

STATE OF INDIANA

DIVISION OF STATE COURT ADMINISTRATION

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September 4, 2009

Ms. Merrily A. Friedlander
Chief, Coordination and Review Section, NWB
U. S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Ms. Friedlander:

Thank you for forwarding to my attention your letter dated February 4, 2009, which was first sent to our old address.

Please be assured that the Indiana Supreme Court and its divisions, as recipients of federal financial assistance from the Department of Justice (DOJ), are mindful of the Court's obligation under Title VI to provide limited-English-proficient (LEP) individuals with meaningful access to Indiana's courts. This would be our policy even if we were not a grant recipient. I am pleased to take this opportunity to respond to your inquiry, to detail the programs implemented by the Court and to clarify the ruling of *Arrieta v. State*, 878 N.E.2d 1242 (Ind. 2008), in order to demonstrate the Court's continuing compliance with Title VI.

For many years, the Court, and particularly Indiana Chief Justice Randall T. Shepard, have promoted greater access to our courts for LEP litigants and have searched for innovative ways, in addition to employing more traditional means, to reach this goal. This is a topic that Chief Justice Shepard has discussed on two specific occasions in his addresses to the Indiana General Assembly. See State of the Judiciary Speech: *"Indiana's Place in American Court Reform: Rarely First, Occasionally Last, Frequently Early"* (2006); and State of the Judiciary Speech: *"Most Justice Happens in the County Courthouse"* (2007). www.in.gov/judiciary/supreme/state_jud.html. In a law review article, *Access to Justice for People Who Do Not Speak English*, 40 Ind. L. Rev. 643, 652-57 (2007), Chief Justice Shepard highlighted many of Indiana's language access programs.

Consistent with DOJ's *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient*

Persons, 67 Fed. Reg. at 41459, the Supreme Court has worked hard to achieve meaningful access for LEP litigants in Indiana courts while understanding the need to balance cost considerations that would impose undue burdens on local governments, which shoulder the large majority of court interpreter costs in Indiana. Since 2005, the Supreme Court has funded a state account with Language Line Services to provide telephone interpretation to all trial courts. Any court in the state may access the Supreme Court's account and use the telephonic foreign language interpretation service, with no cost to the local court. Since Indiana joined the National Consortium for State Court Interpreter Certification in 2002 and created a certification program in compliance with Consortium standards, Indiana successfully has certified over 65 interpreters in Spanish, 1 interpreter in French, and 1 in Arabic. The Court has also convened a Court Interpreter Advisory Committee which advises the Court on court interpretation services. That advisory committee proposed and the Court adopted a Code of Ethics for Court Interpreters.

The Supreme Court also recognized that courtroom interpretation was not the only area of need. Sometimes even the simplest questions, such as "What court do I go to?" can remain unanswered if court personnel cannot communicate with Spanish speaking individuals who come through their doors. To help alleviate this barrier, the Court partnered with Indiana's Ivy Tech Community College System, which has numerous extensions throughout the state, to develop a work place Spanish training program for Indiana's court personnel. Since the program began in 2006, approximately 700 court and clerk employees have completed coursework to learn how to communicate basic information to Spanish speaking litigants and their family members.

Other projects initiated by the Supreme Court to improve communication and understanding in our courts include translating into Spanish the following: portions of the Indiana Criminal Code, pamphlets explaining the difference between legal advice and legal information, the Indiana Child Support Guidelines, the Indiana Parenting Time Guidelines, and several on-line self-service legal forms. Further, the Supreme Court's Commission on Race and Gender Fairness created a DVD to advise criminal defendants in Spanish of their constitutional rights and explain the possible penalties they may face. These DVDs have been distributed to all trial court judges and are widely used. The Commission further plans to create a similar version of the DVD for defendants charged with offenses in juvenile court.

Competing with these laudable efforts is a struggling state economy and rising court expenses which in Indiana are paid through local county and city budgets. Indiana's judiciary, like many jurisdictions, is coping with significant financial constraints. However, unlike some other jurisdictions the DOJ may have encountered, the funding structure for Indiana's judiciary is one in which trial courts are funded locally, rather than by the state. In practical terms, this means that trial court judges must rely on the budgets dictated by local county and city councils and on the decisions of the persons elected to those council positions. Faced with numerous competing interests, local officials do not always sufficiently consider the need for interpretation and the rising costs for those services. Additionally, since trial court funding is dependent almost entirely on local tax revenue, a funding source which has diminished due to

the recent economic downturn, local governments have been forced to further streamline budgets in all areas.

The Supreme Court has worked tirelessly to educate lawmakers of the need for proper court interpretation services in our courts. In addition to providing a state-paid account with a telephonic foreign language interpretive service mentioned previously, it has worked to alleviate some of the financial burdens facing local courts that need to provide interpretation services by seeking financial assistance from the state legislature. In response to requests by the Chief Justice, the state legislature has provided funds for the Supreme Court to forward to the trial courts in the form of grants used for foreign language interpretation services. Grant award recipients must dedicate at least sixty percent of the award to employing certified court interpreters. Just in the last two years, the Supreme Court has awarded over \$400,000 in court interpreter grants, benefitting forty-four county court systems.

It is against this backdrop that the Supreme Court's decision in *Arrieta* should be viewed. Through its careful and considerate reasoning, the *Arrieta* decision upholds the important interest of providing meaningful access for LEP litigants but limits, to the extent constitutionally permissible, when court interpreter services must be borne by the government. The Court found that indigent defendants are entitled to a court-financed interpreter but that non-indigent defendants are entitled to a court-financed interpreter when the interpreter will be providing service in a court proceeding or activity, interpreting LEP testimony being an obvious example.

As a point of clarification, in your letter, you describe the *Arrieta* holding as follows: "the Court ruled that limited English proficient (LEP) defendants are not entitled to receive interpreter services at the court's expense unless they are indigent." This synopsis does not capture the Supreme Court's complete ruling. In *Arrieta*, the LEP defendant was an individual with financial means, who posted a significant bond and hired private counsel. Although the trial court provided the defendant with a court-funded interpreter at his initial hearing, the trial court denied him an appointed interpreter at subsequent proceedings, absent a showing of indigency. *Id.* at 1240. The defendant sought an interlocutory appeal.

The issue before the Supreme Court was whether a criminal defendant has a constitutional right to a court-paid interpreter when the defendant is solvent. As part of its analysis, the Court evaluated the functions that interpreters fulfill and, based on those functions, found that interpreters serve two crucial roles in criminal proceedings: they serve as "defense interpreters" and "proceedings interpreters." *Id.* at 1242-43. A defense interpreter primarily benefits the LEP litigant by simultaneously interpreting the English proceedings and by assisting with attorney-client communications. *Id.* In theory, this interpreter is a part of the defense "team." By contrast, the proceedings interpreter is considered akin to the "physical accoutrements" of a trial, as this type of interpreter serves the court, parties, counsel, and jury by interpreting various events in a case, such as the taking of testimony at a trial, a bond hearing, or any other pretrial hearing. *Id.* at 1243-44. Certainly, any time that a LEP litigant

needs to communicate with the trial court, whether it be as a witness or a defendant, a proceedings interpreter is required at public expense.

The Supreme Court reasoned that the decision whether to appoint a defense interpreter should be analogized to that of the appointment of counsel. *Id.* at 1245. “Defendants who do not speak English are entitled to the help of counsel and defense interpreters. The indigent defendant receives this help at public expense; the solvent defendant proceeds on his own.” *Id.* In contrast, the Court intimated that a trial court’s financial obligation to provide a proceedings interpreter is more extensive. Because this type of interpreter is fundamental “to ensure intelligible and fair proceedings,” trial courts should provide a proceedings interpreter at the court’s own cost, regardless of the defendant’s financial circumstances. *Id.* at 1245. Practically speaking, because many court hearings involving a LEP defendant will require either LEP testimony or a verbal response from the LEP defendant to the court, the majority of proceedings will necessitate a court-paid proceedings interpreter. But the solvent defendant must fund, at his own expense, an interpreter who is utilized for strategic purposes (i.e. to assist with attorney-client preparation, as in the lawyer’s office, or to evaluate the proceedings interpreters’ performance during trial). The Court recognized that effective management of the various steps in a criminal proceeding may well call for surmounting language barriers that arise at points that are difficult to define with precision ahead of time and that our trial courts will face various scenarios requiring solutions through the exercise of sound judgment. Although the Court did not mention, nor was it asked to consider, Title VI in the *Arrieta* decision, the Supreme Court actively evaluated in its decision many of the points which the DOJ propounds that recipients of federal assistance should consider when deciding the extent of a recipient’s obligation to provide LEP services. See DOJ’s *Guidance*, 67 Fed. Reg. 41455-01. Specifically, the Court considered the efforts of its own Commission on Race and Gender Fairness [created by Indiana Administrative Rule 4(C)] to quantify the need for interpretation in Indiana courts. The Court further commented on the importance of building a cadre of competent interpreters in this state, given the important role that interpreters play.

Ultimately, the decision that the Constitution does not require a court-financed defense interpreter for all purposes and places for defendants who are financially solvent comports with the DOJ’s position in that Indiana is “taking reasonable steps to ensure meaningful access” for the greater number of participants in the nature and spirit of Title VI. The *Arrieta* decision made it clear that Indiana recognizes its obligations under Title VI and, indeed, endeavors to provide resources and programs to those in need. But in doing so, the *Arrieta* Court also held that, when a solvent LEP has the resources to pay for defense interpreter services and desires an interpreter who serves only his private interests, the defendant is not entitled to an interpreter at the court’s expense. The *Arrieta* decision provides a thoughtful, reasonable and balanced approach that we believe comports with the DOJ’s *Guidance*.

This analysis appears in line with your department’s previously issued *Guidance* which states that, “[W]hen oral language services are necessary, recipients should *generally* offer competent interpreter services free of cost to the LEP person.” See DOJ’s *Guidance*, 67 Fed. Reg. at 41,462 (emphasis added). These guidelines are not specific and do not call for the

mandatory provision of interpreter services free of charge but create the strong suggestion that the court should be prepared to pay. In the majority of situations, Indiana courts, in fact, are prepared to pay for court interpreters. However, interpreting the *Guidance's* language as requiring a blanket application of court-financed interpretation for all LEP individuals, regardless of the individual's ability to pay for interpreter services and regardless of the purpose or place of the interpreting, is not a balanced approach as it would divert funds from providing services to much more economically disadvantaged LEP individuals. The *Arrieta* analysis promotes the availability of funding in the fairest manner by providing interpreters for the indigent and by providing interpreters for proceedings in which LEP testimony will be presented.

Certainly, we agree that greater efforts to ensure meaningful access should be pursued. The Conference of State Court Administrators (COSCA) White Paper and the more recent Brennan Center for Justice report on court interpretation services have been our useful guides. We are also eagerly following the legislation proposed by Wisconsin Senator Herb Kohl that would authorize a federal grant program to support court interpreter efforts in the state courts. We are most interested in learning about innovative techniques that other states and the DOJ have used to reach their objectives and we welcome your help. Indiana is committed to having an open and accessible state court system, and any suggestions you provide will help us form the building blocks for the Indiana judiciary's own LEP plan that is targeted for development.

It is my hope that I have adequately addressed your inquiry. Thank you for the opportunity to respond.

Sincerely,



Lilia Judson

cc: Ms. Linda Quash