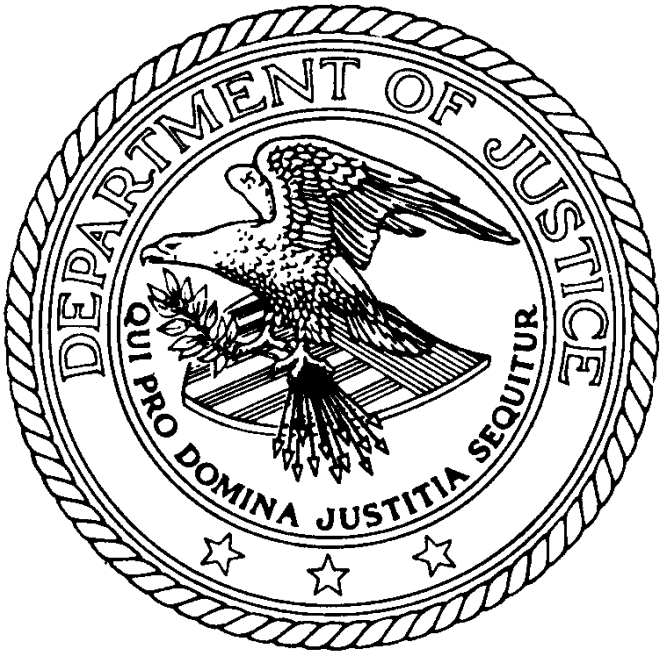
**Editor's Note**: In Chapter XII of this Manual, entitled "Private Right of Action and Individual Relief through Agency Action," the text notes that there was a split among the federal Circuits as to whether plaintiffs had a private right of action to enforce disparate impact regulations implementing section 602 of Title VI. The text further notes that the Supreme Court had granted certiorari in one of these cases, Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), and that the Court would "likely definitively decide the issue when it hears Sandoval."

In 2001, the Supreme Court decided the issue. In Alexander v. Sandoval, 532 U.S. 275 (2001), the Court held that there is no private right of action to enforce Title VI disparate impact regulations; that only the funding agency issuing the disparate impact regulation has the authority to challenge a recipient's actions under this theory of discrimination. The Court held that although Congress clearly intended to create a private cause of action to enforce section 601 of Title VI, id. at 279-280, 283, the question before the Court was whether Congress had also intended these particular regulations to be privately enforced. The Court noted that there were two types of regulations. Regulations that simply "apply," "construe," or "clarify[]" a statute can be privately enforced through the existing cause of action to enforce the statute because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of a statute to be so enforced as well." Id. at 283-85. But regulations that go beyond the statute require a separate cause of action, even if those regulations were a valid exercise of Congress's grant of rulemaking authority. Id. at 285-86.

In applying this dichotomy, the Court relied on its uncontested holding in prior cases that section 601 prohibits only disparate treatment (i.e., intentional discrimination). Id. at 280. Since the Title VI regulations expanded the section 601 definition of discrimination to include effects, the disparate impact regulations could not be viewed merely as an interpretation or application of section 601. Id. at 285-86. Accordingly, the Court concluded that Congress would have had to create (either explicitly or implicitly) a separate private cause of action to enforce such regulations. Id. at 285-87. Assessing the text and structure of the statute, the Court concluded that Congress had intended only agency enforcement of disparate impact regulations and had not intended to create a private right of action to enforce those regulations that went beyond the statute. Id. at 290-93.

On October 26, 2001, the Assistant Attorney General for the Civil Rights Division issued a memorandum for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that clarified and reaffirmed the vitality of the disparate impact regulations in light of Sandoval. The memorandum noted that although Sandoval foreclosed private judicial enforcement of Title VI disparate impact regulations, it did not undermine the validity of those regulations or otherwise limit the authority and responsibility of Federal grant agencies to enforce their own implementing regulations. Therefore, the agencies' disparate impact regulations continue to be a vital administrative enforcement mechanism.

# TITLE VI
# LEGAL MANUAL




**U.S. Department of Justice**
**Civil Rights Division**
**P.O. Box 66560**
**Washington, D.C. 20035-6560**

**January 11, 2001**

# TITLE VI LEGAL MANUAL TABLE OF CONTENTS

# Introduction

This manual provides an overview of the legal principles of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000d, et seq. This document is intended to be an abstract of the general principles and issues that concern Federal agency enforcement, and is not intended to provide a complete, comprehensive directory of all cases or issues related to Title VI. For example, this manual does not address all issues associated with private enforcement. In addition, this manual has cited cases interpreting Title VI to the fullest extent possible, although cases interpreting both Title IX and Section 504 also are included. While statutory interpretation of these laws overlap, they are not fully consistent, and this manual should not be considered to be an overview of any statute other than Title VI.

It is intended that this manual will be updated periodically to reflect significant changes in the law. In addition, policy guidance or other memoranda distributed by the Civil Rights Division to Federal agencies that modify or amplify principles discussed in the manual will be referenced, as appropriate. Comments on this publication, and suggestions as to future updates, including published and unpublished cases, may be addressed to:

Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
Attention: Legal Manual Coordinator
P.O. Box 66560
Washington, D.C. 20035-6560

Telephone and TDD (202) 307-2222
FAX (202) 307-0595
E-mail COR.CRT@USDOJ.GOV

This manual is intended only to provide guidance to Federal agencies and other interested entities, and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

## TABLE OF AUTHORITIES

### FEDERAL CASES

**STATE CASES**



**CONSTITUTION**



**FEDERAL STATUTES**

**REGULATIONS**

**MISCELLANEOUS**

## I. Overview: Interplay of Title VI with Title IX, Section 504, the Fourteenth Amendment, and Title VII

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides that

> [n]o 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. Title VI is the model for several subsequent statutes that prohibit discrimination on other grounds in federally assisted programs or activities, including Title IX (discrimination in education programs prohibited on the basis of sex) and Section 504 (discrimination prohibited on the basis of disability). See United States Dep't. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 600 n.4 (1986); Grove City College v. Bell, 465 U.S. 555, 566 (1984) (Title IX was patterned after Title VI); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (Section 504 patterned after Titles VI and IX).1/ Accordingly, courts have "relied on case law interpreting Title VI as generally applicable to later statutes," Paralyzed Veterans, 477 U.S. at 600 n.4.

It is important to note, however, that not all issues are treated identically in the three statutes. For example, Title VI statutorily restricts claims of employment discrimination to instances where the "primary objective" of the financial assistance is to provide employment. 42 U.S.C. § 2000d-3. No such restriction applies to Title IX or Section 504. See North Haven v. Bell, 456 U.S. 512, 529-30 (1982) ("The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the

---

[1] In addition, Title II of the Americans with Disabilities Act of 1990, as amended, is patterned after Section 504. 42 U.S.C. § 12131.

extent that the language and history of Title IX do not suggest a contrary interpretation."); Bentley v. Cleveland County Bd. of County Comm'rs, 41 F.3d 600 (10th Cir. 1994) (Section 504 claim alleging discriminatory termination of former employee).

Apart from the provisions common to Title VI, Title IX, and Section 504, courts also have held that Title VI adopts or follows the Fourteenth Amendment's standard of proof for intentional discrimination, and Title VII's standard of proof for disparate impact. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1405 n.11, 1407 n.14 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993); (see Chapter VIII). Accordingly, cases under these constitutional and statutory provisions may shed light on an analysis concerning the applicability of Title VI to a given situation.

## II. Synopsis of Legislative History and Purpose of Title VI

The landmark Civil Rights Act of 1964 was a product of the growing demand during the early 1960s for the Federal Government to launch a nationwide offensive against racial discrimination. In calling for its enactment, President John F. Kennedy identified "simple justice" as the justification for Title VI:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.

See H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).

Title VI was not the first attempt to ensure that Federal monies not be used to finance discrimination on the basis of race, color, or national origin. For example, various prior Executive Orders prohibited racial discrimination in the armed forces, in employment by federally funded construction contractors, and in federally assisted housing.2/ Various Federal court decisions also served to eliminate discrimination in individual federally assisted programs.3/

Congress recognized the need for a statutory nondiscrimination provision such as Title VI to apply across-the-board "to make sure that the funds of the United States

---

[2] Exec. Order No. 11063, 3C.F.R. 652-656 (1959-1963) (equal opportunity in housing), as amended by Exec. Order No. 12259, 3 C.F.R. 307 (1981); Exec. Order No. 10479, 3 C.F.R. 61 (1949-1953), as amended by Exec. Order No. 10482, 3 C.F.R. 968 (1949-1953) (equal employment opportunity by government); Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948) (equal opportunity in the armed services).

[3] See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (5th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

are not used to support racial discrimination." 110 Cong. Rec. 6544 (Statement of Sen. Humphrey). Senator Humphrey, the Senate manager of H.R. 7152, which became the Civil Rights Act of 1964, identified several reasons for the enactment of Title VI. Id. First, several Federal financial assistance statutes, enacted prior to Brown v. Board of Education, 347 U.S. 483 (1954), expressly provided for Federal grants to racially segregated institutions under the "separate but equal" doctrine that was overturned by Brown. Although the validity of these programs was doubtful after Brown, this decision did not automatically invalidate these statutory provisions. Second, Title VI would eliminate any doubts that some Federal agencies may have had about their authority to prohibit discrimination in their programs.

Third, through Title VI, Congress would "insure the uniformity and permanence to the nondiscrimination policy" in all programs and activities involving Federal financial assistance. Id. Thus, Title VI would eliminate the need for Congress to debate nondiscrimination amendments in each new piece of legislation authorizing Federal financial assistance.4/ As stated by Congressman Celler:

> Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular Federal assistance programs. Its enactment would avoid for the future the occasion for further legislative maneuvers like the so-called Powell amendment.

---

[4] See 6 Op. Off. Legal Counsel 83, 93 (1982) ("The statutes [Title VI, Title IX, Section 504, and the Age Discrimination Act] . . . [are] intended to apply to all programs or activities receiving federal financial assistance without being explicitly referenced in subsequent legislation. They should therefore be considered applicable to all legislation authorizing federal financial assistance . . . unless Congress evidences a contrary intent.")

110 Cong. Rec. 2468 (1964).5/

Fourth, the supporters of Title VI considered it an efficient alternative to litigation. It was uncertain whether the courts consistently would declare that government funding to recipients that engaged in discriminatory practices was unconstitutional. Prior court decisions had demonstrated that litigation involving private discrimination would proceed slowly, and the adoption of Title VI was seen as an alternative to such an arduous route. See 110 Cong. Rec. 7054 (1964) (Statement by Sen. Pastore).

Further, despite various remedial efforts, racial discrimination continued to be widely subsidized by Federal funds. For example, Senator Pastore addressed how North Carolina hospitals received substantial Federal monies for construction, that such hospitals discriminated against blacks as patients and as medical staff, and that, in the absence of legislation, judicial action was the only means to end these discriminatory practices.

> That is why we need Title VI of the Civil Rights Act, H.R. 7152 - to prevent such discrimination where Federal funds are involved. . . . Title VI is sound; it is morally right; it is legally right; it is constitutionally right. . . . What will it accomplish? It will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind. Let me say it again: The title has a simple purpose - to eliminate discrimination in Federally financed programs.

Id.

President Lyndon Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964, after more than a year of hearings, analyses, and debate. During the course of congressional consideration, Title VI was one of the most debated provisions of the Act.

---

[5] These amendments were so named because of their proponent, Congressman Adam Clayton Powell. See 110 Cong. Rec. 2465 (1964) (Statement by Cong. Powell).

## III. Title VI Applies to "Persons"

Title VI states "no person" shall be discriminated against on the basis of race, color, or national origin. While the courts have not addressed the scope of "person" as that term is used in Title VI, the Supreme Court has addressed this term in the context of challenges brought under the Fifth and Fourteenth Amendments. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982); Mathews v. Diaz, 426 U.S. 67 (1976). The Supreme Court has held that undocumented aliens are considered "persons" under the equal protection and due process clauses of the Fifth and Fourteenth Amendments. Plyler, 457 U.S. at 210-211; Mathews, 426 U.S. at 77. Since rights protected by Title VI, at a minimum, are analogous to such protections under the Fifth and Fourteenth Amendments, these cases provide persuasive authority as to the scope of "persons" protected by Title VI. See Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Regents of the Univ. of Cal. v Bakke, 438 U.S. 265 (1978).6/ Thus, one may assume that Title VI protections are not limited to citizens.

Related to the scope of coverage of Title VI is the issue of standing to challenge program operations as a violation of Title VI. Individuals may bring a cause of action under Title VI if they are excluded from participation in, denied the benefits of, or subjected to discrimination under, any Federal assistance program. See Coalition of Bedford-Stuyvesant Block Ass'n, v. Cuomo, 651 F. Supp. 1202, 1209 n.2 (E.D.N.Y. 1987); Bryant v. New Jersey Dep't of Transp., 998 F.Supp. 438 (D.N.J. 1998). At least two courts of appeal have ruled that a city or other instrumentality of a State does not

---

[6] Fifth and Fourteenth Amendment equal protection claims are coextensive, and "indistinguishable." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995).

have standing to bring suit against the State under Title VI. In United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986), the United States, later joined by intervenors, Alabama State University (ASU), a majority-black institution, along with faculty, staff, students, and graduates of ASU, filed suit against the state of Alabama, state educational authorities, and all state four-year institutions of higher education, claiming that Alabama operates a dual system of segregated higher education. Based on its review of Title VI and its legislative history, the court concluded that neither the statute nor the legislative history of Title VI provided for a state instrumentality to be considered "a person" protected by Title VI, and the court "decline[d] to infer such a right of action by judicial fiat." Id. at 1456-57. The court further stated there are other avenues of recourse to remedy Title VI violations, including a private right of action for individuals under Title VI and Title VI's comprehensive scheme of administrative enforcement.7/ Id. at 1456, (citing Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1978)). See also Dekalb County Sch. Dist. v. Schrenko, 109 F.3d 680, 689 (11th Cir. 1997) (concluding that a political subdivision created by the state has no standing to bring a Title VI claim against the state); Stanley v. Darlington County Sch. Dist., 84 F.3d 707, 717 n.2 (4th Cir. 1995) (finding no authorization under Title VI for a political subdivision to sue the state).

---

[7] See discussion infra Chs. XI and XII for a discussion of these remedies. This may mean that although a subrecipient could not sue a state recipient of Federal financial assistance for alleged discriminatory allocation of funds among subrecipients, aggrieved individuals may be able to bring suit against the state recipient for discriminatory distribution of funds.

## IV. "In the United States"

Title VI states that no person “in the United States" shall be discriminated against on the basis of race, color, or national origin by an entity receiving Federal financial assistance. Agency Title VI regulations define "recipients" or "United States" to encompass, inter alia, territories and possessions.8/ No court has addressed the scope of "United States" or the validity of the regulations including territories and possessions, although we believe such regulations are valid. Cases interpreting the Fifth and Fourteenth Amendments again provide guidance in this analysis.

The Fourteenth Amendment only prohibits violations by the States, and does not encompass the territories. District of Columbia v. Carter, 409 U.S. 418, 424 (1973) (Territories are not "States" and are not subject to the Fourteenth Amendment). The Fifth Amendment equal protection guarantees, however, do apply to the territories. In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 940-41 (N.D. Cal. 1975), citing Balzac v. Puerto Rico, 258 U.S. 298, 312-13 (1922) (Fifth Amendment applies to territories); Downes v. Bidwell, 182 U.S. 244, 282-83 (1901) (same). Thus, all areas under the sovereignty of the United States fall within the combined jurisdiction of the Fifth and Fourteenth Amendments. Accordingly, since Title VI is at least coextensive with the Fifth and Fourteenth Amendments (for purposes of intentional

---

[8] See e.g., 5 C.F.R. § 900.403(f) (Office of Personnel Management's definition of "recipient"); 24 C.F.R. § 1.2(d) (Housing and Urban Development's definition of "United States"); 28 C.F.R. § 42.102(b) (Department of Justice's definition of "United States"); 29 C.F.R. § 31.2(j) (Department of Labor's definition of "United States"); 38 C.F.R. § 18.13(d) (Veterans Administration’s definition of "United States"); 45 C.F.R. § 80.13(e) (Health and Human Services’ definition of "United States"); and 49 C.F.R. § 21.23(f) (Department of Transportation's definition of "recipient").

violations), to construe Title VI to apply to the States yet not to the territories would be inconsistent with its constitutional underpinnings, as well as congressional intent that Title VI be interpreted broadly to effectuate its purpose. See 110 Cong. Rec. 6544 (Statement of Sen. Humphrey); S. Rep. No. 64, 100th Cong., 2d Sess. 4-5 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 6-7.

## V. Federal Financial Assistance Includes More Than Money

Title VI states that no program or activity receiving "Federal financial assistance" shall discriminate against individuals based on their race, color, or national origin. The clearest example of Federal financial assistance is the award or grant of money. Federal financial assistance, however, also may be in nonmonetary form. See United States Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 607 n.11 (1986). As discussed below, Federal financial assistance may include the use or rent of Federal land or property at below market value, Federal training, a loan of Federal personnel, subsidies, and other arrangements with the intention of providing assistance. Federal financial assistance does not encompass contracts of guarantee or insurance, regulated programs, licenses, procurement contracts by the Federal government at market value, or programs that provide direct benefits. It is also important to remember that not only must a program receive Federal financial assistance to be subject to Title VI, but the entity also must receive Federal assistance at the time of the alleged discriminatory act(s). See Huber v. Howard County, Md., 849 F. Supp. 407, 415 (D. Md.1994) (Motion to dismiss claim of discriminatory employment practices under § 504 denied as defendant received Federal assistance during the time of probationary employment and discharge.), aff'd without opinion, 56 F.3d 61 (4th Cir. 1995), cert. denied, 516 U.S. 916 (1995); see also Delmonte v. Department of Bus. Prof'l Regulation, 877 F. Supp. 1563 (S.D. Fla. 1995).9/

[9] In Delmonte, the plaintiff alleged that he was demoted in 1990 on a prohibited basis in violation of Section 504. 877 F. Supp. at 1564. The court held that the defendant received Federal financial assistance through its participation in at least 10 Federal training programs (consisting of less than one to three-day programs) both

A. Examples of Federal Financial Assistance

Agency regulations use similar, if not identical, language to define Federal financial assistance:

> (1) Grants and loans of Federal funds,
>
> (2) The grant or donation of Federal property and interests in property,
>
> (3) The detail of Federal personnel,
>
> (4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and
>
> (5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

28 C.F.R. § 42.102(c).10/ No extended discussion is necessary to show that money, through Federal grants, cooperative agreements and loans, is Federal financial assistance within the meaning of Title VI. See Paralyzed Veterans, 477 U.S. at 607. For example:

# A State health department receives $372,000 in Federal funds from the Department of Health and Human Services to be distributed to private hospitals

---

before and after the demotion, over a course of approximately twelve years. Id. at 1565-66. The court does not clearly address if its conclusion is based on training in the aggregate, or if a single training session (with the required contractual assurances of compliance with nondiscrimination), is sufficient. Id. at 1566.

[10] Agency Title VI regulations include an appendix that sets forth examples of the types of Federal financial assistance provided through the agency's programs. This list can provide guidance, although it should not be considered (and may specifically state that it is not) an exhaustive list of all Federal financial assistance provided by that agency. Agencies should amend the appendix, "at appropriate intervals," to include programs enacted after issuance of the regulations. See 28 C.F.R. § 42.403(d).

for emergency room services. The funds constitute Federal financial assistance to the State health department as well as the private hospitals that are funded, and thus Title VI would apply to all of these entities. See 42 U.S.C. §§ 2000d-4a(1)(a), 4a(3)(A)(ii).

# White patients are treated more expeditiously than minority patients at the emergency room of HealWell Hospital, even though the minority patients' medical needs are similar. HealWell receives Medicare funds through its patients. Partial payments by Medicare funds constitute Federal financial assistance to HealWell. See United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

# United States military veterans are enrolled at Holy University, a private, religious university. The veterans receive payments from the Federal government for educational pursuits and such monies are used by the veterans to pay a portion of their respective tuition payments at Holy University. Although Federal payments are direct to the veterans and indirect to Holy University, the university is receiving Federal financial assistance. See Grove City College v. Bell, 465 U.S. 555 (1984).

As set forth in the regulations, Federal financial assistance may be in the form of a grant or donation of land or use (rental) of Federal property for the recipient at no or reduced cost. Since the recipient pays nothing or a lower amount for ownership of land or rental of property, the recipient is being assisted financially by the Federal agency. Typically, assurances state that this type of assistance is considered to be ongoing for as long as the land or property is being used for the original or a similar purpose for which such assistance was intended. E.g., 28 C.F.R. § 42.105. Moreover, regulations bind the successors and transferees of this property, as long as the original purpose, or a similar objective, is pursued. Id. Thus, if the recipient uses the land or rents property for the same purpose at the time of the alleged discriminatory act, the recipient is receiving Federal financial assistance, irrespective of when the land was granted or

donated.11/

For example:

# Sixteen years ago, the Department of Defense (DOD) donated land from a closed military base to a State as the location for a new prison. Currently, the prison has been built and houses 130 inmates. Black and Hispanic inmates complain that they tend to be in long-term segregation more often than white inmates, and allege racial discrimination by the prison administrators. Because the State still uses the land donated to it by the DOD for its original (or similar purpose), the State is still receiving Federal financial assistance. See 32 C.F.R. § 195.6.

# A police department has a branch office located in a housing project built, subsidized, and operated with Housing and Urban Development (HUD) funds. The police department is not charged rent. Thus, the police department is receiving Federal financial assistance and is subject to Title VI.

Under the Intergovernmental Personnel Act of 1970, Federal agencies may allow a temporary assignment of personnel to State, local, and Indian tribal governments, institutions of higher education, Federally funded research and development centers, and certain other organizations for work of mutual concern and benefit. See 5 U.S.C. § 3372. This detail of Federal personnel to a State or other entity is considered Federal financial assistance, even if the entity reimburses the Federal agency for some of the detailed employee's Federal salary. See Paralyzed Veterans, 477 U.S. at 612 n.14. However, if the State or other entity fully reimburses the Federal agency for the employee's salary, it is unlikely that the entity receives Federal financial assistance. For example:

# Two research scientists from the National Institute of Health (NIH) are detailed to a research organization for two years to help research treatments for cancer. NIH pays for three-fourths of the salary of the two detailed employees, while the

---

[11] Regulations also typically bind the successors and transferees of this property, as long as the original purpose, or a similar objective, is pursued. Id.

organization pays the remaining portion. The research organization is considered to be receiving Federal financial assistance since the Federal government is paying a substantial portion of the salary of the detailed Federal employees. The research organization is thus now subject to Title VI.

Another common form of Federal financial assistance provided by many agencies is training by Federal personnel. For example:

# A city police department sends several police officers to training at the FBI Academy at Quantico without cost to the city. The police department is considered to have received Federal financial assistance. See Delmonte v. Department of Bus. & Prof'l Regulation, 877 F. Supp. 1563 (S.D. Fla. 1995).

B. Direct and Indirect Receipt of Federal Assistance

Federal financial assistance may be received directly or indirectly.12/ For example, colleges indirectly receive Federal financial assistance when they accept students who pay, in part, with Federal financial aid directly distributed to the students. Grove City College v. Bell, 465 U.S. 555, 564 (1984)13/; see also Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 603 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975). In Bob Jones Univ., the university was deemed to have received Federal financial assistance for participating in a program wherein veterans received monies directly from the Veterans Administration to support approved educational pursuits, although

---

[12] It is often difficult to separate discussions of closely linked concepts, such as what is a recipient and what is Federal financial assistance. Accordingly, the concept of "direct" and "indirect" are discussed both in terms of "direct/indirect recipient" and "directly receive/indirectly receive Federal financial assistance."

[13] "With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase 'receiving federal financial assistance,' we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs." Grove City College v. Bell, 465 U.S. 555, 569.

the veterans were not required to use the specific Federal monies to pay the schools for tuition and expenses. 396 F. Supp. at 602-03 & n.22. Even if the financial aid to the veterans did not reach the university, the court considered this financial assistance to the school since this released the school's funds for other purposes. Id. at 602. Thus, an entity may be deemed to have "received Federal financial assistance" even if the entity did not show a "financial gain, in the sense of a net increment in its assets." Id. at 602-03. Aid such as this, and noncapital grants, are equally Federal financial assistance. Id.

C. Federal Action That Is Not Federal Financial Assistance

To simply assert that an entity receives something of value in nonmonetary form from the Federal government's presence or operations, however, does not mean that such benefit is Federal financial assistance. For example, licenses impart a benefit since they entitle the licensee to engage in a particular activity, and they can be quite valuable. Licenses, however, are not Federal financial assistance. Community Television of S. Cal. v. Gottfried, 459 U.S. 498, 509 (1983) (The Federal Communications Commission is not a funding agency and television broadcasting licenses do not constitute Federal financial assistance); California Ass'n. of the Physically Handicapped v. FCC, 840 F.2d 88, 92-93 (D.C. Cir. 1988) (same); see Herman v. United Bhd. of Carpenters, 60 F.3d 1375, 1381-82 (9th Cir. 1995) (Certification of union by the National Labor Relations Board is akin to a license, and not Federal financial assistance under § 504.).

Similarly, statutory programs or regulations that directly or indirectly support, or establish guidelines for, an entity's operations are not Federal financial assistance.

Herman, 60 F.3d at 1382 (Neither Labor regulations establishing apprenticeship programs nor Davis-Bacon Act wage protections are Federal financial assistance.); Steptoe v. Savings of America, 800 F. Supp. 1542, 1548 (N.D. Ohio 1992) (Mortgage lender subject to Federal banking laws does not receive Federal financial assistance.); Rannels v. Hargrove, 731 F. Supp. 1214, 1222-23 (E.D. Pa. 1990) (Federal bank regulations are not Federal financial assistance under the Age Discrimination Act).

Furthermore, programs "owned and operated" by the Federal government, such as the air traffic control system, do not constitute Federal financial assistance. Paralyzed Veterans, 477 U.S. at 612; Jacobson v. Delta Airlines, 742 F.2d 1202, 1213 (9th Cir. 1984) (air traffic control and national weather service programs do not constitute Federal financial assistance).14/

It also should be noted that, while contracts of guaranty and insurance may constitute Federal financial assistance, Title VI specifically states that it does not apply to "Federal financial assistance...extended by way of a contract of insurance or guaranty." 42 U.S.C. § 2000d-4; see Gallagher v. Croghan Colonial Bank, 89 F.3d 275,

---

[14] As stated by then-Deputy Attorney General Nicholas deB. Katzenbach to Hon. Emanuel Celler, Chairman, Committee on the Judiciary, House of Representatives (December 2, 1963):

> Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements or other public works, defense installations, veteran's hospitals, mail service, etc. are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of Title VI.

110 Cong. Rec. 13380 (1964).

277 (6th Cir. 1996) (Default insurance for bank's disbursement of Federal student loans is a "contract of insurance," and excluded from Section 504 coverage by agency regulations). But see Moore v. Sun Bank, 923 F.2d 1423, 1427 (11th Cir. 1991) (loans guaranteed by the Small Business Administration constituted Federal financial assistance since Section 504 does not exclude contracts of insurance or guaranty from coverage as does Title VI).

Procurement contracts also are not considered Federal financial assistance.15/ DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377 (10th Cir. 1990); Jacobson, 742 F.2d at 1209; Muller v. Hotsy Corp., 917 F. Supp. 1389, 1418 (N.D. Iowa 1996) (procurement contract by company with GSA to provide supplies is not Federal financial assistance); Hamilton v. Illinois Cent. R.R. Co., 894 F. Supp. 1014, 1020 (S.D. Miss. 1995). A distinction must be made between procurement contracts at fair market value and subsidies; the former is not Federal financial assistance although the latter is. Jacobson, 742 F.2d at 1209; Mass v. Martin Marietta Corp., 805 F. Supp. 1530, 1542

---

[15] In response to specific questions from Senator John Sherman Cooper, Attorney General Robert F. Kennedy explained the exclusion of procurement contracts from Title VI:

> Title VI does not apply to procurement contracts, or to other business contracts which do not involve financial assistance by the United States. It does apply to grant and loan agreements, and to certain other contracts involving financial assistance (for example, those research "contracts" which are essentially grants in nature). In those cases in which Title VI is applicable, section 602 would apply to a person or corporation who accepts a direct grant, loan, or assistance contract from the Federal Government. But, as indicated, the fact that the title applied would not authorize any action, except with respect to discrimination against beneficiaries of the particular program involved.

110 Cong. Rec. 10075 (1964).

(D. Co. 1992) (Federal payments for goods pursuant to a contract, even if greater than fair market value, do not constitute Federal financial assistance). As described in Jacobson and followed in DeVargas, there need not be a detailed analysis of whether a contract is at fair market value, but instead a focus on whether the government intended to provide a subsidy to the contractor. DeVargas, 911 F.2d at 1382-83; Jacobson, 742 F.2d at 1210. In DeVargas, a Department of Energy contract, issued through a competitive bidding process after a determination that a private entity could provide the service in a less costly manner, evidenced no intention to provide a subsidy to the contractor. Id. at 1382-83. For example:

# DOD contracts with SpaceElec, a private aerospace company, to develop and manufacture parts for the space shuttle. Under the contract, full price is paid by the DOD for the goods and services to be provided by SpaceElec. Because this is a direct procurement contract by the Federal government, the funds paid to SpaceElec by the DOD do not subject SpaceElec to Title VI.

Finally, Title VI does not apply to direct, unconditional assistance to ultimate beneficiaries, the intended class of private citizens receiving Federal aid. For example, social security payments and veterans' pensions are not Federal financial assistance. Soberal-Perez v. Heckler, 717 F.2d 36, 40 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984); Bob Jones Univ., 396 F. Supp. at 602, n.16.16/ Members of Congress, responding to criticisms about the scope of Title VI, repeatedly explained during the congressional hearings in 1964 that Title VI does not apply to direct benefit programs:

---

[16] The court in Bob Jones Univ., distinguished pensions from payments to veterans for educational purposes since the latter is a program with a requirement or condition that the individual participate in a program or activity. 396 F. Supp. at 602 n.16. For a more detailed discussion of when assistance to a beneficiary may constitute indirect assistance to a recipient, see discussion of indirect recipient in section (VI)(C) of this chapter.

> The title does not provide for action against individuals receiving funds under federally assisted programs -- for example, widows, children of veterans, homeowners, farmers, or elderly persons living on social security benefits.

110 Cong. Rec. 15866 (1964) (Statement of Senator Humphrey); see 100 Cong. Rec. 6544 (1963) (Statement of Senator Humphrey). See also 110 Cong. Rec. 1542 (1964) (Statement of Rep. Lindsay); 110 Cong. Rec. 13700 (1964) (Statement of Sen. Javits).

## VI. What is a Recipient?

### A. Regulations

A "recipient" receives Federal financial assistance and/or operates a "program or activity," and therefore its conduct is subject to Title VI. All agency Title VI regulations use a similar if not identical definition of "recipient," as follows:

> The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.
>
> The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

28 C.F.R. § 42.102(f), (g) (emphasis in original).

Several aspects of the plain language of the regulations should be noted. First, a recipient may be a public (e.g., a State, local or municipal agency) or a private entity. Second, Title VI does not apply to the Federal government. Therefore, a Federal agency cannot be considered a “recipient” within the meaning of Title VI. Third, there may be more than one recipient in a program; that is, a primary recipient (e.g., State agency) that transfers or distributes assistance to a subrecipient (local entity) for distribution to an ultimate beneficiary.17/ Fourth, a recipient also encompasses a successor, transferee, or assignee of the Federal assistance (property or otherwise), under certain circumstances. Fifth, as discussed in detail below, there is a distinction

[17] An ultimate beneficiary usually does not receive a “distribution” of the federal money. Rather, he or she enjoys the benefits of enrollment in the program.

between a recipient and a beneficiary. Finally, although not addressed in the regulations, a recipient may receive Federal assistance either directly from the Federal government or indirectly through a third party, who is not necessarily another recipient. For example, schools are indirect recipients when they accept payments from students who directly receive Federal financial aid.

B. Direct Relationship

The clearest means of identifying a "recipient" of Federal financial assistance is to determine whether the entity has voluntarily entered into a relationship with the Federal government and receives Federal assistance under a condition or assurance of compliance with Title VI (and/or other nondiscrimination obligations). Paralyzed Veterans, 477 U.S. at 605-06.

> By limiting coverage to recipients, Congress imposes the obligations of § 504 [and Title VI] upon those who are in a position to accept or reject those obligations as part of the decision whether or not to "receive" federal funds.

Id. at 606; see also Soberal-Perez, 717 F.2d at 41. It is important to note that by signing an assurance, the recipient is committing itself to complying with the nondiscrimination mandates. Even without a written assurance, courts describe obligations under nondiscrimination laws as similar to a contract, and have thus concluded that "the recipients' acceptance of the funds triggers coverage under the nondiscrimination provision." Paralyzed Veterans, 477 U.S. at 605. In this scenario, the recipient has a direct relationship with the funding agency and, therefore, is subject to the requirements of Title VI. For example:

# Airport operators are recipients of Federal financial assistance pursuant to a statutory program providing funds for airport construction and capital

development. Id. at 607.

# Hall City Police Department (HCPD) received a grant from the U. S. Department of Justice for community outreach programs. HCPD is considered to be a recipient of Federal financial assistance.

# Six years ago, LegalSkool, a law school at a university, was built partly with Federal grants, loans, and interest subsidies in excess of $7 million from the Department of Education (ED). The law school is a "recipient" because of the funding from ED for construction purposes.

While showing that the entity directly receives a Federal grant, loan, or contract, (other than a contract of insurance or guaranty) is the easiest means of identifying a Title VI recipient, this direct cash flow does not describe the full reach of Title VI.18/

C. Indirect Recipient

A recipient may receive funds either directly or indirectly. Grove City, 465 U.S. at 564-65.19/ For example, educational institutions receive Federal financial assistance indirectly when they accept students who pay, in part, with Federal loans. Although the money is paid directly to the students, the universities and other educational institutions are the indirect recipients. Id.; Bob Jones Univ., 396 F. Supp. at 602.

In Grove City, the Supreme Court found that there was no basis to create a distinction not made by Congress regarding funding paid directly to or received

---

[18] It should be noted that the remaining text of this section distinguishes various scenarios for recipients and beneficiaries. While captions are used to separate different circumstances, courts do not uniformly use the same phrase to explain the same funding pattern. Thus, a court may refer to an "indirect recipient" when the situation more closely fits the paradigm of "primary recipient/subrecipient." See discussion infra Section E.

[19] While the court's analysis in Grove City of the scope of "program or activity" was reversed by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), the Court's discussion of other principles, including direct and indirect recipients, remains undisturbed.

indirectly by a recipient. 465 U.S. at 564-65. In reaching its conclusion, the Court considered the congressional intent and legislative history of the statute in question to identify the intended recipient. The Court found that the 1972 Education Amendments, of which Title IX is a part, are "replete with statements evincing Congress' awareness that the student assistance programs established by the Amendments would significantly aid colleges and universities. In fact, one of the stated purposes of the student aid provisions was to 'provid[e] assistance to institutions of higher education.' Pub. L. 92-318, § 1001(c)(1), 86 Stat. 831, 20 U.S.C. § 1070(a)(5) " Id. at 565-66. Finally, the Court distinguished student aid programs that are "designed to assist" educational institutions and that allow such institutions an option to participate in, or exclude themselves from, other general welfare programs where individuals, including students, are free to spend the payments without limitation. Id. at 565 n.13.

In contrast, as subsequently explained by the Supreme Court in Paralyzed Veterans, it is essential to distinguish aid that flows indirectly to a recipient from aid to a recipient that reaches a beneficiary.

> While Grove City stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid.

Paralyzed Veterans, 477 U.S. at 607 (citing Grove city, 465 U.S. at 564).

Along these lines, the Supreme Court in NCAA v. Smith, 525 U.S. 459, 470 (1999), citing both Grove City and Paralyzed Veterans, stated that while dues paid to an entity (NCAA) by colleges and universities, who were recipients of federal financial assistance, "at most ... demonstrates that it [NCAA] indirectly benefits from the federal

assistance afforded its afforded members." But the Court stated, "This showing, without more, is insufficient to trigger Title IX coverage. Id. at 468.20/

D. Transferees and Assignees

Agency regulations and assurances often include specific statements on the application of Title VI to successors, transferees, assignees, and contractors. For example, the Department of Justice's regulations state:

> In the case where Federal financial assistance is to provide or is in the form of personal property, or real property or interest therein or structures thereon, such assurance shall obligate the recipient, or in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits . . . . The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which the assurances will be required of subgrantees, contractors, and subcontractors, transferees, successors in interest, and other participants in the program.

28 C.F.R. § 42.105(a)(1) (emphasis added).

Furthermore, land that originally was acquired through a program receiving Federal financial assistance shall include a covenant binding on subsequent purchasers or transferees that requires nondiscrimination for as long as the land is used for the original or a similar purpose for which the Federal assistance is extended. 28 C.F.R. § 42.105(a)(2).21/

---

[20] The Court in Smith specifically did not address the Department's argument that "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient. Id. at 469-471.

[21] In contrast, in Independent Hous. Servs. of San Francisco (IHS) v. Fillmore Ctr. Assoc., 840 F. Supp. 1328, 1341 (N.D. Ca. 1993), the transfer of property in issue occurred before the effective date of HUD regulations that stated transferees or purchasers of real property are subject to Section 504. Accordingly, in IHS, a San

E. Primary/Subrecipient Programs

Many programs have two recipients. The primary recipient directly receives the Federal financial assistance. The primary recipient then distributes the Federal assistance to a subrecipient to carry out a program. See, e.g., 28 C.F.R. § 42.102(g). Both the primary recipient and subrecipient are covered by and must conform their actions to Title VI. For example:

# A State agency, such as the Department of Children and Family Services, receives a substantial portion of its funding from the Federal government. The State agency, as the primary recipient or conduit, in turn, funds local social service organizations, in part, with its Federal funds. The local agencies receive Federal financial assistance, and thus are subject to Section 504 (and Title VI, and other nondiscrimination laws). See Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429 (N.D. Ill. 1985).22/

# Under the Older Americans Act, funds are given by the Department of Health and Human Services to State agencies which, in turn, distribute funds according to funding formulas to local agencies operating programs for elderly Americans. Title VI applies to the programs and activities of the State agencies because of each agency's status as a direct conduit recipient passing Federal funds on to subrecipients. Title VI also applies to the local agencies as subrecipients of Federal financial assistance. See Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995).

F. Contractor and Agent

A recipient may not absolve itself of its Title VI obligations by hiring a contractor or agent to perform or deliver assistance to beneficiaries. Agency regulations

---

Francisco agency was a recipient of funds under a block grant to assemble and clear land for redevelopment, and the purchaser of the land, who built housing units, was considered a beneficiary. Id.

[22] The Graves court described the local agency as an "indirect" recipient since the Federal money flowed "through another recipient," and compared this situation to Grove City College's indirect receipt of BEOG funds from students. Id. at 433. Given that the funding was distributed to a State agency and a portion allocated to a local entity, the more accurate description is that of primary/subrecipient.

consistently state that prohibitions against discriminatory conduct, whether intentional or through race neutral means with a disparate impact, apply to a recipient, whether committed "directly or through contractual or other arrangements." E.g., 28 C.F.R. §§ 42.104(b)(1), (2) (emphasis added). For example:

# A recipient public housing authority contracts with a residential management company for the management and oversight of a public housing authority. Employees of the contractor reject prospective tenants based on their race, color, or national origin. The recipient is liable under Title VI for the contractor's actions as the contractor is performing a program function of the recipient.

One also should evaluate the agency's assurances or certifications; such documents can provide an independent basis to seek enforcement. For example, the assurance for the Office of Justice Programs, within the Department of Justice, states, inter alia,

> It [the Applicant] will comply, and all its contractors will comply, with the nondiscrimination requirements of the [Safe Streets Act, Title VI, Section 504, Title IX . . . .] (emphasis added).

G. Recipient v. Beneficiary

Finally, in analyzing whether an entity is a recipient, it is necessary to distinguish a recipient from a beneficiary; the former is covered by Title VI while the latter is not.[23] Paralyzed Veterans, 477 U.S. at 606-07. An assistance program may have many beneficiaries, that is, individuals and/or entities that directly or indirectly receive an advantage through the operation of a Federal program. Beneficiaries, however, do not enter into any formal contract or agreement with the Federal government where

[23] Most agency Title VI regulations state that the term recipient "does not include any ultimate beneficiary under the program." See, e.g., 28 C.F.R. § 42.102(f) (DOJ).

compliance with Title VI is a condition of receiving the assistance.24/ Id.

> In almost any major federal program, Congress may intend to benefit a large class of persons, yet it may do so by funding - that is, extending federal financial assistance to - a limited class of recipients. Section 504, like Title IX in Grove City [465 U.S. 555 (1984)], draws the line of federal regulatory coverage between the recipient and the beneficiary.

Id. at 609-10. Title VI was meant to cover only those situations where Federal funding is given to a non-Federal entity which, in turn, provides financial assistance to the ultimate beneficiary, or disburses Federal assistance to another recipient for ultimate distribution to a beneficiary. It is important to note that the Supreme Court has firmly established that the receipt of student loans or grants by an entity renders the entity a recipient of Federal financial assistance. See Grove City, 456 U.S. at 596

In Paralyzed Veterans, a Section 504 case decided under Department of Transportation regulations, the Court held that commercial airlines that used airports and gained an advantage from the capital improvements and construction at airports were beneficiaries, and not recipients, under the airport improvement program. 477 U.S. at 607. The airport operators, in contrast, directly receive the Federal financial assistance for the airport construction. The Court examined the program statutes and

---

[24] For example, in Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) plaintiffs, the Knights of the Ku Klux Klan, brought suit against the Missouri Highway and Transportation Commission (State) for denying its application to participate in Missouri's Adopt-A-Highway program. Among the State's reasons for denying the application was that allowing the Klan to participate in the Adopt-A-Highway program would violate Title VI of the Civil Rights Act of 1964 and would cause the state to lose its federal funding. The Eighth Circuit ruled that "Title VI clearly does not apply directly to prohibit the Klan's discriminatory membership criteria" and that the Klan is not a direct recipient of federal financial assistant through the Adopt-A-Highway program, but merely a beneficiary of the program. Therefore, the State's denial of the Klan's application was invalid. Id. at 710.

concluded:

> Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries. [note omitted]. Congress did not set up a system where passengers were the primary or direct beneficiaries, and all others benefitted by the Acts are indirect recipients of the financial assistance to airports.
>
> The statute covers those who receive the aid, but does not extend as far as those who benefit from it. . . Congress tied the regulatory authority to those programs or activities that receive federal financial assistance.

Id. at 607-09.

## VII. "Program or Activity"

Title VI prohibits discrimination in "any program or activity," any part of which receives Federal financial assistance. Initially, it should be understood that interpretations of "program or activity" depend on whether one is analyzing the scope of Title VI's prohibitions or evaluating what part of the entity is subject to a potential fund termination or refusal. Further, the Civil Rights Restoration Act of 1987 (CRRA) amended Title VI and related statutes by adding an expansive definition of "program or activity." As described more fully below, the CRRA was passed to restore broad interpretations, consistent with original congressional intent, and to reverse the Supreme Court's narrow ruling in Grove City, 465 U.S. 555.

### A. Initial Passage and Judicial Interpretations

When enacted in 1964, Title VI did not include a definition of "program or activity."[25] Congress, however, made its intentions clearly known: Title VI's prohibitions were meant to be applied institution-wide, and as broadly as necessary to eradicate discriminatory practices supported by Federal funds. 110 Cong. Rec. 6544 (Statement of Sen. Humphrey); see S. Rep. No. 64, 100th Cong., 2d Sess. 5-7 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 7-9.

The courts, consistent with congressional intent, initially interpreted "program or activity" broadly to encompass the entire institution in question. For example, all of the services and activities of a university were subject to Title VI even if the sole Federal assistance was Federal financial aid to students. See Bob Jones Univ., 396 F. Supp. at

[25] See, e.g., 42 U.S.C. § 2000d (1964), 42 U.S.C. § 2000d-1 (1964), and 42 U.S.C. § 2000d-4 (1964).

603; S. Rep. No. 64 at 10, reprinted in 1988 U.S.C.C.A.N. at 12.26/

B. Grove City College

In 1984, however, the Supreme Court in Grove City, severely narrowed the interpretation of "program or activity." 465 U.S. at 571-74. The Court ruled that Title IX's prohibitions against discrimination applied only to the limited aspect of the institution's operations that specifically received the Federal funding. Since the college received Federal funds as a result of Federal financial aid to students, the "program or activity" was the college's financial aid program. Id. at 574. The Court rejected the court of appeal's analysis that receipt of Federal funds for one purpose (financial aid) freed up school funds for other purposes (e.g., athletics) to render the entire university (or at least the other programs that benefitted from 'freed up' funds) a "program or activity." Id. at 572.

Further, the Court held that, although the Federal money was added to the college's general funds, the purpose of the monies was for financial aid, and, therefore, the covered program or activity was the financial aid program. Id. Thus, the receipt of Federal financial aid by some of the students of the college did not subject an entire college to Title IX, but only the operations of the financial aid program. Finally, the Court noted that earmarked funds, such as the Federal financial aid monies, increase resources and obligations of the recipient, while non-earmarked funds are unrestricted in use and purpose. Id. at 573.

---

[26] Agency regulations, while broad in scope, provide limited, specific guidance. See, e.g., 28 C.F.R. § 42.102(d).

C. Civil Rights Restoration Act

The Grove City interpretation of "program or activity" lasted for four years, until Congress passed the Civil Rights Restoration Act of 1987 (CRRA), Pub. L. No. 100-259, 102 Stat. 28 (1988). Congress' intent in passing the CRRA was clear. As the Senate Report states:

> S.557 was introduced . . . to overturn the Supreme Court's 1984 decision in Grove City College v. Bell, . . . and to restore the effectiveness and vitality of the four major civil rights statutes [Title IX, Title VI, Section 504, and the Age Discrimination Act of 1975] that prohibit discrimination in federally assisted programs.

S. Rep. No. 64 at 2, reprinted in 1988 U.S.C.C.A.N. at 3-4.[27] The CRRA includes virtually identical amendments to broadly define "program or activity" (for coverage purposes) for the four cross-cutting civil rights statutes.

The Senate Report provides extensive detail about the history of these statutes, including Congress' original intent that they be broadly interpreted and enforced; the consequences of Grove City, i.e., the narrow interpretations by courts and agencies that relieved entities of liability for apparent acts of discrimination because of the new, constricted interpretation of program or activity; and detailed explanations of the Act's language. Id. at 5-20.[28]

As explained in Chapter VIII, Title VI prohibits intentional discrimination, and

---

[27] The Senate further stated:

> The purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-Grove City judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes. Id.

[28] No House Report or Conference Report was submitted with the legislation.

agency Title VI regulations prohibit conduct that has an unjustified discriminatory effect. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) and Alexander v. Choate, 469 U.S. 287, 293 (1985). In 1999, the Third Circuit held that the CRRA's statutory definition of "program or activity" did not apply to the effects test created by Title VI regulations. Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999) (appeal pending). The court reasoned that since the Title VI regulations in question had not been amended to reflect the CRRA's definition, the effects test only applied to specifically funded programs.29/ In response to the decision, federal agencies took steps to amend their regulations to make clear that the broad definition of program or activity applies to claims brought under the effects test enunciated in regulations, as well as to intentional discrimination.30/

D. State and Local Governments

The CRRA defines coverage in specific areas. As to State and local governments, Title VI now states:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of--
>
> (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

---

[29] The Cureton court implied that the CRRA definition of "program or activity" applied to the regulations dealing with the disparate treatment or intent standard. However, it specifically refused to rule on the issue, because the allegations in the case were solely based upon the regulatory disparate impact theory. 198 F.3d at 116.

[30] See, e.g., the Department of Education Notice of Proposed Rulemaking. 65 Fed. Reg. 26464 (2000) (to be codified at 34 C.F.R. pts. 100, 104, 106, & 110) (proposed May 5, 2000); the Department of Health and Human Services Notice of Proposed Rulemaking, 65 Fed. Reg. 64194 (2000) (to be codified at 45 C.F.R. pts. 80, 84, 86, 90, 91) (proposed Oct. 26, 2000).

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(1) (emphasis added).

Two courts of appeals and several district courts have interpreted this language, and most of the cases have concerned the scope of § 504. Generally, the entire department or office within a State or local government is identified as the "program or activity."[31] For example, if a State receives funding that is designated for a particular State prison, the entire State Department of Corrections is considered the covered "program or activity" (but not, however, the entire State).

In Huber v. Howard County, Md, 849 F. Supp. 407, 415 (D. Md. 1994), the court held that the county fire department received Federal financial assistance under § 504 upon evidence that a subunit within the fire department received Federal funds and the salary of one employee was partially paid with Federal funds. The court stated:

> While the receipt of federal financial assistance by one department or agency of a county does not render the entire county subject to the provisions of § 504, and while such assistance to one department does not subject another department to the requirements of § 504, if one part of a department receives federal financial assistance, the whole department is considered to receive federal assistance as to be subject to § 504. Id.

Thus, while the CRRA overruled Grove City's narrow interpretation, the amendments were not so broad as to cover an entire local or State government as part of a "program

[31]At least one court, however, has held that an entire county was the "program or activity." See Bentley v. Cleveland County Bd. of Comm'rs, 41 F.3d 600 (10th Cir. 1994).

or activity." See Hodges by Hodges v. Public Bldg. Comm'n of Chicago (I), 864 F. Supp. 1493, 1505 (N.D. Ill. 1994), reconsideration denied, 873 F. Supp. 128, 132 (N.D. Ill. 1995) (City of Chicago "is a municipality and, as such, it does not fit within the definition of 'program or activity' for purposes of Title VI.");32/ see also Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991).33/

Examples:

# If Federal health assistance is extended to a part of a State health department, the entire health department would be covered in all of its operations. However, the entire State government is not considered a recipient just because the health department receives Federal financial assistance.

# If the office of a mayor receives Federal financial assistance and distributes it to departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually receive the aid from the Mayor's office.

It is significant to note that some courts have held that a State need not be a "program or activity" to be a defendant under Title VI. A State is properly included as a defendant if it is partly responsible for or participates in the discriminatory conduct. See

---

[32] In the first opinion, the District Court recognized that the Public Building Commission (PBC) could be subject to Title VI even if it did not directly receive Federal funds (as part of a larger program or activity). Conclusory allegations of PBC's contractual relationship with the Board of Education (CBOE), which received Federal funds, were insufficient to survive a motion to dismiss. "These conclusory allegations are insufficient to show that the PBC administered the CBOE's funds, benefitted from the CBOE's funds, or was connected in any other way to the Federal funds received by the CBOE." Id. at 1507.

[33] In Schroeder, the court stated:

> But the amendment was not, so far as we are able to determine--there are no cases on the question--intended to sweep in the whole state or local government, so that if two little crannies (the personnel and medical departments) of one city agency (the fire department) discriminate, the entire city government is in jeopardy of losing its federal financial assistance. Id.

United States v. City of Yonkers, 880 F. Supp. 212, 232 (S.D.N.Y. 1995) vacated and remanded on other grounds, 96 F. 3d 600 (2d Cir. 1996); New York Urban League v. Metropolitan Transp. Auth., 905 F. Supp. 1266, 1273 (S.D.N.Y. 1995), vacated on other grounds, 71 F.3d 1031 (2d Cir. 1995).

In United States v. City of Yonkers,the court rejected the State's argument that sovereign immunity applied since it is not a "program or activity." 880 F. Supp. at 232. The court stated that not only does the plain language of § 2000d-7 defeat the State's assertion, but also that

> nothing in the legislative history of Title VI compels the conclusion that an entity must be a 'program' or 'activity' to be a Title VI defendant. . . .We therefore hold that the State of New York can be sued under Title VI as long as it, along with those of its agencies receiving federal financial assistance, is alleged to have been responsible for a Title VI violation. Id. (note omitted).34/

E. Educational Institutions

The CRRA also defines "program or activity" in an educational context. Title VI (and Title IX, Section 504 and the ADEA of 1975) now provide:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of--
>
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

---

[34] Plaintiffs had alleged that the State, through its legislature, contributed to the alleged school segregation by passing laws that impeded desegregation efforts and providing limited financial assistance for such efforts. Id. at n.25. It is unclear whether evidence of such allegations was introduced. In a subsequent opinion, the court did not address these facts and rejected plaintiffs' arguments that a State, solely by its failure to prevent alleged discrimination, could be held vicariously liable for the discriminatory acts of a local education agency under either an intent or impact theory. United States v. City of Yonkers, 880 F. Supp. 591, 597-98 (S.D.N.Y. 1995), vacated and remanded, 96 F. 3d 600 (2d Cir. 1996).

(B) a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system;

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(2) (emphasis added). It is section 2(A) that specifically overturns the Grove City decision by including all of the operations of a postsecondary institution when any part of that institution is extended Federal financial assistance.[35]/ See Knight v. Alabama, 787 F. Supp. 1030, 1364 (N.D. Ala. 1991) (entire Statewide university system constituted "program or activity," notwithstanding limited autonomy of institutions and even though not all institutions received Federal assistance), aff'd in part, rev'd in part, and vacated in part, 14 F.3d 1534 (11th Cir. 1994).

Senate Report 64 provides several examples of the scope of an educational "program or activity." Federal funding to one school subjects the entire school system to Title VI. S. Rep. No. 64 at 17, reprinted in 1988 U.S.C.C.A.N. at 19. For example, Federal aid to one of three schools operated by the Catholic Diocese would subject all three schools to Title VI. Further, Congress explained that "all of the operations of" encompasses, but is not limited to, "traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities." Id.

The courts have followed this broad interpretation by ruling that a local educational agency includes school boards, their members, and agents of such boards.

---

[35] "Postsecondary institution is a generic term for any institution which offers education beyond the twelfth grade. Examples of postsecondary institutions would include vocational, business and secretarial schools." S. Rep. No. 64 at 16, reprinted in 1988 U.S.C.C.A.N. at 18.

Meyers by and through Meyers v. Board of Educ. of the San Juan Sch. Dist., 905 F. Supp. 1544 (D. Utah 1995)36/; Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994) (Title IX case); see also Young by and through Young v. Montgomery County (Ala.) Bd. of Educ., 922 F. Supp. 544 (M.D. Ala. 1996) (Court addressed the merits of Title VI claims against the county board of education without comment or question as to the propriety of such claims). In Horner, the Sixth Circuit held that both the school board and its agent for intercollegiate athletics were subject to Title IX. The court addressed this issue in terms of identifying a "program or activity" and "recipient" interchangeably. Id. at 271-72. The court reasoned that the State Department of Education receives the Federal funds, and the Board statutorily "controls and manages," on behalf of the Department, the operations of the schools. Furthermore, the Board's agent (a high school athletic association) was also a recipient since it had statutory authority to perform the Board's functions and received dues from schools that received Federal funds. Id.

F. Corporations and Private Entities

The CRRA also defines "program or activity" to include certain private entities. The scope of "program or activity" as it applies to a corporation or other private entity depends on the operational purpose of the entity, the purpose of the funds, and the structure of the entity. Title VI provides:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of--

---

[36] The court in Meyers opined that the Department of Education's regulations have a more narrow definition of "program or activity" than is set forth in the statute. Id. at 1574 n.37.

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship;

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(3) (emphasis added).

Generally, funds are given to an entity "as a whole" when such funds further the central or primary purpose of the entity, or the funds are not for a specific, narrow purpose. Senate Report No. 64 provides several examples regarding the application of this section. S. Rep. No. 64 at 17-18, reprinted in 1988 U.S.C.C.A.N. at 19-20. The following principles can be identified based on examples set forth in the Senate Report:

a. Funds provided to ensure the continued operation of a corporation are assistance to the entity "as a whole," and thus all operations of the entire corporation are subject to Title VI. Federal financial assistance extended to a corporation or other entity "as a whole" refers to situations where the corporation receives general assistance that is not designated for a particular purpose. For example:

# Federal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to a corporation "as a whole." Id.;

b. When any recipient is principally engaged in the business of providing education,

health care, housing, social services, or parks and recreation, and any part of this entity is extended Federal financial assistance, then "program or activity" encompasses all of the operations of the entire entity. For example:

# If a private hospital corporation receives Federal funds to operate its emergency room, all of the operations of the hospital (e.g., the operating rooms, pediatrics, discharge and admissions offices, etc.) are subject to Title VI.

# Nursewell Corporation owns and runs a chain of five nursing homes as its principal business. One of the five nursing homes receives Federal financial assistance under the Older Americans Act. Because the corporation is principally engaged in the business of providing social services and housing for elderly persons, aid to one home will subject the entire corporation to the requirements of Title VI. See 42 U.S.C. § 2000d-4a(3)(A)(ii); S. Rep. No. 64 at 18, reprinted in 1988 U.S.C.C.A.N. at 20.

c. Funds for a specific purpose or funds that support one of several functions of the recipient would not be considered assistance "as a whole," and thus only that aspect of the recipient's operations would be subject to Title VI. For example:

# A grant to a religious organization to enable it to extend assistance to refugees would not be assistance to the religious organization as a whole if the funded program is only one among a number of activities of the organization.

# Federal aid which is limited in purpose, e.g., Job Training Partnership Act (JTPA) funds, is not considered aid to the corporation as a whole, even if it is used at several facilities and the corporation has the discretion to determine which of its facilities participate in the program.

d. When Federal assistance is extended to a plant or any other comparable, geographically separate business facility of a corporation or other private entity, only the operations of the specific plant or facility are a "program or activity" subject to Title VI. Further, Federal financial assistance that is earmarked for one or more facilities of a private corporation or other private entity when it is extended is not assistance to the

entity "as a whole." Id. For example:

# The Dearborn, Michigan plant of General Motors is extended Federal financial assistance for first aid training through the State department of health. All of the operations of the Dearborn plant are covered by Title VI, as well as the State health department that distributed the Federal money. However, other geographically separate facilities of General Motors are not considered to be covered just because of the assistance to the Dearborn plant. See S. Rep. No. 64 at 18, reprinted in 1988 U.S.C.C.A.N. at 20-21.

e. The theory of "freeing up" funds for other purposes due to the receipt of Federal aid does not expand the application of Title VI beyond the principles described above.37/

G. Catch-All/Combinations of Entities

Finally, the CRRA defines "program or activity" to include the operations of entities formed by any combination of the aforementioned entities. Title VI is amended to read:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of--
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
>
> any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(4) (emphasis added).

Since any entity under this provision will include a partnership with a public entity, coverage will extend to the entire entity.

[A]n entity which is established by two or more entities described in [Paragraphs]

---

37 Nor does S. 557 embody a notion of "freeing up." Federal financial assistance to a corporation for particular purposes does not become assistance to the corporation as a whole simply because receipt of the money may free up funds for use elsewhere in the company. Id.

> (1), (2), or (3) is inevitably a public venture of some kind, i.e., either a government-private effort (1 and 3), a public education-business venture (2 and 3) or a wholly government effort (1 and 2). It cannot be a wholly private venture under which limited coverage is the general rule. The governmental or public character helps determine institution-wide coverage. . . . Even private corporations are covered in their entirety under (3) if they perform governmental functions, i.e., are "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation."

S. Rep. No. 64 at 19-20, reprinted in 1988 U.S.C.C.A.N. at 21-22. Thus, all of the operations of a partnership between a public and private entity, such as a school and a private corporation, would be subject to Title VI. The Senate Report also notes that coverage under Paragraph (4) applies to the newly created entity; coverage of the separate entities that comprise the partnership or joint venture must be determined independently. Id. at 20, reprinted in 1988 U.S.C.C.A.N. at 22.

## VIII. What Constitutes Discriminatory Conduct?

Title VI prohibits discrimination on the basis of "race, color, or national origin . . . under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The purpose of Title VI is simple: to ensure that public funds are not spent in a way which encourages, subsidizes, or results in racial discrimination. Toward that end, Title VI bars intentional discrimination. See Guardians, 463 U.S. at 607-08; Alexander v. Choate, 469 U.S. 287, 293 (1985). In addition, Title VI authorizes and directs Federal agencies to enact "rules, regulations, or orders of general applicability" to achieve the statute's objectives. 42 U.S.C. § 2000d-1. Most Federal agencies have adopted regulations that prohibit recipients of Federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination based on race, color, or national origin. The Supreme Court has held that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory. Guardians, 463 U.S. at 582; Alexander v. Choate, 469 U.S. at 292-94; see Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993).

Thus, Title VI claims may be proven under two primary theories: intentional discrimination/disparate treatment and disparate impact/effects. Under the first theory, the recipient, in violation of the statute, engages in intentional discrimination based on race, color, or national origin. The analysis of intentional discrimination under Title VI is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. Elston, 997 F.2d at 1405 n. 11; Guardians, 463 U.S. at

582, Alexander, 469 U.S. at 287, 293; Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

Under the second theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on individuals of a particular race, color, or national origin, and such practice lacks a "substantial legitimate justification." Larry P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984); New York Urban League v. New York, 71 F.3d 1031, 1038 (2d Cir. 1995); Elston, 997 F.2d at 1407. Title VI disparate impact claims are analyzed using principles similar to those used to analyze Title VII disparate impact claims. Young by and through Young v. Montgomery County (Ala.) Bd. of Educ., 922 F. Supp. 544, 549 (M.D. Ala. 1996).

A. Intentional Discrimination/Disparate Treatment

An intent claim alleges that similarly situated persons are treated differently because of their race, color, or national origin. To prove intentional discrimination, one must show that "a challenged action was motivated by an intent to discriminate." Elston, 997 F.2d at 1406. This requires a showing that the decisionmaker was not only aware of the complainant's race, color, or national origin, but that the recipient acted, at least in part, because of the complainant's race, color, or national origin. However, the record need not contain evidence of "bad faith, ill will or any evil motive on the part of the [recipient]." Elston, 997 F.2d at 1406 (quoting Williams v. City of Dothan, 745 F.2d 1406, 1414 (11th Cir. 1984)).

Evidence of discriminatory intent may be direct or circumstantial and may be found in various sources, including statements by decisionmakers, the historical background of the events in issue, the sequence of events leading to the decision in

issue, a departure from standard procedure (e.g., failure to consider factors normally considered), legislative or administrative history (e.g., minutes of meetings), a past history of discriminatory or segregated conduct, and evidence of a substantial disparate impact on a protected group. See Arlington Heights v. Metropolitan Hous. Redevelopment Corp., 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment); Elston, 997 F.2d at 1406.

Direct proof of discriminatory motive is often unavailable. In the absence of such evidence, claims of intentional discrimination under Title VI may be analyzed using the Title VII burden shifting analytic framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).38/ See Baldwin v. Univ. of Texas Med. Branch at Galveston, 945 F.Supp. 1022, 1031 (S.D.Tex. 1996); Brantley v. Independent Sch. Dist. No. 625, St. Paul Public Schools, 936 F.Supp. 649, 658 n.17 (D.Minn. 1996).39/

Applying the McDonnell Douglas principles to a Title VI claim, the investigating agency must first determine if the complainant can raise an inference of discrimination by establishing a prima facie case. The elements of a prima facie case may vary depending on the facts of the complaint, but such elements often include the following:

1. that the aggrieved person was a member of a protected class;

2. that this person applied for, and was eligible for, a federally assisted

---

[38]At least one court, however, has declined to apply the McDonnell Douglas burden shifting framework to the analysis of a Title VI claim. See Godby v. Montgomery County Bd. of Educ., 996 F. Supp. 1390, 1414 n.17 (M.D. Ala. 1998).

[39]The Civil Rights Act of 1991 amended Title VII to clarify the burdens of proof in disparate impact cases. 42 U.S.C. § 2000e-2.

program that was accepting applicants;

3. that despite the person's eligibility, he or she was rejected; and,

4. that the recipient selected applicants of the complainant's qualifications -- or that the program remained open and the recipient continued to accept applications from applicants of complainant's qualifications.40/

If the case file contains sufficient evidence to establish a prima facie case of discrimination, the investigating agency must then determine if the recipient can articulate a legitimate, nondiscriminatory reason for the challenged action. See McDonnell Douglas, 411 U.S. at 802. If the recipient can articulate a nondiscriminatory explanation for the alleged discriminatory action, the investigating agency must determine whether the case file contains sufficient evidence to establish that the recipient's stated reason was a pretext for discrimination. Id. In other words, the evidence must support a finding that the reason articulated by the recipient was not the

---

[40] It is important to remember that the "prima facie case method established in McDonnell Douglas was 'never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 715 (1982) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

For example, it should be noted that the McDonnell Douglas *prima facie* framework for Title VII claims does not require that the applicant selected for the position be of a different race, color, or national origin than the complainant. Under McDonnell Douglass, the complainant only needs to show that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas, 411 U.S. at 802. Several courts dealing with this issue in the Title VII context have noted that the fact that the applicant selected in place of the complainant is of a different race "may help to raise an inference of discrimination," but it is not necessarily dispositive on the question of discriminatory intent. Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000) (internal citations omitted); see also Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 354 (3d Cir. 1999); Jackson v. Richards Med. Co., 961 F.2d 575, 587 n.12 (6th Cir. 1992).

true reason for the challenged action, and that the real reason was discrimination based on race, color, or national origin.

Similar principles may be used to analyze claims that a recipient has engaged in a "pattern or practice" of unlawful discrimination. Such claims may be proven by a showing of "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." See International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). The evidence must establish that a pattern of discrimination based on race, color, or national origin was the recipient's "standard operating procedure the regular rather than the unusual practice." Id. Once the existence of such a discriminatory pattern has been proven, it may be presumed that every disadvantaged member of the protected class was a victim of the discriminatory policy, unless the recipient can show that its action was not based on its discriminatory policy. Id. at 362.

It is also important to remember that some claims of intentional discrimination may involve the use of policies or practices that explicitly classify individuals on the basis of membership in a particular group. Such "classifications" may constitute unlawful discrimination if based on characteristics such as race, color, national origin, sex, etc. For example, the Supreme Court held in a Title VII case that a policy that required female employees to make larger contributions to the pension fund than male employees created an unlawful classification based on sex. See City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978). The investigation of such claims should focus on the recipient's reasons for utilizing the challenged classification policies. Most such policies will be deemed to violate Title VI, unless the recipient can articulate a lawful justification for classifying people on the basis of race, color, or

national origin.

B. Disparate Impact/Effects

The second primary theory for proving a Title VI violation is based on Title VI regulations and is known as the discriminatory "effects" or disparate impact theory. As noted previously, Title VI authorizes Federal agencies to enact regulations to achieve the statute's objectives. Most Federal agencies have adopted regulations that apply the disparate impact or effects standard. For example, the Department of Justice regulations state:

> (2) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, 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 accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

28 C.F.R. § 42.104(b)(2) (emphasis added).

Pursuant to such regulations, all entities that receive Federal funding enter into standard agreements or provide assurances that require certification that the recipient will comply with the implementing regulations under Title VI. Guardians, 463 U.S. 582, 642 n. 13. The Supreme Court has held that these regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory. Guardians, 463 U.S. at 582, Alexander v.

Choate, 469 U.S. at 293.

Many subsequent cases have also recognized the validity of Title VI disparate impact claims. See Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996); New York Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995); David K. v. Lane, 839 F.2d 1265 (7th Cir. 1988); Gomez v. Illinois State Bd. Of Educ., 811 F.2d 1030 (7th Cir. 1987); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984). 41/ In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of Federally financed programs."

Under the disparate impact theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. The elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law. New York Urban League, 71 F.3d at 1036.

In a disparate impact case, the focus of the investigation concerns the consequences of the recipient's practices, rather than the recipient's intent. Lau v. Nichols, 414 U.S. 563 at 568 (1974). For example, in Sandoval v. Hagan, 197 F.3d 484

---

[41] While there is no question that a Federal funding agency can enforce its Title VI regulations providing for a disparate impact standard of proof, several courts of appeals have held that plaintiffs have a private right of action to enforce the disparate impact regulations implementing Section 602 of Title VI, as well. See Chapter XII for further discussion of this issue.

(11th Cir. 1999), cert. granted sub. nom. Alexander v. Sandoval, __ U.S. __, 121 S.Ct. 28, 68 U.S.L.W. 3749 (U.S. Sept. 26, 2000) (No. 99-1908) plaintiffs filed a private action under Title VI claiming that Alabama's English-only driver's license exam policy, although facially neutral, had a disparate impact on the basis of national origin in violation of section 602 of Title VI. The court observed that the defendant-recipients, the Alabama Department of Public Safety, did not contest the district court's finding of fact "as to the disparate impact of the [English-only] policy on non-English speaking license applicants," nor the "disparate impact their English-only policy visits on Alabama residents of foreign descent." Id. at 508. Instead, the court stated that the defendants argued "that an English language policy, even if exerting a disparate impact on the basis of national origin, cannot ever constitute national origin discrimination." Id. The court rejected this claim, concluding that regardless of whether language may serve as a proxy for national origin discrimination in an intentional discrimination claim, claims brought under section 602 of Title VI do not involve an intent requirement. Id. at 508-09. Rather, in order to establish a disparate impact claim under section 602, plaintiffs need only show that the policy "has a 'disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.'" Id. at 509 (quoting Elston, 997 F.2d at 1407).

To establish discrimination under a disparate impact scheme, the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI.42/ Larry P. v. Riles,

---

[42] The policy or procedure in question need not be formalized in writing, but can also be a practice that is understood as a "standard operating procedure" by its employees

793 F.2d 969, 982; Elston, 997 F.2d at 1407 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)). The agency must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on a protected Title VI group.

In New York City Envtl. Justice Alliance (NYCEJA) v. Giuliani, 214 F.3d 65, 69 (2d Cir. 2000), plaintiffs sought to enjoin the City of New York from selling or bulldozing certain city-owned lots containing 600 community gardens mainly located in minority neighborhoods. They alleged that the city's actions would violate the Environmental Protection Agency's Title VI implementing regulations because the actions would have a disproportionately adverse impact on the city's minority residents. 214 F. 3d 65, 67.

Although plaintiffs "alleged in substance that white community districts tend to have access to more open space than minority ones, and that the sale of community gardens would perpetuate and exacerbate this disparity," the court found that the evidence plaintiffs presented in support of their claim consisted of broad conclusive statements or flawed statistics. 214 F.3d 65, 69-71. Accordingly, the court dismissed plaintiff's motion for preliminary injunction for failure to present adequate proof of causation. Id. at 69. In order to establish causation, plaintiffs were required "to employ facts and statistics that 'adequately capture[d]' the impact of the city's plans on similarly situated members of protected and non-protected groups." 214 F. 3d 65, 70 quoting New York Urban League, 71 F. 3d 1031, 1037.

If the evidence establishes a prima facie case, the investigating agency must

---

or others who implement it.

then determine whether the recipient can articulate a "substantial legitimate justification" for the challenged practice. Georgia State Conference, 775 F.2d at 1417. "Substantial legitimate justification" is similar to the Title VII concept of "business necessity," which involves showing that the policy or practice in question is related to performance on the job. Griggs v. Duke Power, 401 U.S. 424 (1971).

To prove a "substantial legitimate justification," the recipient must show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission." Sandoval v. Hagan, 7 F.Supp. 2d 1234, 1278 (M.D. Ala. 1998), aff'd, 197 F.3d 484 (11th Cir. 1999), cert. granted sub. nom. Alexander v. Sandoval, __ U.S. __, 121 S.Ct. 28, 68 U.S.L.W. 3749 (U.S. Sept. 26, 2000) (No. 99-1908) (quoting Elston, 997 F.2d at 1413). The justification must bear a "manifest demonstrable relationship" to the challenged policy. Georgia State Conference, 775 F.2d. at 1418. See, e.g., Elston, 997 F. 2d at 1413 (In an education context, the practice must be demonstrably necessary to meeting an important educational goal, i.e. there must be an "educational necessity" for the practice).

If the recipient can make such a showing, the inquiry must focus on whether there are any "equally effective alternative practices" that would result in less racial disproportionality or whether the justification proffered by the recipient is actually a pretext for discrimination. Id. See generally, McDonnell Douglas, 411 U.S. 792. Evidence of either will support a finding of liability.

Courts have often found Title VI disparate impact violations in cases where recipients utilize policies or practices that result in the provision of fewer services or benefits, or inferior services or benefits, to members of a protected group. In Larry P. v.

Riles, 793 F.2d 969 (9th Cir. 1984), the Ninth Circuit applied a discriminatory effects test to analyze the Title VI claims of a class of black school children who were placed in special classes for the "educable mentally retarded" ("EMR") on the basis of non-validated IQ tests. The Ninth Circuit upheld the district court's finding that use of these IQ tests for placement in EMR classes constituted a violation of Title VI. Id. at 983. Similarly, in Sandoval, the court held that discrimination on the basis of language, in the form of an English-only policy, had an unjustified disparate impact on the basis of national origin, and thus violated Title VI. Sandoval, 7 F.Supp. 2d at 1312. See Meek v. Martinez, 724 F.Supp. 888 (S.D.Fla. 1987) (Florida's use of funding formula in distributing aid resulted in a substantially adverse disparate impact on minorities and the elderly). See also, Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 655 N.E.2d 1178 (N.Y. Ct. App. Jun 15, 1995) (Prima facie case established where allocation of educational aid had a racially disparate impact).

In evaluating a potential disparate impact claim under Title VI, it is important to examine whether there is a substantial legitimate justification for the challenged practice and whether there exists an alternative practice that is comparably effective with less of a disparate impact. See Elston, 997 F.2d at 1407. For example, the Second Circuit in New York Urban League, reversed the district court's preliminary injunction for its failure to consider whether there was a "substantial legitimate justification" for a subway fare increase that had an adverse impact. 71 F.3d at 1039.

> [B]ut the district court did not consider, much less analyze, whether the defendants had shown a substantial legitimate justification for this allocation. The MTA and the State identified several factors favoring a higher subsidization of the commuter lines. By encouraging suburban residents not to drive into the City, subsidization of the commuter rails

> minimizes congestion and pollution levels associated with greater use of automobiles in the city; encourages business to locate in the City; and provides additional fare-paying passengers to the City subway and bus system. In these respects and in others, subsidizing the commuter rails may bring material benefits to the minority riders of the subway and bus system. The district court dismissed such factors, concluding that the MTA board did not explicitly consider them before voting on the NYCTA and commuter line fare increases. That finding is largely irrelevant to whether such considerations would justify the relative allocation of total funds to the NYCTA and the commuter lines. (Emphasis added) 43/

Similarly, in Young by and through Young, 922 F.Supp at 544, the court ruled that even if a disparate impact were assumed, the defendants had established a "substantial legitimate justification."

> [T]he Defendants presented evidence that Policy IDFA was adopted to address concerns that the M to M transfer program was being used to facilitate athletic recruiting in the Montgomery County school system and to help revitalize Montgomery's west side [minority] high schools. Both of these justifications are substantial and legitimate because they evince a genuine attempt by the Board of Education to improve the quality of education offered in [the] County.

Id. at 551.

If a substantial legitimate justification is identified, the third stage of the disparate impact analysis is the plaintiff's demonstration of a less discriminatory alternative. Elston, 997 F. 2d at 1407; see also, Young by and through Young, 922 F. Supp. at 551 (where defendants established a substantial legitimate justification, plaintiffs failed to demonstrate existence of an equally effective alternative practice).

---

[43] It is interesting to note that this opinion suggests that post-hoc justifications, be they "substantial and legitimate," will be considered. Furthermore, these justifications also are arguably tangential in their alleged benefits to the minority riders disparately affected by the fare increase. However, it also should be remembered that this case was on review of a preliminary injunction, where plaintiffs must show a likelihood of success on the merits to receive an injunction. New York Urban League, 71 F. 3d at 1039.

C. National Origin Discrimination and Services in Languages Other than English

Since its adoption and initial implementation, Title VI regulations have barred utilization of criteria and methods of administration which have, among other results, "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin."44/ This universal regulatory language incorporates a disparate impact standard into Title VI.45/

In Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court faced a challenge by Chinese-speaking students to a school district's policy of offering instruction only in English. Siding with the students, the Court concluded that the failure to provide information and services in languages other than English could result in discrimination on the basis of national origin where the failure to do so resulted in a significant number of limited English proficiency (LEP) beneficiaries from the same language minority being unable to fully realize the intended benefits of a federally assisted program or activity.

> [i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program - all earmarks of the discrimination banned by [the Title VI implementing regulations]."46/

Lau has its clearest application in the educational setting. However, Lau's reach

---

[44] 65 Fed. Reg. 50121, 50123.

[45] See discussion supra Section B of this chapter for a discussion of the disparate impact standard.

[46] Lau v. Nichols, 414 U.S. at 568.

is not limited to educational programs or activities. The core holding in Lau -- that the failure to address limited English proficiency among beneficiary classes could constitute national origin discrimination -- has equal vitality with respect to any federally assisted program or activity providing services to the public.47/

1. Presidential Reaffirmance and Clarification of Lau Obligations

Recently, the obligation to eliminate limited English proficiency as an artificial barrier to full and meaningful participation in *all* federally assisted programs and activities was reaffirmed and clarified by the President. See Executive Order 13166, 65 Fed. Reg. 50121 (August 16, 2000).48/

> The Federal Government is committed to improving the accessibility of...services to eligible [limited English proficiency] persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English....Each Federal agency shall...work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries....[R]ecipients must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.49/

The Executive Order requires each federal agency to develop, after consultation

---

47 See e.g., Sandoval v. Hagen, 7 F. Supp. 2d 1234 (driver's licence examinations); Pabon v. Levine, 70 F.R.D. 674 (S.D.N.Y. 1976) (unemployment insurance information).

48 Executive Order 13166 also expanded the obligation to address the language needs of Limited English Proficiency (LEP) persons beyond federally assisted programs and activities to include federally conducted programs and activities. The Executive Order makes clear that the same compliance standards expected of recipients of federal financial assistance are applicable to Federal agencies themselves in the conduct of their own programs and activities. See Section 2, Executive Order 13166, 65 Fed. Reg. at 50121.

49 Section 1, Executive Order 13166.

with appropriate program and activity stakeholders50/, agency-specific LEP guidance for recipients of federal financial assistance.51/ As an aid in developing this guidance, the Executive Order incorporates the Department of Justice LEP Guidance (LEP Guidance) issued contemporaneously with the Executive Order.52/ The LEP Guidance "sets forth the compliance standards that recipients must follow to ensure that programs and activities they normally provide in English are accessible to LEP persons."53/ Agency-specific LEP guidance for recipients is to be "consistent with the standards set forth in the [DOJ] LEP Guidance."54/

2. The Four Factor Analysis: Reasonable Steps Toward Reasonable Measures

Title VI, Executive Order 13166, and the LEP Guidance do not require a recipient to re-invent or mirror a federally assisted program or activity solely because a significant number or proportion of its beneficiary class are LEP persons. Indeed, in some

---

[50] Id. at Section 4. "Stakeholders" are persons and organizations having an interest in the administration and operation of particular programs and activities providing services or benefits to the public. For the purposes of documents developed in furtherance of Executive Order 13166, "stakeholders" includes, but is not necessarily limited to, "LEP persons and their representative organizations, recipients, and other appropriate individuals or entities." Id.

[51] Id. at Section 3. Agency-specific LEP Guidance for recipients must be submitted to the Department of Justice for review and approval prior to final issuance. Approval responsibility for the Department has been assigned to the Coordination and Review Section of the Civil Rights Division, Department of Justice.

[52] Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination Against Persons with Limited English Proficiency, dated August, 11, 2000, reprinted at 65 Fed. Reg. 50123 (August 16, 2000).

[53] See Executive Order 13166 at Section 1.

[54] Id. at Section 3.

circumstances, the creation of separate but equal language-based mirror programs could itself be questioned under Title VI. Nor do they require recipients to add non-English modules to a program or activity where English competency is an essential element (such as providing employment examinations only in English when English proficiency is a legitimate job requirement).55/ Rather, recipients are required to address, consistent with the core objectives of the federally assisted programs or activities, *the specific language needs* of their LEP beneficiaries *which operate as artificial barriers* to full and meaningful participation in the federally assisted program or activity. This requires that recipients evaluate how a LEP person's inability to understand oral and written information provided by and about a federally assisted program or activity might adversely impact his or her ability to fully participate in or benefit from that program or activity. The LEP Guidance provides a structure through which these various aspects of a program or activity can be consistently evaluated.

Given the wide range of programs and activities receiving Federal financial assistance, no single uniform rule of compliance is either possible or reasonable. Instead, the LEP Guidance incorporates "reasonableness" as its guiding principle. Toward that end, the LEP Guidance articulates a flexible four-factor analysis requiring reasonable steps to identify and implement reasonable measures to mitigate those

---

[55] See 65 Fed. Reg. at 50125, n. 13. The fact that English competency is a core element of the federally assisted program or activity does not necessarily mean that a recipient is alleviated from an LEP obligations to program beneficiaries. Recipients should undertake a separate analysis for each aspect of their program or activity (e.g., application, admission, instruction/service, referral, recruitment, outreach, etc.) to ensure that some specific language need on the part of LEP persons does not operate directly or indirectly as an artificial barrier to full and meaningful participation in the English proficiency portion of the federally assisted program or activity.

aspects of beneficiaries' limited English proficiency that act as artificial barriers to "accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin."56/

> Title VI and its regulations require recipients to take reasonable steps to ensure "meaningful" access to the information and services they provide. What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.57/

Under the DOJ four-factor analysis, the search for "reasonableness" flows from a balancing or blending of all four factors to determine what, if any, language mitigation measures are reasonably necessary to eliminate or minimize LEP as a barrier to participation in or receipt of the benefits of a federally assisted program or activity. Under this approach, no single factor alone is determinative and no single factor is entitled to greater weight in isolation from the other three. Finally, separate analyses should be undertaken with respect to each different language group within the recipient's beneficiary class.

D. Environmental Justice and Title VI

"Although the term 'environmental justice' is of fairly recent vintage, the concept is not."58/ For thirty-five years, Title VI has prohibited methods of administration or the

---

[56] See 65 Fed. Reg. at 50123.

[57] See 65 Fed. Reg. at 50124 (LEP Guidance).

[58] Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 195 (4th Cir. 1999) (King, Circuit Judge, concurring). To highlight his point, Judge King recalled an observation made almost thirty years ago that continues to have validity. "'As often

use of criteria which had the effect of discriminating on the basis of race, color or national origin. The application of this result-oriented analysis to criteria used or *not used* in decision-making on projects or activities affecting the human environment is a logical extension of Title VI. Indeed, the core tenet of environmental justice – that development and urban renewal benefitting a community as a whole not be unjustifiably purchased through the disproportionate allocation of its adverse environmental and health burdens on the community's minority – flows directly from the underlying principal of Title VI itself.

1. Executive Order 12898: The Duty to Collect, Disseminate and Think

In 1994, the President issued Executive Order 12898 entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."59/ While that Executive Order creates no new obligations or rights, it does clarify existing Title VI requirements on Federal officials and those that receive federal financial assistance to incorporate into their respective cost-benefit analyses a meaningful consideration of possible disproportionate adverse environmental and health impacts on minority and low-income populations.

> [Executive Order 12898] is designed to focus Federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice. That order is also intended to promote non-discrimination in Federal

---

happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live'." Id. quoting Triangle Improvement Council v. Ritchie, 402 U.S. 497, 502 (1971) (per curiam) (Douglas, J., dissenting).

[59] 59 Fed. Reg. 7629 (1994), codified at 3 C.F.R. § 859 (1995).

> programs substantially affecting human health and the environment, and to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.60/

In order to accomplish its goals, Executive Order 12898 requires each federal agency to develop, under the guidance of an Interagency Working Group on Environmental Justice, a written strategy to identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations. That strategy is to reflect agency efforts to re-focus and, if necessary re-tool, its programs, policies, planning and public participation processes, enforcement, and/or rulemaking related to human health or the environment to:

> (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.61/

In sum, Executive Order 12898 requires agencies to develop and implement an integrated approach to realizing environmental justice through the collection, analysis and dissemination of understandable62/ and useful information on the adverse

---

[60] Presidential Memorandum for the Heads of all Departments and Agencies, 30 Weekly Comp. Pres. Doc. 279 (February 11, 1994) ("Presidential Memorandum").

[61] 59 Fed. Reg. 7629, 7630 at §1-103(a).

[62] In this regard, Executive Order 12898 directs federal agencies to ensure that public documents, notices and hearing are "concise, understandable, and readily accessible to the public." Executive Order 12898, §5-5(c). In addition, where practicable and appropriate, agencies are authorized to translate crucial environmental or health information into languages other than English. Id., §5-5(b). For a discussion

environmental and health impacts on protected populations. Armed with this information, decision-making on projects and proposals affecting the social and physical environment should be enriched to the benefit of both decision-makers and the public.

2. EPA Guidance on Environmental Justice

While the concept of environmental justice is applicable to any federally assisted program or activity involving potential environmental or health burdens, it has its clearest impact with respect to undertakings which also trigger federal obligations under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §321, et seq, or its state and local progeny.63/ Such undertakings generally involve changes to a community's land use patterns or physical environment and include, but are not limited to, such things as highways, water/sewer/power lines, mass transit projects, urban re-development and other activities associated with community infrastructure construction.

Consistent with its leadership role over federal environmental policy and its enhanced obligations under Executive Order 12898,64/ the Environmental Protection

---

of where such translations may be required under Executive Order 13166, issued six years after Executive Order 12898, see pp. 59-65 in this chapter.

[63] As clarified by the President when he issued Executive Order 12898, the duty to engage in an environmental justice analysis is coextensive with the duty to engage in an environmental analysis under NEPA. See Presidential Memorandum.

[64] In addition to its environmental justice responsibilities share in common with other federal departments and agencies, EPA is directed to ensure as part of its reviews under Section 309 of the Clean Air Act, 42 U.S.C. § 760, that the environmental effects of proposed action on minority and low-income communities have been fully analyzed, including all human health, social, and economic effects. See Presidential Memorandum.

Agency is currently finalizing two environmental guidance documents focusing on the application of environmental justice concepts in the permitting context.65/ The first outlines EPA's policies on recipients' existing environmental justice obligations under Title VI of the Civil Rights Act of 1964, as amended. The second details the internal investigative procedures and criteria that will be used by EPA to investigate Title VI complaints containing environmental justice concerns. Through these documents, EPA intends to address questions raised over how to achieve environmental justice in this important yet difficult area. Notwithstanding their focus on permitting, the EPA guidance documents offer valuable assistance in clarifying environmental justice questions raised in other areas. These documents are available on the EPA Office of Civil Rights website at www.epa.gov/civilrights.

3. An Analytical Approach and its Attendant Problems of Timing and Proof

Two recent cases illustrate the approach and inherent difficulties of timing and proof associated with environmental justice actions. The first, Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180 (4th Cir. 1999) highlights the consequences of lack of meaningful notice on the ability to seek environmental justice through litigation. The second, New York City Envtl. Justice Alliance v. Giuliani, 214 F.3d 65 (2d Cir. 2000) [hereinafter NYCEJA], sets out one approach to analyzing environmental justice claims but highlights the difficulties of proof a complainant faces in establishing a prima facie case.

---

65 "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Revised Draft Guidance for Investigating Title VI Administrative Complaints Challenging Permits," 65 Fed. Reg. 39650 (2000).

In Jersey Heights, an African-American community challenged under Title VI, among other grounds, a decision to route a highway bypass through their community. The challenged route, initially chosen in 1985, confirmed in 1989 and revised in 1991, placed the path of the bypass adjacent to Jersey Heights, a local community whose population was more than 90% African-American. The other route under consideration in 1985, running through a predominantly white area of the city, was rejected after residents of that area voiced strong and timely objections to its selection. The residents of the predominantly white area had received individual notice in 1985 of the planning process while the residents of Jersey Heights had not. Planning officials did not specifically meet with Jersey Heights residents until 1992, after the bypass routing decision had already been made.66/ When administrative remedies under Title VI failed to address their concerns, the residents resorted to their judicial remedies in 1997. On appeal, the Fourth Circuit Court of Appeals sustained a dismissal of the action as untimely.

In connection with the plaintiff's Title VI claim against state official,67/ the court in Jersey Heights first held that Title VI actions were subject to the state's three-year limitation period.68/ Because the final route decision was made in 1989 and in light of

---

[66] Jersey Heights, 174 F.3d at 195.

[67] The court affirmed dismissal of parallel claims against federal official under Title VI as barred by sovereign immunity and, with respect to a claimed abdication of enforcement duty, unauthorized. Id. at 191.

[68] In so doing, the court acknowledged that the question of which limitations period applied to Title VI actions had not been definitively addressed in the Fourth Circuit. In addition, finding no state statute comparable to Title VI, the court concluded that the applicable limitation period of that applied to personal injuries. Id. at 187.

evidence indicating that at least *some* of the residents of Jersey Heights had actual or imputed knowledge of the decision at that time, their 1997 action was time-barred. In reaching this result, the court rejected argument that Title VI is triggered by the final commitment of federal assistance to the project rather than the local decision to proceed with the project. It also refused to adopt the "continuing violation" theory, citing established Circuit law that a "'continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.'"69/ Finally, while recognizing the desirability of resort to administrative remedies, the court declined to hold that the limitations period was tolled during the administrative complaint process.70/

In large measure, Executive Order 12898 seeks to address the Jersey Heights result by mandating timely and effective notice to minority and low-income populations as part of any planning process. In drafting guidance or conducting program reviews, agency officials should focus specific attention on the public notice and participation procedures employed by themselves and their recipients to ensure compliance with the public consultation requirements of Executive Order 12898.

Even where notice is sufficient, environmental justice litigants must overcome the inherent difficulties of providing adequate proof of discrimination.71/ In NYCEJA, a panel of the Second Circuit Court of Appeals confronted a challenge to a proposed

---

[69] Id. at 189 (quoting National Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1166 (4th Cir. 1991).

[70] Id. at 191.

[71] See supra pp. 55-57 for a discussion on NYCEJA and providing proof of disparate impact.

auction of city-owned lots, most located in minority communities and used as community gardens, for the asserted purpose of building new housing and fostering urban renewal. 214 F. 3d 65. As discussed above in Section B of this Chapter, the court rejected the plaintiffs' proffered prima facie case because it was not based on an "appropriate measure" that "adequately captured" the nature and scope of the asserted adverse impact borne specifically and principally by the minority population in relation to the non-minority population.72/

The decision in NYCEJA demonstrates that although the analytical approach to environmental justice claims is relatively easy to articulate, they are difficult to resolve. In such circumstances, the ability to isolate and prove adverse environmental and health burdens disproportionately suffered by a minority which are not shared by other parts of a community will play a determinative role in establishing a violation of Title VI in the environmental justice setting.

E. Retaliation

A complainant may bring a retaliation claim under Title VI or under a Title VI regulation that prohibits retaliation. For example, most agency Title VI regulations provide that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart." 28 C.F.R. § 42.108(e) (Department of Justice Regulation).

---

[72] See NYCEJA, 214 F.3d 65, 69 (2d Cir. 2000).

To establish a prima facie case of retaliation, the investigating agency must first determine if the complainant can show (1) that he or she engaged in a protected activity, (2) that the recipient knew of the complainant's protected activity, (3) that the recipient took some sort of adverse action against the complainant, and (4) that there was a causal connection between the complainant's protected activity and the recipient's adverse actions. See Davis v. Halpern, 768 F.Supp. 968, 985 (E.D.N.Y. 1991). (Defendants's summary judgment motion to dismiss Title VI retaliation claim was denied because plaintiff established evidence of prima facie case).

Once a prima facie case of retaliation has been established, the investigating agency must then determine if the recipient can articulate a "legitimate non-discriminatory reason" for the action. Id. If the recipient can offer such a reason, the investigating agency must then show that recipient's proffered reason is pretextual and that the recipient's actual reason was retaliation. Id. A showing of pretext is sufficient to support an inference of retaliation. Id.

## IX. Employment Coverage

### A. Scope of Coverage

While Title VI was not meant to be the primary Federal vehicle to prohibit employment discrimination, it does forbid employment discrimination by recipients in certain situations. If a primary objective of the Federal financial assistance to a recipient is to promote employment, then the recipient's employment practices are subject to Title VI. 42 U.S.C. § 2000d-3.[73]/

> Nothing contained in [Title VI] shall be construed to authorize action under [Title VI] by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Id. (emphasis added). In addition, as explained below, a recipient's employment practices also are subject to Title VI where those practices negatively affect the delivery of services to ultimate beneficiaries.

For example, if a recipient built a temporary shelter with funds designed to provide temporary assistance to dislocated individuals, the employment practices of the recipient with respect to the construction of such facility are not subject to Title VI.

---

[73] In contrast, if employment of potential beneficiaries was not a primary object of the Federal assistance, the employment practices of a recipient are not covered by Title VI.

> [S]ection 604 would be added, to preclude action by a Federal agency under Title VI with respect to any employment practices of an employer, employment agency, or labor organization, except where a primary objective of the Federal financial assistance involved is to provide employment. This provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title. 110 Cong. Rec. 12720 (1964) (Statement by Sen. Humphrey); see 110 Cong. Rec. 2484 (1964) (Statement by Sen. Poff).

However, if the recipient built the same facility with funds received through a public works program whose primary objective is to generate employment, the employment practices are subject to Title VI. In the former case, the program's benefit was to provide shelter to dislocated individuals while, in the latter case, the benefit was the employment of individuals to build the facility.

Thus, to sustain a claim of employment discrimination under Title VI, the plaintiff has an additional threshold requirement: not only must the plaintiff establish that the recipient receives Federal financial assistance, but also that the "primary objective" of the Federal funding is to provide employment. Reynolds v. School Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1531 (10th Cir. 1995) (motion to dismiss granted due to plaintiff's failure to show that the primary purpose of Federal assistance was to provide employment); Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 276 (2d Cir. 1981) (failure to prove all elements of employment discrimination claim due to lack of evidence of primary purpose of Federal funds), cert. denied, 455 U.S. 988 (1982); Bass v. Board of County Comm'rs of Orange County, 38 F. Supp. 2d 1001 (M.D. Fla, 1999) (summary judgment against plaintiff due to lack of evidence of primary purpose of Federal funds); Thornton v. National R.R. Passenger Corp., 16 F. Supp. 2d 5 (D.D.C. 1998) (complaint dismissed because primary objective of funding was to promote transportation, not employment). In Reynolds, plaintiff's assertion that Federal funds paid, in part, the salary of an employee was insufficient, since plaintiff did not show that the primary objective of the Federal funds was employment rather than general funding of school programs. Id. at 1532.

Further, where employment discrimination by a recipient has a secondary effect

on the ability of beneficiaries to meaningfully participate in and/or receive the benefits of a federally assisted program in a nondiscriminatory manner, those employment practices are within the purview of Title VI.74/ Agency regulations specifically address this principle in identical or similar language:

> In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) [prohibitions where objective is employment] apply to the employment practices of the recipient if discrimination on the grounds of race, color, or national origin in such employment practices tends, on the grounds of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

28 C.F.R. § 42.104(c)(2); see also 15 C.F.R. § 8.4(c)(2) (Commerce); 34 C.F.R. § 100.3(c)(3) (Education). In this situation, there is a causal nexus between employment discrimination and discrimination against beneficiaries. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 883 (5th Cir. 1966) ("Faculty integration is essential to student desegregation."), cert. denied. sub nom., Caddo Parish Sch. Bd. v. United States, 389 U.S. 840 (1967); Ahern v. Board of Educ., 133 F. 3d 975 (7th Cir. 1998) (applying infection theory to public school plan for assignment of principals); Caulfield v. Board of Educ., 486 F. Supp. 862, 876 (E.D.N.Y. 1979) (characterization of infection theory where employment practices affect beneficiaries, i.e., students); Marable v. Alabama Mental Health Bd., 297 F. Supp. 291, 297 (M.D. Ala. 1969) (patients of State mental health system have standing to challenge segregated employment practices which affect delivery of services to patients.).

---

[74] This is oftentimes referred to as the "infection theory."

Section 2000d-3 does not exempt a recipient's employment practices from other applicable Federal statutes, executive orders, or regulations. United States by Clark v. Frazer, 297 F. Supp. 319, 321-322 (M.D. Ala. 1968); see also, Contractors Ass'n. of E. Pa. v. Secretary of Labor, 442 F.2d 159, 173 (3d. Cir. 1971), cert. denied., 404 U.S. 854 (1971). Furthermore, a recipient's compliance with State and local merit systems for employment may not constitute compliance with Title VI. 28 C.F.R. § 42.409.

B. Regulatory Referral of Employment Complaints to EEOC

In 1983, the Department of Justice and the Equal Employment Opportunity Commission (EEOC) published "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal financial assistance." 28 C.F.R. §§ 42.601-42.613 (DOJ); 29 C.F.R. §§ 1691.1 - 1691.13 (EEOC) (often referred to as the Title VI/VII rule). In summary, the procedures provide that a Federal agency receiving a complaint of employment discrimination against a recipient that is covered by both Title VI (and/or other grant-related prohibitions against discrimination) and Title VII should refer the complaint to the EEOC for investigation and conciliation.75/ 28 C.F.R. §§ 42.605(d), 42.609. If the EEOC determines that there is discrimination and is unable to resolve the complaint, the rule calls for the funding agency to evaluate the matter, "with due weight to the EEOC's determination that reasonable cause exists," and to take appropriate enforcement action. 28 C.F.R. § 42.610. Where complaints

---

[75] If the complaint only alleges a violation of Title VII and not Title VI, the matter should be transferred to the EEOC. In addition, the regulation exempts from its application Executive Order 11246, which is enforced by the Office of Federal Contracts Compliance Programs, and the Omnibus Crime Control and Safe Streets Act, as amended, and the Juvenile Justice and Delinquency Prevention Act. 28 C.F.R. § 42.601.

allege a pattern or practice of discrimination and there is dual coverage, agencies have the option of keeping the complaint rather than referring it.

The reason for this regulation is clearly stated in the Preamble to the notice in the Federal Register:

> The rule . . . will reduce duplicative efforts by different Federal agencies to enforce differing employment discrimination prohibitions and thereby will reduce the burden on employers covered by more than one of those prohibitions. At the same time it will allow the Federal fund granting agencies to focus their resources on allegations of services discrimination.

48 Fed. Reg. 3570 (1983).

## X. Federal Funding Agency Methods to Evaluate Compliance

The Federal agency providing the financial assistance is primarily responsible for enforcing Title VI as it applies to its recipients. Agencies have several mechanisms available to evaluate whether recipients are in compliance with Title VI, and additional means to enforce or obtain compliance should a recipient's practices be found lacking. Evaluation mechanisms, discussed below, include pre-award reviews, post-award compliance reviews, and investigations of complaints.

### A. Pre-Award Procedures

Agencies should endeavor to ensure that awards of Federal financial assistance are only granted to entities that adhere to the substantive antidiscrimination mandates of Title VI and other nondiscrimination laws.

#### 1. Assurances of Compliance

The Title VI Coordination Regulations, (as well as the Section 504 coordinating regulation), require that agencies obtain assurances of compliance from prospective recipients. 28 C.F.R. §§ 41.5(a)(2), 42.407(b). Regulations requiring applicants to execute an assurance of compliance as a condition for receiving assistance are valid. Grove City, 465 U.S. at 574-575 (Title IX assurances); Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968) (Title VI assurances). If an applicant refuses to sign a required assurance, the agency may deny assistance only after providing notice of the noncompliance, an opportunity for a hearing, and other statutory procedures. 42 U.S.C. § 2000d-1; 28 C.F.R. § 50.3 II.A.1. However, the agency need not prove actual discrimination at the administrative hearing, but only that the applicant refused to sign an assurance of compliance with Title VI (or similar

nondiscrimination laws). Grove City, 465 U.S. at 575. Assurances serve two important purposes: they remind prospective recipients of their nondiscrimination obligations, and they provide a basis for the Federal government to sue to enforce compliance with these statutes. See United States v. Marion County Sch. Dist., 625 F.2d 607, 609, 612-13 (5th Cir.), reh'g denied, 629 F.2d 1350 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981).

2. Deferral of the Decision Whether to Grant Assistance

The "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," (the "Title VI Guidelines") specifically state that agencies may defer assistance decisions: "In some instances . . . it is legally permissible temporarily to defer action on an application for assistance, pending initiation and completion of [statutory remedial] procedures--including attempts to secure voluntary compliance with title VI." 28 C.F.R. § 50.3 I.A. Thus, deferral may occur while negotiations are ongoing to special condition the award, during the pendency of a lawsuit to obtain relief, or during proceedings aimed at refusing to grant the requested assistance.76/

---

[76] The Title VI Guidelines distinguish between the applicability of an agency's deferral authority for initial or one-time awards versus continuing, periodic awards. The Title VI Guidelines state, that agencies have deferral authority with regard to "applications for one-time or noncontinuing assistance and initial applications for new or existing programs of continuing assistance." 28 C.F.R. § 50.3 II.A. In contrast, if an application for funds has been approved and a recipient is entitled to "future, periodic payments," or if "assistance is given without formal application pursuant to statutory direction or authorization," distribution of funds may not be deferred or withheld unless all the Title VI statutory procedures for a termination of funds are followed. Id. II.B.

The Title VI Guidelines do not specify what may constitute "abnormal" or exceptional circumstances to warrant deferral of a continuing grant. In these renewal or continuation situations, the Title VI Guidelines indicate that an assurance of compliance or a nondiscrimination plan may be required prior to continuing the payout of funds.

This interpretation is a reasonable, and even necessary, application of the statutory remedial scheme. The congressional authorization to obtain relief pre-award would be sharply reduced, if not rendered a near nullity, if agencies could not postpone the assistance decision while spending the time needed to conduct a full and fair investigation and while seeking appropriate relief. Furthermore, the Attorney General's administrative interpretation is entitled to deference. See, e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).77/

The Title VI Guidelines recommend that agencies adopt a flexible, case-by-case approach in assessing when deferral is appropriate, and consider the nature of the

---

[77] Subsequent to the adoption of Title VI, Congress on at least two occasions has refused to prohibit agencies from exercising pre-award deferral authority. In 1966, in considering the Elementary and Secondary Education Amendments of 1966, the House adopted a provision that effectively would have prohibited pre-award deferrals of certain education grants by the Department of Health, Education, and Welfare. The amendment, offered by Representative Fountain, provided that no deferral could occur unless and until there was a formal finding, after opportunity for hearing, that the applicant was violating Title VI. 112 Cong. Rec. 25,573 (1966). Representative Fountain argued that a deferral was the same as a refusal, and accordingly that deferrals should be subject to the same hearing procedure required to refuse or terminate assistance. Id. at 25,573-74. In opposition, Representative Celler argued that the amendment would preclude HEW from obtaining pre-award relief since the award procedure would be completed before the Title VI hearing could be held. Id. at 25,575. During the debate, Rep. Celler noted that HEW was acting pursuant to the directives set out in the Title VI Guidelines. Id. The Senate version did not include any limitation on deferrals. In conference, the prohibition was deleted and replaced with a durational/procedural limitation on certain HEW deferrals. Conf. Rep. No. 2309, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 3896. Codified at 42 U.S.C. § 2000d-5. Again in 1976, in adopting the Education Amendments of 1976, Congress imposed a durational/procedural limitation on HEW deferral authority, codified at 20 U.S.C. 1232i(b), but rejected a House passed amendment effectively prohibiting specified HEW deferrals. 122 Cong. Rec. 13411-13416; H.R. Conf. Rep. No. 1701, 94th Cong., 1st Sess. 242-43 (1976), reprinted in 1976 U.S.C.C.A.N. 4943-44. This post-adoption legislative history buttresses the conclusion that deferrals are an appropriate application of the pre-award remedial authority granted agencies by Congress. Board of Pub. Instruction v. Cohen, 413 F.2d 1201 (5th Cir. 1969).

potential noncompliance problem. Where an assistance application is inadequate on its face, such as when the applicant has failed to provide an assurance or other material required by the agency, "the agency head should defer action on the application pending prompt initiation and completion of [statutory remedial] procedures." 28 C.F.R. § 50.3 II.A.1 (emphasis added). Where the application is adequate on its face but there are "reasonable grounds" for believing that the applicant is not complying with Title VI, "the agency head may defer action on the application pending prompt initiation and completion of [statutory remedial] procedures." Id. II.A.2 (emphasis added).78/

When action on an assistance application is deferred, remedial efforts "should be conducted without delay and completed as soon as possible." Id. I.A. Agencies should also be cognizant of the time involved in a deferral to ensure that a deferral does not become "tantamount to a final refusal to grant assistance." Id. II.C. The agency should not completely rule out deferrals where time is of the essence in granting the assistance, but should consider special measures that may be taken to seek expedited relief (e.g., by referring the matter to the Department of Justice to file suit for interim injunctive relief).

---

[78] The Title VI Guidelines note that deferral may be more appropriate where it will be difficult during the life of the grant to obtain compliance, e.g., where the application is for noncontinuing assistance. On the other hand, deferral may be less appropriate where full compliance may be achieved during the life of the grant, e.g., where the application is for a program of continuing assistance. Where the grant of assistance is not deferred despite a concern about noncompliance, the Title VI Guidelines advise that

> the applicant should be given prompt notice of the asserted noncompliance; funds should be paid out for short periods only, with no long-term commitment of assistance given; and the applicant advised that acceptance of the funds carries an enforceable obligation of nondiscrimination and the risk of invocation of severe sanctions, if noncompliance in fact is found. Id. II.A.2.

3. Pre-Award Authority of Recipients vis-a-vis Subrecipients

The Title VI Guidelines provide that the "same [pre-award] rules and procedures would apply" where a Federal assistance recipient is granted discretionary authority to dispense the assistance to subrecipients. Id. III:

> [T]he Federal Agency should instruct the approving agency -- typically a State agency -- to defer approval or refuse to grant funds, in individual cases in which such action would be taken by the original granting agency itself . . . . Provision should be made for appropriate notice of such action to the Federal agency which retains responsibility for compliance with [Title VI compliance] procedures.
>
> Id.

Thus, the Title VI Guidelines support Federal agencies requiring that recipients/subgrantors obtain assurances of compliance from subrecipients.79/ When the recipient receives information pre-award that indicates noncompliance by an applicant for a subgrant, recipients may defer making the grant decision, may seek a voluntary resolution and, if no settlement is reached, (after complying with statutory procedural requirements), may refuse to award assistance.

4. Data Collection

Section 42.406(d) of the Coordination Regulations lists the types of data that should be submitted to and reviewed by Federal agencies prior to granting funds. In addition to submitting an assurance that it will compile and maintain records as required, an applicant should provide: (1) notice of all lawsuits (and, for recipients, complaints) filed against it; (2) a description of assistance applications that it has pending in other agencies and of other Federal assistance being provided; (3) a

---

[79] In the alternative, a Federal agency may obtain assurances directly from subrecipients, if it so chooses.

description of any civil rights compliance reviews of the applicant during the preceding two years; and (4) a statement as to whether the applicant has been found in noncompliance with any relevant civil rights requirements. Id.

The Coordination Regulations require that agencies "shall make [a] written determination as to whether the applicant is in compliance with Title VI." 28 C.F.R. § 42.407(b). Where a determination cannot be made from the submitted data, the agency shall require the submission of additional information and take other steps necessary for making a compliance determination, which could include communicating with local government officials or community organizations and/or conducting field reviews. Id.

5. Recommendations Concerning Pre-award Reviews

It is recommended that agencies implement an internal screening process whereby agency officials are notified of potential assistance grants and are provided the opportunity to raise a "red flag" or concern about the potential grant recipient.80/ If limited resources are a problem, agencies should develop a system to target a significant proportion of assistance applications.81/ As part of the Department of Justice's oversight and coordinating function, each agency should submit to the Department, as part of its annual implementation plan, any targeting procedures that

---

[80] A further refinement would involve agencies sharing their lists of potential grantees with other agencies, as appropriate. For example, there may be instances in which it would be appropriate for HUD to share its lists with the Department of Justice, Civil Rights Division's Housing and Civil Enforcement Section.

[81] For example, pre-award reviews would not be necessary for applications that are unlikely to be funded for programmatic reasons.

are adopted.

B. Post-Award Compliance Reviews[82]/

Federal agencies are required to maintain an effective program of post-award compliance reviews.[83]/ Federal agency Title VI regulations reiterate this requirement.[84]/ Compliance reviews can be large and complex, or more limited in scope.

1. Selection of Targets and Scope of Compliance Review

Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews. However, this discretion is not unfettered. In United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992), the Fifth Circuit found that a Title VI compliance review involves an administrative search and, therefore, Fourth Amendment requirements for "reasonableness" of a search are applicable. The Court considered three factors: (1) whether the proposed search is authorized by statute; (2) whether the proposed search is properly limited in scope; and (3) how the administrative agency designated the target of the search. Id. at 101; United States v. New Orleans Pub. Serv. Inc., 723 F.2d 422 (5th Cir.) reh'g en banc denied, 734 F.2d 226 (5th Cir. 1984) [hereinafter NOPSI III] (E.O. 11246 compliance review unreasonable) (citing United States v. Mississippi

---

[82] Post-award reviews may be limited to a "desk audit," i.e., a review of documentation submitted by the recipient, or may involve an on-site review. In either case, an agency will demand the production of or access to records, and this discussion addresses the limits on an agency's demand for such records.

[83] See Coordination Regulations, 28 C.F.R. § 42.407(c).

[84] See, e.g., Department of Justice Title VI Regulations, 28 C.F.R. § 42.107(a).

Power & Light Co., 638 F.2d 899 (5th Cir. 1981)); and First Ala. Bank of Montgomery, N.A., v. Donovan, 692 F.2d 714, 721 (11th Cir. 1982) (Exec. Order No. 11246 compliance review reasonable); see Marshall v. Barlow's Inc., 436 U.S. 307 (1978).85/

The Harris Methodist Court suggested that selection of a target for a compliance review will be reasonable if it is based either on (1) specific evidence of an existing violation, (2) a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]," or (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria." Harris Methodist, 970 F.2d at 101 (internal citations omitted); NOPSI III, 723 F.2d at 425.

In Harris Methodist, the court rejected the Department of Health and Human Services' (HHS') attempts to gain access to records, including a vast array of records associated with confidential, physician peer review evaluations, as part of a compliance review of the hospital. The court held that signing an assurance gives consent "only to searches that comport with constitutional standards of reasonableness." 970 F.2d at 100. Where the proposed compliance review was not subjected to management review and not based upon consideration of a management plan or objective criteria, the court of appeals agreed that the HHS official acted "arbitrarily and without an administrative plan containing neutral criteria. Id. at 103.

---

[85] As mentioned above, it is assumed that the first two factors can be established. First, that the access provision is an appropriate exercise of agency authority to issue regulations consistent with the statute. Second, it is assumed that any data sought will be relevant to an evaluation of whether the recipient's employment practices or delivery of services are discriminatory.

Thus, agencies are cautioned that they should not select targets randomly for compliance reviews but, rather, they should base their decisions on neutral criteria or evidence of a violation. A credible complaint can serve as specific evidence suggesting a violation that could trigger a compliance review.

In developing targets for compliance reviews, agencies may wish to take into consideration the following:

- Issues targeted in the agency's strategic plan, if any;
- Issues frequently identified as problems faced by program beneficiaries;
- Geographical areas the agency wishes to target because of the many known problems beneficiaries are experiencing or because the agency has not had a "presence" there for some time;
- Issues raised in a complaint or identified during a complaint investigation that could not be covered within the scope of the complaint investigation;
- Problems identified to the agency by community organizations or advocacy groups that cite actual incidents to support their concerns;
- Problems identified to the agency by its block grant recipients;[86] and
- Problems identified to the agency by other Federal, State, or local civil rights agencies.

Apart from complying with the standards outlined above, it is recommended that a decision to conduct a compliance review be set forth in writing and approved by senior civil rights management. An agency may be required to show that it has

[86] An agency may wish to consider involving the block grant recipient (generally, a State agency) in the compliance review and in any subsequent negotiations to resolve identified violations.

selected its targets for compliance reviews in an objective, reasonable manner. A contemporaneous, written record that reflects the factors considered will aid in refuting allegations of bias or improper targeting of a recipient. See NOPSI III, 723 F.2d at 428. The memorandum should identify any regulations or internal guidance that set forth criteria for selection of targets for compliance reviews, and explain how such criteria are met.

2. Procedures for Compliance Reviews

Agency Title VI regulations are silent as to procedures for conducting compliance reviews, although, as discussed, the Coordination Regulations provide general guidance as to the types of data to solicit. Federal agencies granting Federal financial assistance are required to "establish and maintain an effective program of post-approval compliance reviews" of recipients to ensure that the recipients are complying with the requirements of Title VI. 28 C.F.R. § 42.407(a). Related to the reviews themselves, recipients should be required to submit periodic compliance reports to the agencies and, where appropriate, conduct field reviews of a representative number of major recipients. Finally, the Coordination Regulations recommend that agencies consider incorporating a Title VI component into general program reviews and audits. 28 C.F.R. § 42.407(c)(1).87/

---

[87] "All Federal staff determinations of Title VI compliance shall be made by, or be subject to the review of, the agency's civil rights office." 28 C.F.R. § 42.407(a). Where regional or area offices of Federal agencies have responsibility for approving applications or specific projects, the agency shall "include personnel having Title VI review responsibility on the staffs" of these offices. These personnel will conduct the post-approval compliance reviews. Id.

In this era of downsizing, it is understood that not all field offices will have Title VI

Results of post-approval reviews by the Federal agencies should be in writing and include specific findings of fact and recommendations. The determination by the Federal agency of the recipient's compliance status shall be made as promptly as possible. 28 C.F.R. § 42.407(c).

C. Complaints

The Coordination Regulations require that Federal agencies establish procedures for the "prompt processing and disposition" of complaints of discrimination in federally funded programs. 28 C.F.R. § 42.408(a). Agency regulations with respect to procedures for the investigation of complaints of discriminatory practices, however, are typically brief, and lack details as to the manner or time table for such inquiry. See, e.g., 28 C.F.R. § 42.107; 32 C.F.R. § 195.8. Generally, by regulation, an agency will allow complainants 180 days to file a complaint, although the agency may exercise its discretion and accept a complaint filed later in time. See, e.g., 28 C.F.R. § 42.107(b). An agency is not obliged to investigate a complaint that is frivolous, has no apparent merit, or where other good cause is present, such as a pending law suit. An investigation customarily will include interviews of the complainant, the recipient's staff, and other witnesses; a review of the recipient's pertinent records, and potentially its facility(ies); and consideration of the evidence gathered and defenses asserted. If the agency finds no violation after an investigation, it must notify, in writing, the recipient and the complainant, of this decision. See, e.g., 28 C.F.R. § 42.107(d)(2). If the agency

---

staff. This element of review, however, should be conducted and reviewed by experienced Title VI personnel, whether as a full time or collateral duty, and whether or not as members of the office in issue.

believes there is adequate evidence to support a finding of noncompliance, the first course of action for the agency is to seek voluntary compliance by the recipient. See, e.g., 28 C.F.R. § 42.107(d)(1). If the agency concludes that the matter cannot be resolved through voluntary negotiations, the agency must make a formal finding of noncompliance and seek enforcement, either through judicial action or administrative fund suspension.

If an agency receives a complaint that is not within its jurisdiction, the agency should consider whether the matter may be referred to another Federal agency that has or may have jurisdiction, or to a State agency to address the matter. 28 C.F.R. § 42.408(a)-(b). If a recipient is required or permitted by a Federal agency to process Title VI complaints, such as under certain block grant programs, the agency must ascertain whether the recipient's procedures for processing complaints are adequate. In such instances, the Coordination Regulations require that the Federal agency obtain a written report of each complaint and investigation processed by the recipient, and retain oversight responsibility regarding the investigation and disposition of each complaint. 28 C.F.R. § 42.408(c).

Finally, the Coordination Regulations require that each Federal agency, (and recipients that process Title VI complaints), maintain a log of Title VI complaints received. 28 C.F.R. § 42.408(d). The log shall include the following: the race, color, or national origin of the complainant, the identity of the recipient, the nature of the complaint, the date the complaint was filed, the investigation completed, the date and nature of the disposition, and other pertinent information.

## XI. Federal Funding Agency Methods to Enforce Compliance

Agencies should remember that the primary means of enforcing compliance with Title VI is through voluntary agreements with the recipients, and that fund suspension or termination is a means of last resort.88/ This approach is set forth in the statute, is a reflection of congressional intent, and is recognized by the courts. See 42 U.S.C. § 2000d-1; Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1075 n.11 (5th Cir. 1969) (citing 110 Cong. Rec. 7062 (1964) (Statement of Sen. Pastore)). Accordingly, if an agency believes an applicant is not in compliance with Title VI, the agency has three potential remedies:

(1) resolution of the noncompliance (or potential noncompliance) "by voluntary means" by entering into an agreement with the applicant, which becomes a condition of the assistance agreement; or

(2) where voluntary compliance efforts are unsuccessful, a refusal to grant or continue the assistance ; or

(3) where voluntary compliance efforts are unsuccessful, referral of the violation to the Department of Justice for judicial action. 42 U.S.C. § 2000d-1. In addition, agencies may defer the decision whether to grant the assistance pending completion of a Title VI (Title IX, or Section 504) investigation, negotiations, or other action to obtain remedial relief.89/

---

[88] The discussion herein applies primarily to post-award enforcement. Subsections address the extent to which enforcement may vary in a pre-award context.

[89] In considering options for enforcement, agencies should consult the Title VI Guidelines. 28 C.F.R. § 50.3.

A. Efforts to Achieve Voluntary Compliance

Under Title VI, before an agency initiates administrative or judicial proceedings to compel compliance, it must attempt to obtain voluntary compliance from a recipient.

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law: *Provided, however,* that no such action shall be taken until the department or agency concerned . . . has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1 (emphasis in original); see Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 351 (M.D. Ala. 1967) (voluntary compliance is to be effectuated if possible). Both the Coordination Regulations and the Title VI Guidelines urge agencies to seek voluntary compliance before, and throughout, the administrative or judicial process.90/ See 28 C.F.R. § 42.411(a) ("Effective enforcement of Title VI requires that agencies take prompt action to achieve voluntary compliance in all instances in which noncompliance is found."); 28 C.F.R. § 50.3 I.C.

> Title VI requires that a concerted effort be made to persuade any noncomplying applicant or recipient voluntarily to comply with Title VI. Efforts to secure voluntary compliance should be undertaken at the outset in every noncompliance situation and should be pursued through each state of enforcement action. Similarly, when an applicant fails to file an adequate assurance or apparently breaches its terms, notice should be promptly given of the nature of the noncompliance problem and of the possible consequences thereof, and an immediate effort made to secure voluntary compliance. Id.

---

[90] Agencies are strongly encouraged to make use of alternative dispute resolution (ADR), whenever appropriate. Both the President and the Attorney General have encouraged the use of alternative dispute resolution in matters that are the subject of civil litigation. See Executive Order 12988 and Attorney General Order OBD 1160.1. The Administrative Dispute Resolution Act of 1996 authorizes the use of ADR to resolve administrative disputes. 5 U.S.C. § 571 et seq.). ADR can consist of anything from the use of a neutral third party or mediator to informally resolving a matter without completing a full investigation.

An agency is not required to make formal findings of noncompliance before undertaking negotiations or reaching a voluntary agreement to end alleged discriminatory practices. However, there must be a basis for an agency and recipient to enter into such a voluntary agreement (e.g., identification of alleged discriminatory practices, even if the parties do not agree as to the extent of such practices).91/ In addition, throughout the negotiation process, agencies should be prepared with sufficient evidence to support administrative or judicial enforcement should voluntary negotiations fail.

An agency must balance its duty to permit informal resolution of findings of noncompliance against its duty to effectuate, without undue delay, the national policy prohibiting continued assistance to programs or activities which discriminate. Efforts to obtain voluntary compliance should continue throughout the process, but should not be allowed to become a device to avoid compliance.92/ Once an area of noncompliance is identified, an agency is required to enforce Title VI.

1. Voluntary Compliance at the Pre-Award Stage

a. Special Conditions

As is done post-award, agencies may obtain compliance "by voluntary means" in

---

[91] Where voluntary compliance is achieved, the agreement must be in writing and specify the action necessary for the correction of Title VI deficiencies. 28 C.F.R. § 42.411(b).

[92] Although Title VI does not provide a specific limit within which voluntary compliance may be sought, it is clear that a request for voluntary compliance , if not followed by responsive action on the part of the institution within a reasonable time, does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute. A consistent failure to do so is a dereliction of duty reviewable in the courts. 28 C.F.R. § 42.411(b)

the pre-award context by entering into an agreement with the applicant that enjoins the applicant from taking specified actions, requires that specified remedial actions be taken, and/or provides for other appropriate relief. The terms of the agreement become effective once the assistance is granted, and typically are attached as a special condition to the assistance agreement. Three issues arise by exercise of the voluntary compliance authority at the pre-award stage: what is the appropriate scope of special remedial conditions; what is the remedy if an applicant refuses to agree to a special condition proposed by an agency; and what is the remedy if, post-award, the recipient fails to comply with a special remedial condition of the assistance agreement.

When voluntary compliance is sought at the pre-award stage, agencies may exercise greater flexibility in designing appropriate remedial conditions, for two reasons. First, if the pre-award remedy does not fully resolve the discrimination concern, agencies may have the opportunity to rectify this matter during the life of the assistance grant. Second, since a pre-award investigation and remedial efforts likely would require a deferral of the assistance award, it may be in the interest of the applicant (as well as potentially the agency) that interim measures be agreed to that allow the award to go forward while also addressing the discrimination concern. Thus, a pre-award special condition may grant provisional relief, require that certain aspects of the recipient's program be monitored, and/or require that the recipient provide additional information relating to the discrimination allegations. Of course, the mere fact that relief may be sought post-award does not necessarily mean that full relief, using voluntary means or otherwise, should not be sought pre-award.

Agency authority to attach special conditions to assistance agreements extends

no further than the agency's authority to seek voluntary compliance. Thus, if an applicant refuses to agree to a proposed special remedial condition, the agency either would have to negotiate a different condition, award the assistance without the condition, seek to obtain compliance "by any other means authorized by law," or initiate administrative procedures to refuse to grant assistance. However, an agency may not refuse to grant assistance based solely on an applicant's refusal to accept a special condition unless the agency is prepared to make a finding of noncompliance and proceed to an administrative hearing. This is because the applicant has a right to challenge a refusal to grant assistance through an administrative hearing. See 42 U.S.C. § 2000d-1.

Whether an agency may immediately suspend payment based on noncompliance with a previously imposed special remedial condition depends on the terms of the condition. As a general matter, if a recipient violates the terms of a special remedial condition, the noncompliance must be remedied in the same manner that any other post-award noncompliance is addressed -- through voluntary efforts, by the government filing suit, or by the agency suspending or terminating the assistance pursuant to the statutory procedure. If, however, as part of the remedial condition the applicant agrees that the agency immediately may suspend payment if noncompliance occurs, then that contractual provision would likely supersede the statutory protection against instant fund suspension that the recipient otherwise enjoys.

b. Use of Cautionary Language

If an agency has evidence at the time of the award which does not rise to the level of an actual violation by an applicant, and thus does not warrant refusal of a grant

award, the agency may consider notifying the recipient in the grant award letter that the agency has a civil rights concern. The statement could acknowledge, where appropriate, the applicant's cooperation with an ongoing civil rights investigation or its attempts to resolve the concern.93/ By including this language, the applicant is on notice that there may be a potential problem and that the funding arm is aware of what the civil rights arm is doing. It also warns that a failure to cooperate could lead to a denial of funds in the future. The language also may encourage the applicant to enter into voluntary compliance negotiations and engage in alternative dispute resolution, in appropriate cases, to resolve the alleged discrimination at issue without a formal finding or the completion of an investigation. A major advantage of this approach is that it avoids the due process concerns raised when deferral or special conditioning is utilized because, in this case, the funds are being awarded, i.e., there is no "refusal to grant," which would trigger the right to an administrative hearing.

2. Other Nonlitigation Alternatives

The Title VI Guidelines list four other approaches, short of litigation or fund termination, that may be available when civil rights concerns are discovered. The

---

[93] One example of language currently used by the Department of Justice's Office of Justice Programs is as follows:

> In reviewing an application for funding, we consider whether the applicant is in compliance with federal civil rights laws. A determination of noncompliance could lead to a denial of assistance or an award conditioned on remedial action being taken. We are aware that the Department's Civil Rights Division is conducting an investigation involving possible civil rights violations. The Civil Rights Division has advised us that your agency is cooperating with its investigation, and we have taken that into account in deciding to approve your grant application.

possibilities listed include:

> (1) consulting with or seeking assistance from other Federal agencies . . . having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries.

28 C.F.R. § 50.3 I.B.2. Agencies are urged to consider all of these options, as appropriate.

B. "Any Other Means Authorized by Law:" Judicial Enforcement

The Department of Justice's statutory authority to sue in Federal district court on behalf of an agency for violation of Title VI is contained in the phrase "by any other means authorized by law." See 42 U.S.C. § 2000d-1; United States. v. City and County of Denver, 927 F. Supp. 1396, 1400 (D. Colo. 1996); Ayers v. Allain, 674 F. Supp. 1523, 1551 n.6 (N.D. Miss. 1987); United States v. Marion County Sch. Dist., 625 F.2d 607, 612-13 & n.14, reh'g denied, 629 F.2d 1350 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981). In addition, the Department of Justice may pursue judicial enforcement through specific enforcement of assurances, certifications of compliance, covenants attached to property, desegregation or other plans submitted to the agency as conditions of assistance, or violations of other provisions of the Civil Rights Act of 1964, other statutes, or the Constitution. See Marion County, 625 F.2d at 612; 28 C.F.R. § 50.3 I.B.

Agency regulations interpreting this phrase provide for several options including: 1) referral to the Department of Justice for proceedings, 2) referrals to State agencies, and 3) referrals to local agencies. See, e.g., 29 C.F.R. § 31.8(a) (Labor); 34 C.F.R.

§ 100.8 (Education); and 45 C.F.R. § 80.8(a) (HHS):

> [C]ompliance may be effected by . . . other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or contractual undertaking and (2) any applicable proceedings under State or local law.

In order to refer a matter to the Justice Department for litigation, agency regulations require that the funding agency make a finding that a violation exists and a determination that voluntary compliance cannot be achieved. The recipient must be notified of its failure to comply and must be notified of the intended agency action to effectuate compliance.94/ Some agency regulations require additional time after this notification to the recipient to continue negotiation efforts to achieve voluntary compliance.95/ It should be noted that the funding agency must in fact formally initiate referral of the matter to the Justice Department, because there is no automatic referral mechanism.

In United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039 (5th Cir. 1984), the Fifth Circuit held that when a referral is made to the Department of Justice, and suit for injunctive relief is filed, a court can order termination of Federal financial assistance as a remedy. However, the termination cannot become effective until 30 days have passed. The court reasoned that the congressional intent to allow a 30-day period when the administrative hearing route is followed (see 42 U.S.C. 2000d-1, which

---

[94] See, e.g., 24 C.F.R. § 1.8(d) (HUD); 29 C.F.R. § 31.8(c) (Labor).

[95] For example, HUD regulations require that the agency continue negotiations for ten days from the date of mailing the notice of noncompliance to the recipient. Id.

provides that the agency must file a report with Congress and 30 days must elapse before termination of the funds) evinces a congressional intent to likewise permit a 30-day grace period before a court's order to terminate funds takes effect.

C. Fund Suspension and Termination

Several procedural requirements must be satisfied before an agency may deny or terminate Federal funds to an applicant/recipient. A four step process is involved:

1) the agency must notify the recipient that it is not in compliance with the statute and that voluntary compliance cannot be achieved;

2) after an opportunity for a hearing on the record, the "responsible Department official;" must make an express finding of failure to comply.

3) the head of the agency must approve the decision to suspend or terminate funds; and

4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds.96/ The report must provide the grounds for the decision to deny or terminate the funds to the recipient or applicant. 42 U.S.C. § 2000d-1; See, e.g., 45 C.F.R. § 80.8(c) (HHS).

1. Fund Termination Hearings

As noted above, funds cannot be terminated without providing the recipient an opportunity for a formal hearing. See, e.g., 28 C.F.R. § 42.109(a). If the recipient waives this right, a decision will be issued by the "responsible Department official" based on the record compiled by the investigative agency. Hearings on terminations cannot be held less than 20 days after receipt of notice of the violation. See, e.g., 45

---

[96] The congressional intent behind the 30 day requirement was to include seemingly neutral third parties, (the relevant Congressional committees), to ensure that the decision to terminate funds was fair, reasoned, and not arbitrary. See 110 Cong. Rec. 2498 (1964) (Statement of Cong. Willis); 110 Cong. Rec. 7059 (1964) (Statement of Sen. Pastore).

C.F.R. § 80.9(a) (HHS).

Agencies have adopted the procedures of the Administrative Procedures Act for administrative hearings. See, e.g., 28 C.F.R. § 42.109(d) (Justice); 45 C.F.R. § 80.9 (HHS). Technical rules of evidence do not apply, although the hearing examiner may exclude evidence that is "irrelevant, immaterial, or unduly repetitious." See, e.g., 28 C.F.R. § 42.109(d); 45 C.F.R. § 80.9(d)(2) [HHS]. The hearing examiner may issue an initial decision or a recommendation to the "responsible agency official." See, e.g., 28 C.F.R. § 42.110. The recipient may file exceptions to any initial decision. In the absence of exceptions or review initiated by the "responsible department official," the hearing examiner's decision will be the final decision. A final decision that suspends or terminates funds, or imposes other sanctions, is subject to review and approval by the agency head. Upon approval, an order shall be issued that identifies the basis for noncompliance, and the action(s) that must be taken in order to come into compliance. A recipient may request restoration of funds upon a showing of compliance with the terms of the order, or if the recipient is otherwise able to show compliance with Title VI. See, e.g., 28 C.F.R. § 42.110; 45 C.F.R. § 80.10(g). The restoration of funds is subject to judicial review. 42 U.S.C. § 2000d-2. Moreover, as noted above, no funds can be terminated until 30 days after the agency head files a written report on the matter with the House and Senate committees having legislative jurisdiction over the program or activity involved. 42 U.S.C. § 2000d-1.

2. Agency Fund Termination is Limited to the Particular Political Entity, or Part Thereof, that Discriminated

Congress specifically limited the effect of fund termination by providing that it

> ...shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, . . . .

42 U.S.C. § 2000d-1. This is called the "pinpoint provision." As discussed below, the CRRA did not modify interpretations of this provision, but only affected the interpretation of "program or activity" for purposes of coverage of Title VI (and related statutes). See S. Rep. No. 64 at 20, reprinted in 1988 U.S.C.C.A.N. at 22.

Congress' intent was to limit the adverse affects of fund termination on innocent beneficiaries and to insure against the vindictive or punitive use of the fund termination remedy. Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969).97/

---

[97] Much of the legislative debate on Title VI centered on the potential scope of any termination of assistance due to a failure to comply with the rules effectuating Section 601. The Dirksen-Mansfield substitute bill, which was developed through informal, bipartisan conferences, sought to answer those concerns. For a listing and explanation of specific changes made by the substitute see, 110 Cong. Rec. 12817-12820 (1964) (Report of Senator Dirksen). Senator Humphrey explained the purpose behind the substitute language.

> Some Senators have expressed the fear that in its original form Title VI would authorize cutting off of all federal funds going to a state for a particular program even though only part of the state were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize canceling all federal assistance to a state if it were discriminating in any of the federally-assisted programs in that State.
>
> As was explained a number of times on the floor of the Senate, these interpretations of Title VI are inaccurate. The title is designed to limit any termination of federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs. Since this was our intention, we have made this specific in the provisions of Title VI by adding language to 602 to spell out these limitations more precisely. This language provides that any termination of federal assistance will be restricted to the particular political subdivision which is violating non-discriminatory regulations established under Title VI. It further provides that the termination shall affect only the particular program, or

"The procedural limitations placed on the exercise of such power were designed to insure that termination would be 'pinpoint(ed) . . . to the situation where discriminatory practices prevail.'" Id. (quoting 1964 U.S.C.C.A.N. 2512).

The seminal case on this issue is Finch, 414 F.2d at 1068. A Department of Health, Education, and Welfare (HEW) hearing officer had found that the school district had made inadequate progress toward student and teacher desegregation and that the district had sought to perpetuate the dual school system through its construction program. Based on these findings, a final order was entered terminating "any class of Federal financial assistance" to the district "arising under any Act of Congress" administered by HEW, the National Science Foundation, and the Department of the Interior. Id. at 1071.

On appeal, the Fifth Circuit vacated the termination order, holding that it was in violation of the purpose and statutory scope of the agency's power. The "programs" in issue were three education statutes, yet the HEW officer had not made any specific findings as to whether there was discrimination in all three programs, and/or if action in one program tainted, or caused discriminatory treatment in, other programs. Id. at 1073-74, 79. The court paid considerable attention to the congressional intent of the pinpoint provision: limiting the termination power to "activities which are actually discriminatory or segregated" was designed to protect the innocent beneficiaries of untainted programs. Id. at 1077. The court further held that it was improper to construe

---

part thereof, in which such a violation is taking place.

110 Cong. Rec. 12714-12715 (l964); see, 110 Cong. Rec. 1520 (1964) (Celler); 110 Cong. Rec. 1538 (1964) (Rodino); 110 Cong. Rec. 7061-7063 (1964) (Pastore).

Section 602 as placing the burden on recipients to limit the effect of termination orders by proving that certain programs are untainted by discrimination, rather than on an agency to establish the basis for findings as to the scope of discrimination. Id.

As to the meaning of the term "program" in the pinpoint proviso, the court concluded that the legislative history of Title VI evidenced a congressional intent that the term refer not to generic categories of programs by a recipient, but rather to specific programs of assistance, or specific statutes, administered by the Federal government. Id. at 1077-78.98/ Further, even if "program" was meant to refer to generic categories of aid, the parenthetical phrase, "or part thereof", must be given meaning. Thus, an agency's fund termination order must be based on program-specific (i.e., grant statute specific) findings of noncompliance. The Court reasoned that:

> [T]he purpose of the Title VI [fund] cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute. If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends.

---

[98] The court noted that each of the grant statutes affected by the order was denominated "a program" by the terms of its own statutory scheme.

Id. at 1078.99/

The specificity required for fund termination was also addressed by the Seventh Circuit in Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972). In Gautreaux, the court reversed a district court's order approving Federal fund termination for a Housing and Urban Development (HUD) program where there were no findings of discrimination in such program, and where such action was pursued in an effort to pressure action to remedy the defendant's discriminatory conduct in a wholly sparate HUD program. 457 F.2d at 127-128. The district court had previously found that defendants had violated fair housing laws yet intended to withhold Model Cities Program funds, which primarily support education, job training, and day care programs on behalf of low and moderate income families. Although a small portion of Model Cities money also supported public housing, there was no allegation or finding that any Model Cities program was operated in a discriminatory fashion. Id. at 126. Accordingly, the court of appeals held that the district court violated Section 602 of Title VI and the "mandate of" Finch, and abused its discretion in withholding the Model Cities funds. Id. at 128.

It is equally critical to note that, notwithstanding the need for an independent evaluation of each program, an agency (or reviewing court) must examine not only

---

[99] The court also quoted Senator Long from the debate on passage of the Act:

> Proponents of the bill have continually made it clear that it is the intent of Title VI not to require wholesale cutoffs of Federal [f]unds from all Federal programs in entire States, but instead to require a careful case-by-case application of the principle of nondiscrimination to those particular activities which are actually discriminatory or segregated.

Id. at 1075 (quoting 110 Cong. Rec. 7103 (1964)).

whether the Federal funds are "administered in a discriminatory manner, . . . [but also] if they support a program which is infected by a discriminatory environment." Finch, 414 F.2d at 1078 (emphasis added). Not all programs operate in isolation. Thus,

> the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the [overall operation, e.g., school system] that it thereby becomes discriminatory.

Id. at 1079; see North Haven, 456 U.S. at 539-540 (approval of HEW Title IX regulations that adopt the Finch "infection" standard.) This latter analysis is often referred to as the "infection theory." Although Finch and Gautreaux were decided prior to passage of the CRRA, it is important to recognize that while the CRRA defined the meaning of "program or activity" for purposes of prohibited conduct, it did not change the definition of such terms for purposes of fund termination for a violation of Title VI. In particular, the CRRA left intact the "pinpoint" provision that limits any fund termination to the "program, or part thereof, in which noncompliance has been so found." 42 U.S.C. § 2000d-1.

## XII. Private Right of Action and Individual Relief through Agency Action

The Supreme Court has established that individuals have an implied private right of action under Title VI (and Title IX and Section 504). The Court has stated that it has "no doubt that Congress...understood Title VI as authorizing an implied private right of action for victims of illegal discrimination." See Cannon v. University of Chicago, 441 U.S. 677 (1979) (holding that an individual has a private right of action under Title IX). In addition, several courts of appeals have held that plaintiffs have a private right of action to enforce the disparate impact regulations implementing Section 602 of Title VI. See Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), cert. granted sub. nom. Alexander v. Sandoval, __ U.S. __, 121 S.Ct. 28, 68 U.S.L.W. 3749 (U.S. Sept. 26, 2000) (No. 99-1908).; Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999).

In Sandoval, the court found that a reading of Lau, Guardians, and Alexander, *in pari materia* supported the finding of an implied private cause of action under Section 602 of Title VI. 197 F.3d 484, 507 (11th Cir. 1999). Likewise, in Powell v. Ridge, 189 F.3d 387, 397-400 (1999), the Third Circuit Court of Appeals recognized an implied private right of action to enforce regulations promulgated pursuant to Section 602 of Title VI. The Second Circuit, however, declined to reach the issue of whether a private right of action may be brought under regulations implementing Section 602 and let stand the lower court's ruling that a private right of action is not available to plaintiffs bringing suit pursuant to Section 602. NYCEJA, 214 F.3d at 72-73. The Supreme Court will likely definitively decide the issue when it hears Sandoval.

Many circuits have ruled that individuals may not bring suit against the federal government for failure to enforce Title VI (and Section 504 and Title IX). Jersey Heights

Neighborhood Ass'n v. Glendening et al., 174 F.3d 180 (4th Cir. 1999); Washington Legal Found. v. Alexander, 984 F.2d 483, (D.C. Cir. 1993); Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990) [hereinafter WEAL II]. In Jersey Heights, plaintiffs, African-American landowners, filed suit against the U.S. Department of Transportation, among others, claiming that it abdicated its duties under section 602 of Title VI to eliminate discrimination in federally-funded programs by failing to terminate funds to recipients who failed to comply with Title VI. The Fourth Circuit found that Title VI provides two avenues of recourse to address discrimination by federal funding agencies: private right of action against recipients of Federal financial assistance and petition to the federal funding agency to secure voluntary compliance by its recipients. After reviewing the legislative history of Title VI, the court concluded that Congress did not intend for aggrieved parties "to circumvent that very administrative scheme through direct litigation against federal agencies." 174 F.3d at 191.

Similarly, the court in WEAL II, ruled that, absent congressional authorization, individuals do not have a private right of action against the federal government under Title VI, Title IX, or Section 504.100/ 906 F.2d at 752. Citing the Supreme Court's examination of the legislative history of Title VI in Cannon, the court found that Congress did not intend for private suits to be brought against the federal funding agencies. Id. at 748. The WEAL II court further concluded that because individuals

---

[100] The WEAL II decision brought to a close sub nom. the twenty year history of litigation that began in 1970 under Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), a suit that challenged the Department of Health, Education, and Welfare's dereliction in enforcing Title VI.

already have an adequate remedy through private rights of action against the recipients of Federal financial assistance, individuals could not maintain a cause of action against the federal funding agency to compel enforcement of Title VI under the Administrative Procedure Act, the Mandamus Act, or the Constitution. Id. at 752. One possible exception to these rulings might to be a situation where the federal funding agency makes a finding that a recipient is in violation of Title VI but, nonetheless, refuses to enforce its own determination. See Washington Legal Found. v. Alexander, 984 F.2d at 488 101/.

The most common form of relief sought and obtained through a private right of action is an injunction ordering a recipient to do something. See Cannon, 441 U.S. 667. See also, United States v. Baylor Univ. Med. Ctr., 736 F. 2d 1039, in which the court ordered termination of funds. The Supreme Court also has held that individuals may obtain monetary damages for claims of intentional discrimination under Title IX. See Franklin v. Gwinett, 503 U.S. 60 (1990) at 75 n.8. 102/ As discussed below, agencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements,

---

[101] In this case, plaintiffs brought suit to enjoin the Department of Education from allowing recipients of its funds to offer certain federally funded scholarships exclusively to minorities. Id. at 486.

[102] The broad reasoning employed in Franklin is equally applicable to Title VI lawsuits, and the Franklin Court explicitly linked the availability of damages under Titles VI and IX by its citation to Guardians. Subsequent to Franklin, courts of appeals have unanimously extended the Franklin holding to Section 504 lawsuits. W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995); Rodgers v. Magnet Cove Pub. Sch., 34 F.3d 642, 644 (8th Cir. 1994); Waldrop v. Southern Co. Servs., 24 F.3d 152, 156 (11th Cir. 1994); Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 831 (4th Cir. 1994).

including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context. Agencies are also asked to recommend the scope of relief to be sought in referrals of matters to the Department of Justice for judicial enforcement.

A. Entitlement to Damages for Intentional Violations

In addition to agency enforcement mechanisms, private individuals have an implied right of action under Title VI (as well as Title IX and Section 504). See Cannon, 441 U.S. at 696 (private right of action recognized under Title IX, and citing with approval cases finding a private right of action under Title VI).103/ In addition, the Supreme Court has ruled that monetary damages are an available remedy in private actions brought to enforce Title IX for alleged intentional violations. See Franklin, 503 U.S. at 72-75104/, Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630-31 (1984).

Franklin contains a detailed discussion on the merits of allowing monetary damages for intentional violations of Title IX (as well as Title VI and Section 504). Id. at 71-76. The Court placed great reliance on the "longstanding rule" that where a Federal statute provides (expressly or impliedly) for a right to bring suit, Federal courts

---

[103] See Lane v. Peña, 518 U.S. 187, 202 & n.3 (1996) (Stevens, J., dissenting) (citing uniform holdings of ten courts of appeals that Section 504 provides an implied right of action). The Supreme Court had addressed the merits of two Title VI cases brought by private plaintiffs without addressing the issue of whether a private right of action exists. See, Bakke, 438 U.S. at 282; Lau, 414 U.S. 563.

[104] Justice White authored the opinion for the Court in which five Justices joined. Justice Scalia wrote an opinion concurring in the judgment, in which Chief Justice Rehnquist and Justice Thomas joined. The Franklin Court also recognized that a majority of justices in Guardians, notwithstanding the multiple opinions, opined that private plaintiffs may obtain damages under Title VI to remedy intentional violations. Id. at 70.

"presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Id. at 66.105/ The Court found no congressional intent to abandon this presumption in the enforcement of Title IX.106/ Accordingly, the Court concluded that private individuals may obtain damages in appropriate cases.

Throughout its opinion, the Franklin Court broadly referred to the relief being sanctioned as "monetary damages." Although the Court did not define this term, it specifically rejected limiting Title IX plaintiffs to monetary relief that is equitable in nature, such as backpay. See id. at 75-76. In these circumstances, it appears appropriate to be guided by the traditional definition of "compensatory damages," which includes damages for both pecuniary and nonpecuniary injuries.107/

---

[105] The Court further stated, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Id. at 70-71.

[106] The Court examined congressional intent expressed both prior to and after its decision in Cannon. When Title IX was enacted, Congress was silent on the subject of a private right of action, but the Court noted that Congress acted in the context of the prevailing presumption in favor of all available remedies. Id. at 72. Following Cannon, Title IX (Title VI, Section 504, and the Age Discrimination Act) were amended on two occasions, although neither action evidenced congressional disagreement with this presumption. Id. at 72-73. First, Congress added 42 U.S.C. § 2000d-7 through the Rehabilitation Act Amendments of 1986, to abrogate the States' Eleventh Amendment immunity in suits under these statutes. Second, Congress added 42 U.S.C. § 2000d-4a under the CRRA to broaden the scope of programs covered by these statutes.

[107] Section 903 of Restatement (Second) of Torts (1979) defines "compensatory damages" as "the damages awarded to a person as compensation, indemnity or restitution for harm sustained." Section 904 states that damages for nonpecuniary harm include damages for bodily harm and emotional distress. See generally id., §§ 901-932.

Courts applying Franklin generally have interpreted it to permit the award of the full range of compensatory damages, including damages for emotional distress. Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992) (same); see also DeLeo v. City of

B. Availability of Monetary Damages in Other Circumstances

In Franklin, the Supreme Court was not called upon to rule whether monetary damages are available where other types of discrimination are proven. Nonetheless, the Court noted that unintentional discrimination may present a different legal question, and damages may not be available. Id. at 74.108/ Awarding damages may be particularly problematic where the violation rests on a "disparate impact" theory of discrimination. See Guardians, 463 U.S. at 595-603 (Opinion of White, J.).

C. Recommendations for Agency Action

In incorporating the damages remedy into agency compliance activities, agencies will need to decide when damages should be sought as part of a voluntary compliance agreement and, if damages are requested, the amount of emphasis to be placed on the damages request in compliance negotiations. Agencies will want to ensure that the damages remedy is implemented in a manner consonant with other

---

Stamford, 919 F. Supp. 70 (D. Conn. 1995) (citing cases equating monetary damages with compensatory damages). Contra, Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947 (W.D. Tex. 1995), rev'd on other grounds, 101 F.3d 393 (5th Cir. 1996).

[108] The Court explained that the problem with "permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." Id. at 74. The notice problem is a function of the consensual nature of an entity's decision to accept Federal funds and the conditions attached to their receipt. The entity weighs the benefits and burdens before accepting the funds, including the nondiscrimination obligations that attach to the funding. The concern is that where the violation is unintentional, particularly if it is a "disparate impact" violation, the recipient may not have been sufficiently aware at the time the funds were accepted that the nature and scope of the nondiscrimination obligation included a prohibition on the specific behavior subsequently found to constitute unlawful discrimination. Accordingly, responsibility for money damages may not have been foreseen. See id.; Guardians, 463 U.S. at 596-597 (White, J., joined by Rehnquist, J.); Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

enforcement goals and policies, in a manner consistent among compliance agreements, and in a manner that protects the flexibility of the voluntary compliance process. To effectuate these goals, agencies may wish to draft written guidelines, and establish special supervisory procedures and internal reporting requirements.

There are several considerations that may be relevant in deciding how to exercise administrative discretion in applying the damages remedy in particular cases. One factor may be the degree of seriousness of the violation. A second factor may be whether the injury is substantial. A third factor may be whether the injury is pecuniary in nature. Since pecuniary losses represent a concrete injury and are relatively straightforward to measure, they may represent a type of loss for which damages almost always should be sought. Injuries involving "emotional distress" also should be addressed, but may require closer analysis. A fourth factor may be whether the discrimination victim has a current, ongoing relationship with the recipient that involves regular interactions between the two. If such a relationship exists and prospective relief is obtained that benefits the victim, that may weigh against providing compensation for any nonpecuniary injury that is relatively slight.

Another issue is how agencies should respond to requests by recipients that discrimination victims sign a liability release in order to obtain a damage award through a compliance agreement. As a practical matter, agencies likely will need to be open to including such a release in any agreement that provides for damages, if requested by the recipient.

D. States Do Not Have Eleventh Amendment Immunity Under Title VI

The Eleventh Amendment bars a State from being sued by a citizen of the State

in Federal court.109/ Since 1890, the Supreme Court has consistently held that this Amendment protects a State from being sued in Federal court without the State's consent. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 n.7 (1996) (cases cited). However, Federal courts have jurisdiction over a State if the State has either waived its immunity or Congress has abrogated unequivocally a State's immunity pursuant to valid powers. See id. at 68. Congress has unequivocally done so with respect to Title VI and related statutes.

In 1986, Congress enacted 42 U.S.C. § 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986), to abrogate States' immunity from suit for violations of Section 504, Title VI, Title IX, the Age Discrimination Act, and similar nondiscrimination statutes. See Lane, 518 U.S. at 199. Section 2000d-7 states:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794], title IX of the Education Amendments of 1972 [20 U.S.C. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

---

[109] U.S. Const. Amend. XI states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." See, Hans v. Louisiana, 134 U.S. 1 (1890).

It is the position of the Department of Justice that Section 2000d-7 is an unambiguous abrogation which gives States express notice that a condition for receiving Federal funds is the requirement that they consent to suit in Federal court for alleged violations of Title VI and the other statutes enumerated.

## XIII. Department of Justice Role Under Title VI

The Department of Justice has two roles to play in Title VI enforcement: coordination of Federal agency implementation and enforcement, and legal representative of the United States. Pursuant to Exec. Order No. 12250, 28 C.F.R. Pt. 41, App. A, the Attorney General shall “coordinate the implementation and enforcement by Executive agencies" of Title VI, Title, IX, Section 504 and "any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. Exec. Order No. 12250 § 1-201. Except for approval of agency regulations implementing Title VI and Title IX and the issuance of coordinating regulations, all other responsibilities have been delegated to the Assistant Attorney General for Civil Rights. While each Federal agency extending Federal financial assistance has primary responsibility for implementing Title VI with respect to its recipients, overall coordination in identifying legal and operational standards, and ensuring consistent application and enforcement, rests with the Civil Rights Division of the Department of Justice.

Initially, the Title VI coordination responsibility was assigned to a President's Council on Equal Opportunity, which was created by Exec. Order No. 11197, dated February 5, 1965. Exec. Order No. 11197, 3 C.F.R. 1964-1965 Comp. 278. However, the Council was abolished after six months and the responsibility was reassigned to the Attorney General pursuant to Exec. Order No. 11247, dated September 24, 1965. 3 C.F.R. 1964-1965 Comp. 348. Exec. Order No. 11247 provided that the Attorney

General was to assist Federal departments and agencies in coordinating their Title VI enforcement activities adopting consistent, uniform policies, practices, and procedures. During this period, the Department issued its "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," 28 C.F.R. § 50.3.

In 1974, the President signed Exec. Order No. 11764, which was designed "to clarify and broaden the role of the Attorney General with respect to Title VI enforcement." Exec. Order No. 11764, 3A C.F.R. § 124 (1974 Comp.). The Order gave the Attorney General broad power to insure the effective and coordinated enforcement of Title VI. Pursuant to this Executive Order, in 1976, the Department promulgated its Coordination Regulations describing specific implementation, compliance, and enforcement obligations of Federal funding agencies under Title VI. See 28 C.F.R. §§ 42.401-42.415.110/ Every agency that extends Federal financial assistance covered by Title VI is subject to the Coordination Regulations and Title VI Guidelines issued by the Department of Justice.

Finally, on November 2, 1980, President Carter signed Exec. Order No. 12250, which directs the Attorney General to oversee and coordinate the implementation and enforcement responsibilities of the Federal agencies pursuant to Title VI. For the first time, the President's approval power over regulations was delegated to the Attorney General. See id. at § 1-1.111/ This Executive Order also requires agencies to issue

---

[110] These regulations were amended slightly after the signing of Executive Order 12250 in 1980 to correctly identify the applicable Executive Order, but in substance they are substantially as they were when issued in 1976.

[111] Title VI provides that no rules, regulations and orders of general applicability "shall become effective unless and until approved by the President." 42 U.S.C. §

appropriate implementing directives either in the form of policy guidance or regulations that are consistent with the requirements prescribed by the Attorney General. Id. at § 1-402.

The Department of Justice's second role is as the Federal government's litigator. As discussed in Chapter XI, the Department of Justice, on behalf of Executive agencies, may seek injunctive relief, specific performance, or other remedies when agencies have referred determinations of noncompliance by recipients to the Department for judicial enforcement. Such litigation will be assigned to the Department's Civil Rights Division. In addition, the Department is responsible for representing agency officials should they be named in private litigation involving Title VI.

---

2000d-1.

# Index