The Leadership Conference
Education Fund

Discrimination in All Its Forms: Different Treatment and Disparate Impact
Identifying Prohibited Discrimination Under Title VI

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin[1] by recipients of federal financial assistance.[2] When determining whether unlawful discrimination has occurred,[3] investigators[4] will look to see whether a person or group was subject to different treatment or disparate impact because of their race. These two different tests recognize that discrimination shows up in many different forms. Sometimes discrimination is explicit, and a policy or decision-maker is clear that someone is being treated differently because of who they are. Sometimes a policy doesn't explicitly treat people differently[5] for different groups. Sometimes discrimination is obvious only in its impact. The purpose of our civil rights laws is to eliminate discrimination in all its forms and allow all people to thrive free from the burdens of discrimination.

The ***different treatment*** tests look to see:

(1) whether <u>a policy is explicit</u> that people are treated differently based on their race;

> Examples:[6] A policy that says that Black students are not allowed to take AP classes; that Asian Americans are not allowed to ride a bus; that Latinos are not allowed to access a public water supply; or that White people will be given preference for a government loan program.

or (2) whether the policy itself does not talk about race, but in practice the policy <u>works differently</u> for people from different racial groups.

> Examples: A hospital allows patients to be accompanied by a care partner, but Black patients' care partners are always turned away; there is no rule prohibiting the wearing of turbans while driving, but drivers wearing turbans (who are all of South Asian descent) are stopped far more often than drivers not wearing turbans (who are not South Asian); or the owners of an apartment building repair broken air conditioners for non-Latino residents but not Latino residents.

If there is a real, nondiscriminatory reason (and not just a pretext) that people are treated differently, then the policy or practice may not be illegal discrimination.

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1. "Race, color, and national origin" have been interpreted over the years to include shared ancestry and ethnic characteristics and limited English proficiency.
2. "Recipients of federal financial assistance" include all public schools as well as many police departments, public housing authorities, hospitals, public transportation agencies, and social service agencies.
3. An investigation may be conducted by a federal civil rights office in response to a complaint of discrimination or a compliance review, or it may be conducted as part of a lawsuit brought by an individual in court.
4. For many years both the government and individuals were able to challenge a policy or practice under Title VI of the Civil Rights Act because it was discriminatory because of either different treatment or disparate impact. In 2001 the Supreme Court ruled in *Alexander v. Sandoval* that individuals could not challenge discrimination that was manifest as disparate impact.
5. The language to describe this is usually "neutral on its face."
6. These fictitious examples describe scenarios in which Black, Latino, and Asian American people are subject to discrimination. Title VI protects all people from discrimination based on race, color, and national origin, and similar examples could describe unlawful discrimination against Arab Americans, Irish Americans, Jews, Muslims, Native Americans, Sikhs, White people, or other groups of people based on their identity. Any investigation of discrimination would take the totality of the circumstances into account and apply the law to the facts in the specific situation.

The **disparate impact** test looks to see what the <u>effects</u> of a policy or practice are on different groups of people. Under this test, investigators look to see:

(1) are some racial groups harmed more than others;[7]

(2) is the policy justifiable;

(3) is there a policy that could meet the same goals and that wouldn't harm some groups more than others?

Examples: A school has a policy of suspending students for tardiness, and Latino students are more likely to be suspended under the policy than non-Latino students because of residency patterns and bus routes. Pushing students out for not coming to school isn't educationally justifiable, and if there isn't another legitimate justification for the policy, it is likely that this policy would be unlawful discrimination.

A county initiative to install new sewer lines up in the hillside neighborhoods bypasses neighborhoods in the valley (where most Black neighborhoods are) and means that Black residents are more likely than non-Black residents to experience sewer backups. If there isn't a justifiable reason why Black residents aren't connected to the new sewer line, it is likely that this policy would be unlawful discrimination.

A library uses facial recognition software[8] to enable access to the computers, but is unable to match Asian American faces more than faces that aren't Asian American and so Asian Americans are not able to access the computers. If there isn't a justifiable reason to use the facial recognition technology instead of other forms of identification, it is likely that this policy would be unlawful discrimination.

In order to achieve an America as good as its ideals where all people can live, learn, work, and grow to their fullest potential, we must work together to end discrimination in all its forms. This is the promise of the Civil Rights Act.

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8. The ability to measure whether some racial groups are harmed more than others by a policy relies on the availability of data that are disaggregated by race. There are efforts to halt the collection of disaggregated data in part because it would make it easier to hide discrimination in the form of disparate impact.

9. In addition to the use of facial recognition software, which may create the veneer of objectivity because the computer is matching faces instead of a human being, these same problems are pronounced when algorithms are used to inform decision-making. Algorithms pose particular discriminatory risks because the tool itself is likely to be hidden from view (unlike messages shared between individuals making a decision) and because of the representation that the decision was made by a computer that lacks animus.

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