



September 15, 2016

**Office of General Counsel Guidance on  
Fair Housing Act Protections for  
Persons with Limited English Proficiency**

**I. Introduction**

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental or financing of dwellings, and in other housing-related transactions, because of race, color, religion, sex, disability, familial status or national origin.<sup>1</sup> This guidance discusses how the Fair Housing Act applies to a housing provider's consideration of a person's limited ability to read, write, speak or understand English. Specifically, this guidance addresses how the disparate treatment and discriminatory effects methods of proof apply in Fair Housing Act cases in which a housing provider bases an adverse housing action – such as a refusal to rent or renew a lease – on an individual's limited ability to read, write, speak or understand English.<sup>2</sup> Because of the close nexus between limited English proficiency (“LEP”)<sup>3</sup> and national origin, the distinctions between intent and effects claims involving LEP and national origin are often subtle and can be difficult to discern.

**II. Background**

LEP refers to a person's limited ability to read, write, speak, or understand English. Individuals who are LEP are not a protected class under the Act. The Act nonetheless prohibits housing providers from using LEP selectively based on a protected class or as a pretext for discrimination because of a protected class. The Act also prohibits housing providers from using LEP in a way that causes an unjustified discriminatory effect.

Over twenty-five million persons in the United States, approximately nine percent of the United States population, are LEP. Among LEP persons in the United States, approximately 16,350,000 speak Spanish (65%), 1,660,000 speak Chinese (7%), 850,000 speak Vietnamese (3%), 620,000 speak Korean (2%), 530,000 speak Tagalog (2%), 410,000 speak Russian (2%), and fewer speak dozens of other languages.<sup>4</sup>

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<sup>1</sup> 42 U.S.C. §§ 3601-19.

<sup>2</sup> Programs and activities that receive federal financial assistance, including from HUD, have greater obligations to provide meaningful access to their LEP applicants and beneficiaries under Title VI of the Civil Rights Act of 1964. See 42 U.S.C. § 2000d *et seq.*; 24 C.F.R. § 1.4; Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” 65 Fed. Reg. 50121 (Aug. 16, 2000); *see also* Dep’t of Hous. & Urban Dev., Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007) [hereinafter HUD LEP Guidance]. This guidance does not address the obligations under Title VI that apply to programs and activities that receive federal financial assistance.

<sup>3</sup> Depending on the context, “LEP” is used to stand for “limited English proficiency” or “limited English proficient.”

<sup>4</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16001; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B16001](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16001).

Nearly all LEP persons are LEP because either they or their family members are from non-English speaking countries. The link between national origin and LEP is fairly intuitive<sup>5</sup> but is also supported by statistics. In the United States, 34% of Asians<sup>6</sup> and 32% of Hispanics<sup>7</sup> are LEP as compared with 6% of whites<sup>8</sup> and 2% of non-Hispanic whites.<sup>9</sup> Focusing on place of birth, in the United States 61% of persons born in Latin America<sup>10</sup> and 46% of persons born in Asia<sup>11</sup> are LEP as compared with 2% of persons born in the United States.<sup>12</sup> Thus, housing decisions that are based on LEP generally relate to race or national origin.<sup>13</sup> Sometimes, “the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible.”<sup>14</sup>

“National origin” means the geographic area in which a person was born or from which his or her ancestors came.<sup>15</sup> The geographic area need not be a country for it to be considered someone’s “national origin,” but rather can be a region within a country, or a region that spans multiple countries.<sup>16</sup> In general, national origin discrimination can occur even if the defendant

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<sup>5</sup> See *Faith Action for Cmty. Equity v. Hawaii*, No. 13-00450 SOM/RLP, 2014 U.S. Dist. LEXIS 58817 at \*32 (D. Haw. Apr. 28, 2014) (finding it “relatively intuitive” that an “English-only policy disproportionately adversely affects people of national origins other than the United States.”); *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (“English-only rules . . . disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees.”); *EEOC v. Synchro-Start Prods.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999) (“[A]ny English-only rule unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others.”); *Saucedo v. Bros. Well Serv., Inc.*, 464 F. Supp. 919, 922 (S.D. Tex. 1979) (“A rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees. Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job.”).

<sup>6</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005D; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B16005D](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005D).

<sup>7</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005I; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B16005I](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005I).

<sup>8</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005A; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B16005A](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005A).

<sup>9</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16005H; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B16005H](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16005H). As used here, “Hispanic” means of “Hispanic, Latino, or Spanish origin.”

<sup>10</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table S0506; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/S0506](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S0506).

<sup>11</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table S0505; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/S0505](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/S0505).

<sup>12</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B06007; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B06007](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B06007).

<sup>13</sup> Race and national origin discrimination are highlighted in this memorandum because LEP cases typically involve discrimination on these bases, but particular facts could implicate other protected classes. For example, certain religious groups share a common language. Alternatively, a particular person’s inability to read, write or speak in English could coincide with a disability, in which case other statutory protections, such as the obligation to provide reasonable accommodations, would apply.

<sup>14</sup> *Deravin v. Kerik*, 335 F.3d 195, 202 (2d Cir. 2003); see also *Salas v. Wis. Dep’t of Corr.*, 493 F.3d 913, 923 (7th Cir. 2007) (“[T]here is uncertainty about what constitutes race versus national origin discrimination.”).

<sup>15</sup> *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 (1973) (employment discrimination case); *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1138 (C.D. Cal. 2003) (applying the definition of national origin in *Espinoza* to the Fair Housing Act).

<sup>16</sup> See Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85632, 85633 (Dec. 29, 1980) (EEOC explanation that under Title VII national origin need not be a “sovereign nation”).

does not know, or is mistaken about, precisely from where the plaintiff originates.<sup>17</sup> Although language discrimination is not necessarily national origin discrimination, national origin discrimination includes discrimination because an individual has the physical, cultural, or linguistic characteristics of persons from a foreign geographic area.<sup>18</sup> Thus, “[c]ourts have found a nexus between language requirements and national origin discrimination.”<sup>19</sup>

National statistics also demonstrate a connection between citizenship and LEP: for the U.S. population eighteen years and over, 63% of noncitizens are LEP, compared with 39% of naturalized citizens and 1% of native-born citizens.<sup>20</sup> As with language discrimination, discrimination against non-citizens or against those with a particular immigration status is not national origin discrimination, per se, because one’s citizenship and immigration status are related but distinct from one’s birthplace or ancestry. A requirement involving citizenship or immigration status will violate the Act when “it has the purpose or [unjustified] effect of discriminating on the basis of national origin.”<sup>21</sup>

### III. Intentional Discrimination

A housing provider violates the Fair Housing Act if the provider uses a person’s LEP to discriminate intentionally because of race, national origin, or another protected characteristic. Selectively enforcing a language-related restriction based on a person’s protected class violates the Act, as does using LEP as a pretext for intentional discrimination. In such cases, the use of the language-related criteria is analyzed under the Act the same as is the use of any other potentially discriminatory criteria. In an LEP case, as in any Fair Housing Act case, intentional discrimination can be established through direct or circumstantial evidence. “The key question . . . is whether the plaintiffs have presented sufficient evidence to permit a reasonable jury to conclude [they] suffered an adverse housing action” because of their protected class.<sup>22</sup>

Often, “lack of English proficiency is used as a proxy for national-origin discrimination.”<sup>23</sup> Therefore, courts have held that language-related restrictions are “worthy of close scrutiny,”<sup>24</sup> are subject to “a very searching look,”<sup>25</sup> and “should be examined in the most careful possible

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<sup>17</sup> See *Berke v. Ohio Dep’t of Pub. Welfare*, No. C-2-75-815, 1978 U.S. Dist. LEXIS 17380, at \*22 (S.D. Ohio June 6, 1978) *aff’d*, 628 F.2d 980 (6th Cir. 1980) (Employee satisfied the prima facie elements for national origin discrimination under Title VII even though her employer did not know that she was of Polish origin but could have inferred that her “national origin was other than of the United States.”).

<sup>18</sup> See, e.g., 29 C.F.R. § 1601.1 (“The [EEOC] defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”).

<sup>19</sup> *Colindres v. Quietflex Mfg.*, Nos. H-01-4319, -4323, 2004 U.S. Dist. LEXIS 27981, at \*36 (S.D. Tex. Mar. 23, 2004).

<sup>20</sup> U.S. Census Bureau; American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B16008; [http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B16008](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B16008).

<sup>21</sup> *Espinoza v. Hillwood Square Mut. Asso.*, 522 F. Supp. 559, 568 (E.D. Va. 1981) (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. at 92) (Fair Housing Act claim alleging discrimination against non-citizens survives motion to dismiss because “a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination.”).

<sup>22</sup> *Lindsay v. Yates*, 578 F.3d 407, 416 (6th Cir. 2009).

<sup>23</sup> *Aghazadeh v. Me. Med. Ctr.*, No. 98-421-P-C, 1999 U.S. Dist. LEXIS 23538, at \*12 (D. Me. July 8, 1999).

<sup>24</sup> *Rivera v. Nibco, Inc.*, 701 F. Supp. 2d 1135, 1141 (E.D. Cal. 2010).

<sup>25</sup> *Fragante v. Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989).

manner.”<sup>26</sup> Justifications for language-related restrictions in a Fair Housing Act case must therefore be closely scrutinized to determine whether the restriction is in fact a proxy or pretext for race or national origin discrimination. LEP persons may speak English well enough to conduct essential housing-related matters or have a household member who can provide assistance as needed, so a blanket refusal to deal with LEP persons in the housing context is likely not motivated by genuine communication concerns.<sup>27</sup> Suspect practices include advertisements containing blanket statements such as “all tenants must speak English,” or turning away all applicants who are not fluent in English. If the housing provider or resident can access free or low-cost language assistance services, any cost-based justifications for refusing to deal with LEP persons would also be immediately suspect.<sup>28</sup> In addition, the languages residents speak amongst themselves or to their guests do not affect the housing provider or neighbors in any legitimate way. Thus, bans on tenants speaking non-English languages on the property or statements disparaging tenants for speaking non-English languages have no cognizable justification under the Act.<sup>29</sup>

Aside from restrictions against all persons whose primary language is not English, the Act also may be violated by policies or practices that discriminate against persons based on their particular primary language, whether facially or through selective enforcement.<sup>30</sup> For example, if a housing provider has a policy of not selling, renting or lending to persons who speak a certain language, but will conduct those same transactions with persons who speak other languages, intentional discrimination is the likely reason.<sup>31</sup> Courts have recognized that “an individual’s primary language skill generally flows from his or her national origin,” and “persons of different nationalities are often distinguished by a foreign language.”<sup>32</sup> Because a person’s primary language generally derives from his or her national origin, singling out persons for disparate treatment because they speak a certain language is typically national origin discrimination. Furthermore, the Act’s prohibitions include making statements with respect to the sale or rental of a dwelling indicating “any preference, limitation, or discrimination” based on national origin, evaluated according to the perceptions of a reasonable person.<sup>33</sup> A reasonable person could understand a restriction against persons who speak a specific language as indicating a “preference, limitation, or discrimination” against individuals whose national origins are areas where that

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<sup>26</sup> *Smothers v. Benitez*, 806 F. Supp. 299, 306 (D.P.R. 1992).

<sup>27</sup> *See Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 601 (9th Cir. 1993) (explaining that the court will not permit “an easy refuge” for the defendant “to state falsely that it was not the person’s national origin” but rather his “communication skills” that motivated the adverse action).

<sup>28</sup> *See Faith Action for Cmty. Equity*, 2014 U.S. Dist. LEXIS 58817 at \*35 (In a Title VI case, based on an allegation that a third party “has been willing to offer competent translations at no cost to Defendants, and that this offer has been repeatedly rejected... any cost-based justification for the English-only policy is undermined.”).

<sup>29</sup> *See, e.g., Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013) (Fair Housing Act claim survived a motion to dismiss based in part on the housing provider’s statement that tenant “should learn English now that she is in America.”).

<sup>30</sup> *See Wilkie v. Geisinger Sys. Servs.*, No. 3:12-CV-580, 2014 U.S. Dist. LEXIS 132162, at \*27 (M.D. Pa. Sep. 18, 2014) (“[I]f Plaintiff can prove that she alone was prohibited from speaking another language, then such a restriction would be indicative of discrimination.”); *Aghazadeh*, 1999 U.S. Dist. LEXIS 23538, at \*8 (“Discrimination against an individual because she speaks Farsi, for example, could be considered discrimination on the basis of her national origin” because “it is reasonable to infer that Farsi is the primary language of Iran.”).

<sup>31</sup> *See Lopez v. Advantage Plumbing & Mech. Corp.*, No. 15-CV-4507 (AJN), 2016 U.S. Dist. LEXIS 43608, at \*12 (S.D.N.Y. Mar. 30, 2016) (“[C]ourts have recognized that prohibiting certain non-English languages in the workplace while permitting others may constitute actionable employment discrimination.”).

<sup>32</sup> *Olagues v. Russoniello*, 797 F.2d 1511, 1520-21 (9th Cir. 1986), *vacated as moot*, 484 F.2d 131 (9th Cir. 1987).

<sup>33</sup> 42 U.S.C. § 3604(c); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991) (describing the standard for 42 U.S.C. § 3604(c) as the perception of an “ordinary” or “reasonable” person).

language is primarily used. Therefore, a notice, statement, or advertisement with respect to the sale or rental of a dwelling containing such a restriction will likely violate the Act.

Under Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>34</sup> some courts have recognized as legitimate the needs of employers to require that employees speak English for effective supervision, a cohesive workforce and to put customers at ease.<sup>35</sup> A housing provider’s relationship with a resident, however, is quite different from that of a supervisor with an employee in that generally a supervisor must instruct and monitor the employee to improve performance. Likewise, the relationship among neighbors does not resemble that of coworkers in that generally neighbors can coexist effectively with minimal communication. Title VII also has the bona fide occupational qualification defense,<sup>36</sup> which does not exist under the Fair Housing Act. Thus, many of the interests asserted by employers that some courts have recognized as non-pretextual under Title VII will be inapplicable with regards to housing, lending or other real-estate related transactions covered by the Act.

A person’s accent and his or her national origin are “inextricably intertwined.”<sup>37</sup> It is thus inconceivable that a housing decision that treats someone differently because he or she speaks English fluently but with an accent is anything but intentional discrimination because of national origin in violation of the Act.<sup>38</sup> The same is true for housing-related policies or practices that treat persons with certain accents differently than persons with other accents.<sup>39</sup>

Targeting individuals for unfair or illegal housing-related services who are LEP or speak a particular language may also constitute intentional discrimination in violation of the Act. This is akin to “reverse redlining,” where a service provider, such as a lender or insurer, targets a group of persons who share a race or national origin, or targets an area where most of the residents share a race or national origin, for the extension of credit or insurance on unfair or illegal terms.<sup>40</sup> Targeting in this manner violates the Act, regardless of whether the defendant acts based on animus towards the individuals’ race or national origin group. In the same way, targeting such a group or area for other housing-related services, such as home loan modifications or audits, on unfair or illegal terms also violates the Act.<sup>41</sup> In some of these targeting cases, the discrimination has consisted of unfair and illegal language-related practices,

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<sup>34</sup> 42 U.S.C. § 2000e *et seq.*

<sup>35</sup> See, e.g., *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999) (collecting cases).

<sup>36</sup> See 42 U.S.C. § 2000e-2(e)(1).

<sup>37</sup> *Gold v. FedEx Freight E., Inc.*, 487 F.3d 1001, 1008 (6th Cir. 2007); *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1195 (9th Cir. 2003).

<sup>38</sup> Compare *Gold*, 487 F.3d 1001 at 1009 (“Our characterization of [defendant’s] comments concerning [plaintiff’s] accent as direct evidence of national-origin discrimination is consistent with the Supreme Court’s statements on the subject.”); with *Shah v. Oklahoma*, 485 F. App’x 971, 974 (10th Cir. 2012) (“[C]omments regarding a plaintiff’s accent may constitute circumstantial evidence of discrimination.”).

<sup>39</sup> See *Odima*, 53 F.3d at 1491 n.2 (in finding employment discrimination, noting that the plaintiff, who spoke with a Nigerian accent, was told to go to speech therapy to advance his career while a coworker, who spoke with an Austrian accent, was not).

<sup>40</sup> See *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

<sup>41</sup> See *HUD v. The Home Loan Auditors, L.L.C.* (Jan. 7, 2016), <http://portal.hud.gov/hudportal/documents/huddoc?id=16-1-CHARGE-CALI.PDF>

such as false advertising in non-English mediums and failing to explain untranslated documents or translating them inaccurately.<sup>42</sup>

If a housing provider is required to provide housing-related language assistance services to LEP persons under federal, state or local law, or by contract, and the housing provider fails to comply with that requirement, this too may constitute intentional discrimination.<sup>43</sup> By failing to comply with a requirement to provide language assistance, the housing provider may be denying individuals, based on their national origin, an equal opportunity to enjoy the housing benefits to which that requirement entitles them.<sup>44</sup>

#### **IV. Discriminatory Effects Liability and Use of Limited English Proficiency to Make Housing Decisions**

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.<sup>45</sup> Under this standard, a facially-neutral policy or practice that has a discriminatory effect because of race, national origin, or another protected characteristic violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of LEP has a discriminatory effect based on national origin, race, or other protected characteristic, such policy or practice violates the Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.<sup>46</sup> Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.<sup>47</sup>

The following sections discuss the three steps used to analyze claims that a housing provider's use of LEP results in an unjustified discriminatory effect in violation of the Act.

##### **A. Assessing the Discriminatory Effect**

In the first step of the analysis, the plaintiff (or HUD in an administrative proceeding) must prove that the defendant's policy or practice concerning LEP persons has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of the group's national origin, race, or other protected characteristic.<sup>48</sup> The burden of proving this first

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<sup>42</sup> *Id.*; *Garcia v. Zak*, 37 MDLR 55 (Mass. Comm'n Against Discrimination, Apr. 28, 2015).

<sup>43</sup> *See Cabrera*, 977 F. Supp. 2d at 977 (denying a motion to dismiss as to plaintiffs' intentional Fair Housing Act claim where the plaintiffs, LEP tenants, alleged, *inter alia*, that their landlord failed to provide translation services as required by their lease).

<sup>44</sup> *See Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (finding that one could "logically infer" discriminatory intent where the defendant "chose to continue a policy of failing to ensure bilingual services" as required by Title VI "knowing that Spanish-speaking applicants and recipients . . . were being harmed as the consequence").

<sup>45</sup> 24 C.F.R. § 100.500; *accord Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2507, 2514-15 (2015).

<sup>46</sup> 24 C.F.R. § 100.500; *see also Inclusive Cmty. Project*, 135 S. Ct. at 2514-15 (summarizing the standards in HUD's discriminatory effects regulations at 24 C.F.R. § 100.500).

<sup>47</sup> *See* 24 C.F.R. § 100.500.

<sup>48</sup> *Id.* A discriminatory effect can also be proven with evidence that the policy creates, increases, reinforces, or perpetuates segregated housing patterns. *See* 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing a disparate impact claim, which in HUD's experience is more commonly asserted in this context.

step of the analysis is satisfied by presenting evidence proving that the challenged practice causes or predictably will cause a disparate impact.

Census data may be used to prove that an LEP-related policy has a disparate impact based on race, national origin or another protected characteristic.<sup>49</sup> The U.S. Census Bureau publishes data relating LEP to other criteria that may be relevant to a given case, such as national origin, race, geography, language spoken, citizenship, and age, and it also provides Public Use Microdata Sample files that can be used to produce figures relating LEP to other potentially relevant criteria, such as income, household size and renter/owner status. Other evidence can also demonstrate the existence of a disparate impact, such as the characteristics of the actual applicants or residents affected by a housing provider's policy, where, for example, a landlord is alleged to have evicted all tenants who are LEP. No single comparative method is generally required or always preferred. Regardless of the method of analysis, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry.

A policy disfavoring LEP persons can have a disparate impact on persons of multiple national origins; in other words, the members of the injured group need not all be of the same national origin. As one court explained:

The fact that the impact of the English-only policy does not fall only on one national origin or a few national origins does not prevent the impact of the policy from being disparate. Indeed, if an impact cannot be 'disparate' when it affects multiple national origins, then any policy would be immune from challenge so long as it casts its discriminatory net widely enough. If a policy differently affects individuals from nations where English is the primary language and nations where it is not, then the policy has a disparate impact.<sup>50</sup>

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.<sup>51</sup> The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to supply evidence proving that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy.<sup>52</sup> Assertions based on generalizations or stereotypes about LEP persons will not satisfy the housing provider's burden.

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<sup>49</sup> *Cf. Veles v. Lindow*, No 99-15795, 2000 U.S. App. LEXIS 27672, at \*3 (9th Cir. Nov. 1, 2000) (affirming verdict in favor of defendants where plaintiffs had "provided virtually no evidence to prove disparate impact and inexplicably failed to object to the district court's exclusion of statistical evidence in support of their claim").

<sup>50</sup> *Faith Action for Cmty. Equity*, 2014 U.S. Dist. LEXIS 58817 at \*33 (Title VI challenge to Hawaii's decision to cease offering its driver's license test in eight non-English languages).

<sup>51</sup> 24 C.F.R. § 100.500(c)(2).

<sup>52</sup> *See* 24 C.F.R. § 100.500(b)(2); *see also* 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

Whether a policy or practice is necessary to achieve a housing provider's substantial, legitimate, nondiscriminatory interest will vary by case. Many of the LEP cases in the employment context where the business justification defense has succeeded lack analogs in the housing context. Housing and employment practices differ for many reasons, including the amount and nature of the communication that they generally require.<sup>53</sup> Therefore, many of the business justifications that have succeeded under Title VII will not apply or will not be considered substantial, legitimate, nondiscriminatory interests under the Act.

English proficiency is likely not necessary in the seller-buyer context because it does not involve an ongoing relationship. Nor is it likely necessary in the landlord-tenant context where communications are not particularly complex or frequent or where, for example, a landlord employs a management company with multilingual staff or otherwise can access language assistance. Similarly, refusing to allow an LEP borrower to have mortgage documents translated, or refusing to provide the borrower with translated documents that the lender or mortgage broker has readily available, is likely not necessary to achieve a substantial, legitimate, nondiscriminatory interest. Likewise, restricting a borrower's use of an interpreter, or requiring that an English speaker cosign a mortgage, likely will not prove justifiable.

Some states require that if negotiations for a mortgage are conducted in a non-English language, certain mortgage documents must also be provided in that language.<sup>54</sup> Avoiding compliance with a state consumer protection law would not be considered a substantial, legitimate, nondiscriminatory interest that would justify refusing to serve LEP borrowers.

### C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its language-related policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff (or HUD in an administrative proceeding) to prove that such interest could be served by another practice that has a less discriminatory effect.<sup>55</sup> The identification of a less discriminatory alternative will depend on the particulars of the policy or practice under challenge, as well as specifics about the housing at issue and affected population.

Allowing a tenant (or home-buyer, mortgage-borrower, etc.) a reasonable amount of time to take a document, such as a lease, to be translated, could be a less discriminatory alternative. Other less discriminatory alternatives in an LEP case might include obtaining written or oral translation services or drawing upon the language skills of staff members. Similarly, if the family has a member who speaks English or brings another person along to interpret, agreeing to communicate through these individuals could be an alternative to refusing to deal with anyone who does not speak English.<sup>56</sup>

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<sup>53</sup> See *supra* Part III discussing the reasons housing differs from employment with regards to intent claims, which apply to effects claims as well.

<sup>54</sup> See, e.g., Cal. Civ. Code § 1632; Or. Rev. Stat. § 86A.198.

<sup>55</sup> 24 C.F.R. § 100.500(c)(3).

<sup>56</sup> For assisted housing providers, however, requiring tenants to rely on family members rather than providing language assistance may not be permissible under Title VI. See HUD LEP Guidance, *supra* note 2, at 2743.

## **V. Conclusion**

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Selective application of a language-related policy, or use of LEP as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics, violates the Act. Moreover, because of the close link between LEP and certain racial and national origin groups, restrictions on access to housing based on LEP are likely disproportionately to burden certain protected classes and, if not legally justified, may violate the Act under a discriminatory effects theory.

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