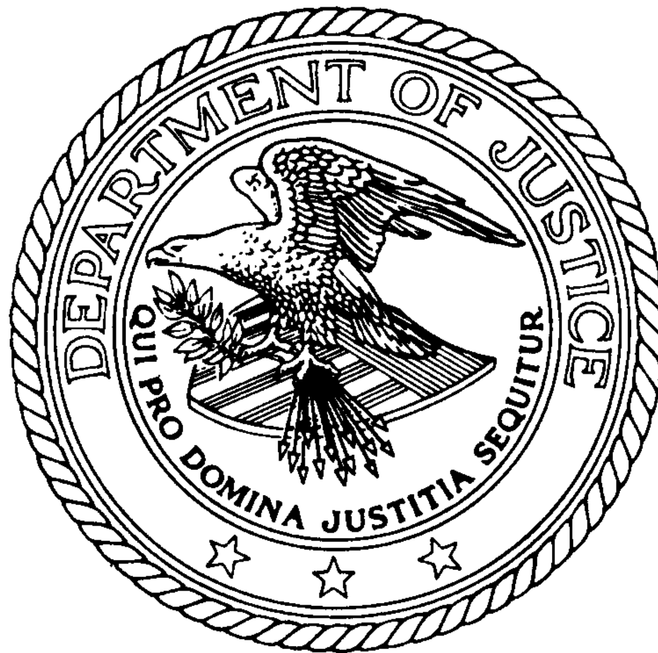
TITLE VI LEGAL MANUAL



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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 Comments on this publication, and suggestions as to future updates, including published and unpublished cases, may be addressed to:

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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.

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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 U.S. Department of Transportation 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, supra, 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

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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.

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 extent that the language and history of Title IX do not suggest a contrary interpretation."); Bentley v. Cleveland County Board of County Commissioners, 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 Board of Education, 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/

2/ Exec. Order No. 11063, 3 CFR 652-656 (1959-1963) (equal opportunity in housing), as amended by Exec. Order No. 12259, 3 CFR 307 (1981); Exec. Order No. 10479, 3 CFR 61 (1949-1953), as amended by Exec. Order No. 10482, 3 CFR 968 (1949-1953) (equal employment opportunity by government); Exec. Order No. 9981, 3 CFR 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 Hospital, 323 F.2d 959 (5th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

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 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:

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 (continued...)

> 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.

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.

4/ (...continued)
Congress evidences a contrary intent.")

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

> 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.

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, supra, 457 U.S. at 210-211; Mathews, supra, 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 Assn. v. Civil Service Commission, 463 U.S. 582 (1983); Regents of the University of California 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.

6/ Fifth and Fourteenth Amendment equal protection claims are coextensive, and "indistinguishable." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217; 115 S. Ct. 2097, 2107-2108 (1995).

See Coalition of Bedford-Stuyvesant Block Association, Inc. v. Cuomo, 651 F. Supp. 1202, 1209 n.2 (E.D.N.Y. 1987; Bryant v. New Jersey Department of Transportation, 1998 WL 133758 (D.N.J.).

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.7/ 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. Matter of 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

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

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 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 Department of Transportation 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; 116 S.

Ct. 306 (1995); see also Delmonte v. Dept. of Bus. Pro. ABT of Fla., 877 F. Supp. 1563 (S.D. Fla. 1995).8/

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.

8/ 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 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.

28 CFR § 42.102(c).9/ 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, supra, 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 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 University Medical Center, 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

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9/ 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 CFR § 42.403(d).

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 CFR § 42.105. 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.10/ 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 CFR § 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

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

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, supra, 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 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 Business & Professional 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.11/ For example, colleges indirectly receive Federal financial assistance when they accept

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11/ 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."

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)12/; see also Bob Jones University v. Johnson, 396 F. Supp. 597, 603 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975). In Bob Jones, supra, 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 the veterans were not required to use the specific Federal monies to pay the schools for tuition and expenses. Id. 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

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12/ "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." Id. at 569.

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 Southern California 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); Calif. Assoc. of the Physically Handicapped v. FCC, 840 F.2d 88, 92-93 (D.C. Cir. 1988) (same); see Herman v. United Brotherhood 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, supra, 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 Americans with Disabilities 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, supra, 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).13/

It also should be noted that, by statute, contracts of guarantee and insurance are not Federal financial assistance. 42 U.S.C. § 2000d-4; see Gallagher v. Croghan Colonial Bank, 89 F.3d 275, 277 (6th Cir. 1996) (Default insurance for bank's disbursement of Federal student loans is a "contract of insurance," and therefore not Federal financial assistance). But see Moore v. Sun Bank, 923 F.2d 1423 (11th Cir. 1991) (loans guaranteed by the Small Business Administration constituted Federal financial assistance).

Procurement contracts also are not considered Federal financial assistance.14/ DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377

13/ 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).

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

(continued...)

(10th Cir. 1990); Jacobson, supra, 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 Central Railroad Company, 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, supra, 742 F.2d at 1209; Mass v. Martin Marietta Corporation, 805 F. Supp. 1530, 1542 (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, supra, 911 F.2d at 1382-83; Jacobson, supra, 742 F.2d at 1210. In DeVargas, a Department of Energy contract, issued through a competitive bidding process after a

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14/ (...continued)

> 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).

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 University, supra, 396 F. Supp. at 602, n.16.15/ 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:

> 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).

15/ The court in Bob Jones, supra, 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. Id.

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 CFR § 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 ultimate distribution to an ultimate beneficiary. 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 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, Contract Relationship

The most clear 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 akin to a contract and receives Federal assistance under a condition or assurance of compliance with Title VI (and/or other nondiscrimination obligations). Paralyzed Veterans, supra, 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, supra, 717 F.2d at 41. It is important to note that by signing an assurance, the recipient has provided documentation that may be a basis for a breach of contract action. Even without such writing, courts describe Title VI obligations (and other nondiscrimination laws) as similar to a contract; "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.16/

C. Indirect Recipient

A recipient may receive funds either directly or indirectly. Grove City College, supra, 465 U.S. at 564-65.17/ 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

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16/ 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," as described in Section E, below.

17/ 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 unchallenged.

universities and other educational institutions are the indirect recipients. Id.; Bob Jones, supra, 396 F. Supp. at 602.

In Grove City College, supra, the Supreme Court found that there was no basis to create a distinction not made by Congress regarding funding paid directly to or received 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 amendments to Title IX are "replete with statements evincing Congress' awareness that the student assistance programs established by the Amendments would significantly aid colleges and universities." Id. at 565-66 (citations omitted). 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 addition, 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.

477 U.S. at 607.

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 CFR § 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 CFR § 42.105(a)(2).18/

18/ In contrast, in Independent Housing Services of San Francisco (IHS) v. Fillmore Center Associates, et al., 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 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.

E. Primary/Subrecipient Programs

Many programs have two recipients. The primary recipient or conduit 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 CFR § 42.102(g). Both the primary recipient and subrecipient 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 Services, Inc., 624 F. Supp. 429 (N.D. Ill. 1985).19/

- 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 consistently state that prohibitions against discriminatory conduct,

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19/ 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.

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 CFR §§ 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 . . . .] (emphasis added).

Not only is the recipient responsible for the contractor's actions, but courts have held that a contractor or agent hired by a recipient to perform duties that are integral to the functions of the recipient may be independently subject to Title VI (Section 504 or Title IX). In Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 272 (6th Cir. 1994), for example, the court concluded that a high school athletic association was covered by Title IX since it was designated by statute as the recipient's agent with respect to interscholastic sports and because it performed the recipient's duties and collected dues from schools that received Federal monies. In Smith v. National Collegiate Athletic Association (NCAA), 139 F.3d 180 (3rd Cir.

1998), the Third Circuit concluded that the NCAA was likewise a recipient covered by Title IX, even though there was no statutory designation of the NCAA as an "agent" as there was in Horner. The fact that the NCAA acted as a surrogate for the colleges and universities, which paid dues to it, was sufficient for the court to find Title IX coverage.

In addition, following a different approach, the Fifth Circuit held that a respiratory care contractor to a hospital was a primary recipient since it was responsible, in part, for Medicaid and Medicare payments to the hospital. Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir.), modified on other grounds, 777 F.2d 329 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986). The court also noted that the absence of a direct connection between the hospital's receipt of Medicaid and Medicare funds (which constitute Federal financial assistance) and payment to the contractor with such Federal monies was not controlling since the contractor's "revenue was *in fact* linked to the hospital's receipt of Medicare and Medicaid funds. . . " Id. at 1289 (emphasis in original).20/

> It is this mutual benefit that distinguishes Lifetron's [the contractor's] womb-like financial situation from that of a private contractor with no material relationship to the recipient's receipt of federal funds. Unlike the hospital's

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20/ The hospital and the contractor, Lifetron, had a unique relationship; former hospital staff became Lifetron staff, all Lifetron offices were on hospital property, the hospital provided equipment to Lifetron, and Lifetron employees were subject to hospital regulations. Id. at 1281. In addition, Lifetron also had to reimburse the hospital for any payments received if any Medicaid or Medicare claims based on the contractor's work were subsequently disallowed. Id. at 1290.

> privately-contracted mower of lawns, sweeper of floors, or supplier of aspirin, Lifetron contributes in a direct and intangible way to the hospital's claims for reimbursement under Medicare and Medicaid.

Id. at 1290.21/ Given the contractor's direct role or "financial nexus" to the amount of Medicaid and Medicare funds paid to the hospital, the court considered the contractor a "primary recipient." Id. at 1290 n.29.22/

In contrast, in Hamilton v. Illinois Central Railroad Company, 894 F. Supp. 1014, 1019-22 (S.D. Miss. 1995), the court primarily followed Grove City's focus on congressional intent to determine whether an entity was an indirect recipient subject to Section 504, and Paralyzed Veteran's distinction of indirect recipients and beneficiaries to conclude that a contractor to a recipient was not subject to Section 504. In Hamilton, the court evaluated whether railroads were indirect recipients of

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21/ The court further explained, "we do not hold that independent contractors who perform services for recipients of federal funds become recipients by virtue of a vicarious relationship through the primary recipient." Id. at 1290 n.29.

22/ A district court has questioned whether Frazier survives Paralyzed Veterans, supra. Eivins v. Adventist Health System/Eastern, Inc., 651 F. Supp. 340 (D. Kan. 1987). The court in Eivins opined that Frazier's conclusion that both entities, the hospital and contractor, were recipients since both benefitted from Medicaid and Medicare is an analysis that was refuted by Paralyzed Veterans, which distinguished recipients from beneficiaries. It is our view that Eivins takes too narrow a view of Frazier. In Paralyzed Veterans, the Court focused on the fact that Congress was not intending to provide aid to airlines, although they may have indirectly benefitted from the runways constructed by the airports that received the Federal assistance. In Frazier, on the other hand, the contractor was not merely an indirect beneficiary of Medicare and Medicaid funds, but rather was a direct recipient of those funds, just like the hospital. An airline that is permitted to use a federally funded runway is totally different from a contractor that moves into a funded hospital, operates a respiratory therapy department with its own employees, and is paid from the same Federal funds as is the rest of the hospital.

Federal financial assistance under the Highway Safety Act of 1973 (HSA). Under the HSA, States receive funds for, inter alia, improvement and construction safety projects at railroad crossings. Id. at 1018. The HSA permits States to enter into contractual agreements with railroads to perform the construction work, and such agreements (and other State projects) are subject to the approval of the Federal Highway Administration (FHA). Id. The State is reimbursed by FHA for 80% of the costs charged by the railroads. Id. at 1019. While recognizing that Federal funds may be received indirectly, the court determined that

> Congress intended that the State of Mississippi and/or its political subdivisions receive direct federal assistance for the purpose of improving the safety of highways and railroad crossings. However, nothing contained in the . . . [HSA] or the applicable regulations indicates a Congressional intent to place the burden of improving the safety of the nation's highways and railroad crossings on railroad companies or to provide federal assistance directly to them for that purpose.

Id. The court distinguished Congress' intent and awareness that Federal financial aid would help educational institutions under Title IX from the lack of evidence of any congressional intent to aid or subsidize the railroad companies for HSA objectives. The court concluded that HSA's reimbursement procedures were to "compensate railroad companies for their services." Id. at 1020.23/ The court also followed the analysis of Paralyzed Veterans to conclude that the railroad company

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23/ The court also distinguished Frazier by finding a lack of "financial nexus" by the contractor, a lack of dependence by railroads on these Federal funds, and the lack of a role by the contractor in the reimbursement process. Id. at 1021.

benefitted from the statutory program, but was not an indirect recipient. Id. at 1021-22.

G. Recipient v. Beneficiary

Finally, in analyzing whether an entity is a recipient, it is essential to distinguish a recipient from a beneficiary; the former is covered by Title VI while the latter is not.24/ Paralyzed Veterans, supra, 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 compliance with Title VI is a condition of receiving the assistance. 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.

For example, in Paralyzed Veterans, the Court held that commercial airlines that used airports and gained an advantage from the capital improvements and

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24/ Most agency Title VI regulations state that the term recipient "does not include any ultimate beneficiary under the program." See, e.g., 28 CFR § 42.102(f) (DOJ).

construction at airports were beneficiaries, and not recipients, under the airport improvement program. The airport operators, in contrast, directly receive the Federal financial assistance for the airport construction. The Court examined the program statutes and 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 College, supra.

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 institutionwide, 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

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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).

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 University, supra, 396 F. Supp. at 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 College, supra, 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

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26/ Agency regulations, while broad in scope, provide limited, specific guidance. See, e.g., 28 CFR § 42.102(d).

program. Finally, the Court noted that earmarked funds, such as the Federal financial aid monies, increase resources and obligations of the recipient, while nonearmarked funds are unrestricted in use and purpose. Id. at 573.

C. Civil Rights Restoration Act

The Grove City College interpretation of "program or activity" lasted for four years, until Congress passed the Civil Rights Restoration Act (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 College, i.e., the narrow interpretations by courts and agencies that relieved entities of liability for apparent acts of

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27/ The Senate further stated:

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

discrimination because of the new, constricted interpretation of program or activity; and detailed explanations of the CRRA's language. Id. at 5-20.28/

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--
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> (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (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."29/ For example, if a State receives funding that is designated

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

29/ At least one court, however, has held that an entire county was the "program or activity." See Bentley v. Cleveland County Board of Commissioners, 41 F.3d 600 (10th Cir. 1994).

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, supra, 849 F. Supp. 407, 415, 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 or activity." See Hodges by Hodges v. Public Building Commission of Chicago (I), 864 F. Supp. 1493, 1505 (N.D. Ill. 1994) (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."), reconsideration denied, 873 F. Supp. 128, 132

(N.D. Ill. 1995);30/ see also Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991).31/

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 several 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 United States v. City of Yonkers, 880 F. Supp. 212, 232 (S.D.N.Y.

30/ 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.

31/ In Schroeder, supra, 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.

1995); Association of Mexican-American Educators (AMAE) v. State of California, 836 F. Supp. 1534 (N.D. Cal. 1993); New York Urban League, Inc. v. Metropolitan Transportation Authority, 905 F. Supp. 1266, 1273 (S.D.N.Y. 1995), vacated on other grounds, 71 F.3d 1031 (2d Cir. 1995). The court in AMAE held that a State may be a defendant if it is alleged that it is partly responsible for the alleged discriminatory conduct within the "program or activity." Id. at 1543. In AMAE, plaintiffs claimed that a specific test required by the State of California for certification of teachers violated Title VI (and Title VII). The State established the entity that administered the test and other teacher certification procedures. Id. The court rejected the State's assertion that, since it was not a "program or activity," it was improperly named as a defendant. Id. at 1540-42.

> Although the text of § 2000d-4 . . . obviously excludes a state from the definition of "program or activity" . . . *nothing* in the language of Title VI mandates that an entity must be a "program or activity" to be a Title VI defendant. Indeed, to the extent it has any bearing on this issue, the statutory language points in the *opposite* direction. Section 2000d-7 clearly provides that a state *may* be a defendant in a Title VI action.

Id. at 1542 (emphasis in original). Accordingly, summary judgment for dismissal of the State was denied.

Similarly, in 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 (2nd Cir. 1996), the court rejected the State's argument that sovereign immunity applied since it is not a "program or activity." 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. (citation to AMAE) 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).32/

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
>
> (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

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32/ 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, 888 F. Supp. 591, 597-98 (S.D.N.Y. 1995), vacated and remanded, 96 F. 3d 600 (2nd Cir. 1996).

financial assistance.33/ See Knight v. State of 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. Meyers v. Board of Education of the San Juan School District, 905 F. Supp. 1544 (D. Utah 1995)34/; Horner, supra, 43 F.3d at 272 (Title IX case); see also Young

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33/ "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.

34/ 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.
(continued...)

by and through Young v. Montgomery County (AL) Board of Education, 922 F. Supp. 544 (M.D. Al. 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.

The court in AMAE also held that the State's commission for teacher preparation and licensing was part of the "program or activity," i.e., the State's public school system. 836 F. Supp. at 1544-45. Even though the commission did not receive Federal financial assistance, its activities were subject to Title VI since the State educational system of which it is a part received such assistance. 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

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34/ (...continued)
Id. at 1574 n.37.

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--
>
> (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;
>
> <u>any part of which</u> 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, <u>reprinted in</u> 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.35/

35/ 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.

G. <u>Catch-All/Combinations of Entities</u>

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);
>
> <u>any part of which</u> 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] (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, <u>reprinted in</u> 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. 582; Alexander v. Choate, 469 U.S. at 292-94; see Elston v. Talladega County Board of Education, 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, supra, 997 F.2d at 1405 n. 11; Guardians, supra; Alexander v. Choate, 469 U.S. 287, 293; Georgia State Conference of Branches of NAACP v. State of 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. State of New York, 71 F.3d 1031, 1038 (2nd Cir. 1995); Elston, supra, 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 (AL) Board of Education, 922 F. Supp. 544, 549 (M.D. Al. 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, supra, 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, Alabama, 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. Metro. Housing Redevelopment Corp., 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment); Elston, supra, 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).36/ See Baldwin v. University of Texas Medical Branch at Galveston, 945 F.Supp. 1022, 1031 (S.D.Tex.

36/ 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 Cty. Board of Education, 996 F.Supp. 1390, 1414 n.17 (M.D.Ala. 1998).

1996); Brantley v. Independent School District No. 625, St. Paul Public Schools, 936 F.Supp. 649, 658 n.17 (D.Minn. 1996).37/

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 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 a different race, color, or national origin than the complainant -- or that the program remained open and the recipient continued to accept applications from applicants of a different race, color, or national origin than the complainant.38/

If the record 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

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37/ 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.

38/ 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.'" U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 715 (1982) (quoting Furnco Construction Corp. V. Waters, 438 U.S. 567, 577 (1978)).

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 record 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 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 Brotherhood 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, Department 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, supra; Alexander v. Choate, supra.

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 (2nd 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 Conf. v. Georgia, 775 F.2d 1403 (11th Cir. 1985); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984). 39/ In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate

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39/ Moreover, 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 Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3rd Cir. 1997) (citing cases addressing this issue), vacated as moot, ___ U.S. ___, 1998 WL 477242 (August 17, 1998).

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, supra, 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). To establish liability 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.40/ Larry P. v. Riles, 793 F.2d 969, 982; Elston, 997 F.2d at 1407 (citing Georgia State Conference, 775 F.2d 1403, 1417 (11th Cir. 1985)).

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

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40/ 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 or others who implement it.

"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, supra, 1998 WL 295891, at *36 (M.D.Ala.), __ F.Supp. __, (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 (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, supra, 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, 1998 WL 295891, *46 (M.D.Ala.). 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 of New York, 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, supra, 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.41/

Similarly, in Young by and through Young, supra, 922 F.Supp 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, supra at 1407; see also, Young by and through Young, supra, 922 F.Supp at 551 (where defendants established a substantial legitimate

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41/ 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.

justification, plaintiffs failed to demonstrate existence of an equally effective alternative practice).

C. 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).

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-3.42/

> 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

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42/ 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).

of the recipient with respect to the construction of such facility are not subject to Title VI. 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 District No. 1, Denver, CO, 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); Rosario-Olmedo v. Community School Board for District 17, 756 F. Supp. 95, 96-97 (E.D.N.Y. 1991) (Title VI claim dismissed for failure to plead primary objective of Federal funds is employment). In Reynolds, supra, 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.43/ 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 CFR § 42.104(c)(2); see also 15 CFR § 8.4(c)(2) (Commerce); 34 CFR § 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 Board of Education, 372 F.2d 836, 883 (5th Cir. 1966) ("Faculty integration is essential to student desegregation."), cert. denied. sub nom., Caddo Parish School Board v. United States, 389 U.S. 840 (1967); Caulfield v. Board of Education of City of New York, 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 Board, 297 F. Supp. 291, 297 (M.D. Ala. 1969) (Patients of

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43/ This is oftentimes referred to as the "infection theory."

State mental health system have standing to challenge segregated employment practices which affect delivery of services to patients.).

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 Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 173 (3rd. 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 CFR § 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 CFR §§ 42.601-42.613 (DOJ); 29 CFR §§ 1691.1 - 1691.13 (EEOC). 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.44/ 28 CFR §§ 42.605(d),

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44/ 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 CFR (continued...)

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 CFR § 42.610. Where complaints allege a pattern and 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).

44/ (...continued)
§ 42.601.

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 Reviews

An agency's decision to extend Federal financial assistance should involve an evaluation of the applicant's proposed means of furthering the goals of the underlying program as well as compliance with Title VI and other nondiscrimination laws. See Shannon v. United States Dept. of Housing and Urban Dev., 436 F.2d 809, 819 (3rd Cir. 1970).

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 CFR §§ 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 College, supra, 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 CFR § 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 College, supra, 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 U.S. v. Marion County School District, 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

Neither Title VI (nor Title IX or Section 504) specifically addresses if an agency may defer the decision regarding whether to grant assistance while conducting an investigation, during negotiations for voluntary compliance, or during enforcement proceedings after a violation is found. However, there are both strong policy reasons and ample authority for concluding that agencies have this power.

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 CFR § 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.45/

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).46/

45/ 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 CFR § 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.

46/ 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-

(continued...)

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 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 CFR § 50.3 II.A.1 (emphasis added). Where the application is adequate on its face but there are "reasonable grounds" for believing

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46/ (...continued)
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 Public Instruction of Palm Beach County, Florida v. Cohen, 413 F.2d 1201 (5th Cir. 1969).

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).47/

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 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).

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

47/ 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.

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 agencies requiring that recipients/subgrantors obtain assurances of compliance from subrecipients.48/ 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. Pre-Award 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

48/ In the alternative, an 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 CFR § 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

Agencies typically only require that applicants submit an assurance of compliance with Title VI (and other applicable nondiscrimination laws) as part of a pre-award review. In light of constraints with budget, staff, and time, detailed pre-award reviews of each applicant are not practicable or realistic. Notwithstanding these limits, however, it is recommended that agencies, in addition to obtaining signed assurances, require that applicants submit the limited data described in the Coordination Regulation (pending suits, prior determinations, etc.). It is further recommended that agencies implement an internal screening process whereby agency civil rights officials are notified of potential assistance grants and are

provided the opportunity to raise a "red flag" or concern about the potential grant recipient.49/

If an agency determines that it is impractical to implement these steps for all applications for assistance, it should develop a system to target a significant proportion of assistance applications for implementation of these three pre-award steps.50/ As part of the Department of Justice's oversight and coordinating function, agencies also should submit to the Department, as part of its annual implementation plan, any targeting procedures that are adopted.

B. Post-Award Compliance Reviews51/

Federal agencies are required to maintain an effective program of post-award compliance reviews.52/ Federal agency Title VI regulations reiterate this requirement.53/ Compliance reviews can be large and complex, or more limited in scope.

49/ 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.

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

51/ 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.

52/ See Coordination Regulations, 28 C.F.R. § 42.407(c).

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

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 Public Service (NOPSI III), 723 F.2d 422 (5th Cir.) rehearing en banc denied, 734 F.2d 226 (5th Cir. 1984) (E.O. 11246 compliance review unreasonable) (citing United States v. Mississippi Power & Light Co., 638 F.2d 899 (5th Cir. 1981)); and First Alabama 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).54/

The Harris 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

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54/ 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.

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, supra, 970 F.2d at 101 (internal citations omitted); NOPSI III, supra, 723 F.2d at 425.

In Harris Methodist, supra, 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.

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 of an existing violation.

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

- Issues targeted in the agency's strategic plan;

- 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 are familiar with actual incidents to support their concerns;

- Problems identified to the agency by its block grant recipients;55/ 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 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, supra, 723 F.2d at 428. The memorandum should identify any regulations or

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55/ 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.

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 CFR § 42.407(a). Related to the reviews themselves, recipients should be required to submit periodic compliance reports to the agencies and, where appropriate, 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 CFR § 42.407(c)(1).56/

56/ "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 CFR § 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 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.

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 CFR § 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 CFR § 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 CFR § 42.107; 32 CFR § 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 CFR § 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 CFR § 42.107(d)(2). If the agency 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 CFR § 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 CFR § 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 CFR § 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 CFR § 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.57/ 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 Public Instruction of Taylor County, Florida 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

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

completion of a Title VI (Title IX, or Section 504) investigation, negotiations, or other action to obtain remedial relief.58/

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.59/ See 28 CFR § 42.411(a)

58/ In considering options for enforcement, agencies should consult the Title VI Guidelines. 28 CFR § 50.3.

59/ 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.

("Effective enforcement of Title VI requires that agencies take prompt action to achieve voluntary compliance in all instances in which noncompliance is found."); 28 CFR § 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.

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).60/ 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.

60/ Where voluntary compliance is achieved, the agreement must be in writing and specify the action necessary for the correction of Title VI deficiencies. 28 CFR § 42.411(b).

Efforts to obtain voluntary compliance should continue throughout the process, but should not be allowed to become a device to avoid compliance. Adams v. Richardson, 480 F.2d 1159, 1163 (D.C. Cir. 1973)61/; Hardy v. Leonard, 377 F. Supp. 831, 838 (N.D. Cal. 1974). Once an area of noncompliance is identified, an agency is required to enforce Title VI. Adams v. Richardson, 480 F.2d at 1162.

The regulations do not identify a deadline or line of demarcation between a continuation of good faith attempts to achieve voluntary compliance and an abdication by an agency of its enforcement responsibilities, although the courts have addressed this issue.62/

1. Voluntary Compliance at the Pre-Award Stage

a. Special Conditions

61/ Although Title VI does not provide a specific limit to the time period 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 CFR § 42.411(b).

62/ In a series of opinions, the District Court for the District of Columbia dealt with this issue in the context of HEW's efforts to obtain compliance by various school districts with Title VI. The court held that the agency's limited discretion to seek voluntary compliance was exhausted where voluntary compliance negotiations continued on for more than 2-3 years after notice of noncompliance. The court ordered enforcement proceedings initiated within 60 days. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973). The appellate court modified this decree only to the extent of providing systems of higher education 120 days to submit desegregation plans. "If an acceptable plan has not been arrived at within an additional period of 180 days, HEW must initiate compliance procedures." Adams, supra, 480 F.2d at 1165.

As is done post-award, agencies may obtain compliance "by voluntary means" in 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.63/ 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

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63/ 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.

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 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 CFR § 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; U.S. 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); Marion County, supra, 625 F.2d at 612-13 & n.14. 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 CFR § 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. E.g., 29 CFR § 31.8(a) (Labor); 34 CFR § 100.8 (Education); and 45 CFR § 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.64/ Some agency regulations require additional time after this notification to the recipient to continue negotiation efforts to achieve

64/ See, e.g., 24 CFR § 1.8(d) (HUD); 29 CFR § 31.8(c) (Labor).

voluntary compliance.65/ 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 University Medical Center, 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 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;

65/ 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.

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.66/ 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 CFR § 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 CFR § 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 CFR § 80.9(a) (HHS).

Agencies have adopted the procedures of the Administrative Procedures Act for administrative hearings. See, e.g., 28 CFR § 42.109(d) (Justice); 45 CFR § 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 CFR § 42.109(d); 45 CFR § 80.9(d)(2) [HHS]. The hearing examiner may

66/ 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).

issue an initial decision or a recommendation to the "responsible agency official." See, e.g., 28 CFR 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 CFR § 42.110; 45 CFR § 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. Finch, supra, 414 F.2d at 1075.67/ "The procedural limitations placed on the exercise of such power were designed to insure that termination

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67/ 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.
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> 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 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).

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, supra, 414 F.2d 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 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 1077-78.68/ 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

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68/ 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.

> reaches only those programs which would utilize federal money for unconstitutional ends.

Id. at 1078.69/

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, supra, 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 separate HUD program. Id. 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

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69/ 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)).

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 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 1068, 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 Board of Education, supra, 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 IX (and Title VI and Section 504). The most common form of relief sought and obtained is an injunction ordering a recipient to do something. See Cannon v. University of Chicago, 441 U.S. 677 (1979). 70/ See also, United States v. Baylor University Medical Center, supra, 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, supra, 503 U.S. at 75 n.8. 71/ 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, 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

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70/ In addition, as noted in Chapter VIII, 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 Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3rd Cir. 1997) (citing cases addressing this issue), vacated as moot, ___ U.S. ___, 1998 WL 477242 (August 17, 1998).

71/ 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 Public Schools, 34 F.3d 642, 644 (8th Cir. 1994); Waldrop v. Southern Co. Services, Inc., 24 F.3d 152, 156 (11th Cir. 1994); Pandazides v. Virginia Board of Education, 13 F.3d 823, 831 (4th Cir. 1994).

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, supra, 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).72/ 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, supra, 503 U.S. at 72-7573/, Consolidated Rail Corp., supra, 465 U.S. at 630-31.

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

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72/ See, Lane v. Peña, 116 S. Ct. 2092, 2101 & 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, supra, 438 U.S. at 283; Lau, supra, 414 U.S. 563.

73/ 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.

Federal statute provides (expressly or impliedly) for a right to bring suit, Federal courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Id. at 66.74/ The Court found no congressional intent to abandon this presumption in the enforcement of Title IX.75/ 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.76/

74/ 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.

75/ 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.

76/ Section 903 of Restatement (Second) of Torts (1979) defines "compensatory damages" as "the damages awarded to a person as compensation, indemnity or

(continued...)

B. Availability of Compensatory 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 74.77/ Awarding damages may be particularly problematic where the violation rests on a "disparate

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

77/ 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 Association, supra, 463 U.S. at 596-597 (White, J., joined by Rehnquist, J.); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

impact" theory of discrimination. See Guardians, supra, 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.78/ Agencies will want to ensure that the damages remedy is implemented in a manner consonant with other 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, tangible injury and are relatively straightforward to measure, they may represent a type of

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78/ If an agency is interested in seeking such relief in instances other than intentional violations, it should contact COR to discuss the matter.

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.79/ 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 Florida 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

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79/ 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).

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, supra, 518 U.S. 187 at ___. 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.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 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.

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, 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 CFR 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 CFR 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 CFR § 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 CFR § 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 CFR §§ 42.401-42.415.80/ 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

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80/ 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.

the first time, the President's approval power over regulations was delegated to the Attorney General. See § 1-1.[81] This Executive Order also requires agencies to issue appropriate implementing directives either in the form of policy guidance or regulations that are consistent with the requirements prescribed by the Attorney General. § 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.

81/ 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. § 2000d-1.