

[28 CFR 42.104](#)

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§ 42.104 Discrimination prohibited.

(a) General. 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 otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited. (1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any

such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance shall be deemed to include all portions of the recipient's program or activity, including facilities, equipment, or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) Employment practices.

(1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which

contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to part III of Executive Order 11246 or any Executive order which supersedes it.

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

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

[42 U.S.C. 2000d](#)-2000d-7; E.O. 12250, [45 FR 72995](#), 3 CFR, 1980 Comp., p. 298.

History

[[31 FR 10265](#), July 29, 1966, as amended by [38 FR 17955](#), July 5, 1973; [68 FR 51334](#), [51364](#), Aug. 26, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

[68 FR 51334](#), [51364](#), Aug. 26, 2003, amended paragraph (b)(1), and revised paragraph (b)(4), effective Sept. 25, 2003.]

Case Notes

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

[Alexander v Sandoval \(2001, US\) 149 L Ed 2d 517, 121 S Ct 1511](#)

LexisNexis® Notes

Civil Rights Law : General Overview

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 Labor & Employment Law : Discrimination : National Origin Discrimination : Federal &
 State Interrelationships
 Public Health & Welfare Law : Housing & Public Buildings : General Overview
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Civil Rights Law : General Overview

[*Clyburn v. Shields*, 2002 U.S. App. LEXIS 5752](#) (2d Cir Mar. 29, 2002).

Overview: *Where the law school applicant's complaint that the use of the law school admissions test as a criterion for admission was discriminatory was insufficient to state a claim, the law school's motion to dismiss was granted.*

- The use of criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race is prohibited under [28 C.F.R. § 42.104\(b\)\(2\)](#). [Go To Headnote](#)

[*Maryland State Conf. of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560](#), 1999 U.S. Dist. [LEXIS 16613](#) (D Md Sept. 30, 1999).

Overview: *In class action suit against State Police alleging discriminatory stops of minority motorists, defendants' motion for summary judgment denied in part. Defendants had standing and alleged a claim for supervisory liability.*

- No program receiving financial assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. [28 C.F.R. § 42.104\(b\)\(2\)](#). [Go To Headnote](#)

Civil Rights Law : Civil Rights Acts : Civil Rights Act of 1964

[*S. Camden Citizens In Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 505](#), 2001 U.S. Dist. [LEXIS 5988](#) (D NJ May 10, 2001).

Overview: *U.S. Supreme Court's decision did not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI. Thus, the motion to vacate was denied.*

- [28 C.F.R. § 42.104\(b\)\(2\)](#) prohibits recipients of federal funds from, inter alia, utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. [Go To Headnote](#)

[Alexander v. Sandoval, 532 U.S. 275, 69 U.S.L.W. 4250, 121 S. Ct. 1511, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367](#) (Apr. 24, 2001).

Overview: *No private right of action existed to enforce regulations which prohibited discriminatory impact of conduct by federal funding recipients, since implementing statute only prohibited intentional discrimination in federal programs.*

- The disparate-impact regulations of the United States Department of Justice, [28 C.F.R. § 42.104\(b\)\(2\) \(1999\)](#), and the United States Department of Transportation, [49 C.F.R. § 21.5\(b\)\(2\) \(2000\)](#), do not simply apply § 601 of Title VI of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000d](#) et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. [Go To Headnote](#)

[Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062](#) (ND Cal Mar. 13, 2000).

Overview: *In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.*

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. [28 C.F.R. § 42.104\(b\)\(2\)](#). [Go To Headnote](#)

Civil Rights Law : Federally Assisted Programs : Discriminatory Intent

[Nat'l Multi Hous. Council v. Jackson, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822](#) (DDC Mar. 28, 2008).

Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- [28 C.F.R. § 42.104\(b\)\(2\)](#) states that a federally funded program may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of

defeating, or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. [Go To Headnote](#)

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in [28 C.F.R. § 42.104\(b\)\(2\)](#) to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. [24 C.F.R. § 1.4\(b\)\(2\)\(i\)](#). Thus, a "disparate impact" theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. [Go To Headnote](#)

Civil Rights Law : Federally Assisted Programs : Enforcement

[Alexander v. Sandoval, 532 U.S. 275, 69 U.S.L.W. 4250, 121 S. Ct. 1511, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367](#) (Apr. 24, 2001).

Overview: No private right of action existed to enforce regulations which prohibited discriminatory impact of conduct by federal funding recipients, since implementing statute only prohibited intentional discrimination in federal programs.

- The disparate-impact regulations of the United States Department of Justice, [28 C.F.R. § 42.104\(b\)\(2\) \(1999\)](#), and the United States Department of Transportation, [49 C.F.R. § 21.5\(b\)\(2\) \(2000\)](#), do not simply apply § 601 of Title VI of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000d](#) et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute. [Go To Headnote](#)

Civil Rights Law : Federally Assisted Programs : Federal Assistance

[S. Camden Citizens In Action v. N.J. Dep't of Env'tl. Prot., 145 F. Supp. 2d 505, 2001 U.S. Dist. LEXIS 5988](#) (D NJ May 10, 2001).

Overview: U.S. Supreme Court's decision did not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA's implementing regulations to Title VI. Thus, the motion to vacate was denied.

- [28 C.F.R. § 42.104\(b\)\(2\)](#) prohibits recipients of federal funds from, inter alia, utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. [Go To Headnote](#)

[Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068](#) (ND Ohio Apr. 20, 2000).

Overview: Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.

- [28 C.F.R. § 42.104 \(b\)](#), promulgated under Title VI of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000d](#) et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. "Disposition" is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. [28 C.F.R. § 42.102\(j\)](#). Clearly, the process of questioning motorists about their immigration status constitutes a "disposition" within the meaning of Title VI. [Go To Headnote](#)

[Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 2000 U.S. Dist. LEXIS 3062](#) (ND Cal Mar. 13, 2000).

Overview: In a racial discrimination action, a government defendant could not prove it was entitled to statutory immunity at the demurrer stage. However, state law claims against defendant were dismissed pursuant to its sovereign immunity.

- The regulations implementing Title VI of the Civil Rights Act of 1964 provide that no program receiving federal assistance through the Department of Justice shall utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. [28 C.F.R. § 42.104\(b\)\(2\)](#). [Go To Headnote](#)

Civil Rights Law : Federally Assisted Programs : Scope

[Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068](#) (ND Ohio Apr. 20, 2000).

Overview: Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.

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Governments : State & Territorial Governments : Claims By & Against

[Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 2000 U.S. Dist. LEXIS 6068](#) (ND Ohio Apr. 20, 2000).

Overview: *Motorists stated viable equal protection claim against state highway patrol and individuals based on alleged practice of interrogating motorists concerning their immigration status because of motorists' Hispanic appearance.*

- [28 C.F.R. § 42.104 \(b\)](#), promulgated under Title VI of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000d](#) et seq. (Title VI), provides that a federally funded program or activity cannot provide any disposition to an individual which is different, or is provided in a different manner based on that individual's race, color or national original. "Disposition" is defined as any treatment, handling, decision, sentencing, confinement, or other prescription of conduct. [28 C.F.R. § 42.102\(j\)](#). Clearly, the process of questioning motorists about their immigration status constitutes a "disposition" within the meaning of Title VI. [Go To Headnote](#)

Labor & Employment Law : Discrimination : Disparate Impact : Statutory Application : General Overview

[Am. Ass'n of People With Disabilities v. Harris, 605 F.3d 1124, 2010 U.S. App. LEXIS 9615](#) (11th Cir May 11, 2010), substituted opinion at [647 F.3d 1093, 2011 U.S. App. LEXIS 15455, 23 Fla. L. Weekly Fed. C 159, 25 Am. Disabilities Cas. \(BNA\) 467 \(11th Cir. Fla. 2011\)](#).

Overview: *Where disabled voters asserted claims under [42 U.S.C.S. § 12133](#) and the Rehabilitation Act, [29 U.S.C.S. § 794](#), based on inaccessible voting machines, the court of appeals found that [42 U.S.C.S. § 15481\(a\)\(3\)](#) and [28 C.F.R. § 35.151\(b\)](#) did not provide for a private cause of action against state election officials, and their injunction was dissolved.*

- Section 601 of Title VI of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000d](#), contained a provision prohibiting discrimination in covered programs or activities on the basis of race, color, or national origin. Section 602 of Title VI of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000d-1](#), authorized federal agencies to effectuate § 2000d, by promulgating regulations. One regulation promulgated under § 2000d-1 prohibited funding recipients from using criteria or methods of administration that had the effect of discriminating based on race, color, or national origin. [28 C.F.R. § 42.104\(b\)\(2\)](#). [Go To Headnote](#)

Labor & Employment Law : Discrimination : National Origin Discrimination : Federal & State Interrelationships

[*Sandoval v. Hagan*, 197 F.3d 484, 1999 U.S. App. LEXIS 30722](#) (11th Cir Nov. 30, 1999).

Overview: *Official policy of English-only driver's license exams constituted disparate impact on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, and suit was not barred by U.S. Const. amend. XI.*

- Department of Transportation and Department of Justice regulations prohibit grant recipients from employing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their national origin. [49 C.F.R. § 21.5\(b\)\(2\)](#); [28 C.F.R. § 42.104\(b\)\(2\)](#). [Go To Headnote](#)

Public Health & Welfare Law : Housing & Public Buildings : General Overview

[*Nat'l Multi Hous. Council v. Jackson*, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822](#) (DDC Mar. 28, 2008).

Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

- The Department of Housing and Urban Development (HUD) has adopted the same operative language found in [28 C.F.R. § 42.104\(b\)\(2\)](#) to govern recipients of funding for housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any funded program or activity. [24 C.F.R. § 1.4\(b\)\(2\)\(i\)](#). Thus, a "disparate impact" theory of discrimination is and has been available under the duly promulgated Title VI of the Civil Rights Act of 1964 regulations of both the Department of Justice and HUD for 35 years. [Go To Headnote](#)

Public Health & Welfare Law : Social Services : General Overview

[*Nat'l Multi Hous. Council v. Jackson*, 539 F. Supp. 2d 425, 2008 U.S. Dist. LEXIS 24822](#) (DDC Mar. 28, 2008).

Overview: *HUD's motion for a judgment on the pleadings was granted because two landlord groups lacked standing to challenge a policy guidance since invalidation of the policy guidance would not redress their claimed injury; the guidance took pains to identify its function as fleshing out existing responsibilities, rather than creating new ones.*

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Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.

Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.

Employees' Benefits: See title 20.

Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.

Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 42 procedural limitations, see: [61 FR 42556](#), Aug. 16, 1996.]

NOTES APPLICABLE TO ENTIRE SUBPART:

h1 See also [28 CFR 50.3](#). Guidelines for enforcement of Title VI, Civil Rights Act.

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