

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<i>OMAR AGHAZADEH, et al.,</i>	)	
	)	
<i>Plaintiffs</i>	)	
	)	
<i>v.</i>	)	<i>Docket No. 98-421-P-C</i>
	)	
<i>MAINE MEDICAL CENTER,</i>	)	
	)	
<i>Defendant</i>	)	

***MEMORANDUM DECISION ON PLAINTIFFS’ MOTION TO EXCLUDE AND  
RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS***

The defendant, Maine Medical Center, moves to dismiss all five counts of the complaint in this putative class action arising from its alleged failure to provide adequate translation services for patients with limited English proficiency (“LEP”). Docket No. 16. The plaintiffs move to exclude certain allegedly immaterial and unsupported assertions from the defendant’s motion. Docket No. 20. I deny the motion to exclude and recommend that the court grant the motion to dismiss in part and deny it in part.

**I. Applicable Legal Standard**

The motion is based on an alleged failure to state a claim upon which relief may be granted, a ground that invokes Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184,

187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

## II. Factual Background

Five plaintiffs are named in the third amended complaint. The following allegations in the third amended complaint are relevant to the court’s consideration of the motion to dismiss. Plaintiff Omar Aghazadeh, whose primary language is Farsi, has LEP. Third Amended Complaint (Docket No. 33) ¶ 5. Plaintiff Maria Herrera, the only named plaintiff who is not a resident of Portland, Maine, is a resident of New Jersey who has LEP and whose primary language is Spanish. *Id.* ¶ 6. Plaintiff Azardokht Ariania, whose primary language is Farsi, was born in Iran and has LEP. *Id.* ¶ 7. Plaintiff Tahereh Khansari Nejad, who is the minor child of Ariania and whose primary language is Farsi, was born in Iran and has LEP. *Id.* ¶ 8. Plaintiff Jorge Abiague, whose primary language is Spanish, is a native of Cuba who has LEP. *Id.* ¶ 9.

Maine Medical Center is a private acute care hospital licensed and operating under the laws of the State of Maine. *Id.* ¶ 10. It receives federal financial assistance known as Hill-Burton construction or modernization grants, Medicare and Medicaid. *Id.* ¶ 12. The plaintiffs claim that they have suffered delays in and denials of medical care because the defendant did not provide services in their primary languages. *Id.* ¶ 17. They further contend that the defendant’s policies and practices with regard to providing interpreters for persons with LEP discriminate against them on the basis of race, color, ancestry or national origin. *Id.* ¶ 20.

Specifically, the third amended complaint charges that the defendant has violated 42 U.S.C. § 2000d (“Title VI”) and its implementing regulations, 45 C.F.R. § 80 *et seq.* (Count I); violated 42 U.S.C. §§ 291c and 300s-1 (the “Hill-Burton Act”) and their implementing regulations, 42 C.F.R. § 124.601 *et seq.* (Count II); breached a contract between the defendant and the Office of Civil Rights of the United States Department of Health and Human Services of which the plaintiffs are third-party beneficiaries (Count III); violated 42 U.S.C. § 1981 (Count IV); and violated the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* (Count V).

### **III. Discussion**

#### **A. Title VI (Count I)**

The defendant contends that the plaintiffs have failed to state a claim upon which relief may be granted under 42 U.S.C. § 2000d and 45 C.F.R. § 80 *et seq.* because neither “mandate[s] the kind of expansive and comprehensive language assistance contemplated here.” Motion to Dismiss Complaint and Incorporated Memorandum of Law (“Motion to Dismiss”) (Docket No. 16) at 3. The statute at issue provides, in its entirety:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. The defendant argues that no actionable claim has been stated because the complaint does not allege that the defendant discriminated intentionally against any of the plaintiffs on the basis of his or her race, color or national origin and it does not even allege the race or national

origin of any of the plaintiffs.<sup>1</sup> Motion to Dismiss at 4. Section 2000d only prohibits intentional discrimination, not actions that have a disparate impact. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-11 (opinion of Powell, J., joined by Burger, C.J. and Rehnquist, J.), 612 (opinion of O'Connor, J.), 641-42 (opinion of Stevens, J., joined by Brennan and Blackmun, JJ.) (1983). The defendant urges the court to conclude that neither LEP nor the speaking of a particular primary language other than English is a sufficient proxy for race or national origin within the scope of section 2000d. Motion to Dismiss at 4-5.

In response, the plaintiffs rely on *Lau v. Nichols*, 414 U.S. 563 (1974), and the following regulations issued by the Department of Health, Education and Welfare (now the Department of Health and Human Services), which include a disparate-impact standard, in accordance with Title VI's delegation to federal agencies of the authority to promulgate regulations incorporating such a standard. *Guardians Ass'n*, 463 U.S. at 584 n.2 (opinion of White, J.), 623 n.15 (opinion of Marshall, J.), 643 (opinion of Stevens, J., joined by Brennan and Blackmun, JJ.). *See also Latinos Unidos de Chelsea en Accion v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 785 n.20 (1st Cir. 1986).

*Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

- (i) Deny an individual any service, financial aid, or other benefit provided under the program;
- (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that

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<sup>1</sup> After the defendant filed this motion, the plaintiffs were allowed to amend the second amended complaint, *inter alia*, to add three additional named plaintiffs. Motion to Join Parties and Second Motion to Amend Complaint (Docket No. 31). The third amended complaint includes allegations that two of these added plaintiffs were born in Iran and that the third is a "native of Cuba." Third Amended Complaint ¶¶ 7-9.

provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program . . . .

(2) A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

\* \* \*

(5) The enumeration of specific forms of prohibited discrimination in this paragraph . . . does not limit the generality of the prohibition in paragraph (a) of this section [which repeats the statutory language].

45 C.F.R. § 80.3(b).

The defendant correctly points out that discrimination on the basis of a primary language other than English is not prohibited by either section 2000d or the implementing regulations. However, its subsequent assertion that the speaking of a language other than English as a primary language may not serve as an indicator of race or national origin for the purpose of pleading a cause of action under the statute or the regulations does not necessarily follow. Here, the national origin of three of the named plaintiffs has been specified in the complaint, and it is reasonable to infer that Farsi is the primary language of Iran and Spanish the primary language of Cuba. Discrimination against an individual because she speaks Farsi, for example, could be considered discrimination on the basis of her national origin.

Courts have differed on the question whether language may serve as an indicator of race or national origin for purposes of actions alleging violation of statutes prohibiting discrimination on these bases. The plaintiffs rely on a sentence from the plurality opinion in *Hernandez v. New York*, 500 U.S. 352, 371 (1991): “It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.” Aside from the fact that the instant case does not raise an equal protection claim, the statement is so qualified that it would provide little help to the plaintiffs here even if it had been adopted by more than four of the nine members of the Supreme Court who heard the case. *See* 500 U.S. at 375 (O’Connor, J., concurring, joined by Scalia, J.; apparently rejecting conclusion that prosecutor’s professed concern in striking Hispanic jurors — that they would be unable to accept the official translation of trial testimony — should be treated as surrogate for race as basis of strikes).

In dealing with an equal-protection challenge to a state constitutional article providing that the state and its political subdivisions must act only in English, the Ninth Circuit observed that “language is a close and meaningful proxy for national origin.” *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995), *vacated on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In a case alleging employment discrimination under Title VII, the Ninth Circuit also noted that “[a]ccent and national origin are obviously inextricably intertwined,” *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 601 (1993)<sup>2</sup> (*quoting Fragante v.*

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<sup>2</sup> *See* 29 C.F.R. §1606.1, defining “national origin discrimination” for purposes of Title VII claims before the Equal Employment Opportunity Commission “as including, but not limited to, the denial of equal employment opportunity because . . . an individual has the physical, cultural or linguistic characteristics of a national origin group.”

*City & County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989)), holding that consideration of accent if the accent does not interfere with the employee’s ability to communicate is “illegitimate and discriminatory” on the basis of national origin. In *Asian Am. Bus. Group v. City of Pomona*, 716 F. Supp. 1328 (C.D.Cal. 1989), the court found that an ordinance requiring commercial signs to devote one-half their advertising space to English alphabetical characters when foreign alphabetical characters are used constituted discrimination based on national origin, upholding an equal-protection challenge. *Id.* at 1329, 1332.

On the other hand, the Fifth Circuit held in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), that “we do not think it can seriously be asserted that [a] program [of allegedly inadequate bilingual education in a Texas public school] was intended or designed to discriminate against Mexican-American students” in violation of Title VI. *Id.* at 1007. In *Franklin v. District of Columbia*, 960 F. Supp. 394 (D.D.C. 1997), *rev’d on other grounds*, 163 F.3d 625 (D.C.Cir. 1998), the court found after trial that the plaintiffs were not entitled to relief on their Title VI claims because

the LEP Hispanic inmates are not being barred from participation in prison programs because of their race, color or national origin. While the programs are open to all inmates, limited-English proficient inmates’ participation is limited only by their English fluency.

*Id.* at 432. And in *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), the court held that “[l]anguage, by itself, does not identify members of a suspect class” for purposes of equal protection analysis, in an action challenging the failure of a government agency to provide forms and services in Spanish. *Id.* at 41.

Both of the cases dealing with Title VI claims discussed above were decided after the facts had been developed and presented to the court. Some of the other cases may have been decided on

motions to dismiss, but in each of those cases Title VI was not at issue. Constitutional claims have their own unique substantive requirements. Here, on balance, I conclude that the plaintiffs' claims under Title VI are not subject to dismissal to the extent that alleged discrimination due to lack of English proficiency is used as a proxy for national-origin discrimination.

The defendant next contends that the complaint fails to allege intentional discrimination. In the equal-protection context, the Supreme Court discussed intent in the following manner:

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.

*Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). The Court also described the nature of the required proof of discriminatory intent.

Proof of discriminatory intent must necessarily usually rely on objective factors . . . . The inquiry is practical. What a legislature or any official entity is “up to” may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, “the give and take of the situation.”

*Id.* n.24 (citations omitted). These definitions relate more to the proof of the plaintiffs' allegations than they do to the sufficiency of those allegations in the pleadings, however. The third amended complaint alleges intentional discrimination. Third Amended Complaint ¶¶ 16, 45, 47. The allegations on this point are brief and conclusory. Coupled with the allegations of specific failures in services provided to the named plaintiffs, from which intent to discriminate could possibly be inferred, however, the third amended complaint appears to offer minimal but adequate allegations

of intentional conduct to survive a motion to dismiss this aspect of the Title VI claim.<sup>3</sup>

The defendant next argues that the plaintiffs have not sufficiently pleaded a violation of the Title VI regulations. In support of this argument the defendant first asserts that the regulations at issue “do not require LEP assistance.” Motion to Dismiss at 8. However, the fact that the regulations do not specifically require the particular relief that the plaintiffs seek does not mean that the regulations cannot be violated by the absence of such assistance. The law does not require that government regulations anticipate every possible factual situation to which they might be applied. In a similar vein, the fact that other regulations specifically require certain forms of assistance and services for the hearing-impaired does not mean that the absence of a requirement of LEP services from the regulations at issue must be interpreted to mean that such services cannot be required by those regulations. *See generally School Bd. of Nassau County v. Arline*, 480 U.S. 273, 280-86 & n.15 (1987) (fact that statute does not specify plaintiff’s condition as disability does not mean that it cannot be considered as a disability within the scope of the statute). More to the point is the defendant’s argument that a regulation specific to LEP was proposed by the Department of Health and Human Services in 1991, National Origin Discrimination in Programs Receiving Federal Financial Assistance from the DHHS Against Persons of Limited English Proficiency, 56 Fed. Reg.

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<sup>3</sup> The plaintiffs assert in the course of their argument on the issue of the sufficiency of their pleadings with respect to intentional discrimination that they “should be allowed to proceed to discovery to develop the particulars of their intentional discrimination claim.” Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Objection to Defendant’s Second Motion to Dismiss Complaint (“Plaintiffs’ Memorandum”) (Docket No. 19) at 12. Later, discussing Count IV, they contend that “it would be premature to dismiss this claim now” because proof of the assertions at issue involves finding of fact. *Id.* at 28. Both of these statements appear to be based on a misunderstanding of the nature of a motion to dismiss. Such a motion tests the sufficiency of the pleadings, not whether the plaintiff can improve the pleadings after discovery or whether the plaintiff is likely to be able to prove what is alleged. *See Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

53277 (1991) (to be codified at 45 C.F.R. pt. 80) (proposed December 1991), but has not yet been adopted. Motion to Dismiss at 10. The defendant does not rely upon this sequence of events to argue that the existing regulations could not encompass LEP services, however, but rather uses it to support an argument that such services may only be required when a substantial non-English language group is present in the service area of the institution receiving federal funds. Motion to Dismiss at 10-11. As discussed below, that argument can only be developed on summary judgment and does not present grounds for dismissal. Interpreting the allegations of the third amended complaint in a manner favorable to the plaintiffs, I conclude that they have sufficiently pleaded one or more violations of the regulations quoted above.

The defendant argues vigorously that both *Lau* and regulations promulgated by the Department of Justice require that a Title VI plaintiff demonstrate that the alleged discrimination affects a substantial minority population, rather than individuals each of whom speaks a different language. The regulation upon which the defendant relies is entitled “Public dissemination of Title VI information” and provides, in relevant part:

Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program . . . needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

28 C.F.R. § 42.405(d)(1). The defendant also relies on Justice Blackmun’s concurrence in *Lau*, in which the Supreme Court found a violation of Title VI in the failure of the San Francisco school system to provide English-language instruction to 1,800 students of Chinese ancestry who did not

speak English, 414 U.S. at 564, 566-68, in which he cautioned that the judgment should not be interpreted too broadly, emphasized that the case presented “a very substantial group” that was deprived of schooling, and observed that “[f]or me, numbers are at the heart of this case,” *id.* at 571-72. The defendants also cite language in subsequent opinions of the Supreme Court and other federal courts questioning whether *Lau* remains valid, but the case has not been overruled.

Both the *Lau* concurrence and the Department of Justice regulation raise questions that must be resolved before the court can determine whether these plaintiffs can meet or have met their burden of proof. However, neither imposes a pleading requirement. From the facts pleaded in the third amended complaint, it does not appear to a certainty that the plaintiffs will be unable to recover under any set of facts. The plaintiffs may be able to prove that they belong to one or more “substantial groups” of LEP individuals with a common race or national origin in the defendant’s service area, if such proof is required. The language of the third amended complaint certainly does not preclude them from doing so. The defendant offers documentary evidence that it contends proves that the plaintiffs will not be able to do so. Such evidence, and such contentions, are appropriate in the context of a motion for summary judgment but may not be considered in connection with a motion to dismiss under Rule 12(b)(6). The parties have not asked that the pending motion to dismiss be considered as a motion for summary judgment under Rule 56, and I do not consider it appropriate for the court to do so on its own under the circumstances.<sup>4</sup>

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<sup>4</sup> It is for this reason that I deny the plaintiffs’ Second Motion to Exclude Immaterial and Unsupported Assertions from Defendant’s Second Motion to Dismiss Complaint (Docket No. 20), to the extent that it does identify material included in the defendant’s submissions the consideration of which by the court would transform the motion to dismiss into a motion for summary judgment pursuant to Rule 12(b). Of the “unsupported assertions” identified in Exhibit A to the plaintiffs’ motion, the first two are merely argument and not subject to exclusion in any event. The remainder  
(continued...)

Finally, the defendant argues that the fact that it has an LEP policy means that the plaintiffs are only raising a claim that it has failed to implement that policy fully, and that such a failure cannot, as a matter of law, constitute intentional discrimination. Reply Brief of Defendant in Support of Motion to Dismiss (“Defendant’s Reply”) (Docket No. 23) at 3-4. This argument would apply only to the claim of a statutory violation raised in Count I and not to the claim of violation of the implementing regulations, for the reasons already discussed. However, I am unable to locate in either the second amended complaint, to which the defendant’s motion refers, or the third amended complaint any allegation that the defendant has an “LEP policy.” Both versions of the complaint refer to the 1991 voluntary compliance agreement between the defendant and the Office for Civil Rights (“OCR”) of the Department of Health and Human Services, but there is no allegation that this agreement constitutes an LEP policy of the defendant or that any such policy was in effect at the time of the incidents alleged by the plaintiffs to have given rise to this action. The plaintiffs certainly allege that the defendant has failed to carry out its obligations under this agreement, but that is not the same as a failure to implement fully a policy applicable to the factual circumstances set forth in the complaint and adopted by the defendant on its own, which is the situation present in the case law cited by the defendant. The defendant’s citation to an appellate court’s finding that “there was no proof” of intentional discrimination presented at trial, Defendant’s Reply at 4, is not particularly helpful in determining whether a cause of action is sufficiently pleaded in the complaint, as distinct

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<sup>4</sup>(...continued)

are factual assertions that require consideration of material outside the pleadings. Because consideration of this motion to dismiss will not be expanded into a consideration of possible summary judgment, the court will not consider these assertions. Accordingly, there is no need to determine whether the assertions are “immaterial and unsupported” and no need to strike them from the record.

from the issues before a court that is considering a motion for summary judgment.

The defendant is not entitled to dismissal of Count I.

### **B. The Hill-Burton Act (Count II)**

Count II of the third amended complaint alleges violations of the Hill-Burton Act. The plaintiff's memorandum specifies the violated provisions as 42 U.S.C. §§ 291c(e) and 300s-1(b)(1)(K), and its implementing regulations, specifically 42 C.F.R. §§ 124.601, 124.603(d), 124.604(a) and 124.605(a).<sup>5</sup> Plaintiff's Memorandum at 20-22. The defendant contends that neither the statutes nor the regulations impose an obligation upon a recipient of funds to provide LEP services.

The statutes cited by the plaintiffs provide as follows:

The Surgeon General, with the approval of the Federal Hospital Council and the Secretary of Health and Human Services, shall by general regulations prescribe —

\* \* \*

that the State plan shall provide for adequate hospitals, and other facilities for which aid under this part is available, for all persons residing in the State, and adequate hospitals (and such other facilities) to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant; and (2) there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial viewpoint.

42 U.S.C. § 291c(e).

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<sup>5</sup> The plaintiffs also cite 42 C.F.R. §§ 124.601(a) and 124.603(e), Plaintiffs' Memorandum at 20, 23, which do not exist.

An application for a medical facilities project shall be submitted in such form and manner as the Secretary shall by regulation prescribe and shall . . . set forth —

\* \* \*

reasonable assurance that at all times after such application is approved (i) the facility or portion thereof to be constructed, modernized, or converted will be made available to all persons residing or employed in the area served by the facility, and (ii) there will be made available in the facility or portion thereof to be constructed, modernized, or converted a reasonable volume of services to persons unable to pay therefor and the Secretary, in determining the reasonableness of the volume of services provided, shall take into consideration the extent to which compliance is feasible from a financial viewpoint.

42 U.S.C. § 300s-1(b)(1)(K).<sup>6</sup>

The regulations upon which the plaintiffs rely are set forth in relevant part below. Section 124.605(a) concerns the filing by the recipient hospital of reports with the secretary of Health and Human Services and does not appear to be implicated by any allegation in the third amended complaint; accordingly, it will not be set forth here and will not be discussed further in this recommended decision. The other regulations follow.

The provisions of this subpart apply to any recipient of Federal assistance under title VI . . . of the Public Health Service Act that has given an assurance that it would make the facility or portion thereof assisted available to all persons residing . . . in the territorial area it serves. This assurance is referred to in this subpart as the “community service assurance.”

42 C.F.R. § 124.601.

*Exclusionary admissions policies.* A facility is out of compliance

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<sup>6</sup> On their faces, neither statutory provision appears to provide a private cause of action for enforcement; the former only prescribes the requirements for state hospital plans and the latter only prescribes the content of applications for federal funding. However, the courts have found a private cause of action under both statutes, at least as to the assurance that a recipient hospital will provide free care. *E.g., White v. Moses Taylor Hosp.*, 763 F. Supp. 776, 781-84 (M.D.Pa. 1991); *Saine v. Hospital Auth. of Hall County*, 502 F.2d 1033, 1034 (5th Cir. 1974).

with its community service assurance if it uses an admission policy that has the effect of excluding persons on a ground other than those permitted under paragraph (a) of this section. . . .

42 C.F.R. § 124.603(d).

The facility shall post notices, which the Secretary supplies in English and Spanish, in appropriate areas of the facility, including but not limited to the admissions area, the business office and the emergency room.

42 C.F.R. § 124.604(a). It is apparent from the specific quotations included in the plaintiffs' memorandum that they also mean to invoke the following regulation, for which they have provided an incorrect citation:

In order to comply with its community service assurance, a facility shall make the services provided in the facility or portion thereof constructed, modernized, or converted with Federal assistance under Title VI . . . of the Act available to all persons residing . . . in the facility's service area without discrimination on the ground of race, color, national origin, creed, or any other ground unrelated to an individual's need for the service or the availability of the needed service in the facility.

42 C.F.R. § 124.603(a)(1).

The defendant relies on *Metropolitan Med. Ctr. & Extended Care Facility v. Harris*, 693 F.2d 775 (8th Cir. 1982), to support its argument that the Hill-Burton Act does not impose any specific requirements upon a recipient hospital other than a non-discriminatory admissions policy. Motion to Dismiss at 17. In that case, the hospital sought reimbursement under the Medicare program for free care and community services that it had provided in accordance with the Hill-Burton Act. 693 F.2d at 778. In response to the hospital's argument that the Hill-Burton Act "mandated" the expenditures for outreach programs for the elderly for which it sought reimbursement, the Eighth Circuit held that the Hill-Burton community service requirement "is a nondiscrimination provision which does not impose a duty upon hospitals to make any specific expenditures." *Id.* at 786-88.

The facts underlying the *Harris* case make the general language from the opinion cited by the defendant of little value here, where the plaintiffs charge that the defendant violated its community service assurances by acting in a manner that had the effect of denying services to certain individuals based on their national origin, or some other factor not related to those individuals' need for services. The Hill-Burton Act may not prescribe the method by which the defendant should fulfill its obligation, regardless of the expenditure entailed, if any, but it may well require that the defendant not act in ways that cause potential patients to be denied service due to their national origin or some other factor within the scope of the applicable regulations.

On balance, I conclude that the third amended complaint, interpreted to extend every reasonable inference to the plaintiffs, sufficiently alleges that the defendant has not made its facilities available to all persons residing in its service area without discrimination based on national origin. That is sufficient to allege a violation of the Hill-Burton Act.

### **C. Breach of Contract (Count III)**

In Count III of the third amended complaint the plaintiffs allege that the defendant has breached the 1991 voluntary compliance agreement between itself and OCR and that the plaintiffs may seek damages for this breach as third-party beneficiaries of the agreement, a copy of which is attached to the motion to dismiss. The defendant seeks dismissal of this count on the ground that the plaintiffs lack standing to sue as third-party beneficiaries. The First Circuit has observed that

[b]ecause third-party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to nonsignatories, a person aspiring to such status must show with special clarity that the contracting parties intended to confer a benefit on him.

*McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) (citations omitted).

A breach-of-contract claim is a state-law claim. *E.g., Ramsdell v. Bowles*, 64 F.3d 5, 10 (1st Cir. 1995) (applying Maine law). The parties do not suggest that any state law other than that of Maine should apply to the contract at issue here. In order to be able to sue for breach as the third-party beneficiary of a contract under Maine law, it is not enough for a plaintiff to show that he or she benefitted from the contract; there must be evidence of a “clear and definite” intent on the promisee’s part that the plaintiff receive an enforceable benefit under the contract. *Fleet Bank of Maine v. Harriman*, 721 A.2d 658, 660 (Me. 1998); *Ramsdell*, 64 F.3d at 10. “The intent must be clear and definite, whether it is expressed in the contract itself or in the circumstances surrounding its execution.” *Devine v. Roche Biomedical Labs.*, 659 A.2d 868, 870 (Me. 1995).

The plaintiffs identify the following language from the agreement as providing the necessary clear expression of intent:

When so advised [that OCR was likely to find its policies and practices as to communication with LEP persons in violation of 42 C.F.R. § 124.603(a) and 45 C.F.R. §§ 80.3(b) & 80.6(d)], the Hospital indicated its desire . . . to reach an agreement with OCR on the steps it would take to establish effective procedures for communication with LEP persons, in order to provide equal, non-discriminatory services to all residents of its service area.

\* \* \*

Maine Medical Center (Hospital) recognizes the special needs and concerns of individuals who are members of linguistic and cultural minority groups and have limited English proficiency (LEP). Availability of interpreters is necessary to provide LEP persons equal access to Hospital services. Accordingly, it is Hospital policy to maintain a system reasonably designed to provide staff with access to interpreter services 24 hours per day, seven days per week. Interpreters should be used for face-to-face, telephone and written communication with LEP persons.

Voluntary Compliance Agreement between Office for Civil Rights, U. S. Department of Health and Human Services, Region I, and Maine Medical Center, Portland, Maine, Docket No. 01-89-3040

(copy attached to Motion to Dismiss), § I.4 and Exhibit A thereto at ¶1<sup>7</sup>; Plaintiffs' Memorandum at 26.

Neither of these paragraphs indicates a clear and definite intent to confer upon the plaintiffs in this case an enforceable right. *See generally* Restatement (Second) of Contracts § 302 (1981), adopted by the Maine Law Court in *Denman v. Peoples Heritage Bank, Inc.*, 704 A.2d 411, 414 (Me. 1998). If the plaintiffs mean to rely on the alternative source of evidence of intent, the Law Court has also established a clear standard for that circumstance.

In the absence of contract language, there must be circumstances that indicate with clarity and definiteness that [the promisee] intended to give [the plaintiff] an enforceable benefit under the contract. In assessing the relevant circumstances, courts must be careful to distinguish between the consequences to a third party of a contract breach and the intent of a promisee to give a third party who might be affected by that contract breach the right to enforce performance under the contract. If consequences become the focus of the analysis, the distinction between an incidental beneficiary and an intended beneficiary becomes obscured. Instead, the focus must be on the nature of the contract itself to determine if the contract necessarily implies an intent on the part of the promisee to give an enforceable benefit to a third party.

*Devine*, 659 A.2d at 870. In this case, there is no such necessary implication. Indeed, the agreement specifies, under the heading "Enforcement of Compliance with Agreement," that OCR may pursue administrative or judicial enforcement and describes the procedural framework for enforcement. Voluntary Compliance Agreement § II.6. There is no mention in the agreement of enforcement by any other agency or individual. It is quite possible that attempted enforcement by LEP individuals

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<sup>7</sup> The copy of Exhibit A that has been provided to the court is unsigned and undated, although it includes blank spaces for the date and the signature of the defendant's president on its second and final page. The Voluntary Compliance Agreement, the copy of which that has been submitted to the court is fully executed and dated, incorporates Exhibit A by reference. Voluntary Compliance Agreement § III.1.

would interfere with OCR enforcement of the agreement. In any event, neither the language of the agreement itself nor the circumstances surrounding its execution, as pleaded in the third amended complaint, meet the standard for third-party beneficiary status under Maine law.

The defendant is entitled to dismissal of Count III.

#### **D. 42 U.S.C. § 1981 (Count IV)**

The defendant seeks dismissal of Count IV on the grounds that the complaint fails to allege intentional discrimination on the basis of race and that it fails to allege the necessary contractual relationship upon which liability under 42 U.S.C. § 1981 is based. The statute at issue provides:

**(a) Statement of equal rights**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

**(b) “Make and enforce contracts” defined**

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

**(c) Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

This court has stated the traditional interpretation of section 1981. “Section 1981 of Title 42 prohibits purposeful racial discrimination in the formation and enforcement of contracts.” *Benjamin v. Aroostook Med. Ctr.*, 937 F. Supp. 957, 971 (D. Me. 1996). Section 1981 reaches only

purposeful discrimination. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982). I have already concluded, for purposes of the Title VI claim raised in Count I, that the third amended complaint includes sufficient allegations of intentional discrimination and, accordingly, will not address that issue further in this context.

Racial discrimination actionable under section 1981 has been further defined by the Supreme Court as follows:

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. . . . If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

*Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). The defendant correctly points out that the race of the named plaintiffs is not pleaded in the third amended complaint. There are no allegations of ancestry or ethnic characteristics. The third amended complaint does allege the country of birth or “native” country of each of the plaintiffs, but nothing more that might meet the *Saint Francis College* definition.

The plaintiffs instead argue that their proficiency in Farsi and Spanish may be considered synonymous with ethnicity. Plaintiffs’ Memorandum at 29. This is a more difficult connection to make than that between language and national origin that was discussed earlier in connection with Title VI. Before *Saint Francis College*, a few federal district courts, the reported decisions of two of which are cited by the plaintiffs, held that section 1981 reaches discrimination based on national

origin, but the plaintiffs have cited no reported decisions in which courts have done so since, nor would any federal court be likely to do so.<sup>8</sup>

The third amended complaint does allege that the defendant's challenged practices and policies discriminate against the plaintiffs on the basis of race. Third Amended Complaint ¶ 20. At least one court has found this sufficient to state a claim under section 1981. *Chandoke v. Anheuser-Busch, Inc.*, 843 F. Supp. 16, 19 (D.N.J. 1994). *Cf. Zapata v. IBP, Inc.*, 162 F.R.D. 359, 360 (D.Kan. 1995) (denying untimely motion to amend complaint alleging violation of section 1981 by discrimination based on national origin as Mexican or Mexican-American to allege discrimination based on race as Mexican or Mexican-American). On balance, while the factual allegations included in the third amended complaint to support the alleged claim of discrimination based on race are minimal, I cannot conclude that the issue of ethnicity has not been raised. *See Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1218 (5th Cir. 1987). This conclusion is not based merely on

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<sup>8</sup> In addition to the pre-*Saint Francis College* case law, the plaintiffs contend that *dicta* in two Supreme Court cases, *Castaneda v. Partida*, 430 U.S. 482, 486 n.5 (1977), and *Hernandez*, 500 U.S. at 371, support the use of foreign language proficiency as a proxy for race. Plaintiffs' Memorandum at 29. In fact, neither case does so. In addition to the facts that neither case involves § 1981 and that *Castaneda* predates *Saint Francis College*, the plaintiff in *Castaneda* testified concerning discrimination against Mexican-Americans as a race or ethnic group, and the court used statistics concerning persons both with Spanish surnames and with Spanish as their mother tongue as the only available means to approximate the Mexican-American population in the area from which the grand jury at issue was drawn. 430 U.S. at 483-86 & n.5. The Court did not equate speaking Spanish alone with Mexican-American ethnicity, nor did it suggest that its case-specific methods could or should be used for other purposes. In *Hernandez* the Court stated that, under certain limited circumstances, it "may well be . . . that proficiency in a certain language . . . should be treated as a surrogate for race under an equal protection analysis," but immediately pointed out that such a case was not before it. 500 U.S. at 371-72. Accordingly, that *dictum* has little or no precedential value even for the analysis of equal protection claims. The plaintiffs here have not alleged that there is anything about the community in which the defendant is located or the unidentified ethnic groups to which they may belong, *id.* at 371, that should cause this court to apply that *dictum* to this § 1981 claim.

the allegations of language proficiency but also on the allegations of place of birth of the named plaintiffs, from which may, given the generous interpretation in the plaintiffs' favor required at this stage of the proceedings, be drawn inferences as to ancestry or ethnicity.

The defendant correctly points out that the voluntary compliance agreement between it and OCR cannot serve as the affected contract for purposes of the plaintiffs' section 1981 claim. However, that is not the only contract alleged in the third amended complaint. The creation of a contract between the defendant and each plaintiff when medical services were provided is also alleged. Third Amended Complaint ¶ 38. The defendant has not suggested that no such contract could exist as a matter of law, nor could it so argue. *See, e.g.*, 24 M.R.S.A. § 2502(2) & (6) (action for professional negligence against health care provider, including hospital, may be based upon tort or breach of contract). The third amended complaint sufficiently alleges the contract element of a section 1981 claim.

Accordingly, the defendant is not entitled to dismissal of Count IV.

#### **E. Maine Human Rights Act (Count V)**

Count V of the third amended complaint alleges that the defendant has violated the Maine Human Rights Act (the "Act"), 5 M.R.S.A. § 4591, by discriminating against the plaintiffs on the basis of race, color or national origin. Third Amended Complaint ¶ 58. The defendant seeks dismissal of this count because the Act cannot be interpreted "to require public accommodations to provide LEP individuals with translation services." Motion to Dismiss at 26. The defendant also seeks dismissal of the claims of plaintiff Herrera under the Act as barred by the Act's statute of limitations, 5 M.R.S.A. § 4613(2)(C). *Id.* at 28.

The plaintiffs do not respond to the defendant's argument concerning Herrera. The third

amended complaint alleges that she was admitted to the defendant's emergency room on July 22, 1996 and hospitalized for approximately two weeks. Third Amended Complaint ¶ 41 at 13. The initial complaint in this action was filed on December 10, 1998. The Act provides that any action filed under the Act "shall be commenced not more than 2 years after the act of unlawful discrimination complained of." 5 M.R.S.A. § 4613(2)(C). Herrera's claim is barred by this statute and the defendant is entitled to dismissal of Count V to the extent that it is based on any alleged act of discrimination against Herrera.

The Act includes the following relevant provisions:

The opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, physical or mental disability, religion, ancestry or national origin is recognized as and declared to be a civil right.

5 M.R.S.A. § 4591.

It is unlawful public accommodations discrimination, in violation of this Act:

**1. Denial of public accommodations.** For any public accommodation . . . to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S.A. § 4592. A "place of public accommodation" is defined under the Act to include a hospital. 5 M.R.S.A. § 4553(8)(F).

The third amended complaint appears on its face to allege a violation of section 4592. Third Amended Complaint ¶¶ 11, 20-21, 47, 58. The defendant contends that it does not because the relief

sought by the plaintiffs, which it posits as requiring places of public accommodation to make “special arrangements to serve members of minority groups,” Motion to Dismiss at 27, is not available under the Act with the exception of specific accommodations required for individuals with physical or mental disabilities. The defendant cites 5 M.R.S.A. § 4592(1) in support of this argument. *Id.* While it is certainly true that subsection (1) of section 4592 sets forth, *inter alia*, certain failures to make accommodations to meet the needs of individuals with disabilities that constitute unlawful discrimination, the statute also makes clear that unlawful discrimination “*also includes, but is not limited to*” these specific accommodations. 5 M.R.S.A. § 4592(1) (emphasis added). There is no sense in which the listing of these actions precludes any other form of relief for those subjected to any other form of discrimination covered by the Act. While the provision by a hospital of interpreters for any primary language other than English spoken by any individual who happens to seek services may well be beyond the scope of the relief contemplated by the Act, that is a matter for case-by-case determination after the issue is joined. It is not a determination to be made in the context of a motion to dismiss, where the issue is only whether the complaint states a claim under the express terms of the statute. *See* 5 M.R.S.A. § 4613(2)(B) (listing some of the remedies available under the Act). Indeed, in *Maine Human Rights Comm’n v. City of South Portland*, 508 A.2d 948 (Me. 1986), the only “public accommodations” case in which the Maine Law Court has to date reported a decision under the Act, the court, in the course of discussing a claim based on alleged discrimination due to physical disability, emphasized the flexibility inherent in the Act’s statement of purpose found in section 4591. *Id.* at 954-55. The court endorsed the Maine Human Rights Commission’s position that reasonable accommodations are to be made where they can be made without undue hardship. *Id.* at 955. The specter raised by the defendant of a

requirement that all places of public accommodation provide interpreters to all comers if the plaintiffs are allowed to proceed with Count V in this case, Motion to Dismiss at 27, is simply not supported by the Law Court's interpretations of the Act to date. In addition, of course, there is also the possibility that the plaintiffs may not prevail on this claim.

The defendants are not entitled to dismissal of Count V.

### **F. Damages**

Finally, the defendant asks this court to dismiss any claims for compensatory or punitive damages on Counts I, II, III and V. The plaintiffs agree that their claims in Counts II and V are limited to "prospective, injunctive relief." Plaintiffs' Memorandum at 35 n.13. The parties' submissions on this issue are cursory. Neither addresses the availability of damages on Count III, so I will not consider the availability of damages on that claim.

With respect to Count I, the defendant confines its argument to the assertion that compensatory damages are not available on Title VI claims that do not involve intentional discrimination. Motion to Dismiss at 28-29; Defendant's Reply at 5-6. This contention appears to be correct. *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989, 1998 (1998). However, I have concluded that the third amended complaint adequately alleges intentional discrimination under Title VI. If the court adopts my recommendation, this point is moot.

With respect to Count II, the defendant contends that compensatory and punitive damages are not available under the Hill-Burton Act because the claim is essentially one for breach of contract. Motion to Dismiss at 29. The plaintiffs do not respond to this argument, and the defendant does not cite any supporting case law on point. The defendant cites an opinion of the Maine Law Court in support of its position, *id.*, but federal law governs the availability of damages on claims

based on federal statute. *White*, 763 F. Supp. at 792 n.29. The third amended complaint does not allege facts that would demonstrate that the defendant acted with malicious or evil intent or with reckless of callous indifference to the plaintiffs' rights under the Hill-Burton Act. Accordingly, punitive damages are not available on Count II. *Id.* at 792. I am not convinced that a private cause of action under the Hill-Burton Act sounds only in breach of contract, particularly since the action is one for violation of a federal statute while a breach of contract claim is a creature of common law. In the absence of any authority on point, I decline to recommend that the court strike any claim for compensatory damages on the Hill-Burton claim at this stage of the proceeding.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED** as to Count III of the third amended complaint, as to Count II insofar as the plaintiffs seek punitive damages on that count, as to Count V insofar as that count is based on alleged acts involving plaintiff Herrera and as to any claims for compensatory damages arising under Count V; and otherwise **DENIED**. The plaintiffs' motion to exclude certain material from the defendant's motion is **DENIED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 8th day of July, 1999.*

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*David M. Cohen*  
*United States Magistrate Judge*