TITLE VI LEGAL MANUAL

CIVIL RIGHTS DIVISION

U.S. DEPARTMENT OF JUSTICE

SECTION V: DEFINING TITLE VI

In the following materials, the Manual provides guidance regarding how several of the terms used in Title VI have been interpreted or defined.

Date Issued: September 27, 2016

ABOUT THIS DOCUMENT

The Civil Rights Division's *Title VI Legal Manual* provides an overview of Title VI legal principles. This document is intended to be an abstract of Title VI principles and issues; it 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, although the manual includes cases interpreting both Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq., and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, where their interpretation overlaps with Title VI, the manual should not be considered to be an overview of any statute other than Title VI.

The Civil Rights Division periodically issues policy guidance, directives, and other memoranda to federal agencies regarding statutes the Division enforces. The manual discusses, as appropriate, current guidance documents and directives relating to Title VI. Persons referring to the manual should check the Division's websites periodically (www.usdoj.gov/crt and www.lep.gov) for guidance documents and directives issued subsequent to its publication. Comments on this manual, and suggestions as to future updates, including published and unpublished cases, may be addressed to:

Federal Coordination and Compliance Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW - NWB
Washington, D.C. 20530
Telephone and TDD (202) 307-2222
FAX (202) 307-0595
E-mail FCS.CRT@USDOJ.GOV

The Civil Rights Division issues the *Title VI Legal Manual* pursuant to its responsibility under Executive Order 12250, 28 C.F.R. pt. 41, app. A, to coordinate federal government compliance with the requirements of Title VI and other federal financial assistance statutes and to foster consistent and coordinated Title VI enforcement. The manual is intended only to provide general assistance to interested persons and is not intended to, does not, and may not be relied upon to create any right or benefit that is substantive, procedural, or enforceable at law by a party against the United States. Finally, because the law changes frequently, the Civil Rights Division cannot guarantee that all information is current. Updates will be issued from time to time; please refer to the date issued for each chapter.

A. Who Is Protected Under Title VI?

Title VI protects *everyone* who is "in the United States" (which is separately defined below).

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

Title VI states "no person" shall be subject to discrimination because of race, color, or national origin. It is well-settled that the word "person" includes citizens and noncitizens alike and that undocumented individuals in the United States are protected from discrimination on the basis of race, color, and national origin. The Supreme Court has addressed "person" in the context of challenges brought under the Fifth and Fourteenth Amendments. *See*, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Plyler v. Doe*, 457 U.S. 202 (1982); *Mathews v. Diaz*, 426 U.S. 67 (1976). The Court has held that undocumented individuals are considered "persons" under the equal protection and due process clauses of the Fifth and Fourteenth Amendments. *Plyler*, 457 U.S. at 210–11; *Mathews*, 426 U.S. at 77.[1] These cases provide persuasive authority as to the scope of "persons" protected by Title VI because the Supreme Court has found that Title VI is limited by the Fifth and Fourteenth Amendments *See Guardians Ass'n v. Civil Serv. Comm.*, 463 U.S. 582, 589–90 (1983); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).[2]

Under Title VI, a private entity is also a "person" when it receives federal financial assistance from a recipient and may bring suit alleging discriminatory allocation of funds. Similarly, a private entity also is a "person" when it seeks to contract with a recipient.

Where a recipient receiving federal financial assistance enters the marketplace seeking to contract for goods or services, it cannot discriminate among entities

---

[1] In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), a Title VII case, the Court ruled that an employer's distinction between a citizen and noncitizen for employment purposes did not violate the prohibition against national origin discrimination. It also noted that because the employer did not discriminate among the citizens it did hire based on national origin, it did not violate Title VII. *Id.* at 93 n.5

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

seeking to do business with it. In *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1209 (9th Cir. 1984), the court noted that a contractor, corporate or individual, may be deemed a "person" and covered by Title VI. *See*, *e.g.*, *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 705–06 (2d Cir. 1982) (holding that corporate plaintiffs had standing to pursue racial discrimination claims pursuant to Title VI); *Bogdan v. Housing Auth. of Winston-Salem,* No. 1:05CV00568, 2006 WL 3848693 *6 (M.D.N.C. Dec. 29, 2006) (finding that Title VI covered a contractor if he has a logical nexus to a federally funded program, as a beneficiary, applicant, or participant in the program); *Carnell Const. Corp. v. Danville Redev. and Hous. Auth.*, 745 F.3d 703, 715 (4th Cir. 2014) (Carnell has Title VI standing because its president and sole shareholder is African–American, it was eligible for consideration as a contractor on a federally funded public project, and it alleged that defendants discriminated against it based on race), *cert. denied*, 135 S. Ct. 357 (2014); *see also United States v. Harris Methodist Ft. Worth*, 970 F.2d 94, 97 (5th Cir. 1992) (holding that Title VI protected from discrimination private physicians who were neither beneficiaries nor employees of the hospital); *J.A. Croson Co. v. City of Richmond*, 488 U.S. 469 (1989) (corporate standing to sue for race discrimination under the Equal Protection Clause).

In contrast, an entity's receipt of a procurement contract with the federal government does not subject the contractor to coverage under Title VI. *See*, *e.g.*, *Fredricks v. City of New York*, No. 12 CIV. 3734, 2013 WL 839584, at *5 (S.D.N.Y. Mar. 6, 2013); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1060 (2d Cir. 1990) (receipt of Army procurement contracts does not render the company a "program or activity receiving federal financial assistance").

Once an entity receives federal financial assistance, jurisdiction under Title VI attaches and if the recipient's program includes selection of contractors to carry out its various functions, then Title VI covers that selection process. For example, if a state agency receives funds pursuant to a federal program to establish and operate homeless shelters and uses some of the federal money to hire a food service company to provide meals in the shelter, the food service contractor is a participant in the homeless shelter program. Title VI would operate not only to ensure nondiscrimination against homeless people—the ultimate beneficiaries—but would also require the recipient to select the food service contractor in a nondiscriminatory manner. An essential purpose of Title VI—to prevent discrimination—would be undermined if it were limited to ensuring that a homeless shelter was operated in a nondiscriminatory manner, while the process by which such a facility is constructed, supplied, and serviced were free of any such restraints.

A number of courts have held that cities, political subdivisions, and other state instrumentalities are not Title VI-defined "persons" and do not have Title VI standing to bring suit against the state. In *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), the United States, later joined by intervenors, Alabama State University (ASU), a majority-black institution, along with faculty, staff, students, and graduates of ASU, filed suit against the state of Alabama, state educational authorities, and all four-year state institutions of higher education, claiming that Alabama operated a dual system of segregated higher education. Based on the language of Title VI and a review of its legislative history, the court concluded that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute" and the court "decline[d] to infer such a right of action by judicial fiat." *Id.* at 1456–57. The court further stated there are other avenues of recourse to remedy Title VI violations, including a private right of action for individuals under Title VI and Title VI's comprehensive scheme of administrative enforcement. *Id.* at 1456, (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–97 (1978)). *See also Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 442 F. App'x 681, 688 (3d Cir. 2011) (explaining that a charter school did not meet definition of "person"); *Dekalb Cty. Sch. Dist. v. Schrenko*, 109 F.3d 680, 689 (11th Cir. 1997) (noting that a state created political subdivision has no standing to bring a Title VI claim against the state). Nevertheless, this should not preclude entities such as a school district or other political subdivision from bringing a Title VI administrative complaint either on its own behalf or on behalf of its students or other constituents. It also would not preclude individual students or other constituents from bringing a private Title VI suit against the state recipient in appropriate cases. *See, e.g.*, *Coalition for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, 977 F. Supp. 2d 507, 519–20 (D. Md. 2013).

B. Where Does Title VI Apply?

Title VI states that no person "in the United States" shall be discriminated against based on race, color, or national origin by an entity receiving federal financial assistance. The phrase "in the United States" is intended to be broadly inclusive. Agency Title VI regulations, including those of the Department of Justice (DOJ),

define "recipients" or "United States" to encompass, inter alia, territories and possessions.[3]

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

Although no court has addressed the scope of "United States" or the validity of regulations that extend coverage to territories and possessions, cases interpreting the Fifth and Fourteenth Amendments again provide guidance in this analysis. Title VI covers all areas under the sovereignty of the United States that fall within the combined jurisdiction of the Fifth and Fourteenth Amendments. By separate covenant, Title VI applies to the Trust Territories of the Pacific Islands, which includes the Commonwealth of the Northern Marianas Islands. *See Temengil v. Trust Territory of the Pac. Islands*, No. 81-0006, 1983 WL 30363, at *32 (D.N. Mar. I. Mar. 22, 1983), *rev'd in part*, *aff'd in part on other grounds*, 881 F.2d 647 (9th Cir. 1989); *see also Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1088 (9th Cir. 2006) (applying Title IX analysis in a case from the Northern Marianas Islands).

Whether Title VI applies extraterritorially presents a separate question. It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Title VI may apply to discriminatory conduct outside the United States in certain narrow circumstances, depending on how much control the recipient exercises over the overseas operation and how integral the overseas operation is to the recipient's program in the U.S.

To date, however, the only application of extraterritoriality appears in cases involving schools and study abroad programs. For example, a district court ruled that Title IX protects students who participate in study abroad programs through American universities. *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 790–91 (E.D. Mich. 2002) (because study abroad programs have become an integral part of college education, equality of opportunity in study abroad programs is "unquestionably mandated by Title IX" and requires extraterritorial application

[3] Individual agency descriptions of "United States" can be found in the following regulations, *see,, e.g.*, 24 C.F.R. § 1.2(d) (HUD); 28 C.F.R. § 42.102(b) (DOJ); 29 C.F.R. § 31.2(j) (DOL); 38 C.F.R. § 18.13(d) (VA); 45 C.F.R. § 80.13(e) (HHS); and 49 C.F.R. § 21.23(f) (DOT).

of Title IX); *but see Phillips v. St. George's Univ.*, No. 07-CV-1555, 2007 WL 3407728, at *5 (E.D.N.Y. 2007) (Title IX does not apply where the plaintiff was attending a school in Grenada and alleged that she was harassed by a school employee in Grenada and that the school employees ignored her complaints in Grenada); and *Archut v. Ross Univ. Sch. of Veterinary Med.*, No. 10-1681, 2012 WL 5867148 (D.N.J. 2012) (Section 504 of the Rehabilitation Act does not apply to a foreign educational institution even if it is receiving federal financial aid and has a U.S. parent). Whether the rationale of these cases might be applicable to other matters remains to be determined.

C. Federal Financial Assistance

Title VI states that no program or activity receiving "Federal financial assistance" shall discriminate against individuals based on their race, color, or national origin. Section V.E presents a detailed discussion of "program or activity." The focus here is on what is and what is not federal financial assistance; why it is necessary to establish that a recipient is receiving federal financial assistance; and things to consider when conducting a Title VI investigation or review.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving **FEDERAL FINANCIAL ASSISTANCE**.

1. What is Federal Financial Assistance?

The clearest example of federal financial assistance is the award or grant of money. An agency also might provide federal financial assistance in nonmonetary form; that is, "whatever thing of value is extended by the grant statute." *See United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 607 n.11 (1986) ("Although the word 'financial' usually indicates 'money,' federal financial assistance may take nonmoney form," citing *Grove City Col. v. Bell,* 465 U.S. 555, 564–65 (1984)). As discussed below, federal financial assistance may include the use or rental 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. [4] Note, however, that federal financial assistance is contractual in the sense that the recipient agrees to use the assistance in a manner consistent with the terms of the award and, in most instances, should have signed an assurance agreement binding it to comply with certain terms and conditions.

It is important to remember that the availability of remedies may depend on the timing of an entity's receipt of federal financial assistance. For example, while past funding alone may not support prospective relief such as an injunction, past funding may support a claim for backward-looking relief, such as back pay, restitution, or damages. *See Huber v. Howard Cty.*, 849 F. Supp. 407, 415 (D. Md. 1994) (Section 504 matter, finding that the recipient received federal financial assistance during the time of plaintiff's employment and discharge); *James v. Jones*, 148 F.R.D. 196, 201 (W.D. Ky. 1993) (state "does not presently receive [federal] funds, but … has appealed its suspension from the program and it maintains its hope of receiving future funds"). Moreover, the amount of federal financial assistance does not affect Title VI coverage. *See, e.g.*, *K.H. v. Vincent Smith Sch.*, CV 06-0319(ERK) (JO), 2006 WL 845385, *11 (E.D.N.Y. Mar. 29, 2006) (court could find "no support in the law for the *de minimis* exception the [recipient] School advocates").[5]

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 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

---

[4] *See* Letter from Robert Kennedy, Attorney General, to Hon. John Sherman Cooper (April 29, 1964), *reprinted in* 110 Cong. Rec. 10075, 10076 (1964) ("Title VI does not apply to procurement contracts, or to other contracts which do not involve financial assistance by the United States.").

[5] One court ruled that the entity must receive more than de minimis federal assistance. *See Marshall v. Sisters of Holy Family Nazareth*, 399 F. Supp. 2d 597, 602–03 (E.D. Pa. 2005) (finding school's participation in a national school lunch program where only one student received a free lunch and the school received no proceeds from the sale did not constitute financial assistance). In our view, however, the sounder approach is that the amount of federal financial assistance is not relevant. Rather, what is important is whether the recipient receives federal assistance in some form or amount and thus becomes obliged to ensure that it acts in a nondiscriminatory manner.

(5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

28 C.F.R. § 42.102(c) (Department of Justice regulations).

a. Grants and loans of federal funds

The clearest example of Title VI-covered federal financial assistance is money provided through federal grants, cooperative agreements, and loans. An entity may receive grant money directly from an agency or indirectly through another entity. In either case, the direct recipient as well as the secondary or subrecipient are considered to have received federal funds. In other instances, the funding may be directed to the funding beneficiaries but another entity ultimately receives the funding. For example, a college or university receives federal financial assistance indirectly where it enrolls United States military veterans for whom the federal government provides tuition payments. Although federal payments go directly to the veterans and indirectly to the university, the university is receiving federal financial assistance that neither it nor the students would have received but for students' enrollment and entitlement. *See Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (*superseded by statute on other grounds by* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988)); *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759, 767 (S.D. Miss. 2008) (state may be recipient of the funds but it is not the ultimate recipient, serving as a conduit of funds earmarked for payment to the child care provider).

b. Federal property

As set forth in the regulations, federal financial assistance may be in the form of a grant or donation of land or use (rental) of federal property for the recipient at no or reduced cost. It also could be in the form of other tangible goods. *See Marable v. Ala. Mental Health Bd.*, 297 F. Supp. 291, 295–96 (M.D. Ala. 1969) (defendant received federal financial assistance in the form of, among other things, surplus food commodities from the U.S. Department of Agriculture through the Food Distribution Program and surplus property under the Federal Property and Administrative Services Act of 1949); *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1013 (2d Cir. 1986) (plaintiff made plausible claim that defendant "received federal financial assistance in the form of services of federal personnel or the use of Government property in the form of satellite launching facilities and technology or, perhaps, federal lands"); *Staley v. Nat'l Capital Area Council, Boy Scouts of Am.*,

No. RWT 10CV2768, 2011 WL 2416724, at *12 (D. Md. June 9, 2011) (discovery allowed to determine whether defendant received federal financial assistance because it was allowed to use federal land at no cost for scouting activities). Ownership of land, rental property, or other tangible goods is considered federal financial assistance if the recipient does not pay or pays less than market value. Recipients typically sign assurance documents at the time the assistance is conferred and agree that assistance is ongoing for as long as the land or property is being used for the original or a similar purpose to that for which the assistance was intended. *E.g.*, 28 C.F.R. § 42.105. Moreover, regulations bind the successors and transferees of this property as long as the original purpose or a similar objective is pursued. *Id.* Thus, if at the time of the alleged discriminatory act, the recipient uses the land or rents the property for the same or similar purpose, the recipient is receiving federal financial assistance, irrespective of when the land was granted or donated. 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. The prison has been built and currently 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 DOD-donated land for its original (or similar) purpose, the state is still receiving federal financial assistance. *See* 32 C.F.R. § 195.6.

- A police department has a branch office located in a housing project built, subsidized, and operated with Department of Housing and Urban Development funds. The police department is not charged rent. The police department is receiving federal financial assistance and is subject to Title VI.

- A railroad company receives federal funds to rehabilitate railroad crossings the railroad company owns. The railroad benefits from receiving federal funds because federal money is being used to pay for repairs to the railroad's property that the railroad otherwise would have had to pay for itself. Because the railroad benefits from the federal funds through the upgrade to its own property, the railroad company is receiving federal financial assistance and is covered by Title VI. *See Moreno v. Consol. Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) (Section 504 case). Note that a railroad that is paid under contract by the federal government to maintain federal property may not be covered under Title VI.

c. Detail of federal personnel

Under the Intergovernmental Personnel Act of 1970, federal agencies may allow a temporary assignment of personnel (also known as a detail) to state, local, and Indian tribal governments, institutions of higher education, federally funded research and development centers, and certain other organizations for work of mutual concern and benefit. *See* 5 U.S.C. § 3372. This detail of federal personnel to a state or other entity is considered federal financial assistance even if the entity reimburses the federal agency for some (but not all) of the detailed employee's federal salary. *See Paralyzed Veterans*, 477 U.S. at 612 n.14. For example, two research scientists from the National Institute of Health 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 receiving federal financial assistance because the federal government is paying a portion of the salary of the detailed federal employees. The research organization is subject to Title VI.

d. Tax Benefits

Typical tax benefits—tax exemptions, tax deductions, and most tax credits—are not considered federal financial assistance. Unlike grants, most typical tax benefits are not included in the statutory or regulatory definitions of federal financial assistance because they are not contractual in nature. *See, e.g.,* 42 U.S.C. § 2000d-1; 28 C.F.R. § 42.102(c); 31 C.F.R. § 28.105. Most courts that have considered the issue have concluded that typical tax benefits are not federal assistance. *See*, *e.g.*, *Paralyzed Veterans of Am. v. Civil Aeronautics Bd.*, 752 F.2d 694, 708–09 (D.C. Cir. 1985); *Johnny's Icehouse, Inca v. Amateur Hockey Ass'n of Ill., Inc.*, 134 F. Supp. 2d 965, 971–72 (N.D. Ill. 2001); *Chaplin v. Consol. Edison Co.*, 628 F. Supp. 143, 145–46 (S.D.N.Y. 1986).

However, while these cases suggest that typical tax benefits are not federal financial assistance, a few courts have found instances where a tax benefit would be considered federal financial assistance. *See McGlotten v. Connally*, 338 F. Supp. 448, 462 (D.D.C. 1972) (provision of a tax deduction for charitable contributions is a grant of federal financial assistance within the scope of the 1964 Civil Rights Act); *see also Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 621 (2d Cir. 1989) (jurisdiction under Title VI and Title IX because "the League receives federal assistance indirectly through its tax

exemption and directly through grants from the Department of Energy and the EPA."); *M.H.D. v. Westminster Sch.*, 172 F.3d 797, 802 n.12 (11th Cir. 1999) (although not deciding the issue, the court observed that "appellant's allegation that tax-exempt status constitutes 'Federal financial assistance' is neither immaterial nor wholly frivolous … [and that] appellant contends [that] a direct grant and a tax exemption should be treated the same; because a grant constitutes 'Federal financial assistance' under Title IX, tax-exempt status also should satisfy this element of the statute"). Other courts have ruled otherwise, however, stating that assistance requires the transfer of funds or something of value to a recipient. S*ee, e.g., Bachman v. Am. Soc. of Clinical Pathologists*, 577 F. Supp. 1257, 1264 (D.N.J. 1983); *Johnny's Ice House*, 134 F. Supp. 2d at 972.

e. Training

The regulations also state that federal financial assistance can be in the form of any federal agreement, arrangement, or other contract that has as one of its purposes the provision of assistance. A typical example is training conducted 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. Dep't of Bus. & Prof'l Regulation*, 877 F. Supp. 1563, 1566–67 (S.D. Fla. 1995) (training state officers received from DEA, FBI and DOT constituted receipt of federal financial assistance pursuant to Section 504 of the Rehabilitation Act of 1973).

2. What Is Not Federal Financial Assistance

The receipt of some types of items of value in nonmonetary form may not constitute federal financial assistance.

a. Licenses

Licenses impart a benefit because they entitle the licensee to engage in a particular activity, and they can be quite valuable. However, in *Community Television of Southern California. v. Gottfried*, 459 U.S. 498, 509–12 (1983), the Supreme Court noted that the Federal Communications Commission is not a funding agency and television broadcasting licenses do not constitute federal financial assistance. *Accord, Cal. Ass'n of the Physically Handicapped v. FCC*, 840 F.2d 88, 92–93 (D.C. Cir. 1988) (same). Similarly, the court ruled in *Herman v. United Bhd. of*

Carpenters, 60 F.3d 1375, 1381–82 (9th Cir. 1995), that certification of a union by the National Labor Relations Board is akin to a license, and not federal financial assistance under Section 504.

b. Statutory programs or regulations

Similarly, statutory programs or regulations that directly or indirectly support or establish guidelines for an entity's operations are not federal financial assistance. *Herman*, 60 F.3d at 1382 (neither labor regulations establishing apprenticeship programs nor Davis-Bacon Act wage protections are federal financial assistance.); *Steptoe v. Savings of Am.*, 800 F. Supp. 1542, 1548 (N.D. Ohio 1992) (mortgage lender subject to federal banking laws does not receive federal financial assistance); *Rannels v. Hargrove*, 731 F. Supp. 1214, 1222–23 (E.D. Pa. 1990) (federal bank regulations are not federal financial assistance under the Age Discrimination Act).

c. Programs owned and operated by the federal government

Programs "owned and operated" by the federal government, such as the air traffic control system, generally do not constitute federal financial assistance to the beneficiaries of those programs where they cannot be categorized as recipients of that assistance. As stated by then-Deputy Attorney General Nicholas Katzenbach to chairman Emanuel Celler of the Committee on the Judiciary for the House of Representatives:

> Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements and 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). *See Paralyzed Veterans*, 477 U.S. at 612 ("[T]he air traffic control system is not 'federal financial assistance' at all. Rather, it is a federally-conducted program that has many beneficiaries but no recipients."); *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1213 (9th Cir. 1984) (Congress put in

place a mechanism to charge airlines for their share of the cost of air traffic control system; therefore, airlines were not recipients of federal financial assistance).

d. Guaranty and insurance contracts

Title VI specifically states that it does not apply to "Federal financial assistance … extended by way of a contract of insurance or guaranty." 42 U.S.C. § 2000d-4. In *United States v. Baylor University Medical Center,* 736 F.2d 1039, 1048 (5th Cir. 1984), for example, the court noted that the legislative history of Title VI makes it abundantly clear that Congress intended to exempt individual bank accounts in a bank with federally guaranteed deposits from Title VI. *See also 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 excluded from Section 504 coverage of agency regulations); *Butler v. Capitol Fed. Sav.*, 904 F. Supp. 1230, 1233 (D. Kan. 1995) ("Title VI specifically exempts a contract of insurance from the definition of 'federal financial assistance.'").[6]

e. Procurement contracts

Like guaranty and insurance contracts, procurement contracts are also not considered federal financial assistance. *See* Letter from Robert Kennedy, Attorney General, to Hon. John Sherman Cooper (April 29, 1964), *reprinted in* 110 Cong. Rec. 10075, 10076 (1964) ("Title VI does not apply to procurement contracts, or to other contracts which do not involve financial assistance by the United States."); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421 (4th Cir. 2005) (defendant's "status as a government contractor is irrelevant to Title VI liability [because Title VI] coverage turns on the receipt of "federal financial assistance", not the existence of a contractual relationship"); *LaBouve v. Boeing Co.*, 387 F. Supp. 2d 845, 854 (N.D. Ill. 2005) (Department of Defense contract with a corporation for the procurement of a fighter aircraft did not constitute federal financial assistance); *Gallagher*, 89 F.3d at 277 (interest subsidies are akin to procurement contracts); *Cook v. Budget Rent-A-Car Corp.*, 502 F. Supp. 494, 496–97 (S.D.N.Y. 1980) (contracts involving goods or services purchased by the government at fair market value do not constitute "assistance" because the word connotes a transfer of funds at reduced consideration or as a subsidy).

---

[6] On the other hand, in *Moore v. Sun Bank*, 923 F.2d 1423, 1427 (11th Cir. 1991), the court ruled that loans guaranteed by the Small Business Administration constituted federal financial assistance because Section 504—as contrasted with Title VI—does not exclude contracts of insurance or guaranty from coverage.

f. Assistance to ultimate beneficiaries

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); *but see Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602, n.16 (D.S.C. 1974) (distinguishing pensions from payments to veterans for educational purposes because payments for education require or are conditioned on the individual participating in a program or activity). During debate preceding passage of the Civil Rights Act, members of Congress responded to concerns about the scope of Title VI by explaining that Title VI would 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 Sen. Humphrey); *see* 100 Cong. Rec. 6544 (1963) (statement of Sen. Humphrey); *see also* 110 Cong. Rec. 1542 (1964) (statement of Rep. Lindsay); 110 Cong. Rec. 13700 (1964) (statement of Sen. Javits).

3. Why Establish Federal Financial Assistance?

Under Title VI and similar statutes, a federal agency has jurisdiction over a recipient's conduct through the federal financial assistance that it gives to the recipient. Before an agency can undertake a complaint investigation, it first needs to establish that it has or is providing federal financial assistance to the recipient alleged to be engaging in discriminatory conduct. *See, e.g., Bachman v. Am. Soc. of Clinical Pathologists*, 577 F. Supp. 1257, 1261 (D.N.J. 1983) (defendant received funds during the period of alleged discrimination); *cf. Johnson v. Bd. of Educ. of Prince George's Cty.*, No. PJM 11-1195, 2014 WL 3778603, at *1 (D. Md. July 29, 2014) (court noted that "funds must be received during the relevant time period of the alleged discrimination for a cause of action to survive."); *Vanes v. Indiana Comm'n on Pub. Records*, No. 2:07-CV-00063 RLYWGH, 2008 WL 763374, at *4 (S.D. Ind. Mar. 20, 2008) (court stated that "the entity must be a recipient of federal financial assistance during the time of the alleged discriminatory conduct; otherwise, the entity cannot be liable under Section 504.").

The financial assistance does not have to relate to a program in which the complainant participates or seeks to participate or used for the complainant's

benefit. Rather, an agency only has to prove that the entity received federal financial assistance when the alleged discrimination occurred. *See Howe v. Hull*, 874 F. Supp. 779, 789 (N.D. Ohio 1994) ("Defendant cannot receive federal funds on the one hand, and on the other deny he is covered by the [federal Rehabilitation Act] simply because he received no federal funds for his involvement with [complainant]."); s*ee also Estate of Alcalde v. Deaton Specialty Hosp. Home, Inc.* 133 F. Supp. 2d 702, 708 (D. Md. 2001) (motion to dismiss denied in case where the court emphasized "the receipt of federal funds when determining liability under [Section 504 of the Rehabilitation Act]" where defendant claimed he was not subject to federal financial assistance requirements because he saw the patient in his office and not at the hospital and it was the hospital that entered into the grant with the federal agency).

An agency unable to establish that it provided federal financial assistance to an entity would not have the authority to conduct a complaint investigation or seek recourse under Title VI unless it is jointly investigating with another federal agency that provides the federal financial assistance, the unresolved complaint has been referred to DOJ for litigation, or DOJ is considering potential participation in a private Title VI case and needs to conduct some investigation to determine if such participation is appropriate. In the absence of these circumstances, the Title VI coordination regulations require the agency to "refer the complaint to another federal agency or advise the complainant." 28 C.F.R. § 42.408(b).[7]

4. Determining Whether an Entity Receives Federal Financial Assistance

When trying to identify funding sources of a recipient who has allegedly engaged in discriminatory acts, agencies should:

- Seek information from program offices responsible for providing grants;
- Use a data request to ask the target of the investigation directly for the information;

[7] The Civil Rights Division is able to file statements of interest in matters pending in U.S. District Courts, including on matters brought by private litigants involving recipients of funds from non-DOJ sources. For example, the Division filed a statement of interest in a case involving a recipient's obligation to provide language assistance to limited English proficient individuals seeking driver's licenses. *Faith Action for Cmty. Equity v. Hawaii Dep't. of Transp.*, 13-CV-00450 (D. Haw. filed Mar. 28, 2014) *available at http://www.lep.gov/resources/DOJ_SOI_Hawaii.pdf* (last visited Apr. 12, 2016).

- Contact possible primary recipients for assistance identifying pass-through funds;
- Conduct internet research (e.g., county board minutes);
- Contact funding component program staff for leads;
- Research entities on the USA Spending.gov website (includes data about recipients and sub-recipients of various types of contracts, grants, loans, and other possible federal financial assistance);
- Contact other federal agencies to discuss possible coordination. Some agencies have accessible online databases. *E.g.*, https://taggs.hhs.gov/ (the TAGGS database is a central repository of grants awarded by the eleven HHS Operating Divisions); the DOJ, Office of Justice Programs has a public website that provides award information; similarly, the Community Oriented Policing Services website, a component within DOJ, also has grant information on line. Other agencies also post award information.

Finally, agency offices addressing Title VI complaints should confirm receipt of any federal financial assistance before concluding that the agency has jurisdiction.

D. What/Who Is a Recipient?

In simple terms, a Title VI recipient is an entity that receives, directly or indirectly, financial assistance from a federal agency.

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

1. Regulations

A "recipient" is an entity or person that receives federal financial assistance. Under Title VI, it is the recipient who is barred from discriminating against persons because of race, color, or national origin with respect to the operation of covered programs or activities.

All agency Title VI regulations use a similar if not identical definition of "recipient," as follows:

> (f) 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, including any successor, assign [sic], or transferee thereof, but such term does not include any ultimate beneficiary.
>
> (g) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

28 C.F.R. §§ 42.102(f), (g) (Department of Justice regulations).

In plain language, the regulation provides:

- A recipient may be a public entity (e.g., a state, local or municipal agency), a private entity, or an individual;
- Title VI does not apply to the federal government;
- There may be more than one recipient in a program; that is, a primary recipient (e.g., state agency) that transfers or distributes assistance to a subrecipient (local entity) for distribution to an ultimate beneficiary;[8]
- A recipient also encompasses a successor, transferee, or assignee of the federal assistance (property or otherwise), under certain circumstances; and
- As discussed below, there is a distinction between a recipient and a beneficiary.

A recipient also may receive federal assistance either directly from the federal government or indirectly through a third party, who is not necessarily another recipient (e.g., schools are indirect recipients when they accept payments from students who directly receive federal financial aid). [9]

If a recipient distributes federal financial assistance to other entities, it must monitor Title VI compliance for subrecipients and implement procedures to receive and investigate complaints or other information indicating potential noncompliance. Federal agency regulations generally require that the primary recipient obtain

---

[8] An ultimate beneficiary usually does not receive a "distribution" of the federal money. Rather, the beneficiary enjoys the benefits of enrollment in the program.

[9] *See Grove City Coll. v. Bell*, 465 U.S. 555, 563 (1984) (student financial aid office received federal financial assistance in the form of loans to students provided for the purpose of paying for college); *see also Liberty Res., Inc. v. Philadelphia Hous. Auth.,* 528 F. Supp. 2d 553, 558 (E.D. Pa. 2007) (public housing authority that receives federal financial assistance from HUD through a voucher program).

compliance reports from its subrecipients and make efforts to ensure that subrecipients permit access to information. *See*, *e.g.*, 28 C.F.R. §§ 42.106(b), (c) (DOJ regulations). A recipient can be liable for failure to take steps to ensure the compliance of its subrecipients. *Cf. United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073 (D. Ariz. 2012) (ruling that the county government is a proper Title VI defendant under principles of municipal liability).

2. Direct Recipient

A direct recipient of federal financial assistance for Title VI purposes is an entity that accepts financial assistance from a federal agency and, therefore, becomes subject to the requirements of Title VI. Federal financial assistance can be monetary or non-monetary and includes federal grants, loans, or contracts (other than a contract for goods or services at fair market value or of insurance or guaranty). For example:

- City Police Department (CPD) applies for and receives a grant from DOJ for its community outreach programs. CPD is a recipient of federal financial assistance.
- CPD also received a grant for the purchase of bulletproof vests. CPD remains a recipient as long as it uses the vests purchased with grant funds.
- CPD is given excess military equipment from the Defense Department that it continues to use. CPD remains a recipient as long as it uses the equipment.
- Ten years ago, Smithtown University applied for and received federal grants, loans, and interest subsidies in excess of $7 million from the Department of Education. The University used this assistance to construct a law school. The University is a "recipient" through the present day because it used federal financial assistance during construction and it continues to use the building for its original (or similar) purpose.
- Airport operators voluntarily accept federal funds under a statutory program for airport construction and capital development. The airport operators are recipients subject to nondiscrimination provisions as long as they use the facilities constructed with federal funds for their original (or similar) purposes. *See Paralyzed Veterans*, 477 U.S. at 606–07.

The clearest means of identifying a "recipient" of federal financial assistance is to determine whether the entity has voluntarily entered into a relationship with the federal government and receives federal assistance under a condition or assurance of compliance with Title VI (and/or other nondiscrimination obligations). *Id.* 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."). As one court noted:

> By accepting the funds, one accepts the obligations that go along with it, namely, the obligation not to exclude from participation, deny benefits to, or subject to discrimination an otherwise qualified handicapped individual solely by reason of her handicap. Only by declining the federal financial assistance can one avoid this obligation.

Chester v. Univ. of Wash., No. C11-5937, 2012 WL 3599351, at *4 (W.D. Wash. Aug. 21, 2012).

The acceptance of federal assistance triggers Title VI coverage and becomes formalized when a recipient signs an assurance: a contract whereby the recipient agrees to comply with the nondiscrimination provisions as a condition of receiving federal assistance.[10] Even without a written or signed assurance, however, acceptance of federal financial assistance triggers coverage under Title VI. *See Paralyzed Veterans*, 477 U.S. at 605 ("the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision"). *See also Grove City Coll. v. Bell*, 465 U.S. 555, 560–61, 563 (1984) (finding that Grove City College was a recipient even though it refused to sign an assurance); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 630 (1983) (Marshall, J., dissenting) (citing 3 R. Cappalli, *Federal Grants* § 19:20, at 57, and n.12 (1982) ("[W]ritten assurances are merely a formality because the statutory mandate applies and is enforceable apart from the text of any agreement.").

3. Indirect Recipient

Finding that an entity directly receives federal financial assistance is usually the

[10] A recipient's written assurance and certification documents can provide an independent contractual basis for enforcement of nondiscrimination requirements. For example, the assurance document from the Office of Justice Programs, a Department of Justice component, states, inter alia, "[The Applicant] will comply, and all its contractors will comply, with the nondiscrimination requirements of the [Safe Streets Act, Title VI, Section 504, Title IX ….]." The United States may bring civil actions to enforce Title VI contractual assurances. *See* Department of Justice, *Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964*, 28 C.F.R. § 50.3, pt. I.B.1 (listing various "[p]ossibilities of judicial enforcement," including suits to enforce contractual assurances).

easiest way to identify a Title VI recipient. It is not, of course, the only way.[11] A recipient may receive funds either directly or indirectly. *Grove City*, 465 U.S. at 564–65.[12] In *Grove City*, the Supreme Court found the college was a "recipient" under Title IX because students paid for their educational expenses, in part, with federally subsidized loans. *Id.* at 569–70. The Court reasoned that colleges and universities were the intended recipients of the grant program because Congress created the grants to supplement the financial aid programs of institutions of higher education. *Id.* at 565–66. The *Grove City* Court concluded that Congress never intended to "elevat[e] form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance." *Id.* at 564; *see also Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 452 (5th Cir. 2005) (finding that a university was a "recipient" under Section 504 because its students received federal work study assistance and grants); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602 (D.S.C. 1974) ("payments are specifically tied to the beneficiary's participation in an educational program or activity," and go to the university "recipient"), *aff'd,* 529 F.2d 514 (4th Cir. 1975).[13]

Nevertheless, there are limits to the concept of an indirect recipient. As the Supreme Court explained in *Paralyzed Veterans*, an entity that merely enjoys indirectly the benefits of federal financial assistance is not an intended recipient: "While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid." *Paralyzed Veterans*, 477 U.S. at 607 (citing *Grove City*, 465 U.S. at 564).

---

[11] The remaining text of this section distinguishes various scenarios for recipients and beneficiaries. While captions are used to distinguish 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."

[12] As noted in the Manual, the Supreme 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, however, including direct and indirect recipients, remains undisturbed.

[13] Similarly, in *Spann v. Word of Faith Christian Center Church*, 589 F. Supp. 2d 759, 765–67 (S.D. Miss. 2008), the court found that a daycare center was a recipient of federal financial assistance because it accepted a federally funded voucher from a family to pay for part of the cost of child care. The court reasoned that the daycare center was an intended recipient because the funds were earmarked for a child care provider and the purpose of the subsidy was to "improve the quantity and quality of child care available to low income families." *Id.* at 767.

Along these lines, the Supreme Court in *NCAA v. Smith*, 525 U.S. 459, 468–70 (1999), citing both *Grove City* and *Paralyzed Veterans*, ruled that the NCAA was not an indirect recipient of federal financial assistance under Title IX. The NCAA received dues from colleges and universities who were recipients of federal financial assistance, but the assistance to those institutions was not earmarked for the NCAA. *Id.* at 468. The court concluded that "[a]t most, the [NCAA's] receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members." *Id.* But, the Court stated, "[t]his showing, without more, is insufficient to trigger Title IX coverage." *Id.*

The Court in *Smith* specifically did not address DOJ's argument that "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient." *Id.* at 469–70. The Eleventh Circuit found enough of a connection, however, in *Williams v. Board of Regents*, 477 F.3d 1282 (11th Cir. 2007). In this Title IX case, the court noted that the plaintiff "alleged that [the University of Georgia], a funding recipient, has ceded control over one of its programs, the athletic department, to [the University of Georgia Athletic Association] and provided extensive funding to UGAA." *Id.* at 1294. Based on this contention, the court ruled that to not extend Title IX coverage to the University in this case would allow "funding recipients to cede control over their programs to indirect funding recipient" but "avoid Title IX liability." *Id.* (citing *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n,* 80 F. Supp. 2d 729, 733–34 (W.D. Mich. 2000).

4. Primary/Subrecipient Programs

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

- A state agency, such as the Department of Children and Family Services, receives a substantial portion of its funding from the federal government. The state agency, as the primary recipient or conduit, in turn, funds local social service organizations in part with its federal funds. The local agencies receive federal financial assistance, and thus are subject to Title VI. *See*

Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429 (N.D. Ill. 1985) (Section 504 case).[14]

- A state subcontracts with a private company to operate a state institution for individuals with developmental disabilities. The state receives federal funding and uses those funds to pay the private company for its services. The state is the recipient of federal financial assistance and the private company is a subrecipient. As a subrecipient, the company must comply with any program-specific statutes through which it receives funding, as well as Title VI. *See*, *e.g.*, *Brown v. Fletcher*, 624 F. Supp. 2d 593, 607 (E.D. Ky. 2008) (Section 504 case).

- Under the Older Americans Act, the Department of Health and Human Services gives funds to state agencies. Those agencies, in turn, distribute funds according to funding formulas to local agencies operating programs for elderly Americans. Title VI applies to the local agencies as subrecipients of federal financial assistance as well as to the state agencies that directly receive the funds. *See Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995).

In many instances, a recipient receives funds with the purpose and expectation that it will distribute the funds to one or more sub-grantees or indirect recipients.[15] For example, in *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) (en banc), the United States Department of Transportation provided funds to Michigan

---

[14] The *Graves* court described the local agency as an "indirect" recipient because the federal money flowed "through another recipient," and it compared this situation to Grove City College's indirect receipt of financial aid funds from students. *Graves,* 624 F. Supp. 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.

[15] The Title VI Coordination Regulations, codified at 28 C.F.R. § 42.401 et seq., are designed to provide agencies with a set of standards for use in developing and implementing a Title VI enforcement and compliance program. One provision addresses grants that go to a central state office with an expectation that the state will distribute the funds to subrecipients:

> Each state agency administering a continuing program which receives federal financial assistance shall be required to establish a Title VI compliance program for itself and other recipients which obtain federal assistance through it. The federal agencies shall require that such state compliance programs provide for the assignment of Title VI responsibilities to designated state personnel and comply with the minimum standards established in this subpart for federal agencies, including the maintenance of records necessary to permit federal officials to determine the Title VI compliance of the state agencies and the sub-recipient.

Id. § 42.410.

for use in upgrading railroad crossings. The state, in turn, provided these funds to Conrail. In finding that Conrail was a recipient of federal financial assistance, the court noted that "[i]t makes no difference, in our view, that the federal funds of which Conrail is the recipient come to it through the State of Michigan rather than being paid to it by the United States directly." *Id.* at 787. Similarly, in *Rogers v. Board of Education*, 859 F. Supp. 2d 742, 752 (D. Md. 2012), the court held that the county board of education received federal financial assistance because the State Department of Education received federal funds and, through its Department of Treasury, distributed funds to county boards of education. *Id.*

5. 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 apply to a recipient, whether committed "directly or through contractual or other arrangements." *E.g.*, 28 C.F.R. §§ 42.104(b)(1), (2). For example:

- A recipient public housing authority contracts with a residential management company for the management and oversight of a public housing complex. 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. (For the reasons discussed below, the contractor may also be liable under Title VI).

- In addition, Title VI may cover a contractor that performs an essential function for the recipient, making the contractor itself a recipient. In *Frazier v. Board of Trustees.*, 765 F.2d 1278, 1290, *amended,* 777 F.2d 329 (5th Cir. 1985), a Section 504 case, the court noted that the defendant hospital contracted out core medical functions, for which it received federal financial assistance, to a contractor. The court ruled that this financial assistance to the hospital "would not have been [provided] at all were it not for [the contactor's] performance as a de facto subdivision of [the hospital]." *Frazier*, 765 F.2d at 1290; *but see Rose v. Cahee,* 727 F. Supp. 2d 728, 739 (E.D. Wis. 2010) (court declined to follow *Frazier*, limiting coverage of the funding assistance nondiscrimination cover the contractor of a recipient requirement to those entities receiving the funds directly and that "are in a position to choose whether to do so"). Of significance, core hospital functions were at

issue in *Frazier*. Failure to extend Title VI protection in this case arguably would have permitted the hospital to contract out all of its federally funded functions and deprive the beneficiaries of protection under the Title VI and the other federal financial assistance statutes.[16] See also the discussion of indirect recipients, above.

6. Transferees and Assignees

When the federal government provides financial assistance related to real or personal property, such as by partially financing construction or renovations on a building, a "recipient" is defined more broadly. In such circumstances, successors, transferees, assignees, and contractors all may be recipients under Title VI. Agency regulations and assurances often include specific statements on the application of Title VI in situations involving real or personal property. For example, DOJ'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, and the extent to which like assurances will be required of subgrantees, contractors, and subcontractors, transferees, successors in interest, and other participants.

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

---

[16] As the court noted in *Frazier*:

> It is this mutual benefit that distinguishes [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 privately contracted mower of lawns, sweeper of floors, or supplier of aspirin, [the contractor] contributes in a direct and tangible way to the hospital's claims for reimbursement under Medicare and Medicaid. That the federal check does not bear [the contractor's] name is no answer to the fact that the check would not have been written at all were it not for [the contractor's]performance as a de facto subdivision of [the hospital].

Frazier, 765 F.2d at 1290.

Furthermore, land that originally was acquired through a program receiving federal financial assistance must include a covenant binding on subsequent purchasers or transferees that requires nondiscrimination for as long as the land is used for the original or a similar purpose for which the federal assistance is extended. 28 C.F.R. § 42.105(a)(2).[17]

7. Recipient v. Beneficiary

Finally, in analyzing whether an entity is a recipient, it is necessary to distinguish a recipient from a beneficiary: the former must comply with Title VI while the latter does not. *See Paralyzed Veterans*, 477 U.S. at 606–07. [18] An assistance program may have many beneficiaries, that is, individuals and 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.[19]

> 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*, draws the line of federal regulatory coverage between the recipient and the beneficiary.

Id. at 609–10.

---

[17] In contrast, in *Independent Housing Services of San Francisco v. Fillmore Center Associates*, 840 F. Supp. 1328, 1341 (N.D. Cal. 1993), the transfer of property at issue occurred before the effective date of HUD regulations stating that transferees or purchasers of real property are subject to Section 504. The San Francisco agency was a recipient of funds under a block grant to assemble and clear land for redevelopment. The purchaser of the land, who built housing units, was considered a beneficiary. *Id.*

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

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

In distinguishing between recipients and beneficiaries, courts have considered both the intent of Congress and a party's ability to accept or reject the federal financial assistance. *Alfano v. Bridgeport Airport Servs.*, 373 F. Supp. 2d 1, 5 (D. Conn. 2005) (citing *Paralyzed Veterans*, 477 U.S. at 605–06). In *Paralyzed Veterans*, the Court held that commercial airlines were beneficiaries of an airport improvement program, and not recipients under Section 504. *Id.* at 607.[20] The Court reasoned that the purpose of the program was to improve airports, not to give aid to individual airlines. *Id.* at 604–05. The Court rejected the argument that the airlines were indirect recipients because airport operators converted federal funds into runways and other property improvements for the airlines. *Id.* at 606–07. The Court noted that there was no evidence that the airlines were intended recipients of the aid or that the airport operators were mere conduits of the funds. *Id.* at 607 (citing *Grove City*, 465 U.S. at 564). The Court found that the airport operators were the recipients because they received federal funds, agreed to comply with civil rights statutes as a condition of the assistance, and could terminate their participation in the program at any time. *Id.* at 604–06 (citing *Grove City*, 465 U.S. at 565 n.13).

[20] In response to *Paralyzed Veterans*, Congress passed the Air Carrier Access Act (ACAA) in 1986, requiring that Department of Transportation regulations ensure that air carriers traveling within the United States do not discriminate against passengers based on disability.

E. "Program or Activity"

Title VI prohibits discrimination in "any program or activity," any part of which receives Federal financial assistance. *See* 42 U.S.C. §§ 2000d, 2000d-4(a). 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. As described in greater detail elsewhere in the manual, "a recipient may be only a part of a larger entity. Title VI often covers, and prohibits discrimination in, the larger entity, rather than the smaller program that directly receives the funding." This section focuses on coverage.

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

1. Introduction

When enacted in 1964, Title VI did not include a definition of "program or activity." Congress had made its intentions clear, however: Title VI's prohibitions were meant to be applied institution-wide, and as broadly as necessary to eradicate discriminatory practices in programs that federal funds supported. 110 Cong. Rec. 6544 (statement of Sen. Humphrey); *see* S. Rep. No. 64, 100th Cong., 2d Sess. 5–7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3, 7–9. The courts, consistent with congressional intent, initially interpreted "program or activity" broadly to encompass the entire institution in question. For example, Title VI covered all of the services and activities of a university even where the sole federal assistance was federal financial aid to students. *See*, *e.g.*, *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd,* 529 F.2d 514 (4th Cir. 1975); S. Rep. No. 64 at 10, *reprinted in* 1988 U.S.C.C.A.N. at 12. In 1984, the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 571 (1984), severely narrowed the interpretation of "program or activity." The Court ruled that Title IX's prohibitions against discrimination applied only to the specific office of an institution's operations that received the federal funding. Because the college received federal funds as a result of federal financial aid to students, the Court found that the "program or activity" was the college's financial aid program. *Id.* at 574.

In response to *Grove City*, Congress passed the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (CRRA). The CRRA includes virtually identical amendments to broadly define "program or activity" (for coverage purposes) for the four cross-cutting civil rights statutes: Title VI, Title IX, Section 504, and the Age Discrimination Act.[21] Congress determined that legislative action was "necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." CRRA § 2. Congress explained that it always had been its intent that Title VI and its progeny "be given the broadest possible interpretation" so that federal agencies may "assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination." S. Rep. No. 64 at 7, *reprinted in* 1988 U.S.C.C.A.N. at 9; [22] s*ee also Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 942 (9th Cir. 2009) (citing *Sharer v. Oregon*, 581 F.3d 1176, 1178 (9th Cir. 2009)) (the term "program or activity" should be viewed as expansive in meaning and application); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 775 (W.D. Tex. 2006) (citing *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002)) ("Courts have broadly construed the "services, programs, or activities" language in … the Rehabilitation Act to encompass "anything a public entity does.").[23]

With regard to public institutions or private institutions that serve a public purpose, the "program or activity" that Title VI covers encompasses the entire

---

[21] The Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 et seq. (ADA 1975), similar to Title VI, provides that "no person in the United States shall, on the basis of age, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." *Id*. § 6102. The ADA 1975 does not include age limits; that is, there are neither minimum nor maximum age parameters that would limit coverage to young or old persons. The Act includes a provision giving the Department of Health and Human Services responsibility for issuing regulations addressing the Act, *id*. at § 6103, as well as other coordination and oversight responsibilities. Similar to the other federal financial assistance statutes, however, each grant making agencies are responsible for addressing allegations that their recipients have violated the Act.

[22] The Senate further stated that "[t]he purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-*Grove City* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes." *Id.*

[23] In 1999, the Third Circuit held that the CRRA's statutory definition of "program or activity" did not apply to the effects test created by Title VI regulations. *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999). The court reasoned that because the Title VI regulations in question had not been amended to reflect the CRRA's definition, the effects test only applied to specifically funded programs. In response to the decision, federal agencies amended their regulations to make clear that CRRA's broad definition of "program or activity" applies to claims brought under the effects test enunciated in regulations, as well as to intentional discrimination. *See, e.g.*, 34 C.F.R. §§ 100.13(g); 104.3(k); 106.2(h) (Dep't of Educ.); 45 C.F.R. §§ 80.13; 86.2; 91.4 (HHS).

institution and not just the part of the institution that receives federal financial assistance. 42 U.S.C. § 2000d-4a. Moreover, the part of the program or activity that receives assistance can be, and often is, distinct from the part that engages in the allegedly discriminatory conduct. *See White v. Engler*, 188 F. Supp. 2d 730, 745–47 (E.D. Mich. 2001) (plaintiffs could pursue a Title VI claim against a scholarship program, even though the program operated without federal financial assistance, because it was part of a department that received federal funds); *D.J. Miller & Assocs. v. Ohio Dep't of Admin. Servs.*, 115 F. Supp. 2d 872, 878 (S.D. Ohio 2000) (granting a preliminary injunction under Title VI regarding alleged discrimination in a state contract where the contract was administered by a department that received federal funds).

In *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 785–86 (E.D. Mich. 2001), plaintiffs claimed that school officials violated Title VI when they relocated a largely minority elementary school to a site with alleged environmental toxins. The court held that it was irrelevant that the construction of the new school did not involve federal financial assistance because the term "program or activity" broadly encompassed the entire school district. *Id.* at 785. The court reasoned that the construction of the new school was "an operation of" or "part of" the larger school district. *Id.* Therefore, it was sufficient that the school district received federal funds for other purposes to extend Title VI coverage to the construction of the school in question. *Id.*

2. State and Local Governments

The following instrumentalities of a state or local government may constitute a "program or activity" under Title VI:

> [A]ll of the operations of
> (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). The legislative history confirms Congress intended a broad application to state and local governments:

> [W]hen any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered.

S. Rep. No. 100-64, at 16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 18. As such, when an office or operation is part of a larger department or entity, the relevant "program or activity" is the larger entity.

In *Haybarger v. Lawrence County Adult Probation & Parole*, 551 F.3d 193, 199–203 (3d Cir. 2008), the plaintiff alleged that Lawrence County Adult Probation and Parole Department (LCAPPD) engaged in unlawful employment discrimination practices that Section 504 prohibits. *Id.* at 196–97. While LCAPPD did not receive federal funds, "the Domestic Relations Section (DRS) of the Fifty–Third Judicial District did receive federal funds under Title IV–D of the Social Security Act." *Id.* at 197. The court explained that "although a particular function or operation might be the State's only link to federal funds … [Title VI] applies to 'all the operations' of the entity receiving federal funds." *Id.* at 200.[24] Because the court found the DRS to be a sub-unit of the Fifty–Third Judicial District, which is in turn part of Pennsylvania's Unified Judicial System, the DRS's receipt of federal funds effectuated a waiver of Eleventh Amendment immunity for not just the DRS, but for all subunits of the Fifty–Third Judicial District, including the LCAPPD. *Id*. at 202. The court concluded that the relevant "program or activity" was the entire Judicial District because the LCAPPD formed a part of the Judicial District. *Id.* at 202–03 (citing *Thomlison v. City of Omaha*, 63 F.3d 786 (8th Cir. 1995)).[25] *See also Huber v. Howard Cty.*, 849 F. Supp. 407, 415 (D. Md. 1994) ("if one part of a department receives federal financial assistance, the whole department is considered to receive

---

[24] While federal law controls in determining whether an entity is a covered "program or activity" under Title VI, state or local law can inform the decision of whether a particular entity is independent or a subunit of another entity. *See Haybarger*, 551 F.3d at 200–01; *Sharer v. Oregon*, 581 F.3d 1176, 1178 (9th Cir. 2009).

[25] In *Thomlison*, the court stated, "Because the definition of program or activity covers all the operations of a department, here the Public Safety Department, and part of the Department received federal assistance, the entire Department is subject to the Rehabilitation Act." 63 F.3d at 789. In this case, the civil action involved the Fire Department, which was part of the Public Safety Department that also included the Police, and Communications Departments. Because the Police Department received federal financial assistance, the entire Public Safety Department was covered, including the Fire Department.

federal assistance"), *aff'd* 56 F.3d 61 (4th Cir. 1995); *Starr v. Hawaii*, CV05-00665, 2007 WL 3254831 *3 (D. Haw. Nov. 2, 2007) (citing cases).

An entire state or local government generally is not considered a "program or activity" where the funding goes to an agency or department within the entity and not to the state or local government specifically.[26] *See Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) ("The term 'program or activity' … does not encompass all the activities of the State. Instead, it only covers all the activities of the department or the agency receiving federal funds.")*;*[27] *see also Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991).[28] The following examples illustrate this point:

- If federal health assistance is extended to a part of a state health department, the entire health department, including its components, would be covered in all of its operations. However, the entire state government is not considered a covered program 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 that actually receive the aid from the Mayor's office.

---

[26] At least one court, however, has held that an entire county was the "program or activity." *See Bentley v. Cleveland Cty. Bd. of Comm'rs*, 41 F.3d 600 (10th Cir. 1994) *See also Thorpe v. Borough of Jim Thorpe*, 2013 WL 1703572 *13–15 (M.D. Pa. 2013) (extended discussion of federal funding issues), *aff'd in part and rev'd in part on other grounds,* 770 F.3d 255 (3d Cir. 2014).

[27] In *Hodges by Hodges v. Pub. Bldg. Comm'n of Chicago*, 864 F. Supp. 1493, 1506 (N.D. Ill. 1994), the court framed the test as follows:

> In the post-CRRA era, whether or not an entity receives federal funds is no longer the *sine qua non* of a Title VI action. Consistent with the broad definition of "program or activity," courts have rejected such a formalistic approach in favor of examining the defendant's relationship to the entity receiving the federal funds.

[28] In *Schroeder*, the court stated:

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

Id.

- If a state receives funding that is designated for a particular state prison, the entire State Department of Corrections is considered the covered "program or activity" (but not, however, the entire state).

An entire state or local government may, however, be liable for Title VI violations if it is partially responsible for the discriminatory conduct, is contractually obligated to comply with Title VI, or has a responsibility to monitor subrecipients. 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 (2d Cir. 1996), the court rejected the state's argument that sovereign immunity applied because 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

> [N]othing in the legislative history of Title VI compels the conclusion that an entity must be a 'program' or 'activity' to be a Title VI defendant…. We therefore hold that the State of New York can be sued under Title VI as long as it, along with those of its agencies receiving federal financial assistance, is alleged to have been responsible for a Title VI violation.

Id. (note omitted).[29] *See also N.Y. Urban League v. Metro. Transp. Auth.*, 905 F. Supp. 1266, 1273 (S.D.N.Y.), *vacated on other grounds*, 71 F.3d 1031 (2d Cir. 1995).

Further, when accepting federal financial assistance, state and local governments should be required to obligate themselves to comply with Title VI by a separate contract of assurance. Often times, this contractual arrangement is formalized when a state or local government signs an assurance agreement. *See*, *e.g.*, *United States v. Maricopa Cty.*, 2:10-cv-01878-LOA (D. Ariz. filed Sept. 13, 2010) (United States sues county government for Title VI violations, in part, because of its obligations under contractual assurances); *United States v. Maricopa Cty.*, 2:12-cv-00981-ROS (D. Ariz. filed May 10, 2012) (same). Even absent a written contract, the state or local government obligates itself to comply with Title VI if the entire governmental unit accepts federal financial assistance. *Cf. Paralyzed Veterans*, 477

---

[29] 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 232 n.25. It is unclear whether the plaintiffs introduced evidence in support of these allegations. 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 a local agency's discriminatory acts under either an intent or discriminatory effect standard. *United States v. City of Yonkers*, 880 F. Supp. 591, 597–98 (S.D.N.Y. 1995), *vacated and remanded*, 96 F.3d 600 (2d Cir. 1996).

U.S. at 605 (noting that "the recipient's acceptance of the funds triggers [contractual] coverage under the nondiscrimination provision") (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983)).

3. Educational Institutions

In the educational context, Title VI provides that the following institutions constitute a "program or activity":

> 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 7801 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). Section 2(A) specifically overturns *Grove City* by including all of the operations of a postsecondary institution when any part of that institution is extended federal financial assistance.[30] *See Knight v. Alabama*, 787 F. Supp. 1030, 1364 (N.D. Ala. 1991) (entire statewide university system constituted "program or activity," notwithstanding limited autonomy of institutions and even though not all institutions received federal assistance), *aff'd in part, rev'd in part, and vacated in part*, 14 F.3d 1534 (11th Cir. 1994).

Senate Report 64 provides several examples of the scope of an educational "program or activity." Federal funding to one school subjects the entire school system to Title VI. S. Rep. No. 64 at 17, *reprinted in* 1988 U.S.C.C.A.N. at 19. Congress explained that the phrase "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. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (Title IX case); *Rogers v. Bd. of Educ.*, 859 F. Supp. 2d 742, 752 (D. Md. 2012); *Meyers ex rel. Meyers*

---

[30] "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.

v. Bd. of Educ., 905 F. Supp. 1544 (D. Utah 1995);[31] *see also Young ex rel. Young v. Montgomery Cty. Bd. of Educ.*, 922 F. Supp. 544 (M.D. Ala. 1996) (court addressed the merits of Title VI claims against the county board of education without comment or question as to the propriety of such claims). In *Rogers*, for example, the court held that the county board of education received federal financial assistance because the state's Department of Education received federal funds and, through its Department of Treasury, distributed funds to county boards of education. *Rogers*, 869 F. Supp. 2d at 752. The court concluded that the county board of education was a proper defendant under Title VI because it fit the definition of a "local educational agency" under the statutory language for covered programs or activities. *Id.* at 745 (citing 42 U.S.C. § 2000d-4a(2)(B)).

4. Corporations and Private Entities

While the CRRA restored institution-wide definitions of a program or activity for public entities or entities that serve a public purpose, it left in place a more narrow definition for private entities. *See Boswell v. Skywest Airlines, Inc.*, 217 F. Supp. 2d 1212, 1216 (D. Utah 2002) ("[W]ith respect to private organizations such as [the defendant], the statutory definition of 'program or activity' was not expanded to the pre-*Grove City* institution-wide definition."), *aff'd,* 361 F.3d 1263 (10th Cir. 2004) (court did not address the definition of program or activity). The scope of "program or activity" as it applies to a corporation or other private entity depends on the operational purpose of the entity, the purpose of the funds, and the structure of the entity. Title VI provides:

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

[31] The court in *Meyers* opined that the Department of Education's regulations have a narrower definition of "program or activity" than is set forth in the statute. *Id.* at 1574 n.37. Nonetheless, the definition was broad enough to encompass the program at issue in the case.

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

42 U.S.C. § 2000d-4a(3).

When federal financial assistance broadly supports an entire private organization, all of its operations are subject to Title VI. 42 U.S.C. § 2000d-4a(3)(A)(i). 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. For example, funds provided to ensure the continued operation of a corporation such as by preventing bankruptcy, are assistance to the entity "as a whole." S. Rep. No. 100-64 at 17, *reprinted in* 1988 U.S.C.C.A.N. at 19. By contrast, funds for a specific purpose or funds that support one of several functions of the private entity are not assistance to the recipient "as a whole." When the funding is narrowly tailored, Title VI covers only the part of the recipient's operations that receives funds. The following are examples of funding for a specific purpose that does not apply to the entity "as a whole":

- An airline that receives Department of Transportation funds for certain rural routes. *Boswell*, 217 F. Supp. 2d at 1217–19.
- A company that receives funds for job training. S. Rep. No. 100-64 at 17, *reprinted in* 1988 U.S.C.C.A.N. at 19.
- A religious organization that receives a grant to enable it to extend assistance to refugees, which is just one of a number of activities of the organization. *Id.*

The notion that federal aid "frees up" funds for other purposes or the fungibility of money does not expand the application of Title VI beyond the principles described above. *Id*. at 17–18, *reprinted in* 1988 U.S.C.C.A.N. at 19–20.

When federal assistance is extended to a plant or any other comparable, geographically separate corporate facility or other private entity, Title VI covers only the operations of the specific plant or facility. 42 U.S.C. § 2000d-4a(3)(B). Congress gave the following example to illustrate this point: the federal government extended federal financial assistance to the Michigan State Department of Health, which in turn provided funding for first aid training to the General Motors Dearborn,

Michigan plant. As a result, Title VI covers all Dearborn plant operations, as well as the State Department of Health that distributed the federal money. Title VI does not, however, cover other geographically separate General Motors facilities merely because of the assistance to the Dearborn plant. S. Rep. No. 100-64 at 18-19, *reprinted in* 1988 U.S.C.C.A.N. at 20–21.

The definition of "program or activity" is broader for private entities that engage in certain public works. For recipients "principally engaged" in the business of providing education, health care, housing, social services, or parks and recreation, the term "program or activity" has an institution-wide application. 42 U.S.C. § 2000d-4a(3)(A)(ii). In other words, Title VI covers the entire entity when any part of it receives federal financial assistance. For example, 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* S. Rep. No. 64 at 18, *reprinted in* 1988 U.S.C.C.A.N. at 20; *see also* Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 Vill. L. Rev. 195, 265 (2003).

The terms "education, health care, housing, social service, or parks and recreation" should be construed broadly consistent with ordinary meaning. In an Eighth Circuit case, the court addressed the scope of "social services" and "education."

> In terms of what businesses might qualify as providing education, the statute envisions that education is not limited to the sort of instruction received in a traditional school system. As noted above, formal educational systems are covered by a separate provision, § 794(b)(2). Section 794(b)(3)(A)(ii), then, covers the sort of education offered by stand-alone schools or by other private organizations seeking to train and develop individuals. As to what constitutes a social service, it is "an activity designed to promote social well-being" such as "organized philanthropic assistance of the sick, destitute, or unfortunate."

Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana, 786 F.3d 510, 527 (7th Cir. 2015) (citing *Doe v. Salvation Army,* 685 F.3d 564, 570 (6th Cir. 2012), quoting Merriam Webster's Collegiate Dictionary 1115 (10th Ed.1995)). In *Doe*, 685 F.3d at 571, the court noted that the notion of "'principally engaged' has been interpreted in other statutory contexts as referring to the primary activities of a business, excluding only incidental activities" (citing *Carrington v. Lawson's Milk*

Co., No. 86–3264, 1987 WL 36691, at *3 (6th Cir. Mar. 6, 1987) (unpublished opinion) (convenience store not "'principally engaged in selling food' for onsite consumption because service was 'incidental to some other business.'") (quoting *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 435–36 (4th Cir. 1967) (holding term "principally" does not require a specific percentage); *United States* v. *Baird*, 85 F.3d 450, 454 (9th Cir. 1996) (construing "principally engaged in selling food for consumption on the premises," as directed to "the issue of principal and peripheral uses"); *Fazzio Real Estate Co.* v. *Adams*, 396 F.2d 146, 150 (5th Cir. 1968) (it is "clear" that sales from refreshment counter constituting from eight to eleven percent of gross revenue were "not de minimus [sic] [and] that the operation of the refreshment counter was not an insignificant adjunct of the operation of bowling alley"; thus, refreshment counter was "principally engaged in sale of food for consumption on the premises").

Moreover, the statute requires that Title VI's anti-discrimination requirements apply institution-wide if, in the aggregate, the organization is principally engaged in the business of providing any of the services enumerated in the statute. In other words, the conjunction "or" does not mean that only one item on the list *by itself* must be a principal activity. Rather, Title VI covers all operations of a private recipient if it is principally engaged in providing these services alone or in combination. *Runnion,* 786 F.3d at 528 ("There is no reason to think Congress was laying out mutually exclusive conditions."). In sum, a covered "program or activity" under Title VI broadly applies to entire institutions, except when the institution in question is a private entity that does not serve a public purpose.

It is important to reiterate that even if a private institution does not fit into one of the broad categories of coverage, Title VI covers the recipient's facility that receives funds.

5. Catch-All/Combinations of Entities

Finally, the term "program or activity" includes the operations of entities formed by any combination of the aforementioned entities. Title VI provides that a "program or activity" includes:

> [A]ll of the operations of
> (4) any other entity which is established by two or more of the entities described in paragraph (1) [instrumentalities of state or local

> government], (2) [educational institutions], or (3) [corporations or private entities];
> … any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(4) (emphasis added). This catch-all provision recognizes the complex nature of entities that serve a public purpose. For example, the provision ensures that "a multistate, regional transportation commission which received federal financial assistance would be covered in its entirety, like a state Transportation Department." Rep. No. 64 at 19, *reprinted in* 1988 U.S.C.C.A.N. at 21.

Unlike the limitations placed on private entities described above, this provision ensures that all of the operations of a partnership between public entities or between a public and private entity, such as a school and a private corporation, would be subject to Title VI. It is the public nature of these hybrid institutions that led Congress to expand Title VI coverage:

> [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."

Id. at 19–20, *reprinted in* 1988 U.S.C.C.A.N. at 21–22. While coverage under paragraph (4) applies to the hybrid 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.