of its Language Access Plan, as well as through Virginia's creation of the Access to Justice Commission.¹⁹⁶ However, Virginia still has work to do before it can claim to ensure meaningful access to all LEPs based on its language access policy. Virginia needs to improve compliance with the DOJ's "minimal requirements" to provide free language services to civil LEP litigants; guarantee courts' awareness and competency in providing language services; and avoid unnecessary delays in court proceedings caused by language services.¹⁹⁷

Thus, the existence of state statutes that impose interpreter costs on LEP litigants or that require documents to be filed only in English fail to provide not only meaningful, but equal access to all court users in Virginia. Virginia should change its civil interpreter payment statute to provide free interpreter services to all LEP litigants. Additionally, to ensure greater compliance with legally binding documents, Virginia should encourage courts to read the so-called "English only" law liberally to allow courts to accept documents filed in a LEP's native language when attached to a certified translation.

Virginia must also engage in greater outreach both inside and outside the courtroom. Specifically, OES should require judges and

195. See Rubin-Wills, *supra* note 42, at 488.

196. See VIRGINIA LANGUAGE ACCESS PLAN, *supra* note 99, at 1-1; Supreme Court of Virginia, Order Establishing the Virginia Access to Justice Commission (Sept. 13, 2013), <http://www.courts.state.va.us/programs/vajc/resources/order.pdf>.

197. See Letter from Loretta King, Deputy Assistant Att'y Gen., to Dir. of State Court and/or State Court Adm'r (Dec. 1, 2003) (on file with author).

court personnel to engage in continuous language access training. Information regarding this training should be published on the judiciary’s website to ensure compliance. Finally, Virginia should work with courts to modernize court procedures and practices to provide greater access to LEPs.

In his letter to Chief Justices and State Court Administrators, former Assistant Attorney General Thomas E. Perez emphasized that the “DOJ expects that courts that have done well will continue to make progress toward full compliance in policy and practice.”¹⁹⁸ Thus, Virginia’s responsibility does not end once a policy is in place. Rather, Title VI and the DOJ require all states, including Virginia, to guarantee meaningful access to all LEP litigants in both policy and practice.

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198. Perez Letter, *supra* note 160, at 4.

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