

## **Updated Sections**

Sections I - IX and XII - XIII have been removed from this document.

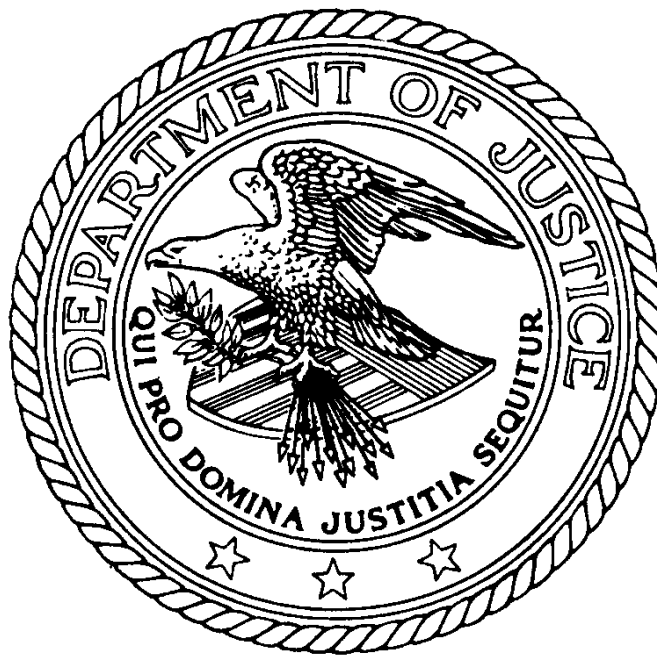
These sections have been updated and are available at [www.justice.gov/crt/fcs/T6Manual](http://www.justice.gov/crt/fcs/T6Manual).

Updated sections of the Title VI Manual will be released as they are completed.

Please visit the link above to get more information on:

- I. Overview: Interplay of Title VI with Title IX, Section 504, the Fourteenth Amendment, and Title VII
- II. Synopsis of Legislative History and Purpose of Title VI
- III. Title VI Applies to "Persons"
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- VIII. What Constitutes Discriminatory Conduct?
- IX. Employment Coverage
- XII. Private Right of Action and Individual Relief Through Agency Action
- XIII. Department of Justice Role Under Title VI

# **TITLE VI LEGAL MANUAL**



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

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 Comments on this publication, and suggestions as to future updates, including published and unpublished cases, may be addressed to: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

Sections I - IX and XII - XIII have been removed from this document.

These sections have been updated and are available at [www.justice.gov/crt/fcs/T6Manual](http://www.justice.gov/crt/fcs/T6Manual).

Updated sections of the Title VI Manual will be released as they are completed.

Please visit the link above to get more information on:

- I. Overview: Interplay of Title VI with Title IX, Section 504, the Fourteenth Amendment, and Title VII
- II. Synopsis of Legislative History and Purpose of Title VI
- III. Title VI Applies to "Persons"
- IV. "In the United States"
- V. Federal Financial Assistance Includes More Than Money
- VI. What is a Recipient?
- VII. "Program or Activity"
- VIII. What Constitutes Discriminatory Conduct?
- IX. Employment Coverage
- XII. Private Right of Action and Individual Relief Through Agency Action
- XIII. Department of Justice Role Under Title VI



## **X. Federal Funding Agency Methods to Evaluate Compliance**

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

### **A. Pre-Award Procedures**

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

#### **1. Assurances of Compliance**

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

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

## 2. Deferral of the Decision Whether to Grant Assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

### 4. Data Collection

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

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<sup>79</sup> In the alternative, a Federal agency may obtain assurances directly from subrecipients, if it so chooses.

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

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

#### 5. Recommendations Concerning Pre-award Reviews

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

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<sup>80</sup> 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.

<sup>81</sup> For example, pre-award reviews would not be necessary for applications that are unlikely to be funded for programmatic reasons.

are adopted.

B. Post-Award Compliance Reviews<sup>82/</sup>

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

1. Selection of Targets and Scope of Compliance Review

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

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<sup>82</sup> 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.

<sup>83</sup> See Coordination Regulations, 28 C.F.R. § 42.407(c).

<sup>84</sup> See, e.g., Department of Justice Title VI Regulations, 28 C.F.R. § 42.107(a).

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

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

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

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



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

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

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

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

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

## 2. Procedures for Compliance Reviews

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

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

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

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

C. Complaints

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

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

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

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

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

## **XI. Federal Funding Agency Methods to Enforce Compliance**

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

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

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

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

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<sup>88</sup> The discussion herein applies primarily to post-award enforcement. Subsections address the extent to which enforcement may vary in a pre-award context.

<sup>89</sup> In considering options for enforcement, agencies should consult the Title VI Guidelines. 28 C.F.R. § 50.3.

A. Efforts to Achieve Voluntary Compliance

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

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

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

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

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

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

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

1. Voluntary Compliance at the Pre-Award Stage
  - a. Special Conditions

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

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

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

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

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

Agency authority to attach special conditions to assistance agreements extends



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

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

b. Use of Cautionary Language

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

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

## 2. Other Nonlitigation Alternatives

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

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<sup>93</sup> One example of language currently used by the Department of Justice's Office of Justice Programs is as follows:

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

possibilities listed include:

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

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

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

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

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

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

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

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

In United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039 (5<sup>th</sup> 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

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<sup>94</sup> See, e.g., 24 C.F.R. § 1.8(d) (HUD); 29 C.F.R. § 31.8(c) (Labor).

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

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

### C. Fund Suspension and Termination

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

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

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

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

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

#### 1. Fund Termination Hearings

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

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

C.F.R. § 80.9(a) (HHS).

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

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

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

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

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

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

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

Some Senators have expressed the fear that in its original form Title VI would authorize cutting off of all federal funds going to a state for a particular program even though only part of the state were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize canceling all federal assistance to a state if it were discriminating in any of the federally-assisted programs in that State.

As was explained a number of times on the floor of the Senate, these interpretations of Title VI are inaccurate. The title is designed to limit any termination of federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs. Since this was our intention, we have made this specific in the provisions of Title VI by adding language to 602 to spell out these limitations more precisely. This language provides that any termination of federal assistance will be restricted to the particular political subdivision which is violating non-discriminatory regulations established under Title VI. It further provides that the termination shall affect only the particular program, or

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

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

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

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

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



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

As to the meaning of the term "program" in the pinpoint proviso, the court concluded that the legislative history of Title VI evidenced a congressional intent that the term refer not to generic categories of programs by a recipient, but rather to specific programs of assistance, or specific statutes, administered by the Federal government. Id. at 1077-78.<sup>98</sup>/ Further, even if "program" was meant to refer to generic categories of aid, the parenthetical phrase, "or part thereof", must be given meaning. Thus, an agency's fund termination order must be based on program-specific (i.e., grant statute specific) findings of noncompliance. The Court reasoned that:

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

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

Id. at 1078.<sup>99</sup>

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

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

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<sup>99</sup> The court also quoted Senator Long from the debate on passage of the Act:

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

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

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

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

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

## **Updated Sections**

Sections I - IX and XII - XIII have been removed from this document.

These sections have been updated and are available at [www.justice.gov/crt/fcs/T6Manual](http://www.justice.gov/crt/fcs/T6Manual).

Updated sections of the Title VI Manual will be released as they are completed.

Please visit the link above to get more information on:

- I. Overview: Interplay of Title VI with Title IX, Section 504, the Fourteenth Amendment, and Title VII
- II. Synopsis of Legislative History and Purpose of Title VI
- III. Title VI Applies to "Persons"
- IV. "In the United States"
- V. Federal Financial Assistance Includes More Than Money
- VI. What is a Recipient?
- VII. "Program or Activity"
- VIII. What Constitutes Discriminatory Conduct?
- IX. Employment Coverage
- XII. Private Right of Action and Individual Relief Through Agency Action
- XIII. Department of Justice Role Under Title VI

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