

**COMMENTS OF THE
NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS AND
TRANSLATORS
ON THE
DEPARTMENT OF HOMELAND SECURITY'S
PROPOSED RECIPIENT LEP GUIDANCE
PUBLISHED AT 75 FED. REG. 34465 (JUNE 17, 2010)
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Introduction

The National Association of Judiciary Interpreters and Translators (NAJIT) was founded in 1978 in order to build professionalism among interpreters and translators working in the legal and law-enforcement arenas; to advocate in support of state and federal judiciary interpreter and translator training programs; and to educate the public about the need for qualified and well-trained professional judiciary interpreters and translators. NAJIT's members represent professional interpreters who regularly provide services to limited English proficient (LEP) persons, usually in judicial and law enforcement settings. Many NAJIT members also regularly participate in immigration proceedings and have first-hand knowledge of DHS programs where access to qualified interpreters can be critical to the civil rights of LEP individuals.

As a result, NAJIT has a strong interest in providing comments to the Department of Homeland Security (DHS) with respect to its guidance document related to Executive Order 13166, Improving Access for Persons with Limited English Proficiency, 65 FR 50121. We welcome and appreciate the opportunity to comment.

General Comments

NAJIT recognizes that DHS has many different programs and services that are covered by the guidance document. In many cases, the services and programs offered by DHS are not adversarial in nature. For instance, Coast Guard boater safety services and outreach efforts require a different level of interpreter training than for immigration proceedings. Similarly, services and guidance to importers and exporters does not carry the same weight or importance as do the adversarial and law enforcement activities of the agency. Clearly there is a difference between providing language services in an immigration proceeding, and providing translation of boater safety documents or import-export procedures.

Because NAJIT represents interpreters and translators who work primarily in law enforcement and adversarial judicial and quasi-judicial proceedings such as administrative hearings, our comments on the guidance document are, not surprisingly,

directed at those programs within DHS that are law enforcement and adversarial in nature. Our general comments are offered with this caveat in mind.

However, as a general matter, NAJIT is concerned that the guidance document attempts to cover all DHS activities with one umbrella set of guidelines. Given the adversarial nature of many DHS proceedings and the implications for LEP persons, the umbrella approach is both inadequate and confusing. Our general comments point this out in several areas, since the guidance document appears to be endorsing the use of modes of interpretation that are clearly not appropriate for any kind of judicial or law enforcement setting.

We strongly urge DHS to consider redrafting this document with an eye to creating a special section covering LEP access issues specific to the agency's adversarial and law enforcement programs. In our view, DHS needs to recognize in a more coherent and easily-referenced section the differences between educational and commercial programs of the agency and those involved with immigration (including detention centers), border enforcement, or other types of law enforcement-related activities.

Specific Comments

Explicitly state that interpreter proficiency needs to be tested.

In section VI A Oral Language Services (interpretation), the guidance document suggests, among other things, that recipients ensure that persons who will interpret “demonstrate proficiency in, and the ability to communicate information accurately in both English and the other language.” In NAJIT's view, recipients need instruction in the acceptable ways such proficiency can be demonstrated.

Note #9 says “recipients should consider a formal process for establishing the credentials of the interpreter.” NAJIT holds that there are no *informal* ways to reliably establish such credentials. Credentialing, by its nature, requires a formal process with a set of clearly defined competencies. To the extent that DHS plans to rely on informal means for determining competency, it ought to specifically identify means to make that determination. For example, asking a few questions in each language and judging the candidate's ability to answer is not a reliable yardstick of interpreter proficiency. While not every test needs to be on the level of a certification examination, tests do need to be meaningful and appropriate to the interpreter's expected workload.

Summarization is not an acceptable mode of interpretation in adversarial proceedings or medical settings

In section VI A Oral Language Services (interpretation), the guidance document directs the DHS to ensure that interpreters demonstrate proficiency in English and the second language as well as appropriate modes of interpretation, including "*summarization*."

While having an interpreter provide a brief summary of a conversation may be appropriate in some casual settings, "*summarization*" is *never* appropriate in medical, adversarial or law enforcement settings, or in any setting in which the information provided to or by the LEP person is of a critical nature. Standard practice, settled in law, recognizes appropriate modes of interpreting in judiciary settings to include *only* consecutive interpreting, simultaneous interpreting and sight translation. Modern professional standards forbid summary interpreting in the courtroom and other legal settings because by its very definition "summary" involves the omission of content. Moreover, this mode requires an interpreter to decide what to include or exclude, and thus puts the interpreter in an ethical quandary.¹

For good reason, summarizing is contrary to the standard rules and canons of judiciary interpreting. A judiciary interpreter has the duty to convey accurate and *complete* messages between or among parties. Summarizing, whether from spoken or written communication, requires an interpreter to participate in creating part of the message. When an interpreter is directed to summarize, he or she is placed in the untenable ethical position of having to evaluate which portion of the testimony or statements given by the parties is relevant. An interpreter is not qualified to make such determinations. If an officer wants to summarize, and ask for that summary to be interpreted, that is another matter completely, but the interpreter is not qualified to decide how much of anyone's message it is necessary to convey. To give an interpreter "summary" privileges is to court disaster.

Equally important, the first canon of NAJIT's *Code of Ethics and Professional Responsibilities* explicitly bans omitting or paraphrasing speech to be interpreted. For this reason, DHS should *never* allow summary in any immigration proceedings or other judicial proceedings carried out by the agency. NAJIT recommends that the agency provide special guidance specifically for immigration proceedings making it clear that summarizing is not an acceptable mode of interpretation in those proceedings.

DHS should not condone the use of informal interpreters in adversarial and law-enforcement settings.

In Section VI A Oral Language Services (interpretation), the guidance document suggests that in some settings it is acceptable to use family members, friends and other non-qualified individuals to provide access to DHS programs and services. The document should certainly specifically state that the use of such interpreters is *never* appropriate in law enforcement settings and judicial settings, such as immigration proceedings.

Friends and family members, in addition to being untrained in the field of interpreting or translation, are not neutral parties and may have an interest in the outcome of a case or investigation. In some cases they may be potential suspects. Children may favor one family member over the other and they, as well as many adults, may not be knowledgeable or sophisticated enough to understand certain terminology and concepts.

¹ NAJIT Position Paper. *Summary Interpreting in Legal Settings. Attachment 2 to these comments.*

In any legal or quasi-legal adversarial setting, including in law enforcement venues, accuracy and impartiality are of paramount importance and professional interpreters should be used. Informal interpreters are unlikely to know about or meet either the accuracy or impartiality standards that are key in legal and law enforcement settings. Without prior training, the average bilingual person is not qualified or able to function as an interpreter in a legal setting. Mere knowledge of language does not make one an interpreter. Interpreters in legal settings need, in addition to bilingual language sophistication, other special skills, knowledge and abilities. They also need to abide by a code of ethics, which is imparted via training, which includes role play in many different possible scenarios.

In law enforcement, immigration settings (including detention centers), and other adversarial proceedings DHS must make it clear that the use of informal interpreters is *not acceptable*. The guidance should be amended so that in adversarial and law-enforcement settings informal interpreters can only be used as a supplement to other impartial and qualified interpreters provided by the agency itself.

DHS should never permit inmates or children to provide language services in any setting. In section VI A Oral Language Services (interpretation), the guidance document rightly recognizes that DHS should take special care to ensure that informal interpreters are appropriate to the subject matter of the program or service. However, as noted above, NAJIT asserts that the use of informal interpreters and translators is never appropriate in judicial, adversarial, or law enforcement settings or in any setting in which life, liberty, due process or health is at stake.

For example, it would be inappropriate to use an inmate to interpret a detention center's rules, or to provide services at medical intake, or to interpret during disciplinary procedures. It would also be inappropriate for children to interpret or convey legal immigration concepts between law enforcement and a parent that is being detained due to their immigration status.

In addition, however, NAJIT believes that DHS should never allow inmates or children to provide any kind of language services to LEP persons that come into contact with the agency. It is never appropriate, except in immediate life-threatening circumstances when no one else is present, or while awaiting the arrival of a trained interpreter, to use children or inmates to interpret or convey messages. The agency should expressly forbid their casual use in all settings. No reasonable faith can be placed in information conveyed by persons whose impartiality, intelligence or level of understanding is unknown.

The use of interpreters in immigration proceedings

NAJIT is baffled that the proposed guidance does not directly address the use of interpreters in immigration proceedings (except proceedings before the Executive Office of Immigration Review which falls under the Department of Justice). In our view, the Bureau of Immigration and Customs Enforcement (ICE) and its programs such as Secure

Communities and 287g partners ought to review and update procedures for language interpreters in immigration proceedings, arrests, at detention centers, and the like.

In particular, NAJIT would like to see significant changes in how interpreters are used in immigration proceedings. It is regular practice in such proceedings for only the judge's remarks to be interpreted for LEP individuals. The remarks of attorneys and others are not regularly interpreted. In NAJIT's view, this is a significant violation of Title VI and Executive Order 13166. We would like to see DHS document specific recommendations on the use of interpreters and translators in immigration proceedings so as to provide meaningful access to LEP individuals. Such a document should forbid the use of summary as a mode of interpretation for the reasons outlined above. It should also forbid the interpreter to remain silent while any person involved in the proceeding is speaking.

In its June 30, 2010 Memorandum of Understanding between DHS and 287g partners², the agency clearly states that qualified interpreters must be provided. DHS has issued guidelines to all ICE components including Secure Communities and 287g partners. NAJIT would like to see these guidelines reiterated and addressed in the guidance policy. Few law enforcement agencies that receive federal funding or assistance with Secure Communities or 287g programs are using qualified interpreters, have policies in place, or are providing training to their staff. There have been reports throughout the years where children have been removed from their parents due to the parent's immigration status or lack of English proficiency without a qualified interpreter or proper due process. The *New York Times* has reported numerous deaths in immigration detention centers. NAJIT would like to see significant changes in these procedures and that the LEP policy address some of these issues.

Conclusion

NAJIT welcomes the opportunity to work with DHS in providing better guidance for LEP access to the agency's services and programs, including its enforcement efforts. We stand ready to work with DHS to help clarify the guidance document insofar as it relates to judicial and quasi-judicial, as well as to law enforcement settings.

Attached to this document you will find NAJIT's Code of Professional Ethics and its position papers on Summary Interpretation and Language Assistance for Law Enforcement.

If you have any questions about NAJIT or its comments on this issue, please contact NAJIT Executive Director Robin Lanier at 202-293-0342 ext 201.

² June 30, 2010 policy number 10072.1 Memorandum for all ICE Employees on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.
http://www.ice.gov/doclib/civil_enforcement_priorities.pdf

ATTACHMENTS:

- 1) NAJIT Code of Ethics
- 2) NAJIT Position on Summary Interpretation
- 3) NAJIT Position on Language Assistance for Law Enforcement

