D.C. BAR COURTS, LAWYERS & THE ADMINISTRATION OF JUSTICE SECTION
STATEMENT OF SUPPORT
D.C. Council Bill B21-0066, "The Language Access for Education Amendment Act of 2015"

The views expressed herein represent only those of the Courts, Lawyers & the Administration of Justice Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors[1]

Statement to be filed with the Committee Director for the Committee on the Judiciary, District of Columbia Council.

The Section on Courts, Lawyers & the Administration of Justice supports the enactment of D.C. Council Bill 21-0066, "The Language Access for Education Amendment Act of 2015," which amends the District of Columbia Language Access Act of 2004 ("the Act"). One in twenty residents of the District over the age of five has limited or no English proficiency. [2] Two of three households with persons with limited or no English proficiency are "linguistically isolated," meaning that no one over the age of fourteen is proficient in English.[3] The Act counters the barriers to the receipt of governmental services that are critical to relieving the marginalization of these members of our community.

The Section endorses the passage of the Language Access for Education Amendment Act of 2015, as strengthening the District's obligations under the Act and under Title VI of the Civil Rights Act of 1964 to provide access to services without discrimination on the basis of national origin. This statement focuses on Section 4 of Bill 21-0066. Section 4 provides persons aggrieved by a violation of the Act with a private, de novo right of action in court. The section authorizes injunctive relief, compensatory damages, and payment of court costs and fees. The Section endorses the addition of a private right of action as consistent with the Section's mission to promote full access to justice through the courts and through administrative tribunals.

The Act requires twenty-six District agencies and entities whose activities involve significant public contact to provide meaningful access to their services and programs for persons with limited or no English proficiency. These agencies include providers of critical essential services, among them the D.C. Public Schools, the Department of Human Services, the Metropolitan Police Department, and Department of Consumer and Regulatory Affairs. [4] The mandated linguistic services include in-person interpretation, telephonic interpretation and translations of key documents. Enforcement of these obligations lies with the Office of Human Resources, which the Act charges with providing technical assistance and monitoring complaints about the availability of services.

To address deficiencies in the covered entities' performance of their obligations, the Act established a public complaint procedure, to be administered by the Office of Human Rights (OHR).[5] Under the Act, OHR holds primary responsibility for monitoring the compliance of covered agencies with the Act's requirements. OHR has issued final regulations which detail OHR's investigative and enforcement procedures, and add a right of administrative appeal through the Office of Administrative Hearings.[6]

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[1] The Steering Committee of the Section voted by e-mail on July 1, 2015 to adopt this statement, with 8 members of the Committee voting in support, 0 voting in opposition, and one recusal.
[2] District of Columbia, Office of Human Rights, LANGUAGE ACCESS IN THE DISTRICT: 2014 COMPLIANCE REVIEW 14-15 (2014).
[3] *Id.*
[4] D.C. CODE §2-1931 (3)(B)(2007)(listing the statutorily "'covered entities with major public contact"). Fifteen other agencies have been designated by regulation as "covered entities," including the Office of the Tenant Advocate, the Office of the State Superintendent of Education and the Office of Administrative Hearings. D.C.MUN.REGS.tit.4, §1206.2(b)(2014).
[5] D.C. CODE §§2-1935 (2007); D.C. MUN.REGS. tit. 4, §§ 1215-1225 (2014).
[6] D.C. MUN.REGS. tit.4, §1226 (2014). The regulations also preserve a complementary right of administrative action through mechanisms available under the D.C. Human Rights Act. D.C.MUN.REGS. tit.4, §1215.3 (2014).

The present system of adjudication of complaints through OHR is lacking for several reasons. The regulations give OHR six months to issue a finding of non-compliance, if appropriate, after an aggrieved person files a complaint. Within these six months, the Human Rights Director issues a preliminary order with a recommendation for corrective action. Multiple referrals and meetings occur, between the Language Access Director, the Director of OHR and OHR's General Counsel, and the respondent agency and the Director of OHR.[7] None of these processes is visible to the complainant. Remedies available to complainants through this process consist solely of the provision of the previously withheld services. The only mechanism available to OHR for enforcement of its recommendations is referral to the Office of the City Administrator, should an agency fail to comply. [8]

Reports by the D.C. Language Access Coalition and the Urban Institute note frustration with the intricacy, opacity and pace of this process. [9] OHR's own 2014 compliance report reinforces the impression that the process is cumbersome to use, with few complaints filed and too much potential for dismissal before review of the merits.[10] The Section agrees with the position that the burdensomeness and uncertain results of the current complaint procedure justify making alternatives available. The importance of the interests at stake for linguistically marginalized residents to secure full access to critical government services warrants a structure with sharper "teeth," and with more expansive remedies than the obligation to provide services that the agency was already derelict in its duty to provide. A private right of action will extend opportunities for meaningful redress and relief.

The Section thus supports the intent of the Bill to afford complainants a private right of action. The Section also recommends amendment of proposed Section 4 to clarify the intent to provide two distinct, independent paths to redress for violations of the Act: through administrative complaint or through litigation. In addition to providing a cause of action and remedies in litigation, Section 4 codifies OHR's current process of administrative review of complaints as established in regulations. The Bill does not require the complainant to exhaust that administrative remedy before she files suit for redress of a violation of the Act.

While the Section endorses the establishment of a private right of action, we urge re-writing of Section 4 to make clear that the administrative and litigative remedies are exclusive. In its current form, the description of the private right of action in court lies within Section 4(a)(1), a subsection of Section 4(a), which entitles a person to "…judicial review (sic) in the Office of Administrative Hearings." Relocating the private right of action into a separate subsection 4(b) would show that the right to action in court is distinct from the right to make an administrative complaint. Deletion of the word "judicial" from line 71 of the Bill would reduce some confusion, as the Office of Administrative Hearings does not provide "judicial review," as the provision is currently written.

The Section also recommends clarification of Section 5, the provision that creates a "Language Access Education and Awareness Fund," and introduces penalties for violations of the Act. Section 5(b)(1) imposes a civil penalty "…per pay period for each violation,…." The provision implies that the penalty is durational, increasing over the length of time that the agency fails to provide linguistic services. But the provision does not specify the time period for which the agency's failure will be penalized. Should penalties be assessed for each pay period starting from the first instance of withholding of services through resolution of the complaint? From the filing of the complaint through resolution? Adoption of the former will provide incentives for agencies to speed the provision of services, as the Bill allows complainants a year from the date of violation to file complaints.

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[7] D.C.MUN.REGS., tit.4, §1223.3 (2014).

[8] D.C.MUN.REGS. tit.4, §1223.4 (2014).

[9] D.C. Language Access Coalition, American University Immigrant Justice Clinic, ACCESS DENIED 38 (2012); Urban Institute, Hamutal Bernstein et al, TEN YEARS OF LANGUAGE ACCESS IN WASHINGTON, D.C. 29 (2014).

[10] Office of Human Rights, LANGUAGE ACCESS, *supra* note 2 at 6 (summarizing that of 17 complaints filed in 2014, eight were dismissed with four dismissed for inability to re-contact the complainant and two dismissed for insufficient information. Of the nine complaints docketed, OHR found non-compliance in six). The Report does not indicate whether the agencies found to have violated the Act complied with the relief that OHR ordered.

Bill 21-0066 makes other substantive amendments to the Act. These include the addition of the Council, the Executive Office of the Mayor, and local education agencies as "covered agencies with major public contact" and as such, subject to the full range of obligations under the Act; and the obligation of all covered entities to designate full time language access coordinators. The Section supports these provisions in total as fulfilling in total the District's obligations of inclusiveness and fairness to all residents.