Subrecipient Title VI Reviews

2016 AASHTO National Civil Rights Training Symposium

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Learning Objectives

1. Understand risk mitigation

2. Understand the basics of Title VI as it pertains to subrecipients

3. Understand the requirements for external reviews

4. Understand how to ensure compliance in practice
What is the Risk?

- If Recipients, including LPAs, lack good data, analysis, and review procedures, they can adversely impact the public and Recipients will have little defense if:
  1. Formal complaints are filed against them with FHWA or USDOJ, or
  2. FHWA initiates a compliance review.
How do we mitigate risk?

- Checklists and forms are useful to roll up information but must work in conjunction with in-depth reviews.
- Meet face-to-face with subrecipients and review material together.
- Civil Rights practitioners must be conversant in project development (planning, NEPA, etc.) and data analysis.
What is the law?

“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.” 42 U.S.C. § 2000d, et seq.
What is the law?

Civil Rights Restoration Act of 1987

- Rejected 1984 Supreme Court decision in Grove City College v. Bell (465 US 555)
- “Program or activity” means all of the operations—any part of which is extended Federal financial assistance—of:
  - a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
  - 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 governmental of the operations of any entity” 42 U.S.C. § 2000d-4a(1).
Title VI - Roles and Responsibilities

FHWA

• Provides stewardship and oversight
• Approves Implementation Plans and conducts process reviews
• Provide policy and technical assistance training

State DOTs

• Perform required actions under 23 C.F.R. Part 200
• Submit annual Plan, assurances, and Report to FHWA Division
• Conducts internal and external reviews
• Process and investigate complaints against subrecipients
Local Public Agency Recipients

- Conform to State DOT Implementation Plan, including:
  - Collection and analysis of demographic data to ensure nondiscrimination
  - Complaint procedures
  - Training requirements
  - Limited English Proficiency policies
  - Submit annual assurances to State DOT and use contract inserts
  - Submit reports on demographic data requested from State DOT

- Assist in State DOT external reviews
Title VI – Key Local Public Agency Requirements

Regulations do not provide many express requirements for Local Public Agencies (LPAs), however, as Recipients they are required to affirmatively ensure nondiscrimination in their transportation programs and activities.

- At a minimum, LPAs must:
  - Submit annual signed Title VI Assurances and insert language from DOT Order 1050.2A into agreements
  - Develop procedures for the collection of statistical data (race, color, and national origin) of participants in, and beneficiaries of State highway programs, i.e., relocatees, impacted citizens and affected communities.
Title VI – Key Local Public Agency Requirements

• At a minimum, LPAs must (cont):

  – Conform to the State DOT’s policies and reporting requirements in the State DOT’s Title VI Implementation Plan (LEP, complaint procedures, etc.) and the LPA must develop its own written procedures. While the regulations do not require LPAs to have an IP, they must be able to demonstrate how they comply with Title VI.

  – Designate a responsible point of contact to coordinate Title VI efforts
Use a Risk-Based Approach:

• Include “desk audit” and data/project analysis. Compliance on paper is not enough.

• Use a selection method best suited for your program. If your state has too many LPAs to review annually, sampling and weighting criteria are acceptable. But, remember risk can come from the smallest subrecipients.
How do I know what to review and analyze?

- Not different from internal state DOT reviews
- Think from perspective of the public and beneficiaries.
- Where and how do you contact public?
- Where are your contracts; whom with?
- Where does the state spend its funds?
- Have you or they received formal or informal complaints or public comments?
Example Review Methods:

1. **Threshold or Representation analysis** compares demographics to actual distribution of benefit/burden (e.g. project alternative route selection)

2. **Barrier analysis** to test whether practices have a disproportionate, adverse impact, acting as a barrier to participation (e.g. venue for public meetings).

3. **Selection analysis** to determine whether the selection rate for one demographic group of beneficiaries is lower than other groups (e.g. selection of consultants).
Two main types of disparate impact analysis:

1. **Practical Significance Test** – if rate of selection or impact for one group is less than 4/5 or 80% than that of the highest group’s rate, then disparate impact is inferred.

2. **Statistical Significance Tests** – calculation of the probability that difference in selection or impact was due to random chance
Hypothetical:

An Asian consultant appraiser approaches a State DOT Right of Way employee at a conference with concerns that she is on the “on call” list for the LPA but has never received a contract. She does not wish to file a complaint, but wanted to voice her concerns.
1. Collect Data and Information
   - On Call list, selectees over 12 months, demographic data
   - Policies and procedures

2. Analyze
   - Practical Significance test for Disparate Impact

3. Act on Findings
   - Change policies or procedures
Step 1: Calculate rate of representation for each group by dividing the number of persons selected from a group by the number of applicants – or candidates – from that group.

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<tr>
<th>Race</th>
<th>Number of Applicants</th>
<th>Number of Selectees</th>
<th>Percent Selected</th>
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<tbody>
<tr>
<td>White</td>
<td>50</td>
<td>40</td>
<td>80%</td>
</tr>
<tr>
<td>Asian</td>
<td>50</td>
<td>10</td>
<td>20%</td>
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</tbody>
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Step 2: Determine which group is experiencing the most advantageous rate:

- For positive actions (e.g., grant selection), most favored group has highest rate
- For negative actions (e.g., contract sanctions), most favored group has lowest rate

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Step 3: Calculate **impact ratio** by comparing representation rate for each group with that of the most favored group. If a group’s rate of representation is less than 80% of the most favored group, the group is disparately impacted.

Impact Ratio: \(
\frac{.20}{.80} \times 100 = 25\%
\)

\(25\% < 80\% = \text{Disparate Impact}\)
Things to notice:

1. No complaint was filed, but Recipients have an affirmative duty (23 CFR 200.9(b)) to review program areas and LPAs for Title VI regardless of whether they receive complaints.

2. Data and analysis is only the beginning. Reviews should include other information (interviews, policy review) and potentially lead to actual change.

3. Assumption was LPA had demographic data on hand. If LPA had not collected this data, then review would not have been possible.
Example Review Methods:

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3. **Selection analysis** to determine whether the selection rate for one demographic group of beneficiaries is lower than other groups (e.g. selection of consultants).
• Document, document, document
• Reviews are required, but use them as an opportunity to teach and learn
• Whether reviewing internally or externally, use the reporter’s motto
• We can’t mitigate all risk, but we can use our resources well
Discussion

Questions & Comments?
Thank you for your hard work and assistance!