Justice Department Promotes Bad English in the Schools

by Hans Bader on September 28, 2011 · 1 comment

in Economy, Employment, Legal

"Facing a possible civil-rights lawsuit, Arizona has struck an agreement with federal officials to stop monitoring classrooms for mispronounced words and poor grammar from teachers of students still learning the English language. . .The state's agreement with the U.S. Departments of Justice and Education allows it to avoid further investigation and a possible federal civil-rights lawsuit," notes the *Arizona Republic*. As legal commentator Walter Olson notes, this is nutty, but it has the apparent support of the nation's largest teacher's union, the National Education Association, which passed a "resolution 'decrying disparate treatment on the basis of 'pronunciation' — quite a switch from the old days when teachers" were sticklers for correct pronunciation.

As I noted earlier, the Justice Department has gone even further in other cases, making the sweepingly overbroad and inaccurate claim that discrimination based on accent, pronunciation, or language is a form of racial or national origin discrimination. That argument ignores two federal appeals court rulings that rejected the idea that an employer's requirement that employees speak English on the job is illegal discrimination. (*See Garcia v. Spun Steak Co.* (1993) and *Garcia v. Gloor* (1980).) (When another federal agency, the EEOC, sues private employers for expecting their employees to speak a language their colleagues and supervisors can understand, it claims that the courts should ignore these prior appellate court rulings, and instead follow its own "national origin" guidelines, which treat English-only rules as a form of "national origin harassment" and racially "disparate impact." Amazingly, trial courts in Massachusetts and elsewhere have accepted this absurd argument, even though the Supreme Court long ago rejected the idea that EEOC guidelines supersede prior court decisions or have the force of law, as it made clear in rejecting EEOC guidelines in its decisions in *EEOC v. Arabian American Oil Co.* (1991) and *General Electric v. Gilbert* (1976).)

The Justice Department has overstepped its authority by promulgating "guidelines" requiring accommodation of non-English speakers under Title VI of the Civil Rights Act. The Justice Department guidelines suggest that recipients of federal funds, such as private health care providers, can be liable for "disparate impact" discrimination if they fail to provide translation services for just a single non-English speaker. Influenced by such guidelines, New York Lawyers for the Public Interest has demanded that drugstores hire bilingual interpreters.

But the Justice Department guidelines are legally flawed in two key respects. First, the Supreme Court cast doubt on whether "disparate impact" claims, which do not require a showing of discriminatory *intent*, are even valid under Title VI in *Alexander v. Sandoval*

(2001), which barred any damage claims or private lawsuits for "disparate impact" under Title VI. Second, it is blackletter law, under cases like *Coe v. Yellow Freight* (1981), that a claim of unintentional (or disparate impact) discrimination cannot be based on a practice's effect on *just one* minority group member in an establishment: there must be a large class of affected people at that establishment. Yet the Justice Department's guidelines suggest that a health care provider might be liable for not having a translator to accommodate each and every speaker of an obscure language like Hmong that did not even exist in written form until recently.

Even worse, the Education Department, where I used to work as a civil rights attorney, interprets Title VI to require that school districts translate all notices into every conceivable language spoken by even one student or parent using the school system, such as Hmong, and to ignore the cost of oral translations. That is contrary to basic principles of disparate-impact law, which recognize that high cost can be a defense (not even the Justice Department suggests that costs should be ignored), and that an institutional practice that inadvertently harms just a single minority group member is not illegal discrimination unless it systematically excludes members of that person's minority group.

It is unlikely that the Justice and Education Departments even care that their interpretation of federal civil-rights law is very suspect. The Justice Department has become more politicized under the Obama administration, as droves of left-wing ideologues have been hired; and the Education Department has recently shown contempt for federal court rulings limiting the reach of liability under civil-rights statutes like Title IX (and also contempt for civil liberties such as free speech, and limits on government power).

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