


KDHE NON-DISCRIMINATION POLICY

December 20, 2022



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OVERVIEW

This policy (1) identifies the federal laws governing non-discriminatory practices applicable to the Kansas Department of Health and Environment (KDHE) and (2) outlines KDHE's responsibilities to prohibit the practice of discrimination under such federal laws.

As a recipient of federal funding and an administrator of programs that receive federal financial assistance, KDHE must carry out the federally mandated responsibilities to enforce several civil rights laws identified in this policy which, together, prohibit discrimination on the basis of: race, color, national origin (including on the basis of Limited English Proficiency (LEP)), sex, disability, and age by applicants for and recipients of federal financial assistance.

All requirements contained herein are effective as of the date of this policy's enactment and not retroactive. This policy supplements other policies and procedures KDHE has enacted for protection of its employees and the public against discrimination.

LEGAL FRAMEWORK

The following form the legal basis for this policy and are referred to collectively as "Federal Non-Discrimination Laws."

Title VI of the Federal Civil Rights Act of 1964 requires programs receiving federal assistance to ensure that no person, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of or be subject to discrimination under any federal program or activity receiving federal financial assistance.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against qualified individuals on the basis of their disability. Section 504 states: "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of his or her disability, be excluded from participation in, be denied benefits of, or be

subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794.

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in programs and activities receiving federal financial assistance. The statute states: “Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) of this title and section 6103(c) of this title, 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.” 42 U.S.C. § 6102.

Section 13 of the Federal Water Pollution Control Act of 1972 requires compliance with 40 C.F.R. § 7.30, which states: “No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance under this Act. . . .”

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any federally funded education program or activity. Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance” 20 U.S.C. § 1681.

Executive Order 13166, issued on Aug. 11, 2000 by President Clinton requires recipients of federal funding to examine the services they provide, identify any need for services to those with Limited English Proficiency (LEP), and develop and implement a system to provide those services so LEP persons can have meaningful access to them. The Executive Order also requires that the federal agencies work to ensure that recipients of federal financial assistance provide meaningful access to the LEP applicants and beneficiaries.

The regulations of 40 C.F.R. Part 5 and 40 C.F.R. Part 7, which implement the above-mentioned laws, apply to both intentional acts of discrimination and policies and practices that have a discriminatory effect.

COMPLIANCE PROGRAM

To accomplish adherence with the above provisions and provide opportunity for meaningful involvement in its processes, KDHE administers a compliance program with oversight of Federal Non-Discrimination Laws. This includes evaluation of agency actions to ensure affected parties can fairly and equitably participate in public processes, regardless of race, color, national origin, Limited English Proficiency (LEP), sex, disability, or age. The following items encompass components of KDHE’s non-discrimination guidance:

Designation of a Non-Discrimination Coordinator: The purpose of this position is (1) to consult with agency programs to ensure development, implementation, and enforcement of laws are done in compliance with non-discrimination standards, and (2) to interface with the public regarding these measures. Activities required of this position are delegated by the Secretary of KDHE. The

Non-Discrimination Coordinator's contact information will be prominently available on KDHE's website. Some of these duties include:

- Development and publication of data regarding demographics, history and background of communities in Kansas
- Establishment and maintenance of grievance procedures, process grievances, and maintain records, and semiannual review of grievances for patterns or systemic problems
- Investigate and resolve grievances according to KDHE's Grievance Procedures
- Provision or procurement of training for staff on Federal Non-Discrimination Laws and KDHE policies
- Evaluate periodically the efficacy of KDHE's non-discrimination efforts, both in-house and through the work of its subcontractors
- Establish a Non-Discrimination Stakeholder Group for review of agency practices, as needed.

The Non-Discrimination Coordinator may be assigned other roles or responsibilities within the agency but none that may cause or suggest a conflict of interest for any complaint investigations.

Grievance Procedures: The KDHE website provides a link to a non-discrimination complaint form. KDHE customers who feel they have been subject to discrimination may complete this form. This form is automatically submitted to the Non-Discrimination Coordinator. The Non-Discrimination Coordinator shall receive and review all grievances according to the KDHE Non-Discrimination Grievance Procedure.

Non-Discrimination Policy Statement: A statement has been included on the KDHE website addressing compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. This statement shall also be posted in prominent places in KDHE offices and in general publications distributed to the public (and published after the date of this policy). Such language shall be substantially similar to the following:

The Kansas Department of Health and Environment does not discriminate on the basis of race, color, national origin, Limited English Proficiency, disability, age, or sex in administration of its programs or activities. KDHE does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in programs or actions, or opposed programs or activities. If you would like to learn more or believe that you have been discriminated against with respect to a KDHE program or activity, you may visit www.kdhe.ks.gov/1874/Non-Discrimination-Policy or call 785-296-5156 to learn how and where to file a complaint of discrimination.

Meaningful Access for Public Participation: KDHE programs shall ensure, in coordination with the Non-Discrimination Coordinator, that the public involvement process is available to all interested persons. This starts with staff familiarizing themselves with the community at issue by evaluating relevant variables on EJ Screen and using other available resources. In their planning of public events, programs shall:

- i. Ensure that the time, place, location, duration, and security of public meetings are not discriminatory to those in the affected community;
- ii. Take into consideration the availability and schedules of public transportation;

- iii. Provide appropriate staff contact information in public notices;
- iv. Review past and present community concerns related to the agency action;
- v. Develop and implement a contingency plan for potential postponement or cancelation;
- vi. Confer with KDHE's public information office regarding translation or interpretation;
- vii. Confer with KDHE's public information office regarding appropriate local media contacts, based on the culture and linguistics needs of the community; and
- viii. Provide the location of the information repository, if any.

Meaningful Access to Programs and Activities for Persons with Disabilities: Programs shall provide, at no cost, appropriate auxiliary aids and services, including, but not limited to, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals upon request to ensure effective communication and an equal opportunity to participate fully in the benefits, activities, programs, and services provided by KDHE in a timely manner and in such a way as to protect the privacy and independence of the individual. Programs shall ensure that any facility used for a public meeting or hearing is physically accessible for individuals with disabilities.

U.S. EPA Environmental Justice mapping tool (EJ Screen): To assist KDHE in compliance with Federal Non-Discrimination Laws, KDHE staff will use the EJ Screen mapping tool. KDHE's use of EJ Screen includes, but is not limited to, the following:

- Identifying, for any agency action, populations that have a higher likelihood of being comprised of individuals who have protected demographic characteristics.
- Identifying, prior to issuance of a public notice, whether the action proposed by the public notice may affect protected populations, which would indicate the need for enhanced or alternative forms of public notices.

Whenever it is determined that the use of EJ Screen is appropriate, KDHE staff determines whether the tool indicates the presence of an affected community. This may subject the agency action to enhanced public notice, and further consideration of appropriate measures to ensure meaningful participation should ensue with program staff, management, legal, and the Non-Discrimination Coordinator. After performing this EJ Screen search, KDHE staff should capture and save the map in the files for the project at hand.

Non-Discrimination Training: The Non-Discrimination Coordinator and/or delegates will present periodic training on Federal Non-Discrimination Laws. KDHE shall provide training to its employees on the basis for this policy and how to appropriately and effectively implement this policy to ensure that nondiscrimination remains a priority for all KDHE programs.

Agency Contracts, Grants, Loans and Intergovernmental Agreements: KDHE shall include language substantially similar to the language below in every contract, grant, loan and intergovernmental agreement requiring compliance with this policy, and its legal bases, including passing these requirements onto applicable subcontractors. Each subcontractor shall determine its own applicability, but generally any subcontractor with fifteen or more employees will be subject.

This applies to all contracts for “activities or programs.” The Non-Discrimination Coordinator will periodically audit the agency’s contracts and intergovernmental agreements for such compliance.

All contracts that meet the threshold above shall contain the following language: “[CONTRACTOR/PARTY NAME] shall ensure it complies with all applicable requirements of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If [CONTRACTOR/PARTY NAME] subcontracts, assigns, or transfers any of the work contemplated by this [AGREEMENT/CONTRACT/ORDER] to another party, [CONTRACTOR/PARTY NAME] is responsible for ensuring such subcontractor, assignee, or transferee also complies with these federal nondiscrimination laws.”

Language Access Plan. Title VI, 40 CFR Part 7, Lau v. Nichols, 414 US 563 (1974).

Public notices. All public notices will include the following sentence in Spanish directing the reader to the Non-Discrimination Coordinator for additional resources regarding participation in the public notice and comment process: “*La noticia anterior se refiere a la [ACTIVITY/ ACTION] para [NAME OF FACILITY/SITE/OTHER] en la [ADDRESS]. Si desea obtener más información en español o tiene otras preguntas, por favor, comuníquese con el Coordinador de No Discriminación de KDHE al 785-296-5156 o en: KDHE.NonDiscrimination@ks.gov.*” (Please consult with the Communications office for additional help translating this.) In the alternative, programs may decide to provide the full public notice at the time of issuance in Spanish if it is reasonable under the four-factor test below. For languages other than English and Spanish, public notices issued in an area with five (5) percent LEP population in a certain language will contain a notice in such foreign language directing the reader to the Non-Discrimination Coordinator for additional resources. Provision of the entire public notice in such language will be determined (1) upon request by a LEP person or (2) if reasonable under the four-factor test below.

Translation of additional documents. Upon request for translation of documents at issue in or related to the public notice, the appropriate program staff will evaluate how to handle the request in consultation with the Non-Discrimination Coordinator and provide such documents determined to be “vital” to the process and reasonable/feasible to translate.

Oral Interpretation. Programs shall provide simultaneous oral interpretation of live proceedings in prominent languages according to the four factors below, or for an individual LEP person participating in a program or activity.

Four-factor test. KDHE must take “reasonable steps” to ensure meaningful access to its programs and activities. KDHE can use the following factors to make determinations based on their knowledge and experience and data gathered from EJ Screen. The four factors are as follows:

- i. Number or percentage of LEP persons;

- ii. Frequency with which the LEP persons come in contact with the activity or program;
- iii. The nature and importance of the activity, service, or program; and
- iv. The resources available to the program/recipient/permittee and costs of interpretation or translation.

Website Translation. The KDHE website, www.kdhe.ks.gov, incorporates a function that allows individuals to translate most website content into other languages. The website also includes functionality to allow use by the visually impaired to the maximum extent possible. KDHE intends to expand these functions as it is able.

Substantive consideration of discrimination allegations: KDHE staff must evaluate potential for substantive discrimination for each policy or practice. Upon analysis of community demographics and receipt of comments addressing disparate impacts of environmental and health burdens, staff shall examine the possibility of these impacts using EJ Screen and other resources. Agency staff may evaluate potential conditions to mitigate impacts and provide responses to any allegations of disparate impact. Examples of appropriate mitigating conditions may include an equity analysis or enhanced public reporting requirements (i.e. a website containing emissions data or periodic community meetings).

There are three methods of proving discrimination based on the Federal Non-Discrimination Laws, as described below. These explanations are sourced from the U.S. Department of Justice’s Title VI Legal Manual, and further information can be found therein. There is a link to this manual on KDHE’s Non-Discrimination webpage. Staff should be familiar with these for purposes of avoiding any intentional or unintentional discrimination in agency policy or practice. If a complaint is made alleging one of these forms of discrimination, it will be handled according to KDHE’s Non-Discrimination Grievance Procedures.

Intentional Discrimination: Generally, intentional discrimination would occur if the agency acted, at least in part, ***because of*** the actual or perceived race, color, or national origin of the alleged victims of discriminatory treatment. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011). While discriminatory intent does not need to be the only motive, a violation occurs when the evidence shows that the entity undertook an action or adopted a policy “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Some assume that the intentional use of race should be carefully scrutinized only when the intent is to harm a group or an individual defined by race, color, or national origin. That is not true: the Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), and *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 226 (1995), established that any intentional use of race, whether for malicious or benign motives, is subject to the most careful judicial scrutiny. Accordingly, the record need not contain evidence of “bad faith, ill will or any evil motive on the part of the [recipient].” *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

Disparate Impact: Courts have adopted a three-part test to determine whether a recipient's policy or practice violates the Title VI disparate impact regulations. First, does the adverse effect of the policy or practice **disproportionately affect** members of a group identified by race, color, or national origin? Some courts refer to this first inquiry as the "prima facie" showing. If so, can the recipient demonstrate the existence of a **substantial legitimate justification** for the policy or practice? *N.Y. Urban League*, 71 F.3d at 1036. A violation is still established if the record shows the justification offered by the recipient was pretextual. See *Elston v. Talladega Cty. Bd. Of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (citing *Georgia State Conf. v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985)). Finally, is there an **alternative** that would achieve the same legitimate objective but with less of a discriminatory effect? If such an alternative is available to the recipient, even if the recipient establishes a justification, the policy or practice will still violate disparate impact regulations.

Retaliation: The Supreme Court has defined retaliation as an **intentional act in response** to a protected action. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). Citing *Jackson*, the court in *Gutierrez* underscored the intentional nature of a retaliation complaint: "Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment." *Gutierrez*, 2005 WL 2346956, at *5. The complained of matter need not be a complaint; it can be any lawful conduct that an individual engages in connected with a protected right. "The very concept of retaliation is that the retaliating party takes action against the party retaliated against after, and because of, some action of the latter." *Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 514 (1958). It carries with it the notion of "getting even." See *id.*