

## What types of discrimination are prohibited by Title VI?

The purpose of Title VI is to ensure that recipients of federal financial assistance do not discriminate on the basis of race, color, or national origin in their programs and activities. The U.S. Department of Transportation's (USDOT's) Title VI regulations at Title 49 of the Code of Federal Regulations (CFR), Part 21, describe some specific types of discriminatory actions that are prohibited, but they generally fall under three legal categories:

### 1. Disparate Treatment

### 2. Disparate Impact

### 3. Retaliation

## What is disparate treatment discrimination?

Disparate treatment (also called intentional discrimination) happens under Title VI when similarly situated persons are treated differently because of their race, color, or national origin by a recipient of federal funds directly or through contractual or other arrangements. For example, USDOT regulations provide that recipients of federal financial assistance, in operating a federally-assisted program, may not, on the basis of race, color, or national origin, among other things: [As a general matter, it gets a little messy when you try to summarize the regulations like this instead of just stating what the regulations themselves say.

- Deny an individual any service, financial aid, or other benefit;
- Provide any service, financial aid, or other benefit to a person that is different or is provided in a different manner from that provided to others under the program;
- Subject a person to segregation or separate treatment;
- Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
- Treat a person differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any service, financial aid, or other benefit provided under the program;
- Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford them an opportunity to do so which is different from that afforded others under the program; or
- Discriminate in site or location selection of facilities.

To establish disparate treatment requires a showing that the recipient decisionmaker was not only aware of the race, color, or national origin of the person(s) affected by the decision, but that the

recipient acted, at least in part, because of the person(s)'s race, color, or national origin. Discriminatory intent does not need to be the only reason for an action. Likewise, decision-makers do not need to have had "bad faith, ill will, or any evil motive." Instead, disparate treatment occurs when the evidence shows an action was taken "because of," not merely "in spite of," its adverse effects upon an individual or group based on race, color, or national origin (*Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

The evidence for disparate treatment can come from a variety of sources. Disparate treatment can be shown through comments or conduct by decision-makers, which demonstrates an intent to discriminate. It can also be shown through expressly using race, color, or national origin in the recipient's policies and procedures, if the recipient does not have a compelling governmental interest and the use is not narrowly tailored to suit that compelling interest. If the recipient explicitly conditions receipt of benefits or services on the race, color, or national origin of the beneficiary, or directs adverse action to be taken based on race, color, or national origin, such a policy or practice may be an express classification, which can constitute disparate treatment discrimination.

### **What is disparate impact discrimination?**

Disparate impact (also called adverse impact) discrimination happens under Title VI when a recipient of federal funds from FHWA adopts a procedure or engages in a practice that has a disproportionate, adverse impact on individuals who are distinguishable based on their race, color, or national origin—even if the recipient did not intend to discriminate. USDOT's Title VI regulations, which apply to the FHWA, provide that recipients may not themselves, or through contractual arrangements:

...utilize criteria or methods of administration which have the effect of subjecting persons 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 with respect to individuals of a particular race, color, or national origin.

49 C.F.R. §21.5(b)(2). However, it is important to note that a disparate impact, alone, does not mean the policy or practice is prohibited. If a policy or practice creates a disparate impact, FHWA and recipients must also consider two things:

1. Whether there is a "substantial, legitimate justification" for the policy or practice, and
2. Whether there is an alternative policy or practice that has less of a disparate, adverse impact.

If there is a sufficient justification—one that is substantial and legitimate—for a policy or practice, then the policy or practice may not constitute prohibited discrimination. However, even if the recipient can establish a substantial, legitimate justification, if there is a feasible alternative policy or practice with a lesser adverse impact, the recipient must consider that alternative. Not considering such an alternative, or not establishing a sufficient justification, could constitute prohibited disparate impact discrimination under Title VI.

## What is retaliation?

Just as recipients can not intentionally discriminate in their programs or activities, recipients are also prohibited from intentionally taking adverse actions against persons who exercise their rights under Title VI. This sort of intentional discrimination is called retaliation. USDOT regulations provide that:

No 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....

49 C.F.R. §21.11(e).

Retaliation involves three elements:

1. An individual engaged in protected activity of which the recipient was aware;
2. The recipient took a significantly adverse action against the individual; and
3. There is evidence to show the protected activity was the cause of the recipient's adverse action.

The types of activities considered protected can range from filing a Title VI administrative complaint against a recipient, to participating in an investigation or compliance review, or simply speaking at a public meeting. Evidence that shows the activity was the cause of the recipient's adverse actions can be direct comments or conduct, as well as indirect circumstantial evidence.

Finally, it is important to understand that retaliation is treated as a separate act of prohibited discrimination, even if it happens in response to a disparate treatment or disparate impact allegation. For example, if a person files a disparate impact complaint against a recipient, and FHWA does not find that prohibited disparate impact occurred, FHWA could still find that prohibited retaliation occurred.