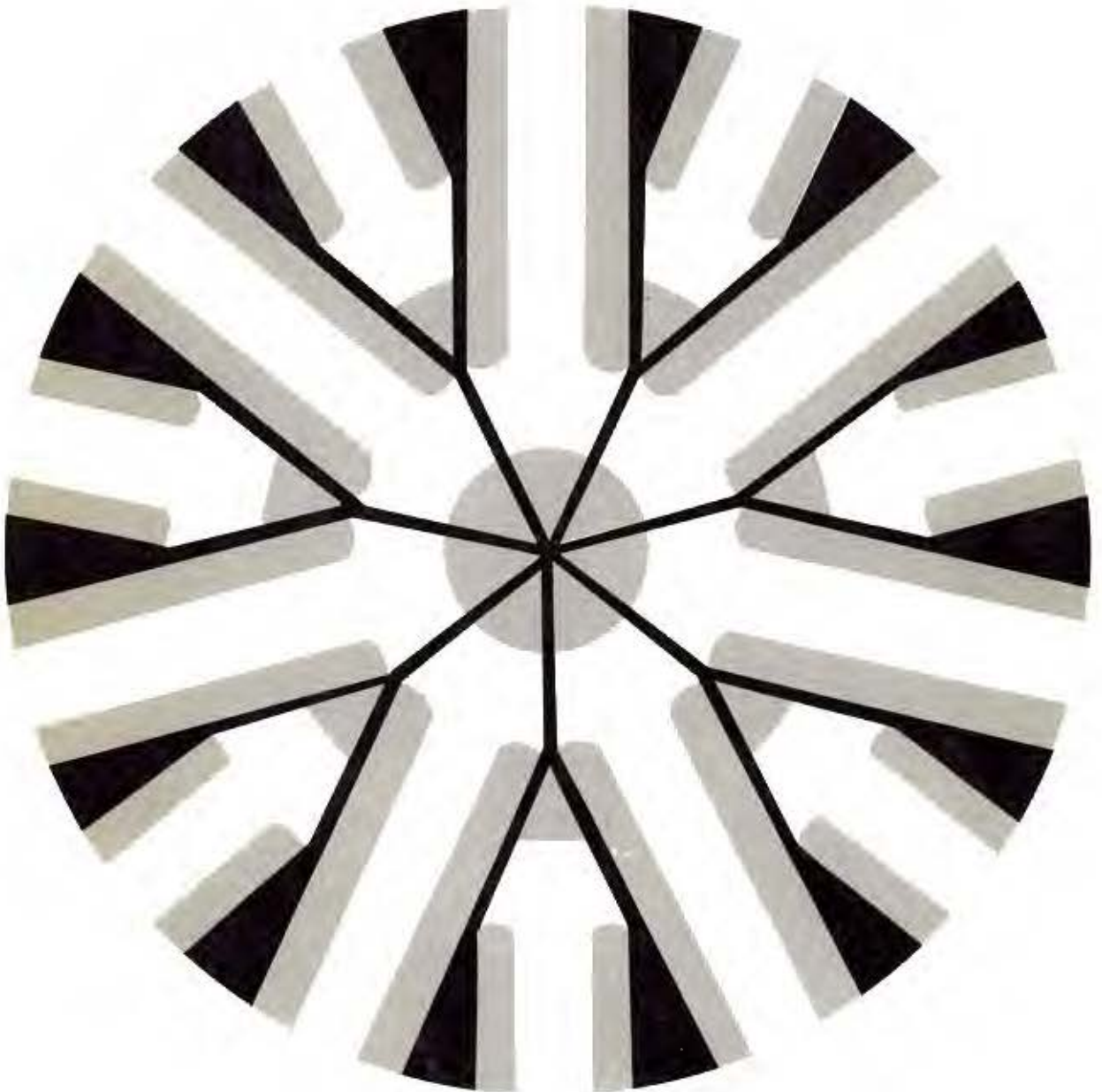


*Alexander*

# THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974

Volume III  
To Ensure Equal Educational Opportunity



A Report of  
The United States  
Commission on  
Civil Rights  
January 1975

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ENFORCEMENT EFFORT--1974

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LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS  
WASHINGTON, D.C., JANUARY 1975

THE PRESIDENT  
THE PRESIDENT OF THE SENATE  
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report evaluates the efforts to ensure equal educational opportunity by three Federal agencies, the Department of Health, Education, and Welfare (HEW), the Internal Revenue Service of the Department of the Treasury, and the Veterans Administration. It is third of a series of six reports to be issued by this Commission describing the structure, mechanisms, and procedures utilized by the Federal departments and agencies in their efforts to end discrimination against this Nation's minority and female citizens. The first report deals with the civil rights responsibilities of five regulatory agencies and the second with the fair housing activities of seven agencies. This series of publications represents our fourth followup to a September 1970 study of the Federal civil rights enforcement effort.

Our findings in this report show that, although these agencies have the responsibility for preventing discrimination against minorities and women in public and private elementary and secondary schools, institutions of higher education, proprietary institutions, and on-the-job training programs which receive Federal assistance, inadequate efforts have been made to deal with the major problems which remain in these areas. Some of the actions taken by HEW to bring elementary and secondary school districts into compliance with Title VI of the Civil Rights Act of 1964 in the last few years have been most useful; for example, its improved reviews of in-school discrimination. A number of deficiencies exist, however, in its overall compliance effort. The agency's civil rights guidelines still do not cover a number of important areas including sex discrimination, pupil transportation, metropolitan school desegregation, and faculty selection criteria. Of equal importance is the failure of HEW to take prompt action once noncompliance is identified in a review. It has allowed its negotiations in some instances to continue for years.

We have also concluded that few significant actions have been taken by other agencies with civil rights responsibilities in the area of education. For example, neither the Internal Revenue Service nor the Veterans Administration has developed adequate standards for determining compliance of those educational institutions to which they provide assistance. In addition, they have conducted reviews of only a relatively small percentage of their recipients and the reviews that they conducted were superficial.

We particularly ask that you direct your attention to the seven general and a number of specific recommendations outlined at the conclusion of this report. Of major importance is the recommendation that all resources and authorities of the Executive Branch be pooled to bring about vigorous enforcement of the constitutional mandate to desegregate elementary and secondary schools. In addition, we recommend that school districts be required to conduct a yearly analysis of the extent to which they offer equal educational opportunities and that State Governments be required to submit annual plans detailing the nature and extent of their efforts to ensure equal educational opportunity. Of greatest significance among these seven recommendations is that HEW initiate prompt enforcement action against all educational institutions with Federal contracts or funding found to be in probable noncompliance with civil rights provisions which do not take acceptable corrective action within 90 days after being notified of that status.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,

Arthur S. Flemming, Chairman  
Stephen Horn, Vice Chairman  
Frankie M. Freeman  
Robert S. Rankin  
Manuel Ruiz, Jr.

John A. Buggs, Staff Director

## PREFACE

In October 1970 the Commission published its first across-the-board evaluation of the Federal Government's effort to end discrimination against American minorities. That report, The Federal Civil Rights Enforcement Effort, was followed by three reports, in May 1971, November 1971, and January 1973, which summarized the civil rights steps taken by the Government since the original report.

At the time we released the last report we indicated that we were conducting another analysis of Federal civil rights programs. This analysis is the Commission's most comprehensive. In order to enable the public to comprehend more fully each of the diverse parts of our study, we have decided to release each of its six sections independently over several months. In November and December 1974, we released the first two volumes of the Federal Civil Rights Enforcement Effort--1974: To Regulate in the Public Interest, and To Provide...For Fair Housing. After this third report, we will publish reports on Federal civil rights efforts in the areas employment, federally-assisted programs, and policymaking. These reports will cover the activities of not only the most widely known agencies with civil rights responsibilities, such as the Civil Service Commission and the Department of Labor, but those which have received lesser public attention such as the Office of Management and Budget and the Office of Revenue Sharing of the Department of the Treasury.

This study was begun in November 1972. As we have done with all previous Commission studies of the Federal enforcement effort, detailed questionnaires were sent to agencies, extensive interviewing of Washington-based civil rights officials took place, and a vast number of documents were reviewed, including laws, regulations, agency handbooks and guidelines, compliance review reports, and books and reports authored by leading civil rights scholars. Volumes of data were also analyzed from sources including the census, agency data banks, complaint investigations, and recipient application forms. For the first time Commission staff also talked to Federal civil rights officials in regional and district offices. Agency representatives were interviewed in Boston, Dallas, New Orleans, San Francisco, Los Angeles, and Chicago.

All of the agencies dealt with at length in our January 1973 report, The Federal Civil Rights Enforcement Effort--A Reassessment, were reviewed in this study with the exception of the Office of Economic Opportunity and the Economic Development Administration of the Department of Commerce. Those agencies had been so reduced in size and authority that we felt we could better utilize our resources by assigning them to monitor other agencies. This study covers some areas not analyzed in the Reassessment report. We will be reporting on the efforts of the White House, the Equal Employment Opportunity Coordinating Council, the Office of Revenue Sharing of the Department of the Treasury, the education program of the Veterans Administration, and the Housing, Education, and Employment Sections of the Civil Rights Division of the Department of Justice.

In addition, this is the first of our studies on Federal enforcement activities to cover the Government's efforts to end discrimination based on sex. The Commission's jurisdiction was expanded to include sex discrimination in October 1972. Information on sex discrimination is an integral part of each section of this study.

These studies of Federal civil rights enforcement efforts, however, are not exhaustive. Limits necessarily have been placed upon them, in terms of the laws, agencies, and programs covered. For example, the Voting Rights Act of 1965, which has been treated in previous Commission reports and which will be the subject of a separate Commission publication, was not covered. Further, in the sections dealing with the various Federal programs, it was not possible to treat more than a representative sample. For example, we have only covered the Department of Transportation's assistance for urban mass transit and highways, although that agency also provides aid to airports, railways, and the St. Lawrence Seaway Corporation. In other instances where all or many agencies have responsibilities but one agency is charged with the duty for overall enforcement, we will report only on the activities of the lead agencies. This is true in the case of the Civil Service Commission and the Federal equal employment program, and the Office of Federal Contract Compliance of Department of Labor and the Executive orders prohibiting discrimination by Federal contractors. Finally, due to restrictions of time and staff resources, there will be variation in the depth of treatment of the various programs and agencies.

To assure the accuracy of these reports, before final action, the Commission forwards copies of them in draft form to departments and agencies whose activities are discussed in detail to obtain their comments and suggestions. Thus far their responses have been helpful, serving to correct factual inaccuracies, clarify points which may not have been sufficiently clear, and provide updated information on activities undertaken subsequent to Commission staff investigations. These comments have been incorporated in the report. In cases where agencies expressed disagreement with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, their point of view, as well as that of the Commission, has been noted. In their comments, agencies sometimes provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes, the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

In the course of preparing these reports, Commission staff interviewed hundreds of Federal workers in the field of equal opportunity and made a large number of demands upon Federal agencies for data and documents. The assistance received was generally excellent. Without it, we would not have been able to publish our views at this time. We further would like to note our belief that many of the Federal employees assigned to duties and responsibilities within the equal opportunity area should be commended for what they have done, considering the legal and policy limitations within which they have been working.



These reports will not deal primarily with the substantive impact of civil rights laws. The Commission will not attempt here to measure precise gains made by minority group members and women as a result of civil rights actions of the Federal Government. This will be the subject of other Commission studies. Rather, we will attempt to determine how well the Federal Government has done its civil rights enforcement job--to evaluate for the period of time between July 1972 and June 1974 the activities of a number of Federal agencies with important civil rights responsibilities.

The purpose of these reports is to offer, after a careful analysis, recommendations for the improvement of those programs which require change. The Commission's efforts in this regard will not end with this series of reports. We will continue to issue periodic evaluations of Federal enforcement activities designed to end discrimination until such efforts are totally satisfactory.

Acknowledgments

The Commission is indebted to Whitney Adams, Jeanette Binstock, Kathleen Buto, and Jane Delgado, who wrote this report, under the direction of A. Diane Graham, formerly Associate Director, Office of Federal Civil Rights Evaluation.

The report was prepared under the overall supervision of Jeffrey M. Miller, Assistant Staff Director for Federal Civil Rights Evaluation. The following staff members and former staff members provided support in the preparation of this report: Patricia A. Alicea, Randall D. Briggs, Alice R. Burruss, Patricia A. Cheatham, Josie Gonzales, Wallace Greene, Jeanette Johnson, Nancy Langworthy, Michele A. Macon, Grenda Morris, Bruce E. Newman, Penny K. Smith, Ruby Spillman, Rudella Vinson, Veronica Washington, Mary Watson, Brenda Watts, and Rita L. Young.

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## Chapter 1

### DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (HEW)

#### OFFICE FOR CIVIL RIGHTS (OCR)

#### Elementary and Secondary Education

### I. Responsibility

#### A. Overall

In its fall 1973 survey, the Department of Health, Education, and Welfare reported that there were in the United States 16,698 public school systems serving 45,499,000 students.<sup>1</sup> These districts receive billions of dollars in Federal funds each year for a variety of purposes, including compensatory, bilingual, vocational, and special education programs<sup>2</sup> and are therefore obligated to comply with Title VI of the Civil Rights Act of 1964<sup>3</sup> and with

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1. Department of Health, Education, and Welfare, Fall 1973 Statistics of Public Schools, Advance Report.

2. Sources of funds include, for example, Title I of the Elementary and Secondary Education Act (ESEA) of 1965, which provides funds for reading, mathematics, and other compensatory programs for disadvantaged children; Title VII, ESEA, which provides funds for bilingual-bicultural programs; Title III, ESEA, which provides funds for supplementary educational centers and services; and the Education of the Handicapped Act of 1971, which provides funds for research, training, model centers, and other services for handicapped children. Under Title I of ESEA alone, school districts nationwide received \$1.6 billion in Federal funds in fiscal year 1974.

3. Section 601 of Title VI of the Civil Rights Act of 1964 provides:

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 (1970).

Title IX of the Education Amendments of 1972.<sup>4</sup> In addition, an estimated  
 4,900,000 children<sup>5</sup> were enrolled in 18,142 nonpublic elementary and secondary  
 schools,<sup>6</sup> many of which benefit indirectly from Federal funding to public  
 school districts.<sup>7</sup> Those schools are also subject to compliance with Title  
 VI.

HEW's Office for Civil Rights (OCR) is responsible for monitoring federally-funded public elementary and secondary school districts and nonpublic schools benefiting from Federal programs, to ensure compliance with civil rights provisions. Responsibility under Title VI includes overseeing the elimination of all vestiges of unlawful segregation and enforcing the requirements of the May 25, 1970 memorandum issued to school districts by OCR, which specifically defines districts' responsibilities

4. Title IX of the Education Amendments of 1972 in effect amends Title VI to include a prohibition of sex discrimination in education programs receiving Federal financial assistance. With regard to admissions to educational institutions, Title IX applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education. Educational institutions controlled by religious organizations are exempt from coverage if Title IX is inconsistent with the organization's religious tenets. Educational institutions which provide training in preparation for military service or the merchant marine and public undergraduate higher education institutions established as single sex institutions are similarly exempt from coverage.

5. Department of Health, Education, and Welfare, Office of Education, Digest of Educational Statistics, 1971, Table 44--Estimated enrollment in nonpublic elementary and secondary schools, by State: Fall 1973.

6. Id. at Table 12--Number of local basic administrative units (school districts) and number of schools by level and control, by State: 1970-71.

7. Under Titles III and VII, ESEA, for example, public school districts must assure that provisions will be made to invite participation, in programs funded under those titles, of children attending nearby nonpublic schools.

to overcome discrimination against national origin minority group children.

Since January 1973, OCR has also assisted the U.S. Office of Education

(USOE) in the selection and review of school districts funded under USOE's

Emergency School Aid Act (ESAA).<sup>9</sup> USOE has ultimate authority for monitoring

the program. However, since ESAA funds are used to aid school desegregation,

OCR has been delegated the responsibility for ensuring that school districts

are in compliance with ESAA civil rights assurances. ESAA is the only

education program in which OCR takes a direct role in monitoring. Finally,

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8. Memorandum from J. Stanley Pottinger, Director, Office for Civil Rights, to school districts with more than 5 percent national origin minority group children, Subject: Identification of Discrimination and Denial of Services on the Basis of National Origin, May 25, 1970. Four major areas of concern are described in the memorandum: (1) School districts must take affirmative steps to rectify a language deficiency whenever it excludes national origin minority group children from effective participation in the educational program; (2) school districts must not assign pupils to emotionally or mentally retarded classes on the basis of deficient English skills; (3) ability grouping or tracking must be designed to increase language skills; and (4) school districts are responsible for notifying the parents of national origin minority children regarding school activities.

9. Title VII of the Education Amendments of 1972, cited as the Emergency School Aid Act, provides funds for implementation of voluntary and court-ordered desegregation plans in schools. ESAA replaces the Emergency School Assistance Program (ESAP), which provided funds for implementation of court-ordered desegregation plans in school districts. ESAP expired in January 1973. The first group of ESAA programs was selected in January 1973. HEW expended \$212,052,628 in fiscal year 1973, \$233,355,147 in fiscal year 1974 and proposes spending an estimated \$125,000,000 in fiscal year 1975 for ESAA programs. Telephone interview with Elsie Janifer, Program Specialist, Equal Educational Opportunity, Division of Program Development, Office of Education, Dec. 20, 1974.

10. OCR accepted responsibility for this aspect of the ESAA program during planning meetings held jointly with USOE staff in 1972.

11. For a further discussion of OCR's relationship to federally funded education programs, see p. 14 infra.

since February 1973, OCR's responsibilities have included implementing the court injunction in Adams v. Richardson,<sup>12</sup> which requires HEW to enforce Title VI in school districts found in noncompliance in 1971.

#### B. Headquarters and Regional Responsibilities

OCR's specific activities in accordance with Titles VI and IX, the May 25 memorandum, Adams v. Richardson, and ESAA are carried out by Elementary and Secondary Education staff in a headquarters office (Washington, D.C.) and 10 regional offices.<sup>13</sup> The headquarters staff collects data and provides review and policy guidelines to the field offices. Regional staff have primary responsibility for conducting compliance reviews of school districts, investigating complaints, negotiating corrective action, and selecting and monitoring districts under ESAA.

12. Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). Plaintiffs alleged that HEW violated the Civil Rights Act of 1964 and the fifth and 14th amendments to the U.S. Constitution by failing to terminate Federal funds to elementary schools and colleges and universities which continue to discriminate. The D.C. Federal district court found that HEW had been negligent in enforcing those civil rights provisions, and issued an order on February 16, 1973, requiring HEW to take a number of specific steps. 356 F. Supp. 82 (D.C. 1973). The decision was upheld on appeal in the U.S. Court of Appeals for the District of Columbia. Where school districts were concerned, HEW was required within 60 days of the injunction to secure compliance with Title VI from school districts found out of compliance during the 1970-71 school year and commence enforcement proceedings if compliance was not secured. For further discussion of this important case, see pp. 102-109 infra.

13. The locations of HEW's 10 regional offices are as follows:

Region I	Boston (Conn., Me., Mass., N.H., R.I., Vt.)
II	New York (N.J., N.Y., P.R., V.I.)
III	Philadelphia (Del., D.C., Md., Pa., Va., W. Va.)
IV	Atlanta (Ala., Fla., Ga., Ky., Miss., N.C., S.C., Tenn.)
V	Chicago (Ill., Ind., Mich., Minn., Ohio, Wis.)
VI	Dallas (Ark., La., N.M., Okla., Tex.)
VII	Kansas City (Iowa, Kan., Mo., Neb.)
VIII	Denver (Colo., Mont., N.D., S.D., Utah, Wyo.)
IX	San Francisco (Ariz., Cal., Hawaii, Nev., Samoa, Guam)
X	Seattle (Alaska, Idaho, Ore., Wash.)

Regional offices establish their own program priorities, but those priorities are often superseded by national objectives established in the headquarters office. Region VI's (Dallas) heavy involvement in national origin reviews, for example, resulted from its selection by headquarters as a pilot region for enforcement of the May 25 memorandum.

OCR plans to decentralize <sup>14</sup> functions consistent with the Nixon administration's decentralization of Federal programs and offices. <sup>15</sup> The decentralization would increase authority at the regional level for selecting districts for review, preparing and sending letters of noncompliance, and negotiating corrective action with school <sup>16</sup> districts. OCR headquarters would continue to monitor regional office activities, determine national policies and priorities, and provide technical support. <sup>17</sup> In addition, when negotiations fail, districts would continue to be referred to Washington for further negotiation or enforcement action.

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14. As of July 29, 1974, the Secretary of HEW had not approved OCR's decentralization plan. However, the functions of OCR were decentralized in January 1974. Telephone interview with Harry Fair, Assistant Director for Administration and Management, OCR, July 30, 1974, and interview with Gary Arnold, Equal Opportunity Specialist, OCR, July 29, 1974.

15. In the spring of 1973, HEW offices received a memorandum from the HEW Assistant Secretary for Administration and Management proposing that, wherever possible, functions be decentralized and decisionmaking be brought closer to the point of actual program activity. Offices were required to develop plans to implement such a decentralization.

16. At present, regional offices require headquarters approval for action in all three activities. Under decentralization, the regional director of OCR would oversee such activities.

17. Memorandum from Assistant Director (Administration and Management), Office for Civil Rights, to Regional Civil Rights Directors, Assistant Directors, Division Directors, Office of Policy Communications, and Office of Public Information, Subject: Decentralization, Aug. 16, 1973.

### C. Planning

Until fiscal year 1974, the only planning system utilized by OCR was the Operational Planning System (OPS), designed to monitor staff and budget allocations. In the OPS plan, program goals were covered only generally. Further, OPS lacked a breakdown of specific program activities for each regional office. Beginning with fiscal year 1974, however, OCR instituted a program planning system, which will enable division directors to monitor regional activities by requiring each regional office to submit an annual enforcement plan and a monthly report on its implementation. The overall plan includes goals for initiating compliance reviews, investigating complaints, and providing staff training within the fiscal year. In September 1973, regional offices finalized their annual plans for fiscal year 1974. They began submitting monthly reports as of December 1973.

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18. Regions IV (Atlanta) and VI (Dallas) have conducted more Title VI/IX reviews and complaint investigations than any other regions. In ESAA pre-grant desk reviews, particularly, the two regions are heavily obligated. Dallas estimates it will conduct 459 such reviews of more than three times as many as Region II (Philadelphia), the region with the next largest number. Atlanta will conduct 652, or more than four times those to be conducted by Philadelphia.

19. Interview with Willem van den Toorn, Executive Assistant to the Director, OCR, Nov. 8, 1973.

In addition to setting forth practical goals for fiscal year 1974, OCR also identified in the overall plan for the Elementary and Secondary Education Division policy issues which need to be resolved within the year, since they affect implementation of the elementary and secondary compliance program.

These include policy positions on transportation of students in cases of de<sup>20</sup> jure segregation and Title IX coverage of textbooks and athletics.<sup>21</sup> The plan also calls for refining procedures for reviewing special education programs, ability grouping practices,<sup>22</sup> ESAA projects, and vocational education programs.<sup>23</sup> OCR's use of the OPS and program planning systems should enable it to align resources with program needs annually.

Although OCR has made some plans to involve State education agencies in its activities relating to vocational education and some of its reviews of school districts with large concentrations of national origin minority children, it has not yet attempted to ensure that State education agencies share fully the<sup>24</sup> responsibility for obtaining compliance of all local school districts.

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20. Segregation which has resulted from State law or administrative action is called de jure segregation.

21. Memorandum from Lloyd R. Henderson, Director, Elementary and Secondary Education Division, OCR, to Peter E. Holmes, Director, OCR, Subject: Compliance Activity Plan for FY 74, Aug. 23, 1973.

22. Minority students often are placed in lower level classes in larger proportion than majority students. Once students are placed in lower "ability groups" or "tracks," they are likely to proceed through all grades in those groups and thus never receive the same quality of educational opportunity afforded their majority group counterparts.

23. In February 1974, HEW published a pamphlet entitled Focus on HEW which outlined its major goals and objectives for fiscal year 1975. OPS was the key element used in preparing this document. The five major objectives for the Office for Civil Rights are set forth in the publication. They cover 1) construction compliance, 2) health and social services, 3) emergency school aid, 4) employment in higher education institutions, and 5) higher education-student affairs. None of the major objectives deals with Title VI or Title IX compliance in elementary and secondary educational institutions. Department of Health, Education, and Welfare, Focus on HEW 50 (1974).

24. For a more detailed discussion of this point, see section on State agency reviews, pp. 109-111 infra.

Together, OCR and State agencies could require all school districts to conduct an analysis to determine if they are providing equal educational services and if they have student assignment problems. They would then have to develop remedies for all identified problems. Such plans could be submitted by the districts to State education agencies or OCR upon request in the same manner university affirmative action plans are now available for review to OCR's Higher Education Division.

## II. Organization and Staffing

### A. Structure

25

OCR headquarters is organized into a director's office, two assistants director's offices,<sup>26</sup> and four divisions--Elementary and Secondary Education, Higher Education, Health and Social Services, and Contract Compliance. Currently, the Elementary and Secondary Education Division is divided into four branches: Administration, Policy and Program Development, Operations, and Technical Support.<sup>27</sup>

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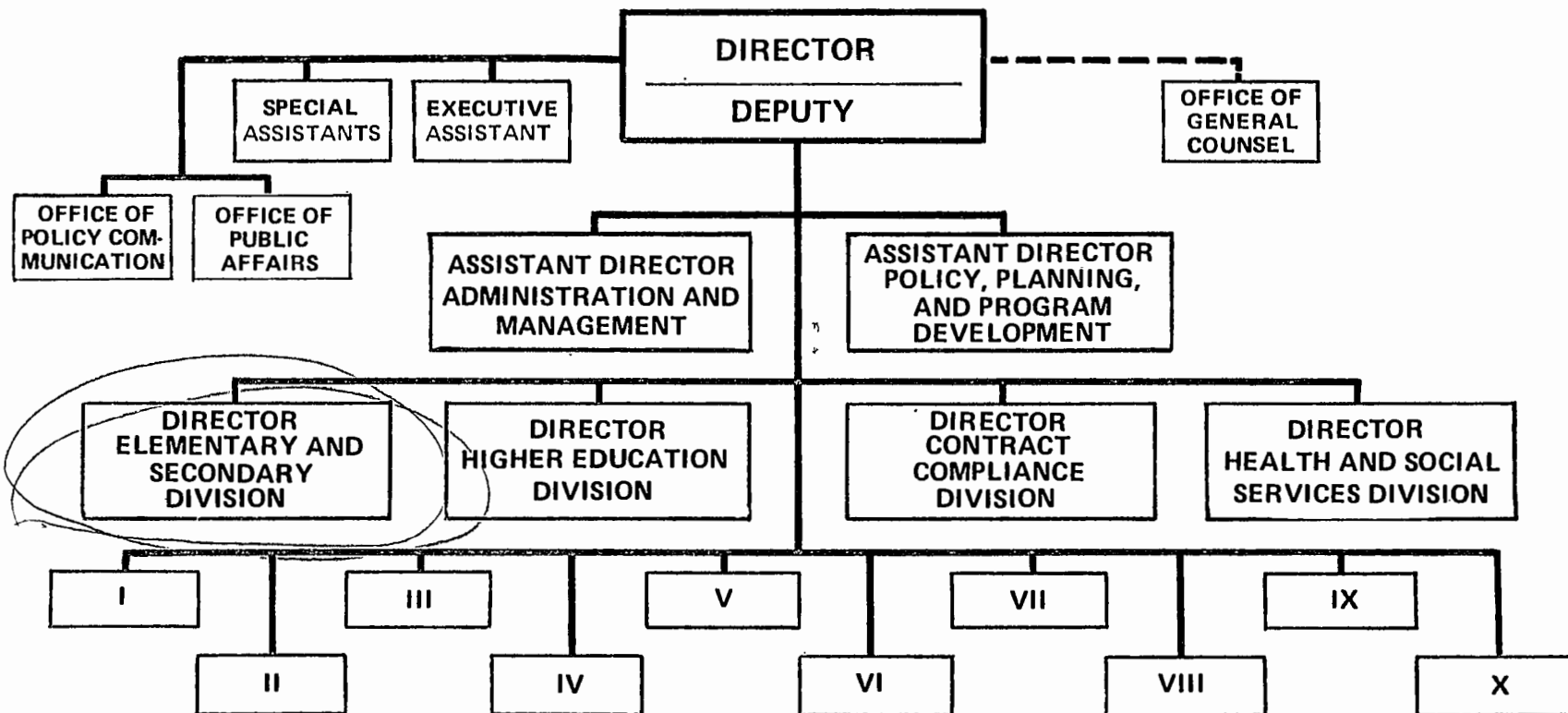
25. Auxiliary to the Director's office are a Deputy Director, an Executive Assistant, a Special Assistant, the Civil Rights Division of the Office of General Counsel, the Office of Policy Communication, The Office of Governmental Relations, and the Office of Public Affairs. The Deputy Director serves as the focal point for liaison with other agencies and individuals. Other special assistants are assigned a variety of tasks. On December 12, 1974, a new office, the Office of New Programs, was added to the Director's office. 39 Fed. Reg. 43866 (Dec. 12, 1974).

26. The two assistant directors' offices are: 1) Administration and Management, and 2) Policy, Planning, and Program Development.

27. Functions of the four branches are as follows: (1) Administration--conduct of basic administrative duties, including correspondence, filing, and personnel; (2) Operations--oversight of priorities and procedures, clearinghouse for cases initiated by regional offices, maintenance of compliance activity information, and response to information requests; (3) Program and Policy--coordination of annual enforcement plans, maintenance and development of policy, establishment of new techniques and procedures, and provision of supportive services to regional offices; and (4) Technical Support--coordination of technical assistance, maintenance and implementation of training goals, collection and analysis of data, and development of information and analysis systems to support compliance activities. Memorandum from Don Vernon, Acting Director, Elementary and Secondary Division, to staff members in the Elementary and Secondary Education Division, Subject: Meeting on Divisional Reorganization--August 10, 1973, OCR Conference Room--10 a.m., Aug. 9, 1973.



**U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE  
OFFICE FOR CIVIL RIGHTS - ORGANIZATION CHART**



Each regional office has a regional director's office, and four branches corresponding to headquarters divisions. Organization of functions within individual Elementary and Secondary Education branches varies, however, from region to region. For example, Region VI (Dallas) has unofficially divided its Elementary and Secondary Education Branch into three units, according to the way districts are classified: (1) the form 441-national origin review team, responsible for reviewing districts which have voluntarily submitted 441  
<sup>28</sup> assurances; (2) the ESAA-form 441b unit, which monitors ESAA programs and  
<sup>29</sup> districts which submitted voluntary desegregation plans under 441b; and  
 (3) the complaint-teacher firing unit, responsible for investigating all complaints except those concerning districts under review by the other two units. Region V (Chicago) has divided its Elementary and Secondary Education Branch into two sections, with one located in Chicago and the other in  
<sup>30</sup> Cleveland. The two offices function along geographic lines, with the Chicago office servicing Illinois, Wisconsin, Minnesota, and northern Indiana (principally Gary and East Chicago), and the Cleveland office covering Ohio, Michigan, and southern Indiana.

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28. Form 441 is the standard assurance submitted by HEW grantees agreeing to comply with Title VI provisions, in which the district assures OCR that it has eliminated all vestiges of the dual school structure and that it will not discriminate in the future.

29. Form 441b is an assurance of compliance with Title VI submitted by districts formerly maintaining dual systems of education for black students and white students, in which the district assures OCR that it is going to comply with Title VI and the desegregation plan it submits. A plan to desegregate the district must accompany the assurance.

30. The Cleveland office was established in 1969 and includes the entire Contract Compliance Branch as well as more than half the Elementary and Secondary Education Branch. OCR reports that there are six professional staff members in Chicago and nine in Cleveland. OCR chart, Elementary and Secondary Education Division, Full-time Professional Employees by Location, Race, Sex, and Grade, May 25, 1973.

All regional civil rights directors are responsible directly to headquarters, rather than to the HEW Regional Director. As GS-15's, they are equal in rank to the Regional Commissioners of the U.S. Office of Education, HEW. Except for mandatory ESAA involvement, however, OCR does not monitor compliance within any HEW-administered elementary and secondary education program as such. The Title I program, for example, has received much criticism for misuse of funds; yet OCR has never investigated the program to determine to what extent such misuse has had an adverse effect on minorities and whether Title I staff adequately monitor the programs. In Region V (Chicago), the Regional Director of HEW has given regional OCR the authority to approve all grants made by that regional office.<sup>31</sup> In this manner the regional OCR will be able to assist in determining whether districts are using Federal funds to further equal educational opportunity. A major shortcoming in this arrangement is that by reviewing all, rather than a percentage, of grants OCR effectively relieves program staff of responsibility for ensuring nondiscrimination on the part of potential grantees. If it were to provide program staff with guidelines for determining civil rights compliance, OCR could act as a check for determinations made by program staff and thus devote more time to its major civil rights activities.

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31. Interview with Kenneth A. Mines, Regional Director, OCR Region V (Chicago), May 14, 1973, in Chicago, Ill.

### B. Workload

In fiscal year 1974, OCR had a staff of 872 as compared to a staff of 708<sup>32</sup> in June 1972. As of June 1973, there were 116 OCR Elementary and Secondary Education professional staff members<sup>33</sup> in headquarters and the ten regional offices.<sup>34</sup> The headquarters office has the largest staff, with 25 staff members. The Atlanta, Chicago, and San Francisco offices have 15 staff members each,

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32. Focus on HEW, supra note 23, at 50. In fiscal year 1974, OCR had a budget of 19.2 million.

33. As of May 1973, OCR's Elementary and Secondary Education professional staff was 47 percent black, 12 percent Spanish speaking, and 40 percent other (including white). Together, Native Americans and Asian Americans comprised less than 1 percent. Despite large numbers of Puerto Ricans in the New York region, Mexican Americans and Puerto Ricans in the Chicago region, and Cubans in the Atlanta region, there were no Spanish speaking staff members serving on the professional staffs of any of those regional civil rights offices. In addition, there were no Native American professional staff members in the Dallas, Denver, or San Francisco regional offices, which collectively serve 62.5 percent of the total Native American population.

Females made up only 35.3 percent of the professional staff. The regions in which they were most severely underrepresented are Region III (Philadelphia), Region IV (Atlanta), and Region VIII (Denver), which collectively employed only six professional women, none of whom held positions above GS-9, while all 24 of the men on those staffs held positions GS-11-14.

34. Under a fiscal year 1973 supplemental appropriation, headquarters and regional offices have been assigned 79 additional positions for ESAA activities. Headquarters 19; Boston 1; New York 7; Philadelphia 9; Atlanta 10; Chicago 8; Dallas 14; Kansas City 1; Denver 1; San Francisco 8; and Seattle 1. OCR's budget request for fiscal year 1974 includes 30 additional positions for the Elementary and Secondary Education Division (Title VI and ESAA). The chief of the Elementary and Secondary Education Division's Operations Branch reports that approximately 90 to 95 percent of the 79 ESAA positions were filled between June and December 1973. However, because these persons were hired after the Commission conducted its field investigation, this report does not reflect the racial/ethnic and sex composition of these new positions.

while Dallas and Philadelphia have 12 each and New York has 10 staff  
 35 members. The Kansas City, New York, Dallas, and Chicago regions each  
 have between 610 and 1,986 districts to monitor, 36 followed by the Atlanta,  
 Philadelphia, and San Francisco regions with between 544 and 588 districts.

OCR's additional responsibilities in fiscal year 1973 limited the time  
 spent on Title VI activities. Between January and June 1973, OCR's Elementary  
 and Secondary Education staff members were engaged in assisting the U.S. Office  
 of Education in the selection and review 37 of districts under the Emergency  
 School Aid Act. During that period OCR estimated that 90 percent of its pro-  
 fessional staff time in the southern regions and 20 percent in the northern  
 38 regions was devoted to ESAA activities, with the remainder of time being  
 39 utilized in Title VI functions.

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35. The remaining four offices, Boston, Kansas City, Denver, and Seattle, have five, two, three, and two staff members respectively.

36. These data are taken from an OCR planning staff document providing statistics on a representative sampling of 7,709 school districts nationwide. The number of districts which each region is responsible for monitoring is much higher, since there are approximately 17,000 school districts in the United States. The sampling of 7,709 school districts, however, represents most of the districts having minority students. Breakdowns are given by State, districts, total schools, and whether the districts have submitted plans, have court-ordered plans, are in litigation, or are districts which have submitted 441 assurances.

37. OCR processed the applications of approximately 1,100 school districts interested in receiving ESAA funds. OCR was unable to provide information on the number of pregrant reviews conducted of potential ESAA grantees. The Education Branch chief in Region VI, which has a large number of ESAA grantees, indicates, however, that this staff conducted 10 pregrant reviews.

38. The northern regions are Regions I, II (plus Pennsylvania and Delaware), V, VII, VIII, IX, and X. The southern regions include Regions VII (less Pennsylvania and Delaware), IV, and VI.

39. Letter from Patricia A. King, former Acting Director of OCR, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Feb. 23, 1973.

Since March 1973, OCR Elementary and Secondary Education staff have been reviewing and notifying school districts of noncompliance in accordance with a court injunction in the case of Adams v. Richardson. OCR was re-  
 quired to take action to secure compliance from 197 school districts.  
 J. Stanley Pottinger, Director of OCR at the time of the court order, estimated that compliance with the court's directive would result in a 40 percent increase over the normal workload of OCR staff during the first 90 days of its implementation, adding 2,250 staff days for OCR and 1,235 staff days for attorneys in HEW's Office of General Counsel (OGC).

According to OCR, Adams v. Richardson and ESAA occupied most of the Elementary and Secondary Education staff's time during calendar year 1973, continued to be the first and second priorities in OCR activities throughout fiscal year 1974, and remain the top priorities for fiscal year 1975.

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40. These districts include 74 found to be out of compliance with Title VI during the 1970-71 school year; 42 found by HEW to be in presumptive violation for having racially isolated schools and which have not satisfactorily explained or rebutted the findings; and 85 districts which have been charged with being in presumptive violation for having racially isolated schools but which had not been required to explain or rebut that finding.

41. J. Stanley Pottinger was succeeded as Director of OCR by Peter E. Holmes, on April 12, 1973.

42. Notice of appeal by defendants from order of February 16, 1973.

43. HEW response to Commission questionnaire, June 18, 1973 [hereinafter cited as HEW response].

44. Arnold interview, supra note 14.

Given the continuing workload associated with those two obligations, and the necessity to maintain a viable Title VI enforcement program, OCR is obviously<sup>45</sup> badly in need of a larger staff.

Simply increasing the size of the staff, however, is not an adequate response to the problem. There are other steps which OCR should take which would increase its capacity within its present resources for dealing more effectively in both quantitative and qualitative terms, with its many responsibilities in the area of elementary and secondary education. The remainder of this chapter will discuss these steps. They include, for example, the development of a comprehensive set of guidelines which define the exact nature of HEW requirements, the adoption of a requirement that States assume responsibility for securing compliance for their school districts, the adoption of a requirement that school districts conduct a self analysis of their compliance status and take affirmative action to correct any deficiencies noted in the analysis, and the far more aggressive and prompt use of the administrative sanctions available to HEW.

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45. ESAA programs already funded will have to be visited by OCR, and OCR is still in the process of securing compliance from school districts covered by Adams v. Richardson. For a discussion of the status of these schools, see pp. 102-109 infra.

### C. Training

OCR's training program is designed to provide Elementary and Secondary Education staff with the expertise necessary to conduct compliance reviews. Particularly under the May 25 memorandum and equal educational services approach,<sup>46</sup> it became necessary to inform staff concerning the subtle patterns and methods of discrimination against minority children within integrated schools.

New OCR Elementary and Secondary Education staff members are provided 3 months of orientation in several locations nationwide. This includes briefing with HEW program personnel, Federal agencies, private organizations, and community groups. This initial training is followed by the development of an individual training plan to cover a 9-month period.<sup>47</sup>

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46. The May 25 memorandum originally only covered discrimination against national origin minority group children. In a letter to this Commission, OCR described how the scope of the May 25 memorandum "has been broadened during the last two years to include black as well as ethnic minority children as clients and all in-school discrimination practices as the subject matter." King letter, supra note 39. Reviews of districts using the assumptions set forth in the May 25 memorandum were formerly called national origin reviews, but are now known as "equal educational services reviews." These reviews are supposed to include the issue of student assignment.

47. HEW response, supra note 43.



Periodic training for headquarters and regional OCR Elementary and Secondary Education staff is provided in large part by OCR's Office for Special Programs. Since June 1970 training has concentrated primarily on familiarizing staff with the principles and techniques involved in conducting reviews under the May 25 memorandum. OCR provides frequent training opportunities, including both formal training and onsite training.<sup>48</sup>

Between June 1970 and December 1971, 1- and 2-day workshops were held in Dallas, San Francisco, Washington, D.C., and New York to discuss provisions of the May 25 memorandum. These sessions were followed by onsite training in the Beeville, Texas; East Chicago, Indiana; and Bakersfield, California, school districts. In January 1972, a session was held in Dallas on the techniques to use in national origin reviews under the May 25 memorandum. The attendees spent the 2 weeks following the session taking part in the review of the El Paso, Texas, Independent School District, including onsite investigations, analysis of data, and report writing.

In March 1972, Education Branch chiefs from the 10 regional offices attended a 3-day training session in Washington, D.C., concerning the legal bases for investigating school districts under the May 25 memorandum. Discussion centered around diagnostic tests as they affect placement of children in classes for the educable mentally retarded (EMR),

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48. Id. and King letter, supra note 39.

ability grouping and tracking, data collection and analysis, and case studies of the El Paso, Texas, and Tucson, Arizona, reviews. In May 1972, Education Branch staff from regional offices were provided a 5-day training program in techniques for conducting compliance reviews and for writing reports, with an emphasis on the concept of equal educational services. From June through September 1972, headquarters also held training programs covering statistical analysis for Education Branch staff.

In the fall of 1972, Education Branch staff attended training given by the U.S. Office of Education on OCR's role in selecting school districts for funding under ESAA. From February to April 1973, Education Branch staff attended 3-day workshops on compliance report writing, taught by consultants.

In April and May 1973, training sessions, provided jointly by USOE and OCR headquarters staff, were held in Washington, D.C., and the regional offices on ESAA postgrant procedures. No training was provided OCR staff between May and December 1973. Training sessions for ability grouping and special education took place in December 1973 and January 1974 in New York, N.Y.; Cleveland, Ohio; San Francisco, Calif.; Atlanta, Ga.; Dallas, Tex.; and Philadelphia, Pa., and were attended by all Elementary and Secondary Education staff. Vocational education program training was held in May and July 1974 in New York, N.Y.; Kansas City, Mo.; Atlanta, Ga.; Chicago, Ill.; San Francisco, Calif.; and Dallas, Tex. These sessions were open to all Elementary and Secondary Education staff but, for the most part, attendees were selected by the regional office officials.

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49. Arnold interview, supra note 14. Under Adams v. Richardson, HEW has been required to review State-administered vocational educational schools. For a more detailed discussion of this effort, see p. 102 infra.

#### D. Auxiliary Offices

##### 1. The Office of General Counsel

OCR Elementary and Secondary Education staff work closely with the 24 attorneys in the Civil Rights Division of the Office of General Counsel in headquarters. OGC advises OCR on numerous general matters, especially on legal problems and principles involved in conducting compliance reviews, particularly when new or complex compliance issues are faced, such as what constitutes discrimination in equal educational services. OGC's participation in the Shawano, Wisconsin, School District review, for example, was essential because Shawano was the first district reviewed in accordance with the May 25 memorandum for discrimination in the provision of educational services for Native American children.

All letters of noncompliance must be approved for legal soundness by OGC. In addition, OGC staff members sometimes accompany the OCR staff onsite or take part in negotiations with school districts when the district is represented by counsel or when OCR is contemplating enforcement action against a district.

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50. Examples of reviews in which OGC participated include Berkeley City Unified School District, Cal.; Del Rio Independent School District, Tex.; Ferndale City School District, Mich.; Prince George's County School District, Md.; and Winslow School District, Ariz. A partial listing provided by OCR included 32 school districts in 15 States.

Before HEW issued the May 25, 1970 memorandum, OGC prepared an analysis of the legal basis for regarding national origin discrimination as a Title VI violation.<sup>51</sup> A major issue covered in the legal memorandum was whether the actions or failure to act cited in the May memorandum's four provisions constituted discrimination under Title VI. OGC determined that affirmative steps, including offering bilingual education to equalize educational services, could be required, since the practices adversely affecting the educational opportunity of national origin group students cited in the memorandum tended to discriminate against them.<sup>52</sup>

While we note that similar legal analyses have been obtained on other issues, no input from OGC was requested on such important issues as the use of transportation as a desegregation tool and metropolitan desegregation.<sup>53</sup> In failing

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51. Memorandum from Edwin Yourman, Assistant General Counsel (Civil Rights), HEW, to St. John Barrett, Deputy General Counsel. Subject: Legal Basis for Proposed Memorandum to Local School Districts Regarding National Origin Discrimination, Apr. 10, 1970.

52. Letter from Peter E. Holmes, Director, OCR, HEW, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Nov. 15, 1974.

53. OCR recently wrote to this Commission that:

From decisions with respect to enforcement of the court order under Adams v. Richardson, to the interpretation of court decisions and Congressional legislation, OGC provides this office with a constant and absolutely essential flow of legal opinion and analysis. In essence, what the Commission is saying in making this charge is that, other than reviewing cases prior to the initiation of enforcement proceedings and providing assistance on individual reviews, OGC contributes nothing else. Unfortunately, the record is too voluminous to cite instances to the contrary. One additional point, however: the report obscures the fact that many novel "issues", to use the report's word, surface during the conduct of reviews and in such cases, either in writing or orally, OGC staff is invariably asked for legal advice and analysis. There is constant dialogue between the OCR Directors and individual attorneys on questions of law, moreover. Id.

to do so, OCR may be depriving itself of identifying a legal basis for comprehensive approaches for desegregating schools.

OGC regional staff have been granted a total of 18 positions for the purpose of providing all OCR regional offices with legal advice and for assisting in the review of investigative cases and letters of findings. Each regional OGC office now devotes at least one personyear to regional civil rights work. This shift to legal support in the field, carried out as part of decentralization, is designed to expedite the handling of civil rights cases by making legal counsel more readily available to the OCR regional offices.

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54. Holmes letter, supra note 52. At the time of Commission field visits, this system was in effect in Region VI (Dallas), where OCR worked directly with regional OGC staff, rather than with headquarters OGC. Like the headquarters OGC, the Dallas regional attorney provided legal input on important reviews and accompanied OCR staff on site. For example, Dallas regional OGC accompanied OCR onsite to Uvalde Independent School District, Texas and El Paso Independent School District, Texas. Although the Dallas OCR staff was able to send letters of noncompliance directly to school districts from the regional office, the regional counsel still referred districts to OGC in Washington, D.C., for further negotiations and enforcement action if voluntary negotiations failed. Recommendations for enforcement action were included in the materials sent to headquarters.

## 2. The Office of Special Programs

The Office of Special Programs (OSP), with a staff of six, works closely with all branches in OCR, but has been most heavily involved in the work of the Elementary and Secondary Education Division. OSP is responsible for developing new approaches to enforcement of Title VI and for providing technical assistance to regional offices. Once the new approaches have been refined, the Elementary and Secondary Education Division integrates them into the regular compliance program. For example, OSP was responsible for the evolution of the May 25 memorandum's principles into what is now called the "equal educational services approach."<sup>56</sup> Between 1971 and 1972, OSP participated in at least

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55. This office was abolished in October 1973. However, since it played a critical role in OCR activities during fiscal year 1973 and early 1974, we have included the description for the reader's information.

56. See note 46 supra for an explanation of this concept.

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 six onsite reviews under the May 25 memorandum to train Elementary and Secondary Education Division staff in the techniques of the new approach.

Beginning in August 1973, the OSP staff was involved in a review of the New York City public schools. The review, which OCR expects will take 3 years to complete, concentrates on equal educational services for minority pupils, particularly Puerto Rican students. OCR will consider for the first time in that review the comparability of resources allocated individual schools by the school district and possible discrimination in discipline policies and practices. In addition, the review will include an assessment of racially or ethnically isolated schools. Desegregation of majority minority schools

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57. Reviews in which OSP participated include Bakersfield City School District, Cal.; Tucson Elementary School District # 1, Ariz.; Boston Public Schools, Mass.; Shawano School District, Wisc.; El Paso Independent School District, Tex.; and East Chicago City School District, Ind.

58. Interview with Barry Anderson, Program and Policy Development Administrator (Employment), OSP/OCR, June 29, 1973.

59. For a discussion of the educational needs of Puerto Ricans in New York City, see U.S. Commission on Civil Rights, Hearing before the U.S. Commission on Civil Rights, New York City, N.Y., Feb. 14-15, 1972.

60. Anderson interview, supra note 58.

61. Majority minority schools are those in which more than 50 percent of students enrolled are minority.

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 within "community school districts" will be one of OCR's goals,  
 but it is unlikely that desegregation across community school dis-

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 trict lines will be required.

In the past, OCR has concentrated on reviewing small school districts having approximately 10,000 students. The Director of the Office of Special Programs stated that the New York City review, which involves 1,140,359 students, and proposed reviews of the Chicago and Los Angeles school systems are the result of a major program decision to review large city school districts. By concentrating on large cities, OCR expects to focus public attention 64  
 on the needs of minority children for equal educational services.

With its sophisticated review procedures, OCR can effectively pin-

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62. New York City's 927 elementary and secondary schools are divided into 31 community school districts, each having a separate school board. The New York City Board of Education oversees the operations of all 31 boards.

63. Anderson interview, supra note 58.

64. Presentation by Martin Gerry, Director of OSP, OCR, in the Administrative Action Work Lab, the National Bilingual Bicultural Institute, sponsored by the National Education Task Force de la Raza and the National Education Association, Nov. 29, 1973, in Albuquerque, N.M.



point subtle forms of discrimination in such districts. Because of the scope of large city reviews, however, OCR's resources will be taxed, both in efforts to force the districts to change inequitable conditions and in the provision of technical assistance.

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### III. Compliance Mechanisms

#### A. Data Collection

Each October of even numbered years, schools in the following categories are required to submit survey forms to OCR in headquarters:

(1) all districts eliminating dual school systems pursuant to court order; (2) all districts eliminating dual school structures pursuant to a voluntary desegregation plan; (3) all districts involved in private and public litigation relating to desegregation; and (4) a random sample of all remaining districts containing 300 or more pupils (except those in Hawaii). In

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65. Id.

66. Hawaii is the only State where the State education agency is also the local education agency. Thus, it has more than 300 pupils in the district. Hawaii has been exempted by HEW from providing any racial-ethnic data on students and faculty, however, because officials in Hawaii contend that race and ethnicity cannot be judged accurately in sight observations and that discrimination does not exist in Hawaii. See p.32 infra for a discussion of this argument.

odd numbered years, a portion of the same districts is surveyed. Districts receive two forms, one which requests information about the district as a whole (Form OS/CR 101) and another which surveys information for each individual school (Form OS/CR 102).

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67. During odd numbered years, OCR surveys 3,000 school districts as opposed to 8,000 in even numbered years. All districts under court order, litigation, implementing voluntary desegregation plans, plus districts having 10 percent or more minority students and all districts having one school with 50 percent or more minority students are required to submit data on odd numbered years as well as even numbered years. In even numbered years, OCR covers approximately 95 percent of school districts having minority children, while in odd numbered years, OCR covers approximately 90 percent of school districts having minority students.

In fiscal year 1973, form 101 required the district to report by race and ethnicity the following: pupil membership in the system, expulsion statistics for the system, resident school age children not enrolled in the school system, full-time professional instructional staff, and part-time professional instructional staff. The form also included questions on bilingual instruction in the system <sup>68</sup> and new school construction or acquisition of sites. 69

The form 102 for fiscal year 1973 collected racial and ethnic data on such matters as pupil membership for the individual school, the number of pupils retained in the same grade they attended the previous year, the number of pupils in grades 3, 6, 9, and 12, full-time professional instructional staff, and pupil membership in class sections or ability groups within a grade. Another question requested the number of pupils transported at pupil expense.

School districts are instructed to return both forms to headquarters OCR. In addition, OCR requests that the school district send one copy of each of the forms to the regional OCR office and to the State education agency. One copy is to be retained by the district and, in the case of

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68. The questions on bilingual instruction concern whether any instructors teach any subject (except foreign language instruction) in a language other than English; if so, the number of teachers offering such courses and the number of students receiving such instruction; and whether instructional materials (except foreign language instructional materials) are written in a language other than English.

69. The questions on new school construction or site acquisition concern whether the districts plan to acquire any new sites; the number; the number of schools to be operated on the sites; whether the districts plan to construct any new schools; if so, how many; renovations of existing buildings; if so, how many; and the expected racial-ethnic composition of the schools built having the largest percentage of minority students.

Form 102, one copy is retained by the appropriate school principal.

This information provides up-to-date references for OCR regional staff in reviewing districts and assists them in monitoring the progress of school integration. At least one regional office, San Francisco, relies on the 101 and 102 forms almost exclusively in selecting school districts with racially isolated schools for review. 70

OCR publishes a summary of the data for even numbered years in its Directory of Public Elementary and Secondary Schools in Selected Districts, which includes the racial-ethnic composition of students and faculty by numbers and percentages <sup>71</sup> for more than 8,000 school districts nationwide.

The publication is not available, however, until 2 years after the <sup>72</sup> data are collected.

**70.** Region IX (San Francisco) selects for review those school districts having a minority student enrollment of less than 50 percent and one or more schools with 80 percent or more minority student enrollment. The Education Branch chief estimates that several hundred school districts in the region have ethnically isolated schools. Interview with John Palomino, Education Branch Chief, Region IX (San Francisco), OCR, Mar. 19, 1973, in San Francisco, Cal.

**71.** The publication includes data for American Indian, Negro, Oriental, Spanish American, minority total, others, and total. Numbers and percentages of students and faculty are provided for the district as a whole. The number of students in each category for individual schools is also given. The survey includes State totals, giving the numbers of systems, schools, minorities by group and total, nonminority, and total students.

**72.** OCR did not release the data collected in 1972 until mid-1974.

These data are utilized by some States to supplement racial and ethnic data collected by State and local agencies. The State of Illinois' Department of Public Instruction, for example, uses the 101 and 102 forms to assist in the enforcement of the Armstrong Act,<sup>73</sup> the State's racial balance law.<sup>74</sup>

The data requested in fiscal year 1973 had several limitations. Although they provided an adequate indication of the degree of racial or ethnic isolation within a given school system, obvious violations under the May 25 memorandum could not be detected. Information on bilingual instruction was collected in 101's for the school district as a whole, but the distribution of bilingual instruction within the district's schools could not be determined, since the 102's did not require the same information. HEW would, therefore, not know if bilingual education were offered in all schools having large numbers of national origin minority children. While 102's did provide data on the number of students enrolled in special education by race and ethnicity, these figures included students enrolled in classes for gifted children

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73. The racial balance section of the Armstrong Act is as follows:

Sec. 10-21.3. Attendance units. To establish one or more attendance units within the district. As soon as practicable, and from time to time thereafter, the board shall change or review existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, or nationality. All records pertaining to the creation, alteration or revision of attendance units shall be open to the public. (Amended by Act approved June 13, 1973.)

74. Interview with Robert A. Lyons, Director, Equal Educational Opportunity Program, Illinois Department of Public Instruction, May 14, 1973, in Chicago, Ill.

and were useless in detecting EMR placement discrimination. Racial and ethnic data on disciplinary actions taken against students and dropout rates, both of which reflect institutional discrimination and inadequacy in dealing effectively with minority students, are also not recorded in the 1972, 101 and 102 forms.

In addition, the forms were sometimes not specific enough for individual regions. For example, French Americans or Portuguese Americans would probably be categorized under "all individuals not included in columns 1-4"<sup>76</sup> and would therefore be included in the statistics for whites, when in fact each constitutes a distinct minority group in the New England area and faces educational problems as serious as those of other minority groups.<sup>77</sup> In the San Francisco region, immigrant Chinese American and Pilipino<sup>78</sup> American

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75. California Rural Legal Assistance (CRLA) has been engaged in litigation against school districts in California for placing disproportionate numbers of Chicano and black children in EMR classes because of language deficiencies. Since OCR data on special education includes students placed in gifted as well as EMR classes, CRLA could not determine the extent of minority placement in EMR, and had to collect its own data for school districts. Interview with Martin Glick, Director, CRLA, Mar. 20, 1973, in San Francisco, Cal.

76. Columns 1-4 are American Indian, Negro, Oriental, and Spanish Surnamed American. Portuguese Americans might be erroneously categorized under "Spanish Surnamed American."

77. Both French Americans and Portuguese Americans face the problem of English language deficiencies, for example.

78. The term "Pilipino" is used by Pilipino Americans instead of "Filipino" for three reasons:

- 1) "Filipino" is often pronounced "Pilipino" by Pilipino Americans;
- 2) The "f" sound in "Filipino" is associated with Spanish colonization, since the Spanish named the Philippines after King Philip; and
- 3) "Pilipino" is the national language of the Philippines.

79 children face a greater degree of language difficulty and discrimination in EMR placement than is faced by Japanese American children. Separate data would more clearly identify the groups needing equal educational services, particularly in terms of English language difficulties.

Fiscal year 1974 and 1975, 101 and 102 forms eliminated some of the shortcomings of the old forms. OCR requested by race and ethnicity more specific information on special education on both the 101 and 102 forms, according to whether students were placed in EMR or educable mentally handicapped (EMH) classes, trainable mentally retarded (TMR) or trainable mentally handicapped (TMH) classes, or other special education classes. For the first time, OCR requested information by race and ethnicity concerning the number of students suspended and the total number of suspension days, ability grouping, different course requirements for female and male students, the number of nonblack students enrolled in bilingual instruction, and the number of students in the first grade in the system whose primary language is other than English.

Data on bilingual instruction by school, dropout rates, and specific regional ethnic group categories are still not requested in the forms. Although Title IX was passed more than 2 years ago, data on sex cross-classified by race and ethnicity are also not requested. Changes which may prove unwise were the elimination of faculty data and the alteration of data collected by classes within grades so that enrollment is reflected for minority children as a group rather than by

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79/ Between 1967 and 1971, Chinese immigrants numbered 98,001 and Pilipinos 108,014, as compared with 20,458 Japanese immigrants during that same time period. Approximately one-third of these immigrants cited California as the intended State of residence. U.S. Department of Justice, Immigration and Naturalization Service, Annual Reports, 1967-1971.

separate ethnic categories. Faculty data are to be collected and shared with OCR by the Equal Employment Opportunity Commission (EEOC), which now has jurisdiction over employment discrimination in educational institutions.<sup>80</sup>

Only one State, Hawaii, is not required to submit forms 101 and 102.<sup>81</sup> Despite the State's claim that there is no discrimination on the basis of race or national origin, Hawaii is experiencing immigration of non-English-speaking groups, such as Filipinos and Samoans. The submission by Hawaii of 101 and 102 data would enable OCR to determine if such groups are facing discrimination in EMR placement and ability grouping within the school system due to English language difficulties. In addition, data on different course requirements by sex are needed by OCR to assist in determining the extent of Hawaii's compliance with Title IX.

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80. The Equal Employment Opportunity Act of 1972 has amended Title VII of the Civil Rights Act of 1964 to give EEOC jurisdiction over employment discrimination in education institutions.

81. See note 66 supra for an indication of why OCR exempts Hawaii from filing Forms 101 and 102.



## B. Guidelines

### 1. Instruction to School Districts

Following issuance of its Title VI regulations in 1964, HEW initiated a program solely concerned with eliminating segregation of black and white students in elementary and secondary schools, primarily in the deep South.

This effort was initially characterized by uncertainty on the part of HEW staff, recipient school districts, and the general public concerning compliance standards implicit in the regulations.<sup>82</sup>

In April 1965,<sup>83</sup> HEW issued its first set of guidelines. School districts were

given three choices for satisfying the Title VI requirement:

- (1) Desegregated districts could file a civil rights assurance;
- (2) school districts under court order could provide HEW with a copy of the order and agree to comply with it; or (3) school districts could submit desegregation plans for approval by the Commissioner of Education.

Districts choosing to submit plans could integrate schools by assigning students to schools within nonracial, geographic zones, by allowing

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82. For a discussion of the development of HEW's civil rights program, see U.S. Commission on Civil Rights, HEW and Title VI. A Report on the Development of the Organization, Policies, and Compliance Procedures of the Department of Health, Education, and Welfare under Title VI of the Civil Rights Act of 1964 (1970).

83. "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools" hereinafter referred to as the 1965 Guidelines.

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freedom of choice, or by utilizing a combination of the two.

Definitive compliance standards were missing from the 1965 guidelines, and freedom of choice plans often failed to result in desegregation of schools. In 1966, OCR issued a second set of guidelines, which set forth criteria for determining if freedom of choice plans

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84. "Freedom of choice" plans theoretically allowed students to attend the school of their choice. Such plans usually failed to bring about desegregation. Three years after the 1965 guidelines were released, in the case of *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), the U.S. Supreme Court found that a freedom of choice plan was not acceptable per se unless it resulted in the abolishment of the dual school system.

85. Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964 hereinafter referred to as the 1966 Guidelines/.

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were being implemented successfully. School districts were also required to undertake affirmative desegregation of faculty and staff.

It was not until March 1968, however, that OCR issued to school districts guidelines which embodied its compliance standards and review procedures. The 1968 guidelines basically reiterated and clarified Title VI regulations by describing general compliance policies, compliance policies applicable to systems eliminating dual structures pursuant to a voluntary desegregation plan, and type of compliance

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86. These standards were set forth to assist in determining which free choice plans would be reviewed:

1. If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected.
2. If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965-66 school year.
3. If a lower percentage of students transferred for the 1965-66 school year, then the rate of increase in total transfers for the 1966-67 school year would normally be expected to be proportionately greater than under (2) above.
4. If no students transferred from segregated schools under a free choice plan for the 1965-66 school year, then a very substantial start would normally be expected, to enable such a school system to catch up as quickly as possible with systems which started earlier. If a school system in these circumstances is unable to make such a start for the 1966-67 school year under a free choice plan, it will normally be required to adopt a different type of plan. 1966 Guidelines, supra note 88 at 181.54.

87. These policies covered areas such as school organization and operation, educational opportunity, education facilities and services, and professional staff.

88. This section of the 1968 guidelines described different areas which might be covered in a voluntary plan, including student assignment patterns, new and special educational programs, transportation of students, and consolidation and construction of schools.

activities to be engaged in by OCR staff. Although in 1968 the focus of OCR's compliance program was on desegregation of dual school systems, the guidelines also covered school systems' responsibility to provide equal educational opportunity for all students.

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89. These activities included voluntary compliance efforts, technical assistance, reports, reviews, negotiation, cooperation with State education agencies, and enforcement action.

90. In Subpart B: General Compliance Policies, the guidelines state that:

School systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system. Providing equal educational opportunity does not, however, require school systems to offer an identical educational program for each student, or to fund each school, curriculum, course or activity on the same basis, if the variations in programs and funding do not deny educational opportunities to students on the ground of race, color, or national origin. (Based on Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. § 2000d-1.)

and further, that:

Where there are students of a particular race, color, or national origin concentrated in certain schools or classes, school systems are responsible for assuring that these students are not denied equal educational opportunities by practices which are less favorable for education advancement than the practices at schools or classes attended primarily by students of any other race, color, or national origin.

With the issuance of the May 25 memorandum in 1970, OCR reemphasized the principle that the denial of equal educational opportunity is as discriminatory as the maintenance of a dual school system. The memorandum set forth the responsibility of school districts to provide national origin minority group children with an equal educational opportunity by instituting language programs and other services needed to maximize their success in the school system. The May 25 memorandum is limited in its coverage to language programs, ability groups, and educable mentally retarded practices. Although it now has four years experience enforcing the equal educational services concept, OCR has not yet prepared an updated version of the Memorandum to reflect areas now covered in reviews, such as discriminatory allocation of district resources, or to emphasize that the burden of proof is on school districts to prove that language programs, provided to language minority students, are effective. In addition, a revised version should indicate that the Memorandum's principles are now applied to all minority children rather than solely to national origin minority group children.

A fifth document, a memorandum entitled "Nondiscrimination in Elementary and Secondary School Staff Practices," issued in January 1971, informed chief State school officers and school superintendents of OCR's position that discrimination in hiring, promotion, demotion, dismissal, or other treatment of faculty or staff serving the students has a direct bearing on equal educational services and is therefore prohibited by Title VI. Descriptions of what constitutes discrimination in those areas are enunciated in that memorandum.

OCR is considering the issuance of a separate policy on the elimination of discrimination in the assignment of children to EMR

<sup>91</sup> classes. The proposed position statement would essentially describe the elements that should be considered in assigning children to EMR classes.<sup>92</sup>

In addition, Region V's (Chicago) staff prepared a memorandum on equal educational services for migrant children.<sup>93</sup> The memorandum restates some of the principles of the May 25 memorandum, while delineating additional responsibilities of State and local educational agencies to offer equal educational opportunities to migrant students, including, for example, ensuring that migrant children receive the same number of instructional days as is stipulated in the standard instructional term for nonmigrant children.<sup>94</sup>

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91. Memorandum from the Director, Office for Civil Rights, to the Secretary of HEW, Subject: Issuance of Policy Position Regarding Elimination of Discrimination in the Assignment of Children to Special Education Classes for the Mentally Retarded-Information Memorandum, June 6, 1973.

92. Id.

93. Draft memorandum from Regional Civil Rights Director, Office for Civil Rights and Regional Commissioner, Office of Education, to State Education Agencies, Subject: Provision of Equal Educational Services for Migrant Children, May 30, 1973.

94. Other responsibilities outlined in the memorandum include the provision of instruction during late spring until late fall in the event that the migrant child has not received the same number of instructional days as is stipulated in the standard instructional term for nonmigrant children; the requirement that the school district make the attempt to gather pertinent data on migrant children from schools they previously attended; and the integration of migrant children into the school as a whole, rather than into "new" or "additional" classes, despite late enrollment.

Intended for use nationwide, the memorandum had not been approved by  
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 the national office as of July 1974.

On June 20, 1974, more than 2 years after the passage of Title IX  
 of the Education Amendments of 1972, OCR issued a proposed regulation  
 96  
 covering its enforcement. It is not expected that any permanent  
 regulation will become effective until at least January 1975.

In order to bridge the interim period, OCR issued several memoranda  
 to educational institutions, including chief State school officers and  
 school district superintendents, in an effort to make them aware of  
 Title IX coverage and the statute's major provisions. Several pilot  
 reviews have been initiated and complaints investigated. Title IX  
 issues have been included in the New York City review. A task force  
 has been at work preparing an investigative manual, review priorities,  
 and compliance standards, as the regulation proceeds to final form.  
 Both the 1973 and 1974 elementary and secondary school survey included

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95. As of December 1, 1973, headquarters had decided not to distribute  
 the memorandum until some issues related to Title I's Migrant Educa-  
 tion Program could be clarified with USOE. Interview with Allanson  
 Sumner, Coordinator for Special Programs, Region V (Chicago)OCR, Nov. 23,  
 1973, in Albuquerque, N.M.

96. For a discussion of the coverage of Title IX, see p. 2, supra  
 note 4.

data collection pertinent to Title IX. With no regulation available, however, regional staff have not routinely been including sex discrimination considerations in their reviews, complaint investigations have been postponed, and school districts do not know what is expected of them. Since sex discrimination is prevalent in education programs and its prohibition is relatively recent, school districts must be

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97. Holmes letter, supra note 52. OCR has also indicated that the fact that its:

...record is portrayed as "nullifying" Title IX and the will of Congress is so far-fetched as to be absurd. To the contrary, the record evidences a strong commitment to enforce Title IX and to lay the necessary groundwork so that compliance activity pursuant to the regulation will be both legally sound and broadly impactful in terms of review procedures, the standards applied, and selection criteria.

In this regard, the Commission seems to forget that OCR must always cope with staff limitations in enforcing statute against thousands of school districts and institutions. For this reason it is imperative to set priorities designed to yield, on a relative basis, the widest impact possible. To dispatch compliance personnel to a number of districts to conduct Title IX reviews is evidently what the Commission is looking for, but without staff training, a data base, background and research into the potentially most serious problems affecting students, knowledge of evidentiary standards and investigative guidance, and other such factors, it is a futile and wasteful approach right now, destined to foreclose any chance we may have of reaching a relatively large number of students in terms of effective remedial action. This is what we mean by "laying the groundwork", and it has proceeded, with certain understandable limitations, as the regulation is developed. It takes time and it takes hard work. It is something that the Commission's simplistic approach to Title IX enforcement utterly ignores. Id.

98. For a general discussion of this issue, see Frazier and Sadker, Sexism in School and Society (1973).



informed in detail what their responsibilities are. In failing to promptly issue and enforce regulations, OCR has effectively nullified the intent of the Congress in enacting Title IX.

While this Commission acknowledges that comprehensive regulations cannot be developed overnight, it is clear that it should not take 2 years to publish a draft of the regulations. Within a little more than a year from the date the Equal Employment Opportunity Commission began operation it had issued guidelines on sex discrimination, religious

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99. A memorandum has been sent to chief State school officers and school superintendents, providing them with a summary of Title IX requirements and coverage. Memorandum for Chief State School Officers and Local School Superintendents, from Patricia A. King, Acting Director, Office for Civil Rights. Subject: Title IX of the Education Amendments of 1972 Prohibiting Discrimination on the Basis of Sex as it Affects Elementary, Secondary, and Vocational Schools and Programs, Feb. 1973.

100. OCR recently indicated to this Commission that the issuance of draft Title IX guidelines was delayed because of the:

...difficulty in interpreting Congressional "intent." In regard to numerous areas, the statute was susceptible to various interpretations and the legislative history was often either unclear or devoid of any guidance. It was obviously our duty to study carefully the ramifications and implications of all provisions proposed for inclusion in the regulation prior to mandating a course of conduct on the part of institutions and school districts involved; any other procedure would have been irresponsible and, as the compliance agency, would have undermined from the outset OCR's credibility for dealing competently with the complex issues. We also felt an obligation to consult with a broad range of interested parties in preparing the regulation--sponsors of the legislation, other Federal agencies, women's organizations, etc. It should also be noted that during this period HEW's attorneys and OCR had to cope with other ongoing responsibilities.

In short, the draft report simply parrots criticism heard from other quarters with respect to the delay and discounts the reasons for it. We suspect, in fact, that the Commission did not even inquire independently as to the difficulties involved and the process of developing the regulation, preferring instead to repeat the conventional wisdom. Holmes letter, supra note 52.

discrimination, and the complex subject of employee selection procedures. Further, within 6 months after the effective date of Title VI, HEW issued regulations pursuant to that historic statute.

In addition, HEW could well have begun to enforce the provisions on a case-by-case basis. Thus, it could make determinations on issues as it came upon them as a result of reviews or complaint investigations. Although it has initiated some reviews and investigations under Title IX, it has not, however, brought enforcement action in any instances in which it has identified noncompliance. Having decided not to enforce Title IX on a case-by-case approach, it became incumbent upon HEW to have issued the regulation expeditiously since by adopting the course of action which it did, HEW has prevented those intended to benefit by Title IX from receiving the protection Congress intended.

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The proposed regulation for Title IX covers sex discrimination in such areas as admissions, athletic programs, and financial aid. However, the proposed regulation has major deficiencies. It fails to provide adequate guidance in the identification of and means for overcoming limited participation by members of one sex in education programs and employment, and to address adequately the subject of

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101. 45 C.F.R. Part 86-Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance-Nondiscrimination on the Basis of Sex.

equal participation in athletic programs.

## 2. Guidelines for OCR Staff

When OCR's compliance program concentrated on the elimination of segregated dual school systems, OCR Elementary and Secondary Education staff members utilized principles developed by the courts in such

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102. The Commission sent extensive comments to HEW on the proposed Title IX regulations. Letter from Arthur Flemming, Chairman, U.S. Commission on Civil Rights, to Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare, Oct. 15, 1974.

A major weakness in the proposed regulation was its need for greater specificity throughout. In any event, it should be noted that Title IX is an extremely weak law. It was created as an extension of Title VI to cover sex discrimination in education programs, but it is replete with exemptions and exceptions. For example, Title IX exempts many institutions from coverage of its admission and housing requirements. No such exemptions exist under Title VI. The difference between the two provisions is explained only by a philosophy that sex discrimination is less invidious than race discrimination. Among the weaknesses noted were:

1. Remedial and Affirmative Action--The proposed regulation lacked a clear definition of what constituted each type of action and when each was in order. Further, the proposed regulation made the adoption of affirmative action programs optional. The Commission stated that all recipients should be required to analyze the extent of participation by sex and to take corrective action where limited participation exists.

2. Compliance Reviews--Specifics concerning the conduct of compliance reviews were missing from the proposed regulation, including time limits for reviews and procedures and priorities for conducting reviews.

3. Athletics--In a particularly inadequate section, HEW proposed that recipients establish integrated athletic programs but permitted single sex teams where "selection for such teams is based upon competitive skill." The Commission recommended the immediate integration of all elementary school teams, with secondary and college teams to be integrated according to a timetable. In addition, the Commission noted that per capita expenditures for male and female athletic programs should be required to be equal.

4. Exemptions--HEW attempted to increase the number of exemptions to Title IX. For example, the exemption of scholarships, fellowships, etc. which are established under a foreign will, trust, bequest, or foreign government is not included in the statute and is a direct violation of the intent of Title IX. HEW was requested to delete the exemption and include a provision to notify executors of such wills, etc. of its intention to carry out Title IX affirmatively.

cases as Swann v. Charlotte Mecklenburg Board of Education <sup>103</sup> and  
Singleton v. Jackson Municipal Separate School District, <sup>104</sup> as legal  
standards for determining the acceptability of plans for the desegre-  
gation of school districts.

The existence of segregated schools in the 1960's was easier to  
prove than OCR's new focus, the denial of equal educational services to  
minority students. In March 1972, almost 2 years after the May 25  
memorandum had been released, OCR prepared a manual for staff members on  
conducting equal educational services reviews, <sup>105</sup> specifying in detail

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103. 402 U.S. 1 (1971). In this case the Supreme Court held that, for the  
purposes of desegregation, assignment of students to schools within a  
district should reflect the racial composition of the district as a whole.

104. 419 F.2d 1211 (5th Cir. 1969). In this case the court found that assign-  
ment of teachers to individual schools should reflect the ethnic composition  
of faculty for the district as a whole. It should be noted however, that  
because minorities are severely underrepresented in many school districts,  
assignment of teachers to individual schools reflecting the racial-ethnic  
composition of faculty for the district as a whole would not be an effective  
nondiscriminatory device.

105. Manual for Conducting Equal Educational Services (EES) Compliance Reviews,  
prepared by Catherine A.C. Welsh, Office for Civil Rights, Washington, D. C.,  
with input from headquarters and regional OCR staff at training sessions  
held Jan. 17-21 and Mar. 27-29, 1972.

the legal principles <sup>106</sup> applicable and the data collection and analysis <sup>107</sup> needed to conduct a review of a school district under provisions of the memorandum. The manual, which is the most comprehensive guideline developed by OCR, covers discrimination against all minority students in the district who enter school with different linguistic and/or cultural backgrounds, thus expanding the memorandum's interpretation <sup>108</sup> to cover black as well as national origin minority group children.

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106. According to the manual, three basic propositions need to be proven from a legal standpoint to demonstrate inequality of educational services:

1. Minority students in the district enter the schools with different linguistic and/or cultural backgrounds which directly affect their ability to speak and understand the standard English language of the school environment.
2. The district has failed to take effective affirmative action to equalize access of minority students to the full benefits of the educational program.
3. Minority students are excluded from effective participation in and the full benefits of the educational program (including success as measured by the district) of the district as a result of possessing nonstandard English language skills or primary language skills in another language and an accompanying lack of affirmative action by the school districts to respond to such cultural and linguistic differences.

107. Test data for minority students and nonminority students are examined, for example. Analysis would include both comparative and historical approaches. Comparative analysis is a comparison of test scores of the entire grade unit for 1 year with the same grade unit for another year, e.g., for 1971-72 and 1972-73. The historical approach is an analysis of the degree of improvement or decline in the rate of achievement of a particular group of children, over a period of 1 or 2 years.

108. For a discussion of equal educational services and black students, see p. 85 infra.

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In addition, court decisions have supported OCR's posture that special programs be provided in cases where students have been denied equal educational opportunity.

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109. In *United States v. Jefferson County Board of Education*, 380 F.2d 385, 394 (5th Cir. 1967), the court ordered that remedial educational programs be provided students who had previously attended segregated schools, to overcome the inadequacies of the segregated educational environment.

In *Hobson v. Hansen*, 269 F. Supp. 401, 515 (D.D.C. 1967), aff'd 408 F.2d 175 (D.C. Cir. 1969), the District of Columbia public school system was ordered to provide compensatory education to overcome the effects of segregation.

In a class action, the Chinese community charged the San Francisco Unified School District in *Lau v. Nichols*, 414 U.S. 563 (1974) with failure to provide all non-English-speaking children with special instruction to equalize their educational opportunity. The plaintiffs contended that the school district had abridged their rights under the U.S. Constitution and Section 601 of the Civil Rights Act of 1964 (Title VI). Plaintiffs were denied relief both at the district and appeals court levels. The Supreme Court ruled in January 1974, that there had been a denial of equal educational opportunity under Title VI. The Court, however, chose not to rule on whether there had been a violation of constitutional rights. While the decision upholds HEW's interpretation of the May 25 memorandum, no particular program of language instruction, e.g., bilingual-bicultural education, was endorsed. The case was remanded to the district court for the fashioning of a remedy. The motion of the Department of Justice to intervene on behalf of the Federal Government's interests was granted. That Department was concerned that the remedy be consistent with established Federal policies.

The Federal court decision in *Serna v. Portales Municipal Schools* is, to date, the first and only Federal court opinion upholding that non-English-speaking students are entitled, as a constitutional right, to be educated in public schools utilizing a bilingual-bicultural program. The court found that the school district had denied Spanish-surnamed children the right of equal protection by not providing them with equal educational opportunity. 351 F. Supp. 1279 (D.N.M. 1972), aff'd 499 F.2d 1147 (10th Cir. 1974).

Guidelines covering OCR's role in selecting and reviewing districts under the Emergency School Aid Act were provided OCR staff members in December 1972.<sup>110</sup> The document outlined criteria for determining the eligibility for ESAA of court-ordered and voluntary plan districts<sup>111</sup> and presented descriptions of areas where violations of the assurances are most likely to occur.<sup>112</sup> In addition to outlining thoroughly specific questions for each area and the evidence needed to prove discrimination, the guidelines include procedures for analyzing information, sample letters to be sent to ineligible districts, and sample letters requesting additional information or pointing out violations.

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110. Memorandum from Lloyd R. Henderson, Director, Education Division, OCR, and Michael S. Lottman, Chief, Equal Educational Opportunity Branch, OGC, to Regional Directors, OCR, and Education Branch Chief, OCR Subject: Emergency School Aid Act--Instructions for OCR Clearance and Waiver Procedures, undated.

111. For court-ordered districts, OCR must determine whether the plan submitted is being implemented pursuant to a final order of a Federal or State court; whether the district is operating its schools under the plan; and whether the documents submitted constitute the plan under which the district is operating.

For voluntary plan districts, OCR must determine that there is a copy of a final official action, agreeing to or adopting the plan; and if the plan is to be implemented upon award of assistance, evidence that a notice of the contents and intent to implement it has been published in a newspaper of general circulation at least 20 days prior to the date of the application.

112. These include transfer of property to discriminatory private schools, disproportionate demotion or dismissal of minority faculty and administrators, discriminatory treatment of faculty and staff, classroom segregation, discriminatory assignment of students, discriminatory extracurricular activities, discriminatory administration of discipline, and discriminatory closings.

Despite the fact that HEW has developed a number of guidelines covering its equal educational opportunity responsibilities, its efforts in this area remain deficient. It still has not prepared one document which explains in detail to recipients all of HEW's requirements as they pertain to each type of recipient. Without such a document a recipient could not be expected to come into voluntary compliance, since it would not know what "compliance" consists of.<sup>113</sup> In addition, OCR has failed to issue guidelines to cover more comprehensively those areas which it recently has begun to include in its reviews, e.g., discriminatory placement in special classes.<sup>114</sup> Further, it has not defined some areas which are fundamental to quality integrated education. For example, it has not spelled out the conditions under which pupil transportation is necessary<sup>115</sup> and it has developed no standards

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113. OCR has indicated that it has a number of documents informing grantees of their Title VI obligations and "guidelines applicable to specific areas or beneficiaries are under consideration, dealing with relatively new subject matter, such as placement in EMR classes." Holmes letter, supra note 52. OCR also indicates "that the basic Title VI document, the Departmental regulation (45 C.F.R. Part 80), which was updated through amendment in 1973, applies to all federally assisted programs, and serves as guidance for both recipients and HEW as the compliance agency." Id. It should be noted, however, that HEW's Title VI regulations pertain largely to procedural matters.

114. In a recent communication to this Commission, OCR indicated that the development of such guidelines "is dependent upon an analysis of the results of those reviews and careful study as to the kinds of universal standards which are legally sound and likely to be practically effective." Holmes letter, supra note 52.

115. OCR recently wrote that:

a major reason for not doing so has been the pendency in the last Congress of anti-busing amendments, and the uncertainty of the precise outcome. Legislation of this nature was recently enacted into law. The provisions of P.L. 93-380 are specific with respect to limitations placed on OCR in the area of student transportation.

Id.

The development by OCR of specific standards in the years prior to the Congressional action might well have removed the impetus for such action. In addition, OCR should have guidelines which clearly enunciate the extent of its authority in all areas at a given point in time irrespective of whether legislation exists or not. The Executive branch is not justified in failing to implement a responsibility assigned to it because of legislation pending in Congress.



to evaluate the actions of governmental bodies other than school districts which may play a part in the creation of a segregated school or school system.

Such matters as zoning regulations and the granting of sewer and building permits are subjects of governmental action which can be used to create racially and/or ethnically segregated schools.

C. Compliance Reviews

1. Title VI Reviews

Between 1965<sup>116</sup> and 1970, the Elementary and Secondary Education Division's major focus was in the area of eliminating dual school systems in the South and in integrating majority minority group schools in majority white school districts. As a result of HEW efforts<sup>117</sup> and court litigation, OCR reports that the number of black students nationwide attending 100 percent minority schools decreased<sup>118</sup> from 39.7 percent in 1968 to 10.9 percent in 1972. In 11 States in the South such enrollment dropped from 68 percent in 1968 to 9.2 percent in 1972.<sup>119</sup>

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116. In January 1965, the first HEW civil rights staff, comprising 23 persons, was assigned to enforce Title VI. OCR was formally established in December 1965.

117. For a full discussion of HEW's efforts in equal educational opportunity, see U.S. Commission on Civil Rights, Twenty Years After Brown: Equality of Educational Opportunity (in press). See also Miles, The Department of Health, Education, and Welfare 244-62 (1974), for a discussion of civil rights and education issues since 1954 and HEW's efforts in this area since passage of the Civil Rights Act in 1964.

118. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

119. HEW News Release, Apr. 12, 1973, concerning 1972 HEW survey of racial-ethnic composition of schools nationwide.

While these statistics are encouraging, a survey conducted by the Southern Regional Council indicated that disproportionate numbers of minority students have been suspended, expelled, or have dropped out following school desegregation. Black students comprise 33.4 percent of all students in Little Rock, Arkansas, high schools, yet 79.9 percent of the suspensions were of black students. Southern Regional Council, Student Pushout: Victim of Continued Resistance to School Desegregation (Nov. 20, 1973).

Other data indicate, however, that 39.2 percent of all black students still attend schools which are 90 to 100 percent minority.<sup>120</sup> In the Nation's 26 largest cities, this figure rises to 75.5 percent of black students attending such schools.<sup>121</sup> These statistics suggest that, while there may be a decrease in the number of totally minority schools,<sup>122</sup> meaningful desegregation has not yet been achieved, and efforts must continue. Desegregation of northern school districts needs particular attention, since racial isolation is more acute there than in the South,<sup>123</sup> and de jure intent may not be apparent.<sup>124</sup> In general, the desegregation movement has barely progressed in the Northern and Western States, while, in the South, the number of black and white students attending school together has greatly increased. For example, between 1968 and 1970, the proportion of minority students attending 90-100 percent minority schools

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120. Office for Civil Rights, Department of Health, Education, and Welfare, fall 1972 Racial and Ethnic Enrollment in Public Elementary and Secondary Schools, Table 1-A.

121. Office for Civil Rights, Department of Health, Education, and Welfare, Directory of Public Elementary and Secondary Schools in Selected Districts, Enrollment and Staff by Racial/Ethnic Group, Fall 1970.

122. Nationally, the percentage of black pupils in all-minority schools has decreased from 39.7 percent in 1961 to 10.9 percent in 1972. HEW News Release, Apr. 12, 1973.

123. In 1970, 37.8 percent of all black students in 32 Northern and Western States attended 90-100 percent black schools as compared with 33 percent for the 11 Southern States. Digest of Educational Statistics 137, Table 177 (1971).

124. For a history of litigation surrounding northern school desegregation, see R.L. Herbst, "The Legal Struggle to Integrate Schools in the North," 407 The Annals of the American Academy of Political and Social Science 43 (May 1973).

in the Northern and Western States decreased by only 0.2 percent, from 38.0 to 37.8 percent while, in the South, such enrollment decreased by 37.4 percent, from 70.4 to 33.0 percent.<sup>125</sup> In addition, more than 71 percent of the public schools in the North have enrollments that are more than half minority. The figure is 68 percent for the Border States and 53.7 percent for public schools in the South.<sup>126</sup> Although the data continue to indicate a problem in the South, they also evidence a growing problem in the North and West. The problem of desegregation has quickly shifted from the southern to the northern and western part of the country.<sup>127</sup> In a recent survey of the Chicago public schools, for example, data showed that the percentage of black students increased for the third year in a row, as did the number of schools which are 95-100 percent black.<sup>128</sup>

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125. Digest of Educational Statistics, supra note.123, at 153.

126. The Washington Post, May 18, 1974, p. 2, col. 2.

127. Id. Dr. Kenneth Clark, a noted psychologist whose studies were used as a basis for the Supreme Court decision in the historic case of Brown v. Board of Education, has noted that, "The major problem now in the desegregation of the schools is clearly the Northern urban problem."

128. Board of Education, City of Chicago, Racial Survey, Sept. 28, 1973.

OCR nevertheless has avoided the issue of the assignment of students to schools in its onsite reviews, findings, negotiations, and enforcement of Title VI.<sup>129</sup> In some cases such schools continue to exist with OCR's knowledge. The policy of the Nixon administration appears to be chiefly responsible for OCR's inactivity in this area.<sup>130</sup> This policy is reflected also in passage of Title VIII of the Education Amendments of 1972, which expressly prohibits the use of Federal funds for transportation or "busing" of students or teachers for desegregation purposes, unless school officials submit a written request for such use.<sup>131</sup>

The reluctance by OCR to utilize transportation of students as a tool to achieve desegregation and, thus, even to include in reviews an examination of

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129. For further discussion of this point, see pp. 72-73 infra.

130. OCR staff members acknowledge that since the President's message to the Congress on educational opportunity and busing, on March 17, 1972, fewer reviews have dealt with student assignment discrimination among schools in a district. Interviews with Lloyd Henderson, Chief, Elementary and Secondary Education Division, headquarters OCR, June 26, 1973, and Kenneth Mines, Regional Director, Region V OCR (Chicago), May 14, 1973, in Chicago, Illinois.

131. The Nixon administration consistently opposed the busing of students to achieve integration. See, The Federal Civil Rights Enforcement Effort--1974, Volume VI, The Policymakers (in preparation). In fact, the \$25.2 billion bill, which the Congress passed in 1974 to provide Federal aid to elementary and secondary education and which included the strongest antibusing provision ever adopted by Congress, received enthusiastic support from the Nixon administration. Antibusing provisions of the Law include (1) a prohibition on courts to order children to be bused for desegregation beyond the school next nearest their homes, (2) a bar against use of any Federal school funds to finance busing for desegregation except those under the impact aid program, (3) termination of busing order if the court finds the school district has satisfied the requirements of the 14th and fifth amendments to the Constitution.

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minority schools, is unwarranted, and can only retard the achievement of equality of opportunity. Moreover, if public transportation is required to implement a constitutional right, then public officials do not have the option of not utilizing it. The results of such administrative failures are potentially tragic, since educational research has established that in desegregated schools white children rarely suffer any educational damage, and both white and black children sometimes

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132. In a survey of public opinion on busing, this Commission found that public support in favor of busing exceeds opposition to busing. The survey's three basic findings were as follows:

1. The public seriously misunderstands the facts of the busing controversy;
2. Those who best understand the facts are more supportive of busing much more opposed to congressional action or a constitutional amendment to forbid court-ordered busing;
3. Most people expressing an opinion are willing to support strictly limited busing when there is no other way to desegregate the schools.

U.S. Commission on Civil Rights, Public Knowledge and Busing Opposition: An Interpretation of a New National Survey, Mar. 11, 1973.

make significant gains in achievement.<sup>133</sup> One survey suggests that school desegregation reduces the gap in achievement between blacks and whites by 20 to 30 percent over a 5- or 6-year period.<sup>134</sup> Another study shows that in 1972 in Hartford, Connecticut, black children who were bused as part of a desegregation plan progressed 13 months in achievement as compared with a 6-month achievement increase for a comparable group of black children in a segregated school in Bridgeport.<sup>135</sup> Further, desegregated education provides white and black children with an invaluable experience: that of learning to live and work together.

This Commission found in a study of school desegregation in 10 cities<sup>136</sup> that movement of students and the subsequent reconstitution of schools had an additional positive effect--that of stimulating, in 8 of the 10 cities studied, the development of innovative educational programs. In the Winston-Salem, North Carolina, public schools, for example, a number of new programs have been instituted since desegregation, including early childhood education, open classrooms,<sup>137</sup> individualized instruction, nongraded programs, and multiage grouping. The Pontiac

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133. J. Coleman, et al., Equality of Educational Opportunity (1966). C. Jencks, Inequality (1972). Frederick Mosteller and Daniel P. Moynihan, On Equality of Educational Opportunity (1972). See also, U.S. Commission on Civil Rights, School Desegregation in Ten Communities (1973). It should be noted, however, that all indications, whether positive or negative, are tentative because so few systems have been desegregated (integrated) for sufficiently appreciable time capsules.

134. Coleman, supra note 133.

135. See Gary Orfield, "School Integration and its Academic Critics," 5 Civil Rights Digest 2 (Summer 1973).

136. Ten Communities, supra note 133.

137. In an "open classroom" setting, the emphasis is on allowing the individual student to choose his or her own activities throughout the classroom. Several learning centers or activity areas are available to the student, in such subjects as reading, mathematics, and science. The teacher and teacher aides work with individual children at various times during the day.

public schools in Michigan, which had experienced in 1971 violent opposition to school busing and desegregation, instituted for the 1972-73 school year a comprehensive reading program designed to improve by one grade level the reading skills of all children in the system. An educational laboratory was also established, where 1,850 students were exposed to innovative teaching materials and techniques, which were later disseminated to other schools in the district.

During the past 20 years, the number of whites leaving the cities and moving to the suburbs has greatly increased, resulting in a concentration of blacks in the cities. Between 1960 and 1970, in metropolitan areas with a population of 500,000 or more, the white population in the suburbs grew by 12.5 million as compared with a black population increase of 0.8 million, and the black population of the cities increased by 2.8 million, while the white population in cities declined by 1.9 million. <sup>138</sup>

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138. Statement of Dr. George H. Brown, Director, Bureau of the Census, Department of Commerce, Hearing Before the U.S. Commission on Civil Rights, Washington, D.C., table 1.5, at 531 (1971).

This suburban boom, which was accompanied by increased residential  
 139 segregation, has caused a comparable flow of the school age population. 140  
 Two-thirds of the Nation's public school population reside in metropolitan  
 areas and most of these metropolitan schools are also segregated. For example,  
 more than three-quarters of the black pupils in the 26 largest cities  
 attend schools which are 90-100 percent minority, while an even larger  
 percentage of whites in the suburban areas attend schools which are  
 90-100 percent white.<sup>141</sup> Owing to the severity of racial isolation,  
 urban schools cannot effectively be desegregated unless suburban schools  
 are included in the process.

In court cases involving the Richmond, Virginia, Detroit, Michigan,  
 and Indianapolis, Indiana, school systems,<sup>142</sup> the courts found de jure  
 segregation in the city school systems. Since local school authorities  
 are agents of the State, plaintiffs charged that the States were respon-  
 sible for providing a workable remedy, that is, desegregation of city  
 and suburban schools. In attempting to eliminate the segregation in  
 Detroit, for example, the district court ruled that it was proper to  
 consider a desegregation plan which would encompass the suburbs because

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139. For a discussion of this problem, see, U.S. Commission on Civil Rights, Equal Opportunity in Suburbia (1974).

140. For a full discussion of this point, see, U.S. Commission on Civil Rights, Metropolitan Desegregation (in press).

141. Id.

142. Bradley v. Milliken, 42 U.S.L.W. 5249 (1974). In U.S. v. Board of Sch. Commr's, 332 F. Supp. 655 (S.D. Indianapolis 1971) aff'd 474 F. 2d 81 (7th Cir. 1973), the U.S. Court of Appeals ordered the elimination of segregation in Indianapolis schools and maintained that the argument that whites are fleeing the city cannot be allowed to stop desegregation.



it seemed clear that a Detroit-only plan would not adequately accomplish desegregation. The plan included 53 of the 85 suburban school districts. The court of appeals remanded the decision but directed that all suburban school districts should be included in such a plan. The Supreme Court, however, reversed this decision and limited the availability of a multidistrict remedy for segregation in the Detroit public schools, holding that such a remedy was not proper and necessary because no interdistrict violation was shown. It appears that anything less than metropolitan desegregation in such cities will result in increased isolation of minorities from whites and a return to "separate but equal" schools for minority and majority group students.

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143. The court did hold that Detroit had a de jure segregated system and a Detroit-only plan was necessary. Id. at 5258,5260.

144. Id. In his dissenting opinion, Justice Marshall wrote that:

Desegregation is not and was never expected to be an easy task....Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities - one white, the other black - but it is a course, I predict, our people will ultimately regret. Id. at 5279.

145. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The court prohibited the implementation of desegregation plans which would lead ultimately to racially identifiable school districts in the city and suburbs.

HEW's unwillingness to desegregate unlawfully segregated schools is demonstrated in its failure to take a position on the issue of metropolitan desegregation.<sup>146</sup> As HEW increasingly focuses its compliance efforts on urban school districts, it cannot continue to ignore this remedy for urban racial isolation.

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146. Metropolitan desegregation is desegregation of a minority inner city school district with white suburban school districts.

HEW has not pressed for metropolitan school desegregation in large  
 147  
 cities. It has not, for example, attempted to determine in each review whether racially and ethnically imbalanced schools exist in the urban school districts have few or no minority students. If it undertook such analysis and discovered this was the case it could then investigate the possibility that the districts involved came within the principles of the Bradley v. Milliken decision of the United States Supreme Court, i.e. whether there were inter-district violations which caused the existing racial-ethnic imbalance. This subject is of major importance and requires prompt and intensive study by OCR.

One vehicle which OCR might productively utilize in its efforts to deal with the problem of metropolitan school desegregation is State education agencies. State agencies could encourage the merger of school districts or  
 148  
 other forms of interdistrict cooperation among metropolitan school districts.

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147. See "Issue Areas to be Reviewed During Initial Phase of the Equal Educational Services Review of New York City Public Schools and other federally assisted Programs 1973-74." Draft submitted to the Commission June 18, 1973.

148. In addition, States plainly have the authority to establish and change school district boundaries. For more than 30 years the number of school districts has been steadily declining as a result of State-authorized consolidation. In the 40 years between 1931-32 and 1971-2, the number of public school districts has declined from 127,531 to 17,237. U.S. Office of Education, National Center for Educational Statistics, Department of Health, Education, and Welfare, Statistics of State School Systems, 1967-68, at 22, table 5: and Public School Systems in 1971-72, at 1.

HEW, however, has not yet begun a systematic program of reviewing the part that State education agencies have played or should play in desegregation including a determination of their involvement in school segregation within metropolitan areas. Until HEW reviews State education agencies for compliance with civil rights provisions, it lacks the means to stimulate States to sponsor desegregation of metropolitan area school systems.

OCR has substantially improved its reviews of in-school discrimination against minority students to ensure that minority students are receiving equal educational services. Such reviews involve greater sophistication in the analysis of data and more expertise in recommending remedies than reviews relating to the elimination of segregated schools. In its assessment of equal educational services, OCR examines four major areas: (1) ability grouping patterns, (2) EMR placement, (3) language programs, and (4) faculty recruitment and

150 assignment. While an examination of possible discrimination in student assignment policies should be a fifth element in each equal educational services review, this is not always the case. This fact diminishes the validity of this approach in areas where a major problem is segregation of black students.

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149. For further discussion of State agency reviews, see pp. 109-111 infra.

150. Where a simple examination of data on student and teacher assignment is sufficient to determine the extent of racial segregation, reviews to evaluate the quality of equal educational services involve analyses of achievement and attitudinal test scores, language deficiencies, and other indicators of inequitable treatment of minority students and faculty.

Between January 1972 and May 1973, OCR staff conducted 134 Title  
 151  
 VI reviews, with the most active regions being VI, V, IV, and III.  
 Region VI (Dallas) alone conducted 51 reviews. Three regions--I (Boston),  
 VII (Kansas City), and X (Seattle)--conducted only one review each during  
 152  
 that period. OCR's Region IX office (San Francisco), with more staff than  
 Region VI (Dallas), conducted only 13 or slightly more than one-fourth as  
 many reviews.

No matter how thoroughly regional staff conduct one review, it is of little  
 assistance to the thousands of minority and female children who live in the  
 other districts throughout the region. Thus, although OCR has developed more  
 sophisticated methodologies and it has appropriately begun the time consuming  
 task of reviewing the education systems of the country's major cities, it must  
 adopt shortened procedures to increase staff efficiency and must be provided  
 with the resources to enable it to increase the number of reviews if significant  
 progress is to be made in implementing the constitutional right of

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151. Reviews conducted by each regional office are as follows:

VI (Dallas)	51
V (Chicago)	23
IV (Atlanta)	18
III (Philadelphia)	17

152. Reviews conducted by the remaining three regions are as follows:

II (New York)	6
VIII (Denver)	3
IX (San Francisco)	13

equal educational opportunity for all children. <sup>153</sup> For example,  
 discrimination against national origin minority children is still wide-  
 spread and often difficult to detect. <sup>154</sup>

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153. OCR has recently indicated its opinion that its efforts should not be measured against a total solution of the problem. It stated: "A thousand new employees would still leave us well short of the mark as far as this standard is concerned...." OCR also stated that if the Commission is serious about desiring it to conduct additional reviews, the Commission should at the same time recommend other areas of compliance activity where OCR should trim effort and resources in order to increase school Title VI reviews. Finally, OCR contends that, in this and other sections of the draft report, the Commission improperly measures OCR's effort in terms of the "number" of "reviews," as if this criterion alone were a proper index of effort and impact. Holmes letter, supra note 52.

154. See, for example, U.S. Commission on Civil Rights, Toward Quality Education for Mexican Americans, Report VI of Mexican American Education Study (1974), Pennsylvania State Advisory Committee to the U.S. Commission on Civil Rights, In Search of a Better Life--The Education and Housing Problems of Puerto Ricans in Philadelphia (1974), and Illinois State Advisory Committee to the U.S. Commission on Civil Rights, Bilingual/Bicultural Education--A Privilege or a Right (1974).

Prior to the issuance of the May 25 memorandum, OCR's efforts had been directed almost exclusively at discrimination against black students. Once the memorandum was issued and the equal educational services approach was developed, discrimination faced by Spanish speaking students in elementary and secondary schools as a result of language problems became the main thrust of OCR's compliance program. Some reviews did cover discrimination against both black and Spanish speaking or Native American and Spanish speaking students and included recommendations which applied to the need for equal educational services for all minority students.<sup>155</sup> During fiscal year 1973, OCR began to conduct reviews in school districts having concentrations of black students, utilizing the equal educational services approach.<sup>156</sup> In many cases, however, those districts were districts which were reviewed as a result of the court injunction issued in Adams v. Richardson,<sup>157</sup> rather than as a result of OCR's initiative. The majority of school districts under review in fiscal year 1974 continued to be districts with concentrations of Spanish speaking students.

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155. These include reviews of public schools in East Chicago, Ind.; Fresno, Cal.; Tempe, Ariz.; and Winslow, Ariz. For further discussion of these recommendations, see pp. 70-73 infra.

156. Examples include: Mexia, Tex.; Marlin, Tex.; Sparkman, Ark.; and Fresno, Calif.

157. Region VI (Dallas) submitted a list of districts with heavy concentrations of black students which have been reviewed for equal educational services. Of the 10 districts listed, 8 were districts covered by the court order in Adams v. Richardson. Letter from John A. Bell, Chief, Elementary and Secondary Education Branch, OCR Region VI (Dallas), to Kathleen A. Buto, Equal Opportunity Specialist, U.S. Commission on Civil Rights, May 16, 1973.

a. Procedure

In selecting school districts for review under Title VI, Region VI (Dallas), which has been the pilot region for reviews under the new equal educational services review policy, conducted 28 reviews in school year 1971-1972, all of which were the result of complaints alleging discrimination. Region I (Boston) staff has been involved for more than 2 years exclusively in the review and enforcement proceedings against the Boston public schools. Its action resulted from complaints received and a decision by headquarters to proceed against segregated northern school districts.<sup>158</sup> Regions V and IX select districts for review based on the degree of minority group isolation<sup>159</sup> in the district.

OCR procedure for conducting reviews is generally consistent from region to region. Between four and five staff members spend from 3 days to 2 weeks onsite, depending on the size of the school district and the complexity of violations anticipated.<sup>160</sup> Teachers, parents,

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158. Interview with John Bynoe, Regional Director, OCR, Region I (Boston), Nov. 13, 1972, in Boston, Mass.

159. Region V (Chicago) gives priority to reviewing majority white districts having schools with over 80 percent minority students. Region IX has concentrated primarily on reviewing districts having 60-70 percent Spanish speaking and Native American children. Only one review conducted in fiscal year 1972, the Fresno, Cal., review, involved possible discrimination against black children.

160. The review in 1972 of the El Paso Independent School District, Tex., for example, which was the first review of a large city under the May 25 memorandum and was utilized as a training session for OCR headquarters and regional staff, took 2 weeks, while a routine review of the Rotan Independent School District, Tex., lasted only 3 days.



children, administrators, and community persons are interviewed. OCR requests that the superintendent provide lists showing the different course descriptions, including the different ability levels or tracks, and achievement test scores by race and ethnicity for children in each course section. In addition, student handbooks, the school budget, Federal program applications, and employment statistics are examined. The OCR staff concentrates primarily on three areas of possible discrimination: personnel, provision of equal educational services, and assignment of students to classes within a school. Consideration of discrimination in the assignment of students to schools is now seldom a major part of a review, even where data indicate probable violations. This omission has meant that some districts are considered to be in compliance with Title VI while OCR ignores the existence of racially isolated schools in the districts.

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b. Analysis of Data

Following the onsite review, OCR staff begin analyzing data to determine if the school district is in noncompliance with Title VI. Information on language, achievement tests used, ability grouping-tracking, special education, curriculum, and notification to parents

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161. Examples of districts where OCR is aware of racially isolated schools but which are considered to be in compliance with Title VI include the El Paso Independent School District, Tex.; the School City of East Chicago, Ind.; and the Shawano School District, Wis.

is analyzed for evidence of a pattern of discrimination in the provision of services. The analysis is extensive and includes identifying correlations between home language and English skills and test scores, performing comparative and historical analyses of test information, relating racial-ethnic and test data to grouping-tracking in classes, and examining materials utilized in different ability groups-tracks.

The review of the Beeville Independent School District, Texas, served as a pilot in terms of data analysis for other equal educational services reviews. OCR collected and analyzed data relating to the students' home language and culture and to their English language skills at the time they entered school. By following the Mexican American students' progress over a 6-year period, OCR was able to demonstrate that the educational performance of such children declined an average of 29 percentile points, while the performance of Anglo children improved. A determination was made that the school district had failed to provide equal educational services. On this basis OCR justified requiring the district to prepare and implement a comprehensive educational plan to correct these discriminatory patterns.

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162. See note 110 supra for an explanation of these analyses.

163. In analyzing instructional materials utilized by different ability groups or tracks, OCR attempts to ascertain whether minority students are locked into low ability groups because the classroom materials preclude their progressing into higher ability groups or tracks.

164. This methodology was explained in a statement by J. Stanley Pottinger, former Director, Office for Civil Rights, HEW, before the Civil Rights Oversight Subcommittee, House Committee on Judiciary, June 14, 1972.

OCR staff spend an average of 7 months completing an analysis,<sup>165</sup>  
 although analyses of data in the reviews of Tucson and Winslow, Arizona,  
<sup>166</sup>  
 for example, lasted 3 years. In the San Francisco region, where  
 the analysis process is particularly slow, the Elementary and Secondary  
 Education Branch chief considers 1 year a reasonable amount of time  
<sup>167</sup>  
 to spend on analyzing the data and preparing the letter of noncompliance.  
 Judging by the performance of the Dallas and Chicago regional offices, where  
 the quality of reviews is high, it appears that a thorough analysis can  
 be done in a 4- to 5-month period. Further, although reviews under  
<sup>168</sup>  
Adams v. Richardson were not as extensive as other Title VI reviews,  
 analyses of data were completed and letters of noncompliance were sent  
<sup>169</sup>  
 to the appropriate districts within 1 month after the reviews.

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165. This average was derived from a sampling of 23 reviews representating four regions. Included in the time involved in analysis is the time spent by OGC in reviewing the letter of noncompliance for legal sufficiency.

166. Palomino interview, supra note 70.

167. Id.

168. Onsite reviews which were made in accordance with the court order issued to HEW in Adams v. Richardson concentrated primarily on discrimination in ability grouping or faculty assignment and demotion. OCR relied on statistical information and written plans to assess districts' compliance in the area of student assignment.

169. OCR was operating under time constraints imposed by a court injunction. Districts visited under Adams v. Richardson were reviewed on site in March 1973 and received letters of noncompliance by April of 1973.

c. Findings

In 27 reviews<sup>170</sup> conducted by four regional offices<sup>171</sup> between 1971 and 1973, 20 districts were found to have deficiencies in the area of minority faculty recruitment and assignment, 18 were cited for not providing special language programs, 16 for discriminatory assignment of minority students to EMR classes, 12 for discriminatory ability grouping-tracking, and 10 for student assignment discrimination.

Findings in reviews prior to 1972 were notably less comprehensive than later reviews.<sup>172</sup> This difference is exemplified by letters sent during the two periods. In an August 12, 1971, letter of noncompliance to the Taft Independent School District in Texas, for example, OCR found:

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170. Arizona: Tucson, Clifton, Tempe, and Winslow. Arkansas: Sparkman. California: Fresno. Indiana: East Chicago. New Jersey: Perth Amboy and Hoboken. New Mexico: Hobbs. New York: Mt. Vernon. Texas: Ft. Stockton, Socorro, Eagle Pass, Harlingen, La Feria, Pawnee, Rotan, Taft, Weslaco, El Paso, Karnes City, Beeville, Uvalde, Marlin, and Huntsville. Wisconsin: Shawano.

171. OCR provided copies of letters of findings and other review material from the following four regions: Regions II (New York), V (Chicago), VI (Dallas), and IX (San Francisco).

172. All equal educational services reviews conducted prior to 1972 were in Region VI.

the district has failed to provide for the bilingual/bicultural needs of the Mexican-American student in that:

- a. It has no bilingual programs.
- b. Its recruitment efforts have failed to produce a substantial number of Mexican-American professional staff members. 173

And in a 1971 review of the Weslaco Independent School District in Texas, OCR pointed out that, "the remedial programs operate as an educational dead end for minority group children," and

The district's grouping techniques continue to perpetuate the effects of ethnic isolation as evidenced by the patterns of assignment in the English, Spanish, science, vocational, reading, and mathematics classes at the Junior and Senior High School level. 174

In comparison, a March 26, 1973, letter of noncompliance to the Winslow School District in Arizona indicates the more intensive degree of analysis used to conclude that national origin minority group children were being excluded from effective participation in the educational program.

The data gathered indicated that a substantial number of national origin minority group children enter first grade classes with serious deficiencies in English language skills; that the district does not provide adequate programs to meet the educational needs of these children; that the Spanish-surnamed and Native American children, on the average, score consistently lower than

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173. Letter of noncompliance from John A. Bell, Chief, Education Branch, Region VI OCR, to Superintendent Carl W. Waddle, Taft Independent School District, Taft, Tex., Aug. 12, 1971.

174. Letter of noncompliance from John A. Bell, Chief, Education Branch, Region VI OCR, to Superintendent Otto W. Longlois, Weslaco Independent School District, Weslaco, Tex., July 20, 1971.

Anglo children on the Stanford Achievement Tests 175 administered by the district through the first six years of school, and that the scores of these national origin minority children fall further behind those of Anglo children each year they are in school. Even at the high school level, while only 18% of the overall enrollment is Spanish-surnamed,<sup>1</sup> such students make up 33% of the remedial Basic English classes. 176

This same detailed analysis was apparent in the October 4, 1972, letter of noncompliance to the Shawano Board of Education in Wisconsin, where OCR found,

Of the 85 students currently assigned to special education classes for the educably mentally retarded, 63 were assigned in direct contravention of current Wisconsin state law. Of the 63 students assigned in contravention of the Wisconsin state law, 46, or 86%, were American Indian students. More specifically, of 11 children improperly assigned to special educational classes for the mentally retarded for reasons other than mental retardation, e.g., "reading" and "hearing" problems, 10, or 91%, were American Indian; of the 29 children assigned to special educational classes for the mentally retarded who had I.Q. Performance scores above the state minimum level (80) 22, or 76% were American Indian. 177

In another case, the El Paso Independent School District in Texas, OCR found,

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175. The Stanford Achievement Test is a test commonly utilized to measure the achievement of elementary school children in language areas and mathematics. The test is used to group students for instructional purposes and to otherwise analyze the abilities and achievement level of individual students.

176. Letter of noncompliance from Floyd L. Pierce, Regional Civil Rights Director, Region IX OCR, to Superintendent Francis Dahlen, Winslow Elementary and High School District, Winslow, Ariz., June 21, 1972.

177. Letter of noncompliance from Kenneth A. Mines, Regional Civil Rights Director, Region V OCR, to Superintendent Arnold A. Gruber, Shawano Board of Education, Shawano, Wis., Oct. 4, 1972.

A review of a random sample of the cumulative folders of Special Education students indicates that 84% of the Spanish surnamed students in Special Education classes were assigned primarily on the basis of English language skills, even though a significant number of these students had a very limited knowledge of the English language. Anglo students were retested more frequently than were Spanish surnamed students. Several Spanish surnamed students, but no Anglo students, had not been retested for a period of four to seven years. These problems were compounded by the district's use of personnel who do not meet state or district qualification standards to perform important functions in Special Education, such as testing, assignment, formulating curricula, and teaching. 178

Some letters of noncompliance sent after 1971 have also included recommendations concerning the school district's responsibility to notify parents whose primary language is other than English of school activities and to equalize facilities in schools with concentrations of minority students. 179

180 The 1972 letter sent to the Shawano School District also charged that discipline policies, guidance services, and extracurricular activities discriminated against American Indian students. 181

Where students of more than one minority group face discrimination in a school district, OCR makes two types of recommendations: those concerning the district's responsibility to overcome language difficulties

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178. Letter of noncompliance from Dorothy D. Stuck, Regional Civil Rights Director, Region VI OCR, to Superintendent H.E. Charles, El Paso Independent School District, El Paso, Tex., June 13, 1972.

179. Examples include the letters of noncompliance sent to School City of East Chicago, Ind., and to the Clifton Public Schools, Clifton, Ariz.

180. An example is the letter of noncompliance to the Winslow, Ariz., School District, supra note 176.

181. Id.

of national origin minority students, and those covering discrimination against all minority students as a group. In the East Chicago, Indiana, letter of noncompliance,<sup>182</sup> for example, OCR pointed out that:

minority children have been discriminatorily assigned to EMR classes on the basis of procedures which differ from those used for Anglo children, and that national origin minority children have been discriminatorily assigned to EMR classes on the basis of criteria which essentially measure or evaluate English language skills, not their true intelligence or mental capacity.

The letter goes on to state that,

Although a sizeable portion of the national origin minority students in the East Chicago public schools come from homes in which English is not the primary language, the district has no policy of sending notices or providing oral communication in any language other than English.

and,

The district's assignment policies result in racially identifiable classes. For example, in the 1970-71 school year in the eighth grade at Block Junior High, Anglo students, who comprised 15 percent of the grade population, made up 40 percent of the highest track, 10 percent of the middle track, and only 2 percent of the lowest track. Minority students who comprised 85 percent of the grade population, made up 60 percent of the highest track, 90 percent of the middle track, and 98 percent of the lowest track.

OCR's criticism of school districts concerning the denial of equal educational opportunity to black students has been confined to the areas of placement in EMR classes and low ability groups. Yet, OCR goes beyond these areas where national origin minority group children are concerned, by citing as a Title VI violation the failure of districts to be responsive to those students' cultural backgrounds.

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182. Letter of noncompliance from John R. Hodgdon, Regional Civil Rights Director, Region V OCR, to Superintendent Robert Krajewski, East Chicago Public Schools, East Chicago, Ind., June 9, 1972.



Of 27 reviews examined, OCR cited student assignment discrimination or the existence of a racially isolated school in 10 cases,<sup>183</sup> only 2 of which were reviewed initially after 1971.<sup>184</sup> In reviews of Shawano, Wisconsin, and East Chicago, Indiana, OCR found ethnically isolated schools but such findings were not included in the letters of noncompliance.<sup>185</sup>

OCR has not yet resolved the issue of student assignment discrimination in majority minority school districts, despite the decision in the Swann v. Charlotte Mecklenburg Board of Education case in which the

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183. Ft. Stockton, Tex.; Eagle Pass, Tex.; La Feria, Tex.; Taft, Tex.; Weslaco, Tex., Beeville, Tex.; Uvalde, Tex.; Winslow, Ariz.; Fresno, Calif.; and Tempe, Ariz.

184. Eagle Pass, Tex. and Fresno, Calif.

185. OCR's review report of the East Chicago, Indiana, review indicated that as of September 17, 1971, 3 of 11 elementary schools in the district were more than 50 percent white, while 7 were more than 50 percent minority, and the remaining one was 50 percent white and 50 percent minority. This finding was not included in the letter of noncompliance sent to the district in June 1972.

In the Shawano, Wisconsin, review report, OCR staff reported that of four schools serving grades 1-5, two were predominantly Anglo and two were predominantly Native American. The only reference to this finding in the letter of noncompliance of October 1972 was the statement that "information gathered by the Office for Civil Rights during its review has also raised the possibility that school board actions and policies governing the assignment of students to schools violates Title VI of the Civil Rights Act of 1964; but our analysis is not complete." The district was told that if the analysis revealed violations, it would be asked to develop a plan to correct the violations.

Supreme Court found that school districts are responsible for proving nondiscrimination in such cases, and for making every effort to secure the "greatest possible degree of actual desegregation."<sup>186</sup> In six majority minority districts reviewed,<sup>187</sup> OCR found that there were racially isolated schools in four of them,<sup>188</sup> but none of the districts were required to prove nondiscrimination.

In general, when reviewing school districts OCR has found that the great majority have violations serious enough to warrant a letter of noncompliance. In fact, no district reviewed by the Dallas regional office has been found in compliance without negotiations. Both the Chicago and San Francisco regional offices have sent letters to districts they reviewed, notifying the districts that they are in compliance, but pointing out deficiencies which should be corrected. In such cases no comprehensive educational plan<sup>189</sup> was required.

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186. *Swann v. Charlotte-Mecklenburg*, supra note 106, at 26.

187. *East Chicago, Inc.*; *Hoboken, N.J.*; *Perth Amboy, N.J.*; *Mt. Vernon, N.Y.*; *El Paso, Tex.*; and *Marlin, Tex.*

188. *East Chicago, Ind.*; *Mt. Vernon, N.Y.*; *El Paso, Tex.*; and *Perth Amboy, N.J.*

189. See p. 78 infra for a full description of a comprehensive educational plan.

In one case, the San Francisco regional office found that the Clifton, Arizona, public schools had few minority faculty members in proportion to the number of minority students,<sup>190</sup> that the district needed to reassess its responsibility to notify national origin minority group parents about school activities and that the school district's suspension policy might discriminate against minority students.<sup>191</sup> The letter to the district, however, indicated that there was "no evidence that the district is in violation of Title VI of the Civil Rights Act of 1964..."<sup>192</sup> and the district was not required to submit a plan to correct the violations found. The Education Branch

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190. This finding represents but one example of what appears to be a widespread problem: discrimination against minorities in employment at educational institutions. For example, between 1954 and 1970, in 17 Southern and Border States, the black teaching staff decreased while the black student population increased. In addition, it has been shown that in areas where resistance to desegregation has been most intense, the percentage of black teachers decreased by 6.8 percent, while the number of white teachers increased by 4.8 percent. Brief for National Education Association as amicus curiae, *Willie McLaurin v. The Columbia Municipal Separate School District, No. 71-3022* (U.S. Court of Appeals, 5th Circuit). For a more detailed discussion of the prevalence and effect of disproportionate ratios of minority faculty to students in public schools see, Twenty Years After Brown, supra note 117, at 80-85.

191. Letter of noncompliance from Floyd L. Pierce, Regional Civil Rights Director, Region IX OCR, to Superintendent Guido P. Ciscaghi, Clifton Public Schools, Clifton, Ariz., Apr. 24, 1972.

192. Id. OCR has recently indicated to this Commission that:

...the findings which the San Francisco office is alleged to have made with respect to Clifton, Arizona, were observations and suggestions only-- not requirements imposed under Title VI since the district was determined to be in compliance after a review prompted by a complaint. Holmes letter, supra note 52.

Chief in San Francisco indicated that OCR was not able to find more substantial violations of Title VI because Clifton's record-keeping was so deficient.<sup>193</sup> Clifton was not even required, at a minimum, to improve its recordkeeping and submit the requested data before its status was determined to be in compliance with Title VI.<sup>194</sup> Despite the possibility that Clifton was violating Title VI in a number of areas, there were no plans for the San Francisco office to conduct a followup review of the Clifton public schools. Further, it was not

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193. Palomino interview, supra note 70.

194. Lloyd Henderson, Chief of the Elementary and Secondary Education Division, OCR headquarters, stated that OCR staff in Region IX should have required that Clifton submit the requested data prior to its making a decision about the district's compliance status. Interview with Lloyd Henderson, Chief, Elementary and Secondary Division, OCR, June 26, 1973.

expected that Clifton would make any changes in its recordkeeping, suspension policy, faculty representation, or notification to national origin minority group parents.

Although Title IX of the Education Amendments of 1972 has been in effect for more than 2 years, OCR has indicated that sex discrimination was the primary focus of only a few compliance reviews. Until final regulations are adopted by OCR, its staff will not routinely include Title IX concerns in their reviews, only upon receipt of complaints such as the one filed by the Texas Division of the Women's Equity Action League (WEAL), which charges sex discrimination in athletics, student course assignments, and employment policies on the part of the Waco Independent School District. No data are being collected on the sex of students assigned to classes and no determinations are made on the extent to which course requirements for females differ from those for males although this information would be valuable once the regulations are in final form.

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195. Palomino interview, supra note 70.

196. Arnold interview, supra note 14. For example sex discrimination was the primary focus of reviews in Pittsburgh, Pa., Waco, Tex., Fairfax, Va., and Loudon, Va.

197. Letter from Dr. Paula Latimer, President, Texas Division of WEAL, to Dorothy Stuck, Regional Director, OCR, Region VI, Apr. 11, 1973. For further discussion of sex discrimination complaints received by OCR, see p. 124 infra.

198. These data are to be collected in the revised 101 and 102 forms distributed in fall 1973. The data will not be available to regional office staff for several months after school districts respond.

d. Negotiations

Once letters of noncompliance are sent to school districts, OCR begins negotiations with each district to secure compliance with Title VI. Initially, districts are given 30 days to indicate what steps will be taken to come into compliance. Where districts are not providing equal educational services to minority children, OCR requires the development of:

...a comprehensive educational plan which will utilize all available resources to equalize the educational access of all children in order to eliminate significant differences in educational performance attributable to membership in any racial or ethnic groups. 199

Such plans typically cover changes in the referral procedure for placement of children in EMR classes, development of course material or courses which reflect the culture of minority students, increased communication with parents of minority students, recruitment of minority faculty and staff, and examination of or change in ability grouping or tracking procedures. Some plans go beyond what is required by OCR. In its plans the El Paso Independent School District plan outlined a complete curriculum review, the initiation of an early childhood education program, and an extensive staff development program. <sup>200</sup>

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199. Taken from the letter of noncompliance sent from Dorothy D. Stuck, Regional Director, Region VI OCR, to Superintendent R. E. Byrom, Uvalde Independent School District, Uvalde, Tex., June 15, 1971. Similar language is found in all letters to school districts where deficiencies are noted in the provision of equal educational services.

200. These changes are outlined in the plan submitted by the El Paso Independent School District, El Paso, Tex., in its response of July 27, 1972, to Region VI OCR's June 13, 1972, letter of noncompliance.

Although OCR does not require school districts to submit full affirmative action plans with goals and timetables to correct most Title VI violations, affirmative action plans to correct discriminatory recruitment, promotion, and assignment of minority faculty often must be included in the overall comprehensive educational plan.<sup>201</sup> For example, in the letter of noncompliance to Fresno, California. OCR stated that:

In order to comply with Title VI in this regard, the District must develop and implement an affirmative action plan to recruit, hire, and promote minorities, and in addition, develop and implement a plan that will assign teachers to schools based on educational needs without regard to race, color, or national origin.<sup>202</sup>

In some cases, OCR has specified the time period in which implementation of the affirmative action plan must be undertaken. For example, both Taft and El Paso, Texas, were informed that their affirmative action plans for faculty staffing policies and practice must become effective during the following school year. OCR contends that goals and timetables are only appropriate in the area of employment. Yet goals and timetables are merely a management tool to make a program results-oriented

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201. Of the 20 districts with deficiencies in the area of minority faculty recruitment and assignment, all 9 of those asked to submit affirmative action plans with goals and timetables to correct the violations were reviewed in 1972 and 1973. The remaining 11, reviewed prior to 1972, were asked as part of their comprehensive educational plan to correct deficiencies in the area of faculty recruitment, promotion, and assignment.

202. Letter of noncompliance from Floyd L. Pierce, Regional Civil Rights Director, Region IX OCR, to Superintendent Arnold Finch, Fresno City Unified School District, Fresno, Cal., Mar. 26, 1973.

and to make evaluation of progress under a plan easier. The concept could well be required for the implementation of other findings, including development of new EMR policies, bilingual programs, and a coeducational athletic program.

More recent comprehensive educational plans differ drastically from plans submitted prior to 1972. The superficiality of the letters of non-compliance mailed during the earlier period is reflected in the vagueness of plans accepted by OCR during that time. In response to OCR's finding in July 1971, that the Weslaco, Texas, school system was perpetuating the effects of ethnic isolation in its grouping practices, the district proposed to employ a team of consultants to make an indepth study of the practices and to have the team "continually evaluate the instructional program for its effectiveness and advise the School Board of the need for the implementation of alternatives."<sup>203</sup> By contrast in the 1973 negotiation between OCR and the East Chicago school system, the district's plan to correct discrimination in ability grouping included discontinuing use of achievement tests as a mechanism for placement of students, providing OCR with plans for assignment of students, and developing a plan to<sup>204</sup> modify ability grouping practices by improving the instructional program.

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203. Letter from John A. Bell, Chief, Education Branch, Region VI OCR, to Superintendent Otto W. Longlois, Weslaco Independent School District, Weslaco, Tex., Aug. 4, 1971. In this letter, OCR accepted the plan submitted by the Weslaco School District.

204. These changes were reiterated in a letter from Kenneth A. Mines, Regional Civil Rights Director, Region V OCR, to Superintendent Robert Krajewski, East Chicago Public Schools, East Chicago, Ind., Mar. 14, 1973.



Since OCR has defined no specific parameters for determining how long negotiations will continue, its negotiations are almost always protracted. According to OCR, the length of time spent on negotiations is dependent on several factors, including "the complexity of the areas of noncompliance, the decision-making process of the institution involved, and the availability of consultants and technical assistance."<sup>205</sup> Although negotiation time averages approximately 5 months, there are some glaring examples of negotiations drawn out for even more extended periods.

Taft Independent School District in Taft, Texas, is still considered to be negotiating with OCR, 3 years after the letter of noncompliance was sent.<sup>206</sup> Negotiations with La Feria Independent School District in Texas lasted more than 2 years.<sup>207</sup> Lengthy negotiations, added to the extended periods of time spent on the analysis of data and the preparation of the letters of noncompliance, result in the fact that most districts will not complete negotiations with OCR until at least 1 year after OCR's initial visit to the district. By this time areas where violations were found, such as student and faculty composition and course offerings, may have changed considerably.

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205. HEW response, supra note 43.

206. Letter from John A. Bell, Chief, Education Branch, Region VI OCR, to Superintendent Carl W. Waddle, Taft Independent School District, Taft, Tex., Aug. 12, 1971.

207. Letter from John A. Bell, Chief, Education Branch, Region VI OCR, to Superintendent Clyde E. Vail, La Feria Independent School District, La Feria, Tex., Mar. 9, 1972. In July 1974, HEW accepted La Feria's equal educational services and desegregation plan. Telephone interview with Gary Arnold, Equal Opportunity Specialist, OCR, July 31, 1974. See also situations involving El Paso and Harlingen districts which also involved appreciable lengths of time. "Plans were accepted from El Paso and Harlingen on August 15, 1974 and January 11, 1974, respectively." Holmes letter, supra note 52.

Since 1971, OCR has offered to districts reviewed under the May 25 memorandum the assistance of an "educational program team," comprised of educational consultants, including those with expertise in developing bilingual and other equal educational services programs.<sup>208</sup> Such teams have assisted in the development of comprehensive educational plans for districts. In addition, the Bureau of Equal Educational Opportunities, which administers funds under ESAA and Title IV of the Civil Rights Act of 1964, makes funds available to school districts to assist them in the process of desegregation.<sup>209</sup> One use of such aid was in the case of the Illinois State Department of Public Instruction which received Title IV funds and then provided technical assistance to the school districts in Illinois which were reviewed by OCR.<sup>210</sup>

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208. Teams were utilized, for example, by the El Paso Independent School District, Tex., and the Winslow School District, Ariz.

209. Section 403 of Title IV of the Civil Rights Act of 1964 provides that,

The Commissioner of Education is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools.

and Section 405 states,

The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of--

(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and (2) employing specialists to advise in problems incident to desegregation.

210. Such assistance had, for example, been provided to the Maywood, Joliet, and Kankakee, Ill., school districts.

e. Followup

While OCR spends a great deal of time on reviews, analysis of data, and negotiations, its weak followup program encourages little or no implementation of negotiated plans. There is no policy which states how soon after negotiations are completed a followup review should be conducted. Many districts reviewed by OCR have never received followup reviews, and in fact, OCR was unable to provide information about the number of followup reviews it conducted in fiscal year 1973.<sup>211</sup>

The low priority given followup reviews is evident in the activities of the regional offices. In a sample of six reviews initially conducted by Region VI between 1971 and 1973, only half had received followup visits, one as late as 2 years later.<sup>212</sup> One staff member indicated that because of ESAP, ESAA, and reviews under the May 25 memorandum, the regional office has not been able to conduct many followup reviews.<sup>213</sup> In Region IX the Education Branch Chief could recall only two followup reviews ever having been conducted--Inglewood and Pasadena, California. The original

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211. HEW response, supra note 43. OCR estimated that 50 percent of the districts reviewed have been subject to followup reviews. OCR does not have specific statistics on which districts have been revisited.

212. Ft. Stockton, El Paso, Beeville, Socorro, Pawnee, and Weslaco school districts in Texas. El Paso, Beeville, and Weslaco received followup visits. Letter from John A. Bell, Chief, Elementary and Secondary Education Branch, Region VI OCR, to Kathleen A. Buto, Equal Opportunity Specialist, U.S. Commission on Civil Rights, May 16, 1973.

213. Beeville, Tex.

214. Interview with James C. McClure, Equal Opportunity Specialist, Elementary and Secondary Education Branch, Region VI OCR, Feb. 1, 1973, in Dallas, Tex.

reviews of these districts were conducted by headquarters and the districts were never sent letters of noncompliance, since they came under court orders before the review was complete. Further, the followup reviews were actually  
 215  
 ESAA pregrant reviews.

OCR headquarters has asserted that followup visits and progress reports  
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 have shown that districts are satisfactorily following their plans.

There is no evidence, however, to prove that routine followup visits are made or that it is a uniform practice from region to region to require submission of progress reports following negotiation of voluntary plans.

The need for followup information is evident. For example, the Rotan Independent School District in Rotan, Texas, successfully negotiated a voluntary plan in March 1971 to correct discriminatory practices found by OCR in a January 1971 onsite review. OCR revisited Rotan in February 1972 and found that the negotiated plan had not been implemented. Technical assistance was offered. As of July 1974, the district was considered to be  
 217  
 still negotiating its voluntary plan. Until an effective followup program is developed, districts like Rotan can continue to negotiate compliance with  
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 OCR for protracted periods of time without actually implementing effective plans.

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215. Where it has found noncompliance, Region IX has spent inordinate amounts of time in negotiations. In fact, no negotiations have been completed and therefore no routine Title VI followup revisits have been conducted.

216. Letter from Patricia A. King, former Acting Director, OCR, to Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, Feb. 23, 1973.

217. Arnold telephone interview, supra note 207.

218. OCR has recently informed this Commission that "...consistent with a program objective now in the Division's Annual Enforcement Plan, follow-up visits will be scheduled for all such districts on a regular and systematic basis." Holmes letter, supra note 52.

f. New Program Thrusts

OCR's review of the New York City public schools is part of an effort to ensure compliance with equal educational opportunity principles on the part of large cities. Collection of data for the New York City review began in 1973. Similar efforts were scheduled to begin in Chicago, Philadelphia, Los Angeles, and Houston beginning in mid-1974, but as of August 1974, HEW had not yet begun to collect the data.

An outline of these reviews provided by OCR reveals that, while the scope of the reviews appears to cover thoroughly the extent of equal educational services provided students in the districts, once again OCR is ignoring the issue of assignment of pupils to schools on the basis of race or ethnicity in these reviews. Emphasis is placed primarily on ensuring so-called "quality education" for students, even in racially or ethnically isolated schools without attempting to desegregate such schools.

In addition, OCR plans in fiscal year 1975 to expand further its enforcement effort in 709 districts having large numbers of national origin students. Following analysis of HEW's 101 and 102 forms,

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219. Testimony by Martin Gerry, Acting Director of OCR, before the House Education Subcomm. of the House Education and Labor Comm., Mar. 12, 1974.

220. Telephone interview with Gary Arnold, Equal Opportunity Specialist, HEW, OCR, Aug. 4, 1974.

221. Issues to be reviewed during the Equal Educational Services. Reviews conducted by the Office for Civil Rights, Department of Health, Education, and Welfare. Attachment to Gerry testimony, supra note 219.

222. Telephone interview with Goldia Hodgdon, Branch Chief, Policy and Program Development, Elementary and Secondary Education Division, OCR, HEW, Nov. 25, 1974. These districts will be asked to submit more comprehensive data to the States. However, as of October 21, 1974, the new data forms were awaiting clearance by the Office of Management and Budget. It appears, therefore, that this program will not be initiated until the next school year. Telephone interview with Roy Rodriguez, Equal Opportunity Specialist, OCR, HEW, Oct. 21, 1974.

districts were selected based on the concentrations of national origin students and relative lack of corresponding language programs for such students. OCR plans to issue a memorandum to State education agencies, which will detail plans for a joint Federal-State effort with regard to the districts identified in the survey. This could be a constructive step provided that OCR issues detailed instructions to State education officials so that they know the exact nature and extent of what is expected of them under the agreement. OCR must also closely monitor the performance of the State agencies. Without such activity by OCR these agencies, which have poor records in the area of ensuring equal educational opportunities for minority children, may interpret the proposed joint effort as an abdication  
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by OCR of its enforcement responsibility.

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223. One HEW official commented, "It is our hope that State agency leadership can provide the impetus for voluntary plan development without the need for time consuming onsite reviews." Gerry testimony, supra note 219. Such statements may be read by State officials to indicate that OCR intends to place most of the responsibility for enforcement in their hands.

## 2. ESAP and ESAA Reviews

OCR has been responsible for participating in the selection and monitoring of programs under the Emergency School Assistance Program (ESAP) and the Emergency School Aid Act (ESAA), administered by the U.S. Office of Education (USOE). ESAP, which expired in January 1973, provided funds to assist court-ordered school districts with desegregation. ESAA, a successor program, made funds available beginning in January 1973 to school districts under court-ordered or voluntary plans and to public nonprofit organizations assisting school districts in the process of desegregation. Under both programs, USOE monitored school districts for adherence to the proposed desegregation program design, while OCR was responsible for ensuring that districts comply with civil rights assurances submitted under the program. <sup>224</sup> Activities associated with this responsibility include the processing of applications <sup>225</sup> and the conduct of pregrant and postgrant reviews.

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224. Under ESAP, there were 15 assurances included as part of the program application. Four specifically referred to nondiscrimination in employment, assignment, and treatment of minority faculty, in practices and procedures such as testing, which affect children, and in relationships with nonpublic schools.

There are 28 assurances under ESAA, of which 6 concern civil rights responsibilities, including a prohibition against transfers of property or services to discriminatory nonpublic schools and provisions concerning nondiscriminatory personnel practices and nondiscrimination in student assignment.

225. Pregrant reviews are those conducted in the course of evaluating the school district's application for funds to ensure compliance with the assurances submitted.

Postgrant reviews are those conducted after the school district has been awarded a grant. The USOE staff check the district's program to verify that it is being implemented as planned, and OCR verifies that the district is continuing to comply with the signed civil rights assurances.

a. ESAP Reviews

Since no new ESAP programs were funded in fiscal year 1973, no pregrant reviews were conducted. Grants for many ESAP programs lasted until January 1973, however, when ESAA funds became available. Thus, for the first 6 months of fiscal year 1973, the OCR staff was involved in postgrant reviews of ESAP school districts. Approximately 450 school districts were funded under ESAP, and in fiscal year 1973, OCR staff conducted 179 postgrant reviews of these districts, the bulk of which were conducted by Regions IV (Atlanta), VI (Dallas), and III (Philadelphia).<sup>226</sup>

Districts which were reviewed were selected randomly or as a result of complaints. In the course of the review OCR determined whether the school district engaged in transfer of public property to private discriminatory schools, in discriminatory treatment of faculty and staff, in segregation of students in classrooms, in segregation of students in extracurricular activities, or in discrimination in course offerings of a general nature. The extent to which equal educational services were provided was also examined. Finally, OCR determined if the district had fulfilled its obligations to publicize the ESAP biracial committee in the program's operation.<sup>227</sup>

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226. HEW response, supra note 43.

Region IV	86	V	3
VI	54	IX	3
III	32	II	1

227. Taken from letter of noncompliance from Floyd L. Pierce, Regional OCR Director, Region IX OCR (San Francisco), to Superintendent Doran W. Tregarthen, Oxnard School District, Oxnard, Calif., Feb. 17, 1972. In the letter OCR lists the areas covered by OCR staff in their ESAP postaward reviews.



Prior to making a postgrant review, OCR requested the school districts to assemble data concerning the names and racial-ethnic breakdown of students, curriculum staff, ESAP program staff, participants in the ESAP program, professional staff by school, and members of the student and biracial committee. OCR also requested information concerning property transferred to private schools, community groups involved in the ESAP program, the school's ability grouping policy, selection of participants for the ESAP program, and the different aspects of the ESAP program.

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Following a postgrant review, OCR and USOE staff members prepared separate reports. The USOE report covered the extent of the school district's adherence to the program design. In a review of the Wichita Unified School District, Wichita, Kansas, for example, the program officer noted that student advisory committees had been formed but had not begun to function, that curriculum materials were in the process of being ordered, and that the program staff requested technical assistance. USOE informed the school district by letter that it was progressing satisfactorily and pointed

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228. Letter from Lawrence P. Washington, Deputy Chief, Education Branch, Region V OCR, to Acting Superintendent Reed M. Hagen, Kalamazoo Public Schools, Kalamazoo, Mich., Dec. 2, 1971.

Letter from Lawrence P. Washington, Deputy Chief, Education Branch, Region V OCR, to Superintendent Alvin E. Morris, Wichita Public School, Wichita, Kan., Nov. 18, 1971.

229. Memorandum from Robert E. Farning, Senior Program Officer/EE0, Region VII, to the Associate Commissioner, Equal Educational Opportunity, Subject: Post Grant Review of the Wichita Unified School District #259, Emergency School Assistance Program, Project No. 26-1, Dec. 14, 1971.

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out areas needing improvement. The district further was encouraged to apply for funds under Title IV of the Civil Rights Act of 1964 to support technical assistance.

OCR prepares a checklist which corresponds to the format for ESAP assurances and indicates whether the school district is complying satisfactorily. The checklist is accompanied by a narrative report, with background data and information documenting the findings reported in the checklist. In its letter to the district, OCR reiterated the areas covered in the assurances and provided an analysis of the district's compliance with them.

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Negotiations following ESAP reviews were conducted like Title VI negotiations. OCR found in its postgrant review of Kalamazoo public schools in Kalamazoo, Michigan, that minority children were isolated in classes or activities for more than 50 percent of the day. OCR pointed out to district officials that the district had agreed, in signing the ESAP assurance, not to employ any practice, including testing, in assigning children

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230. USOE indicated that the role of the advisory committees in implementing the ESAP program needed to be identified. The agency recommended that a procedure be implemented to catalogue information in a central distribution center to avoid duplication of materials.

231. In a letter to District 151, South Holland, Illinois, for example, OCR enunciated that discrimination is prohibited in assigning students to ability groups, tracks, special education, and other curricular activities and defined a "track" as being racially or ethnically identifiable if it deviates more than 20 percent in either direction from the school racial and/or ethnic ratio. HEW's final analysis of the school's program in this area was that the racial-ethnic ratio of a kindergarten class deviated by more than 20 percent from the racial-ethnic ratio of the grade: 52 percent of the students assigned to the class were black as compared to 30.2 percent of the total of kindergarten students in the school. Letter from Lawrence P. Washington, Acting Chief, Education Branch, Region V OCR, to Dr. Thomas Van Dam, Superintendent, School District 151, Feb. 21, 1973.

232. Memorandum from Waldo Graton, Civil Rights Specialist, Education Branch, Region V OCR, to Lawrence Washington, Deputy Chief, Education Branch, Region V OCR, Subject: ESAP Review of Kalamazoo, Mich., School District, Dec. 22, 1971.

to classes, which would result in the isolation of minority and nonminority group children for a substantial part of the day. Following a discussion between OCR staff and district administrators, it was agreed that the district would analyze the extent of such isolation and take corrective  
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action.

In another case, the postgrant review of the Oxnard Elementary School District in Oxnard, California, OCR staff found that the district had a policy of not counting previous experience for teachers newly hired from out of the district. As a result such persons often did not receive the same salary as personnel with the same number of years of experience who had obtained their experience within the district. The policy was not on its face discriminatory yet minority faculty members tended to be victims of the policy, since they accounted for a large per-  
234  
centage of new hires. The district complied with OCR's requests and changed its policy to allow out-of-district experience to be counted and provided a vice-principalship for a newly hired, out-of-district employee at a salary comparable to other staff having the same amount of experience. OCR's negotiation with the school district,  
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while effective, took 7 months from the date of the initial review.

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233. Letter to Acting Superintendent Reed M. Hagen, supra note 228.

234. Id.

235. Letter from Floyd L. Pierce, Regional OCR Director, Region IX (San Francisco), to Superintendent Doran W. Tregarthen, Oxnard Elementary Schools, Oxnard, Cal., May 12, 1972. In this letter OCR agreed to the changes proposed by the Oxnard school district.

Prior to ESAP, court-ordered districts were considered to be under the sole jurisdiction of the Department of Justice, and OCR took the position that it could not review such districts even when complaints were received.<sup>236</sup> Under ESAP and ESAA, OCR was not only permitted but required to monitor civil rights compliance in districts receiving funds. This means that, under ESAP and ESAA, OCR is reviewing for the first time large city districts, like San Francisco and Dallas, which have been under court order. Region IX, which has been reluctant to review large city districts,<sup>237</sup> whether or not they are under court order, will be conducting a review of the Los Angeles Unified School District for the first time under ESAA<sup>238</sup> in fiscal year 1975.

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236. OCR referred complaints concerning court-ordered districts to the Justice Department and continues to do so, unless such districts are ESAP or ESAA grantees.

237. The Education Branch chief in Region IX indicated that large city reviews take too much time and "are not worth the effort." Interview with John Palomino, Education Branch Chief, Region IX, OCR, Mar. 19, 1973, in San Francisco, Cal.

238. School districts applying for more than \$500,000 in ESAA funds, if they have otherwise met eligibility criteria, must be visited prior to funding. The Los Angeles Unified School District applied for a grant of \$8,705,000, but was determined to be ineligible for ESAA funds because of faculty discrimination. See section on New Program Thrusts, p.85 supra. Arnold telephone interview, supra note 207.

The Dallas Independent School District (DISD) is one example of the manner in which OCR has been able, as part of its responsibility for monitoring compliance with ESAP assurances, to effect change in a court-ordered district. The Tri Ethnic Committee, a citizens' group appointed by the court to oversee the Dallas court order, compiled data showing that DISD was operating a discriminatory suspension policy under which minority students were subject to more and longer suspensions than some majority group students committing the same offense. A complaint was filed with OCR under the jurisdiction of ESAA, and it required the school district to file monthly reports on suspensions. When discrimination was identified in the application of the suspension policy, DISD altered its suspension policy to make it more equitable.

b. ESAA Reviews

Between January and August 1973, 517 school districts were funded under ESAA, many of which were formerly funded under ESAP. OCR has processed approximately 1,600 ESAA applications from school

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239. The Tri Ethnic Committee was appointed July 21, 1971, by Judge William M. Taylor in his court order governing desegregation of the Dallas Independent School District (Tasby v. Estes, Civil Action No. 3-4211-C /N.D. Tex., Sept. 4, 1971/). In 1973, there were 15 members on the committee (5 black, 5 Chicano, and 5 white). The committee meets regularly to advise the judge on implementation of the plan.

240. The policy was changed by limiting normal suspensions to 3 days. Offenses resulting in suspensions of longer than 3 days gave students the right to a hearing before a three person panel.

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 districts nationwide. In addition, OCR staff members have made pre-grant reviews to school districts which requested grants of \$500,000 or more or districts where civil rights problems were apparent.

In processing applications, the OCR staff verifies that the school district is in compliance with ESAA assurances by investigating whether the district has engaged in transfer of property or services to discriminatory nonpublic schools, the unfair demotion or dismissal of minority group personnel, or the racial isolation of students. OCR also ensures that the district has made efforts to involve nonpublic schools in the proposed ESAA project, has formed an advisory committee, and has held a public hearing prior to submission of the ESAA application. 242

In Region IX, OCR staff members are part of pregrant review teams, comprising USOE ESAA staff, State education agency representatives, and members of USOE's Contracts and Grants office. The USOE staff examine the district's proposed ESAA program, the Contracts and Grants staff review financial data and ascertain how fiscal accounting will be handled, and the State education agency staff offers technical assistance with the desegregation plan. In OCR's attempts to determine whether a district

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241. Arnold interview, supra note 14.

242. These areas are reiterated in OCR's Emergency School Aid Act Clearance Form, a checklist used by staff to determine the extent of a school district's compliance with the ESAA assurances. They are essentially the same areas reviewed to determine compliance under the ESAP Program. See p. 87 supra.

is in compliance with civil rights standards, the staff analyzes the provision of equal educational services as well as the areas explicitly set forth in the ESAA assurances. In order to complete the assessment of a district's eligibility in time for it to be considered for funding, OCR, rather than conducting the extensive analysis normally associated with a Title VI review of equal educational services, concentrates on areas such as discriminatory placement of children in EMR classes or discriminatory grouping practices.

In an ESAA pregrant review of School District 151 in South Holland, Illinois, <sup>243</sup> areas covered by the assurances and the school district's placement of minority students in EMH and special classes were examined. OCR staff found that minority children were represented in EMH classes in greater proportion than they were represented in the school district as a whole. The investigation of the EMH and special class programs was thorough, and included interviews with special education instructors, acquisition of information concerning the criteria used to place children in EMH and other special classes, and an assessment of the educational merits of the classes. OCR staff concluded that the school district's EMH and special class programs were not discriminatorily based on race or ethnicity and that children in the classes benefited from the special instruction.

Where OCR finds violations of the assurances or an absence of equal educational services, it requires the school district to correct the deficiencies or be declared ineligible for funds. Districts can also be

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243. Title VII-ESAA Review, School District #151, South Holland, Ill., Jan. 8-12 and Mar. 26-28, 1973.

put on "legal hold" in terms of ESAA eligibility until the applicant can convince the regional Education Branch Chief of its eligibility or make the appropriate changes.

As in Title VI reviews, OCR requires that school districts utilize an affirmative action approach to correct employment-related deficiencies found in ESAA pregrant reviews. Because their eligibility for ESAA funds is at stake, school districts have been cooperative in setting goals and timetables<sup>244</sup> to eliminate discriminatory practices. To overcome minority teacher erosion, for example, the Gilmer Independent School District in Gilmer, Texas, proposed trying to hire one minority faculty member for each nonminority faculty member.<sup>245</sup>

In the Longview Independent School District in Longview, Texas, OCR found that when the district underwent desegregation black principals were demoted to positions of assistant principals. To correct its non-compliance with ESAA assurances in this area, the district agreed to notify staff members of position vacancies, recommend the employment of a minority group member to fill the next principalship available, and develop and implement an annual evaluation system to serve as the basis for promotion and dismissal actions.<sup>246</sup> OCR found similar discriminatory

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244. Teacher erosion is a term used to refer to the loss, over time, of minority faculty members through retirement and attrition without their being replaced with other minority faculty members.

245. Interview with John A. Bell, Education Branch Chief, Region VI OCR, Jan. 30, 1973, in Dallas, Tex.

246. Letter from John A. Bell, Education Branch Chief, Region VI, OCR (Dallas), to Superintendent Collie W. Smith, Longview Independent School District, Feb. 21, 1973.



demotion of minority principals in the Jones County schools in Laurel, Mississippi, and was able to obtain the school board's agreement to restore the ratio of black principals to white principals that existed prior to desegregation by placing <sup>247</sup> three blacks in principal positions by fall of the 1973-74 school year. These goals will be checked in a postaward review within 6 months to a year from that date. If OCR is unable to make a site visit, the district will be required to submit a <sup>248</sup> written progress report.

OCR does not spend as much time on an ESAA pregrant review as is spent conducting a Title VI review. <sup>249</sup> Nevertheless, ESAA reviews are doubly advantageous: (1) they stimulate school districts seeking ESAA eligibility to rectify discriminatory practices quickly; and (2) they provide OCR with an opportunity to investigate, at least preliminarily, whether a school district is adequately providing equal educational services for minority students. ESAA postgrant reviews are conducted <sup>250</sup> for followup.

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247. Letter from Superintendent A.C. Knight, Jones County School District, Laurel, Miss., to Phillip Lyde, OCR Region IV (Atlanta), June 6, 1973.

248. In a letter dated April 16, 1974, the Jones County Schools informed HEW that three black assistant principals were promoted to principals. Telephone interview with Gary Arnold, Equal Opportunity Specialist, OCR, HEW, Aug. 21, 1974.

249. Between 2 and 5 days is spent on an ESAA onsite review, as compared with between 3 and 10 days for a Title VI review.

250. No postgrant reviews had been conducted as of June 13, 1973. This Commission learned that 80 postgrant reviews were conducted between June and October 1973, after the Commission had completed the major portion of its investigation of OCR's activities. Therefore, no analysis of these reviews appears in this report. The regional breakdown of ESAA postgrant reviews is as follows:

I	1	VI	12
II	2	VII	4
III	12	VIII	3
IV	26	IX	5
V	12	X	3

c. ESAA Regulations

When the last group of school districts was reviewed for funding under ESAA, OCR declared eight large city school districts<sup>251</sup> ineligible because they had violated the ESAA assurances by continuing faculty segregation. According to both the statute and its implementing regulations, such school districts were automatically ineligible for funds but could be granted a waiver and be considered for funding provided they immediately reassigned faculty in accordance with the pattern established in Singleton v. Jackson.<sup>252</sup> Rather than enforcing these requirements, HEW announced its intention to alter the requirements of the regulations to permit faculty segregation to continue as long as the school districts agreed to eliminate the discriminatory patterns<sup>253</sup> by 1975. HEW claimed that the original requirement imposed unrealistic demands on large city school districts, since it would involve the transfer of thousands of teachers. By this action, HEW, the agency charged with

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251. Baltimore, Md.; Chicago, Ill.; Buffalo, N.Y.; Detroit, Mich.; Los Angeles, Cal.; Oklahoma City, Okla.; Tuscaloosa, Ala.; and Princeton, Ohio.

252. 419 F.2d 1211 (5th Cir. 1969), supra note 107.

253. HEW News Release, June 29, 1973.

enforcing civil rights law in educational institutions, rather than contributing to increasing efforts to remove all vestiges of segregated education, has inhibited the progress of desegregation efforts <sup>254</sup> by allowing discriminatory faculty patterns to continue.

OCR has been effective in increasing the ESAA program's potential impact on minority group isolation by reinterpreting ESAA regulations on the issue of majority minority school district eligibility for ESAA funds. A school district applying for funds under the program can be considered eligible

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254. On August 7, 1973, this Commission sent a statement to HEW opposing the proposed amendments to the ESAA regulations for the following reasons:

(1) that the proposed amendments would violate provisions of Sections 706(d) and 703(a) of the Emergency School Aid Act, which prohibits participation in the program of districts maintaining faculty segregation;

(2) that the proposed amendments are contrary to those standards of faculty desegregation set forth by the Supreme Court in cases such as *Singleton v. Jackson Municipal Separate School District*, and *Swann v. Charlotte Mecklenburg Board of Education*; and

(3) that the proposed amendments are directly contrary to stated administration policy. Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Aug. 7, 1973, to Dr. Herman Goldberg, Associate Commissioner, Equal Educational Opportunity, HEW. Nevertheless, on August 10, HEW published the amendments to the regulations exactly as they had been proposed.

On August 23, 1973, a civil suit was filed against HEW on behalf of children adversely affected by the change. Plaintiffs sought to enjoin HEW from granting waivers of ineligibility for ESAA funds to five school districts. The districts became ineligible for ESAA funds because of alleged discriminatory assignment of school personnel. HEW maintained that, since the schools had changed their policies, such waivers should be granted. The District Court for the District of Columbia held that waivers were allowable, but on May 14, 1974, the U.S. Circuit Court of Appeals reversed the decision and held for plaintiffs. *Kelsey v. Weinberger*, 498 F.2d 701 (1974). No ESAA grants had been awarded the districts pending the final court decision.

if it falls into one of five categories:<sup>255</sup>

1. When it is implementing a plan pursuant to a final court desegregation order.
2. When it is implementing a plan approved by the Office for Civil Rights "for the desegregation of minority group segregated children or faculty in such schools."
3. When, not under court order or Title VI plan, it agrees to adopt and implement a plan "for the complete elimination of minority group isolation in all the minority group isolated schools of such agency."
4. When it agrees to implement a plan to eliminate or reduce minority group isolation in one or more schools, or reduce the total number of racially isolated children, or prevent further racial isolation in schools in which a substantial percentage of minority students are in attendance.
5. When it agrees to implement a plan involving the enrollment in its schools of students from other districts, where this effort reduces racial isolation in the other school districts.

It had initially appeared that these categories eliminated from consideration all majority minority school districts, many of which are either rural and impoverished or urban and the result of "white flight."

A memorandum from the HEW Regional Attorney in Region VI to the Regional USOE Commissioner, however, provided grounds for ESAA eligibility for majority minority districts.<sup>256</sup> Under the third category for eligibility,

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255. Title VII of the Education Amendments of 1972, P.L. 92-318 Section 706.

256. Memorandum from John M. Stokes, HEW Regional Attorney, Region VI, to Dr. George Hann, Regional Commissioner, USOE, Subject: ESAA Eligibility Criteria, Feb. 23, 1973.

it was determined that majority minority districts could submit for approval to HEW comprehensive education plans, which would eliminate or reduce the effects of minority group isolation on students in the district. Such plans could eliminate, for example, discriminatory ability grouping and EMR placement, both of which adversely affect the equal educational opportunity of minority students.

Nineteen majority minority school districts in Region VI were awarded ESAA funds in fiscal year 1973 as a result of this new interpretation. The regional counsel's memorandum has been distributed to all OCR regional offices, and in fiscal year 1974 OCR awarded ESAA funds to approximately 155 pilot and basic majority minority school districts.<sup>257</sup>

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257. Arnold telephone interview, supra note 207.

### 3. Reviews Under Adams v. Richardson

In Adams v. Richardson, HEW was found to be derelict in its efforts to enforce Title VI of the Civil Rights Act of 1964. In its February 1973 order, the district court directed HEW to begin enforcement action against school districts and systems of higher education which had been found in noncompliance by the agency between 1969 and 1971. In addition, HEW was required to begin reviewing State-supported vocational schools and school districts under court order. 259

To meet its obligation in the area of elementary and secondary schools, HEW was required to take action against 197 school districts. The court's order divided these districts into three categories: (1) 74 districts which had not complied with desegregation plans previously accepted by HEW; 2) 42 districts which HEW found out of compliance with the decision in Swann and Title VI, but against which no enforcement action had been taken; and (3) 85 districts which had at least a 20 percent disproportion between the percentage of minority students in one or more schools and the percentage of minority students in the school district as a whole. 260 Since districts in the first two categories had been notified in 1970 and 1971 of their noncompliance, the court specified that they be allowed 60 days to comply with

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258. For discussion of this case, see note 12 supra.

259. See Declaratory Judgment and Injunction Order, filed February 16, 1973.

260. Four districts from the first group were also included in the third group, thereby requiring action against 197, not 201, school districts. Id.

Title VI or have enforcement proceedings begin.<sup>261</sup> Districts in the third group were given 60 days to explain the existence of schools in racial disproportion.

During the 60-day period, HEW determined the compliance status of the school districts by analyzing data submitted by the school district or by making onsite visits. All 17 site visits made were to<sup>262</sup> districts which had not complied with voluntary plans, while HEW relied on the submission of acceptable plans or statistical data to determine the status of school districts charged with having racially disproportionate schools. Between July and December 1973, however, another seven school districts were reviewed on site, all of which had been given 60 days to explain the existence of racially disproportionate schools. Nineteen additional school districts in that group have been identified by HEW as being in need of onsite investigations.<sup>263</sup>

Reviews under Adams v. Richardson concentrated on denial of equal educational services. In a review of the Marlin Independent School District in Texas, for example, HEW pointed out deficiencies in areas

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261. Id.

262. Special report to the district court submitted May 1, 1973, by HEW, regarding actions taken pursuant to the court's order of February 16, 1973.

263. See 150 Day Report to the district court submitted by HEW July 17, 1973, and 180 Day Report to the district court submitted August 6, 1973, regarding actions taken pursuant to the court's order of February 16, 1973.

of ability grouping, EMR placement, and isolation of minority students in Title I classes.<sup>264</sup> A significant difference in reviews conducted between July and December 1973 and routine equal educational services reviews was emphasis on the issue of racial isolation of students in schools in the district, an area virtually ignored under equal educational services reviews.

HEW's reliance on statistical data and other written information to determine the compliance status of school districts was by nature superficial. In two cases, the agency failed to investigate thoroughly an area of possible noncompliance. In analyzing data submitted by the two districts,<sup>265</sup> HEW found that they were losing white students from one year to the next, but accepted their assurance that they had made no arrangements with another district to transfer students.<sup>266</sup> Such arrangements could constitute the establishment of dual school systems. Rather than considering the school districts in compliance, the responsible discharge of its mission made it incumbent upon OCR to determine if those white students were in fact transferring to another district or entering segregated private academies.

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264. Onsite review report of Marlin ISD, Texas, from John A. Bell, Chief, Education Branch, OCR Region VI, to A. J. Howell, Region VI - Desk Chief, Washington, D. C. OCR, Apr. 25, 1973.

265. Parkdale, Ark.; and South Mississippi School District # 57, Ark.

266. Special report, supra note 262.



Another shortcoming in depending on written information was that areas of discrimination other than those originally identified by HEW as needing correcting remained undetected. In two cases -- one involving discrimination in ability grouping, teacher assignments, and student assignment; and the other concerning racially disproportionate schools -- information received in the course of investigating the districts' ESAA eligibility disclosed discrimination not identified by HEW in its review of documents submitted pursuant to the Adams decision.<sup>267</sup> In the district which had been cited for racially disproportionate schools, deficiencies in ability grouping, special education classes, and faculty assignment were also discovered. In the other district, information from its ESAA application revealed that students were not being assigned to classes in accordance with the plan accepted by OCR and that racially disproportionate classes were the result.

The court order in Adams specifically addressed itself to HEW's past failure to initiate enforcement proceedings promptly where noncompliance was found and where negotiations were protracted. Nevertheless, the court's order did not specify a time limit for negotiations under Adams, but only required that HEW report regularly on its activities under the order.<sup>268</sup> In

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267. 150 and 180 Day Reports, supra note 263.

268. Injunction Order, supra note 259.

February 1974, pursuant to the order, HEW submitted a 6-month report on the status of the compliance efforts under Adams, at which time it indicated the different types of actions being taken. 269

The compliance status of 56 of the 197 school districts against which HEW was supposed to take action, was still unresolved more than 1 year after the court order.

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269. For a more detailed breakdown of these actions, see Six Month Report, pursuant to Court Order, submitted February 19, 1974. Of the 74 school districts which had not complied with their desegregation plan, 13 were sent Notice of Opportunity for Hearing; 16 were in compliance, 24 submitted acceptable affirmative action plans; 2 were under court order; 7 were then under review; 7 were transmitted to the Department of Justice; 1 was undergoing an HEW administrative enforcement proceeding, and 4 were included in another category. Of the 42 having a disproportionate number of minority students, 19 were sent Notices of Opportunity for Hearing, 5 initially complied, and the remaining 18 were determined to be in compliance. Of the 85 districts which were identified as having racially isolated schools but against which no enforcement action had been taken, 30 required no further desegregation; 15 were under Federal court order or were in litigation; 11 were identified by the Regional Civil Rights Director as requiring onsite reviews; 24 were reviewed by the Washington office, and 5 were sent letters stating that one school in the district must be desegregated.

In May 1974 plaintiffs filed a motion for further relief in which they stated that (1) HEW has taken no steps to obtain corrective action from 213 school districts which have "invalid" racial proportions; (2) 293 school districts have "presumptive Title VI violations"; (3) HEW should be ordered to commence administrative or judicial fund termination proceedings for eight school districts found ineligible for ESAA because of Title VI violations; (4) HEW is not complying with the original order of the court by not initiating enforcement proceedings within 15 months for 39 school districts; and (5) HEW should bring to the attention of the court all areas of noncompliance in the hundreds of school districts subject to court desegregation orders showing probable Title VI violations.

HEW, in its response of June 1974 to the motion, detailed the progress made by OCR in complying with the court's order. It maintained that: (1) Of the 213 districts, 18 were cited for Title VI violations and submitted acceptable plans; 42 no longer have disproportionate schools; 17 districts could not feasibly be desegregated further; 3 were in the process of active negotiation or review, and 6 were under court order or involved in Federal court litigation. As a result 86, or over 40 percent, were not proper subjects for further enforcement action. (2) The contention that 293 districts have presumptive Title VI violations is misleading; the data which served as the basis for the selection of these districts merely indicated schools with possible, not presumptive, Title VI violations. The data were to be used, for example, as part of the process of determining compliance review priorities for fiscal year 1975. (3) It is inaccurate to assume that the standard for determining ineligibility for ESAA is the same as that for determining a

Title VI violation. In the case of ESAA, the school district bears the burden of affirmatively proving its eligibility while in the case of non-ESAA Federal assistance, where a school district has an approved assurance of compliance, HEW has the burden of proving the district's noncompliance before assistance can be terminated. Further, the eight districts listed either do not have proven Title VI violations or have been the subjects of compliance investigations and/or negotiations during the past fiscal year;

4) HEW has complied with the court order, since each of the 85 districts has been requested to rebut or explain the substantial racial disproportion alleged to exist in one or more of their schools. HEW asserted that the process for all school districts has not been completed because of various factors, some of which include insufficient information submitted by the district; and, where a school has been unable to rebut or explain its racial disproportion, HEW must generally conduct its own review of the school district, requiring time and staff. In fact, however, HEW admitted that it had not begun the review of the information secured from 28 school districts;

and 5) Regarding plaintiffs' allegations that hundreds of school districts subject to court desegregation orders have probable Title VI violations, HEW contended that it had been receiving information regarding the compliance status of court-ordered districts while evaluating ESAA applications, receiving complaints, and preparing written reports for the court under the Adams order.

HEW has been forwarding all pertinent information to the Department of Justice in lieu of informing the court of findings, pursuant to the order. Of the 376 districts listed by plaintiff, 131 districts with racially identifiable classes reassigned students as a result of ESAA compliance efforts. Of 301 districts with disproportionate special education programs, 26 were required to retest and reevaluate the

<sup>270</sup> programs. As of November 12, 1974, no final ruling had been made by the judge.

#### 4. State Agency Reviews

State education agencies, like State health and welfare agencies, receive and administer billions of dollars in Federal funds each year, and are therefore subject to Title VI. Although OCR's Health and Social Services Division does review State health and welfare agencies for compliance with Title VI, the Elementary and Secondary Education Division does not oversee State education agencies in the same manner. The reason, according to one regional director,<sup>271</sup> is that OCR has focused on obvious areas of discrimination and the need to eliminate discrimination at the local school district level. The regional director added that it is easier to initiate enforcement proceedings against individual school districts than it is to bring enforcement action against a State agency, and in fact she considers that the purpose of State health and welfare agency reviews is to make the agencies aware of their civil rights obligations. Indeed, OCR has never proceeded administratively against any State health or welfare agency.

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270. HEW Response to Motion for Further Relief.

271. Interview with Dorothy Stuck, Regional Director, Region VI OCR (Dallas), Jan. 30, 1973, in Dallas, Tex.

OCR has made plans in fiscal year 1975 to work jointly with State education agencies in 350 reviews of school districts having large concentrations of national origin minority group students.<sup>272</sup> Steps must be taken to ensure that OCR not abdicate its own responsibility to oversee State enforcement activities, however, lest the joint effort weaken rather than strengthen enforcement of Title VI. As a result of a court order in Texas,<sup>273</sup> the Texas Education Agency (TEA) has worked with OCR in reviews of Texas school districts. OCR has never determined, however, whether TEA itself administers education funds in a nondiscriminatory manner.

Reviews of State education agencies for nondiscrimination are important, since school districts rely heavily on State education agencies for funds, policy guidance, and accreditation, and the attitude of the State education agency toward civil rights enforcement has a strong impact on the civil rights climate in any school district. As discussed earlier, States are also responsible for the establishment of district boundaries and could thus play an active role in school desegregation.<sup>274</sup>

<sup>272</sup>. Gerry testimony, supra note 219.

<sup>273</sup>. In *U.S. v. Texas*, 321 F. Supp. 1043 (S.D. Tex. 1971), the court found that the Texas Education Agency (TEA) has an affirmative obligation, (1) to act at once to eliminate by positive means all vestiges of the dual school structure throughout the State, and (2) to compensate for abiding scars of past discrimination.

<sup>274</sup>. See p. 59 supra.

In its oversight of State enforcement efforts, HEW could, for example, require State agencies to submit written compliance programs, listing problem districts and providing schedules for review. In turn, State agencies could facilitate their own reviews by requiring school districts to do an analysis to determine if there is any discrimination in student assignment policies and the provision of educational services. To the extent that any problems are uncovered, the districts could be required to develop suitable remedies.<sup>275</sup> Thus, by forcing State agencies to assume their rightful duties, HEW could stimulate school districts to take affirmative responsibility for their own compliance with Titles VI and IX.

In addition to the joint State and Federal effort associated with the 350 national origin reviews, at least one regional office--Region IX--plans to begin reviews of State education agencies to determine if vocational education funds<sup>276</sup> are being administered in compliance with Titles VI and IX.<sup>277</sup>

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275. See also p. 59 supra.

276. Gerry testimony, supra note 219. Federal vocational education funds are administered by State education agencies. HEW's civil rights efforts with regard to vocational education are not treated in this report. They will be included in subsequent Commission evaluations of HEW since there is significant evidence of discrimination in the administration of this program. A recent report issued by the General Accounting Office criticized the general administration of Federal funds for vocational education programs. It charged that such programs often overlook low-income and handicapped students, discriminate against women, and provide inadequate vocational training. It showed, for example, that despite increased spending, enrollment of disadvantaged students declined in 13 States between fiscal year 1972 and 1973. General Accounting Office, What is the Role of Federal Assistance for Vocational Education? (1975).

277. In addition, in the court injunction under Adams v. Richardson, supra note 12, OCR is required to implement a program to secure Title VI compliance from vocational and other schools administered and operated by State departments of education. However, because of other priorities Region IX has not yet begun to review State agencies. Arnold telephone interview, supra note 207.

## 5. Nonpublic Schools

Reviews of nonpublic schools are an important part of OCR's responsibility to ensure nondiscrimination in education, particularly since segregated private academies are being established where school districts have been desegregated,<sup>278</sup> and the number of pupils enrolled in segregated academies increased from approximately 300,000 to 550,000 between 1969 and 1971.<sup>279</sup> Nevertheless, OCR gives little, if any, priority to ensuring nondiscrimination in nonpublic schools,<sup>280</sup> relying instead primarily on written assurances of nondiscrimination.

OCR's jurisdiction over nonpublic schools stems from two mandates: (1) Those nonpublic schools which participate in HEW's surplus property program are covered by Title VI, and (2) ESAA regulations prohibit school districts from transferring property to discriminatory nonpublic schools.<sup>281</sup>

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278. According to a 1970 U.S. Office of Education survey of nonpublic schools, Catholic school enrollment has declined 17 percent since 1961-62, but other nonpublic school enrollment has increased 66 percent. These statistics strongly suggest that the increase is due to the formation of a number of private academies which were established to subvert the desegregation of public schools.

Data collected by the NAACP Legal Defense and Educational Fund, Inc., indicate that in Mississippi, for example, the establishment of private academies in 119 school districts coincided with the issuance by the courts of the final court orders to desegregate. The Status of Private Academies in Eleven Southern States. Richard Fields, Field Representative, NAACP Legal Defense and Educational Fund, Inc., Sept. 1972.

279. Kitty Terjen, "White Flight: The Segregation Academy Movement," in The South and Her Children: School Desegregation 1970-71 at 69-79 (March 1971).

280. OCR was unable to provide this Commission with information concerning the number of reviews of nonpublic schools conducted, the number of reviews resulting in a finding of noncompliance, or the disposition of complaints received in fiscal year 1973.

281. HEW response, supra note 43.



Determinations concerning the compliance status of a school applying for surplus property are based on its submission to the appropriate OCR regional office of the following material:

1. A signed 441 assurance form;
2. Evidence that the school has a publicized policy of nondiscrimination in admissions, educational policies, scholarship programs, and extracurricular activities.
3. Statistics indicating the racial composition of the student body, applicants for admission, faculty, and administrative personnel;
4. The amount of scholarship and loan funds and the racial composition of the students who received such assistance;
5. A list of the school's incorporators, founders, board members and donors of land or buildings. 282

Nonpublic schools which lack a publicized nondiscrimination policy are automatically considered to be in noncompliance. Schools which lack minority students or faculty are presumed to be in noncompliance, but may be found in compliance if they are able to show that policies and procedures for selecting students and faculty have been nondiscriminatory. A school with "significant

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282. Memorandum from Patricia A. King, Acting Director, Office for Civil Rights, to Regional Civil Rights Directors, Subject: Clearance of Private Schools Under Title VI, Civil Rights Act of 1964, Apr. 11, 1973.

minority enrollment" is automatically assumed to be in compliance with Title VI,<sup>283</sup> though such a school might also engage in discriminatory recruitment or in-school policies. Where schools do not provide the required nondiscrimination material, regional offices are directed to refer the application to the headquarters office for formal administrative proceedings.<sup>284</sup>

School districts applying for ESAA funds must sign an assurance that they are not transferring property to discriminatory nonpublic schools. Unless a school district was the subject of a pregrant ESAA review, however, OCR accepts the signed assurance of good faith. Where a pregrant review is conducted, nonpublic schools are reviewed in conjunction with a transfer of property. Several school districts have been found ineligible to receive ESAA funds because they transferred property or services to discriminatory nonpublic schools.<sup>285</sup> Nevertheless, HEW has never asked the Department of Justice to sue a school district to require the return of property from a discriminatory private school even though the Justice Department

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283. HEW response, supra note 43. HEW does not state what is meant by "significant minority enrollment."

284. Memorandum to Regional Civil Rights Directors, supra note 17.

285. Upson County School District was found ineligible for ESAA funds because of transfer of services to a discriminatory private school. Telephone interview with Gary Arnold, Equal Opportunity Specialist, OCR, HEW, Sept. 6, 1974.

has taken action against such schools on its own. <sup>286</sup>

At a minimum, HEW should be cooperating with the Internal Revenue Service (IRS) in the area of nonpublic schools. <sup>287</sup> Although both agencies review such schools, they have not met to develop common standards for compliance. Unlike HEW, IRS does not examine faculty data or investigate discrimination in personnel policies and practices. HEW's only collection of racial and ethnic data is for private schools applying for surplus property. However, it does not even share these data with IRS, which has primary responsibility with regard to discrimination in private schools. <sup>288</sup> Yet, this HEW data

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286. U.S. v. State of Georgia, C.A. No. 1201 (N.D. Ga. 1974). In 1972 the Department of Justice initiated a suit against the Baker County public school system for donating a building to Baker Academy, which it alleged was segregated. At the request of the Justice Department, IRS refrained from granting the academy tax-exempt status pending a final determination of the lawsuit. In January 1974, the Federal district court adopted an agreement reached by attorneys for the county board of education and the Justice Department to close the academy.

In a recent hearing initiated by the Justice Department, in August 1974, the U.S. Court of Appeals in New Orleans, La., cancelled an arrangement under which officials of Smith County, Miss., lent a former public school building to a private segregated academy.

287. IRS is responsible for ensuring that nonpublic schools receiving advance deductibility and tax-exempt status do not discriminate against minority children. See the Commission's evaluation of IRS's compliance program, at pp. 141-94 infra.

288. IRS provides monthly reports to HEW on schools granted tax-exempt status.

collection effort is clearly insufficient. HEW should be collecting racial and ethnic data for all private schools, since many of them make use of programs and facilities of the neighboring public schools. For example, public schools or school systems with bilingual education programs are required to invite nearby private schools to participate in use of the bilingual facilities. <sup>289</sup> By participating in these programs, private schools are receiving indirect Federal financial assistance and therefore come under the jurisdiction of Title VI. <sup>290</sup>

Both IRS and HEW lack an affirmative approach to reviewing non-public schools. A school with a publicized nondiscrimination policy and some minority students is automatically assumed to be in compliance by both agencies, although in Title VI reviews of public schools, OCR has shown that discrimination against minority students can often take subtle forms. Communication between HEW and IRS is virtually nonexistent, with neither agency knowing which nonpublic schools are being reviewed

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289. Title VII, ESEA, 20 U.S.C. § 880-b-3.

290. OCR recently indicated to this Commission its belief that its:

...authority to request data from, and enforce Title VI with respect to, private schools is limited to such schools which receive federally funded services or property. In minimizing this limitation the draft report adumbrates an OCR compliance role that would probably be far less effective than the writer supposes. Holmes letter, supra note 52.

or which complaints have been received by the other, or, in general,  
what the other agency is doing in the nonpublic school area. 291

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291. OCR recently informed this Commission of its opinion that:

...it is not legitimate to criticize OCR for lack of proper action in a certain area without making the related point that a more intensive compliance effort in such an area would detract from compliance activity in other areas. In this regard the contradictions in the draft report are self-evident. For instance, the Commission has alleged that the number of Title VI reviews is "inadequate"; it goes on to make other charges of inadequacy in terms of scope of activity, including the private school matter. Certainly the Commission must realize that reinforced efforts with respect to private schools would inevitably prevent the staff of the Education Division from correcting another alleged "inadequacy" by reviewing more public schools. In fact, the effect would probably be to depress further the number of school district reviews. It is a question of priorities, and the Commission, like OCR, should force itself to bite the bullet instead of heaping on largely gratuitous comments. It would be more relevant, in terms of producing a meaningful critique, if the draft report actually sought to weigh existing demands and OCR priorities and suggest, on the basis of argumentation, a different mix. Instead the draft report, like its predecessors, simply cops out. Id.

D. Complaint Investigation

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Complaints are usually handled by letter, telephone, or referral.

In many cases, processing complaints by letter or telephone means notifying the complainant that OCR does not have jurisdiction over the complaint, or, if it does have jurisdiction, that an investigation will be conducted as priorities allow. OCR closes a complaint investigation if a complainant cannot be contacted or if additional information is requested but no response is received.

Complaint investigations, when conducted, may take one of two forms:

(1) if the complaint is an individual complaint and is not one of many received concerning the school district, OCR will investigate only the complaint; (2) if the complaint alleges discrimination against a class of individuals, e.g., all minority students or faculty, then a full Title VI compliance review might be conducted. Investigations of individual

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292. Complaints concerning court-ordered districts are referred to the Justice Department, unless they concern an ESAA program, in which case OCR would investigate it.

In Region IX, 14 of 31 complaints received in fiscal year 1972 were processed by letter; 2 were referred to another branch in OCR; 6 were investigated onsite; 1 was not handled because it was not within the jurisdiction of Title VI, and 8 were listed as "pending" as of July 25, 1972.

Between July 1, 1972 and May 1, 1973, Region VI received 134 complaints, of which 6 were processed by telephone; 70 were processed by letter; 22 were referred to the Department of Justice, 2 were investigated onsite, and in 34 cases the complainants had not been contacted as of May 1, 1973.

One Region V OCR staff member said that complaints are usually handled by mail or telephone, and that in fact there were travel restrictions placed on investigations of complaints onsite. Interview with Ortha Barr, staff member, OCR Region V (Cleveland), May 15, 1973, in Chicago, Ill.

complaints usually involve only a few hours onsite gathering data and interviewing school officials and the complainant, while Title VI reviews may involve 2 weeks onsite, analyzing all aspects of the school district's compliance with civil rights law.

Although Title VI compliance reviews are not generally complaint-initiated, at least one region, Region VI, considers complaints to be a factor<sup>293</sup> in selecting districts for compliance reviews. On the other hand, the Education Branch Chief in Region IX indicated that few reviews in that region are stimulated by complaints. He believes that such a policy would motivate groups to increase the number of complaints they file to the point of causing OCR to become primarily a responding agency,<sup>294</sup> at the expense of its ability to take the initiative on reviews. Region V staff members handle complaints only when they are not actively involved<sup>295</sup> in a compliance review.

Between January 1, 1972, and June 1, 1973, OCR received 574 complaints which alleged discrimination in elementary and secondary schools.<sup>296</sup> The

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293. Bell interview, supra note 245 .

294. Palomino interview, supra note 70 .

295. Barr interview, supra note 292 .

296. HEW response, supra note 43 .

Dallas and Atlanta offices received the most complaints. <sup>297</sup> Headquarters was not able to provide information or data on the nature or disposition of those complaints. The Dallas office, however, estimates that approximately 75 percent of the complaints it received in fiscal year 1973 were not investigated. <sup>298</sup> Of those not investigated, 25 percent of the complaints received as of May 1, 1973, were not acknowledged either because the complaints were received recently or because "no response was deemed necessary by the compliance officer." <sup>299</sup> In Region V (Chicago) 14 complaints were received by that office between July 1972 and April 1973, <sup>300</sup> and only six, or fewer than half,

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297. The Dallas office received 225 complaints, while the Atlanta office received 201 complaints. The number of complaints received by each of the other regional offices is as follows:

Boston	2	Denver	17
New York	27	San Francisco	38
Philadelphia	33	Seattle	6
Chicago	21	Kansas City	4

298. Bell letter, supra note 157.

299. Id. It should be noted, however, that as a result of the Federal court order in Adams v. Richardson, it became OCR policy in 1973 to acknowledge and review all complaints within 90 days if feasible. OCR recently indicated to this Commission its opinion that:

...not all complaints require an "investigation" in the sense of an intensive field visit; numerous complaints can be resolved through telephone communication or correspondence and generally a judgment of the potential merits of the case is reached before scheduling an on-site visit. Holmes letter, supra note 52 .

300. List of Complaints, Region V OCR, July 1973.



were investigated. Five complaint cases were closed without investigation, either because the complainant could not be contacted for further information or because OCR did not have jurisdiction. Three complaints went uninvestigated, despite a preliminary determination that they should be investigated.<sup>301</sup> OCR headquarters acknowledges that there has been a decrease in the number of complaint investigations since fiscal year 1972, and attributes this to responsibilities placed on the staff by the Adams v. Richardson court injunction and by OCR's responsibility for monitoring the civil rights eligibility of school districts under ESAA.<sup>302</sup>

When HEW proves that a complainant has been discriminated against, OCR is often able to secure immediate corrective action. In two cases, for example, where complainants charged that educational institutions had unfairly dismissed students, the institutions agreed to reinstate the students immediately.<sup>303</sup> OCR can similarly require that school districts promote a faculty member who has been discriminatorily demoted.

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301. In a complaint concerning the Richmond School District in Richmond, Indiana, the complaint alleged unlawful increased busing of students and discriminatory educational policies and procedures which result in segregation of black students in inferior schools. Preliminary investigation indicated that the school district should be reviewed. Due to its workload, however, OCR had not still reviewed the school district as of August 21, 1974.

302. HEW response, supra note 43.

303. Complaint concerning Harvey School District No. 152, Harvey, Ill., Oct. 25, 1972. Complaint concerning Allied Institute of Technology (AIT), Chicago, Ill., July 18, 1972.

OCR has not developed guidelines describing how to conduct complaint investigations. It seems that, as a result, OCR's complaint investigations are superficial and lack the depth of analysis used in conducting compliance reviews. For example, a complaint received by the San Francisco regional office alleged discriminatory placement of a student in an EMR class without parental consent.<sup>304</sup> OCR determined that the student was not, in fact, placed in such a class; but he was, with the consent of his parents, placed in an educationally handicapped class. OCR concluded that there was no evidence that race was considered in the placement of the student in this type of class.<sup>305</sup> However, the complaint report included no evidence that this possibility was even investigated. The process by which the investigator arrived at his or her conclusion was not described, thus making it difficult to determine whether HEW reached an appropriate determination.<sup>306</sup>

In another case, the complainants alleged in December 1972 that a high school's utilization of Indians as the school mascot constituted discrimination against the entire Indian community.<sup>307</sup> OCR requested

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304. Complaint concerning the San Leandro School District, California, filed in May 1972.

305. Memorandum from Donald Barnette, Civil Rights Specialist, to John E. Palomino, Chief, Education Branch, Subject: San Leandro Unified School District, Complaint Investigation Report, Oct. 3, 1972.

306. OCR recently informed this Commission that "due to personal contact between the complainant, officials of the school district, and the regional office, the complaint was resolved." Holmes letter, supra note 52.

307. Charge of Discrimination, filed on December 13, 1972, by the Native American Student Association of Idaho State University.

that the school district comment on the charge, and the district replied that no discrimination was intended by use of the mascot. A local Indian tribal leader also expressed his feeling that use of the mascot was not discriminatory and that the charge was irresponsible and inflammatory.<sup>308</sup>

In March 1973, OCR agreed to "give the matter further consideration." In July 1973, the school district informed the regional office that it had discontinued the wearing by the mascot of an Indian mask and some of the more objectionable practices associated with the mascot. Without reviewing the school and fully analyzing the possible implications, OCR determined that the issue was not important enough to result in a finding of noncompliance. The district was subsequently informed that the complaint was being deferred, since the district had demonstrated its willingness to negotiate with complainants.

OCR's inability to resolve complaints in a timely manner has a potentially adverse effect on complainants. In a matter handled by the Denver regional office, for example, a complainant alleged discriminatory hiring practices on the part of the school district.<sup>309</sup> OCR scrupulously analyzed records of more than 200 teacher applicants and determined that few minority teachers were hired and that their attrition rate was high.

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308. Letter from Arthur Haybull, Leader, Shoshone-Bannock Tribes, to Marlaina Kiner, Regional Civil Rights Director, Region X OCR (Seattle), Feb. 15, 1973.

309. Complaint letter to Hollis B. Bach, Director, Region VII OCR (Denver), Nov. 7, 1970.

Further, OCR concluded that the complainant's qualifications were better than many teachers hired. In June 1971, after OCR determined that it had discriminatory hiring practices, the district offered the complainant a job.<sup>310</sup> Unfortunately, 7 months had elapsed from the filing of the complaint, and the complainant no longer wanted the job.<sup>311</sup>

OCR's failure to provide Title IX guidelines has left OCR staff members with no standards for resolving sex discrimination complaints. Between December 1972 and June 1973, OCR regional offices received at least 12 sex discrimination complaints.<sup>312</sup> Five have been resolved.

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310. Letter from Don Edwards, Director of Personnel, Great Falls Public Schools, Great Falls, Mont., to Hollis B. Bach, Director, Region VII OCR (Denver), June 15, 1971.

311. OCR recently wrote the following to this Commission:

Does the Commission actually believe that this case manifests undue delay, with all other complaints and review commitments that must be dealt with simultaneously? Particularly with respect to an employment complaint, which usually requires time-consuming analysis of records and multiple interviews, to say nothing of the preparation of findings and negotiation with the officials involved, a seven-month period does not constitute a failure on our part. To the contrary, we would view this case as one handled as promptly as is possible, given all the circumstances and competing demands. In representing this as an example of deficient case-handling the draft report reflects an ignorance of our workload and of the elements involved in substantiating and negotiating an allegation of discrimination. In this sense, the report is suffused with an air of unreality which serves to diminish its credibility as legitimate criticism. This is but one example of the flawed perception which surfaces time and time again in connection with other explicit or implied criticisms. Holmes letter, supra note 52.

312. This total was derived from complaint logs submitted by regional offices covering complaints received in fiscal year 1973. The logs cover all regional offices except Regions I and II.

However, three of these concerned hair and dress codes, and OCR supported the school boards' right to set policies in those areas. Of the remaining two, one district was found to be in compliance, and one complied after negotiating with OCR. Both of these complaints alleged discrimination in employment. Regional offices indicate they are awaiting issuance of final Title IX regulations prior to resolving the remaining complaints, which already are 15 to 19 months old.

Complaints often provide OCR with revealing information about school districts' civil rights compliance. It is important, therefore, that parents, students, and faculty be aware that OCR has authority to investigate such complaints. Prior to 1972, OCR made wide distribution of its 1968 guidelines and brochures on its Title VI responsibilities to civil rights groups, student and teacher associations, and individuals. During this same time, posters were distributed to school districts in Spanish and English. Since that time, several fact sheets have been prepared dealing with, for instance, language discrimination and the New York City review. A school poster was distributed dealing with discrimination against Native American students, similar to previous posters on in-school discrimination. Pamphlets were prepared on Title IX

and other sex discrimination provisions. Despite OCR's awareness of the need to make posters available in Chinese, Portuguese, and other primary languages spoken by recent immigrant groups, it has not developed posters and other materials to inform these groups, in their own languages, of its civil rights authority.

In the Atlanta and Dallas regions, where OCR concentrated its early Title VI compliance efforts, hundreds of complaints each year attest to the public's awareness of OCR's authority to investigate complaints. The few complaints received by other regional offices might be due to fewer civil rights problems, but the cause is probably the public's ignorance of its rights under the law and OCR's investigative responsibility.<sup>314</sup>

Until fiscal year 1974, regional offices had kept their own records on the receipt and disposition of complaints. This method was

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313. Holmes letter, supra note 52. OCR also recently indicated that:

We taped several spot radio announcements which addressed various areas of Title VI discrimination and which encouraged persons discriminated against to file complaints; these tapes were mailed to radio stations in the top 200 media markets for spot recording as a public service....  
Annually, OCR headquarters and regional personnel participate in numerous seminars and conferences with institutions covered by the statutes we enforce and with the general public. In the summer of 1974, OCR staff visited 12 cities to hold public briefing sessions and press conferences on the proposed Title IX regulation in order to generate exposure and public awareness; in drafting that proposed regulation, numerous meetings were held to consult with interested parties. The Department held Communications Seminars throughout 1973 and 1974 in such cities as Atlanta, Georgia, and San Francisco, California, during which major HEW appointees, including the OCR Director, briefed the public and the local press on Departmental undertakings and requirements, including those pertaining to civil rights. Id.

314. For a list of the number of complaints received by each region, see note 2:7 supra.

unsatisfactory, since the comprehensiveness of recordkeeping varies greatly from region to region, and headquarters could not determine the extent of regional office complaint backlogs.<sup>315</sup> In fiscal year 1974, headquarters devised and distributed to regional offices a complaint log form, which serves as the basis for up-to-date information on the status of all complaints received.<sup>316</sup>

In addition, at least one regional office, the Dallas office, has developed a form to facilitate complaint handling. The complaint form, to be distributed to community organizations and civil rights groups, includes the date, name, and address of the complainant, location of the incident, and basis of the complaint, i.e., race, color, sex, or national origin.

#### IV. Enforcement

##### A. Title VI

In the mid- to late-1960's, HEW's vigorous use of the fund termination sanctions provided by Title VI was responsible, in large measure, for the dismantling of a number of dual elementary and secondary school systems

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315. HEW response, supra note 43.

316. Information collected on the complaint log includes the name and address of the complainant, the date the complaint was received, the name of the school district which is the subject of the complaint, the nature of the complaint, the jurisdiction (such as Title VI or Title IX), the determination (noncompliance or compliance), action taken (compliance negotiated or referred to headquarters), and the current status of the complaint.

in the South.<sup>317</sup> Between 1966 and 1968, 188 school districts, the bulk of which were in seven Southern States, had Federal funds terminated by HEW.<sup>318</sup> In the 6 years since 1968, however, HEW's utilization of administrative sanctions has significantly diminished, with such proceedings being initiated against only 46 school districts and with only 15 school districts being subject to Federal fund termination during that time period. HEW has indicated that by mid-1970 there was no longer a need for termination proceedings in which the issue related to eliminating the dual

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317. However, HEW's Title VI enforcement efforts prior to 1970 were by no means adequate. For example, under the 1965, 1966, and 1967 guidelines, enforcement proceedings were virtually limited to school districts which openly refused to submit assurances of compliance or were the "worst offenders" in failing to implement desegregation plans. Letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Sept. 25, 1974. For a critical assessment of its Title VI enforcement efforts prior to 1971 as they relate to elementary and secondary education, see, Panetta & Gall, Bring Us Together: The Nixon Team and the Civil Rights Retreat (1971); U.S. Commission on Civil Rights, Southern School Desegregation 1966-67 (1967); U.S. Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66 (1966); Southern Regional Council, School Desegregation 1966: The Slow Undoing (1966); Comment, "Title VI of the Civil Rights Act of 1964--Implementation and Impact," 36 Geo. Wash. L. Rev. 824 (1968).

318. Termination Data, Department of Health, Education, and Welfare, Office of General Counsel, Civil Rights Division, Compiled May 1970, up-to-date as of January 1973, and telephone interview with Gary Arnold, Equal Opportunity Specialist, HEW, Aug. 22, 1974. The seven States were Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.



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school system in the South. Yet a Federal district court in Adams v. Richardson found that there were a large number of school districts in the South which should have been terminated by HEW in 1970 and 1971. Further, if there were no longer problems which required the imposition of sanctions in the South, OCR should have shifted its emphasis to concentrate on the significant discriminatory situations which exist in the North and West. It has yet, however, to bring administrative proceedings against a number of school districts in these regions although it has evidence of segregation in their schools.

Moreover, when a nationwide study of desegregation in the public schools by the Center for National Policy Review concluded that HEW has generally neglected the North and West in its public school enforcement efforts,<sup>320</sup> HEW Secretary, Caspar Weinberger, defended the record of his agency and asserted that the "opposition (in the North) to busing and various forms of desegregation is far

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319. OCR has recently indicated:

Nearly all the fund termination cases through 1968 involved Southern school districts which refused to adopt an acceptable plan for student and teacher desegregation. The number of such fund termination cases dropped off markedly in 1969 and 1970, primarily because of the August 1969 court decision in Taylor, which had the effect of remanding for rehearing all cases pending appeal in the administrative enforcement process, and the Supreme Court's decision in Alexander v. Holmes. In order to comply with the "at once" mandate of the latter decision, the Office for Civil Rights referred to the Department of Justice for immediate court action all remaining southern voluntary plan districts which in June 1970 still refused to negotiate an acceptable desegregation plan. Alternately, if OCR had not referred these cases and had instead elected to proceed to administrative enforcement many of these districts would not have been in compliance with the law when school opened in September 1970.

Essentially, the drive to commit all Southern school districts to a desegregation plan by mid-1970 wiped the slate clean of administrative proceedings in which the issue pertained to eliminating the dual school system in the South. Consequently, the potential for fund termination, in terms of numbers of cases, inevitably fell off dramatically....

320. Center for National Policy Review, Justice Delayed and Denied (1974).

stronger than it appears to be in the South...and... "cutting off Federal funds  
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simply promotes more segregation in many situations." It is clear, however,  
that where the protection of a constitutional right is entrusted to an official  
of the Executive branch it is entirely inappropriate for that official to fail  
to take positive action on the basis of popular opposition to the fulfillment  
of that right or the official's view of the possible consequences of enforcement  
activity.

OCR has also referred some matters to the Department  
of Justice for enforcement. The number of such referrals since 1971,  
however, is low. In addition, the referral of matters by HEW to  
the Justice Department for court enforcement should not be allowed to  
become a substitute for the use of administrative sanctions. One of  
the major purposes of Title VI was to provide an administrative remedy  
to Federal agencies, thus ending the role of the Federal courts as the  
sole enforcer of the civil rights of minorities. Not only was Congress  
concerned about involving the whole weight of the executive branch in  
the fight for equal justice for all Americans, but it also desired to  
prevent court calendars from becoming overcrowded. A failure to use to  
the fullest a remedy granted by Congress reduces the effectiveness of an  
entire enforcement effort.

The HEW compliance program cannot be measured solely on the basis  
of any one criterion, such as use of sanctions. Although a more effective  
measure of accomplishment is the nature and extent of corrective change  
and its identifiable effect on the beneficiaries of federally-assisted  
programs, comprehensive data of this nature are not generally available.  
In fact, OCR has not developed any method for evaluating the effectiveness  
of the various forms of enforcement action it can employ, i.e., voluntary

321. The Washington Post, Sept. 7, 1974, p. 2, col. 3. The Secretary did  
admit, however, that HEW's files have evidence of segregation in northern  
schools.

negotiations, referral to the Department of Justice for court action, and initiation of administrative proceedings. It does not maintain data for each school district, for each region, and nationally, which can be compared on a year-to-year basis, on the nature of OCR's compliance activities, e.g., compliance reviews, letters of findings, negotiations, voluntary plans accepted, cases referred to the Department of Justice, administrative hearings.<sup>322</sup> Without charting such data and comparing them to the amount of desegregation achieved, OCR cannot make reasoned judgments about which course of action will be the most productive in achieving its goals.

HEW's reluctance in recent years to utilize the administrative sanction process where school districts are known to be in noncompliance has caused irreparable damage to the strength of the Title VI program and to minority children in those districts.<sup>323</sup> At least one district, the Karnes City Independent School District in Karnes City, Texas, has not been subject to administrative proceedings, despite the fact that it has been considered to be in noncompliance since June 1971.<sup>324</sup> In addition,

322. See letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Peter E. Holmes, Director, OCR, HEW, Oct. 29, 1974; and letter from Peter E. Holmes, Director, OCR, HEW, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Nov. 20, 1974.

323. OCR recently indicated that ". . . in 1970, a year in which the rate of desegregation jumped more than in any previous year, the number of terminations slowed to a trickle." Holmes letter, supra note 52. It should be noted, however, that the impact on desegregation in 1970 from terminations would have been from terminations prior to that year. In fact, there were a significantly greater number of terminations in 1968 and 1969 than there were in 1970.

324. According to OCR's Summary Sheet (Districts under review as regards May 25, 1970 Memorandum), dated January 29, 1973, Karnes City was listed as the one district notified of noncompliance which will not negotiate or submit a plan. OCR recently informed this Commission that:

Negotiations are proceeding with Karnes City, Texas. However, it should be noted that the district pursuant to the ESAA regulation has agreed to hire additional minority staff members and make certain changes in classroom assignments of students, which affects the standing of the case with respect to Title VI. Holmes letter, supra note 52 .

OCR lists three districts in the Northern and Western States where review reports which set forth areas of noncompliance have been awaiting OGC approval for between 2 and 4 years.<sup>325</sup> Owing to this administrative delay, such districts will have to be reviewed again before administrative proceedings can be initiated.

The Federal district court found in Adams v. Richardson that HEW was derelict in its responsibility in the area of enforcement. Under the court's order, HEW is currently engaged in bringing enforcement action against districts found in noncompliance in 1971.<sup>326</sup>

Except for the Ferndale City School District in Ferndale, Michigan,<sup>327</sup> all districts terminated by HEW subsequently either submitted voluntary plans or came under court order and are thereby considered to be in compliance and eligible for Federal funds again. Another 61 school districts are engaged in the various stages of administrative enforcement proceedings with HEW,<sup>328</sup> i.e., from being notified of an opportunity for hearing to the various stages of appeal. Of the districts, four which were sent notices of opportunity for hearing are districts from

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325. Holmes letter, supra note 52. Stamford, Conn., latest visit in June 1970; Cahokia, Ill., latest visit in October 1969; and Flint, Mich., latest visit February 1971. HEW Title VI Compliance Reviews of Elementary and Secondary School Districts in the Thirty-three Northern and Western States, Review Status as of May 8, 1973. All three were listed as "Report being reviewed by OGC."

326. For a further discussion of this case, see note 12 supra. In May 1973, HEW listed three additional districts in this category: Hartford, Conn., latest visit in November 1969; Ulysses, Kan., latest visit in November 1971; and Pleasantville, N.J., latest visit August 1971.

327. Ferndale went through the entire appeal process, and the decision to terminate funds was sustained. The administrative decision to terminate Federal funds was upheld by the Sixth Circuit Court of Appeals.

328. Status of Title VI Compliance Interagency Report, HEW, List no. 311, June 13, 1974.

which OCR had previously accepted voluntary plans,<sup>329</sup> but which are being proceeded against under Adams v. Richardson. The court, in Adams, found that HEW was aware that two of the districts were maintaining racially disproportionate schools after it had accepted the districts' voluntary plans, but that HEW had instituted no enforcement action.<sup>330</sup> The other two districts were among those found in noncompliance because of ability grouping and teacher erosion, also after HEW accepted desegregation plans from the districts.<sup>331</sup>

#### 1. Procedure

OCR regional offices refer noncomplying school districts to OCR headquarters, which may attempt further negotiation with the school districts prior to referring them to OGC in headquarters for enforcement action. Enforcement action may take one of two forms: administrative enforcement proceedings or referral to the Justice Department for litigation. OCR's Director indicated that no school district is referred to the Justice Department for action until OCR and the Justice Department have met to discuss the case and have agreed on the manner in which it will be handled.<sup>332</sup>

Between May 9, 1969 and February 26, 1971, 60 school districts were forwarded to the Justice Department for action.<sup>333</sup>

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329. Fordyce Public Schools, Ark., voluntary plan accepted April 11, 1968; Lumberton Line Consolidated School District, Miss., voluntary plan accepted August 5, 1970; Warren County School System, Miss., voluntary plan accepted August 13, 1970; and Lauderdale County Schools, Tenn., voluntary plan accepted March 1, 1968.

330. Warren County School System, Miss., and Lauderdale County Schools, Tenn.

331. Fordyce Public Schools, Ark., and Lumberton Line Consolidated School District, Miss.

332. Interview with Peter E. Holmes, Director, OCR, June 29, 1973.

333. Taken from a list of referrals to the Department of Justice for Title VI enforcement. Attachment to HEW response, supra note 43.

Ten submitted voluntary plans to the Justice Department subsequent to their referral; the Justice Department filed suit against another 9. One came under a court order; 1 was court involved, and the Justice Department obtained court orders against another 15 immediately because they had not implemented their voluntary plans as agreed upon with HEW. As of June 1973, no action had been taken against nine districts, three of which had been referred to the Justice Department as early as January 1970. Of 15 other districts, which were referred to the Justice Department for immediate action because they were not implementing a previously agreed upon plan, as of September 1974, 10 were still on the Department's "active" list; 3 were considered "inactive"<sup>334</sup> and no information could be obtained on the other 2.<sup>335</sup> From February 1971 to June 1973, however, no school districts were referred to the Justice Department from HEW.<sup>336</sup> Between June 1973 and August 1974, eight school districts were referred to the Justice Department.<sup>337</sup> Four of the districts are pending in litigation.<sup>338</sup> Ferndale, Michigan, was already terminated by HEW, and no action has been taken against three of the districts.<sup>339</sup>

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334. Richton Municipal Separate School District, Miss.; Gibson County Schools, Tenn.; and Sumner County Board of Education, Tenn. All "inactive" districts are subject to being reactivated upon the motion of any party.

335. Telephone interview with Jerry Hebert, Attorney, Education Section, Civil Rights Division, DOJ, Sept. 12, 1974, and telephone interview with Kadel Wright, Attorney, Education Section, Civil Rights Division, DOJ, Sept. 13, 1974.

336. Interview with Mariann Schultz, Staff Assistant, Office of General Counsel, HEW, July 22, 1973.

337. Berkeley, Mo.; Ferndale, Mich.; Cabell County, W. Va.; Raleigh, Co., W. Va. Lumberton City, N.C.; Beaumont, Tex.; Kansas City, Kan.; and Omaha, Neb.

338. Berkeley, Mo.; Beaumont, Tex.; Kansas City, Kan.; and Omaha, Neb.

339. Cabell Co., W. Va.; Raleigh Co., W. Va.; and Lumberton City, N.C. Telephone interview with Laverta York, Research Analyst, Education Section, Civil Rights Division, DOJ, Aug. 29, 1974.

The administrative enforcement process is an involved one and includes a hearing, the issuance of decision by an administrative law judge, and an appeal process. <sup>340</sup> Subsequent to a decision of noncompliance with Title VI by the administrative law judge, districts may not receive any new HEW funds but may continue to receive, with no increase in amounts, funds under existing Federal programs. Inordinate amounts of time are spent in completing this process. The proceedings against the Boston, Massachusetts, public schools, for example, thus far have taken almost 3 years. The district, which was found in HEW administrative proceedings to be maintaining a discriminatory school structure, appealed the decision. The Reviewing Authority, however, upheld the original decision on Mar. 2, 1973. Funds for this school system are still being deferred, but no further action toward final determination has been taken. <sup>341</sup>

In another case, the Uvalde Independent School District in Uvalde, Texas, was first notified of noncompliance on June 15, 1971. The district was referred to headquarters for administrative proceedings on July 14, 1971, after it refused to submit a satisfactory plan to correct discriminatory student assignment and to provide otherwise for equal educational opportunities. A notice of opportunity for hearing

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340. Appeals of rulings made by an administrative law judge are filed with a five-member Reviewing Authority appointed by the Secretary of HEW. Further appeals can be filed either with the Secretary of HEW or with a Federal court of appeals.

341. Arnold telephone interview, supra note 220. One HEW attorney asserted that the court order issued in the private suit against the Boston school system will probably be HEW's final order, but that no decision had yet been made. Telephone interview with Laurie Halloway, Attorney, Office of General Counsel, HEW, Sept. 4, 1974.

was sent 1 year later, on July 7, 1972, and the hearing was held 4 months later. The hearing examiner issued a decision on November 27, 1973, 1 year after the hearing and more than 2 years after the district was originally referred for administrative proceedings. Not until August 1974 was a final determination made by the Reviewing Authority.<sup>342</sup> In addition, several proceedings which have not been completed were begun as early as 1968 and 1969.<sup>343</sup> Others have been listed as being under appeal since 1969 and 1970.<sup>344</sup> Because so much time is consumed in preparing letters of findings, negotiating, and conducting administrative proceedings, even a district with the most flagrant violations need not expect fund termination for at least 3 years after an OCR onsite visit.

Another weakness in its enforcement program stems from OCR's failure to cover in its reviews all areas of noncompliance, e.g., student assignment problems.<sup>345</sup> As a result, the remedy in an administrative enforcement proceeding does not necessarily address all deficient areas. In the Boston administrative proceeding, for example, OCR concentrated its review on the fact that the school system's structure caused de jure segregation of minority students. If Boston

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342. For a full discussion of this case, see pp. 137-39 infra.

343. For example, notices of opportunity for hearing were sent to the Wheeler County Schools in Georgia, the Liberty County Board of Education in Georgia, the Robeson County Schools in North Carolina, and the Oconee County School District in South Carolina between 1968 and 1969. No further action has been taken in the enforcement proceedings.

344. These include the Valdosta Public Schools in Georgia, the Florence Public School District #1 in South Carolina, and the Klein Independent School District in Texas.

345. For a discussion of this point, see p. 65 supra.



negotiates with OCR following fund termination, the plan it would submit to OCR need not specify desegregation in accordance with the doctrine enunciated in the Swann case,<sup>346</sup> but need only eliminate the de jure segregated structure and ensure that deliberate discriminatory policies are not continued.

## 2. Enforcement Proceedings Under the May 25 Memorandum

HEW's administrative enforcement proceedings against the Uvalde Independent School District in Texas were the agency's first attempt to compel a school district to provide equal educational services or face Federal fund termination. In its 1971 letter of noncompliance,<sup>347</sup> HEW charged the district with discrimination in four areas;

(1) unlawful segregation of Mexican American students in elementary schools; (2) discriminatory racial and ethnic teacher hiring and assignment policy; (3) discriminatory ability grouping; and (4) failure to provide bilingual-bicultural education.

In a decision of November 1973, the hearing examiner found that all the schools in the Uvalde Independent School District were unlawfully de jure segregated in that attendance zones and portable classrooms perpetuated racial isolation, and that the school district was therefore

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346. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

347. Letter from Dorothy D. Stuck, Regional Director, Region VI OCR, to Superintendent R. E. Byrom, Uvalde Independent School District, Uvalde, Tex., June 15, 1971.

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in noncompliance with Title VI. However, in the areas of hiring and assigning Mexican American teachers and staff, ability grouping practices, and bilingual-bicultural programs, the school district was found in compliance with the law. HEW filed an appeal with the Reviewing Authority on December 21, 1973. In its final determination, the Reviewing Authority reversed the administrative law judge's decision on two of these three matters. Based on the Supreme Court decision in Lau v. Nichols<sup>349</sup> the Reviewing Authority found that the failure to provide bilingual-bicultural programs was a denial of equal educational opportunity under Title VI. In addition, it found that the manner in which ability grouping was used by the Uvalde Independent School District resulted in segregation of Mexican American students from Anglos. However, the Reviewing Authority denied HEW's exception to the administrative law judge's finding that the school board did not have a discriminatory hiring policy, finding that the district had made a good faith effort to recruit and hire Mexican American teachers and that there was no cogency to the Government's claim that teachers were overwhelmingly assigned to Mexican American schools, especially in view of the fact that all but one of the schools were predominantly Mexican American.

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348. Administrative Proceedings in the Department of Health, Education, and Welfare and the National Science Foundation in the matter of Board of Education and Uvalde Independent School District, Uvalde, Texas, and Texas Education Agency, Respondents. Administrative Law Judge's Initial Decision, Nov. 27, 1973.

349. 414 U.S. 563 (1974). For a discussion of this case, see note 112 supra.

The Reviewing Authority concluded that the Uvalde Independent School District was in noncompliance with Title VI. It ordered that all Federal financial assistance be terminated and that no further Federal financial assistance be granted.

B. ESAP

Under the Emergency School Assistance Program, 20 school districts had program funds terminated following administrative enforcement

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proceedings. The proceedings took approximately 8 weeks, as compared with from 9 months to a year spent on Title VI proceedings. The quickness of ESAP proceedings is due, according to OCR, to having to prove only that the school district violated its ESAP assurances. In addition, Title VI proceedings include appeal procedures, while ESAP proceedings do not.

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Three of the school districts terminated under ESAP later received funding under ESAP or ESAA after taking corrective action and establishing compliance with the civil rights assurances. Typical violations which were sufficient cause to terminate ESAP funds were failure to assign faculty according to principles of the Singleton case,<sup>352</sup> improper formation of bi-racial committees, discriminatory

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350. Caroline County School District, Va.; Clarendon County School District No. 1, S.C.; Decatur County School District, Ga.; Dillon County School District No. 1, S.C.; Franklin School District, Fla.; Henrico County School District, Va.; McComb Municipal Separate School District, Miss.; Monroe County School District, Ala.; Natchez Special Municipal School District, Miss.; Oktibbeha County School District, Miss.; Orleans Parish, La.; Rankin County School District, Miss.; South Pike Consolidated District, Miss.; Worcester County School District, Md.; Broward County School District, Fla.; Butler County District, Ala.; Choctaw County School District, Ala.; Early County School District, Ga.; and LaSalle Parish School District, La.

351. Broward County School District, Fla.; McComb Municipal Separate School District, Miss.; and Orleans Parish, La.

352. Singleton v. Jackson Municipal Separate School District, 419 F.2d.1211 (5th Cir. 1969). For a discussion, see note 107 supra.

assignment of students within schools, failure to implement the agreed-upon desegregation plan, and segregated bus routes. Although some of these<sup>353</sup> constitute clear Title VI violations as well as violations of ESAP assurances, and 13 of the 20 districts had such violations,<sup>354</sup> OCR never proceeded administratively to terminate Federal funds to any of those districts. OCR claims that ESAP assurance violations are "much easier to prove and are rapidly corrected on a voluntary basis."<sup>355</sup>

In spite of the differences in the nature of proceedings under the two provisions, HEW is considering combining enforcement proceedings under Title VI with proceedings to terminate ESAA grants. According to OGC staff members, a major concern in combining the proceedings is determining whether ESAA violations are prima facie Title VI violations.<sup>356</sup> It is important that this point be resolved quickly because, as long as OCR treats ESAA violations independently of Title VI, its sanction action will at best result in the termination of Federal assistance in only one Federal program rather than termination across the board. To the extent that this remains the case, it is possible that more impact can be achieved by giving a higher priority to activity under Title VI.

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353. Violations of "Singleton, discriminatory bus routes, discriminatory student assignment within schools, and failure to implement the desegregation plan are all Title VI violations.

354. Decatur County School District, Ga.; McComb Municipal Separate School District, Miss.; Monroe County School District, Ala.; Natchez Special Municipal School District, Miss.; Oktibbeha County School District, Miss.; Broward Country School District, Ala.; Early County School District, Ga.; Irwin County School District, Ga.; LaSalle Parish School District, La.; Orleans Parish, La.; South Pike Consolidated School District, Miss.; Butler County School District, Ala.; and Choctaw County School District, Ala.

355. HEW response, supra note 43.

356. Interview with Brian McDonald, U.S. Office of Education, OGC, Dec. 6, 1973, in Washington, D.C. Interview with Theodore Miles, HEW Office of General Counsel, Civil Rights Division, Dec. 6, 1973. For a further discussion on this point, see pp. 107-108 supra.

In its comments on a draft of this report OCR has, on a number of occasions, noted that it would like to do all that the Commission requests but that staff limitations make it impossible to do so. While we recognize that additional staff is required to enforce the law in the area of elementary and secondary schools, we are also convinced that if HEW employed different procedures and adopted a more aggressive enforcement posture, it might find that the amount accomplished by its present staff would be significantly increased. By requiring each school district to conduct a self analysis of possible discrimination and by imposing on States the obligation for enforcing nondiscrimination requirements, OCR could relieve its staff of a great burden. In addition, if OCR took prompt action to terminate non-complying school districts, it would not only save staff time spent in protracted negotiations, but it would demonstrate to other noncomplying districts the futility of violating the law, thereby causing a greater willingness to obey its mandates. Further, under the coordination plan in effect since 1966, HEW has had the authority to request that the 10 agencies which delegated to HEW the responsibility for collecting compliance reports, conducting complaint investigations and compliance reviews, and attempting to secure voluntary compliance from elementary and secondary schools systems, reimburse it for the activities it undertook on their behalf. Yet HEW has chosen not to follow this course of action, thereby depriving itself for almost nine years of a valuable source of additional staff and funds.

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357. U.S. Department of Justice, Coordinated Enforcement Procedures for Elementary and Secondary Schools and School Systems Under Title VI of the Civil Rights Act of 1964 (May 1966). Agencies which delegated responsibilities to HEW were; Atomic Energy Commission, General Services Administration, Office of Emergency Preparedness, Small Business Administration, National Science Foundation, Office of Economic Opportunity and the Departments of Agriculture, Defense, Housing and Urban Development, and the Interior.

INTERNAL REVENUE SERVICE (IRS)

I. Civil Rights Responsibilities

The Internal Revenue Code grants tax exemptions to 19 categories of organizations, under one of which is private schools.<sup>358</sup> However, IRS's civil rights activities relate only to private schools,<sup>359</sup> with one exception.<sup>360</sup>

IRS is responsible for ensuring nondiscrimination in the private schools which receive tax exemptions. There are currently

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358. Int. Rev. Code of 1954 § 501(c)(3). Some other types of organizations eligible for exemption include civic leagues, fraternal beneficiary societies, social clubs, labor organizations, and business leagues.

Code section 501(c)(3) grants tax exemptions to:

corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable...or educational purposes,...no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in...any political campaign on behalf of any candidate for public office.

359. Rev. Rul. 67-325, 1967-2 CB 113, holds that an organization which provides free recreational facilities to the residents of a township is not tax exempt as a charitable organization when the use of the facilities is restricted to less than the entire community on the basis of race.

360. On March 9, 1973, this Commission requested a position from IRS on whether it has formulated or implemented a policy of nondiscrimination for other organizations which receive tax exemptions. Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Johnnie M. Walters, Commissioner, IRS, March 9, 1973. On April 25, IRS asserted that its policy, resulting from the Green v. Connally decision, (see p. 147 *infra*) applies only to private schools and unless legal precedents are established for the other organizations, a nondiscriminatory policy will not be required for eligibility for exemption. Letter from Johnnie M. Walters, Commissioner, IRS, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Apr. 25, 1973. As of March 1974, IRS had not altered this position. Telephone interview with Howard Schoenfeld, Chief, Procedures Section, Exempt Organizations Examination Branch, IRS, Mar. 4, 1974.

almost 5,000 private schools receiving individual tax exemption letters.<sup>361</sup>  
 In addition, private schools supervised and operated by a central organization, such as the Catholic Church, do not receive an individual exemption letter. The exemption letter is issued to the central organization on behalf of its subordinates. Schools which operate under this "group ruling"<sup>362</sup> procedure comprise a significantly larger number than those operating under an individual ruling.<sup>363</sup>

The Internal Revenue Code also permits donors to deduct all contributions made to the tax-exempt school,<sup>364</sup> thus creating an incentive for prospective donors. This deduction is quite significant to private schools, since most of them depend upon contributions for capital, particularly for construction and initial operating expenses.<sup>365</sup>

In addition to making contributions attractive to donors, a tax exemption letter often makes available other benefits to the private school, including reduced mailing costs and exemption from some excise, employment, State income, and property taxes. These extra benefits are

361. This figure has been taken from the most recent computer printout of tax-exempt private schools, compiled by IRS in February 1973.

362. For more information, see section on Group Rulings, p. 186 *infra*.

363. IRS estimates that there are 85 central organizations which operate 12,000 private schools. IRS response to Commission questionnaire, Nov. 12, 1973.

364. Section 170(c) of the Internal Revenue Code permits tax deductions for charitable contributions if the contribution is to a "A corporation trust, or community chest, fund, or foundation...organized and operated exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children or animals." Int. Rev. Code of 1954 ■ 170(c).

365. As a result of the importance of tax-free contributions to private schools in their developmental stage, most apply for tax-exempt status prior to actual construction or purchase of their major facility and, thus, before they are operational.

important to a private school but not vital for survival in most cases.

IRS's civil rights policy with regard to schools is set forth in Revenue Ruling 71-447,<sup>367</sup> which stipulates that a private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption. This requirement, which applies to all private elementary and secondary schools and all private colleges and universities, covers the programs and activities as well as the admissions policies of the schools.<sup>368</sup>

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366. Interviews with Howard M. Schoenfeld, Chief, Procedures Section, Exempt Organizations Examination Branch (EOEB); Robert J. McCauley, Chief, EOEB; Frank M. Chapper, Chief, Conference and Review Staff, Exempt Organizations Branch, (EOB); James E. Griffith, Conference and Review Staff, EOEB; and Leon Levine, Acting Chief, Operations Branch, Public Affairs Division; IRS, Washington, D.C., Dec. 17-20, 1973 [hereinafter cited as Schoenfeld et al. interview].

367. C.B. 1971-2, 230. This revenue ruling was adopted in 1971.

368. The revenue ruling maintains that a private school must assure IRS that it:

admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.



IRS indicates that its civil rights efforts are based strictly on the revenue ruling,<sup>369</sup> which was issued as a result of a broad national policy opposing racial discrimination. Although it also states that Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in any program receiving Federal monies,<sup>370</sup> was persuasive

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369. The Commissioner of Internal Revenue recently informed this Commission that:

Different legislative goals reflected in civil rights statutes on the other, will necessarily give rise to different approaches to problems of discrimination. Any criticism of our performance bottomed solely on the goals of civil rights legislation, therefore, fails to strike a proper balance; it seems to me. Furthermore, a published report that conveys the impression of indifference, or a lack of concern, by the Internal Revenue Service is, in my opinion, inconsistent with the record, and could be counterproductive to the efforts of both of our agencies.

The positions taken by the Service regarding private school matters are a product of careful deliberation, representing fully considered policy and legal judgments.

Letter from Donald G. Alexander, Commissioner, IRS, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Nov. 13, 1974.

370. Specifically, Title VI of the Civil Rights Act of 1964 states, in part:

Sec. 601. 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.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. 42 U.S.C. § 2000d (1970).

evidence for the issuance of the revenue ruling, IRS does not consider Title VI as the primary source for its ruling position that racially discriminatory schools do not qualify for exemption status or for deductible contributions. This IRS decision disregards the fact that tax exemptions have been held to be a form of Federal financial assistance, thus bringing them within the provisions of Title VI.

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371. The basis of the revenue ruling is explained in its text:

Developments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. Titles IV and VI...and *Brown v. Board of Education*... (1954), and many subsequent Federal court cases, demonstrate a national policy to discourage racial discrimination in education whether public or private.

372. In 1967 this Commission recommended that the Secretary of the Treasury request an opinion of the Attorney General as to whether Title VI of the Civil Rights Act of 1964 or the Internal Revenue Code requires IRS to withhold tax benefits to racially segregated private schools. U.S. Commission on Civil Rights, Southern School Desegregation 1966-1967 99 (1967) /hereinafter cited as School Desegregation Report/. In December 1973, this Commission requested a copy of any such opinion. In November 1974, IRS's Chief Counsel informed this Commission that his office had:

...not issued any general opinion on the application of Title VI of the Civil Rights Act but that issue has been raised in a number of lawsuits. Both this office and the Department of Justice have taken the position that Title VI is intended to encompass only programs or activities which are federally funded by means of grants, loans or contracts. Letter from Meade Whittaker, Chief Counsel, IRS, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Nov. 11, 1974.

373. In *Evans v. Newton*, 382 U.S. 296 (1965), the Supreme Court found that tax exemptions are a form of Federal financial assistance. Tax deductibility for contributions has also been considered by the Supreme Court to be a form of governmental financial assistance in *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964). See also, *McGlotten v. Connally*, 338 F. Supp. 448, 460-62 (D.C.D.C. 1972), in which a three-judge Federal court, over the objections of the Departments of Justice and the Treasury, held that "assistance provided through the tax system is within the scope of Title VI of the 1964 Civil Rights Act...." Id. at 461.

374. This Commission enunciated its contention that IRS's private school policy comes under the provisions of Title VI of the Civil Rights Act of 1964 in the School Desegregation Report, supra note 372, Appendix VIII, at 146-62.

One major result of IRS's determination that its activities are not covered by Title VI is that its discharge of its civil rights duties does not come under the monitorship of the Department of Justice (DOJ), which was charged in 1965, by Executive Order 11247,<sup>375</sup> with overseeing and coordinating the implementation of Title VI by the appropriate Federal agencies. In January 1974, the President extended DOJ's responsibilities in this area by issuing Executive Order 11764.<sup>376</sup> DOJ must now ensure that guidelines and requirements for compliance with Title VI regulations are standardized for all agencies. Under the leadership of DOJ, IRS would probably be required to abandon its narrow approach to civil rights and would have to develop definitive guidelines and regulations for determining compliance in private schools. For example, all agencies with Title VI responsibilities have issued regulations defining its coverage. The regulations provide that employment discrimination which affects the provision of services is prohibited.<sup>377</sup> IRS has not issued similarly comprehensive regulations, and it has refused to consider faculty discrimination in determining the exemption status of private schools.

IRS developed its nondiscrimination policy when, in the late 1960's, private segregated academies were being established to subvert public school desegregation. By the fall of 1969, an estimated 400,000 students were enrolled in segregated private schools in the South alone.<sup>378</sup>

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375. 30 Fed. Reg. 12327(1965).

376. 39 Fed. Reg. 2575 (1974).

377. See pp. 155-56 infra.

378. NAACP Legal Defense and Educational Fund, Inc., The Status of Private Segregated Academies in Eleven Southern States 1 (September 1972).

The Southern States devised schemes, including tuition grants to private schools, to support these segregated educational institutions. Mississippi, for example, paid a maximum of \$240 to all students for tuition, whether they attended private or public school.<sup>379</sup> Despite their operation in violation of national policy against segregated education established in Brown v. Board of Education<sup>380</sup> and other related cases,<sup>381</sup> the Internal Revenue Service continued to recognize the tax-exempt status of certain of these segregated academies.

The filing of Green v. Kennedy<sup>382</sup> was the first challenge to the IRS policy. Plaintiffs, black parents of school children, challenged IRS's recognition of tax-exempt status for segregated private schools in

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379. Note, The Internal Revenue Code and Racial Discrimination, 6 Harv. Civ. Rights - Civ. Lib. L. Rev. 179 (1970). Virginia allowed tuition grants for attendance at all nonsectarian private schools, and North Carolina made funds available to every child attending public school if against the wishes of their parents, members of another race also attended. See generally, School Desegregation Report, supra note 372, at 73. Eventually, tuition grants were invalidated by the courts. For example, the Mississippi tuition grant system was invalidated in Coffey v. State Educ. Finance Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969), where the court held that the grants were unconstitutional, since they violated the Equal Protection Clause of the 14th amendment by enabling white students to avoid desegregated public schools. In Lee v. Macon County Board of Educ. 267 F. Supp. 458 (M.D. Ala. 1967), the court held that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Also see King, Rebuilding the "Fallen House"-- State Tuition Grants for Elementary and Secondary Education 84 Harv. L. Rev. 1057 (1971).

380. 347 U.S. 483 (1954). Plaintiffs, black school children, through their representatives, sought admission to white public schools operating in accordance with State segregation laws. The Supreme Court held that segregated public schools deprived those belonging to the minority group of equal educational opportunity.

381. See, e.g., Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968); Griffin v. County School Board, 377 U.S. 218 (1964).

382. Decision on motion for preliminary injunction, 309 F. Supp. 1127 (D.D.C. 1970); appeals dismissed for want of jurisdiction, 398 U.S. 956 (1970) and 400 U.S. 986 (1971).

Mississippi and the advance assurance of deductibility of contributions to  
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 these schools. A preliminary injunction was granted on January 12, 1970,  
 which restrained the Commissioner of Internal Revenue from approving any  
 pending or future applications for tax-exempt status by any private  
 school in Mississippi or from allowing contributions to such schools to  
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 be deductible.

The filing of the Green case apparently provoked IRS to reconsider  
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 the legality of recognizing tax exemption for private segregated academies.  
 On July 10, 1970, less than 6 months after the preliminary injunction,  
 IRS announced that it could "no longer legally justify allowing tax-exempt  
 status to private schools which practice racial discrimination nor...treat  
 gifts to such schools as charitable deductions for income tax purposes."  
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 On June 30, 1971, a permanent injunction was issued, which prohibited  
 racially discriminatory private schools in Mississippi from receiving

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383. Specifically, plaintiffs claimed that 1) Section 170 and 501 of the Internal Revenue Code were unconstitutional to the extent that they support the establishment of private segregated schools through tax benefits and that 2) segregated schools serve no public benefit and do not satisfy the statutory requirements of being "organized and operated exclusively for educational purposes." 309 F. Supp. 1127 at 1129, 1130. Ultimately holding for the plaintiffs on statutory grounds, the Court did not decide the constitutional question. Its final decision similarly held that there was no need for it to determine whether Title VI applies to tax deductions and benefits.

384, 309 F. Supp. 1127, 1140. This preliminary injunction was made applicable pending further court order and meanwhile governed all relevant cases in the absence of an affirmative determination "pursuant to appropriate directives and procedures" that the applicant school was not "a part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools."

385. This was the third time in 5 years that IRS had changed its policy on the subject. From October 15, 1965, to August 2, 1967, action on private school exemption applications was suspended pending review of the legal issues involved and on August 2, 1967, the freeze was terminated. Exemptions would be denied only in cases where the schools'..."involvement with the state or political subdivisions...is...such as to make the operation unconstitutional or a violation of the laws of the United States." Id. at 1130.

386. IRS News Release, July 10, 1970, 707 CCH Stand. Fed. Tax Rep. 6790.

the support afforded charitable, educational institutions.<sup>387</sup> A little more than 3 months later, IRS promulgated Revenue Ruling 71-447. requiring private schools to adopt a racially nondiscriminatory policy to qualify for Federal tax exemption.

The Court in the Green case imposed strict limitations on IRS for recognizing the tax-exempt status of private schools in Mississippi. IRS is enjoined from approving any application for tax-exempt status for Mississippi private schools unless: (1) the school has affirmatively shown that it has adopted and adequately publicized a nondiscriminatory racial policy as to students;<sup>388</sup> and (2) the school has furnished IRS with information as to the racial composition of students, faculty, staff, applicants for admission, and recipients of scholarships and awards; and it provides IRS with a listing of incorporators and other administrative officials

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387. Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971).

388. The court order reads in part:

As used in this Order, the term "racially non-discriminatory policy as to students" means that the school or other educational institution admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

and a statement whether any of these officials can be closely identified  
with organizations connected with segregated school education. 389

IRS does not apply the same standards to other States as it does to Mississippi. Thus, despite the existence of segregated and otherwise discriminatorily operated schools in other States, IRS does not generally compel private schools outside of Mississippi to collect or furnish any of the above-mentioned data. In addition, although IRS requires publication of a nondiscriminatory policy from private schools in all States, it has not extended the publication requirement of Mississippi private schools to any other State. In Mississippi, a private school must "provide reference to its nondiscriminatory policy in its brochures and catalogues and also in any printed advertising which it uses as a means of informing applicants of its programs."<sup>390</sup> IRS only requires private schools in other States to publish a nondiscriminatory policy one time. 391

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389. In a recent case, the Supreme Court held that Mississippi may not loan public textbooks to students attending racially segregated private schools. *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Norwood*, the Supreme Court ordered the establishment of a certification procedure to determine the qualification of Mississippi private schools for State-supplied textbooks. The standards of eligibility are similar to those of the *Green* decision. Thus, if a school is determined ineligible for textbooks under *Norwood*, application of the *Green* standards would render the school ineligible for tax-exempt status. A number of private schools, recognized as tax exempt by IRS, failed to apply for certification as specified in *Norwood*, e.g., Copenh Education Foundation, Inc., Hazelhurst, Miss, and Columbia Academy, Columbia, Miss. For further discussion of the effect of this case, see letter from Frank R. Parker, Attorney, Lawyers' Committee for Civil Rights Under Law, to Donald Alexander, Commissioner, Internal Revenue Service, Mar. 11, 1974.

390. 230 F. Supp. at 1179.

391. Schoenfeld *et al.* interview, *supra* note 366. See Rev. Proc. 72-54, C.B. 1972-2, 834. The features of this revenue procedure are discussed on pp. 163-64 *infra*.

IRS has, in effect, taken the narrowest possible interpretation of the court decision despite the court's implication and intention that the ruling was to apply to all States. "To obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside of Mississippi...." <sup>392</sup>

If similar cases had been filed in other States, IRS would most likely have been ordered to apply the Green standard in those States. Yet, as of March 1974, it had not established uniform requirements for all States. <sup>393</sup>

IRS's revenue ruling with regard to its private school requirement addresses itself solely to discrimination based on race. However, IRS national and district office officials stated that IRS is also concerned with discrimination based on ethnic origin, e.g., discrimination against Puerto Ricans and Mexican Americans. <sup>394</sup>

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392. Green v. Connally, 330 F. Supp., at 1174.

393. Schoenfeld et al. interview, supra note 366; interview with Edwin Kelleher, Acting Chief, Audit Division, and Charles Daley, Acting Assistant Chief, Audit Division, IRS, Boston, Mass., Aug. 8, 1973, in Boston; interview with John L. Byrne, Chief, Audit Division, IRS, Dallas, Tex. Aug. 30, 1973, in Dallas; and interview with William Krodell, Chief and Jim Perozzi, Acting Assistant Chief, Audit Division, IRS, Chicago, Ill., Sept. 18, 1973, in Chicago.

394. IRS recently informed this Commission that:

On September 2 of this year, the Employee Retirement Income Security Act of 1974 was enacted. It establishes within the Service a new Office of Employee Plans and Exempt Organizations with a full field structure, and is to be headed by its own Assistant Commissioner. This new office will provide us with an unique opportunity, indeed a mandate, to reassess and redirect all of our efforts in the exempt organization area, including, of course, private schools, and to achieve nationwide uniformity in interpretation and enforcement. In that connection, we consider that the adoption of uniform requirements for exempt private schools across the nation is desirable. Once appropriate requirements are adopted, we can then further our efforts of insuring that there is compliance with these requirements. Alexander letter, supra note 369.



In fact, former Commissioner Randolph W. Thrower, in testimony before the Senate Select Committee on Equal Educational Opportunity, asserted that IRS's nondiscrimination requirement includes ethnicity as well as race:

The Federal Government can no longer legally justify the allowance of the financial benefits of tax exemption and, more importantly, the deductibility of contributions, to private schools which exclude qualified students solely on the basis of race. In this way, private education having these Federal tax benefits will be equally available to all without regard to race, whether white, black, Mexican American, American Indian, Oriental, Eskimo, Aleut or others. 395

Despite this claim, IRS has taken no steps to revise the revenue ruling to include discrimination based on ethnic origin. By not making any modification in its published legal position, IRS's authority to require nondiscrimination based on ethnic origin can be reasonably challenged by school officials who assert that IRS's requirement only prohibits discrimination based on race. In addition, since there is no written policy incorporating ethnic discrimination under the ambit of the revenue ruling, determinations made by revenue agents with regard to noncompliance may not take such discrimination into account.

IRS claims to have responded to public policy in developing its racial nondiscrimination requirements. Despite the emergence of similar

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395. Testimony of Randolph W. Thrower, Commissioner of Internal Revenue, before the Senate Select Committee on Equal Educational Opportunity, Aug. 12, 1970. See also, a recent letter from IRS to this Commission which stated:

Furthermore, it has long been the Service's position that ethnic discrimination by a private school is covered by Rev. Rul. 71-447, and is, therefore, a bar to section 501(c)(3) exemption. Alexander letter, supra note 369.

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public policy regarding sex discrimination, IRS has taken no steps to amend its ruling to cover sex discrimination in its private school program. Nevertheless, this Commission believes that discrimination based on sex within a private school's program or activities is as much a denial of equal education as discrimination based on race or ethnicity. In fact, since tax exemptions are probably Federal financial assistance, it is likely that private schools already are under the jurisdiction of Title IX

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396. Title IX of the Education Amendments of 1972, for example, prohibits discrimination based on sex in any education program receiving Federal financial assistance. 86 Stat. 373, § 901(a)(1). For example, discrimination based on sex in school athletics and in individual courses previously designated as "male" or "female," such as home economics or woodworking, is prohibited by Title IX. In addition, the Comprehensive Health Manpower Training Act of 1971 and the Nurse Training Act of 1971 (also known as the amendments to Title VII and Title VIII of the Public Health Service Act, 42 U.S.C. § 296), prohibit the extension of Federal support to any medical, health, or nursing training program unless the institution providing the training submits, prior to the awarding of funds, satisfactory assurances that it will not discriminate on the basis of sex in its training programs.

Sex discrimination in employment is prohibited by Title VII of the Civil Rights Act of 1964 and Executive Orders 11375--3 C.F.R., 1966, 1970 comp., p.684 and 11478--Id. at 803. In addition, agencies such as the Federal Communications Commission and the Law Enforcement Assistance Administration of the Department of Justice have barred discrimination in employment based on sex by their regulatees and grantees. Also, in a number of instances, sex discrimination in the distribution of Federal assistance has been prohibited. In October 1972, for example, Congress passed the Federal Water Pollution Control Act Amendments of 1972, one section of which prohibits discrimination based on sex in any program or activity receiving Federal assistance under such act, the Federal Water Pollution Control Act, or the Environmental Financing Act, all of which relate to programs of the Environmental Protection Agency. See 86 Stat. 816, 903. The Department of the Interior has also taken action to prohibit sex discrimination in the administration of its programs.

of the Education Amendments, which require nondiscrimination based on sex in all education programs and activities receiving Federal financial assistance. Despite the fact that Title IX's prohibition regarding sex discrimination is not applicable to the admissions policies of all educational institutions,<sup>398</sup> discrimination based on sex in school programs or athletic activities is prohibited at all educational institutions.

IRS policies only prohibit racial discrimination against students, and, thus, faculty discrimination is not considered by IRS in its review of private schools. In fact, even though data on faculty are collected by IRS for Mississippi schools as a result of the Green decision, IRS does not even consider faculty discrimination in its reviews or in its

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397. This question appears to parallel the question involving Title VI of the Civil Rights Act of 1964 which is referred to in note 370 supra. IRS does not agree that charitable deductions and tax exemptions are Federal financial assistance. Specifically, Title IX of the Education Amendments of 1972 provides that:

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 (Supp. III 1974).

398. Title IX of the Education Amendments prohibitions of discrimination based on sex in admissions apply only for "institutions of vocational education, professional education, and graduate higher education and public institutions of undergraduate higher education." Id. at § 1681(c).

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determinations to grant exemption. The Department of Health, Education, and Welfare (HEW), the agency with major responsibility for ensuring Title VI compliance in public schools, has maintained for several years that faculty discrimination is a Title VI violation. 400

In fact, HEW has held that effective school system desegregation requires desegregation of faculty. 401 Further, the Title VI regulations of all Federal agencies indicate that discrimination in employment which has an effect on services is prohibited. 402 Despite its acknowledgement that Title VI was persuasive authority for the issuance of Revenue Ruling 71-447, IRS has also rejected this policy.

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399. Telephone interview with Frank Parker, Attorney, Lawyer's Committee for Civil Rights, Mar. 7, 1974. However, an IRS staff member maintains that data on faculty is used as supplementary evidence of a school's policies. Telephone interview with Howard Schoenfeld, Chief, Procedures Section, Exempt Organizations Examination Branch, Mar. 20, 1974.

400. In January 1971, HEW issued a memorandum entitled "Nondiscrimination in Elementary and Secondary School Staff Practices," which set forth HEW's position that discrimination in hiring, promotion, and other treatment of faculty has direct bearing on equal educational services and is therefore prohibited by Title VI.

401. HEW maintains that school districts should assign staff so that the ratio of minority group to majority group teachers in each school is substantially the same as the ratio throughout the school district. This rule also applies to nonteaching staff who work with children. Id.

Case law also holds that effective desegregation requires, among other things, desegregation of faculty. In *U.S. v. Jefferson County Bd. of Educ.*, for example, a U.S. court of appeals held that, "The United States Constitution as construed in *Brown* requires public school systems to integrate students, faculties, facilities and activities." 372 F. 2d 836, 845-46.

402. See, for example, Title VI regulations for the Department of Transportation, 49 C.F.R. § 21.5(c), and for the Department of Labor, 29 C.F.R. § 31.3.

## II. Organization and Staffing

IRS's exempt organization staff, in the national office and the district offices, is responsible for monitoring and implementing IRS's private school policy. However, the national and district offices have differing functions.

In the national office, there are actually two exempt organization branches responsible for IRS's private school program: an Exempt Organizations Branch under the Office of the Assistant Commissioner (Technical) and an Exempt Organization Examination Branch in the Audit Division under the Office of the Assistant Commissioner (Compliance). The Employee Retirement Income Security Act of 1974 creates the Office of the Assistant Commissioner (Employee Plans and Exempt Organizations). This new office will combine the Technical and Compliance functions relating to exempt organizations.

The Exempt Organizations Branch within Technical, among other things, issues rulings, drafts revenue procedures and revenue rulings, provides technical and legal assistance in interpreting IRS regulations, and acts as the final step in the administrative appeals process.<sup>403</sup> For example, the

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403. This branch, acting as a final appeal in the administrative process, holds conferences and receives written protests when the tax-exempt status of a private school is challenged by the district director and is unresolved by a conference in the district office.

Technical function will determine whether a school's advertisement of its nondiscriminatory policy fulfills IRS's publication requirement.<sup>404</sup>

This function conducts post determination reviews of all District Director determination letters issued to private schools. It also issues rulings to schools operating under a group ruling,<sup>405</sup> to private schools for the handicapped, blind, and retarded, and to certain schools whose applications are referred to the national office. Referrals are required for any school application (1) in which an adverse action is a possibility, (2) which is from a Mississippi school, or (3) in which some method of publication is being relied on other than those outlined in Revenue Procedure 72-54.<sup>406</sup>

The other organizational unit in the national office responsible for implementing the private school program is the Exempt Organization Examination Branch of the Audit Division. The Procedures Section of this branch shares responsibility with the Exempt Organizations Branch of Technical for the development of internal processing instructions for the issuance of District Director determination letters informing private

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404. IRS has established publication requirements for private schools. It requires that all advertisements be captioned in such a way as to call attention to both the notice and to its nature as a notice of a racially nondiscriminatory policy as to students. (Rev. Proc. 72-54, supra note 391. In some cases, where private schools have omitted or used an improper caption, Technical has required the schools to place another advertisement properly captioned. Schoenfeld et al. interview, supra note 366.

405. For information on schools operating under a group ruling, see Section on Group Rulings, p. 186 infra.

406. IRM (11)671-224.1 adopted Mar. 14, 1974.

schools of their exempt status. This branch has responsibility for establishing audit programs for the examination of private schools. It carries out this function as part of its overall role in the implementation and evaluation of nationwide examination programs for exempt organizations. Further, it issues procedural materials for the performance of examinations and reviews certain types of examination reports.<sup>407</sup>

The primary responsibility for implementing IRS's private school policy rests with the 16 key district offices.<sup>408</sup> These offices handle the specialized exempt organization functions for several nonkey district offices.<sup>409</sup> The structure of the Audit Division within a district office depends on the size of the office. However, essentially, all offices

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407. IRS Response to Commission Questionnaire, Aug. 15, 1972.

408. The 16 key district offices are located in Atlanta, Austin, Baltimore, Boston, Chicago, Cincinnati, Cleveland, Dallas, Detroit, Los Angeles, Manhattan, Philadelphia, San Francisco, Seattle, St. Louis, and St. Paul. Regional offices perform a monitoring and evaluation function by acting as liaison between the national and key district offices.

409. Byrne interview, supra note 393; and Kelleher interview, supra note 393.

are divided into five basic functional components.<sup>410</sup> One of these components is an examination branch. Examination branches are divided by specialty into groups,<sup>411</sup> one type of which is an exempt organization group, found only in key districts.

The exempt organization groups have responsibility for private school matters. These groups conduct audits of organizations that are exempt, including the investigation of complaints, and also issue determination letters relating to private school activities. Each group consists of 15 to 18 revenue agents or tax auditors. Where a key district office has jurisdiction over a widely dispersed geographic area, its groups have personnel in other local offices.<sup>412</sup>

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410. These five components and their responsibilities in terms of the private school program are: (1) Return Program Manager who directs the selection of all types of returns for examination, including those of private schools and other exempt organizations; (2) the Conference Staff which holds district conferences with representatives of private schools where there are unresolved issues concerning a school's initial or continuing qualification for tax-exempt status or liability for unrelated business income tax; (3) the Review Staff which reviews cases for procedural and technical accuracy before they are closed; (4) the Service Branch which provides support services such as maintaining files and handling the clerical details involved in processing cases; and (5) the Examination Branch which, in a key district, will have exempt organization group or groups concerned with the conduct of audits of private schools and the processing of exemption applications received from schools.

411. The largest number of groups examine income tax returns, and the remainder examine returns for specialized tax areas, including exempt organizations. Kelleher interview, supra note 393.

412. The Dallas key district, for example, has jurisdiction over northern Texas, Kansas, Oklahoma, and Arkansas. Exempt organization specialists are stationed in Dallas, Forth Worth, and Lubbock, Texas; in Wichita, Kansas; in Oklahoma City and Tulsa, Oklahoma; and in Little Rock, Arkansas.



### III. Recognizing Tax-Exempt Status

IRS key district offices receive a large number of applications for tax-exempt status each year, but applications from private schools represent a small percentage of this total number.<sup>413</sup> The Boston IRS key district office, for example, estimates that, of the approximately 4,000 applications for tax-exempt status filed in fiscal year 1973,<sup>414</sup> only about 100 were from private schools.

All organizations applying for exemption letters, including private schools, must complete an application form.<sup>415</sup> In addition, to qualify for such a letter a private school must respond to three questions relating to nondiscrimination. It must state (1) whether its admissions and program policies are nondiscriminatory, (2) whether its governing instruments, e.g.,

413. Kelleher interview, supra note 393; and interview with Howard Schoenfeld, Chief, Procedures Section, EOEB, IRS, Feb. 21, 1974. There are many more private foundations and other types of exempt organizations than there are private schools.

414. Kelleher interview, supra note 393. The Dallas and Chicago offices receive a smaller number of applications from private schools but report a total of only 1,000 applications received annually. Byrne interview, supra note 393 and Krodel interview, supra note 393.

415. The application form consists of eight major sections including (1) identification of the organization; (2) copies of organization documents, e.g., bylaws, articles of incorporation, constitution; (3) activities and operational information, requiring narrative description of planned or proposed activities; (4) a question as to whether the organization is a private foundation; (5) financial data; (6) a special activities questionnaire; (7) a questionnaire as to the organization's non-private-foundation status; and (8) a questionnaire to be completed if the organization is a private operating foundation. It also consists of five separate schedules, each for a specific type of organization. Schedule A applies to schools, colleges, and universities. IRS Form 1023, "Application for Recognition of Exemption," (Rev. November 1972).

charter and bylaws or other official statements, clearly set forth a nondiscriminatory policy, and (3) whether it has publicized its nondiscriminatory policy in a manner to reach all segments of the community served by the school.<sup>416</sup>

Where the submitted information meets the IRS standard for recognition of exemption, determination letters are issued from the district office.<sup>417</sup> The school also receives an advance assurance of deductibility, which is generally a guarantee to donors that contributions to the organization are tax deductible. The organization is then included in Publication 78, the cumulative list of organizations contributions to which are tax deductible. Following its being recognized as a tax-exempt organization, a school's contact with IRS is limited to the submission of an annual financial report unless IRS conducts an audit of the school or receives a complaint concerning it.<sup>418</sup>

Where the information submitted with an application does not meet the specified requirements, IRS requires additional information or policy changes to correct the deficiencies. The school would be so notified and given a deadline for resubmitting its application to IRS.<sup>419</sup>

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416. Id. at Schedule A.

417. A "determination letter" is a written statement issued by a district director in response to a written inquiry by an individual or organization which applies principles and precedents of the national office to the particular facts of a completed transaction. Rev. Proc. 72-3, C.B. 1972-1, 698.

418. The data noted on the financial report, Form 990, are presented in two major sections. Part I requires general information on gross sales, dues, contributions, expenses, and disbursements. Organizations whose gross receipts exceed \$10,000 are required to complete Part II which requests more detailed information.

419. Section 5.03, Rev. Proc. 72-4, C.B. 1972-1, 706.

The District Director is to refer certain applications to the national office for consideration: those which present a question not specifically covered by public precedent or statute, those which involve matters of extensive public interest, and those required by specific instructions.<sup>420</sup> In addition, recognition of tax-exempt status is not normally to be extended to an organization if an issue involving the organization's exempt status is pending in litigation.<sup>421</sup>

The most comprehensive aspect of IRS's civil rights program is its publication requirement, which permits the school to use any method to publicize its racially nondiscriminatory policy so long as it effectively makes the policy known to all racial segments of the community served by the school.<sup>422</sup> Publication may be in brochures, catalogues, or advertisements distributed by the school. It may also be done by announcements on the radio or by personal contact with minority group leaders.

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420. IRM (11) 671-221.

421. Rev. Proc. 72-4, *supra* note 419, at § 5.04. For example, in September 1972, officials of Baker Academy applied for tax-exempt status for the newly formed private school. Shortly thereafter, the Department of Justice filed suit against the Baker County public school system for donating a building to the academy, which it alleged was segregated. At the request of the Justice Department, IRS refrained from granting the academy tax-exempt status pending a final determination of the lawsuit. In January 1974, the Federal district court adopted an agreement reached by attorneys for the county board of education and the Justice Department to close the school. *United States v. State of Georgia*, C.A. No. 1201 (N.D. Ga. 1974).

422. This requirement is set forth in IRS's Revenue Procedure 72-54, C.B. 1972-2, 834.

Almost all schools fulfill this requirement by placing an advertisement in a local newspaper.<sup>423</sup> Since IRS has not established minimum or standard size requirements for advertisements, it is at the discretion of the IRS employee handling the case to determine whether the advertisement fulfills IRS's publication requirement.<sup>424</sup> Except in Mississippi, private schools are required to publish their nondiscrimination policy only one time.<sup>425</sup> An IRS official maintains that many schools cannot afford to place large advertisements in a newspaper at periodic intervals.<sup>426</sup> Nevertheless, in many areas, low-income persons, many of whom are minorities, may not subscribe to or regularly read a newspaper. It is questionable if a small advertisement, which is published only once, provides adequate notice to the minority community of the nondiscriminatory policy of a private school.

It has been established that service by publication alone is the weakest form of service.<sup>427</sup> States generally permit service by publication only where the address of the party or parties to be reached is unknown.<sup>428</sup>

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423. Schoenfeld et al. interview, supra note 366.

424. IRS only requires that the advertisement, no matter how small, appear in a prominent position and be captioned in such a way as to call attention to both the notice and its nature. Rev. Proc. 72-54, C.B. 1972-2, 834.

425. In Mississippi, under the Green decision, private schools are required to include a nondiscrimination policy statement in any advertisement, brochure, or catalogue used by the school as a medium for publication.

426. Schoenfeld et al. interview, supra note 366.

427. The Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971), for example, noted that "...service by publication...is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings." The IRS maintains that constructive service law is not analogous here because of the common interest that most, if not all, of the affected members of each minority group would naturally share in any nondiscrimination notice.

428. See, for example, N.Y. CPLR R. 316, N.Y. Debtor and Creditor Law § 254; Cal. Code Civ. § 415.50, Cal. Bus. and Prof. Code § 6110.

In most instances, multiple publication is required. <sup>429</sup> The Supreme Court in a famous case set the standard:

...when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected..., or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes....Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper.... 430

In most instances, private schools serve the community in which they are located and their administrators are likely to know minority leaders and the location of minority persons. A single publication by such schools is clearly not the method best calculated to notify the minority community of the nondiscriminatory policy.

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429. For example, the laws of New York State generally require multiple publication, e.g., N.Y. CPLR R. 316 states that notice must appear in two newspapers, at least one of which is in English, once in each of 4 successive weeks; N.Y. R. Prop. Tax Laws, § 1085(5), in an action notice determination of claims to realty sold for unpaid taxes, require notice to appear in two English language papers, once in each of 2 successive weeks and the mailing of a summons is also required. N.Y. Debtor and Creditor Laws, § 254, requires notice to appear in one paper not less than once a week for 6 weeks. Further, the Federal Communications Commission requires license renewal applicants to publish twice a week for 2 consecutive weeks notice of the date of the license renewal. Renewal of Broadcast Licenses, 28 Fed. Reg. 28762 (Oct. 11, 1971).

430. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Although IRS allows the publication requirement to be fulfilled by meetings between school officials and minority group leaders, this method does not appear to have been used to any substantial extent, nor has it been often used by school officials to supplement the formal publication in the newspaper.

Although hundreds of private schools were begun in response to public school desegregation, IRS makes no effort during the process of recognizing tax-exempt status to determine the intent of those responsible for the foundation of a private school. One IRS official contends that subjective intent is considered for Mississippi schools.<sup>431</sup> However, the only report of a compliance review conducted in Mississippi which Commission staff examined contained no information to indicate that this was considered. Thus, while IRS is cognizant that a new private school relies on contributions primarily to finance the costs of construction and initial operation, and that schools solicit contributions from the community, IRS does not systematically attempt to look at solicitation letters or mailing lists to determine whether solicitations are being made for discriminatory purposes. Since a new private school will solicit contributions from the parents of those children it wishes to enroll, a school seeking to remain all white may limit its solicitations to white parents in the community. Those not receiving solicitations are not even likely to know of the school's existence or proposed existence.

In addition, IRS does not generally look at recruiting efforts made by a new private school to determine, for example, if members of the minority group community have been contacted to help recruit students. Again, if a school intends to follow an exclusionary policy, recruitment will be limited to the white segments of community.

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431. James E. Griffith, Conferee, Conference and Review Staff, Exempt Organizations Branch, in Schoenfeld *et al.* interview, *supra* note 366.

In reviewing applications for tax exemption, IRS continues to rely on the school's good faith by accepting a signed assurance that the school has adopted a nondiscriminatory policy. Yet, many years of experience with Title VI has clearly established that the mere obtaining of assurance from recipients of Federal financial assistance provides no guarantee of compliance.<sup>432</sup> Although all recipients of Federal assistance sign an assurance of compliance, many Federal agencies find actual noncompliance in most instances when they conduct onsite compliance reviews.<sup>433</sup>

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432. See, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 213-14 (1971).

433. For example, over 90 percent of the institutions of higher education reviewed by HEW were violating Title VI in some manner. See section on higher education at p. 246 infra.

#### IV. Data Collection

Except in Mississippi, IRS does not require private schools to collect racial or ethnic data on students or faculty. As a result, except for complaint-initiated reviews, schools are as a rule selected randomly for review. Because a small percentage of tax-exempt private schools are reviewed by key district offices, the collection of data at various intervals is essential to allow IRS to identify and give priority to reviewing schools with no or low minority enrollment and to monitor changes in enrollment over a period of time.

A comprehensive racial-ethnic data collection and utilization system is necessary for an evaluation of equal educational opportunities.<sup>434</sup> Nevertheless, IRS has not followed the example of HEW, which requires public schools to report on an annual basis, by race and ethnicity, data on all pupils within a school system, scholarship data, data on in-school activities, expulsion statistics for the system, information on bilingual instruction in the system, and other program data. This information provides HEW with up-to-date references for determining which districts to review, for targeting possible problem areas to examine during the review of schools, and for monitoring the progress of school integration.<sup>435</sup>

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434. U.S. Commission on Civil Rights, To Know Or Not To Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs (1973).

435. For example, HEW's San Francisco regional Office for Civil Rights utilizes the data to select school districts having a minority student enrollment of less than 50 percent and one or more schools with 80 percent or more minority enrollment. For further discussion of HEW's data collection system, see section in this report on Elementary and Secondary Education at pp. 25-32 supra.



## V. Private School Survey

In November 1970, following two news releases announcing the establishment of IRS's nondiscrimination requirements,<sup>436</sup> the national office disseminated a questionnaire to all private schools. The purpose of the questionnaire was to obtain data to show whether tax-exempt schools were operating in accordance with IRS's new policies. Each school was required to respond to three questions relating to its admissions policies. IRS required each school to (1) state whether its admissions policy was discriminatory or nondiscriminatory, (2) submit proof of publication in cases where the school had asserted a nondiscriminatory policy, and (3) submit copies of documents and proof of publication of any proposed changes or modifications<sup>437</sup> in its admissions policy.

This survey had some value.<sup>438</sup> Those private schools which admitted to discriminating lost their exemption.<sup>439</sup> However, with regard to those

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436. July 10, 1970 News release, supra note 386. On July 19, 1970, IRS reasserted its position. 707 CCH Stand. Fed. Tax Rep. 56814.

437. IRS Form L-339 (11-70),

438. Despite the fact that the survey was initiated more than 3 years ago, IRS has not completed its review of the responses. Telephone interview with Bonnie Selinsky, Program Analyst, Procedures Section, Exempt Organizations Branch, IRS, Washington, D.C., Feb. 11, 1974. IRS indicates that responses for which action has not been completed are few in number.

439. By the end of fiscal year 1973 there were 92 revocations as a result of the survey. IRS officials have indicated that they believe that the survey eliminated almost all of the schools which discriminate on the basis of race. Thus, they contend that little additional enforcement is necessary. Schoenfeld et al. interview, supra note 366. This view disregards the well-established fact that almost all recipients of Federal assistance sign assurances of compliance even if they have little intention of complying. In part, this occurs because recipients recognize that the chance of their noncompliance being discovered by a Federal agency is slim and even if they are found to discriminate they need not fear enforcement action as long as they are willing to negotiate and ultimately change some of their discriminatory policies.

schools which espoused an open policy, IRS imposed no burden of proof beyond the signing and publication of an assurance of nondiscrimination.

As is the case with applications for tax-exempt status, limited information was requested in the survey and possibilities of discriminatory intent were not explored. Private schools were not asked substantive questions, nor were they required to submit data on students or programs. In addition, IRS made no systematic effort to contact minority group leaders to verify claims of nondiscrimination by surveyed schools. Moreover, IRS has never sent a followup questionnaire to any of the surveyed institutions.

In fiscal year 1972, 53 schools lost their advance assurance of deductibility and subsequently had their tax-exempt status revoked because of noncompliance with IRS's nondiscrimination requirements. <sup>440</sup> All of these revocations came about as a result of responses to the survey. <sup>441</sup> Most

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440. IRS response, supra note 363. None of these revocations were of Mississippi schools and thus, none were a result of the Green decision. Some of these schools were: Bainbridge Christian School, Inc., Bainbridge, Ga.; Butler County Private School Foundation, Inc., Greenville, Ala.; Dorchester Academy Inc., St. George, S.C.; North Street Day Nursery and Kindergarten, Raleigh, N.C.; Pioneer Christian Academy, Nashville, Tenn.; Wilcox School Foundation, Inc., Catherine, Ala.; Twelve Oaks Academy, Shelby, N.C.; Jupiter Christian School, Inc., Jupiter, Fla.; Jefferson Davis Academy, Inc., Blackville, S.C.; and Wade Hampton Academy, Orangeburg, S.C.

441. Telephone interview with Bonnie Selinsky, Program Analyst, Procedures Section, Exempt Organizations Examination Branch, IRS, Washington, D.C., Feb. 14, 1974.

of these schools were found to be in noncompliance because they refused  
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 to publicize an acceptable notice, while others blatantly objected  
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 to adopting a nondiscriminatory admissions policy.

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442. IRS claims that in most cases where a school's publication was unsatisfactory, a reviewing agent went onsite to verify other information pertaining to the school. Schoenfeld interview, supra note 413.

443. One such university which has been the subject of much controversy is Bob Jones University of Greenville, South Carolina. In the fall of 1970, IRS sent the university the private school survey form, which required a statement that the school had adopted a nondiscriminatory admissions policy. Bob Jones University returned the form in December 1970, indicating that it refused to adopt a racially nondiscriminatory policy and claiming that its religious tenets prohibited it from accepting students of all races. Subsequently, IRS met with officials of Bob Jones University on many occasions to attempt to work out the problem. In September 1971, the university, without notifying IRS of its action, filed suit against IRS in the U.S. District Court for South Carolina, Greenville Division, and requested an injunction to prevent the Secretary of the Treasury and the Commissioner of Internal Revenue from suspending its advance assurance of deductibility or revoking its tax-exempt status. On November 17, 1971, the court granted the university the injunction. IRS subsequently filed a successful appeal to overturn the injunction. Bob Jones University v. Connally, 472 F.2d 903 (4th Cir. 1973). Bob Jones University, in turn, appealed that decision to the U.S. Supreme Court which, on May 15, 1974, upheld the circuit court's decision that the university's suit should be dismissed for lack of jurisdiction. Bob Jones University v. Simon, U.S. , 42 U.S.L.W. 4721. This affirmance did not directly deal with the merits of the university's assertion that the religious basis for its racial discrimination neutralized any adverse effect such policy might otherwise have on its charitable status for Federal tax purposes. The Supreme Court did directly rule, however, that the case before it was not one in which the Government could under no circumstances ultimately prevail. After the final disposition of the university's Supreme Court appeal, the IRS continued with proceedings against it, and on October 29, 1974, announced the suspension of advance assurance of deductibility with respect to any and all contributions to the university. In the meantime, the Federal district court in Greenville, South Carolina, had on July 25 reached a comparable result in another separate injunction suit by upholding an administrative order cutting off all Veteran's Administration benefits to the university on constitutional grounds for so long as it continues to operate on a racially discriminatory basis.

## VI. Reviews

The IRS national office sets audit priorities for key district offices for the 19 types of organizations eligible for exemption. During fiscal year 1973, private foundations were designated as the organizations with the top priority for audit.<sup>444</sup> Despite the history of segregated education in the United States and the increasing number of segregated academies being established,<sup>445</sup> national office directives for fiscal year 1973 required that key district offices examine only 2 to 4 percent of the private schools within their jurisdiction.<sup>446</sup> This resulted in a total of 156 private school reviews in fiscal year 1973.<sup>447</sup>

All regions reviewed at least the minimum number of schools required except

444. Kelleher interview, supra note 393; Schoenfeld et al. interview, supra note 366.

445. For a general discussion of the segregated academy movement, see, Terjen, Close-Up on Segregation Academies, New South, Fall 1972, at 50.

Mr. Boyd Bosma, a civil liberties specialist for the National Education Association was quoted in a recent newspaper article, that "In many places segregated academies are becoming permanent community institutions." In South, Enrollment in Private Schools Continues to Climb, The Wall Street Journal, Dec. 17, 1973, at 1 [hereinafter cited as Wall Street Journal article].

Mr. Bosma further asserts that "the consequences of the continued existence of segregated schools will be seen for generations through inequality of educational opportunity and manifested in the reestablishment of a caste system potentially worse than any the society has seen today." Interview with Boyd Bosma, Human Rights Specialist, National Education Association, Mar. 29, 1974.

446. IRS response 1972, supra note 407.

447. IRS response, supra note 363. In fiscal year 1972, the 16 key district offices were each required to review 10 schools, resulting in the review of 205 private schools. IRS response 1972, supra note 407.

the southeastern region,<sup>448</sup> which encompasses the States of North Carolina, Tennessee, South Carolina, Georgia, Alabama, Mississippi, and Florida. Yet, this is the section of the country where private segregated academies have been established in the greatest number to subvert public school desegregation. A major failure of the IRS enforcement program is that the smallest number of reviews were conducted in the area with the most significant problem. No action has been taken by IRS to require the southeastern region to promptly correct this nonfeasance.<sup>449</sup> Further, the fiscal year 1974 audit criteria continue to require each key district to review the same small percentage of private schools within their jurisdiction, without taking into account the increased probability of noncompliance in certain areas. At the rate set by IRS it may take a key district at least 50 years to review the schools for which it has responsibility. This is hardly an acceptable response by IRS to a major problem affecting the lives of hundreds of thousands of people in the South and across the Nation.

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448. A breakdown of the number of schools reviewed in fiscal year 1973, the total number of private schools in each region, and the minimum number of schools each region was required to review based on the 2-4 percent requirement is as follows:

<u>Region</u>	<u>Total No. of Tax- Exempt Schools*</u>	<u>No. of Schools Reviewed**</u>	<u>No. Required to be Reviewed</u>
North Atlantic	995	37	19
Mid Atlantic	700	17	14
Southeastern	666	8	13
Central	372	8	7
Midwestern	533	13	10
Southwestern	491	25	9
Western	737	48	14

\* From Computer Printout compiled by IRS in February 1973.

\*\* IRS response, supra note 363.

449. IRS reports that during the first 6 months of fiscal year 1974, 18 private schools were examined in the Southeastern Region.

A. Criteria for Review

The national office provides no guidelines for selecting schools to audit. As a result, standards for choosing private schools to audit differ among key district offices. For example, the Boston key district office selects schools based on geographic location, randomly examining schools in each State in its jurisdiction.<sup>450</sup> The Chicago office claimed that its staff is aware of which schools may not meet minimum requirements for exemption. It "ranks" such schools in order of degree of suspected noncompliance and reviews them accordingly.<sup>451</sup> In the Dallas key district office, a staff member is responsible for perusing the newspaper to see if any article relating to private school policies might suggest reasons to review a particular school.<sup>452</sup> In addition to schools which might normally be selected for audit, schools which are the subject of complaints are to receive top priority for examination.<sup>453</sup>

There are also instances where the national or a regional office requests that a review of a specific school be conducted. For example,

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450. Kelleher interview, supra note 393.

451. Krodel interview, supra note 393.

452. Byrne interview, supra note 393. No review has been conducted by the Dallas office as a result of canvassing the newspapers. Id.

453. Kelleher interview, supra note 393; Byrne interview, supra note 393; Krodel interview, supra note 393; and Schoenfeld et al. interview, supra note 366. IRS considers all complaints, and investigations are conducted when deemed necessary to resolve the issues raised. Schoenfeld et al. interview, supra note 366.

an IRS regional official in the central region directed the Cleveland key district office to conduct an audit of a particular school in Canton, Ohio, because the administrative file did not contain a copy of any publication or newspaper advertisement which included a non-discriminatory policy statement.

Since no substantive information or racial-ethnic data is collected except onsite, schools with openly discriminatory policies may never be reviewed. Not only does IRS have no uniform objective measures for determining which schools to review, but in some cases even where it was clear that a specific private school may have been discriminatory, an audit was not instituted. For example, in March 1972, this Commission held a hearing in Cairo, Illinois, concerning the large scale discrimination and racial polarization in that city. The Camelot School, a private academy, had been established after desegregation began in the Cairo public schools. At the time of the hearing, no black student had ever attended Camelot in spite of the fact that 38 percent of Cairo's population is black. In keeping with IRS policy, the publication of a newspaper article noting a nondiscriminatory admissions policy was sufficient to qualify the school for tax-exempt status. Despite longstanding national publicity concerning the resistance in Cairo to desegregation, and the concerns raised by this Commission about the Camelot School, IRS's Midwest Regional Commissioner stated that "IRS would have no reason to review the situation in regard to a particular school, such as Camelot, unless IRS had received a specific complaint of discrimination against the institution." 454

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454. Transcript of Hearing Before the U.S. Commission on Civil Rights, Cairo, Illinois, Mar. 23-25, 1972 at 300-301. Eight months later, in November 1972, IRS reviewed the Camelot School as a result of a request from the NAACP and found it to be in compliance with the revenue ruling. See note 464 infra for an evaluation of that review.

B. Procedure

IRS conducts audits of private schools, which include an examination of their nondiscriminatory policy as well as of their educational activities and financial status. Approximately 25 to 40 percent of an audit is devoted to an inspection of the financial records of the school.<sup>455</sup> The remainder of the examination is concerned with attempting to determine if the institution is engaging in the activity for which it was recognized as exempt and if it is operating in conformity with the IRS civil rights requirements.

Once a determination has been made to audit a particular school, an examiner is assigned to the case. Prior to going onsite, the examiner conducts a precontact analysis. Included in this analysis is a review of all materials IRS has on file for the particular school, such as the school's original application for exemption and its response to IRS's 1970 questionnaire.<sup>456</sup>  
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On the average, a private school examination requires 24 staff hours. Of the reviews examined by Commission staff, some involved 81 staff hours while others involved only 3. The examiner's computation includes the time involved getting to the audit site, the amount of time spent onsite and the time spent writing a report of the examination. To some extent, the number of person-hours spent on a particular case depends on the size of the school and the complexity of the issues involved. However, a major factor in the discrepancy of time

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455. Kelleher interview, supra note 393.

456. For more information on the 1970 questionnaire, see Section on Private School Survey, pp. 169-71 supra.

457. Krodel interview, supra note 393; and Kelleher interview, supra note 393.



involved in the different cases is the variance which may be involved in  
<sup>458</sup>  
 travel time.

Although IRS has not established formal guidelines for examiners, IRS officials indicate that areas to be covered in the onsite audit generally include the racial-ethnic composition of the student body, admissions procedures (including testing), and, where appropriate, the administration of financial aid and housing facilities. The determination of which specific information to collect is left to the discretion of each examining agent. For example, some examiners might look to see whether a picture is required on an application form, and, if so, whether the picture is used as a tool for discrimination in admissions or in selection for academic or athletic programs. Some examiners might request information on a school's scholarship program while others may not go beyond verifying that the school has publicized its nondiscriminatory policy.

During the course of an audit, the agent interviews the president, dean, or legal representative of the school. Faculty, students, and community leaders are not normally interviewed.<sup>459</sup> But, if the only person interviewed is a school official, IRS has no way to verify the information provided. For example, if a school official asserts that he or she has contacted the minority community,

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458. One agent, for example, may be required to drive to the airport, take a flight and drive again while another may only need walk 5 minutes to get to the school.

459. Krodel interview, supra note 393. It was indicated, however, that, if school officials refuse to cooperate with IRS personnel, an exception would be made and students and faculty could be interviewed. This situation has never occurred. IRS officials in Boston and Dallas asserted that students might be interviewed. However, they could not recall instances when such interviews had been conducted. IRS Washington-based officials claimed that community leaders are interviewed in Mississippi because of the Green decision. Schoenfeld et al. interview, supra note 366. However, the one investigation examined by Commission staff of a school in Mississippi included no information indicating that community leaders were contacted.

an examiner can verify this information only by contacting the same parties.

C. Guidelines

There are no guidelines defining what constitutes compliance with the revenue ruling other than the standards used for recognizing tax-exempt status. Agents are to assure that (1) the school has provided a nondiscriminatory policy statement and (2) IRS's publication requirement of a nondiscriminatory policy has been met.

Examination by Commission staff of 41 audit reports<sup>460</sup> revealed that the reports totally lack uniformity. For example, some reports include data on students and scholarships, while others do not. Subsequent to its examination of reports, the Commission was informed by IRS that missing information may have been contained in the workpapers of the examining agents. When a request was made for the workpapers, Commission staff were told that they were probably discarded.<sup>461</sup> In the absence of recorded data on official reports, it is impossible to determine which data, if any, were collected, and if the data collected were consistent and sufficiently comprehensive. Despite IRS's claim that, if all

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460. IRS granted Commission staff permission to examine reports on 41 private schools. All reviews and analyses referred to in this section are based on examination of these 41 reports. However, because of IRS requirements concerning confidentiality in the administration and implementation of the tax laws, names of specific private schools are omitted.

461. Schoenfeld et al. interview, supra note 366. IRS recently informed this Commission that:

The workpapers, examination report, and Form 990 are kept together in an examination case file which is sent to the Service Center when an examination is completed. Once there, the files are eventually sent to a Federal Records Center. The Districts have experienced extreme difficulty in retrieving the files once they have been sent to the Service Center. To cope with this problem, the district reviewer will often make copies of examination reports and pertinent portions of workpapers that are deemed important for future reference. These are then put in the administrative case file which is maintained in the key district office. Those reports which the Commission inspected were available for this reason. As judgment is involved in determining what to save, however, there is no guarantee for a specific case that copies of an examination report and workpapers will be retained in the key district office.

workpapers were kept in district offices, "IRS's administrative case files would double,"<sup>462</sup> the collection of data necessary to substantiate a finding of nondiscrimination need not be extensive. A checklist of a few pages could be developed which would provide IRS with concise information as to the racial-ethnic composition of the students, data on scholarship recipients, and other programmatic activities of the school.<sup>463</sup>

IRS's audits of private schools almost always result in a finding of compliance. In many cases, however, this determination is based on extremely little statistical or substantive information.<sup>464</sup>

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462. Id.

463. Since IRS processes 112 million tax returns each year, the addition of a checklist for private schools does not appear to be an unreasonable additional burden. Since the present audit reports are only a few pages and IRS reviews about 200 private schools per year, it is unlikely that such a list would add more than several hundred pages per year to IRS's files.

For example, in a case involving allegedly discriminatory practices by private schools, a Federal district court required all private schools in Mississippi to fill out a four-page questionnaire, to be evaluated by the Mississippi Textbook Purchasing Board, in order to be eligible to receive State-owned textbooks. This questionnaire, consisting of 19 questions, required Mississippi private schools to submit such information as: data on race of students and faculty upon the opening of the school and for the months of September and February since 1969; copies of existing affirmative nondiscriminatory policy; lists of contributors of buildings or land; names and race of incorporators, founders and board members; and the availability or existence of scholarships for students. *Norwood v. Harrison*, Civil No. WC 70-53-K (N.D. Miss. 1973) Exhibit A. (For further discussion of this case see note 389 supra.)

464. For example, in November 1972, IRS reviewed the Camelot School, in Cairo, Illinois, a city with extensive racial problems. Camelot retained its tax-exempt status despite the fact that limited substantive information was recorded by the agent. Camelot's audit report consisted of proof of the school's publication of a nondiscriminatory policy, information on the hearing held by the Commission regarding discrimination against blacks in Cairo, a statement that admissions applications were distributed to the local Catholic school where three blacks were in attendance, a listing of the credentials of faculty, and financial data. No information on the racial-ethnic composition of the student body or on the recruitment or scholarship program was included in the report.

The audit reports examined by this Commission generally contained information regarding compliance with IRS's publication requirement, i.e., that the school had published a nondiscriminatory policy statement. Some reports indicated the date and medium used, e.g., the local newspaper, while others did not. Also, most reports noted the total number of students and the number of minorities enrolled at the school. Except for these items, the reports generally lacked uniformity in the information set forth.

None of the audit reports examined commented on the possibilities of discriminatory intent in creating the school. Few reports had any indication of possible recruiting efforts undertaken, and only half of the reports contained an assessment of the availability of scholarships. Despite the revenue ruling's requirement of nondiscrimination in all programs and activities of a private school, the examination conducted by this Commission revealed that, aside from some information on scholarship programs, no audit report contained any information relating to athletic programs, extracurricular activities, housing, or other school-administered programs.

IRS maintains that an examining agent's job is to ensure that all admissions tests are nondiscriminatorily utilized. However, IRS claims not to have the staff or expertise to analyze admissions tests to determine whether or not they are culturally biased and designed to eliminate minority students from consideration. The agency asserts that its review of testing is limited to determining if the cutoff point for entrance is applied without discrimina-  
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tion. None of the audit reports examined by this Commission contained such an analysis.

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465. IRS response, supra note 363.

In many cases, the publication of a nondiscrimination policy was deemed sufficient for IRS to find a private school in compliance. One school, for example, located in Arkansas, publicized and incorporated into its bylaws a nondiscriminatory policy statement. The school, which was opened for enrollment in 1970, a time when white segregated academies were rapidly developing in the South to subvert public school desegregation, was found to be in compliance. The report of the examining agent stated that "regarding the third requirement [that the school be integrated] the school is not integrated. It has no minorities, employees, directors....The school officials state that there have been no applications from minority students, and no applications from any minority persons for faculty positions.. During my examination, I found no evidence to indicate otherwise." The report contained no information on the school's scholarship program or possible recruiting efforts. For another school, located in Mississippi, an advertisement in the county newspaper was deemed sufficient for IRS to determine compliance. The examining agent noted no programmatic statistical information.

Reports examined by Commission staff revealed that, where a few minority students were enrolled, no other substantive information was collected by IRS staff to support a final determination of compliance. The fact that IRS does not look any further once it has determined that a few minority students are enrolled means that the agency would not know if a school has made a deliberate effort to limit minority enrollment. In addition, since agents do not examine the possibility of in-school discrimination against already-enrolled minority students, such practices will remain undetected.

The existence or lack of a scholarship program in a private school with no minority enrollment is a crucial factor in determining whether a

school is engaged in discriminatory practices.<sup>466</sup> Where a school maintains a scholarship program and has no minority enrollment, the validity of its nondiscriminatory policy should be subject to intensive scrutiny, since the absence of minority students in such a school cannot as readily be attributed to economic factors. It would be the responsibility of these schools to provide evidence that their policies, in fact, operate on a nondiscriminatory basis. Nevertheless, none of the audit reports on schools falling in this category which were examined showed that any burden was placed on the schools to justify the absence of minority student enrollment, nor were schools required to develop programs to recruit minority students.

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466. Of the examined 41 review reports, 12 schools had no minority enrollment. Of these, two had no scholarship programs; three offered scholarships; and no information on the subject was included in seven reports.

VII. Enforcement

By the end of fiscal year 1973, IRS had revoked tax-exempt status for 95 private schools.<sup>467</sup> However, an IRS staff member indicated that almost all revocations initiated by IRS were the result of responses to the private schools survey, not the result of the subsequent examinations of private schools. Commission staff were also informed that most survey responses had been reviewed by the end of fiscal year 1972.<sup>468</sup> Since IRS believes that the survey eliminated most discriminatory schools,<sup>469</sup> revocations for fiscal year 1973 were few. In fact, IRS revoked tax-exempt status for three schools during that fiscal year.<sup>470</sup> However, two of the revocations were initiated because of violations totally unrelated to civil rights<sup>471</sup> and thus only one school lost its exemption because of a racially

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467. IRS response, supra note 366; and letter from Donald C. Alexander, Commissioner, Internal Revenue Service, to Jeffrey Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Feb. 20, 1974.

468. Selinsky telephone interview (Feb. 11, 1974), supra note 441.

469. Schoenfeld et al. interview, supra 366.

470. Alexander letter, supra note 467.

471. IRS has informed this Commission that the precise reasons for the revocations of Lake Castle Private School in New Orleans, Louisiana, and Pamlico Community School in Washington, North Carolina, may not be disclosed to the public.

discriminatory policy.<sup>472</sup> Thus, despite the existence of significant numbers of segregated academies,<sup>473</sup> IRS has taken little enforcement action. This has occurred apparently because of IRS's belief that the school survey virtually eliminated all violators, and because its audits are so poorly conducted.

An assessment of revocations, by State, reveals that Mississippi has experienced the greatest number of revocations, apparently because of the more stringent requirement of the Green court order. While there were a number of revocations in Alabama and South Carolina, IRS

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472. Telephone interview with Howard Schoenfeld, Chief, Procedures Section, Exempt Organizations Examination Branch, Mar. 21, 1974. Thomas Hayward Academy, Inc., in Ridgeland, South Carolina, lost its exemption because of a racially discriminatory policy. Id.

473. In 1971, for example, almost 10 percent of all students enrolled in private schools were attending segregated academies. In that year, 550,000 students were attending private segregated academies (NAACP Report, supra note 378), and the Office of Education estimated that in the fall of 1971, there were 5,600,000 students enrolled in private elementary and secondary schools in the United States. U.S. Department of Health, Education, and Welfare, Digest of Educational Statistics 34 (1971).



revoked the exempt status of few institutions in Arkansas, Louisiana, Tennessee, and North Carolina,<sup>474</sup> where large numbers of segregated academies were formed in response to public school desegregation.<sup>475</sup>

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474. The breakdown of revocations, by State, through fiscal year 1973 is as follows:

<u>State</u>	<u>No. of Revocations</u>
Alabama	16
Florida	11
Georgia	3
Louisiana	2
Mississippi	33
North Carolina	5
South Carolina	22
Tennessee	3

IRS response, supra note 363 and Alexander letter, supra note 467.

475. NAACP Report, supra note 378.

### VIII. Group Rulings

An organization which maintains more than one subordinate institution may apply to the IRS national office for a group exemption on behalf of its subordinates.<sup>476</sup> Information on the subordinates to be submitted with the application for exemption includes (1) a description of the purposes and activities of the subordinates; (2) a copy of the charter adopted by the subordinates; (3) a statement that each subordinate to be included in the exemption has furnished the central organization with written authorization to include it in the group exemption; (4) a list of all subordinates to be included in the exemption; and (5) a statement that, to the best of its knowledge, no subordinate included in the exemption is a private foundation.<sup>477</sup> Annually, the central organization provides IRS with information regarding all changes relating to its subordinates, i.e., changes in status, addresses, and activities.<sup>478</sup>

Of the estimated 2,400 central organizations covered by group rulings, 85 operate schools.<sup>479</sup> The most noted example of a central organization with many subordinates is the Catholic Church, which operates thousands of private church schools.<sup>480</sup>

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476. Rev. Proc. 72-41, C.B. 1972-2, 820.

477. Id.

478. Id.

479. IRS response, supra note 363.

480. All private schools under group rulings are probably church related. Interview with Howard Schoenfeld, Chief, Procedures Section, Exempt Organizations Examination Branch, IRS, Feb. 7, 1974.

IRS had estimated that approximately 12,000 private schools  
<sup>481</sup> operate under group rulings. If a central organization's tax-exempt status under a group ruling were revoked because of a racially discriminatory policy, such revocation would result in nonrecognition of the exempt status of all subordinates. On the other hand, disqualification of a subordinate organization would not result in revocation of the group exemption.<sup>482</sup>

In June 1971, special questionnaires were disseminated to 220 central organizations exempt under group rulings which IRS believed  
<sup>483</sup> might operate private schools. This survey was initiated to determine how many of such organizations were in compliance with IRS's nondiscrimination requirement. This survey was essentially the same as the one conducted of individual private schools. Thus, the questionnaire requested no data or programmatic information.<sup>484</sup> IRS has not completed the evaluation of these questionnaires because legal questions arose pertaining

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481. Id. IRS is unable to identify all private schools operating under a group ruling in existence at any given time because (1) many schools are operated by major religious denominations, including schools operated in individual parishes or dioceses, and many changes occur as parishes constantly consolidate, establish, or abolish schools, and (2) IRS receives a list of changes only once a year from the central organization.

482. Id.

483. IRS response 1972, supra note 407. The questionnaire, IRS Form M-0750 consists of five questions to be completed by the central organization. Information requested included a statement as to whether or not schools are covered by the group ruling, identification of each school by name, address, type of subject matter taught, statement of each school's policies with respect to admissions based on race, statement of the manner in which each school has publicized its nondiscriminatory policy, and a statement as to any proposed policy modification undertaken by any school and the methods to publicize it.

484. For further discussion on the private school survey, see p. 169 supra.

to the effect on a church's exempt status where it operated discriminatory schools that are not separately incorporated. A special IRS task force was initially formed to consider this question and various other closely-related procedural problems which include the proper scope and effect of the statutory restrictions on the tax examination of church records. These restrictions appear in section 7605(c) of the Internal Revenue Code, a provision that was added to the code by section 121(f) of the Tax Reform Act of 1969. Draft regulations under Code § 7605(c), as initially published in a notice of proposed rule making dated December 16, 1970, were thereafter materially modified, and the final regulations as promulgated on October 26, 1971, in T.D. 7146, 1971-2 C.B. 429 (Treas. Reg. § 301.7605-1(c)(1)<sup>485</sup> make it clear that these restrictions do not apply to an examination of the

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485. This section provides in part that the purposes of the statutory restrictions are:

to protect such organizations from undue interference in their internal financial affairs through unnecessary examination to determine the existence of unrelated business taxable income, and to limit the scope of examination for this purpose to matters directly relevant to a determination of the existence or amount of such income.

religious activities of a church or convention or association of churches for the purpose of determining the initial or continuing qualifications of the organization for exemption under Code § 501(c)(3)<sup>486</sup> or for the receipt of tax-deductible contributions. After the completion of the task force study, the Chief Counsel's office was requested to prepare a formal opinion concerning the central issues covered by its report. Although such an opinion was thereafter prepared, the IRS has not yet finally adopted or announced a specific<sup>487</sup> program with respect to church-related schools.

Until these questions are resolved, IRS will not review church schools operating under a group ruling. In fact, IRS has never reviewed church-sponsored schools. IRS's longstanding inaction in this area has potentially serious consequences, since a large number of the segregated private schools

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486. In this regard section 301.7605-1(c)(iii) broadens the code language by listing three specific exceptions from the general rule that no examination of religious activities of an organization claiming to be a church or convention or association of churches is to be made. In addition to the exceptions mentioned in the above-listed material, examinations are permitted for the purpose of determining whether the organization actually falls within such a special class of organizations for the purpose of the unrelated business income tax provisions found in sections 511 through 515 of the code.

487. See the above-cited decision of May 15, 1974, in *Bob Jones University v. Simon* in which the Supreme Court refused (a) to treat the contemplated revocation of the university's exemption ruling as other than a good faith effort to enforce the technical requirements of the code or (b) to classify the case arising out of such plaintiff's constitutional attack on the application of Rev. Rul. 71-447 to a religious institution as one in which the Government could "under no circumstances...ultimately prevail."

In a recent letter to this Commission, IRS indicated that:

the issue of whether or not a racially discriminatory private school can be sheltered by a church's own exempt status is under active study. If this policy is adopted and approved by the Treasury, it will be duly announced publicly, and will be reflected in our rulings and enforcement programs.

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set up to subvert public school desegregation are church sponsored.

In Memphis, for example, in the face of impending desegregation, white public school enrollment declined by almost 50 percent from the 1971 to the 1972 school year. Forty-two new private schools, most of them church-related, have been established to absorb a large number of white

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students. One such organization, Briarcrest Baptist School System, Inc.,

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488. An official of the Southern Regional Council maintains that:

The surge of "Christian schools" in some areas in recent years can be attributed in large measure to efforts to undercut desegregation. This phenomenon has occurred especially where large scale desegregation was in process or about to take place. Indeed, at least some of these schools have professed to be open to black students. A few of them may have had token black representation in their student body; but just a handful at most.

Telephone interview with Emory Via, Program Officer specializing in Education, Southern Regional Council, Mar. 20, 1974.

For a general discussion of formation of segregated church schools see, Egerton, Segregated Academies, With Much Church Aid, Flourish In South, As Other Private Schools Wane, South Today, Sept. 1973, at 1, col. 4.

489. Private school enrollment in Memphis rose to 33,012 in the fall 1972 as compared with 13,071 in the fall of 1970. Wall Street Journal article, supra note 445.

for example, is operated by 11 Baptist churches affiliated with the Southern Baptist Convention. The school claims that it has an open admission policy and has made an effort to recruit blacks. Nevertheless, black leaders in Memphis agree that Briarcrest is a segregated white academy. <sup>490</sup> Although IRS is aware of this case it has not reviewed the school and plans to take no enforcement action. <sup>491</sup> Other church schools have openly admitted a racially discriminatory policy, <sup>492</sup> but assert that they are mandated by religious tenets. No action has been taken by IRS with regard to such institutions.

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490. Telephone interview with Rev. James M. Lawson, Director, Education Division, NAACP, Memphis, Tenn., Feb. 26, 1974. See Wall Street Journal article, supra note 445.

491. IRS recently informed this Commission that its:

Records show that a letter recognizing the exempt status of Briarcrest Baptist School System, Inc., was issued on December 12, 1973. At that time, IRS was aware of the publicity surrounding the opening of this school system but had no substantial evidence that the system was operating on a racially discriminatory basis. To date, the Service has not received a complaint concerning this school system. Further, since the ruling was fairly recently issued, the IRS Audit Division has thus far not considered the question of whether the School system would or would not be examined. This organization is subject to regular audit selection criteria, however.

492. One school, Southern Methodist College in Orangeburg, South Carolina, in asserting a discriminatory admissions policy stated:

One of these historical doctrinal beliefs has to do with the purity, integrity, and separation of the races. Therefore, Southern Methodist College according to its constitution is open to white caucasian students only. IRS response, supra note 363.

IX. Coordination with the Department of Health, Education, and Welfare

IRS's coordination with the Department of Health, Education, and Welfare (HEW) is inadequate, in spite of the fact that both agencies have the responsibility to ensure nondiscrimination in private schools. Although HEW is the primary agency in charge of ensuring nondiscrimination in public schools and has almost 10 years' experience in investigating discrimination by schools, the extent of IRS communication with HEW is limited to furnishing it with a monthly list of those private schools which have been recognized as exempt.<sup>493</sup> HEW also refers summary information concerning violations of the Civil Rights Act to IRS, but no arrangement exists for the exchange of comprehensive information on private schools. Staff from the two agencies have not met to discuss, for example, the possibility of uniform compliance standards or coordination in reviews of private schools.

IRS justifies this limited communication with HEW by asserting that its statutory disclosure laws prohibit other agencies from gaining access to its files.<sup>494</sup> IRS also maintains that the two agencies operate under different mandates; HEW enforces Title VI while IRS is bound only by Revenue Ruling 71-447. Therefore, further cooperation, IRS feels, would be only of limited value.

The lack of communication and cooperation between HEW and IRS has contributed to the existence of differing standards for determining nondiscrimination in private schools. For example, in June 1972, the Director

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493. IRS response, supra note 363.

494. Schoenfeld et al. interview, supra note 366. See also, Internal Revenue Code § 6103-4 and the regulations thereunder.



of the Education Division in HEW's Office for Civil Rights wrote to the Chief of IRS's Exempt Organizations Examination Branch to apprise him of the fact that HEW had found Free Will Baptist Bible College in Nashville, Tennessee, to be in noncompliance with Title VI of the Civil Rights Act of 1964; i.e., HEW determined that the college's policies were discriminatory. IRS examined the college and found it in compliance with the revenue ruling.

In order to clarify this inconsistency, HEW requested a copy of the IRS examination report and any other materials which led IRS to its conclusion.<sup>495</sup> IRS denied the request, stating that release of information obtained from taxpayers could interfere with its responsibility to administer the tax law.<sup>496</sup>

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495. IRS staff indicate that the requested materials might have been forwarded if the Secretary of HEW formally requested them from the Commissioner of IRS. Schoenfeld et al. interview, supra note 366. To require every request for information to come from the head of an agency is unreasonable and is hardly calculated to facilitate effective cooperation.

496. This Commission has, on several occasions, advocated the release of information to Federal agencies, especially HEW, to the extent that this information is pertinent to IRS's fulfillment of its civil rights responsibilities. Regarding the case of Freewill Baptist Bible College, this Commission asserted that "Since HEW and IRS arrived at different conclusions, given a related set of facts, it seems entirely appropriate for HEW to have sought to clarify this inconsistency." Letter from John A. Buggs, Staff Director, U. S. Commission on Civil Rights, to Johnnie M. Walters, Commissioner, Internal Revenue Service, Feb. 23, 1973. In subsequent correspondence, this Commission noted that:

For IRS to withhold assistance from HEW on the ground that its authority for monitoring civil rights compliance differs from the authority relied on by HEW gives the clear impression that these two Federal agencies have different standards for determining compliance.../t/here is, and should be, no discernible difference in the civil rights compliance criteria applied by IRS and HEW.

Letter from Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, to George P. Shultz, Secretary of the Treasury, May 16, 1973.

The use by two Federal agencies of differing standards for determining the compliance status of a recipient of Federal assistance not only undermines the efforts of the agencies to achieve compliance but is unfair to the recipient, since it cannot know which standard to follow. Coordinated efforts on the part of both agencies could minimize duplication of efforts with respect to compliance reviews and complaint investigations. In addition, HEW's expertise in the area of Title VI compliance reviews could prove invaluable to IRS, since HEW has already developed extensive guidelines and policy directives concerning non-discrimination in public schools. For example, IRS claims that it does not have the expertise to evaluate admissions tests to determine whether or not they are culturally biased and designed to eliminate minorities from consideration.<sup>497</sup> HEW's expertise in this area, however, can be utilized to make such an evaluation. Since neither agency yet collects racial or ethnic data on students or faculty of private schools,<sup>498</sup> a coordinated effort to design a collection instrument would avoid the eventual creation of two separate and possibly conflicting report forms.

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497. IRS response, supra note 363.

498. HEW collects racial and ethnic data only for those private schools applying for surplus property.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (HEW)

## HIGHER EDUCATION DIVISION (HED)

## OFFICE FOR CIVIL RIGHTS (OCR)

I. Responsibilities

In fiscal year 1971, 2,368 institutions of higher education received \$3.48 billion<sup>499</sup> from 14 Federal agencies.<sup>500</sup> Of these, HEW was the largest single source of Federal funding, contributing 65 percent of this total dollar amount.<sup>501</sup> This money was allocated for such purposes as student assistance, programs for the disadvantaged, the strengthening of developing institutions, college personnel development, and planning and evaluation.

Although private colleges and universities receiving Federal support outnumbered public institutions,<sup>502</sup> public institutions accounted for 61 percent of total Federal contracts and assistance, 65 percent of total degrees awarded, and 75 percent of student enrollment.

499. This figure does not include loans granted to institutions of higher education which often constitute the sole source of Federal support to a small college.

500. National Science Foundation, Federal Support to Universities, Colleges, and Selected Nonprofit Institutions, Fiscal Year 1971 (December 1972). The 14 Federal agencies are as follows: the Departments of Agriculture, Commerce, Defense, Health, Education, and Welfare, Housing and Urban Development, the Interior, Labor, and Transportation; the Atomic Energy Commission, Office of Economic Opportunity, Environmental Protection Agency, Agency for International Development, National Aeronautics and Space Administration, and the National Science Foundation.

501. In fiscal year 1972, the Department of Health, Education, and Welfare awarded \$2,840,047,000 in grants and contracts to colleges and universities.

502. National Science Foundation, supra note 500. There were 1,242 private institutions receiving Federal support in 1971, as opposed to 1,126 public institutions.

Sixty-eight percent of the funds were granted to 95 universities, each of which received Federal support exceeding \$10 million.<sup>503</sup>

As a condition of this Federal support, institutions of higher education are obligated to comply with a number of civil rights requirements. The responsibility for assuring that these institutions conform to the laws, Executive orders, and regulations concerning equal opportunity belongs to HEW's Office for Civil Rights. Included in the civil rights statutes monitored by OCR are Title VI of the Civil Rights Act of 1964,<sup>504</sup> Title IX of the Education Amendments of 1972,<sup>505</sup> Titles VII and VIII of the Public Health Service Act,<sup>506</sup> and Executive Order 11246, as amended by Executive Order 11375.<sup>507</sup>

Title VI prohibits colleges and universities from discriminating on the basis of race, color, or national origin, in the admission and treatment of students and in the delivery of institutional services and benefits to students and faculty. There are approximately 2,874 college and university campuses covered by Title VI requirements.<sup>508</sup>

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503. *Id.* The 10 largest recipients were the Massachusetts Institute of Technology, University of Minnesota, University of Michigan, University of Wisconsin (Madison), University of Washington, Stanford University, Howard University, University of California (Los Angeles), University of California (Berkeley), and Columbia University.

504. 42 U.S.C. § 2000.

505. 20 U.S.C. § 1681.

506. 42 U.S.C. § 296.

507. E.O. 11246, 3 C.F.R. (1964-1965 Comp.) p. 339, E.O. 11375, 3 C.F.R. (1966-1970 Comp.) p. 684.

508. Office for Civil Rights, Higher Education Division, Annual Enforcement Plan, Fiscal Year 1975 [hereinafter cited as FY 1975 Enforcement Plan].

Title IX prohibits educational institutions, with certain exceptions,  
 509  
 from discriminating on the basis of sex. With respect to admissions,  
 the statute exempts private institutions of undergraduate higher  
 education, educational institutions whose primary purpose is to train  
 individuals for the military service of the United States or for the  
 merchant marine, and educational institutions controlled by religious  
 organizations whose tenets are inconsistent with Title IX. 510

Institutions whose admissions practices are covered were required  
 to be in compliance by June 1973 unless they were institutions which  
 previously had restricted admission to members of one sex. In those  
 cases compliance was not required until June 1979. This exception to  
 the June 1973 compliance date applies only if the institutions carry  
 out their transitions pursuant to a plan approved by the Commissioner  
 of Education. 511  
 An estimated 2,697 campuses are subject to Title  
 IX. 512

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509. With regard to admissions to educational institutions, Title IX applies  
 only to institutions of vocational education, professional education,  
 graduate higher education, and to public institutions of undergraduate  
 education. All other provisions of Title IX are applicable to any public  
 or private preschool, elementary, or secondary school, or any institution  
 of vocational, professional, or higher education. For further discussion  
 of Title IX, see pp. 220-226, 265-269.

510. An example of such an institution would be Yeshiva University. The  
 university was established by Orthodox Jews whose practice of Judaism  
 requires the separation of men and women in many areas such as religious  
 worship and education. Yeshiva University, however, has not claimed, nor  
 has OCR granted it an exemption under Title IX. Letter from Peter E. Holmes,  
 Director, OCR, HEW, to John A. Buggs, Staff Director, U.S. Commission on  
 Civil Rights, Nov. 15, 1974.

511. The plan is officially referred to by HEW as the "Plan to Eliminate  
 Discrimination in Admissions." For additional discussion of these plans,  
 see pp. 222-24 infra.

512. FY 1975 Enforcement Plan, supra note 508.

The Comprehensive Health Manpower Training Act of 1971 and the Nurse Training Act of 1971 ( also known as the amendments to Title VII and Title VIII of the Public Health Service Act) prohibit the extension of Federal support to any medical, health, or nursing program unless the institution providing the training submits, prior to the awarding of funds, satisfactory assurances that it will not discriminate on the basis of sex in the admission of individuals to its training programs.<sup>513</sup> Approximately 1,500 campuses are covered by these provisions.<sup>514</sup>

Executive Order 11246, which was issued in 1965 and amended in 1967,<sup>515</sup> requires all institutions having contracts with the Government to make two basic contractual commitments: (1) not to discriminate in employment on the basis of race, color, sex, religion or national origin; and (2) to take affirmative action to ensure that equal employment practices are followed at all facilities of the contractor. The Secretary of Labor, who was assigned overall enforcement responsibility for the Executive orders, designated the Office of Federal Contract Compliance (OFCC) to be responsible for the implementation of the program. OFCC has, in turn, assigned contract compliance responsibilities to

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513. Examples of institutions with affected training programs include schools of: medicine, dentistry, osteopathy, pharmacy, optometry, podiatry, and veterinary medicine, which lead to doctoral or equivalent degrees; nursing; training centers for allied health professions which lead to associate and/or baccalaureate degrees in the areas of medical technology, optometric technology, dental hygiene; and any other institution, organization, consortium, or agency eligible to receive Federal support for health training.

514. FY 1975 Enforcement Plan, supra note 508.

515. E.O. 11246, 3 C.F.R. (1964-1965 Comp.) p. 339. Sex was added as a prohibited basis of discrimination in 1967. E.O. 11375, 3 C.F.R. (1966-1970 Comp.) p. 684.

16 Government agencies, one of which is HEW.<sup>516</sup> HEW's enforcement responsibilities under the Executive orders include all educational institutions.<sup>517</sup> HEW estimates that there are approximately 1,000 college and university campuses which are subject to contract compliance requirements.<sup>518</sup>

OCR's responsibilities with respect to the civil rights statutes and Executive orders include conducting compliance reviews of colleges and universities, negotiating appropriate corrective action, investigating individual complaints of discrimination, clearing health manpower

516. The contract compliance program, as administered by OFCC, is discussed more fully at pp. 226-30 infra.

517. HEW has been assigned responsibility for ensuring compliance by contractors in the following industries, in addition to educational institutions: insurance, insurance agents, medical and legal services, museums, art galleries, nonprofit organizations, and certain State and local governments.

518. FY 1975 Enforcement Plan, supra note 508. HEW, OCR Agency Planning Report for FY 1976 (submitted to OFCC in July 1974). HEW does not know the exact number of colleges and universities covered by the Executive order because there is no central clearinghouse within the Federal Government which identifies every institution having a Government contract. In estimating its workload, OCR assumes that all public and major private institutions, such as the State University of New York, University of Chicago, Yale, and Columbia, have at least one Government contract. Interview with John Hodgdon, Acting Director, Higher Education Division, OCR, HEW, June 21, 1973. For smaller institutions, OCR makes general inquiries of Federal agencies likely to contract with universities, such as the Departments of the Army and the Navy, the Atomic Energy Commission, and the National Aeronautics and Space Administration. OCR also contacts institutions directly to inquire if they hold government contracts. Id. At the end of fiscal year 1974, OCR estimated the number of colleges and universities having contracts to be 972. However, one staff member indicated that the estimate was probably too low. Telephone interview with Ms. Rose Brock, Chief, Technical Assistance Branch, OCR, Aug. 28, 1974.

and nurse training grants, preparing recommendations for sanctions as necessary, and working with the General Counsel in the preparation of legal action when such action becomes necessary.

## II. Organization

### A. General

The civil rights responsibilities of HEW are administered by a Special Assistant to the Secretary for Civil Rights,<sup>520</sup> the Office for Civil Rights, and a number of equal opportunity offices throughout the Department.<sup>521</sup> The Special Assistant to the Secretary for Civil Rights has ultimate responsibility for assuring that HEW's programs are operated in a nondiscriminatory manner.<sup>522</sup> While the Special Assistant does not have the power to correct discriminatory program

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519: FY 1975 Enforcement Plan, supra note 508.

520. Until fall 1973, the Special Assistant, who also serves as the Director of the Office for Civil Rights, had been inactive in this role. A staff person was then hired to aid the Special Assistant. This individual represents the Special Assistant at all intra- and interagency program planning meetings and provides OCR input.

521. These offices are responsible for assuring in-house equal employment opportunity and are ultimately responsible to the Secretary of HEW. These offices, however, are not covered in this section. For overall discussion of the Federal equal employment opportunity program, see, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort-1974, Vol. IV, ch. 3 (in press).

522. Telephone interview with Gwendolyn Gregory, Special Assistant to the Director, Office for Civil Rights, Jan. 10, 1974. HEW programs are operated by a number of agencies including the Office of Education, the Public Health Service, the Social and Rehabilitation Service, the Food and Drug Administration, and the Social Security Administration.



elements, he or she is able to investigate problem areas and make recommendations for change to the Secretary. In addition, the Special Assistant may routinely comment on all program regulations, guidelines, and policies for the purpose of assuring that civil rights considerations are included.

The overall operation of the Office for Civil Rights, however, is the responsibility of its Director.<sup>523</sup> The Director's immediate staff consists of a Deputy, two Assistant Directors, and two Special Assistants. The Assistant Director for Management and Administration is responsible for supervising OCR's budget, directing its personnel actions, developing management techniques, and assuring that all other management and administrative functions related to the office are implemented. The Assistant Director for Policy, Planning, and Program Development is responsible for coordinating with appropriate OCR officials<sup>524</sup> the planning and creation of new program policies. The Special Assistant who directs the Office of Policy Communication performs all congressional, interagency, and public organization liaison,<sup>525</sup> and the other Special Assistant is in charge of the Office of Public Information, which deals with the press and other media.

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523. The Office for Civil Rights is responsible for the execution of almost all of HEW's external equal opportunity program. An exception is that the Social Security Administration maintains a small staff which monitors insurance companies for compliance with Executive Orders 11246 and 11375.

524. See planning section at pp. 6-8 supra.

525. Examples of outside liaison would be communication with the Department of Housing and Urban Development and the National Organization for Women.

The Higher Education Division of OCR at the headquarters level is divided into three functional branches--Policy, Planning, and Program Development; Operations Branch; and Technical Assistance<sup>526</sup> Branch.

In addition, staff members of the Office of General Counsel are assigned to OCR. While this staff provides legal assistance and expertise to the Office for Civil Rights and receives its assignments from the OCR Director, it is under the overall supervision of the General Counsel.

As one of OCR's four major program divisions,<sup>527</sup> the Higher Education Division (HED) is represented in all 10 HEW regional offices.<sup>528</sup> Each regional office has a Civil Rights Director who supervises the entire regional civil rights operation. The Regional Civil Rights Directors (RCRD's),

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526. Holmes letter, supra note 510. For a discussion of the duties of these branches see p. 207 infra. Until recently the Higher Education Division was divided into two program areas--Student Affairs, which concerned all Title VI and Title IX matters, and employment, which entailed enforcement of Executive Order 11246, as amended.

527. The other three program divisions are Elementary and Secondary Education, Health and Social Services, and Contract Compliance. The civil rights efforts of the Elementary and Secondary Education Division is treated in chapter 1 supra. The Health and Social Services Division is treated in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V (in press). The Contract Compliance Division is not being evaluated as a separate entity. However, The Federal contract compliance program is addressed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, ch. 2 (in press).

528. The 10 HEW regional offices are: Boston, Mass. (Region I), New York, N.Y. (Region II), Philadelphia, Pa. (Region III), Atlanta, Ga. (Region IV), Chicago, Ill. (Region V), Dallas, Tex. (Region VI), Kansas City, Kan. (Region VII), Denver, Colo. (Region VIII), San Francisco, Cal. (Region IX), and Seattle, Wash. (Region X). See regional map at p. 207 infra.

unlike some other regional HEW program heads,<sup>529</sup> report directly to the Director of OCR and receive no program supervision from the Regional Directors of HEW.

In 1968, OCR began to decentralize its enforcement efforts to the Regional Civil Rights Office.<sup>530</sup> That first decentralization move extended the following authority to RCRD's:

1. Set compliance priorities. However, such determinations had to be based on criteria established by headquarters.
2. Conduct regular compliance reviews and complaint investigations.<sup>531</sup>
3. Assist Washington headquarters in achieving voluntary compliance and in determining the compliance status of recipients of Federal funds and Federal contractors<sup>532</sup> and
4. Conduct liaison with regional HEW program representatives, State agencies, and professional and civil rights organizations.

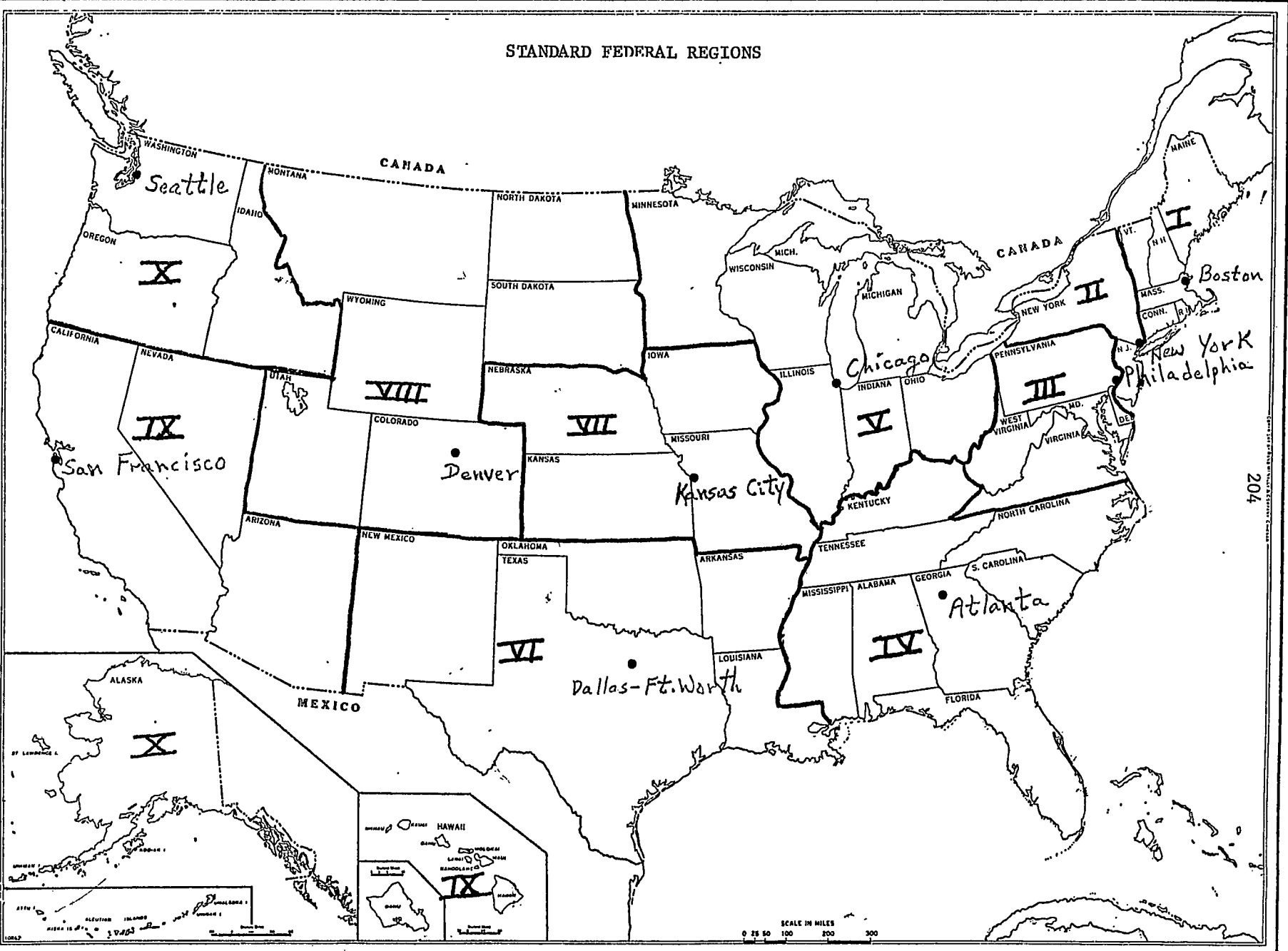
529. HEW regional program heads supervise the major operating units within HEW such as the Social Security Administration, the Office of Education, the Social and Rehabilitation Services, and the Public Health Service. These agency heads report to the Regional Director of HEW who is the representative of the Secretary of HEW in the region.

530. Memorandum from Director, Office for Civil Rights, to the Under Secretary, HEW, May 8, 1973.

531. A compliance review is an onsite inspection, of all of the practices of a given facility. The purpose of such a review is to determine if that facility is generally operating in a discriminatory manner. A complaint investigation involves an onsite inspection, but its purpose is to investigate the specific allegation of discrimination by a complainant. Once a regional office conducted a compliance review or complaint investigation, the results of such investigations were to be transmitted to the Washington office.

532. Voluntary compliance means that a recipient of Federal funds accepts the deficiencies uncovered during a compliance review or complaint investigation and as a result of negotiation with OCR agrees to take corrective action that will overcome the deficiencies, thereby obviating the need for enforcement action. In 1968, this function was handled primarily by the Washington office with occasional assistance from the regional offices.

STANDARD FEDERAL REGIONS



In 1970, OCR further expanded the responsibilities of the regional offices because the offices had grown in size and in expertise.<sup>533</sup> This new grant of authority enabled regional offices to use their own criteria in establishing compliance priorities and to engage in negotiation sessions for the purpose of obtaining voluntary compliance.

As of August 1974, the Secretary had not approved an OCR plan which proposes significant additional decentralization of the four enforcement programs as well as some management functions.<sup>534</sup> The proposed plan, if adopted, would enable regional offices to issue letters of findings<sup>535</sup> without preclearance from headquarters, to determine the acceptability of a commitment or action to correct compliance deficiencies, to seek legal guidance in all compliance matters where practicable, to notify Federal grant recipients or contractors that they are in non-compliance and that they are recommending that sanctions be imposed,<sup>536</sup> and to clear contract awards of \$1 million or more.<sup>537</sup>

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533. Memorandum from Director, OCR to the Under Secretary, HEW, supra note 530.

534. Interview with Burton Taylor, Chief, Policy, Planning, and Program Development, OCR, Sept, 6, 1974.

535. A letter of findings outlines the deficiencies uncovered during a compliance review or complaint investigation.

536. The Director of OCR would retain the authority to make final determinations on whether additional negotiation or conciliation is required before the initiation of enforcement proceedings.

537. Before contracts of \$1 million or more are awarded, the compliance agency must certify that the recipient is in compliance with the equal employment opportunity clause of the Executive Order 11246, as amended. While the regional offices would be able to clear the awarding of such contracts, the power to deny clearance of such awards would remain a headquarters responsibility.

However, enforcement responsibility will be maintained in headquarters. With respect to administration and management authorities,<sup>538</sup> RCRD's would have the power to approve all personnel actions in their regions to detail staff temporarily from one branch to another, provided the details do not exceed 90 days.<sup>539</sup> In addition, RCRD's would be authorized to approve the expenditure of funds for purposes such as securing supplies, travel, and training<sup>540</sup> of staff, but not for purchasing equipment; approval from headquarters would be necessary in that instance. OCR regional offices have taken on some of the responsibilities proposed under the new decentralization plan,<sup>541</sup> although it has not yet been formally approved.

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538. To assist RCRD's with administrative and management functions, each region will be allocated an administrative officer position.

539. Higher Education employees are hired for specific statutory programs, i.e., Executive Order 11246, Title VI, Title IX, because that is the manner in which budget appropriations are assigned to OCR by the Office of Management and Budget.

540. Under 1974 budget appropriations, each regional office will be given \$100 per employee for training. However, the Regional Civil Rights Director can decide how that money is to be spent. For example, the RCRD can elect to spend \$300 on a certain employee and no money on another. The only restriction is that the RCRD cannot spend more than the total amount of training monies allocated to the region.

541. However, all compliance matters which are controversial in nature are still forwarded to Washington. For example, all matters of possible noncompliance with Title IX are reviewed by the headquarters office because it is felt that tighter control must be exercised, since final regulations for the implementation of Title IX have not yet been issued. Taylor interview, supra note 534. For more information on the proposed Title IX regulations, see p. 220 infra.

Under the latest decentralization plan, RCRD's will have even greater flexibility and control over their offices' operation. This could lead to more effective compliance programs because staff will be able to move through the compliance process without having to seek frequent clearances from headquarters. Nevertheless, each RCRD will be required to prepare for OCR in Washington, D.C., an annual enforcement plan that will outline the office's past accomplishments and identify its objectives and goals for the future. <sup>542</sup> Although such plans are essential, it is important that headquarters not solely rely on them for the purpose of learning about regional office activities. A comprehensive monitoring system to assure consistent interpretation and enforcement of the law from region to region must also be maintained. <sup>543</sup>

B. Higher Education Division--Headquarters

The Higher Education Division is administered by a GS-15 Director, who is responsible for overseeing all of HEW's civil rights enforcement activities with respect to institutions of higher education. The Division has three operating branches. The Policy, Planning, and

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542. In addition to the requirement that regions develop such plans, the headquarters program divisions are also required to prepare an annual enforcement plan. The plan for fiscal year 1975 is currently in use by the headquarters office.

543. The Assistant Director for Policy, Planning, and Program Development will monitor and evaluate the activities of the regional offices.

Program Development Branch develops planning systems and policy guidelines. For example, each year this Branch draws up an enforcement plan which indicates the number of compliance reviews and other activities to be conducted during the upcoming year. It also coordinates special task forces of HED personnel established to develop policy guidelines on compliance review procedures and standards to be required of regulatees.<sup>544</sup> The Operations Branch is responsible for monitoring the quality and quantity of program performance by the regional offices' Higher Education Branches. The Operations Branch in headquarters collects information from the regional offices, issues policy directives, and maintains contact with the regional branches on special cases, including those involving enforcement proceedings. The Technical Assistance Branch develops training programs for HED staff and provides technical assistance to college and university officials. The Division has an authorized staff level of 33 positions,<sup>545</sup> as compared with 13 positions in 1972.

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544. For example, HED had organized a special task force, made up of regional and headquarters staff, which, as of August 1974, was in the process of developing formal guidelines and setting definite policy regarding Title VI. Taylor interview, supra note 534.

545. As of August 1974, there were only 26 employees on board. Holmes letter, supra note 510.



C. Regional Higher Education Branches

The chief of each of the 10 regional higher education branches receives immediate supervision from the RCRD. However, program guidance and technical assistance is provided to the branch chief by the Director of the Higher Education Division in Washington, D.C.<sup>546</sup>

Regional staff represent the core of the Higher Education enforcement program. It is this staff that has the direct relationship with the colleges and universities and complainants. Regional staff initiates and follows up on compliance reviews,<sup>547</sup> conducts complaint

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546. FY 1975 Enforcement Plan, supra note 508.

547. A Title VI, VII, VIII, or IX compliance review would involve the inspection of a school's practices as they relate to students and faculty to check for possible discriminatory elements. Some of the areas of investigation would be student financial assistance, recruitment and admission practices, placement, and housing. An Executive order compliance review would encompass the investigation of an institution's employment patterns and practices. The areas of investigation would include recruitment and hiring, promotion, salaries, fringe benefits, and retention.

investigations, seeks voluntary compliance through negotiations, provides institutions of higher education with technical assistance in all areas related to their equal opportunity program, and maintains liaison with concerned civil rights groups and organizations.

The Higher Education Division is authorized a total of 142 positions in the regional offices as compared with 62 positions in 1972. As of July 1974, there were only 123 persons employed in these positions, of whom 93 held professional and 30 held clerical positions. The authorized staffing level for HED programs varied from a high of 18 positions in the New York, San Francisco, and Chicago offices, to a low of nine positions in the Seattle office. Size of regional office staff, according to OCR, is determined by such factors as the number and size of colleges and universities in the region, the total number of minority and nonminority students

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548. Interview with Dr. Mary Lepper, Director, Higher Education Division, Office for Civil Rights, HEW, Aug. 13, 1974. The distribution of HED authorized staff in the regional offices is as follows: Region I (Boston), 9 professionals, 3 clericals; Region II (New York), 13 professionals, 5 clericals; Region III (Philadelphia), 9 professionals, 4 clericals; Region IV (Atlanta), 13 professionals, 4 clericals; Region V (Chicago), 13 professionals, 5 clericals; Region VI (Dallas), 12 professionals, 4 clericals; Region VII (Kansas City), 7 professionals, 3 clericals; Region VIII (Denver), 9 professionals, 2 clericals; Region IX (San Francisco), 12 professionals, 6 clericals; Region X (Seattle), 7 professionals, 2 clericals. Vacancies existed in the following offices: Boston (2); New York (2); Philadelphia (2); Atlanta (1); Chicago (4); Dallas (1); Kansas City (1); Denver (1); and San Francisco (5).

549. Id.

enrolled, the number of these institutions receiving Federal assistance, and the number requiring technical assistance concerning compliance.<sup>550</sup>

However, OCR admits that some of these factors have not been considered in determining the resources needed by each office.<sup>551</sup> In reality, factors such as the number of institutions requiring assistance from OCR have not been given much weight in the past simply because OCR did not have adequate knowledge about these areas. However, with the stronger thrust in the area of planning, OCR believes that staffing determinations in the future will be based on more realistic variables.<sup>552</sup>

As of July 1974, 127 (or 72 percent) of the 175 authorized positions in HED headquarters and regional offices were assigned to the contract compliance program.<sup>553</sup> In its enforcement plan for fiscal year 1975, HED proposed a major revision in its allocation of resources to reduce to 40 percent the total work schedule time devoted to contract compliance.<sup>554</sup> The plan proposed that the 11 new positions HED expected

550. Interview with Harry Fair, Assistant Director for Management and Administration, OCR, HEW, Jan. 18, 1974.

551. Interview with Martin Gerry, Assistant Director, Policy, Planning, and Program Development, OCR, HEW, Feb. 12, 1974.

552. OCR has begun to obtain specific data on its clients. This effort has come about as a result of the annual enforcement plan.

553. Lepper interview (Aug. 13, 1974), supra note 548.

554. FY 1975 Enforcement Plan, supra note 508. The plan's proposed allocation of total workdays was as follows: Executive order compliance reviews (14 percent), complaint investigations (14 percent), development of regulations and investigation manual (6 percent), training and conferences (6 percent), Titles VI, IX, and Public Health Service Act investigations (47 percent), policy and procedures manual (7 percent), and training and conferences (6 percent). Id.

to be authorized during that year be assigned to other enforcement activities. In addition, staff were to be trained in all areas of enforcement responsibility so that joint Title VI, IX, and Executive order compliance reviews could be conducted.<sup>555</sup>

### III. Guidelines

#### A. Title VI

All institutions of higher education which are recipients of some form of Federal financial assistance are required to sign an assurance of compliance with Title VI and, where applicable, with Titles VII and VIII.<sup>556</sup> The Title VI assurance certifies that all of the recipient's programs will be conducted and facilities operated in such a manner that no person shall be subjected to discrimination on the basis of race, color, or national origin.<sup>557</sup> Although HEW's Title VI

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555. Interview with Dr. Mary Lepper, Director, HED, OCR, HEW, Jan. 31, 1974. HED cited, as an example of a joint review, the onsite visitation conducted regarding the implementation of the decision in *Adams v. Richardson*, 480 F. 2d 1159 (D.C. Cir. 1973). For a discussion of this case, see pp. 256-64 infra. In this instance, Executive order staff, as well as Title VI and IX staff, were involved in onsite reviews of the State higher education systems covered by the court order.

556. The compliance requirements imposed under Titles VII and VIII are discussed on pp. 219-20 infra. Proposed regulations would require recipients also to sign an assurance with respect to Title IX. See discussion on p. 220 infra. Contract recipients are not required to sign an assurance but rather must include, as a provision of the contract, an equal opportunity clause.

557. C.F.R. § 80.3 and § 80.4(d). HEW Form 441--Statement of Assurance of Compliance with Title VI of the Civil Rights Act of 1964; and HEW Form 590--Assurance of Compliance with Public Health Service Act Sections 799A and 845.

program is almost 10 years old, OCR has not yet developed a definitive set of guidelines explaining the specific compliance responsibilities of colleges and universities.<sup>558</sup>

Those instructions developed for the Higher Education Division's Title VI program were prepared on an issue-by-issue basis. When an issue developed as a result of a compliance review, the regional office would seek guidance from headquarters as to the methods for resolution. Headquarters would then study the matter and issue an instruction on how to proceed to that region (and other regional offices if it was a matter of national concern). Through this process, a series of memoranda issued over the years have been compiled into what the Higher Education Division refers to as a manual.

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558. HEW's Title VI regulations pertain largely to procedural matters and apply to all HEW-funded recipients. 45 C.F.R. § 80.2. In a recent speech the Assistant Attorney General for Civil Rights, J. Stanley Pottinger, who was formerly the Director of OCR, stated the following:

Discriminatory intent, administrative sloth, and power politics, however, are not the sole, nor, perhaps, the major, cause of discrimination. Discrimination can arise without an intent to discriminate, and frequently arises merely because the recipient does not know how not to discriminate. The federal agency, therefore, must provide recipients with clear and intelligible guidelines, and train the recipients intensively in how to apply them. Only when state and local agencies know what is expected of them, when they have a thorough understanding of what the federal laws and Constitution require, can they carry out their proper role in the federal system. Speech by J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, before Department of Transportation Regional Civil Rights Officials, Nov. 8, 1974.

This manual consists of internal memoranda and letters to institutions of higher education. The subjects of the materials concern such matters as maintenance of racially segregated student fraternities, organizations, and other groups, cooperative relationships between complying and noncomplying institutions, and the elimination by a State of a dual higher education system.

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559. For example, see letter from Assistant General Counsel, OCR, to attorneys for the University of Pennsylvania, May 13, 1970. The letter stresses that university-sanctioned or supported groups and organizations restricted to students of a particular race constitute a violation of Title VI.

560. See Memorandum from Robert E. Smith, Acting Director, Higher Education Division, to Chief, Education Branch, Region IV, June 28, 1972, which states that it is a violation for a school to engage in cooperative programs with another school that is in noncompliance.

561. See Memorandum from the Director, Office for Civil Rights, to the Secretary, HEW, Nov. 19, 1970. This memorandum concerns alternative remedies for the elimination of dual systems in higher education. The Director for the Office of Civil Rights advised the Secretary that OCR:

does not have a blueprint which imposes specific, predetermined techniques of desegregation on State systems of education . . . [n]either we nor the law has set specific time limits on when a plan should culminate in the elimination of the dual system, or even what minimum results must be achieved in order to conclude that the dual structure is eliminated. Our discretion in these matters is still largely unencumbered.

The memorandum then proceeds to outline procedures that may be effective in achieving desegregation. See discussion of *Adams v. Richardson*, at p. 256 infra.

In addition, the manual contains samples of letters of findings to institutions, some of which indicate that an institution which was found to have underrepresentation of minority students which was caused by racial bias in the institution's admission and recruitment policies must adopt a preferential student admission policy.<sup>562</sup> The manual also includes instructions for staff on conducting compliance reviews and writing compliance review reports.<sup>563</sup>

A review of this manual indicates that there are critical Title VI issues which OCR has not yet adequately addressed. For instance, the entire area of remedial education and retention of minority students is not covered and has not been dealt with by HEW except in the context of its attempts to desegregate 10 State systems of higher education which have continued to operate dual college systems for blacks and whites.<sup>564</sup> Yet, while many institutions have made efforts to admit minority students, the problem of successful completion of their education continues to exist.<sup>565</sup> Once an institution has complied with the statute by admitting minority students, it has a further responsibility to ensure that those students obtain a quality education, including, if necessary, compensatory education. Otherwise, the disparity between minority enrollments and degrees obtained by minorities will continue to exist.

The manual also fails to address the extent of Title VI protection for employees of recipient colleges and universities. Because the Executive

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562. See Holmes, letter, supra note 510 .

563. These instructions are discussed on p. 217 infra.

564. See Holmes letter, supra note 510. HEW efforts with regard to these 10 State college systems are discussed further on pp. 256-64 infra.

565. For example, a study by this Commission found that, while 48.4 percent of Anglo students in the Southwest States who enter college graduate, the college holding-power for black and Chicano students is much lower -- 28.7 percent and 24 percent respectively. U.S. Commission on Civil Rights, The Unfinished Education Table 5 (October 1971).

orders apply to only half of these institutions and because of the inadequacies  
 566  
 in EEOC's enforcement of Title VII, it is important that HEW use its full  
 authority under Title VI to investigate and resolve instances of employment  
 567  
 discrimination by its recipients.

Further, with the exception of the fact that, in negotiating for desegregation  
 plans with the dual systems of higher education, OCR developed and applied standards  
 with respect to the legal status of the predominantly black colleges,<sup>568</sup> no distinct  
 policy has been developed for determining the extent of compliance at predominantly  
 minority schools. OCR believes that given its extensive responsibilities and  
 relatively small staff a low priority should be assigned to defining the civil  
 rights problems at predominantly black or minority colleges.<sup>569</sup> Finally, where  
 deficiencies such as underrepresentation of minority students are found in the  
 course of compliance reviews, OCR has not as a general policy set or required the  
 570  
 recipient to set goals and timetables for overcoming noted problems.

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566. The filing of a complaint with EEOC is of limited value, since, as of March 1974,  
 it had a backlog of more than 80,000 complaints.

567. HEW's Title VI regulations apply to employment practices if a primary purpose  
 of the assisted program is to provide employment or, in the case of colleges and  
 universities, if employment discrimination would result in a denial of equal  
 benefits of, or participation in, the program 45 C.F.R. § 80.3(c)(3). This would  
 include almost all academic and professional positions. While Title IX covers the  
 employment practices of all recipient educational institutions, it does not cover  
 race or national origin discrimination.

568. Holmes letter, supra note 510. The status of these colleges forms, in fact,  
 an integral part of the desegregation plans. Also see, pp. 256-64 infra for a  
 discussion of OCR's efforts to desegregate dual systems of higher education.

569. Interview with Burton Taylor, Director, Office of Policy, Planning, and  
 Program Development, HED, OCR, Jan. 31, 1974.

570. See, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement  
 Effort--A Reassessment 187, 194 (1973), in which this Commission indicated that  
 unless this management tool were utilized by HEW there would continue to be no  
 effective method for evaluating the progress made by institutions. Yet, rather  
 than securing a commitment for a specific act to be performed by a date, certain  
 regional offices such as Boston and Dallas continue to seek vague unenforceable  
 pledges of compliance.



In 1968, 1970, and 1972, OCR notified colleges and universities of their Title VI responsibilities in broad terms. At no time, however, has HEW forwarded to all institutions of higher education a comprehensive set of guidelines on Title VI.<sup>571</sup> The manual which OCR produced is an in-house document which has not been shared with the colleges and universities, although some institutions have received some of the letters included in the manual.

HEW lacks a definitive issuance on what constitutes compliance.<sup>572</sup> This omission permits unnecessarily broad discretion to the reviewer in judging the compliance status of a recipient. It allows lack of uniformity not only among regions but among HED staff within a given office. Further, it keeps recipients in the dark concerning the exact parameters of their duties. In lieu of guidelines, staff uses an interview format developed by the Washington office in assessing whether an institution is complying with Title VI. The

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571. One HEW regional official stated that the lack of such guidelines has a negative effect on the potential success of Title VI higher education reviews in that, without guidelines, recipients think OCR is bluffing. Interview with John Palomino, Branch Chief, HED, OCR, Region IX, in San Francisco, Cal., Mar. 21, 1973. Another regional official asserted that OCR had in his opinion done a disservice to minority students by not issuing guidelines governing the Title VI higher education program. He further indicated that he had written to headquarters several times asking that guidelines be provided. Interview with Clarence Laws, Deputy Regional Civil Rights Director, OCR, Region VI, in Dallas, Tex., Jan. 30, 1973.

572. HEW has recently indicated to this Commission that:

With respect to "guidelines", the report's sweeping assertion is not supportable. On other pages, the report itself points to memoranda and to the compliance manual which reflect policy positions....While OCR has recognized the need to develop more comprehensive and detailed standards to guide the review process and clarify requirements placed on institutions, to assert that no written guidelines (compliance standards) exist is untrue. Moreover, to characterize the internal compliance manual, memoranda, and existing written policies in a wholly negative vein conflicts with the Commission's findings in previous reports. The recent effort to develop a comprehensive, single document applicable to student affairs should be seen as a move to fill the gaps and intensify compliance activity in this area. Holmes letter, supra note 510.

format includes suggestions of persons to interview, data to collect, questions to determine if institutional policies discriminate against minority students, and possible recommendations or findings. While it provides a framework for interviews and report writing, the format lacks substantive descriptions of what constitutes compliance or noncompliance with Title VI. Further, the lack of guidelines has resulted in weak recommendations and perfunctory findings of compliance following reviews.

Consistent with its fiscal year 1975 enforcement plan, OCR is in the process of replacing the manual with more formal guidelines on Title VI. A task force, made up of headquarters and regional staff, has been formed to develop an outline of policy and procedure. As of September 1974, this project was in its second phase, with a second task force

573. Data include type of institution, size, composition, and method of appointment for members of the governing body, accreditation status, curricula offered, type of campus, total and minority enrollment, full-time faculty and minority faculty, and the institution's policy with regard to nondiscrimination.

574. Examples of such questions are: "What special efforts, if any, have been made to recruit minority group students?" "Are there any barriers to minority group members participating fully in any student activity?" "Are minority group athletes treated fairly?" "What criteria are used for the selection of individuals to receive financial assistance?"

575. These include: "The school catalogue must contain an equal educational opportunity statement and pictures of minority group members." "Efforts to recruit minority group athletes must be comparable to those for non-minority group athletes." "The University must assure that all college-supported housing is open to all students."

576. OCR staff generally utilize the recommendations set forth in the interview format.

577. The three major elements of HEW's FY 1975 Enforcement Plan are: (1) Termination of ad hoc policy development, to include (a) development of standards and policy manuals for all four HED program areas, (b) issuance of regulations where needed, and (c) development of operation procedures for implementation of policy; (2) Initiation of nationwide training and (3) Development of a quality control and audit system. FY 1975 Enforcement Plan, supra note 508.

578. Taylor interview (Sept. 6, 1974), supra note 534. The second phase of this project began in early summer 1974. Id.

formed to expand upon and refine the first draft. OCR expects that this work will be completed in fiscal year 1975. <sup>579</sup> Until the guidelines are developed and implemented, HEW's Title VI enforcement program as it relates to institutions of higher education will continue to be inadequate.

B. Titles VII and VIII of the Public Health Service Act (Comprehensive Health Manpower and Nurse Training Acts)

Regulations implementing Titles VII and VIII, dealing with discrimination on the basis of sex in health programs, were drafted and issued for comment in 1973, but as of November 1974 they had not yet been finalized. Major <sup>580</sup> deficiencies of the draft regulations were noted by this Commission.

They contained only weak provisions for affirmative action, they contained no requirements for regularly scheduled compliance reviews of the programs or funded entities, and the decision regarding the necessity for investigating complaints was totally left to the discretion of the Director of <sup>581</sup> OCR.

Although all applicants institutions were sent a one-page sheet which explain- <sup>582</sup> ed the meaning of nondiscrimination under Titles VII and VIII, there has been no comprehensive policy issuance. Further, OCR takes the position that there is

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579. Id.

580. Letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to Peter E. Holmes, Director, OCR, HEW, Oct. 23, 1973. While the legislation only prohibits sex discrimination in admissions, the regulations cover other issues as well as admissions.

581. Id.

582. Holmes letter, supra note 510. This explanation was forwarded to each applicant institution with the assurance of compliance which it was required to sign.

limited opportunity for impact in this area, since women constitute only 10 percent of the applicant pool to medical schools; thus OCR believes that emphasis must be placed on premedical education levels so that the availability of female candidates will increase. However, recent statistics show women are applying for and attending medical schools in increasingly large numbers. For example, in three of the largest medical schools women represent 30 percent of the freshman classes.<sup>583</sup> Moreover, medical schools are only one of many types of health training programs covered by Titles VII and VIII. Others include nursing programs, medical technology programs, and numerous paraprofessional health programs. HEW's general neglect of Titles VII and VIII extends to those schools as well. It would appear, therefore, that HEW's lack of concern with the enforcement of Titles VII and VIII is unjustified.

### C. Title IX

On June 20, 1974, more than 2 years after the passage of Title IX of the Education Amendments of 1972,<sup>584</sup> OCR issued a proposed regulation covering its enforcement.<sup>585</sup> Permanent regulations are not expected to be issued until at least January 1975. The fact that HEW has taken so long to issue Title IX regulations is an example of administrative disregard of congressional intent. Sex discrimination is prevalent in education programs. Yet, if colleges and universities are not informed in detail of their responsibilities under Title IX, they cannot be expected to come into full compliance; and HEW, without regulations, has been able to mount only the most meager of enforcement programs. Thus, little has been done by the executive branch to implement

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583. The Washington Post, Sept. 8, 1974 (Parade magazine) p. 18.

584. For a discussion of the coverage of Title IX, see p. 197 supra.

585. 45 C.F.R. Part 86--Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance--Nondiscrimination on the Basis of Sex. 39 Fed. Reg. 120 (June 20, 1974).

the clearly expressed will of the Congress.

Although Title IX covers sex discrimination in such areas as admissions, athletic programs, and financial aid, it is an extremely weak law. Title IX was created as an extension to Title VI to cover sex discrimination in education programs, but it is replete with exemptions and exceptions. For example, Title IX exempts many institutions from coverage of its admission and housing requirements. No such exemptions exist under Title VI.

The proposed regulations contain several deficiencies as well. One of the major criticisms made by this Commission concerned the proposed regulations' treatment of athletics. HEW proposed that recipients establish integrated athletic programs but permitted single sex teams where "selection for such teams is based upon competitive skill," and further provided that no institution would be required to provide equal aggregate expenditures for athletics for members of each sex.

The Commission recommended that elementary school teams be integrated immediately, since girls and boys are of comparable strength at that level, and that secondary school and college teams be integrated according to a timetable.<sup>586</sup> In addition, the Commission's interpretation of Title IX led it to believe that per capita expenditures for male and female athletic programs should be required to be equal.<sup>587</sup>

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586. Letter from Arthur Flemming, Chairman, U.S. Commission on Civil Rights, to Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare, Oct. 15, 1974.

587. Id.

The proposed regulation provides for remedial action by recipients for persons "previously discriminated against on the basis of sex," and for affirmative action "to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." However, although it made the adoption of remedial action mandatory, it stated that institutions falling under the second category "may take" affirmative action, thereby making the adoption of such action merely voluntary. The Commission stated that all recipients should be required to analyze the extent of participation by sex and to take corrective action where limited participation exists. 588

In the absence of approved regulations, on May 4, 1973, OCR sent a memorandum to 175 selected institutions of higher education participating in Federal assistance programs to notify them of their Title IX obligations and to set forth the criteria which OCR believed might qualify an institution to submit a transitional "Plan to Eliminate Discrimination in Admissions." 589 The transitional plans, which are provided for in Title IX, were applicable for (1) institutions which were single sex as of June 23, 1972, or (2) which began to admit both

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588. Other areas in which the Commission noted major deficiencies included the need for specifics concerning the time limits, procedures, and priorities for conducting compliance reviews and the unwarranted exemptions HEW included in the proposed regulations. For example, the exemption of scholarships, fellowships, etc., which are established under a foreign will, trust, or bequest is not included in the statute and is a direct violation of the intent of Title IX. HEW was requested to delete the exemption. Id.

589. Included among those institutions which received this memorandum were Amherst College, Rutgers University, Our Lady of the Lake College, Webster College, California Institute of Technology, Mills College, and Loyola University.

590. Memorandum from Peter E. Holmes, Director, OCR, HEW, to Presidents of Selected Institutions of Higher Education, May 4, 1973.

sexes after June 23, 1965. Schools failing in either category could submit a transition plan which would completely eliminate sex discrimination in admissions not later than June 23, 1979. <sup>591</sup>

Institutions

were given 45 days to submit a plan which would ultimately have to be approved or disapproved by the Commissioner of Education. <sup>592</sup>

Institutions which submitted unacceptable plans were to be notified and offered OCR guidance in the preparation of such plans.

These plans were to include information concerning obstacles to admitting students on a nondiscriminatory basis, steps needed to eliminate those obstacles, and an estimate of the number of students, by sex, expected to apply for and enter each class during the period covered by the plan. One OCR official estimated that only between six and nine eligible institutions submitted plans. <sup>593</sup> OCR has not followed

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591. See Title IX, Sec. 901(a)(2).

592. Id.

593. Taylor interview (Sept. 6, 1974), supra note 534 . OCR assumes that the vast majority of institutions which did not file transition plans are in compliance with Title IX. Remarks of Peter E. Holmes, Director, OCR, HEW, 1973 Conference of the American College Public Relations Association, July 9, 1973. HEW has recently indicated that while:

....such plans provide for the phase-out of discriminatory admissions, ...discrimination is statutorily sanctioned during the transitional period whereas institutions eligible but not opting for this grace period are immediately obligated to comply. In this sense, the impact of Title IX in terms of nondiscriminatory admission would have been diminished by the submission of a larger number of transition plans. Holmes letter, supra note 510 .

up to determine why most institutions elected not to file a plan. <sup>594</sup> Further, no special efforts have been undertaken by OCR to assure that institutions which were single sex as of June 24, 1972, or institutions which began to admit both sexes after June 1965, were in compliance. <sup>595</sup>

Although the only major step taken by HEW to implement Title IX was the issuance of a proposed regulation for public comment, a large number of non-compliance situations have become apparent. One matter facing OCR is the almost universal use of the "Strong Vocational Guidance Plan." This plan utilizes a questionnaire, which seeks to ascertain vocational interest and is used in vocational counseling. However, there are, in fact, two different questionnaires--a pink one for women and a blue one for men. Typical of the differences between these questionnaires is that males are asked if they would like to become a doctor while females can express vocational interest in becoming a nurse or a veterinarian for small animals. An occupation is scored for each answer given. One clearly discriminatory feature of this questionnaire is that women can be scored for only 27 occupations (e.g., nurse, teacher) while men can be scored for 47 occupations. <sup>596</sup>

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594. HEW staff indicated that the institutions may have felt that, by submitting such a plan, they were admitting discrimination. In fact, some of those schools which did submit plans were not even subject to Title IX coverage. For example, Manhattan College submitted a plan, but is already exempt from Title IX with regard to admissions because it is a private undergraduate college.

595. See Title IX Compliance Activities, p. 265-69 <sup>§</sup> infra.

596. Under HEW prodding the manufacturer of the Strong Vocational Guidance Plan agreed to unify the two questionnaires, but indicated that it will continue to have distinct questions for men and women. Taylor interview, supra note . In another matter, Phi Delta Kappa, the traditionally men's honorary educational society, after discussions with HEW, has voted to become coed.



Another complex compliance issue concerns the Cecil Rhodes Scholarships for international graduate study. Since the scholarship awards are restricted to men, the program is in violation of the intent of Title IX. OCR began to address this issue, but was confronted with the fact that this scholarship program is based in England and follows British rules, although many American males are the recipients of its awards. However, the State Department began to initiate informal discussions with the British Government concerning this program's violation of Title IX. All of these informal efforts failed to produce any change and the proposed Title IX regulations have been constructed to specifically exempt this scholarship from Title IX coverage.<sup>597</sup> Several other issues have also been raised concerning, for example, different dormitory rules based on sex and differences in athletic programs, facilities, and scholarships based on sex. Although HEW has taken the position that Title IX prohibits different dormitory hours, it has yet to adopt requirements relating to athletic programs.<sup>598</sup>

A complicated Title IX issue which has arisen concerns the religious exemption under Title IX. While Title IX exempts institutions whose religious tenets are in conflict with Title IX, many religious institutions are not governed by tenets but by tradition, some of which has never been reduced to written form.<sup>599</sup> In these instances, HED has yet to

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597. For a discussion of this exemption, see note 588 supra.

598. See note 711 infra for OCR's position on this matter.

599. This is true of many rabbinically operated institutions, such as the Talmudic Rabbinical Schools.

identify the kind of evidence which must be submitted in order to  
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 claim such an exemption.

D. Executive Orders

The Executive orders and implementing regulations issued by OFCC  
 establish minimum requirements to be followed by both the Government  
 contractor and the contracting Federal agencies. 601 Contracting  
 agencies designated by OFCC as compliance agencies 602 are instructed  
 to prescribe their own regulations for administering the orders, subject  
 to the prior approval of OFCC; to conduct complaint investigations; and to  
 establish programs for the regular conduct of compliance reviews of the  
 contractor facilities for which they are responsible. 603

The Executive order obligations of contractors are specified in  
 OFCC regulations concerning discrimination on the basis of religion

600. As of September 1974, 10 institutions notified HEW that they were  
 exempt from Title IX coverage on this basis. HEW will not rule on  
 such requests for exemption until the final Title IX regulations are  
 issued, at which point it intends to require each recipient to sign an  
 assurance of compliance. Taylor interview (Sept. 6, 1974), supra note 534.

601. For a full discussion of OFCC requirements, see The Federal Civil Rights  
 Enforcement Effort--1974, supra note 527.

602. A listing of the compliance agencies and their respective areas of  
 responsibility is found in The Federal Civil Rights Enforcement Effort--1974,  
supra note 527.

603. 41 C.F.R. §§ 60-1.6(c) 1.20 and 1.24. The OFCC requirements concerning  
 the conduct of compliance reviews are discussed on p. 275 infra. HEW's regulations  
 concerning the conduct of hearings pursuant to the Executive order are found in  
 45 C.F.R. § 82.

and national origin,<sup>604</sup> employee selection procedures,<sup>605</sup> sex  
 discrimination,<sup>606</sup> and affirmative action programs.<sup>607</sup> The most  
 comprehensive description of contractors' obligations is contained  
 in OFCC Revised Order No. 4,<sup>608</sup> which requires the employer to analyze  
 its work force and to establish an ongoing affirmative action program  
 to eliminate any deficiencies identified in the analysis. The work force  
 analysis is to be a listing of each job title appearing in payroll  
 records, ranked from the lowest paid to the highest paid within each  
 department.<sup>609</sup> The listing must indicate the total number of incumbent

604. 41 C.F.R. § 60-50. These guidelines outline eight affirmative action measures directed toward protecting members of various religious and ethnic groups, primarily of Eastern, Middle, and Southern European ancestry.

605. 41 C.F.R. § 60-3. The Guidelines on Employee Testing and Other Selection Procedures require that tests and any other employee selection standards or procedures which tend to reject a disproportionate number of minorities or women be validated by empirical data showing that the test or standard is predictive of performance on the job.

606. 41 C.F.R. § 60-20. OFCC's Guidelines on Sex Discrimination, issued in 1970, prohibit contractors from distinguishing on the basis of sex in hiring, promotions, wages, hours, or any other conditions of employment; from stating a sex preference in recruitment advertising; from denying women the right to any job in reliance on State protective labor laws; and from restricting one sex to certain job classifications. In December 1973, OFCC published for comment proposed revisions in these guidelines, but as of September 1974, none had yet been adopted.

607. 41 C.F.R. §§ 60-1.40; 60-2.

608. 41 C.F.R. § 60-2.

609. 41 C.F.R. § 60-2.11, 39 Fed. Reg. 25654 (July 12, 1974). Prior to 1974, the work force analysis was to include a listing by job classification, rather than by job title. The 1974 revision was intended to make clear to contractors that the utilization analysis must be conducted for each narrowly defined position in its work force. *Id.* As will be discussed below, OCR has experienced difficulty in requiring colleges and universities to analyze their employee work force and to set appropriate goals according to specific jobs within each academic department. The 1974 change in Revised Order No. 4 gives OCR the clear authority to eliminate this difficulty.

employees in each job title, cross-tabulated by race, ethnicity, and sex. If this analysis shows that there are fewer minorities or women employed in each job title than would be expected by their availability for the job, then the contractor is required to develop numerical goals and timetables to eliminate the deficiencies, or underutilization. In addition to the work force analysis, the affirmative action plan must include written descriptions of programs for improving recruitment and training of protected groups, internal auditing systems, and efforts to validate employee selection procedures adversely affecting minority or female incumbent or prospective employees. Finally, Revised Order No. 4 requires that the contractor provide relief to incumbent employees who have been victims of discrimination in the past and who continue to suffer by virtue of that prior discrimination; these employees are considered to be members of an "affected class."

All private colleges and universities holding Government contracts

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610. Availability is determined by consideration of such factors as the percentage of women or minorities in the area's work force, minorities and women having the necessary skills for the jobs, and the extent to which training opportunities exist. 41 C.F.R. § 60-2.11(b). Memorandum to Heads of All Agencies, Technical Guidance Memo No. 1 on Revised Order No. 4, from Philip J. Davis, Director, OFCC, Feb. 22, 1974. HED has developed a publication, "Availability Data: Minorities and Women" (June 1973), which identifies sources that an institution might tap for availability data. Lepper interview, supra note 548. A recurring problem in the contract compliance program for colleges and universities has been the claims by those institutions that it is difficult to set goals and timetables for some job classifications, for example, physics faculty, without adequate data on the availability of minorities and women for those jobs. Interview with Howard Kossoy, Planning Officer, HED, OCR, HEW, June 20, 1973. Related to this problem is the question of the qualifications colleges and universities set for faculty positions. OCR has failed to address this problem.

611. 41 C.F.R. §§ 60-2; 60.9(X) and (XII), 39 Fed. Reg. 25654 (July 12, 1974).

612. 41 C.F.R. §§ 60-2.13 and 2.20 to 2.26.

613. C.F.R. § 60-2.1.

have been subject to Revised Order No. 4 since December 1971. Public educational institutions, although required to take affirmative action, were not required to maintain written plans until January 1973. However, OCR interpretative guidelines issued in October 1972 took the position that public educational institutions would be expected to develop written affirmative action programs when a compliance review uncovered deficiencies.

HEW was designated as the contract compliance agency responsible for educational institutions in 1967. Since that time, it has not consistently adhered to compliance agency standards required by OFCC, nor has it used its full authority to ensure that colleges and universities adhere to the standards required of contractors. In 1972, the Director of OCR informally issued guidelines to colleges and universities interpreting the Executive order's requirements of educational institutions and explaining OCR's compliance procedures. These guidelines have not been revised to reflect important changes made in the Executive order regulations since 1972, such as the extension of Revised Order No. 4 to public educational institutions and the requirement that colleges and universities prepare a work force analysis and goals and timetables for each job title in which underutilization is identified.

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614. 41 C.F.R. § 60-2. Such institutions were subject to less specific affirmative action requirements, which did not include women, from February 1970 to December 1971.

615. 38 Fed. Reg. 1932 (Jan. 19, 1973).

616. Higher Education Guidelines: Executive Order 11246, Memorandum from J. Stanley Pottinger, Director, OCR, HEW, to College and University Presidents (Oct. 1, 1972), 37 Fed. Reg. 24686 (Nov. 18, 1972) [hereinafter cited as Higher Education Guidelines].

617. C.F.R. § 60-1.3: OFCC Order No. 1, Oct. 24, 1967.

618. Higher Education Guidelines, supra note 616. The only revisions HED seriously considered involved the issue of reverse discrimination. Interview with Samuel Soloman, Ombudsman, OCR, HEW, June 28, 1973. See also, Remarks by Peter E. Holmes, Director, OCR, HEW, Affirmative Action Seminar, Cleveland State University, Oct. 25, 1973.

In addition, the guidelines fail to address a number of requirements which were in effect as of 1972. For example, the guidelines do not specify that contractors are required to afford relief to members of an affected class, nor do they specify the types of relief which should be provided.<sup>619</sup> Instead, the guidelines expressly indicate that back pay, one of the most important forms of affected class relief, will not be required under the Executive order if such relief may be obtained under Title VII of the 1964 Civil Rights Act, the Equal Pay Act, or the National Labor Relations Act.<sup>620</sup>

Perhaps the major weakness in the higher education guidelines is their failure to address adequately the responsibility of colleges and universities to identify and validate all of their employee selection standards. OFCC's Guidelines on Employee Testing and Other Selection Procedures<sup>621</sup> stipulate that it is a violation of the Executive order to use any test or selection standard, including an educational requirement such as a Ph.D.,<sup>622</sup> if it adversely affects the job opportunities of minorities or women and if it cannot be validated by empirical evidence

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<sup>619</sup> 41 C.F.R. § 60-2 requires contractors to provide relief to affected class members.

<sup>620</sup> Higher Education Guidelines, *supra* note 616. This provision forces affected class members to rely on the EEOC, the Wage and Hour Division (DOL), or the General Counsel of the NLRB to bring an action; or to incur the expense of bringing an action themselves in order to obtain the financial restitution they claim due to past discrimination. In addition, the provision deprives OCR of an important compliance tool, since the thrust of back pay orders can serve as a strong deterrent to discrimination.

<sup>621</sup> 41 C.F.R. § 60-3, 36 Fed. Reg. 19307 (Oct. 2, 1971).

<sup>622</sup> 41 C.F.R. § 60-3.2.

showing that it is predictive of job performance or replicates important elements of the job.<sup>623</sup> Since proportionately fewer women and minorities obtain advanced academic degrees than do nonminority males,<sup>624</sup> use of the Ph.D. or other advanced degree as a selection standard for hiring, promotion, or award of tenure is subject to the validation requirements of the OFCC guidelines.<sup>625</sup> However, the higher education guidelines fail to specify, or to explain by example, that these validation requirements

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623. OFCC guidelines accept any of three types of validation studies recognized in "Standards for Educational & Psychological Tests," prepared by the American Psychological Association (1974). (1) Content validity is a demonstration that the content of the test replicates the job duties; it is most frequently determined for tests of skill or knowledge. (2) Criterion-related validity is a statistical demonstration of a relationship between a test or selection standard and the job performance of a sample of workers. Intelligence tests normally need to be justified by a criterion-related validity study. (3) Construct validity is a showing that a standard measures a personality trait and that the trait is required for satisfactory job performance. The threshold requirement in developing a validation study is the preparation of a job analysis, or the identification of what constitutes proficiency in performing the job. 41 C.F.R. § 60-3.5(b)(3). The failure of colleges and universities to set forth criteria by which proficiency in teaching or other faculty positions can be measured presents a crucial stumbling block to any validation efforts. Interviews with Dr. William Enneis, Chief, Research Studies Division, EEOC, Aug. 26, 1974, and Dr. James Scharf, Staff Psychologist, EEOC, Aug. 26, 1974; and telephone interview with Dr. Miriam Kelty, Office of Scientific Affairs, American Psychological Association, Aug. 26, 1974. See also S. Huff, "Credentialing by Tests or by Degrees: Title VII of the Civil Rights Act and Griggs v. Duke Power Company," Harvard Educational Review (May 1974).

624. See, for example, "Digest of Educational Statistics: 1973," U.S. Department of Health, Education, and Welfare, Publication No. (Office of Education) 74-11103, p. 95; "Survey of Black American Doctorates," Ford Foundation, Special Projects in Education (1970); "Four Minorities and the Ph.D.," Ford Foundation, Oct. 19, 1973; and "Teaching Faculty in Academe: 1972-1973," American Council on Education, Vol. 8, No. 2 (August 1973).

625. Federal courts have already applied the precepts of the OFCC guidelines, as well as those of EEOC, to standards used for selecting teachers and other personnel at the elementary and secondary school levels. See, e.g., *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); *Armstead v. Starkville Municipal Separate School District*, 461 F.2d 276 (5th Cir. 1972); *Baker v. Columbus Municipal Separate School District*, 462 F.2d 1112 (5th Cir. 1972); *United States v. Nansemond County School Board*, 351 F. Supp. 196 (E.D. Va. 1972).

apply to all standards used by colleges and universities.<sup>626</sup> Instead, HEW's guidelines merely state that selection standards should be relevant to the duties of a particular job and should be valid predictors of job performance. They further explain that "This requirement should not ignore or obviate the range of permissible discretion which has characterized employment judgments, particularly in the academic area."<sup>627</sup> There is, thus, the implicit suggestion that colleges and universities are exempt from a strict application of the job validation requirements issued by OFCC.

Although the Executive order regulations permit some discretion to the contractor in choosing the method of validating a selection standard, they do not permit the contractor the choice not to validate the standard at all. In reality, HED has not enforced the OFCC guidelines with respect to any qualifications used by colleges and universities in selecting or promoting faculty personnel. Instead HED has accepted, apparently without any question, the use of the these qualifications.<sup>628</sup> In determining underutilization and setting goals, colleges and universities are routinely permitted to use availability data based only on the number of mi-

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626. For example, HED could provide examples of selection procedures, such as advanced degree requirements, tenure review boards, and personal interviews, which often operate to exclude proportionately more minorities and females. In addition, HED could provide guidelines on how colleges and universities might work with accreditation boards to revise requirements adversely affecting employment opportunities of protected groups.

627. Higher Education Guidelines, supra note 616.

628. For example, recent conciliation agreements with the University of California at Berkeley and the University of Washington explicitly provide that availability of women and minorities will be based either on the numbers of those groups holding advanced degrees or the number currently employed in specific academic positions. See pp. 281-94 infra. Lepper interview (Aug. 13, 1974), supra note 548.



norities and women with advanced degrees or already holding academic positions, thus eliminating large numbers of persons who could be available for consideration if the job qualification itself could not be validated. Nor has HEW required colleges and universities to begin developing performance criteria, a procedure which is essential to the validation process.

HED had planned to develop contract compliance regulations during fiscal year 1974. This objective was not accomplished, according to HED, because it was unable to resolve difficulties in applying OFCC's compliance review procedures to colleges and universities. HED feels that OFCC's procedures and affirmative action regulations are not, in every respect, adaptable to colleges and universities. Hence, in its fiscal year 1975 plan to develop regulations, HED states that it will begin by identifying "those policy issues for affirmative action which are inappropriate to higher education institutions..."

In December 1974, HEW issued a memorandum to college and university presidents to emphasize that institutions must avoid reverse discrimination in carrying out affirmative action programs. Although purportedly issued to clarify the meaning of the Guidelines, the memorandum is ambiguous and misleading in essentially two ways. First, by focusing on reverse discrimination to the exclusion of other concerns, it conveys the impression that the major problem facing universities is the danger that

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629. While there has been virtually no research on the question, one authority at EEOC expressed doubt that advanced degree standards could be validated as predictors of performance in teaching at the higher education level. Enneis interview, supra note 623.

630. Id. Lepper interview (Aug. 13, 1974), supra note 548. For further discussion of contract compliance issues in higher education which HEW has not addressed, see B. Sandler and S.E. Steinbach, "HEW Contract Compliance--Major Concerns of Institutions," in Sex Discrimination and Contract Compliance, Special Report of the American Council on Education (April 1972).

affirmative action will lead to selecting less "qualified" women and minority groups. Second, the memorandum either misstates or excludes important qualifying information concerning the requirements of the Executive orders. As a result, the memorandum will more likely impede, rather than increase, integration of faculties at institutions of higher education.

The document includes a number of examples of actions which would constitute impermissible reverse discrimination but states that the examples do not apply in cases where there has been a specific finding of discrimination. The memorandum, however, does not explain what constitutes a finding of discrimination; thus, institutions could reasonably interpret the proviso to be limited to formal findings by HEW or to findings by the employer itself. Since the first step of an affirmative action plan under Executive order regulations is to identify discriminatory practices and evidence of past discrimination, it would not be unreasonable to infer that the memorandum's limitations do not apply to corrective action taken by an employer after such an identification. However, the memorandum strongly suggests that affirmative action, absent an HEW determination, must be limited to benign neutrality. For example, if an employer has discriminated in the past, the law may well require the employer to correct the discriminatory image it has created by stating that it will consider and is specifically interested in minority and female applicants. Yet, the HEW memorandum precludes such language and limits recruitment notices to encouraging "all interested persons" to apply.<sup>631</sup>

The memorandum also reflects a fundamental error in HEW's interpretation of Executive order regulations concerning goals and timetables. Under these regulations, a goal is to be established for

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631. Memorandum from Peter E. Holmes, Director, OCR, HEW, to College and University Presidents, December 1974.

ultimately eliminating underutilization, followed by the development of a realistic timetable for reaching that goal in the framework of expected turnover and affirmative action practices. The HEW memorandum does not treat numerical goals as objectives for eliminating underutilization but rather as estimated measures of the results of affirmative action. The memorandum indicates that goals which reflect the employer's estimate of what should be accomplished from affirmative action will be satisfactory, regardless of whether they reflect any meaningful progress toward eliminating underutilization.

In addition, the memorandum is derelict on the question of job qualifications. It states that universities and colleges have the sole authority for determining job qualifications, not HEW. This statement is misleading, since all job qualifications must be validated according to Executive order regulations. Although the memorandum indicates that institutions must demonstrate "the necessity" of such standards, it fails to direct institutions to adhere to the law's requirements on the standards and procedures for demonstrating validity. The memorandum further states that when HEW reviews the validity of a job qualification, the agency will give substantial weight to the opinion of persons in the specific occupation. HEW's position appears to be in violation of Executive order regulations, which require that validity studies be prepared according to prevailing theories of psychometrics. HEW's position is also inconsistent with the views of the Federal courts, which have repeatedly dismissed the often subjective opinions of incumbents raised in defense of challenged job qualifications.<sup>632</sup>

Thus, the recent memorandum fails to correct any of the deficiencies in

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632. For a brief discussion of the Federal judiciary's interpretation of validation requirements imposed by equal employment law, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974 Vol. IV, ch. 4 (in preparation).

the Guidelines and, instead, appears to constitute even further erosion by HEW of Executive order requirements imposed on colleges and universities.

#### IV. Compliance Activities

##### A. Title VI

##### 1. Data Collection

Every 2 years OCR sends to all institutions of higher education a form entitled, "Compliance Report of Institutions of Higher Education under Title VI of the Civil Rights Act of 1964." This form, which requests enrollment data by race and ethnicity, is the basis for a biannual publication issued by HEW-OCR.<sup>633</sup> Although the data for 1972 have been collected, as of September 1974, this information had still not been published.<sup>634</sup> Thus, the latest publication contained data for the fall of 1970. Since the data are important for providing a comparative analysis between institutions and for making public one indicia by which to evaluate the compliance status of institutions, a 4-year lag in the publication of such data significantly reduces their public value.<sup>635</sup> In view of the apparent need for such data, HEW should develop a thorough but expeditious method of collecting and making data available to the regional offices and the public.

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633. HEW Form OS-34. Institutions are given 9 months within which to submit to OCR the requested racial and ethnic data.

634. Taylor interview (Sept. 6, 1974), supra note 534

635. OCR has recently informed this Commission that:

Headquarters and regional staff are not dependent upon the publication to secure access to the data .... In fact, the completed forms returned by the institutions are kept on file and are readily available for the purpose of assessing compliance and conducting reviews. Holmes letter, supra note 510.

The report form requires and the HEW publication provides fairly complete racial and ethnic data.<sup>636</sup> There are, however, a number of limitations in the data collected. For instance, no distinction is made within the "Spanish Surnamed" category among Mexican American, Puerto Rican, and Cuban students.<sup>637</sup> Specific data would identify practices in colleges and universities which might be discriminating against one group but not another. In addition, data on sex, broken down by race and ethnicity, have not been published. The form was being revised to include data on sex<sup>638</sup> and such data will be collected in 1974,<sup>639</sup> but based on the length of time it has taken OCR to publish the data it has collected in the past, it will be at least another 2 years, possibly 4, before student enrollment data are available by race, ethnicity, and sex.<sup>640</sup>

OCR relies upon the racial and ethnic enrollment publication to determine priorities in the compliance review process. Priorities are not always based on the numbers of minorities in the student body.

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636. The publication gives percentages of American Indian, Negro, Oriental, Spanish Surnamed, total minority, other, and the number of students in the whole student body. These figures are available for undergraduate, graduate, and professional school enrollment.

637. These are the largest Spanish-surnamed groups. In Texas, for example, there are primarily Mexican American and Cuban students.

638. The National Institute of Educational Statistics of the U.S. Office of Education, HEW, publishes enrollment data by sex. However, those data do not provide a racial or ethnic breakdown.

639. Holmes letter, supra note 510. Concerning this point, OCR recently indicated that:

OCR enrollment surveys are necessarily prepared and finalized well in advance of the school year. In this case, the survey form was finalized and printed before the enactment of Title IX on June 23, 1972. It was mailed to colleges and universities that same month--June 1972. Id.

640. OCR recently indicated its belief that "the data will be available long before" another 2 years. Holmes letter, supra note 510.

A complaint against an institution can, for instance, influence an OCR determination to conduct a review. Nevertheless, this publication provides OCR with an idea as to the possibility of noncompliance at a particular institution.

## 2. Criteria and Procedures for Reviews

Although there are clearly a number of Executive order requirements which should be adapted to the Title VI program, there is no comparability in sophistication between Title VI and Executive Order 11246 procedures. HED does not require recipients of Federal financial assistance to develop affirmative action plans as are required of contractors under Executive Order 11246. For example, HED does not require each institution to conduct a self-analysis of the racial, ethnic, and sex composition of its student body and faculty to determine if underrepresentation or underutilization exists; to identify the causes of such deficiencies; or to develop goals and timetables for overcoming the identified underrepresentation or underutilization. Similarly, no analysis or affirmative action plan is required to be developed which addresses the composition of groups receiving specific services. If each college or university covered by Title VI were responsible for developing such plans, HED's compliance review process would be much simplified; and colleges and universities would have a clearer understanding of their Title VI responsibilities.

The authority for OCR to adopt such a requirement can be predicated  
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on a number of bases. For example, the assurance of compliance signed by recipients of HEW assistance contains a pledge that the funded program

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641. OCR has recently indicated that it:

...has no authority under Title VI to require adoption of such plans, including goals and timetables, solely on the basis of "underutilization" and without evidence of discrimination. The obligation of a government contractor is broader in this respect. The Executive Order confers two obligations: nondiscrimination and affirmative action. Holmes letter, supra note 510.

or activity will be conducted in full compliance with Title VI. It is, therefore, primarily the recipient's responsibility to ensure that it is and continues to be in compliance. To require an annual self-evaluation to determine if deficiencies exist in a recipient's program is a reasonable outgrowth of the assurance; and, to the extent that any noncompliance is detected in the analysis, it is clear that the recipient must take the necessary steps to rectify it. The same conclusion can be derived from another approach. The provision in HEW's Title VI regulations which concerns "compliance information" obligates recipients to maintain such racial and ethnic data as HEW directs. It specifically notes that recipients should have such data to demonstrate the extent to which members of minority groups are beneficiaries of and participants in their programs. Predicated on this authority, HEW could require each recipient to collect and analyze utilization data. <sup>642</sup> Wherever underutilization or underrepresentation or other compliance problems are identified, the recipient could be required automatically to develop an affirmative action plan. The plan should contain prospective relief, including goals and timetables and revised programs and procedures necessary for accomplishing these objectives. <sup>643</sup>

Before the inception of the Fiscal Year 1975 Enforcement Plan, which calls for a sophisticated method for selecting institutions to be reviewed,

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642. See, Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), cert. denied 389 U.S. 1046 (1968).

643. Also see, Pottinger speech, supra note 558, in which the Assistant Attorney General states that Title VI has a double thrust in that it is:

...intended not only to protect minorities from harmful acts, but also to insure that they benefit on an equal basis from the expenditure of federal tax dollars. Enforcement activities must consider the compliance status of any given program from both aspects.

The speech then indicates that the initial responsibility for complying with the law, for planning and executing projects with full consideration for the rights of minorities, lies with the recipients and that the recipients should analyze the racial and ethnic impact of their actions, and correct any discrimination.

the following was used as a guideline in determining review priorities, in order of importance: (1) institutions which were part of a dual higher education system; (2) large State institutions; (3) major private institutions; and (4) larger community colleges and professional schools.<sup>644</sup> According to the Fiscal Year 1975 Enforcement Plan, however, two statistical formulas will be developed.' The first, which was to be developed by August 15, 1974, would rank institutions by using the following data: (a) the number of students enrolled at a given institution; (b) the number of complaints at a given institution; (c) the status of an institution from rankings such as that developed by the American Council on Education; and (d) the total amount of Federal funds received by an institution from whatever sources. These data will enable OCR to rank institutions nationally and by region.<sup>645</sup> The second formula, however, involves many more variables and is to be a more highly sophisticated system. In addition to the four items mentioned, OCR will need the following data to develop the more sophisticated formula for determining review priorities: student-faculty ratio; enrollment; size of graduate school; ratio of graduate to undergraduate enrollment; nature of institution (primarily research, primarily teaching); governance (public-private); number of Ph.D.'s granted per year by discipline; number of commuters; comparative size of male-female faculty; comparative size of nonminority faculty; size and nature of geographic area serviced by the institution; number of grants; number of contracts; per capita dollars spent on retention and supportive services; and nature of past involvement with OCR.

Prior to a review, a letter is sent to the institution of higher education, confirming the review and requesting that the institution

644. Laws interview, supra note 571.

645. OCR has available all data except (d). FY 1975 Enforcement Plan, supra note 508.



have summary data and other materials available for examination by OCR reviewers.<sup>646</sup> During Title VI reviews OCR staff collect information on the race and ethnicity of the student body, faculty, and athletes. Reviewers do not collect, however, racial-ethnic statistics for some areas where discrimination against minority students is likely to occur, such as housing and job placement.

A review generally takes from 3 1/2 to 4 days onsite. Two persons conduct reviews of institutions having enrollments of 15,000 or more while smaller institutions are reviewed by only one person. A compliance review report is prepared as a basis for recommendations to the institution. Recommendations are sent in a letter of findings to which the institution must respond within 30 days. Compliance is granted when OCR is satisfied with the institution's response to its recommendations.<sup>647</sup>

The Higher Education Division has developed an outline entitled "Instructions for Conducting Higher Education Compliance Reviews and Writing Compliance Review Reports" which is used by staff in the course of conducting traditional Title VI compliance reviews. This instruction form provides an outline of the information to be gathered, the type of persons from whom the information is to be obtained, and the kinds of recommendations that the reviewer may make to the institution.

The form instructs the reviewer how to obtain general information from the institution regarding its nondiscrimination policy. For example, the reviewer is instructed to interview the president and

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646. This information includes: a copy of compliance report form OS-34, with latest available enrollment data; copy of Federal financial assistance form OE 1152-1; copy of the application for admission, admission criteria and recruitment materials; housing regulations and forms; copy of the university bulletin, graduate and undergraduate; faculty total and faculty minority race totals; summary statement of all receipts of Federal funds; and 10 of the most recent issues of the student newspaper. See letter from Miles Schulze, Branch Chief, Higher Education Division, OCR, Dallas, to Mr. Jack O'Wesne, Registrar, Baylor College of Medicine, Feb. 2, 1973.

647. Taylor interview (Sept. 6, 1974), supra note 534.

ask about total minority student enrollment as well as total and minority full-time faculty. The specific areas of inquiry covered by this form concern institutional information and nondiscrimination policy; student admission policy; counseling and tutoring; student teaching and other training requirements; student activities; intercollegiate activities; student financial assistance; student

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648. For instance, the form suggests the dean of admissions be interviewed and asked questions relating to the recruitment practices of the institution. A possible recommendation to the institution that the form notes is that minority group schools and organizations be contacted and informed of educational opportunities available at the institution.

649. For instance, the dean of students might be interviewed and asked about counseling and tutoring programs and whether or not minority students participate in them. A suggested recommendation is that a seminar be conducted for college guidance counselors to explain new techniques for counseling disadvantaged students.

650. For example, the dean of the school of education might be interviewed and asked about procedures for placing minority and nonminority students in training assignments. Where segregation of minority students exists it must be eliminated.

651. In this case, the dean of students is to be interviewed to determine the extent to which minority group members participate in college-sponsored activities. Recommendations provided by the form essentially require that the institution ensure that no activities be restricted because of race or ethnic origin.

652. This inquiry is intended to obtain information concerning the institution's major sports and the methods employed by the institution to recruit athletes. Possible recommendations suggested by the form included comparable recruitment of minority athletes.

653. In this instance, the student financial assistance officer is to be interviewed and asked about the criteria used for selection of individuals to receive financial assistance as well as questions relating to minority participation in the financial aid program. Possible recommendations include the provision that minority group high school students be given every consideration for financial assistance.

654 housing; placement of students; 655 and special civil rights  
656 activity. In addition to interviewing responsible institution  
officials, the reviewer is instructed to interview minority students  
for all the above categories.

These instructions, however, do not provide adequate guidance  
to ensure that the investigator can conduct a comprehensive compliance  
review. First, the form relies too heavily on the interview process  
and not sufficiently on record examination and data analysis. 657

Second, the questions provided for the reviewer are too broad; they  
are likely to result in the collection of superficial facts. The  
sample recommendations also tend to lack specificity.

The form also suggests possible recommendations that the reviewer  
may make to the institution. An example of such a recommendation is  
that the institution's catalogues contain an equal educational opportunity  
statement as a means of communicating the school's equal opportunity  
policy.

Although the instruction form contains a caveat that the form

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654. In this area, the director of student housing is to be asked  
about the manner in which student housing is assigned or made available.  
All of the possible recommendations relate to the institution's assurance  
that housing for students is made available on a nondiscriminatory basis.

655. For this category, the form instructs the reviewer to interview the  
placement director and obtain information concerning employment  
opportunities. Possible recommendations include that the institution  
obtain assurances from prospective employers that they are equal  
opportunity employers.

656. This last section relates to activities which the institution  
sponsors or conducts in the local community. Possible recommendations  
include the suggestion that the institution involve itself with the  
minority group community by, for example, offering an adult education  
program.

657. For example, racial-ethnic data concerning such matters as housing,  
counseling, tutoring and dropout rates were generally not collected.  
Further, college curricula were usually not examined, nor was the  
relationship between institution policies and practices and the student  
retention rates. Interview with Ramon Villareal, Program Officer,  
Student Assistance, U.S. Office of Education, HEW, Jan. 29, 1973.

should not be considered all inclusive and that it does not preclude the reviewer from making additional recommendations as demanded by a particular situation, the fact is that the recommendations made by OCR staff tend to follow closely the provisions of the instructions, and accordingly they lack the detail necessary to make them relevant to each reviewed institution. <sup>658</sup> At best, this instruction form should serve no more than as an outline for writing a compliance review report.

### 3. Reviews

From July 1, 1972 to September 1974, OCR conducted 53 Title VI compliance reviews <sup>659</sup> and two previsits. <sup>660</sup> Three regional offices

658. Of the six Title VI reviews performed in the Dallas region examined by Commission staff, only two contained any recommendations which differed from the sample recommendations found in the instructions.

659. Region I reviewed 24 institutions: Franconia College, N.H.; River College, N.H.; Nasson College, Me.; Colby Junior College, N.H.; Bentley College, Mass.; Champlain College, Vt.; Connecticut College, Conn.; Bennington College, Vt.; Middlebury College, Vt.; Clark University, Mass.; College of Holy Cross, Mass.; Holyoke Community College, Mass.; Notre Dame College, N.H.; Rhode Island School of Design, R.I.; Eastern Connecticut State College, Conn.; Western New England College, Mass.; University of Rhode Island, R.I.; Nichols College of Business Administration, Mass.; St. Anselmo College, N.H.; Garland Junior College, Mass.; Merrimac College, Mass.; Dartmouth College, N.H.; Bennington College, Vt.; and University of Massachusetts Medical Center, Mass. Region III reviewed one institution: Norfolk General Hospital. Region IV reviewed 13 institutions: Wayne Community College, N.C.; Atlanta University, Ga.; University of Kentucky, Ky.; University of Southern Alabama, Ala.; University of Southern Mississippi, Miss.; University of South Carolina, S.C.; East Kentucky University, Ky.; Vanderbilt Medical School, Tenn.; Ihawamba Junior College, Miss.; Middle Tennessee State, Tenn.; Auburn University, Ala.; University of Tennessee, Tenn.; Memphis State, Tenn.; and Edison Community College, Fla. Region VI reviewed seven institutions: St. Mary's University, Tex.; Northeast Louisiana University, La.; Dallas Community College, Tex.; Henderson County Junior College, Tex.; Western New Mexico University, N.M.; University of Texas, Tex.; and Baylor Medical School, Tex. Region VIII has reviewed only one institution: Dickinson College, N.D. Region IX reviewed three institutions: California State University, Long Beach, Cal.; Peralta Community College, Cal.; and Rice University, Tex. Region X reviewed four institutions: Alaska Methodist University, Alaska; University of Alaska, Alaska; Reed College, Ore.; and Yakima Valley Community College, Wash.

660. A previsit is a visit to an institution of higher education prior to the actual compliance review. The purpose of such a visit is to explain the compliance review process. The two previsits made were by Region IX to Glendale College and California State University, Northridge.

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 did not conduct any reviews during that time, and two others  
 conducted only one review each during the same period. 662  
 Although  
 OCR has made an effort since January 1974 to increase the number of  
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 reviews it conducts, this number is still inadequate in view of  
 the number of institutions over which it has jurisdiction and in  
 view of the fact that it finds areas of noncompliance in every  
 institution of higher education reviewed. 664  
 The failure of the  
 regions to complete the compliance review process 665 has been a

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661. Region II had not conducted a Title VI review since October 1971,  
 Region V not since April 1972, and Region VII not since April 1972.

662. Regions III and VIII.

663. For example, the HED staff in Boston found basic deficiencies in all of  
 the 146 Title VI reviews they conducted from 1968 to 1973. Interview with  
 John G. Bynoe, RCRD, Region I, HEW, Nov. 14, 1972. Similarly, the Dallas  
 HED found between two and nine deficiencies in each of the institutions  
 it reviewed, with the most common problem being the need for equitable  
 recruitment of minority students and faculty and the publication in the  
 catalogue of the institution's equal educational opportunity policy.  
 Laws interview, supra note 571.

664. From July 1, 1972, to December 31, 1973, OCR conducted only 24 reviews,  
 while from January 1, 1974, to September 1, 1974, it conducted 29 reviews.

665. For example, the following number of (a) compliance recommendation  
 letters, (b) reports, and (c) replies from institutions were overdue as  
 of June 30, 1974:

Region I	(a) 8	(b) 8	and	(c) 9
Region II	(a) 1	(b) 2	and	(c) 6
Region III	(a) 2	(b) 3	and	(c) 2
Region IV	(a) 7	(b) 11	and	(c) 19
Region V	(a) 15	(b) 17	and	(c) 4
Region VI	(a) 0	(b) 0	and	(c) 2
Region VII	(a) 0	(b) 0	and	(c) 1
Region VIII	(a) 1	(b) 1	and	(c) 1
Region IX	(a) 5	(b) 2	and	(c) 0
Region X	(a) 0	(b) 4	and	(c) 5

problem of long standing. For example, Regions II and VIII have not taken all of the required steps for reviews begun more than 3 years ago.

From the inception of the higher education Title VI program in 1965, 803 reviews have been conducted. Most of these reviews were conducted between 1968 and 1970 when the Division had a smaller staff, but no responsibility for contract compliance. <sup>666</sup> In fact, in fiscal year 1969, OCR conducted 212 Title VI reviews, while in fiscal year 1972, it conducted only 99 such reviews. In the last few years, Executive order reviews have been the priority in terms of staff time. The end result has been almost total abandonment of Title VI as a mechanism to promote change at the college and university level.

OCR's reviews are relatively sophisticated. OCR almost always finds areas of noncompliance when conducting reviews. However, the reviews inspected by the Commission generally lacked OCR recommendations calculated to correct deficiencies. OCR failed to impose on institu-

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666. Taylor interview (Jan. 31, 1974), supra note 569. Even at that time, the higher education enforcement program was only a small part of the Education Division whose major role was to work with elementary and secondary schools.

tions specific courses of action for rectifying problem areas, and it did not effectively monitor corrective action arrangements. For example, when a review report of Wayne Community College in North Carolina revealed that there was low representation of blacks in agricultural programs, OCR merely recommended that special activities be pursued to attract more black students into the agricultural programs. It did not, however, give examples of some appropriate actions which would achieve this result.

In another instance, Colby College in New Hampshire was reviewed in July 1973<sup>667</sup> to examine progress made since an earlier review which found lack of initiative in recruiting minority students.<sup>668</sup> This followup compliance review revealed that little progress had been made by Colby in recruiting minority students and that a neutral recruiting program for nonwhite students continued to exist. In fact, the school only had 2 black students out of a total enrollment of 584, and only one black on the faculty.<sup>669</sup>

In a letter dated August 1, 1973, to the president of the college, OCR recommended that Colby engage in recruiting efforts for minority students comparable to its efforts to recruit white students. The

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667. This was a followup visit to an initial review conducted in November 1971.

668. A letter of commitment from Colby's president to the RCRD on January 18, 1972, agreeing to correct this problem, resulted in a subsequent finding of compliance.

669. Compliance Review Report, Colby College, July 10-11, 1973. The one black faculty member only taught on a part-time basis. The review report gave no indication of the total number of faculty at Colby.

institution's commitment to follow this recommendation was forwarded to HEW,<sup>670</sup> which once again found the college to be in compliance.

OCR's action with regard to Colby College was inadequate. Based on the initial findings, OCR should have required the college to submit periodic reports specifying the steps it was taking to remedy its deficient minority recruitment program. For instance, a quarterly report which required Colby to list the dates and names of persons or groups visited, the percentage of potential minority candidates that could be reached through this contact (if a school, the minority and total enrollment), and the number of minority applicants produced by such contacts would have constituted a minimum requirement appropriate to the identified deficiency. Such reports would not only have given OCR a good starting point for its followup reviews of Colby but would have also enabled it to assess Colby's good faith efforts toward keeping the commitment it made as a result of the first review. Had the reports indicated that no progress was made at the end of 6 months, OCR should have initiated enforcement action. The usefulness of the Colby followup review is questionable, since OCR again made weak recommendations and did not impose any reporting mechanism that would enable it to monitor Colby's progress effectively.

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670. Letter from L. C. Vaccaro, President, Colby College, to John G. Bynoe, RCRD, Region I, HEW, Aug. 28, 1973.



Another example of deficient procedures was OCR's activities with regard to Louisiana State University (LSU) in Louisiana. Initially LSU was reviewed in February 1968. A major finding stemming from that review was that LSU had a serious underrepresentation of black students. This deficiency was attributed mainly to inadequate minority recruitment. Following that review OCR required LSU to commit itself to correcting the deficiencies cited; however, followup reports were not required of the institution. When reviewed again in May 1972, LSU continued to show severe underrepresentation of black students in addition to other deficiencies.<sup>671</sup> No enforcement action was taken by OCR. As a result of the followup review, however, OCR advised LSU that its staff would revisit the institution in the future and that information detailing the university's efforts with regard to OCR's recommendations must "be maintained for our review at that time."<sup>672</sup> Although OCR requested that specific data be maintained,<sup>673</sup>

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671. The other deficiencies included token minority faculty, an absence of an equal opportunity statement, inadequate intercollegiate athletic recruitment of minorities, racially segregated campus organizations, discriminatory room assignments, and failure to obtain equal opportunity assurances from local and part-time employers.

672. Letter of findings from Clarence A. Laws, Deputy Regional Director, Region VI, OCR, HEW, to Dr. C. G. Taylor, Chancellor, Louisiana State University, Baton Rouge, May 2, 1972.

673. The data included the names of high schools visited by the university's representatives, the dates of these visits, and the number of prospective minority race students interviewed. Also, the names and addresses of minority group faculty contacted and/or interviewed, the offers made, the departments making the offers, and the final consequence of the offers.

LSU was not required to submit such data to OCR for its review. 674

It would have been more effective for OCR to require that such data be submitted to OCR at regular intervals. This would have enabled OCR to assure itself that the institution was following its recommendations. Simply requesting an institution to "maintain" data is not nearly as effective as requiring it to submit the data for review. For example, following the 1968 review, OCR required LSU to develop an equal opportunity statement. The followup review revealed that the institution had failed to develop such a statement and attributed its absence to "just an oversight." If OCR had required LSU to report its civil rights accomplishments on a regular basis, it would have known that the statement had not been adopted and could have insisted upon prompt remedial action or initiated enforcement proceedings.

As a result of these inadequate compliance procedures, it is not uncommon for an institution to be found deficient in the same areas several times without OCR commencing enforcement action. For example, OCR found Clark University in Massachusetts in noncompliance with Title VI in March 1969 and again in August 1973. OCR found that five major

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674. The Louisiana higher education system has been sued by the Justice Department as a result of *Adams v. Richardson*. For more information on this point, see pp. 256-64 infra.

recommendations it had made in 1969 were still not implemented.<sup>675</sup> OCR  
 also uncovered five additional areas of noncompliance.<sup>676</sup> Valparaiso  
 University in Indiana was reviewed in August 1970 and in April 1972  
 and was also found in noncompliance both times because of lack of  
 comparable efforts to recruit minority students, failure to have  
 formal procedures to investigate complaints of racial discrimination,  
 and failure to have black cheerleaders.<sup>677</sup> Although the problems at  
 both Clark and Valparaiso were serious enough to have warranted  
 findings of noncompliance, at no time was action initiated to bring  
 proceedings against these institutions.

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675. The following recommendations were made by OCR in 1969 and not yet implemented in August 1973: (1) The recruiting and admission material should contain a clear statement of nondiscrimination; (2) Every effort should be made to employ a minority group person in a full-time position to work in program areas designed to increase minority group enrollment; (3) Emphasis should be made on informing all alumni, guidance counselors, and students of minority group high schools of the equal education policy and the institution's desire to attract minority group students; (4) Clark University must establish a procedure whereby it will obtain written assurance from all prospective landlords and homeowners that off-campus housing is available to all students without regard to race, color, national origin; (5) An employer to whom students are referred should certify that he or she is an equal opportunity employer. Letter from John G. Bynoe, RCRD, Region I, Boston, HEW, to Dr. Alan Guskin, President, Clark University, Aug. 23, 1973.

676. The following recommendations were made by OCR in its followup review of the university: (1) Stronger lines of communication should be established between the financial aid office and recipients, and minority group students should be given every consideration for financial assistance; (2) recruitment of minority group faculty; (3) recruitment of minority group athletes should be comparable to those efforts for nonminority group athletes; (4) effective counseling services should be provided to all students; and (5) all school-sponsored activities should be held in a nondiscriminatory manner.

677. Letter from Kenneth A. Mines, RCRD, Region IV, Chicago, HEW, to Albert G. Hugh, President, Valparaiso University, Nov. 14, 1972.

Data reveal that in addition to others, the University of Texas at Austin, one of the Nation's leading universities, continues to have extremely high rates of underrepresentation of minorities in its student body and that HEW has been ineffective in bringing about change in these cases. For example, in 1970, Mexican Americans and blacks constituted only 3.8 percent and 0.8 percent, respectively, of its student body.<sup>678</sup> Two years later, the percentage of Mexican Americans and blacks enrolled at the institution had not increased at all. Yet the university had increased its size during this period by almost 9,000 students, thus providing ample opportunity for change. The institution, which was once officially segregated, was reviewed in 1969, 1971,<sup>679</sup> and 1974.<sup>680</sup> No sanctions have been imposed as a result of the adverse findings of these reviews.

OCR, in the last few years, has been considering

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678. The 1970 census figures show that 16.4 percent of the population of Texas is of Spanish origin and 12.5 percent is black.

679. The university had first been reviewed in April and May 1969. The 1971 review found, in part, that fraternities and sororities remained segregated and that little progress had been made in such important areas as minority student enrollment and faculty composition. Of major concern to HEW was a policy which the university had recently adopted to the effect that it would "not discriminate either in favor of or against any person on account of his race, creed, color, or national origin." This apparently neutral policy was used as the justification for discontinuing at least two programs of assistance to minorities.

680. The results of the latest review was scheduled for release toward the end of September 1974. UT Daily Texan, Sept. 6, 1974.

imposing Title VI sanctions against only one institution--Cornell University. Cornell was reviewed in April and October 1972.<sup>681</sup> One of the principal findings of the reviews concerned the Ujamma housing unit,<sup>682</sup> all of whose residents were black. Further, in 1972, Cornell, through Ujamma and the Committee on Special Education Programs (COSEP), extended incoming minority freshmen an invitation to become residents of Ujamma. Because such letters were not sent to white students, the invitation letter was deemed to be a violation of Title VI.<sup>683</sup> There was no indication found, however, that Ujamma was not officially open to white students.<sup>684</sup>

A further area of the review focused on the African Studies

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681. The 1972 reviews were conducted in response to three requests, one made by a Cornell University staff member who was concerned about the legality of a black oriented program, another by white students who complained that they had suffered discrimination in attempting to enroll in a course at the African Studies and Research Center, and a third by student groups concerned that the Committee on Special Education Programs operated in a discriminatory manner.

682. Ujamma was a special project dormitory committed to analyzing the problems of underdeveloped countries, namely those countries whose people are of African descent.

683. Another housing issue concerned Cornell's practice of assigning minority students minority roommates, which OCR also termed a violation of Title VI.

684. Letter from William R. Valentine, RCRD, HEW, Region II,<sup>2</sup> to Dr. D.R. Corson, President, Cornell University, Apr. 3, 1973.

and Research Center. Although OCR did not find that any student had actually been refused participation in the center's courses, all students interested in nonlanguage courses at the center were asked about their commitment to Africana studies. OCR felt that such inquiry posed a greater burden on white students than on black, and, therefore, constituted a violation of Title VI.<sup>685</sup>

In April 1973, HEW's New York Regional Office for Civil Rights provided Cornell with recommendations for overcoming the deficiencies cited in the letter of findings. On November 30, 1973, Cornell was informed that there still remained elements of noncompliance,<sup>686</sup> that meetings between OCR and Cornell staff had failed to yield compliance,<sup>687</sup> and therefore, the New York Regional Office was recommending to the Director of OCR that enforcement proceedings be initiated to secure Cornell's compliance with Title VI.<sup>688</sup> During the winter of 1974 the New York Regional Civil Rights Director informed the Director of OCR that he had second thoughts about proceeding with enforcement and desired to reopen negotiations with the university. As of September

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685. The findings of the review also involved discrimination against non-black minorities in the COSEP program, deficiencies in admissions and student financial aid, as well as Cornell's failure to integrate the all-black faculty at the Africana Center.

686. Letter from Joel W. Barkan, RCRD, New York, HEW, to Dr. D.R. Corson, President, Cornell University, Nov. 30, 1973.

687. According to HEW, Cornell refused to alter or withdraw the pamphlet of the Africana Center which to OCR suggested that "the center is intended only for black students." Minority student roommate assignments were still being made along racial lines, and the COSEP program continued to work to the detriment of nonblack minority students.

688. Memorandum from Joel W. Barkan, HEW, Regional Civil Rights Director, New York, to Peter E. Holmes, Director, OCR, HEW, Nov. 30, 1974.

1974 the matter was still in the hands of the New York office.

While it is believed that OCR must impose sanctions on noncomplying institutions, it is worthy to note that the prime issues of this case center around reverse discrimination elements. It does not appear that OCR has invested a similar amount of energy and perseverance in pursuing enforcement of noncomplying institutions which have traditionally discriminated against minority group members.

As a matter of fact, since the inception of the Higher Education Division, only two institutions of higher education, Bob Jones University, Greenville, South Carolina, and Freewill Baptist Bible College, Nashville, Tennessee, have had Federal funds terminated under Title VI. However, only Freewill Baptist Bible College contested HEW's enforcement proceedings; Bob Jones University refused to sign HEW's assurance of compliance. Considering that almost all Title VI reviews of institutions of higher education reveal areas of noncompliance, and that followup reviews generally find continued violations, the absence of enforcement action appears unjustified.

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689 Taylor interview (Sept. 6, 1974), supra note 534. In September 1974 the headquarters office was unaware of any decision the regional office may have made or any action it may have taken with respect to Cornell. A letter requesting such information was written in August 1974. Id.

4. Adams v. Richardson

To date, the most significant aspect of the HED's Title VI program has resulted from the Adams v. Richardson decision.<sup>690</sup> This action was brought in October 1970 against Elliot Richardson, then Secretary of HEW, and J. Stanley Pottinger, then Director of the Office for Civil Rights, because of HEW's failure to protect the plaintiffs, and others in their class, under Title VI against racial discrimination by educational institutions receiving Federal financial assistance. The plaintiffs were black students, citizens, and taxpayers who claimed to represent a class adversely affected by racial discrimination on the part of the educational institutions, which maintained dual structures--one for whites and one for blacks.

The suit addressed racial discrimination by educational institutions at the elementary, secondary, and higher educational levels. Regarding higher education, the court found HEW had not taken enforcement action against the 10 States<sup>691</sup> that were operating segregated systems of higher education even though HEW was aware of their noncompliance with Title VI. In fact, between January 1969 and February 1970, HEW had communicated its finding of noncompliance to the 10 States and had explicitly requested these States to submit desegregation plans within 120 days. Five of the affected States completely

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690. 480 F.2d 1159 (D.D.C. 1973). For additional discussion of Adams v. Richardson, see HEW, Elementary & Secondary Education at pp. 103-10 supra.

691. Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia.



ignored HEW's request, and the other five States submitted plans which HEW determined to be unacceptable. Although these unacceptable plans had been submitted as much as 3 years prior to the court hearing, HEW had failed to comment formally on any of them.

On February 16, 1973, the U.S. district court ordered HEW to initiate enforcement proceedings against these 10 State systems in the event that the systems failed to comply with Title VI within 120 days. As a result of the court action, OCR sent letters to the 10 States advising them that their dual structures were not yet considered to be fully disestablished and that they were required to submit acceptable plans, within 30 days from the date the letter was issued, detailing specific actions designed to increase significantly the presence of black students and faculty at predominantly white institutions, and "to provide supportive services to minority students designed to provide them with reasonable opportunity to complete their education successfully...."<sup>692</sup> No acceptable plans were received and on June 12, 1973, the U.S. court of appeals affirmed the district court's order but, upon the request of HEW, granted a 10-month extension for higher education compliance. Thus, OCR was able to grant States additional time to produce acceptable plans and to provide technical assistance in the development of these plans.

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692- See for example, letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to Mr. Thomas N. Turner, President, Board of Trustees of State Institutions of Higher Learning, Jackson, Mississippi, May 21, 1973.

On November 10, 1973, HEW rejected nine of the plans submitted, stating that they were not acceptable because they lacked detailed comprehensive proposals for achieving college systems so desegregated "that a student's choice of institution or campus will be based on other than racial criteria."<sup>694</sup> A similar plan from Maryland was still undergoing review at the time of this announcement. These States were required to revise their plans so that they would include:

- (a) the effect of desegregation on students and faculty.
- (b) the officials or committees in charge of achieving desegregation.
- (c) assurances that minority students and institutions will not bear an undue share of the desegregation burdens and that minority members will share in desegregation planning.
- (d) steps and schedules for achieving desegregation and for directing student attendance patterns toward the academic offering of an institution rather than its racial identity.

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693. These plans were from the States of Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.

694. See, for example, letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to Dr. Robert B. Mautz, Chancellor, Florida Board of Regents, Florida Department of Education, Nov. 10, 1973; and letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to Dr. George L. Simpson, Jr., Chancellor, University System of Georgia, Nov. 10, 1973.

In addition, onsite visitations to the campuses were made. The purpose of these visits was for OCR to gather its own data base for evaluating the final plans submitted by the systems.<sup>695</sup> An average 1 1/2 days was spent on campus by each team, which generally consisted of seven persons.<sup>696</sup> The onsite visits involved the collection of a great deal of 1973 racial data. For example, facts were gathered on such matters as student enrollment, degrees conferred for the previous academic year, freshmen profiles (description of current freshmen class) indicating, for example, distribution of scores on standardized entrance tests, rank in graduating high school class, attrition rates, financial aid, salary schedules for staff, and faculty profiles, e.g., education and tenure status.<sup>697</sup>

In addition, interviews were held with college officials for the purpose of developing an understanding of the admissions and recruitment

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695. Taylor interview (Jan. 31, 1974), supra note 569.

696. The persons on the team are regional and headquarters Higher Education Division staffs, OCR's General Counsel, other OCR staff, and U.S. Office of Education personnel.

697. Institution budget figures, physical plants, and catalogues were also reviewed.

process. Faculty, students, and interested parties were also asked what they believe could be done to enhance the desegregation process.<sup>698</sup>

HEW, having been granted a further extension by the court, gave the States a final deadline of June 1, 1974, for the submission of a plan, at which time all States but Louisiana submitted their plans. On March 14, 1974, at the request of HEW, the Department of Justice filed suit to desegregate the Louisiana State higher education system, which refused to submit a desegregation plan.

OCR has accepted plans for eight of the remaining States and transferred its file on Mississippi to the Department of Justice. The Mississippi State higher education system is divided into a separate junior and senior college system. Although the senior college component turned in an acceptable plan, the junior college component did not. Rather than take enforcement action against the entire State of Mississippi, OCR, on August 1, 1974, referred the case to the Justice Department, which was requested to commence enforcement proceedings against the junior college component alone. The junior college component submitted a plan to the Department of Justice which was under review as of November 1974.<sup>699</sup>

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698. Another major purpose of these visits was to gain an appreciation of the forces that are at work to strengthen the academic programs of the institutions and to show how such forces impact on the goal of achieving improved racial balance. Memorandum to Office of Education Participants in Onsite Reviews of Selected Institutions Involved in Adams v. Richardson Case, from Preston Valien, Director, College and University Unit, OE, HEW, Jan. 11, 1974.

699. Telephone interview with Tom Keeling, Deputy Chief, Education Section, Civil Rights Division, Department of Justice, Nov. 19, 1974.

Once OCR's regional offices have completed analyzing and evaluating the plans, they will be reevaluated by the Washington office. One staff member asserted that final evaluation of the plans would be completed within a few weeks after receipt by headquarters.<sup>700</sup> OCR's inability to analyze a plan of between 100 and 200 pages within 1 to 2 weeks is unjustified. By the time the plans have been completely evaluated and the States informed of any remaining deficiencies, at least 5 months will have lapsed.

OCR followup of the plans provides for regional office contact with the States and for semiannual reports to be submitted by the States on the progress, or lack thereof, on the desegregation plans. In addition, OCR will be conducting onsite reviews to examine specific areas, especially those in which the plans were deficient.

Desegregation plans for the State higher education systems required detailed information, accompanied by statistics, goals and timetables, and anticipated procedures, for a number of subject areas. For example, the section on governance included racial composition, function and procedure for selecting board members; recruiting procedures included an evaluation of the effectiveness of counselors and recruiters; and employment consisted of specific steps for recruitment of administrative staff at each institution, faculty exchange between institutions within a State, and a commitment to

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700. Regional office evaluations of the plans were due in headquarters by September 27, 1974.

hire more black faculty members. HEW also required information on nondiscrimination in contracts for goods and services, including outlining a plan to provide for elimination of discrimination in such services and nonacademic employment.<sup>701</sup>

Analysis of the plans indicates that they still contain many deficiencies. In addition, issues which HEW clearly enunciated in its refusal of the first plans were ignored in the final plans. Where HEW has specifically asked for procedural or numerical information on issues, States responded with vague terminology. Some of the information requested by HEW, and not provided, for example, by the State of Maryland in its final plan includes: HEW's request that the plan be more specific in the area of recruitment and counseling personnel; HEW's request for a further description of the State's cooperative programs; HEW's request as to how recruitment and counseling efforts, which had had limited effect on increasing student crossovers in the State, will be strengthened and what the expected impact of those efforts on desegregation will be; and HEW's request for a description of how monitoring of the plan will be conducted. In some cases, plans were not only vague but obviously evaded the issues presented. For example, HEW informed North Carolina that it required a commitment to insure that blacks will be appointed to policymaking positions. North Carolina, in a noncommittal response, used phrases such as,

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701. Other areas covered by the plans include institutional role and scope, monitoring, the development of biracial planning committees, financial aid information, commitments concerning methods for retention of the racial composition of the students, cost to the University for implementing the desegregation plan, and the anticipated rate of implementation.

"it is anticipated," and "it is believed" that increasing concern for racial representatives will guide the actions of the board and Governor in making selections and correcting imbalances of racial representation. In fact, in reaction to the 14 items raised by HEW with respect to the Virginia State higher education system, only three definite commitments were made by the State.

In some cases, States provided HEW with the information requested, but it is clear from the response that the State's action will not be consistent with an effective plan for desegregation. For example, HEW indicated to the North Carolina State higher education system that substantial progress should be made during the first year of the plan's implementation to obtain maximum results. North Carolina, in its reply, indicated that only \$15,000 will be spent during the first year, \$12,000 of which will be for brochures and \$3,000 for meetings of counselors. It is clear that North Carolina cannot possibly implement a major desegregation plan with a budget allocation primarily for the printing of brochures.

An enormous amount of personpower was devoted to these onsite visits as well as other matters relating to the Adams v. Richardson case.<sup>702</sup> HEW's action implementing the court's decision was initially

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702. The Chief, Policy, Planning, and Program Development, HED, estimates that he has spent 50 percent of his time during the last 6 months on Adams v. Richardson. In addition, six attorneys on the OCR General Counsel staff have devoted the major portion of their time to this issue. Taylor interview (Jan. 31, 1974), supra note 569.

characterized by resoluteness in upholding the principle of integrated higher education. It was also unfortunately marked by delay and the failure to utilize the remedies provided by Title VI to deal with noncompliance. It is sad that a court order was necessary to prod HEW to take a stand against segregated systems of higher education. Now, however, it seems that HEW, faced with continuing noncompliance, has chosen to compromise its standards rather than impose sanctions. The plans it accepted do not appear to be calculated to bring about prompt integration of the dual systems of higher education. Further, HEW's past vacillations concerning this problem will only serve to encourage the States not to live up to even the meager commitments included in the plans. HEW has the responsibility of overcoming its credibility problem and initiating enforcement action promptly where appropriate.



B. Title IX of the Education Amendments of 1972 and Titles VII and VIII of the Public Health Service Act

An identifiable data collection system for Titles IX, VII, and VIII does not exist. Instead, OCR believes that the student enrollment data collected for Title VI purposes <sup>703</sup> will, when extended to include data on sex, function for Titles IX, VII, and VIII. However, as previously mentioned, the data will not be available for at least another 2 or 3 years. <sup>704</sup> Nevertheless, for the purpose of conducting compliance reviews, OCR believes it can compensate for the lack of data, since student data by race, ethnicity, and sex will be requested whenever a compliance review is scheduled. <sup>705</sup>

In addition, OCR may collect data relating to possible sex discrimination in a school's practices when it reviews a complaint. For example, a letter addressing sex discrimination in athletic programs would be sent to an institution which is alleged to be discriminating against women in athletic programs. <sup>706</sup> The letter requests such information

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703. See p. 234 supra.

704. Enrollment data by sex are available from the National Institute of Educational Statistics although racial and ethnic breakdown are not provided. See p. 235 supra.

705. Taylor interview (Jan. 31, 1974), supra note 569 .

706. For example, the University of Alaska in Fairbanks, Alaska, was sent such a letter on September 6, 1973, by the Region X RCRD. The letter advised the institution that a class action complaint had been filed against it and requested data on the athletic program.

as an organization chart of the department which administers sports programs, a list of all funding sources for the department and the percentage of the total funding provided by each source for each of the department's programs, a list of all varsity and intramural teams indicating sex composition of each team, and a list of the coaching staff for each team including the following information on each employee: identification number, sex, wage earned, and part-time or full-time employment. <sup>707</sup> The letter states that the data are needed in order to determine if an onsite investigation of the complaint is warranted. No letter, however, has been sent to all colleges and universities explaining what constitutes compliance with Title IX in the area of athletics, although HEW staff acknowledge <sup>708</sup> that there are literally hundreds of violations of the law in this field.

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707. The list also covers the following: The number of athletic scholarships available by sex and the terms and provisions of each scholarship; the amount of money allocated for each team, itemized by travel, uniforms, equipment, etc.; the allocation of facilities (used for storage, lockers, practice, and games) for each team including the amount of time and time of day for practice and games; a description of medical and therapeutic services available for each team including staff and facilities; the schedule of home and out of town games for each varsity team; a description of the athletic recruitment program including itemization of expenses involved; and a list of major recruiting sources.

708. Taylor interview (Jan. 31, 1974), supra note 569 .

As of January 31, 1974, there were no review procedures established for Titles IX, VII, and VIII. Task forces, composed of regional and headquarters OCR personnel, were in the process of studying the various issues that would be covered under these titles. OCR staff have stated, however, that, once reviews are regularly scheduled and conducted,<sup>709</sup> the procedure will be to combine Title IX, VII, and VIII reviews with Title VI compliance reviews.

The fact that the Title IX regulations have not been issued is causing a delay in the development of procedures, since HED has no basis for supporting whatever procedures might be utilized prior to the issuance of the guidelines.<sup>710</sup> It is, thus, critical that these regulations be quickly finalized.

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709. Id. While a few reviews had been conducted, they were primarily pilot-type reviews. Regular scheduling of such reviews had not commenced as of September 1974.

710. Id. In November 1974 the Women's Equity Action League, the National Organization for Women, the National Education Association and other concerned organizations and individuals filed suit against HEW and the Department of Labor for lack of enforcement of Executive Order 11246, as amended, Titles VII and VIII of the Public Health Service Act and Title IX of the Education Amendments of 1972, and for inadequate handling of complaints under the Executive order. Extensive supporting materials were submitted to the court by the plaintiffs to substantiate their allegations. *Women's Equity Action League v. Weinberger*, C.A. 74-1720 (D.D.C. filed Nov. 26, 1974).

As of September 1974, the Higher Education Division staff had conducted eight joint Title VI-Title IX reviews. The reviews were conducted at the University of Alaska, Alaska; California State University, Long Beach, Cal.; Dartmouth College, N. H.; University of Massachusetts Medical Center, Mass.; Atlanta University, Ga.; Auburn University, Ala.; University of Southern Mississippi, Miss.; and Alaska Methodist University, Alaska. Three Title VII and Title VIII reviews were conducted during that same period at Vanderbilt University, Tenn.; Baylor University, Tex., and the University of Texas.

Analysis of the review of the University of Alaska reveals that attention has been paid to issues such as: faculty composition, recruitment and admissions, student employment, student clinical experience organization, activities and student organization, and complaint procedures. In most areas the review report gave background information relating to all pertinent issues and, in listing its findings, made it clear which statute was reflected. Title VI and IX matters were considered in most of the areas covered. Some of the major findings uncovered during the review included: bulletins and other recruitment materials did not contain a policy statement of nondiscrimination; with the exception of brochures describing traditionally female-dominated fields, recruitment materials consistently refer to applicants and students in masculine gender; marital status is solicited on application forms; the facilities of the Special Services Program are not comparable to those used by other student services which serve the majority of students; the university does not assure itself that comparable housing for students of both sexes is listed through the university, no assurances of nondiscrimination are obtained from owners, lessors, or renting parties who advertise off-campus housing; the university does not assure itself that employers will not discriminate

on the basis of race, color, national origin, or sex in the consideration of students for employment; no assurances are made that outside clinical or other training institutions will not discriminate; and no assurances are made that student organizations are not free of discriminating.

However, the joint review did contain major deficiencies, most of which concerned Title IX matters. For example, although sex discrimination is prevalent in the area of athletics, this subject was not even considered in the review. Nor did OCR examine the distribution of financial assistance to determine the extent, if any, of discrimination in this area. In addition, although student clinical experience was examined with respect to Title IX and the Public Health Service Act, the review did not look at the health services facility of the university to determine whether comparable services are available to male and female students. For example, the absence of provisions for gynecological services on the campus would indicate that health services are not meeting the needs of female students and are, therefore, in violation of Title IX.<sup>711</sup>

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711. In a recent letter to the Commission, HEW expressed its view that the omission of certain issues should not be considered a deficiency.

To characterize this omission as a "deficiency" is clearly a misnomer. Elsewhere the report notes that, due to the fact that no final regulation has been issued, OCR has declined to review certain university practices. This is the only responsible course for a government agency under the circumstances and does not warrant the charge of "deficiency." Holmes letter, supra note 510.

However, to the extent that reviews are conducted, especially if they are conducted in an effort to develop a basis upon which to draft regulations, OCR should have covered all conceivable areas.

The review of the Vanderbilt University School of Medicine pursuant to Titles VI, VII, and VIII was conducted in February 1973. Seven months later, a letter of findings was issued to the university which found the institution "essentially in compliance,"<sup>712</sup> even though admissions data for 1970 through 1972 indicated that there was a higher rejection rate of female as opposed to male applicants to the medical school and that the enrollment of women, 5.7 percent, was well below the national average.<sup>713</sup> Instead of requesting the university to identify and correct the causes for the disparity in treatment, HED gave the university the following vague instruction:

Given the past attitude toward the admission of females to the Medical School, a special effort should be made to assure that they are given full and close consideration for admission to overcome the effects of the past. 714

Thus, while the review adequately investigated the enrollment status of women and found statistical evidence of disparate treatment, HED

712. Letter from William H. Thomas, Regional Civil Rights Director, OCR, to Dr. Alexander Heard, Chancellor, Vanderbilt University, Sept. 21, 1973.

713. The HED indicates that the enrollment of women in medical schools nationally is approximately 10 percent, but recent reports indicate that the percentage has increased. See p. 220 supra.

714. Letter to Dr. Alexander Heard, supra note 712.

did not require the university to explain the past practices or to correct them by setting goals for increasing female enrollees in the future.

In other respects, the compliance review did not constitute an adequate investigation. HED did not, for example, collect any data on the employment of women and minorities on the medical school faculty. The letter of findings requested the university to compile such information in the future. Further, there was no indication that HED had conducted a statistical analysis of financial aid to students. The findings merely indicated that there was "no evidence"<sup>715</sup> of discriminatory practices on the basis of race, ethnicity, or sex. The school was advised to continue to offer attractive financial assistance to minorities and to make a similar effort<sup>716</sup> "on behalf of women students."

The compliance review also considered "briefly"<sup>717</sup> the allied health professions division of the medical school and found that insufficient efforts had been made to recruit male students. However, the letter of findings gave no instructions to the school on correcting this deficiency.

The letter of findings also indicated that the review had found some evidence of housing problems encountered by African and Asian aliens and recommended the establishment of a grievance

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715. Id.

716. Id.

717. Id.

mechanism to resolve these problems. There was no indication whether HED had investigated housing opportunities for female students.

Finally, HED found that the medical school's catalogue and brochures were deficient and made specific recommendations for revisions.<sup>718</sup> These were the only unequivocal recommendations in the letter of findings.

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718. Id.



### C. Executive Order

#### 1. Data Collection

Executive order regulations require most contractors to submit annually Standard Form 100 (EEO-1),<sup>719</sup> which describes the number, race, sex, and ethnicity of all employees in nine broadly defined job categories, such as officials and managers, professionals, and sale-workers. EEO-1 data on colleges and universities are not meaningful, because they do not show the employment profile within narrow job categories, such as professor, associate professor, assistant professor, or instructor;<sup>720</sup> and because they do not show the employment profile by academic department.<sup>721</sup> Colleges and universities are, however, required by Revised Order No. 4 to maintain with their affirmative action plans

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719. 41 C.F.R. § 60-1.7. This requirement applies to private contractors and subcontractors with 50 or more employees and contracts amounting to \$50,000 or more, and to public contractors in this category which are medical or educational institutions.

720. Surveys show that women and minorities are concentrated in the lower teaching ranks, such as Instructor, while Anglo males tend to be concentrated in the professor and associate professor levels. See, for example, "Teaching Faculty in Academe: 1972-1973," supra note 626; "Pace Seems Slow for Women and Minorities in Gaining Places in Nation's Faculties," Chronicle of Higher Education, Vol. 8, No. 3 (Oct. 9, 1973).

721. HED compliance reviews have found that women and minorities tend to be concentrated in certain departments, for example, departments of education. Interview with Herbert Tyson, Operations Chief, HED, OCR, Sept. 4, 1974. In 1974, the Joint Reporting Committee, which includes EEOC, OFCC, and HEW, published for comment Form EEO-6, which will require colleges and universities with 15 or more employees to file employment data according to salary categories, tenured and nontenured positions, and academic level (for example, deans, professors, and associate professors). 39 Fed. Reg. 16157 (May 7, 1974).

a listing of each job title, ranked according to salary or wage and  
 cross-tabulated by race, ethnicity, and sex. <sup>722</sup> According to OFCC  
 compliance review regulations, when HEW conducts a compliance review,  
 it must request a copy of this listing, as well as other information  
 required to be contained in an affirmative action plan, such as data  
 on recruitment, hiring, promotions, and terminations. <sup>723</sup> If a college  
 or university fails to submit the information within 30 days of the  
 request, HEW is directed to issue a show cause notice. <sup>724</sup> As will  
 be shown below, however, HEW has not, in reality, followed this  
 practice but has instead devoted a large amount of the Higher Education  
 Division's resources to protracted negotiations with colleges and  
 universities over compilation and submission of data. As a result, it has  
 not been able to review a significant number of the colleges and universities  
 subject to the Executive order or to obtain affirmative action plans which

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722. 41 C.F.R. § 60-2.11, 39 Fed. Reg. 25654 (July 12, 1974).

723. 41 C.F.R. §§ 60-60.2, 60-1.40, 60-60.9, 39 Fed. Reg. 25654  
 (July 12, 1974).

724. 41 C.F.R. § 60-60.2.

conform to the requirements of Revised Order No. 4.

## 2. Compliance Reviews

OFCC regulations require compliance agencies to conduct "preaward" reviews of all prospective contractors whose contracts will amount to \$1 million or more; postaward reviews are to be conducted of other contractors according to methods of priority selection approved by OFCC.<sup>725</sup> Criteria for selection include the size of the institution and the number of job opportunities for minorities and women.<sup>726</sup> Compliance reviews are to be conducted according to procedures set out in an OFCC regulation called Revised Order No. 14,<sup>727</sup> which requires that a compliance review be a comprehensive analysis and evaluation of a contractor's facilities to determine if it is abiding by the employment practices and affirmative action provisions required under the Executive orders. The compliance review should begin with an analysis of the written affirmative plan conducted off the premises of the contractor, to be followed by an onsite review for the purpose of verifying the information collected and obtaining additional data.

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725. 41 C.F.R. §§60-1.20(d); 1.6(b); 60-60.3(a).

726. See, The Federal Civil Rights Enforcement Effort--1974, Volume IV, supra note 527.

727. 41 C.F.R. §60-60, 39 Fed. Reg. 5631 (Feb. 14, 1974), 41 C.F.R. §60-60.9, 39 Fed. Reg. 25654 (July 12, 1974). Revised Order No. 14, which was first issued in January 1973 and subsequently modified in February and July 1974, is discussed more fully in Volume IV of The Federal Civil Rights Enforcement Effort--1974, supra note 527.

Upon a finding that a contractor does not have an acceptable affirmative action program, the compliance agency is required immediately to issue a notice to the contractor giving it 30 days to "show cause" why sanction proceedings should not be instituted.<sup>728</sup> If the contractor does not show good cause for its failure to develop a plan and does not develop and implement an acceptable program within 30 days of the show cause notice, the agency must immediately issue a notice of proposed cancellation or termination and debarment from future contracts. The agency is instructed to attempt conciliation with the contractor during that 30-day period. If a prospective contractor is found in noncompliance during a preaward review, the agency must declare it "nonresponsible," which means that the contracting agency may refuse to award it the contract.<sup>729</sup> Before a compliance agency may approve a contractor's affirmative action plan, it must send a report to OFCC, in the form of a coding sheet.<sup>730</sup> OFCC has 45 days in which to revoke approval of the plan.<sup>731</sup>

HED has, in large part, failed to follow the procedures required of compliance agencies under the Executive order regulations. For example, as of September 1974, it had not implemented the Revised Order No. 14 compliance

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728. 41 C.F.R. § 60-2.2(c). See also 41 C.F.R. § 60-60.7, 39 Fed. Reg. 5632 (Feb. 14, 1974).

729. 41 C.F.R. § 60-2.2(b).

730. 41 C.F.R. § 60.7, 39 Fed. Reg. 5632 (Feb. 14, 1974).

731. 41 C.F.R. §§ 60-1.26(b)(2)(iv); 60-2.2(a)(1).

review procedures concerning collection and analysis of information.<sup>732</sup>

Instead, HED intended to devote a portion of its resources in fiscal year 1975 to developing its own procedures for this phase of a compliance review.<sup>733</sup> HED has also failed to follow OFCC instructions concerning the selection of contractors for review.<sup>734</sup> The Division for years also ignored the OFCC requirement that preaward reviews be conducted of all prospective contractors bidding on contracts valued at \$1 million or more.<sup>735</sup> During fiscal year 1973, no such reviews were conducted.<sup>736</sup>

In August 1973, the Division adopted a policy of partial compliance with the requirement.<sup>737</sup> If there are outstanding complaints filed against a prospective contractor, HED's policy is to attempt to resolve them prior to giving preaward clearance. If these attempts do not lead to a resolution of the complaints within 30 days, HED advises the contracting agency that it is unable to certify whether the bidder is in compliance or

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732. Lepper interview (Aug. 13, 1974), supra note 548.

733. 1975 Annual Enforcement Plan, supra note 508.

734. Instead of selecting contractors according to the number of employees and opportunity for change, as OFCC requires, HED's reviews have been exclusively in response to complaints. Telephone interview with Herbert Tyson, Operations Chief, HED, Sept. 6, 1974. By the fall of 1974, OCR intends to implement a selection process based on the size of institutions, as well as the number of complaints. FY 1975 Annual Enforcement Plan, supra note 508.

735. In fact, HEW states that prior to the end of fiscal year 1972, it was impossible to conduct preaward reviews (except in very special cases) because of the serious staff shortage and a sizeable backlog of complaints in most regions. HEW response to Commission Questionnaire, June 18, 1973.

736. Id.

737. Interview with Dr. Mary Lepper, Director, Higher Education Division, OCR, Jan. 28, 1974.

not; in such a situation, the contracting agency has the option of  
 delaying or releasing the award.<sup>738</sup> HED's policy concerning preaward  
 clearance is to refrain from certifying that a prospective contractor  
 is in noncompliance unless there is extensive supporting evidence.<sup>739</sup>

The HED Director stated that HED interprets OFCC regulations as entitling  
 to a hearing those prospective contractors whose bids are passed over  
 because of a negative preaward certification.<sup>740</sup> Hence, HED is reluctant,  
 according to the Director, to report noncompliance in such a situation  
 without evidence sufficient to prove noncompliance by a preponderance of  
 the evidence in the context of a hearing.<sup>741</sup> HED's position on preaward  
 clearance is unwarranted in view of the fact that a contractor is not  
 entitled to a hearing in such circumstances unless there has been a previous  
 finding of nonresponsibility, in which case the agency must propose to debar,  
 the contractor-bidder from all future contracts.<sup>742</sup>

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738. Id. In one case involving the University of California at Berkeley,  
 the Department of the Army released a \$4.8 million contract because  
 OCR was not able to certify whether or not Berkeley was in compliance.

739. Id. HEW staff indicated that it is impossible for the agency to make  
 a valid determination of compliance within the 30-day time period required  
 in preaward reviews. Telephone interview with Edward Levy, Attorney, Office  
 of General Counsel, Nov. 20, 1974.

740. Id.

741. Id.

742. 41 C.F.R. §§ 60-2.2(b); 60-1.26.

HED has failed to follow required compliance review procedures in other respects as well. OFCC regulations require a compliance agency to issue a show cause notice immediately on a finding that a contractor has no affirmative action plan, or an unacceptable plan, or that it has deviated substantially from a previously accepted plan.<sup>743</sup> However, HED's compliance process interjects a lengthy procedure--sometimes taking several years--between the time a contractor is found not to have an acceptable affirmative action plan and the time a show cause notice may be issued.<sup>744</sup> Within 30 days of an onsite review, HED's policy is to send a formal letter to the contractor evaluating its compliance status and indicating what steps must be taken to correct any deficiencies.<sup>745</sup> Within 30 days of receipt of this "compliance letter," or "letter of findings," the contractor must respond, indicating any disagreement with the findings and what steps it has taken or plans to take to comply with HED's instructions.<sup>746</sup> If the contractor's response is deemed adequate, the HED regional office notifies the institution of tentative acceptance and forwards a recommendation

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743. 41 C.F.R. § 60-2.2(c). The agency may undertake an "exit conference" with the contractor upon the completion of the review to itemize the deficiencies uncovered and to secure agreement from the contractor to take specific actions. 41 C.F.R. § 60-60.6(a), 39 Fed. Reg. 5632 (Feb. 14, 1974).

744. Higher Education Guidelines, supra note 616.

745. Id. In reality, however, HED frequently fails to send this letter within 30 days of the compliance review. See pp. 281-306 infra.

746. Id. It should be noted that OFCC regulations provide that contractors should comply with a compliance agency's instructions, even if believed to be erroneous, and then request a hearing to appeal the order. 41 C.F.R. § 60-1.24(c)(4).

to the Washington office for final acceptance. If the contractor takes exception to the letter of findings, negotiations may ensue. If a resolution cannot be obtained within 30 days, the case is to be forwarded to the Washington office.<sup>747</sup> Frequently, the contractor is asked to submit a second affirmative action plan, on which HED issues a second letter of findings. As will be illustrated below, HED has permitted contractors to submit numerous versions of affirmative action plans, over period of several years, without ever issuing a show cause notice.

While the higher education guidelines provide that a show cause notice may be included in a letter of findings, in reality, this is almost never done. Since 1971, HED has issued a show cause notice in only one instance,<sup>748</sup>

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747. Higher Education Guidelines, supra note 616.

748. Show cause notices were issued to Columbia University in 1971 and to the University of Washington in 1974.



and that issuance was only after two intensive compliance reviews<sup>749</sup> and protracted negotiations. This Commission reviewed the compliance files in OCR headquarters concerning four campuses, the University of California at Berkeley, the University of Washington, the University of Michigan, and Harvard University. This review found a pattern of inadequate compliance reviews, inordinate delays, and inexcusable failures to take enforcement action where there were clear violations of the Executive order regulations. To illustrate this pattern, a summary of the case histories of the compliance contacts with these campuses follows.

a. University of California at Berkeley

In March 1974, OCR announced the signing of a conciliation agreement with the University of California at Berkeley, which according to HED staff is now being used as a model for compliance activities with other campuses.<sup>750</sup> HED files indicate that the first compliance review of Berkeley campus took place on June 11, 1970, shortly after the filing of a sex discrimination complaint by the Women's Equity Action League (WEAL).<sup>751</sup> There

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749. For a discussion of the compliance reviews and negotiations concerning the affirmative action plan of the University of Washington, see p. 289 infra.

750. Agreement between The Regents of the University of California, on behalf of the University of California, Berkeley, and the Department of Health, Education, and Welfare, Office for Civil Rights, Mar. 7, 1974 [hereinafter cited as Berkeley Agreement]. The agreement, which is discussed more fully on pp. 286-89 infra, provided that the university compile certain information in order to develop an affirmative action plan. It is being used as a model plan for purposes of obtaining information from other campuses. Telephone interview with Mr. Herbert Tyson, Operations Chief, HED, OCR, Sept. 6, 1974.

751. The WEAL complaint was filed on June 1, 1970, and alleged sex discrimination in faculty appointments. The OCR file on Berkeley indicates that a compliance review was conducted on June 11, 1970, but it does not contain a report on the compliance review or its findings.

is no indication in the files, however, that the WEAL complaint was investigated during the review. By late 1970, several more sex discrimination complaints had been filed.<sup>752</sup> In April 1971, a class action sex discrimination complaint was filed by local women's rights organizations, and HEW was urged by these groups to make the Berkeley case a priority.<sup>753</sup> In May 1971, OCR finally notified the university of these complaints and indicated it intended to conduct a compliance review.<sup>754</sup> On June 4, 1971, OCR requested certain information in order to begin the review. The university refused to permit OCR access to its personnel files, the review of which OCR insisted was necessary to investigate the complaints.<sup>755</sup> The university would provide OCR only with faculty resumes which had been prepared by campus officials in conjunction with the compliance review. In addition, Berkeley refused to permit OCR to interview faculty members without the presence of a university administration official.<sup>756</sup> The university's position

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752. Memorandum to files from Joseph W. Wiley, Chief, Contract Compliance Field Coordinator, OCR, Nov. 19, 1970.

753. Letter from Shirley J. Zimmerman, on behalf of League of Academic Women, National Organization for Women, and Women's Caucus of the Political Science Department, to Frank Albert, Director of Contract Compliance, OCR, Apr. 29, 1971.

754. Letter from Floyd L. Pierce, Regional Civil Rights Director, OCR, Region IX, to Robert L. Johnson, Vice President, Administration, University of California, Berkeley, May 11, 1971.

755. Memorandum to files from Floyd L. Pierce, OCR, San Francisco Regional Office, Jan. 4, 1972.

756. Id.

was a direct violation of the Executive order's equal opportunity clause, by which Berkeley had contracted to "permit access to its books, records, and accounts...." to the compliance agency.<sup>757</sup> Despite Berkeley's failure to comply with the mandates of the Executive order and its own contractual commitments, OCR initiated no enforcement action. Instead, OCR staff conducted protracted negotiations with the university until November 1971 when the matter was referred to the Washington office with a recommendation that enforcement proceedings be initiated.<sup>758</sup> In December 1971, after Berkeley officials met with the OCR Director in Washington, the parties agreed to a memorandum of understanding concerning the conduct of the review.<sup>759</sup>

In the meantime, another class action complaint had been filed against Berkeley, alleging discrimination against Spanish-surnamed' Americans.<sup>760</sup>

In addition, Berkeley's affirmative action plan, which was submitted to OCR in 1971, had identified serious underutilization of both minorities and women.<sup>761</sup>

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757. C.F.R. § 60-1.4(a)(5).

758. Letter from Floyd L. Pierce, Regional Civil Rights Director, OCR, to Dr. Albert Bowker, Chancellor, University of California, Berkeley, Nov. 18, 1971.

759. Pierce Memorandum (Jan. 4, 1972), supra note 755. A copy of the December memorandum of understanding was not in HED's files in Washington.

760. Complaint by the Chicano Mesa Directiva and American Federation of Teachers, June 15, 1971.

761. Memorandum from Pamela O'Shaughnessy, Contract Compliance Specialist, OCR, to David Lasky, Senior Contract Compliance Specialist, OCR, July 23, 1971.

In the spring of 1972, OCR conducted an extensive compliance review of the Berkeley campus. It was not until the following November, however, that a letter of findings was issued.<sup>762</sup> This letter documented, in more than 100 pages, compelling evidence that there was pervasive discrimination against women and minorities in academic and nonacademic positions.<sup>763</sup> The university was instructed to develop a written affirmative action plan to correct the deficiencies set forth in the report, including the establishment of goals and timetables for jobs where underutilization had been identified.<sup>764</sup>

In response, the university submitted a draft affirmative action plan on January 15, 1973, which was totally unacceptable.<sup>765</sup> Throughout 1973,

762. Letter from Floyd L. Pierce, Regional Civil Rights Director, OCR, to Dr. Albert Bowker, Chancellor, University of California, Berkeley, Nov. 27, 1972.

763. Id. This report found that less than 4 percent of the top teaching positions (full, associate, and assistant professor) were held by women, and less than 5 percent by minorities. Less than 0.1 percent of these positions were held by Spanish surnamed Americans, despite their concentration in the work force area. The percentage of women in these jobs had fallen from 9.3 percent in 1939 to 3.8 percent in 1972. Id. The report included voluminous documentation of disparate treatment of women and minorities but largely failed to address the more complex problem of neutral practices (for example, selection standards such as the Ph.D. requirement) having an adverse or disparate effect on protected groups.

764. Id.

765. Letter from Albert H. Bowker, Chancellor, University of California, Berkeley, to Floyd L. Pierce, Regional Civil Rights Director, OCR, Jan. 15, 1973. This letter did not purport to respond to the November letter of findings but merely set forth the university's policy of nondiscrimination and paraphrased sections of Revised Order No. 4 concerning affirmative action.

Berkeley received extensive technical assistance from OCR and repeatedly submitted revisions in its affirmative action plan which failed to address the deficiencies identified in the November 1972 findings. <sup>766</sup>

Finally, in November 1973, OCR wrote to Berkeley that the vast amount of technical assistance the university had received, its total failure to submit adequate analyses, and the complete omission of required segments in its affirmative action plan--such as goals and reasonable timetables--indicated a serious question about the university's commitment to comply with the Executive order. <sup>767</sup> Berkeley was instructed to develop another affirmative action plan within 30 days and was informed that in the interim OCR would delay certification of its eligibility to receive Federal contracts. <sup>768</sup>

Thus, despite the fact that clear evidence of Executive order violations had existed since June 1971, Berkeley's status as a Government contractor was not even remotely jeopardized until November 1973. <sup>769</sup>

The university submitted another unacceptable plan in December 1973. After a series of meetings in January 1974, Berkeley submitted in February a plan to develop an affirmative action plan, which was eventually adopted

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<sup>766</sup>. Letter from Floyd Pierce to Albert Bowker, July 26, 1973. Letter from Albert Bowker to Floyd Pierce, Aug. 2, 1973; Information memorandum from Peter E. Holmes, Director, OCR, to Casper Weinberger, Secretary, HEW, Aug. 13, 1973.

<sup>767</sup>. Letter from Floyd Pierce to Albert Bowker, Nov. 16, 1973.

<sup>768</sup>. Id.

<sup>769</sup>. HEW's contacts with Berkeley between 1972 and March 1974 were summarized in a memorandum from Theodore A. Miles, Assistant General Counsel for Civil Rights, to John B. Rhineland, General Counsel, HEW, Mar. 1, 1974.

in a conciliation agreement reached on March 7, 1974.<sup>770</sup> By the terms of the agreement, OCR affirmed Berkeley's eligibility for awards of Government contracts and waived its authority to impose any sanctions so long as the university abided by the agreement. Berkeley agreed to develop by September 30, 1974, an affirmative action plan responsive to the OCR letter of findings issued in November 1972 and consistent with the Executive order.

This conciliation agreement purported to outline the steps the university agreed to take in compiling data and conducting analyses of its work force, salaries, and recruitment, promotion, and selection procedures. However, the document suffered from such extreme vagueness that, as of August 1974, the university and OCR were in substantial disagreement on the meaning of a number of its provisions.<sup>771</sup> In addition, the agreement specifically violated OFCC regulations in a number of ways. For example, the university was permitted, by the agreement, to conduct a utilization analysis based on related groups of jobs, instead of by job

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770. Berkeley Agreement, supra note 750.

771. See p. 288 infra. HEW staff took the position that subsequent problems were not so much due to any vagueness in the agreement as they were to the university's erroneous interpretation of the document. Levy interview, supra note 739.

772 titles. In calculating the availability of minorities, Berkeley was allowed to use data only on those minorities currently employed in the relevant occupations. <sup>773</sup> OFCC considers these type of data to be only one of numerous factors to be considered in determining availability. 774

Further, the university made no commitment to develop goals and timetables for each job title in which underutilization was identified. Nor did it agree to develop annual hiring and promotion objectives, as is required by OFCC. <sup>775</sup> Finally, the university did not agree to develop goals and timetables where underutilization exists, as Revised Order No. 4 requires,

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772. Berkeley Agreement, supra note 750. This could mean that the university will be permitted to group all teaching staff across departments, despite OCR's finding in 1972 that women and minorities were excluded from teaching jobs in certain departments and from the higher-level teaching positions in other departments. Almost a month before the conciliation agreement, OFCC had issued a revision in Revised Order No. 4 clarifying the required elements of a work force analysis. The revision specified that the listing was not to group jobs. 39 Fed. Reg. 5630 (Feb. 14, 1974). In July 1974, OFCC further revised the regulation to require specifically a listing by job title. 39 Fed. Reg. 25654 (July 12, 1974). Nevertheless, HEW failed to require Berkeley to comply with the regulation in its plan submitted on September 30, 1974.

773. Berkeley Agreement, supra note 750, at 6-9.

774. Id. 41 C.F.R. § 60-2.11. OFCC Technical Guidance Memo on Revised Order No. 4, supra note 610. Other factors to be considered include the percentage of minorities and women in the work force as a whole and the number who could be qualified for the job through training. Availability of women under the Berkeley agreement was to be determined according to data on the number of women holding Ph.D.'s. As noted on p. 288 infra the agreement violates Executive order regulations because it does not require the university to validate any advanced degree requirements. OFCC guidelines clearly prohibit the use of unvalidated skill requirements, such as the Ph.D., which constrict the pool of available applicants. The Berkeley agreement provides for such a constriction by permitting the university to narrow the scope of available women to those with Ph.D.'s and to narrow even more severely the scope of available minorities to those currently holding academic positions.

775. OFCC Technical Guidance Memo or Revised Order No. 4, supra note 610. 41 C.F.R. § 60-60.9 (X).

but only where "statistically significant" underutilization appears. <sup>776</sup>

As of August 1974, OCR and the university had not agreed on which test for statistical significance would be used.

Another fundamental flaw in the agreement was the total omission of any requirement for data analysis over time. For example, the university agreed to analyze selection of applicants for staff appointments only from July to September 1974. OFCC regulations require such data analysis to be on an annual basis. <sup>777</sup> Further, there is no provision for analysis of salary data by job title, as is required by Revised Order No. 4. <sup>778</sup>

Even more fundamentally erroneous is the agreement's complete failure to address the university's responsibility to comply with OFCC guidelines on employee selection. The agreement implicitly gives approval to the use of advanced academic degrees as the threshold standard for selecting faculty, <sup>779</sup> but there is no indication that the university has begun validating the standard, as is required by OFCC guidelines <sup>780</sup>

Finally, the agreement includes no specific commitment to identify affected class members or to develop appropriate affected class relief. This is particularly outrageous in light of the large numbers of individuals whom

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776. Berkeley Agreement, supra note 750. Revised Order No. 4 requires that goals be set wherever there is a deficiency, regardless of whether it is statistically significant. 41 C.F.R. § 60-2.11.

777. 41 C.F.R. § 60-60.9, Part A (III), (IV), and (V).

778. 41 C.F.R. § 60-2.2.

779. See notes 773-774 supra.

780. 41 C.F.R. § 60-3.



the OCR letter of findings in 1972 identified as victims of discrimination. Further, there is no provision for resolving the numerous complaints which have been filed against Berkeley since 1970. <sup>781</sup>

b. University of Washington

The University of Washington was first reviewed in December 1969, after the filing of a sex discrimination complaint the preceding August. <sup>782</sup> OCR sent a letter of findings on December 24, 1969, which outlined certain steps the university should take. <sup>783</sup> The university's response of January 2, 1970, <sup>784</sup> was considered acceptable by OCR. The OCR compliance review, however, had not studied the status of women on the campus.

781. This omission was extremely irresponsible in light of the fact that, on the basis of representations made by Berkeley and OCR, a Federal district judge, for more than 2 years, had delayed the proceedings of a lawsuit filed against Berkeley by the League of Academic Women, on the grounds that the litigation would be mooted by OCR's resolution of the league's class action complaint. Telephone interview with Ms. Jo Ann Chandler, counsel for the League of Academic Women, Public Advocates, Inc., San Francisco, Sept. 6, 1974. The league filed a class action complaint with HEW in April 1971 and subsequently filed suit under 42 U.S.C. §§ 1981 (Equal Rights Under the Law) and 1983 (Civil Action for Deprivation of Rights) on February 15, 1972. As of September 1974, the case had still not been tried. Id.

782. Complaint by Ms. Trudy Lechner, Aug. 20, 1969.

783. Letter from Frank R. Albert, Jr., Chief, Contract Compliance Branch, OCR, to Charles E. Odegaard, President, University of Washington, Dec. 24, 1969.

784. Letter from Charles E. Odegaard, President, University of Washington, to Frank R. Albert, Jr., Chief, Contract Compliance Branch, OCR, Jan. 2, 1970.

In the meantime, in September 1970, a complaint was filed alleging discrimination against Spanish surnamed Americans;<sup>785</sup> and in November 1970, a class action sex discrimination complaint was filed with OFCC.<sup>786</sup> As a result, OFCC conducted its own compliance review of the university in the spring of 1971.<sup>787</sup> The following October, OFCC reported its findings to OCR and recommended that the university be required to develop an affirmative action plan according to Revised Order No. 4, including goals and timetables.<sup>788</sup> On November 30, 1971, the university --not having heard from either OFCC or OCR--submitted an updated report based on its earlier understanding with OCR reached in January 1970.<sup>789</sup>

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785. Complaint by Samuel C. Acquino, Sept. 3, 1970.

786. Letter from Associated Students of the University of Washington Women's Commission, to James G. Hodgson, Secretary of Labor, Nov. 10, 1970.

787. Letter from Joseph W. Wiley, Chief, Contract Compliance Field Coordination, to Charles E. Odegaard, President, University of Washington, OCR, Feb. 2, 1971.

788. Letter from John L. Wilks, Director, OFCC, to Owen P. Kiely, Director, Contract Compliance Division, OCR, Oct. 29, 1971.

789. Letter from Carver C. Gayton, Assistant to the Executive Vice President, University of Washington, to Marlaina Kiner, Regional Director, OCR, Nov. 30, 1971.

In response to inquiries from Congress and complainants, OCR throughout 1972 indicated that it was still reviewing the OFCC compliance review report.<sup>790</sup> Finally, in January 1973, OCR issued a letter of findings to the university based on the OFCC compliance review conducted in 1971.<sup>791</sup> In February 1973, the university submitted a revised affirmative action plan, which contained no utilization analysis and no goals and timetables.<sup>792</sup> In June 1973, OCR informed the university that it was required to comply with Revised Order No. 4 and that OCR would conduct a compliance review in July, following the submission of certain data.<sup>793</sup> The compliance review was conducted from July 30 to September 6, 1973.<sup>794</sup> On September 28, OCR regional staff recommended to the OCR Director

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790. Letter from Jane Delgado, Contract Compliance Specialist, OCR, to Marianne Rice, Sociology Women's Caucus, University of Washington, Jan. 3, 1972; letter from J. Stanley Pottinger, Director, OCR, to Warren G. Magnuson, U.S. Senator, June 29, 1972.

791. Memorandum from Larry Omo, Acting Chief, Higher Education Branch, Region X, to Peter Holmes, Director, OCR, "Case Summary: University of Washington," Sept. 28, 1973 /hereinafter cited as Case Summary/.

792. University of Washington Affirmative Action Plan, Feb. 20, 1973.

793. Letter from Marlaina Kiner, Regional Civil Rights Director, Region X, to Charles E. Odegaard, President, University of Washington, June 15, 1973.

794. Case Summary, supra note 791.

that a show cause notice be issued to the university in light of its failure to comply with Revised Order No. 4.<sup>795</sup> Instead, OCR issued a letter of findings in December, which listed a number of deficiencies in the university's affirmative action plan.<sup>796</sup> Deficiencies included the failure to develop a utilization analysis or goals and timetables, noncompliance with the OFCC sex discrimination guidelines, and inadequate internal audit and reporting systems.<sup>797</sup> While a show cause notice was not issued at this time, OCR did recommend to contracting agencies that contract awards to the university be delayed pending the submission of a revised affirmative action plan.<sup>798</sup> The university submitted another plan on January 25, 1974, which was rejected in a show cause notice issued on March 29, 1974.<sup>799</sup> In the interim, on February 22, the university had been awarded over \$1.4 million in contracts by the Public Health Service of HEW, the National Science Foundation, the National Aeronautics and Space Administration, and the U.S. Naval Ordnance.<sup>800</sup>

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795. Memorandum from Marlaina Kiner, Regional Civil Rights Director, Region X, to Peter Holmes, Director, OCR, Sept. 28, 1973.

796. Memorandum from Peter E. Holmes, Director, OCR, to Casper Weinberger, Secretary, HEW, Dec. 11, 1973.

797. Id.

798. Memorandum from Marlaina Kiner, Director, OCR, Region X, to Dr. Mary M. Lepper, Director, HED, OCR, Dec. 21, 1973.

799. Letter from Marlaina Kiner, Director, OCR, Region X, to Dr. Philip W. Cartwright, Acting President, University of Washington, Mar. 29, 1974.

800. Memorandum from Dr. Mary M. Lepper, Director, HED, to Martin H. Gerry, Acting Director, OCR, Feb. 25, 1974. Each of these contracts had a value of under \$1 million and thus was not subject to the preaward review requirement of OFCC.

After a series of meetings during April, the university submitted a proposed conciliation agreement on April 29, 1974,<sup>801</sup> which was slightly revised and accepted by OCR on May 20, 1974.<sup>802</sup> The conciliation agreement with the University of Washington provided that OCR would reinstate the university's eligibility for contract awards in exchange for a commitment from the university to develop an acceptable affirmative action plan by September 30, 1974. Like the arrangement with the University of California, Berkeley, the Washington agreement suffers from fundamental deficiencies of vague language<sup>803</sup> and noncompliance with OFCC regulations.<sup>804</sup>

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801. Letter from John R. Hogness, President, University of Washington, to Bernard Kelly, Director, HEW, Region X, May 20, 1974.

802. Letter from John R. Hogness, President, University of Washington, to Marlaina Kiner, Director, OCR, Region X, May 20, 1974.

803. For example, the terms "disparate effect" and "disparate impact" are used in numerous instances in completely different contexts; yet there is no definition of the meanings of the terms. Id.

804. For example, the agreement permits the university to treat in its work force analysis most academic employees in one category. Availability will be determined by the number of minorities and women currently holding Ph.D.'s or a master's degree, where "appropriate." Id. Underutilization is defined as less than 90 percent of the proportion of women and minorities in the availability pool. Goals will be set for groups of departments, rather than by individual departments. There is no provision for the setting of annual hiring and promotion objectives. Nor is there any commitment from the university to commence studies to validate selection standards for academic positions. The agreement excludes from the affirmative action analysis all part-time faculty employees, a large percentage of whom at most campuses are women. Finally, there is no provision concerning identification of remedies for an affected class. Id.

c. University of Michigan

OCR's first contacts with the University of Michigan occurred in 1969, when the university medical school and hospital were reviewed and found not to be in compliance with the Executive order.<sup>805</sup> The university was directed to develop a table of job classifications and goals and timetables for minorities, but there is no indication in OCR's files that the university ever complied with this instruction.<sup>806</sup> The compliance contact initiated by OCR during 1969 did not include consideration of the status of women.

In May 1970, a class action sex discrimination complaint was filed by a campus organization,<sup>807</sup> and 2 months later OCR headquarters ordered the regional office to conduct a compliance review.<sup>808</sup> The review was completed by August 1970, and a letter was issued to the university in October, which found extreme underutilization of women in academic positions due to discriminatory hiring practices, salary inequities between women and

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805. Letter from Clifford E. Minton, Contract Compliance Officer, OCR, Region V, to R.W. Fleming, President, University of Michigan, July 3, 1969.

806. Id. Letter from Clifford E. Minton, Contract Compliance Officer, OCR, Region V, to R.W. Fleming, President, University of Michigan, Aug. 11, 1969; and letter from Federick T. Cioffi, Acting Regional Civil Rights Director, OCR Region V, to R.W. Fleming, President, University of Michigan, Oct. 15, 1969.

807. Letter from Jean L. King and Mary N. Yourd, Focus on Equal Employment for Women, to George P. Shultz, Secretary of Labor, May 27, 1970.

808. Memorandum from Joseph W. Wiley, Acting Chief, Field Coordination Branch, Contract Compliance Division, OCR, to Clifford E. Minton, Contract Compliance Branch, Chief, OCR, Region V, July 31, 1970.

men, and severe sex segregation in nonacademic jobs.<sup>809</sup> The university was instructed to make adjustments in salaries, to award back wages to those women whose wages had been discriminatorily low, and to set goals and timetables for achieving a level of female employment equivalent to the availability of women for the positions. In addition, the university was directed to develop an affirmative action plan responsive to the letter of findings within 30 days.<sup>810</sup>

The university's response indicated serious disagreement with the findings and an inability to meet the 30-day deadline.<sup>811</sup> OCR subsequently withheld clearance of contract awards to Michigan from October to December 1970, when an agreement was reached after a meeting between university officials and the Director of OCR.<sup>812</sup> OCR agreed to reinstate the university's eligibility in exchange for a commitment to develop adequate goals and timetables for women in faculty positions. The agreement also provided that the university would review its files to identify salary inequities and would establish a complaint procedure for women who thought their salaries were

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809. Letter from Don. F. Scott, Civil Rights Specialist, OCR, Region V, to R.W. Fleming, President, University of Michigan, Oct. 6, 1970.

810. Id.

811. Letter from R.W. Fleming, President, University of Michigan, to Don F. Scott, Civil Rights Specialist, OCR, Region V, Oct. 7, 1970.

812. Letter from Don F. Scott, Civil Rights Specialist, OCR, Region V, to R.W. Fleming, President, University of Michigan, Oct. 22, 1970; and letters from J. Stanley Pottinger, Director, OCR, to R.W. Fleming, President, University of Michigan, Dec. 16 and Dec. 24, 1970.

inequitable. <sup>813</sup> Eventually, in October 1972, OCR determined that the complaint procedures implemented by the university were in violation of the agreement because they placed the burden of proof on complainants to show that the salary inequity was due to discrimination and because complainants were not permitted access to necessary information or given the right to a hearing before a disinterested party. <sup>814</sup> When OCR instructed the university to revise the procedures, Michigan responded by suggesting that the OCR instruction be rescinded. <sup>815</sup> Subsequent meetings between OCR and University of Michigan officials did not lead to resolution of the matter. <sup>816</sup>

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813. Pottinger letter (Dec. 24, 1970), supra note 812 .

814. Letter from Kenneth A. Mines, Regional Civil Rights Director, Region V OCR, to R.W. Fleming, President, University of Michigan, Oct. 27, 1972.

815. Letter from R.W. Fleming, President, University of Michigan, to Kenneth A. Mines, Regional Civil Rights Director, Region V OCR, Nov. 3, 1972.

816. Letter from Kenneth A. Mines, Regional Civil Rights Director, Region V OCR, to R.W. Fleming, President, University of Michigan, Jan. 22, 1973; letter from Allan F. Smith, Vice President for Academic Affairs, University of Michigan, to Odessa Fellows, Acting Chief, Higher Education Branch, OCR, Region V, Feb. 14, 1973. In May 1973, OCR wrote to one of the complainants that while it had found the procedures to be unfair, it had not found the unfairness to discriminate on the basis of sex, and, therefore, it was "powerless" to require the university to revise the procedures. Letter from Odessa L. Fellows, Acting Chief, Higher Education Branch, Region V OCR, to Jean L. King, May 23, 1973. Since OCR was required by OFCC regulations to investigate and resolve complaints, and since the university's procedures were established to resolve these complaints, OCR clearly had authority to correct the situation. Its failure to do so appears to have been a violation of OFCC regulations. Ultimately, the university phased out the procedures in January 1974. Telephone interview with Bernard Rogers, Equal Opportunity Specialist, Region V, OCR, Sept. 3, 1974. .



In the meantime, the goals and timetables submitted by the university  
in March 1971<sup>817</sup> had been found by OCR to be inadequate because they were  
not developed according to academic departments.<sup>818</sup> When the university  
was ordered to correct this deficiency, it refused to do so.<sup>819</sup> OCR took  
no further action for 2 years, until May 1973, when it issued a second  
letter of findings, again instructing Michigan to develop a utilization  
analysis and goals and timetables by academic departments.<sup>820</sup> The  
university submitted another revised affirmative action plan in July 1973,<sup>821</sup>  
but, as of September 1974, OCR had not issued a letter of findings approving  
or disapproving the plan.<sup>822</sup>

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817. Letter from R.W. Fleming, President, University of Michigan, to  
Don F. Scott, Civil Rights Specialist, OCR Region V. Mar. 8, 1971.

818. Letter from Don F. Scott, Civil Rights Specialist, OCR, Region V,  
to R.W. Fleming, President, University of Michigan, May 17, 1971.

819. Letter from R.W. Fleming, President University of Michigan, to Lucille  
Mathews, Deputy Regional Civil Rights Director, OCR, Region V, June 11, 1971.

820. Letter from Kenneth A. Mines, Regional Civil Rights Director, Region V,  
to R.W. Flemming, President, University of Michigan, May 4, 1973.

821. Letter from R.W. Fleming, President, University of Michigan, to Kenneth A.  
Mines, Regional Civil Rights Director, OCR, Region V, July 27, 1973.

822. Rogers interview, supra note 816. Testimony of Peter E. Holmes,  
Director, OCR, before the Subcommittee on Fiscal Policy, Joint Economic  
Committee, Sept. 12, 1974.

d. Harvard University

The first compliance contact with Harvard University occurred in February 1970 when OCR attempted to conduct a preaward review and found that the university did not have an affirmative action plan.<sup>823</sup> Harvard was informed that OCR would withhold clearance of two proposed contracts<sup>824</sup> until an acceptable affirmative action plan had been submitted. A draft affirmative action plan submitted on March 2, 1970, was found to be unacceptable; nevertheless, on March 6, clearance was given simply on the basis of a commitment from Harvard to develop a new plan.<sup>825</sup> The scheduled onsite compliance review was delayed for several months because Harvard refused OCR access to files showing salary data.<sup>826</sup> In the meantime, a class action complaint was filed alleging sex discrimination in faculty appointments.<sup>827</sup>

In late September, OCR issued a letter of findings, which outlined evidence of severe underrepresentation of women and minorities in faculty and non-faculty positions.<sup>828</sup> In November, Harvard submitted a revised affirmative action plan, which OCR rejected because it contained no utilization analysis

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823. Letter from Owen P. Kiely, Director, Contract Compliance Division, OCR, to Dr. Nathan M. Pusey, President, Harvard University, Feb. 2, 1970.

824. Id.

825. Letter from Owen P. Kiely, Director, Contract Compliance Division, OCR, to Dr. Nathan M. Pusey, President, Harvard University, Apr. 13, 1970.

826. Id.

827. Letter from Lynda G. Christian, Eastern Massachusetts NOW, to Robert Finch, Secretary, HEW, Mar. 25, 1970.

828. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR, to Dr. Nathan M. Pusey, President, Harvard University, Sept. 28, 1970. A month later, the Women's Equity Action League wrote to the Secretary of HEW alleging that the compliance review had ignored the problem of sex discrimination and requested that a new review be instigated. Letter from Bernice Sandler, Women's Equity Action League, to Elliot Richardson, Secretary, HEW, Oct. 28, 1970.

and inadequate goals and timetables.<sup>829</sup> In December 1970, OCR issued a special letter finding strong evidence of sex discrimination on the campus and requesting a revised affirmative action plan.<sup>830</sup>

In February 1971, Harvard submitted a revised affirmative action plan which did not include a utilization analysis according to OFCC regulations and which contained no goals and timetables for improving the status of women and minorities in academic positions.<sup>831</sup> Nevertheless, OCR approved the revised plan 6 days after having received it.<sup>832</sup> In October 1971, OCR revoked its approval on the grounds that the plan was no longer valid because of an employee reclassification program at Harvard which had resulted in significant decreases in the numbers of minorities and women classified in professional positions.<sup>833</sup> In April 1972, Harvard submitted a revised affirmative action plan, which failed to include an acceptable work force analysis, goals and timetables for teaching positions, and a review

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829. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR, to Dr. Nathan M. Pusey, President, Harvard University, Nov. 20, 1970.

830. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR, to Dr. Nathan M. Pusey, President, Harvard University, Dec. 31, 1970.

831. Affirmative Action Program, Harvard University, Feb. 5, 1971, submitted by Edward Wright, Jr., Assistant to the President for Minority Affairs, Office of Minority Affairs, Harvard University. This plan did not include a listing of employees cross-tabulated by race, ethnicity, sex and job classification, as required by 41 C.F.R. § 60-1.40; nor did it include goals and timetables for women and minorities in academic positions.

832. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR, to Dr. Nathan M. Pusey, President, Harvard University, Feb. 11, 1971.

833. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR, to Derek Bok, President, Harvard University, Oct. 8, 1971.

of salaries.<sup>834</sup> Five months later, OCR rejected the plan;<sup>835</sup> and  
 8 months later, in May 1973, another revised plan was submitted  
 which did not correct any of the previous deficiencies.<sup>836</sup> This plan  
 was rejected in June 1973,<sup>837</sup> and another revised plan was submitted  
 in July, which was eventually accepted, with 13 qualifications, in  
 November 1973.<sup>838</sup>

Harvard was, thus, given compliance status although OCR recognized that  
 the university's plan did not conform with Executive order requirements. The  
 major items which OCR identified as missing from the Harvard affirmative  
 action plan were a review of salaries for inequities, an identification  
 of selection standards, and an analysis of promotions, new hires, tenure  
 acquisitions, and terminations for each category of employees.<sup>839</sup> Other

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834. "Goals, Targets, Timetables and Procedural Safeguards," Harvard  
 University, submitted by Walter J. Leonard, Special Assistant to the  
 President, Harvard University, Apr. 7, 1972.

835. Letter from Robert R. Randolph, Chief Contract Compliance Branch, OCR,  
 to Walter J. Leonard, Special Assistant to the President, Harvard University,  
 Sept. 13, 1972.

836. Letter from Derek C. Bok, President, Harvard University, to John G. Bynoe,  
 Regional Civil Rights Director, OCR, May 1, 1973.

837. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR,  
 to Derek C. Bok, President, Harvard University, June 13, 1973.

838. Letter from John G. Bynoe, Regional Civil Rights Director, Region I OCR,  
 to Derek C. Bok, President, Harvard University, Nov. 12, 1973.

839. Id.

major deficiencies in the plan, which OCR neglected to specify, were the university's failure to develop goals for eliminating underutilization or to identify any affected class members as well as to provide appropriate relief. Each of these omissions was in violation of Revised Order No. 4 and was, therefore, grounds for the issuance of a show cause notice.

As a result of HED's lengthy compliance process, the Division has been unable to review a significant portion of the campuses within its jurisdiction. During fiscal year 1974, HED conducted offsite reviews of the affirmative action plans of 126 campuses, or approximately 13 percent of the total number under its jurisdiction.<sup>840</sup> Many of these reviews, however, were not followed by an onsite review. Only 60 campuses, or 6 percent, were reviewed onsite.<sup>841</sup> At this rate, campuses are likely to be subject to complete reviews once every 17 years.

As of September 1, 1974, HED had approved 20 affirmative action plans, 8 of which were approved in fiscal year 1973,<sup>842</sup> 11 in fiscal year 1974,<sup>843</sup>

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840. HED, "OPS Objective Accomplishments At the End of FY-74," July 15, 1974. HED estimates that there are 972 campuses under its jurisdiction. See note 518 supra.

841. Id.

842. Campuses with affirmative action plans approved in fiscal year 1973 were as follows: Oklahoma Liberal Arts College (June 14, 1973); University of Texas, El Paso (June 15, 1973); Central Seattle Community College (Sept. 29, 1972); Idaho State University (Apr. 26, 1973); North Seattle Community College (Sept. 29, 1972); Oregon State University (June 19, 1973); Portland State University (Mar. 22, 1973); South Seattle Community College (Sept. 29, 1972). Id. "Affirmative Action Plan (sic) Accepted From September 29, 1972 Through May 20, 1974," HED (undated); Lepper interview (Aug. 13, 1974) supra note 548.

843. Campuses with affirmative action plans approved in fiscal year 1974 were as follows: Massachusetts Institute of Technology (July 20, 1973); Harvard University (Nov. 12, 1973); Einstein College of Medicine (Jan. 30, 1974); Florida State University (July 31, 1974); John Carroll University (Jan. 28, 1974); East Texas State University (July 30, 1973); McNeese State University (Sept. 6, 1973); Southern Methodist University (Aug. 6, 1973); University of Texas, Austin (July 6, 1973); University of Oregon (Oct. 1973); University of Washington (May 20, 1974). Id.

and 1 in July 1974. <sup>844</sup> Seven of the 20 approved plans, however, had been given only "interim acceptance" <sup>845</sup> because HED did not require these campuses to comply with Revised Order No. 4. <sup>846</sup> In addition, most of the plans were approved on the condition that the college or university implement certain changes specified in the final letter of findings. HED does not regularly verify that these institutions have, in fact, met the specified conditions. <sup>847</sup>

Thus, as of August 1974, HED had found in compliance 13 campuses, or

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844. The affirmative action plan of the University of Pennsylvania was approved in July 1974. Lepper interview (Aug. 13, 1974), supra note 548.

845. HED "Affirmative Action Plan (sic) Accepted From September 29, 1972 Through May 20, 1974," supra note 842.

846. Campuses whose plans had received only interim acceptance were the following: Central Seattle Community College; Idaho State University; North Seattle Community College; Oregon State University; Portland State University; South Seattle Community College; University of Oregon. Revised Order No. 4 became applicable to these public universities in January 1973; nevertheless, three of these plans which did not conform with Revised Order No. 4 were given interim acceptance after that date. These were Idaho State University (Apr. 26, 1973); Oregon State University (June 19, 1973); and Portland State University (Mar. 22, 1973). Id.

847. Lepper interview (Aug. 13, 1974), supra note 548.

approximately 1.6 percent of the total covered by the Executive order.

The compliance status of the remaining campuses remained unsettled. Seven plans had received interim acceptance; of an additional 215 affirmative action plans submitted to HED, 14 had been rejected,<sup>848</sup> and 201 were awaiting HED action.<sup>849</sup> There were, in addition, more than 700 campuses which had not submitted plans.

During the compliance process, colleges and universities receive vast amounts of technical assistance from OCR. In addition, at least one regional office regularly sponsors affirmative action seminars for campus officials.<sup>850</sup> There is no incentive to comply with the law, however, because OCR routinely foregoes enforcement action in the face of clear violations of the Executive order.<sup>851</sup> Instead of attempting to adhere to

848. Campuses whose plans had been rejected, and the dates of rejection, were as follows: New York University Medical School (Oct. 25, 1973); Queens College (Dec. 19, 1973); Brooklyn College (Dec. 15, 1973); Louisiana Technical University (Apr. 23, 1974); North Texas State University (Dec. 28, 1973); Northeast Louisiana University (Jan. 17, 1974); Oklahoma State University (Dec. 27, 1973); Oklahoma University (Aug. 6, 1973); Rice University (Nov. 21, 1973); Southeast Louisiana University (Apr. 29, 1974); Texas Christian University (Jan. 25, 1974); University of Arkansas (Apr. 23, 1974); University of Oklahoma, Health Sciences Center (May 7, 1974); and Western New Mexico University (Apr. 30, 1974) HED, "Inventory of Affirmative Action Plans As of July 1, 1974" (undated); Lepper interview (Aug. 13, 1974), supra note 548.

849. Id.

850. The Dallas Regional Office holds such seminars. Interview with Miles Schultze, Branch Chief, Higher Education, OCR, Region VI, Jan. 30, 1973, in Dallas, Tex.

851. The Chief of the Higher Education Branch of OCR in Region VI stated that because OCR staff and colleges and universities know that sanctions will not be imposed, the staff does not press for full compliance but rather for compromise positions. Schultze interview, supra note 850. A recent suit charged that HEW's Executive order 11246 program is grossly inadequate. See note 710 supra for a discussion of the suit.

OFCC compliance review procedures and enforcement regulations, HED is developing its own procedures and regulations on the grounds that colleges and universities should be treated differently from other  
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employers.

There does not appear to be anything so peculiar about institutions of higher education, however, to justify a deviation from the requirements of Revised Order No. 4, a regulation which has been applied with relative effectiveness in a number of diverse industries. Although, of all Federal contractors, colleges and universities appear to register the most complaints about the "complexities" of compliance with the Executive order, the reverse should be the case. Institutions of higher education have a vast pool of individuals on their faculties, such as statisticians, social scientists, specialists in personnel administration, and lawyers, to devote to the development of meaningful and legally sufficient affirmative action plans. Because of this advantage, colleges and universities should be held to a higher standard of compliance, if the standard is to be any

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852. See p. 234 supra. The Director of HED stated that difficulties are created for colleges and universities by the requirement that an affirmative action plan commence with an identification of underutilization. It is her view that a college or university should begin a plan by describing all of its current employment practices and programs, such as recruitment, promotion, termination, fringe benefits, and salaries. Lepper interview (Jan. 31, 1974), supra note 555. The touchstone of affirmative action, however, is identifying where underutilization exists and then correcting those practices which are its source. 41 C.F.R. § 60-2.



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different at all.

Further, data show that colleges and universities are quite similar to other employers with respect to their underutilization of women and minorities. Severe problems continue to exist for these groups in securing teaching positions on college and university faculties. The proportion of blacks, for example, rose only slightly between 1968 and 1973, from 2.2 percent to 2.9 percent.<sup>854</sup> During the same period, the percentage of women on college faculties increased by less than 1 percent from 19.1 percent to 20 percent.<sup>855</sup> One study indicates that women have actually lost ground as a percentage of faculty at 4-year institutions.<sup>856</sup> Clearly, the promise of equal employment opportunity has not been achieved in institutions of higher education; HEW's failure to enforce the Executive orders has played no small role in frustrating this objective.

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853. A former Director of OCR set forth what he perceived to be a few unusual characteristics of colleges and universities which have made the achievement of equal employment opportunity difficult. First, they have developed decentralized systems which diffuse authority and responsibility for personnel matters, with the result that faculty status is primarily a faculty responsibility. Second, a number of colleges and universities have been slow to develop systematic methods for keeping track of who is in their employment ranks. Third, institutions of higher education have been singularly reluctant to permit external influence on the policies and practices which govern their operations and their faculties in particular. Finally, many members of the college and university teaching community believe that the equal employment opportunity concept infringes on the concept of academic freedom. Remarks by J. Stanley Pottinger, Director, OCR, HEW, National Association of College and University Attorneys, June 30, 1972. The present OCR Director has also noted that "in several cases we have found it painfully difficult to get universities to voluntarily gather and analyze in appropriate breakdowns the race, sex, and ethnic composition of their faculties." Remarks of Peter E. Holmes, Director, OCR, HEW, Affirmative Action Seminar, Cleveland State University, Oct. 25, 1973.

854. American Council on Education, Teaching Faculty in Academe: 1972-73 (August 1973).

855. Id.

856. Carnegie Commission on Higher Education, Opportunities For Women in Higher Education (September 1973).

D. Complaints

From July 1972 to September 1974, the Student Affairs Section of HED  
 857 received 423 complaints, almost all of which concerned Title VI or Title IX. 858  
 A breakdown of these complaints on the HED complaint log, by subject matter, reveals that of the Title VI complaints, 107 related to admissions practices, 12 to dismissals, 122 to general practices; and of the Title IX complaints, 37 related to discrimination on the basis of sex in dormitory regulations, 28 to sex discrimination in athletics, and 117 to general treatment. A clear indication of OCR's inaction is that an inventory taken on April 30, 1974, revealed that 213 complaints had not been resolved.

When a complaint is received by the headquarters office, it is automatically referred to the appropriate regional office for action. The regional office contacts the complainant if additional information is needed to determine whether an onsite investigation is warranted. In most cases, OCR conducts compliance reviews for complaints warranting onsite investigation.

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857. OCR received 256 complaints alleging Title VI violations and 217 alleging Title IX violations. This number is significantly larger than the total number of complaints received because some complaints consisted of allegations of both Title VI and Title IX violations. In addition, 19 complaints contained unspecified allegations.

858. A regional breakdown of these complaints is as follows:

Region I	-21	12 Title VI	9 Title IX	
Region II	-25	17	7	1 unspecified
Region III	-27	16	10	1 unspecified
Region IV	-57	22	34	4
Region V	-42	23	16	2
Region VI	-49	29	17	1
Region VII	-32	10	21	1
Region VIII	-23	12	11	
Region IX	-53	38	15	5
Region X	-16	7	7	2

In processing a complaint, OCR gathers relevant evidence, through record examination and interviews, and transmits letters of findings to both the institution and the complainant. If the findings of OCR support the complainant's allegations, the institution is requested to take corrective action.<sup>859</sup> If the institution refuses, negotiations are initiated. If the allegations of the complainant cannot be substantiated by OCR, the institution and complainant are so notified and no further action takes place.

Because Title IX regulations have not yet been issued, headquarters plays a more active role in the determination process for complaints alleging Title IX violations. In fact, the Washington office must review all such determinations. HEW's failure to adopt final Title IX regulations has hampered its ability to provide relief to complainants.<sup>860</sup> For example, a review report of a complaint received in December 1973 alleging sex discrimination in residence halls is being delayed<sup>861</sup> until the regulations are issued. Assuming the final regulations will be issued, at the earliest, in January 1975, the complaint will be more than a year old before any satisfaction is achieved for the complainant.

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<sup>859</sup>. The time frame allowed for redress depends on the individual situation. For example, if the complaint involves discrimination in access to a school activity, OCR would require immediate action. However, if the complaint concerned a denial of admission to an institution, the institution would be asked to admit the student the following semester if the semester had already begun. If not, the institution would be asked to admit the student immediately.

<sup>860</sup>. See note 711 supra for OCR's comment in this area.

<sup>861</sup>. Letter from Louis O. Bryson, Chief, Higher Education Branch, OCR, to Ms. Glenda Earwood, President, Associated Women Students, Auburn University, June 4, 1974.

In a similar complaint against the University of Southern Mississippi alleging that there were different hours for male and female students living in dormitories, HEW found the charge to be true and in October 1973 gave the University 30 days to change its policies. As of mid-September 1974, also a year later, the university has not changed its practice with regard to sex-based dormitory hours and HEW has initiated no corrective action.

During fiscal year 1973, HED received a total of 358  
<sup>862</sup>  
 complaints under the Executive order. Of these, 20 were referred  
<sup>863</sup>  
 to EEOC, 201 were investigated, and 179 were resolved. A total  
<sup>864</sup>  
 of 137 were not investigated. Thus, 159, or 47 percent, of the  
 complaints received, were not resolved by the close of fiscal year  
 1973. In April 1974, HED indicated that it would develop investigative  
<sup>865</sup>  
 procedures to facilitate Executive order complaint resolution. However,  
<sup>866</sup>  
 as of August 1974, these procedures had not been prepared.

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862. Telephone interview with Mr. Herbert Tyson, Operations Chief, HED, OCR, Sept. 27, 1974.

863. In 1972, when Title VII of the Civil Rights Act of 1964 was amended to cover educational institutions, HED began to refer to EEOC complaints alleging employment discrimination against individuals, but not those alleging discrimination on a class basis. HED eventually concluded that such a distinction could not be made and abandoned the practice of making any referrals to EEOC in April 1974. Lepper interview (Aug. 13, 1974), supra note 548. Memorandum from Martin H. Gerry, Acting Deputy Director, OCR, to all Regional Civil Rights Directors, Apr. 9, 1974.

864. Tyson interview, supra note 862.

865. Gerry memorandum, supra note 863.

866. Lepper interview (Aug. 13, 1974), supra note 548. A recent suit charged that HEW's handling of complaints under Executive Order 11246 is highly inadequate. See note 710 supra for a discussion of the suit.

VETERANS ADMINISTRATION (VA)

## Education

I. Responsibilities

VA is responsible for ensuring nondiscrimination under Title VI  
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 of the Civil Rights Act of 1964, for approximately 7,000 pro-  
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 prietary institutions below college level and 37,000 apprenticeship  
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 and on-the-job training programs which have VA-approved courses.  
 Although these institutions and programs may not receive contracts or  
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 grants per se, they are subject to Title VI jurisdiction where  
 871  
 veterans, their wives, widows, husbands, widowers, or dependents

867. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d.

868. A proprietary institution under Title VI jurisdiction is a privately-owned and operated technical, vocational, and other private school at the elementary or secondary level. 38 C.F.R. § 21.4301(2)(ii).

869. VA Response to Commission questionnaire, June 8, 1973 hereinafter cited as VA response/. As of June 1974, there were 128,945 veterans enrolled in proprietary institutions, 62,120 enrolled in on-the-job training programs, and 66,825 enrolled in apprenticeship training programs. Memorandum from John P. Travers, Director, Veterans Assistance Service, to Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, June 20, 1974.

870. Proprietary institutions can receive an annual fee of \$4.00 per veteran for servicing veterans' records. This, however, is the only direct financial assistance paid these institutions. Interview with Halsey A. Dean, Chief, Appraisal and Compliance, Education and Rehabilitation Service, VA, Jan. 23, 1973.

871. Education-training benefits covered by Title VI are: Vocational Rehabilitation (38 U.S.C. ch. 31, § 1502), Veterans' Educational Assistance (G.I. Educational Assistance) (38 U.S.C. ch. 35, § 1710). Husbands of disabled or deceased female veterans are covered by chapter 35. In October 1972, VA repealed a regulation which stipulated that husbands had to be incapable of working to be eligible for such benefits. A fourth chapter, entitled Administration of Education Benefits (38 U.S.C. ch. 36), covers the approval process for courses attended by veterans, their wives, widows, husbands, widowers, or dependents, and is also covered by Title VI.

attend them using VA educational benefits.

Under VA's Title VI monitorship, proprietary institutions and apprenticeship and on-the-job training programs are prohibited from discriminating in admissions, administration of records, training and education opportunities, staff and faculty, internal school programs, placement service, housing, and financial aid. <sup>873</sup> VA's Title VI responsibilities include monitoring assurances of compliance, conducting compliance reviews, investigating complaints, undertaking negotiations, and initiating enforcement action when appropriate.

Prior to 1969, VA was responsible for ensuring nondiscrimination in all educational institutions attended by veterans, including colleges and universities. The Department of Health, Education, and Welfare (HEW) also had Title VI responsibility for educational institutions receiving Federal financial assistance. In January 1969, in order to eliminate the overlapping jurisdiction, VA delegated to HEW responsibility for Title VI enforcement in elementary and secondary schools and school systems and

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872. Letter from David L. Rose, Special Assistant to the Attorney General for Title VI, Department of Justice, to Robert C. Fable, Jr., General Counsel, VA, Mar. 5, 1968. The Justice Department concluded that Title VI applies to the vocational rehabilitation and education programs administered by VA because veterans' funds are conditioned upon the veterans' pursuit of a VA-approved course of study.

873. VA Title VI Guidelines. For a discussion of the quality of the guidelines, see section on guidelines, pp. 337-42 infra.

institutions of higher education having courses leading to or offering credit toward at least a bachelor's degree.<sup>874</sup> In turn, VA was delegated Title VI responsibility for all proprietary institutions and apprenticeship and on-the-job training programs.<sup>875</sup> The agreement provides for each agency to take separate action in order to terminate its funds to a particular educational institution, regardless of which agency has the civil rights monitoring function.<sup>876</sup>

VA does not acknowledge responsibility for investigating sex discrimination under Title IX of the Education Amendments of 1972<sup>877</sup> in proprietary institutions and apprenticeship and on-the-job training programs.<sup>878</sup> Even though Title IX provisions with regard to admission to educational institutions do not cover all institutions, they do apply to

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874. Letter from W. J. Driver, VA Administrator, to Wilbur J. Cohen, Secretary, HEW, Jan. 3, 1969.

875. Letter from Wilbur J. Cohen, Secretary, HEW, to W. J. Driver, VA Administrator, Jan. 9, 1969.

876. For example, in August 1967, HEW terminated its funds to Bob Jones University, which it found to be in noncompliance with Title VI. However, not until February 1972, after it was unsuccessful in its attempt to gain compliance, did VA initiate enforcement proceedings to terminate its funds to the university. For a more detailed discussion of this matter, see section on enforcement, p. 353 infra.

877. Interview with John Travers, Director, Veterans Assistance Service, and Ed Douglas, Acting Chief, Title VI Staff, VA, May 30, 1974 [hereinafter cited as Travers interview]. Title IX of the Education Amendments of 1972 prohibits sex discrimination in any education program or activity receiving Federal financial assistance. 86 Stat. 373 § 901(a)(1); 20 U.S.C. § 1681 (Ed. 1970 Supp. III (1974)).

878. VA recently informed this Commission, however, that: "With regard to Title IX of the Education Amendments Act of 1972, the VA does recognize its responsibility in certain areas. For instance, regulations have been published relative to grants in the Department of Medicine and Surgery Program. As agency guidelines are developed for other areas of operation in the VA, Title IX will be implemented." Letter from Richard L. Roudebush, VA Administrator, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Nov. 8, 1974.

institutions of vocational and professional education. Thus, they probably cover 99 percent of the educational institutions under VA jurisdiction. However, since HEW has overall administrative responsibility for Title IX, it must delegate the authority to enforce Title IX at proprietary institutions and training programs. As of May 30, 1974, VA had not received this delegation from HEW. According to VA, such a delegation will not be made until HEW has adopted final Title IX regulations.<sup>880</sup> Until such regulations are issued, VA staff members claim that any complaint alleging sex discrimination would be rejected.<sup>881</sup>

In addition, VA does not believe it has authority to consider faculty discrimination in its reviews of proprietary institutions and training programs.<sup>882</sup> This is a clearly erroneous position, especially since HEW, the agency with responsibility for ensuring Title VI compliance in educational

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879. With regard to admissions, Title IX also applies to institutions of graduate higher education and public institutions of undergraduate higher education.

880. VA response, supra note 869. On June 20, 1974, HEW published proposed Title IX regulations. The regulations will not be final until at least January 1975. See section in this report on the Department of Health, Education, and Welfare, higher education, p. 195 supra. Also, in response to an inquiry from Congresswoman Edith Green, the VA Administrator asserted that members of VA staff have been designated to coordinate the development of Title IX regulations with HEW and the Department of Justice. Letter from Donald E. Johnson, VA Administrator, to the Honorable Edith Green, Congresswoman, U.S. House of Representatives, Dec. 22, 1973.

881. Travers interview, supra note 877.

882. Id.



institutions, has maintained for several years that faculty discrimination is a Title VI violation.<sup>883</sup> Also, the Title VI regulations of almost all Federal agencies have been uniformly amended to prohibit employment discrimination which has an effect on services rendered.<sup>884</sup> In fact, VA's own Title VI guidelines have specific provisions prohibiting discrimination with regard to faculty and staff:

The institution does not discriminate with respect to persons chosen to train those enrolled in the program, and does not assign students to teachers on the basis of race, color, or national origin unless there is an educational need to do so, e.g., where there are language barriers. 885

VA claims that this provision applies only to discrimination in the assignment of faculty to a particular function within a school's program, e.g., assigning white instructors to teach white students to cut hair, while

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883. In January 1971, HEW issued a memorandum entitled "Nondiscrimination in Elementary and Secondary School Staff Practices," which sets forth HEW's position that discrimination in hiring, promotion, and other treatment of faculty has direct bearing on equal educational services and is therefore prohibited by Title VI. Yet, VA would not even act on a faculty discrimination complaint; rather it would forward the matter to the Equal Employment Opportunity Commission. Travers interview, supra note 877.

VA recently indicated that with regard to HEW's coverage of faculty discrimination, "it may be pertinent to point out that in discharging its Title VI responsibilities, HEW oftentimes deals with existing dual education systems." Roudebush letter, supra note 878.

884. See, for example; Title VI regulations of the Department of Transportation, 49 C.F.R. § 21.5(c), and of the Department of Labor, 29 C.F.R. § 31.3(c) (2). VA did not include this provision in its Title VI regulations.

885. VA Guidelines for Compliance with Title VI of the 1964 Civil Rights Act of Proprietary Institutions, sec. 4.

assigning black instructors to teach black students to cut hair.<sup>886</sup> It appears, however, that the phrase in the guidelines stating that there shall be no discrimination in regard to those hired to train enrollees could be a nullity if VA's interpretation is adopted. This is true because VA does not require nondiscrimination in hiring, promotion, or termination of faculty, but only in assignment. A school could effectively evade VA's edict by merely refusing to hire minorities or by terminating them because of their race or ethnicity. A more reasonable construction of the guideline provision, therefore, is that all discrimination against faculty is prohibited.<sup>887</sup>

## II. Organization and Staffing

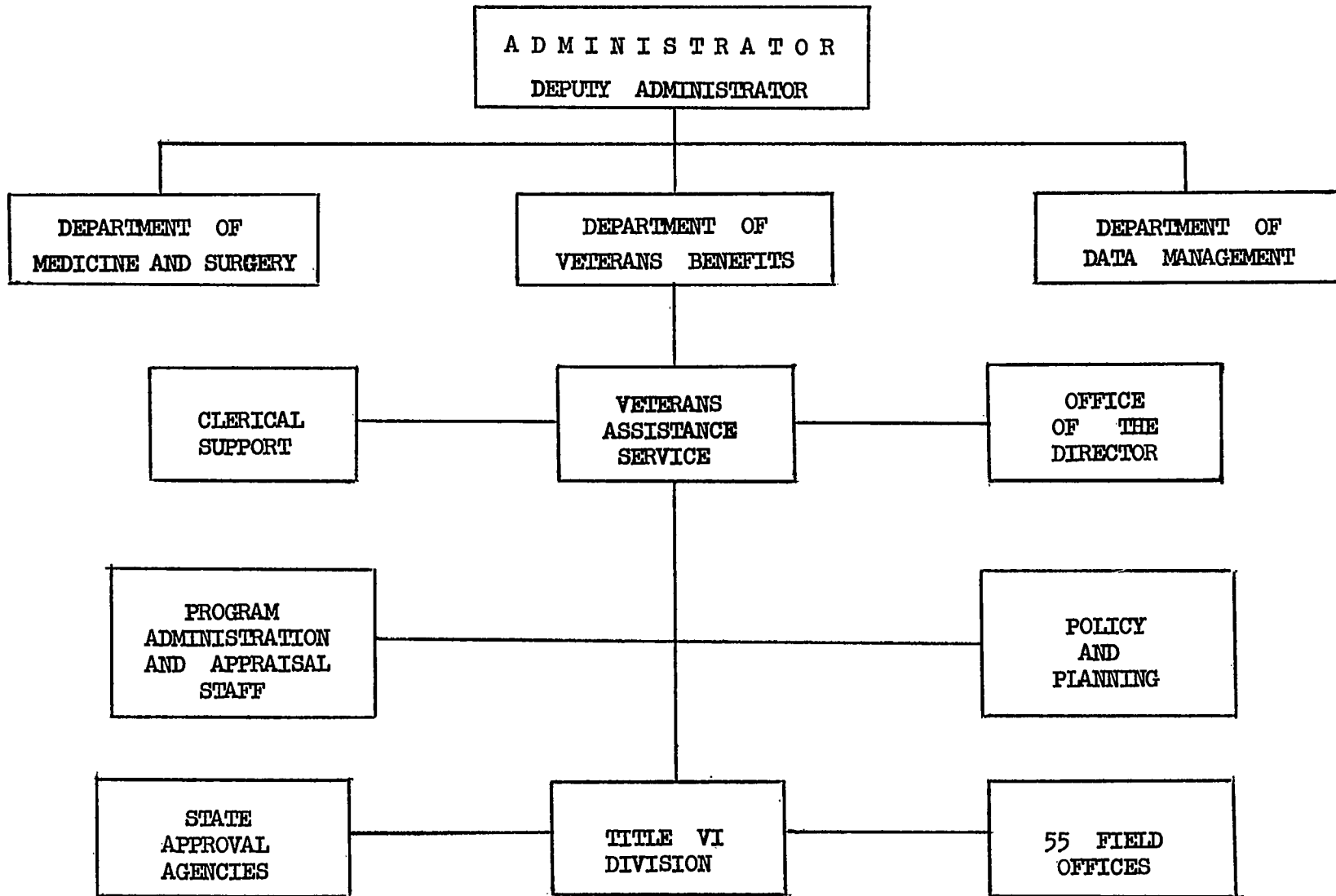
VA's oversight of Title VI compliance in proprietary institutions and apprenticeship and on-the-job training programs is presently shared by three separate units: a Title VI Division in VA's Veterans Assistance Service, the field staff of VA's Department of Veterans Benefits, and State Approval Agencies. The Title VI Division has overall responsibility for all civil rights activities related to such programs and accordingly monitors the Title VI compliance reviews and complaint investigations which are conducted by the field staff of VA's Department of Veterans Benefits (DVB). State

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886. In fact, VA has developed a supplemental form for reviewing faculty composition by race. However, it is only to be used in determining discrimination against students. Further, only 1 of the 13 review reports analyzed by Commission staff made use of it.

887. VA recently informed the Commission that it has asked its General Counsel for an opinion relating to processing complaints received from faculty and staff members. Roudebush letter, supra note 878.

VETERANS ADMINISTRATION



Approval Agencies (SAA's), which are part of State education agencies or State departments of public instruction, receive funds from VA to approve courses for veterans and accordingly secure the assurance of compliance with Title VI from those institutions applying for VA approval.

A. Title VI Division

On January 1, 1974, VA's Title VI program underwent a major organizational change. The Title VI Division was transferred from the Contract Compliance Service to the Veterans Assistance Service (VAS) and the Title VI program was to be decentralized.<sup>888</sup>

Prior to January 1, 1974, the Contract Compliance Service, which reports directly to the VA Administrator, had overall civil rights responsibility for all VA-funded facilities and institutions.<sup>889</sup> The Service consisted of three divisions--an Industrial Compliance Division, a Construction Compliance Division, and a Title VI Division. The Industrial Compliance Division is primarily responsible for enforcing Executive Order

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888. The reorganization came about as a result of an audit conducted by VA's Internal Audit Service. The primary reason for the shifting of the Title VI Division was that it was believed that Title VI responsibilities could be carried out more effectively under the Veterans Assistance Service, which deals directly with the public, than under the Contract Compliance Service. Travers interview, supra note 877.

889. These include hospitals as well as proprietary institutions and apprenticeship and on-the-job training programs.

11246, as amended<sup>890</sup> with regard to drug, cosmetic, and pharmaceutical companies; the Construction Compliance Division handles recipients of funds for construction of VA hospitals, and other contractors serving VA hospitals. The Title VI Division had responsibility for ensuring nondiscrimination in proprietary institutions and apprenticeship and on-the-job training programs. This Division also worked with DVB, which has ultimate responsibility for monitoring VA-approved institutions to ensure that veterans attend courses for which they receive VA benefits.<sup>891</sup>

VA has 55 field offices,<sup>892</sup> which work directly with proprietary institutions and apprenticeship and on-the-job training programs. With the exception of one Title VI officer situated in the Chicago regional office, the entire Title VI Division was located in the headquarters office in Washington, D.C., prior to reorganization. The Division staff conducted compliance reviews and complaint investigations of institutions and programs without assistance from the field offices.

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890. The Executive order prohibits recipients of Federal contracts in excess of \$10,000 from discriminating in employment because of race, color, national origin, religion, or sex. Additionally, those recipients holding a contract in excess of \$50,000 and employing 50 or more persons are required to develop and implement an affirmative action plan.

891. One DVB staff person was assigned to work with the Title VI Division on Title VI matters. He spent approximately 20 percent of his time on such activities. Interview with Morris B. Nooner, Director, Education and Rehabilitation, Milton B. Nichols, Assistant Director for Program Administration, and Halsey A. Dean, Chief, Appraisal and Compliance Branch, VA, Jan. 23, 1973 /hereinafter cited as Nooner interview/.

892. Each of 48 States, the District of Columbia, Puerto Rico, and the Philippines has one field office. Texas and California each have two field offices.

Further, only nine persons were assigned to the Title VI Division, rendering it impossible for the Division effectively to review a reasonable number of the institutions under VA jurisdiction. For example, since an average of 4 hours is spent conducting a compliance review<sup>893</sup> and since VA has more than 44,000 programs and institutions to monitor, it would have taken the staff more than 9 years to review all of the VA-approved programs and institutions.<sup>894</sup>

As of January 1, 1974, however, the Title VI Division was transferred to VAS. VA has decided that in fiscal year 1975 the Title VI Division will devote at least 20 personyears to Title VI in field offices<sup>895</sup> and six Title VI staff persons will be located in Washington.<sup>896</sup>

Responsibilities of the Title VI Division's central office are to monitor compliance reviews and complaint investigations, rather than to conduct them. It requires each regional office to submit a monthly report

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893. VA response, supra note 869.

894. This computation is based on the supposition that full time is devoted to reviews, all Title VI people conduct two reviews per day, and no additional educational programs receive subsequent approval from VA.

895. The Title VI field staff are working from the following field offices having the largest number of institutions under their jurisdiction: Boston, Mass.; New York, N.Y.; Newark, N.J.; Pittsburgh, Pa.; Chicago, Ill.; Indianapolis, Ind.; Detroit, Mich.; St. Paul, Minn.; St. Louis, Mo.; Philadelphia, Pa.; Milwaukee, Wis.; Los Angeles, Cal.; San Francisco, Cal.; Roanoke, Va.; Nashville, Tenn.; Winston Salem, N.C.; New Orleans, La.; Atlanta, Ga.; St. Petersburg, Fla.; Montgomery, Ala.

896. Roudebush letter, supra note 878. As of July 10, 1974, VA's central office had only three professionals working on Title VI matters. Telephone interview with Martin Wall, Equal Opportunity Specialist, Title VI Division, VA, July 10, 1974.

of all educational institutions which were subject to a Title VI compliance review. The reports are to include the names of the schools and, in some cases, the type of school. However, the regional offices do not forward review reports.<sup>897</sup> Therefore, it is likely that almost no actual monitoring is performed by staff of VA's central office and that no other Title VI assignments have been given to this unit.<sup>898</sup> Thus, although the staff of the unit were scheduled to work on Title VI full time, it is probable that they spend even less than half of their time on Title VI matters.<sup>899</sup>

The 20 personyears VA expects to devote to Title VI activities in the field will be derived, not from the hiring of staff specifically to work on Title VI matters, but rather from existing field staff with program review

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897. Interview with Martin Wall, Equal Opportunity Specialist, Title VI Division, VA, June 20, 1974.

898. However, as of August 1, 1974, VA's regional offices and centers were advised that 10 percent of a regional office's review reports are to be forwarded to the central office, that since training to qualitatively improve Title VI surveys is the prime objective the sampling is to include surveys completed by each employee assigned to do Title VI surveys and that the 10 percent sampling be altered, if necessary, to accomplish this. VA anticipates that this monitoring procedure will effectively point out to the central office Title VI staff any areas where training is necessary, or where additional quality appraisals and controls should be initiated. If such areas are identified, VA asserts that action will be promptly taken to correct the situation. Roudebush letter, supra note 878.

899. As of May 1974, VA officials indicated that members of the Title VI Division in the central office spent 50 percent of their time on Title VI matters and the rest of the time was devoted to Veterans Assistance matters. Travers interview, supra note 877.

responsibilities, who have been assigned these duties in addition to their other work. According to a recent letter from VA, as of July 1, 1974, there were 138 compliance specialists in the field who are assigned some Title VI responsibilities.<sup>900</sup> The field staff with Title VI responsibilities spend only a small percentage of their time on Title VI matters.<sup>901</sup>

VA's directives since January 1, 1974, call for field office personnel to conduct a Title VI compliance review in conjunction with an educational survey,<sup>902</sup> whereas previously they were separate undertakings. In this regard, VA officials indicated in May 1974 that it expects to conduct 13,000 compliance reviews in fiscal year 1975.<sup>903</sup> However, since VA's reorganization is already in effect and since VA conducted only 436 compliance reviews

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900. Roudebush letter, supra note 878.

901. A VA staff member asserted that it is impossible to determine the average percent of time field staff members spend on Title VI, but did indicate that it is likely that some field staff members spend as little as 10 percent of their time on Title VI. No field staff member devotes 100 percent of his or her time to Title VI matters. Wall telephone interview, supra note 896. As education benefits specialists, their primary duties include obtaining compliance reports and conducting educational compliance surveys.

902. Such surveys are routine reviews of all educational institutions and programs attended by veterans and their dependents. They are conducted primarily to ensure that the programs' records on attendance, enrollment, and finances correspond to VA records.

903. Travers interview, supra note 877. VA plans to review 100 percent of the facilities under its jurisdiction every 4 years. Travers memorandum, supra note 869. For more information on the educational survey, see p. 329 infra. In November 1974, however, VA indicated that it anticipates conducting more than 5,000 Title VI compliance reviews during fiscal year 1975. Roudebush letter, supra note 878.



from January 1974 through April 1974,<sup>904</sup> it appears unlikely that VA will even approach this goal unless there is an increase in staffing or productivity.<sup>905</sup> However, during the first quarter of fiscal year 1975, VA conducted 1,352 Title VI compliance reviews.<sup>906</sup>

Since the field staff who will be conducting Title VI compliance reviews in conjunction with the routine educational surveys have no experience in civil rights matters, it would seem necessary for VA to have conducted an intensive training program on Title VI procedures, including an indepth course on conducting a Title VI compliance review. However, VA provided no training in this area for field personnel.<sup>907</sup> A one-page list of procedures was provided to all field offices and all Title VI staff persons.

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904. Travers interview, supra note 877.

905. VA Title VI Activities Report, period beginning January 1974 and ending April 1974. One of the reasons for the failure initially to conduct as many Title VI reviews as anticipated is that in January and February 1974, Title VI reviews were not regularly being conducted as part of educational surveys.

906. This is a greater number of Title VI reviews than were conducted by VA during the entire fiscal years 1973 and 1974 combined. Roudebush letter, supra note 878.

907. VA staff members claim that the reason for this was twofold: 1) Because of the energy crisis, travel allocations had been cut and 2) Title VI staff members in the Washington office were receiving training on veterans assistance work and at the same time were training veterans assistance staff on Title VI matters. Travers interview, supra note 877.

Prior to decentralization of the Title VI Division, there was little regional office <sup>908</sup> involvement in the Title VI enforcement program. Staff of the Adjudication Division of DVB <sup>909</sup> were specifically assigned to monitor the educational training courses attended by veterans and their dependents by conducting educational surveys. <sup>910</sup> The surveys, which did not include a civil rights component, checked to determine if the approved courses were being operated in accordance with the VA-approved application. If civil rights complaints were discovered during educational surveys or if civil rights complaints were received, the Adjudication Division would refer the institution to the VA Title VI Division in Washington. <sup>911</sup> This program has now been modified so that educational surveys now have a civil rights component.

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908. VA regional offices are located in Chicago, Ill.; St. Louis, Mo.; Dallas, Tex.; New York, N.Y.; Atlanta, Ga.; and San Francisco, Cal.

909. The Adjudication Division has three sections: (1) Rating Boards, which make decisions concerning veterans' disabilities, rule on the percentage of disability, whether it was incurred in the service, and the entitlement of the veteran to disability benefits; (2) the Rehabilitation and Training Section, which provides vocational rehabilitation counseling for veterans. Such counseling is mandatory for the disabled veteran and children receiving benefits under 38 U.S.C. ch. 35. Counseling is optional for widows, wives, husbands, and veterans receiving benefits under the GI Bill and War Orphans' and Widows' Educational Assistance (38 U.S.C. chs. 34 and 35); and (3) the Authorization Section, which processes all requests for benefits and conducts educational surveys of institutions receiving VA benefits.

910. For more information on the educational survey, see p. 329 infra.

911. It does not appear that the reorganization will change these assignments.

It appears evident that Title VI staff and other VAS employees are inadequately trained to perform Title VI duties.

B. The Department of Veterans Benefits

VA has three major departments: (1) the DVB; (2) the Department of Medicine and Surgery;<sup>912</sup> and (3) the Department of Data Management.<sup>913</sup>

Of these, the DVB disburses funds to veterans for training purposes and oversees the approval, by SAA's, of proprietary institutions and apprenticeship and on-the-job training programs.<sup>914</sup>

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912. VA's Department of Medicine and Surgery provides medical, dental, and hospital service to eligible veterans as prescribed by the Administrator of Veterans Affairs.

913. The Department of Data Management collects a multitude of data on veterans and VA programs.

914. Interview with Billy R. Wickens, staff member, Title VI Division, Chicago Regional VA Office, May 16, 1973, in Chicago, Ill., and interview with William Parker, Director, Contract Compliance Service, VA, Mar. 16, 1973.

### C. State Approval Agencies

VA does not directly approve courses for proprietary institutions and apprenticeship and on-the-job training programs.<sup>915</sup> Instead, because it is felt that the exercise of such authority would be in violation of the States' right to regulate educational policies, SAA's are appointed by each Governor to review institutions applying for VA approval of one or more courses. SAA's are usually located in the State department of public instruction or the State education agency. Although VA has the ultimate authority for approval, SAA decisions are almost automatically accepted.<sup>916</sup>

Proprietary institutions wishing to apply for VA approval must contact the SAA, which will then review the institution's policies and courses.<sup>917</sup> The SAA is primarily interested in the substance of courses to be taken, the school's organization, and compliance with State and Federal laws. However,

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915. Interview with George A. Loftis, Adjudication Office, VA, San Francisco Office, Mar. 21, 1973, in San Francisco, Cal.

916. Noonan interview, supra note 891.

917. This investigation may involve a visit to the institution. Generally included in this review is an investigation of the institution's policies, curriculum, financial aid, and other student activities.

the reviews do not focus on civil rights compliance.<sup>918</sup> Rather, the civil rights involvement of the SAA is limited to collection of Title VI assurances in which the institutions, during the approval process, agree that discrimination based on race, color, or national origin will not take place.<sup>919</sup>

SAA's work closely with VA's Adjudication Division and share information gathered during their routine reviews of VA-approved programs. Civil rights complaints received are also forwarded by SAA's to this Division.

In addition, the SAA's conduct followup reviews of institutions having VA-approved courses.<sup>920</sup> However, they do not look for civil rights problems; they only check that the assurance of compliance has been filed. Where an SAA finds a violation of the rules, it has the power to withdraw VA-approval from the institution. VA acts on the withdrawal of approval by prohibiting the granting of VA benefits to veterans wishing to attend those institutions. No approvals have been withdrawn from institutions as a result of civil rights violations. In fact, no institution has ever been charged with such discrimination as a result of SAA reviews.

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918. VA claims that it is the responsibility of the VA, not the SAA, to review Title VI compliance. VA response, supra note 869.

919. Interview with Herbert Summers, California SAA representative, Mar. 22, 1973, in San Francisco, Cal. For a discussion of Title VI assurance forms and their effectiveness, see p. 330 infra.

920. SAA staff is interested in determining, for example, if the quality of courses has changed or, if indeed, the same courses are still being offered. Veterans already enrolled in courses at such institutions continue to receive benefits to complete their program.

### III. Approval of VA Education-Training Courses

To receive VA educational benefits, veterans must apply for a certificate of eligibility.<sup>921</sup> These certificates allow VA to keep an accurate record of the number of veterans receiving benefits to attend approved courses. A veteran is not issued a certificate of eligibility to receive educational benefits unless the course he or she has chosen to attend has been approved by VA. In reality, however, VA has delegated most of the authority for approval to SAA's. VA, not the SAA, has final authority to approve all institutions having nationwide implications, such as correspondence schools.<sup>922</sup>

An institution applying to the SAA for VA approval of courses may simply decide to apply for approval of a course or courses on its own initiative or may apply for approval after a veteran has applied unsuccessfully to VA for benefits to enroll in an unapproved course or courses in that institution or program. Since institutions apply to have specific courses approved by the SAA, an institution might apply to the SAA several times to have different courses approved. All materials relating to approved courses are forwarded to the appropriate VA field office.

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921. The certificate of eligibility entitles a veteran, a dependent, or a service person to enroll in a specified approved training program. Limitations on the training include a stipulation that enrollment is approved only if the establishment is complying with Title VI.

922. A list of VA-approved courses can be obtained from VA's central computer system.

An institution applying for approval must submit information concerning its financial status, curriculum, compliance with State education regulations, and an assurance of compliance with Title VI. This information is checked in an onsite visit made by SAA staff. Since SAA's do not consider review of civil rights matters to be within their purview,<sup>923</sup> their investigation does not look into the possibility of discrimination.

In addition to reviews conducted by the SAA, VA regional staff conduct educational surveys to verify data and records submitted by the institution on veterans enrolled against data kept at the institution.<sup>924</sup> Surveys usually take 1 day at smaller institutions, like barber schools and small business colleges, and 2 days at the larger institutions, like flight schools.

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923. Interview with Herbert Summers, SAA representative, Mar. 22, 1973, in San Francisco.

924. The nature of these data and records varies with the type of institution reviewed. In below-college-level programs, for example, veterans themselves are required to submit monthly reports listing their absences from class. These reports are checked against school attendance records. Commercial pilot training schools are reviewed for accuracy in their billing of veterans for approved courses. The veteran's number of hours' flight time is also checked.

Correspondence schools are reviewed to determine if they provide lessons in the period of time promised in the school's contract with the veteran. On-the-job training and apprenticeship programs are reviewed in terms of the veteran's progress and wages paid.

Institutions of higher education are not regularly scheduled for review and are visited only where problems exist. These may come to VA attention through newspaper reports or direct complaints from veterans.

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Although VA has issued guidelines for conducting educational surveys, possible forms of discrimination and techniques for uncovering discrimination are not indicated in them. Thus, although information to be analyzed prior to a survey includes absence, tardiness, and refund policies, no figures on student enrollment and faculty composition by race, ethnicity, and sex are reviewed. <sup>926</sup> Further, while in all educational surveys both veterans and nonveterans are interviewed, they are not asked if they have any civil rights complaints. In fact, educational surveys simply do not include any review of possible problems of discrimination in areas such as admissions, financial aid, and staffing.

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925. The guidelines used for compliance surveys are found in DVB Circular 20-66-36, Appendix K-14, "Preparation for Compliance (Educational) Surveys." As well as enumerating on procedures for each type of institution and indicating how often it should be reviewed, the guidelines include a section elaborating on the kinds of correspondence to be prepared when discrepancies are found during a compliance survey and describes the hearing process.

926. DVB Circular 20-66-36, Appendix K-14, "Preparation for Compliance Surveys."



Following the visit to the program or institution a report form is prepared by the reviewing official. It consists of a series of questions or statements concerning attendance, grades, reporting, and the quality of training which are to be answered "yes" or "no." Only one statement, "the <sup>927</sup> school or establishment and students or job trainees have met and are complying with all other applicable provisions of the law," refers even vaguely to civil rights responsibilities.

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927. Compliance Survey of School and Establishments Furnishing Education and Training, VA Form 21E-1934. Many of the questions address the accuracy of recordkeeping by the institution. Typical violations found in compliance surveys include an institution's not having the required 85-15 percent veteran to nonveterans ratio and poor or incomplete recordkeeping. Where violations are found, a copy of the letter to the institution pointing out these deficiencies is sent to the SAA. VA requires that the SAA investigate and secure compliance within 30 days and report back to the VA regional office on action taken. Another VA review is scheduled for the following year unless the reviewer recommends that a compliance survey be made sooner. If the SAA fails to withdraw approval after subsequent visits reveal continued violations by an institution, the regional office may refer the case to the Committee on Educational Allowances, which can override the SAA and withdraw approval from the institution. This committee, set up in each VA regional office, is made up of an SAA representative and two regional VA representatives. In addition to its authority to withdraw approval from institutions, the Committee on Educational Allowances serves as an appeal board for institutions wishing to appeal to VA on SAA withdrawal of approval.

#### IV. Title VI Compliance

##### A. Assurances

VA-approved proprietary institutions and apprenticeship and on-the-job training programs are required to file an assurance that they are in compliance with Title VI.<sup>928</sup> The SAA's obtain the compliance assurance forms from VA and require their remittance from institutions during the approval process.<sup>929</sup> Regional VA offices routinely receive reports indicating which institutions have been approved and which institutions have not submitted assurances. The regional office forwards summaries of this information to headquarters. If all attempts to secure a signed assurance fail, the institution is referred to the VAS for investigation.<sup>930</sup>

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928. VA Form 09-8206, Statement of Assurance of Compliance With Title VI Civil Rights Act of 1964. VA regulations have required a statement of assurance from each approved educational institution and training establishment since 1969. The assurance states that the organization, facility, school, or training establishment will comply with Title VI and that VA will withhold financial assistance, facilities, and benefits to ensure compliance with the assurance. In addition, the right of the Federal Government to seek judicial enforcement of the assurance is stated. Between 1966 and 1969 the wording on the statement of assurance of compliance was changed to make it more explicit. VA has recently indicated that an ongoing review is conducted to ensure that institutions and establishments have the required statement on file. Roudebush letter, supra note 878.

929. VA response, supra note 869.

930. Nooner interview, supra note 891.

This "paper compliance" system has little value, since, essentially, only those institutions which openly refuse to submit assurances are refused VA approval. This method has been proven to be an ineffective guarantee of nondiscrimination.<sup>931</sup> The acceptance of an assurance without onsite verification disregards the well-established fact that almost all recipients of Federal financial assistance sign assurances even if they have little intention of complying.<sup>932</sup>

In addition, since assurances are collected only during the approval process and since many institutions and programs were approved by VA prior to the passage of the Civil Rights Act of 1964, assurances from these institutions have never been obtained.<sup>933</sup> Because VA has no record of which institutions and programs have filed assurances, it may be subsidizing programs which openly practice discrimination. According to VA, the only means it has for identifying such institutions or programs is receipt of complaints of discrimination.<sup>934</sup>

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931. HEW, the agency with primary responsibility for overseeing compliance of schools and institutions of higher education, has found widespread non-compliance among recipients of Federal financial assistance which have submitted assurances of compliance. See section of this report on HEW, Higher Education, p. 246 supra. Also see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 213-214 (1971).

932. In part this occurs because recipients realize that the chance of their noncompliance being discovered by a Federal agency is slim; and, even if it is discovered, as long as they are willing to negotiate and promise to change their discriminatory policies, they need not fear enforcement action.

933. Nooner interview, supra note 891. However, Mr. John Travers, Director, Veterans Assistance Service, claims that the SAA did receive assurance from all courses and institutions, even those which were approved prior to 1964. Travers interview, supra note 877.

934. Mr. Halsey A. Dean, Chief, Appraisal and Compliance Branch, claims that it would entail a monumental task for SAA or VA staff to go back to all institutions that were ever approved to obtain the assurance, Nooner interview, supra note 891.

### B. Compliance Reports

In December 1971, VA began utilizing a compliance report form (VA Form 09-4274) as a compliance review scheduling tool. These forms were mailed to proprietary institutions and apprenticeship and on-the-job training programs to elicit information for the past 3 years. Followup reports were sent in January 1973 and April 1974. Materials requested include racial and ethnic data on enrollment and placement and information concerning equal opportunity in admissions practices, financial aid, housing, and facilities. Information regarding complaints of discrimination is also requested.

The compliance report enables VA to identify institutions and programs which do not have minority students enrolled or which have a substantially smaller percentage of minority students than would be expected when compared to the percentage of minorities in the population of the area served by the institution or program. It is these institutions to which VA gives priority for compliance reviews. In addition, by comparing the response for 1 year against earlier reports, an indication of the increase or decrease in minority student enrollment may be obtained.

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935. VA response, supra note 869. For information on compliance reviews, see p. 345 infra.

936. Data are broken down by total number of all students, Negro American, Indian, Oriental, and Spanish Surnamed Americans, but are not cross-tabulated by sex. These data are required for all students enrolled, and for all students placed during the school year.

The form is also used to determine if any disproportion of minority group participation in the school exists, if there is any disparity in placement of minority group students as compared to nonminority students, if the school has obtained an assurance from employers that recruitment is done on a nondiscriminatory basis, and if the school has been subject to any Title VI or other discrimination complaints.<sup>937</sup>

The compliance report has a number of limitations. No racial-ethnic data on faculty are requested, though representation of minority persons on faculties is one indicator of equal opportunity for students.<sup>938</sup> No data on minority student participation in financial aid or housing programs are requested. In addition, information on the report takes the form of "yes" or "no" answers. For example, the institution is asked to indicate whether or not "informational, recruitment, and promotional activities for admission" is "offered on a nondiscriminatory basis." VA accepts the institution's answer to this and other similar questions, without requiring the institution to submit substantive proof that such action has been taken. This, again, reflects VA's erroneous position that the

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937. VA response, supra note 869.

938. For a discussion of HEW's position on this issue, see note 883 supra.

signing of a statement is a guarantee that stated policies are actually in effect.

Not only do the compliance reports have a number of substantive limitations, but they have not been used effectively by VA. The agency has requested reports from institutions at three different times and some of those reports have been scanned by VA staff in conjunction with the scheduling of reviews. No indepth comparative analysis, however, has been made of the responses.<sup>939</sup>

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939. Travers interview, supra note 877. However, on June 20, 1974, the same VA staff members claimed that the forms are "continually being analyzed to establish whether minorities are represented in proportion to their demographic ratio in the community, that the facilities, practices and amenities are equally administered, and that complaints are promptly and justifiably handled." Travers memorandum, supra note 869.

C. Data Collection

Although the certificate of eligibility, which veterans must file to receive VA educational benefits, provides VA with an accurate count of the number of veterans using these benefits to attend approved courses,<sup>940</sup> no racial or ethnic designations are included in the form.<sup>941</sup> As a result, VA has no record of the extent to which minority veterans are participating in VA-approved programs, nor does it expect to develop such a record.<sup>942</sup> An adequate racial-ethnic data collection system would enable VA to assure that minorities are taking full advantage of the educational benefits available to them.

Since VA is not aware of any underutilization of its benefits by minority veterans, it has developed no program to keep minority veterans or any veterans constantly informed of available benefits.<sup>943</sup> In addition, even if a program were initiated, without a list of minority veterans, VA would probably not be able to personally reach all of those veterans.

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940. VA had data indicating that there are currently 2,416,946 Vietnam veterans in the United States, 90,890 of whom are not high school graduates, and 43.7 percent of whom are enrolled in some form of training or education program under the G.I. Bill. Information obtained from Martin C. Hall, Adjudication Officer, Los Angeles VA Regional Office, Mar. 26, 1973, in Los Angeles, Cal.

941. Data on the sex of the veteran is, however, collected. VA response, supra note 869.

942. Travers memorandum, supra note 869 and telephone interview with Martin Wall, Equal Opportunity Specialist, VA, June 21, 1974.

943. In 1968 VA initiated a program entitled "Operation Outreach." Since most Vietnam veterans were not approaching VA to learn of their rights and benefits under the new G.I. Bill, VA had to approach the veterans. Information was disbursed in the combat areas of Vietnam, in existing points of separation in the United States, in military hospitals, and in Veterans Assistance Centers. VA has prepared a pamphlet entitled "Two Years of Outreach," which describes, using statistical data, the results of its outreach program.

On separate occasions, the Secretaries of four Government agencies have advocated the collection and use of racial-ethnic data in order to determine if agency programs were reaching intended minority beneficiaries and to learn of the quantity and quality of the benefits reaching those being served.<sup>944</sup> Although in 1969 VA began to obtain information including the race, ethnicity, and sex of veterans attending VA-approved institutions, this information is obtained only in its compliance report, which is not intended to be used to assess the extent to which veterans are making use of the benefits available to them. As a result, VA still has no statistical basis for initiating programs aimed at informing minority veterans of the availability of educational benefits.<sup>945</sup>

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944. 1) Clifford M. Hardin, Secretary of Agriculture, 1968-71, in a memorandum dated September 23, 1969, stated that it was crucial for the Department to develop a system of measuring the quantity and quality of services delivered to minority groups in all important and sensitive program areas; 2) Wilbur J. Cohen, Secretary of HEW, 1968-69, in a memorandum to HEW agency heads dated January 17, 1969, endorsed the collection and use of racial and ethnic data as a "vital tool" for determining whether HEW programs are reaching intended beneficiaries and for fulfilling the congressional mandate of nondiscrimination in federally-assisted programs; 3) George Romney, Secretary of Housing and Urban Development, 1968-72, in a memorandum to all HUD Assistant Secretaries and the General Counsel, dated April 8, 1970, stated that it is impossible to carry out civil rights responsibilities affirmatively without information on the racial and ethnic composition of applicants for, and recipients of, HUD assistance; and 4) W. Willard Wirtz, Secretary of Labor, 1962-68, in an address at the Convocation of the NAACP Legal Defense and Education Fund, on May 18, 1966, described the civil rights responsibilities of his agency and the resulting need to know the racial distribution of participants in Manpower Administration programs.

945. A survey of Veterans Administration services to returning Vietnam veterans conducted by the Bureau of the Budget in November 1969 revealed sufficient indication of problems among minority group veterans as to raise the question of whether they are being reached and served equally. Bureau of the Budget, A Survey of Socially and Economically Disadvantaged Vietnam Era Veterans (Nov. 1969).



D. Guidelines1. For Institutions

In January 1973, VA, with the assistance of the Department of Justice, prepared Title VI guidelines to be used by all educational institutions under its jurisdiction. The agency submits a copy of these guidelines to all proprietary institutions and apprenticeship and on-the-job training programs at the time a compliance report<sup>946</sup> is requested of the school. The guidelines contain a general description and examples of nine specific areas in which an institution may not discriminate. According to the guidelines, discrimination is prohibited in (1) admission to the institution,<sup>947</sup> (2) records of the facility,<sup>948</sup> (3) training and education, (4) staff, teachers, and faculty,<sup>949</sup> (5) access to the public,<sup>950</sup> (6) internal organization of the facility,<sup>951</sup> (7) placement services, (8) housing, and (9) financial matters.

The guidelines adequately identify areas in which discrimination may exist but do not provide sufficient guidance on what steps an institution

946. VA Form 09-4274 Compliance Report of Proprietary Institutions Apprenticeship Program, and On-The-Job Training Program. For a discussion of the report, see p. 332 supra.

947. The institution cannot require a picture of the applicant or identification of his or her race, color, or national origin prior to admission except where operationally necessary, e.g., in minority recruitment programs. Also, publications may not indicate, in any form, racial preference and previously segregated institutions must include a nondiscrimination clause in the application form.

948. Records kept identifying trainees' race, color, or national origin are mandatory and identification by such means is considered nondiscriminatory when made subsequent to admission.

949. VA claims that this provision only refers to internal faculty discrimination. See discussion on pp. 312-14, supra.

950. In programs where students serve customers from the general public, assignments may not be made on a discriminatory basis.

951. Nondiscriminatory placement includes use of equal opportunity employers to recruit students and a guarantee of equal access to all students of recruiters used by the institution.

must take to correct the effects of past discrimination. For example, the guidelines do not specifically require or even endorse the use of affirmative action plans. In fact, the concept of affirmative action is relegated to only a few examples in the guidelines. In addition, even in those cases in which affirmative action is mentioned, it is clearly not the primary focus of the example. For instance, one of the examples provides that, "If an institution has undertaken an affirmative action program to correct the effects of past discrimination, it may require racial identification or applicant pictures on application." The concept of affirmative action was here introduced to exemplify certain identification procedures.

## 2. For Staff

Another set of guidelines has been developed by VA for use by its staff in scheduling and conducting site survey reviews<sup>952</sup> and complaint investigations at educational institutions covered by Title VI. The "Site Survey Guide" offers suggestions for conducting interviews, taking notes, examining records, and writing reports.<sup>953</sup> In addition, an eight-part "Site Survey Form" is used for conducting Title VI compliance reviews.<sup>954</sup>

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952. A site survey review is VA's term for what is commonly known as a compliance review. For a discussion of compliance reviews, see p. 345 infra.

953. VA recently informed this Commission that:

The Title VI staff in Central Office is currently editing its operational manual. The purpose of the manual is to provide detailed procedures to enable Veterans Assistance personnel to carry out the VA's responsibilities under Title VI as they relate to proprietary educational institutions, apprenticeship programs and on-the-job training programs. Roudebush letter, supra note 878.

954. The form indicates that the reviewer is responsible for reviewing material collected from the regional office file; making community contacts; reviewing data on school enrollment, minority enrollment, and programs; reviewing data on admissions, recruitment and financial aid policies; checking placement activities and housing and student activities; interviewing minority students and faculty; and making observations, based on a tour of the facilities, which might indicate noncompliance.

Despite the existence of these two documents, the instructions provided are still inadequate. For example, the guide fails to provide standards or criteria for determining compliance. As a result, final determinations are left to the discretion of the reviewer.

Another major weakness of the site survey guide is that in many areas, it does not require reviewers to verify oral information obtained from school officials. For example, in the section on programs of study, although it is suggested that the reviewers determine whether minorities are equitably represented in institutions having multiple programs of study, there are no provisions for them to collect data for such programs to verify a school official's response. In the absence of such data, it is impossible to determine conclusively the extent to which minorities are represented.

In addition, the guide offers no guidance on analyzing the various data which it suggests to collect. For example, one section discusses record examination, but does not indicate how the mere examining of records can reveal a pattern of discrimination.

Similarly, the site survey form is of limited value because of its design and format. For the most part, it merely requires the investigator to answer a series of "yes"- "no" questions. This is done by checking boxes and little space is provided for supplying details.<sup>955</sup> This format of

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955. Questions to be asked include: are minority group members absent or underrepresented in the student body; are all students, including minority students, given training on job interview techniques, resume preparation, etc.; and are students assigned to housing facilities on a nondiscriminatory basis?

questionnaire does not require or encourage the reviewer to probe into specific and more detailed areas to discover possible covert forms of discrimination. This format also does not lend itself to analysis or corroboration of information obtained. For example, the reviewer is asked to list the types of recruitment techniques utilized by the school and to identify or obtain proof of any advertising media used by the school which may specifically be aimed at recruiting minority group members. These two items represent the entire portion relative to recruitment practices.<sup>956</sup>

There are no standards provided in the form by which to evaluate this information. The reviewer is not required to determine if those recruitment methods are successful in reaching minorities or whether the advertising media used do, in fact, reach a representative audience.

No statistical check of student applicant flow, and acceptance and rejection rate, by race and ethnicity is undertaken; nor, in most cases, is any attempt made to determine how minority students currently attending the institution learned of the program.

VA instructions for compliance staff are so general that specific information to be sought is left to the discretion of the reviewer.<sup>957</sup>

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956. However, some review reports were written in narrative form as opposed to utilizing the format of the site survey form.

957. This failure is of added consequence now because civil rights reviews are conducted by program staff with little established commitment and no training in the area of civil rights.

For example, the section of the site survey guide on financial assistance is limited to two suggestions. The reviewer must: "Determine financial assistance available to students. Do minority group members seem to receive fair share of any such assistance?" The reviewers are not specifically directed to ascertain such matters as the exact amount of financial assistance provided the members of each racial and ethnic group and the numbers of students of each racial and ethnic group receiving aid. The site survey form also does not require the reviewer to secure sufficient information in this area to make a determination of compliance. For example, although the form requests the number of minority students receiving financial aid from the institution and the school's budget allotment for financial assistance, it does not request the total number of students receiving financial aid. Without this information, a reviewer is unable to assess what percentage of those receiving aid were minorities. Further, since the reviewer does not deal with the amount of aid given in each case, no computation can be made of the percentage of total aid going to minorities.

A separate questionnaire, developed by VA as part of the site survey form, recommended for use by the reviewer when interviewing minority students and faculty is also vague. This form also consists of "yes"- "no" questions with some spaces for details.<sup>958</sup> However, reviews examined by Commission staff revealed that, even in cases where the reviewer made use

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958. Questions on this form include: is student able to participate in school-sponsored activities; is student aware of any discrimination in school housing; in students' opinion, do minority group students get full benefit of school's placement program; and is treatment and training received equal to that of other students?

of the separate form for interviewing minority students, no areas were probed in detail. A "yes"- "no" answer was given for each of the six questions relating to equal opportunity. This is clearly insufficient, since it is known that covert forms of discrimination can take many forms and are often difficult to detect.<sup>959</sup>

#### E. Reviews

In fiscal year 1973, VA conducted only 375 compliance reviews.<sup>960</sup> This represents reviews of less than .1 percent of those institutions for which it has responsibility. A large majority of compliance reviews identified elements of noncompliance. However, VA maintains that, because in all such instances the reviewer was able to obtain a commitment of corrective action<sup>961</sup> from the school, no findings of noncompliance were reached. Nonetheless, of the 375 reviews, only 4 were followup reviews; i.e., reviews of institutions previously examined to assure that the schools have implemented assurances made at the time of initial review. VA claimed that fiscal year 1974 scheduling would provide for review of the majority of institutions found to be in actual or potential noncompliance

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959. For example, a covert form of discrimination is where a recruiter is selective in those whom he or she interviews or where a few token minority students are admitted to a school.

960. Of these, 88 were conducted by the Chicago Title VI officer and 289 were conducted by the Washington office. VA response, supra note 869.

961. A commitment of corrective action agreement is a statement made by the institution assuring that any practices which were identified during the review as being violative of Title VI will be so modified as to comply with compliance standards.

during fiscal year 1973.<sup>962</sup>

Both program and civil rights field staff conduct civil rights compliance reviews of proprietary institutions and apprenticeship and on-the-job training programs. They use the "Compliance Report of Proprietary Institutions, Apprenticeship Programs, and On-The-Job Training Programs"<sup>963</sup> as the major tool in selecting institutions to be reviewed. Those schools having no minorities enrolled or a substantially lower minority enrollment than is known to approximate the minority population of the area in which the school is located and schools which are the subject of discrimination complaints are given priority for review.<sup>964</sup>

Once a determination has been made to review a particular institution, one reviewer is assigned to conduct the investigation.<sup>965</sup>

962. As of June 20, 1974, this Commission has been unable to obtain a definition of potential noncompliance. In addition, we have not been furnished with the number of followup reviews conducted in fiscal year 1974. We have, therefore, been unable to assess the extent to which VA has fulfilled this intention.

963. For more information on the contents of this form, see pp. 332-34 supra.

964. VA has identified 26 cities as priority areas because of their significant minority population. VA response, supra note 869. These include such cities as Chicago, Ill.; New York, N.Y.; Newark, N.J.; and Atlanta, Ga.

965. One week prior to going onsite, a general notification announcing VA's intention to conduct a Title VI review is sent to the top official of the institution. The letter will generally outline the purpose for the visit and the method to be used in conducting the review.

Files in the regional office are screened for existing data which may be pertinent to the school and its practices.<sup>966</sup> The reviewer may also inquire of local minority organizations such as the National Association for the Advancement of Colored People, the Urban League, or the American G.I. Forum as to whether they are aware of any complaints which may have been filed against the institution. However, no formal or routine check is undertaken with HEW, the Equal Employment Opportunity Commission, or the Adjudication Division of VA to determine if these agencies may have received complaints against the institution or may have other data relevant to the institution's position on equal opportunity.<sup>967</sup>

Generally, during a review the investigator initially meets with a representative of the institution, tours the institution to assure that facilities are not segregated, interviews minority students and faculty, examines records, and, prior to leaving the facility, conducts an exit interview with a responsible institution official. At this point a report on the findings uncovered during the onsite review is made.

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966. The regional office files consist of information obtained by the SAA at the time the institution receives VA approval. These materials include date of VA approval, discrimination complaints on file, the school's reputation regarding treatment of minorities and the number of veterans and beneficiaries enrolled at the school. Also, regional office reviews verifying information collected by the SAA are included in those files.

967. The Title VI Officer of the Chicago Contract Compliance Branch could recall only one instance in which the Adjudication Division was contacted and in that case it was learned that, since the VA had withdrawn its certification on a particular computer science college, there was no Title VI jurisdiction over the institution. Wickens interview, supra note 914.



Because reviewers make use of the site survey guide and form, reviews conducted by VA generally cover all areas required. Most reviews, however, do not cover them adequately. Examination of 13 VA compliance reviews revealed that the information gathered was superficial. This is due, in part, to the lack of depth of VA's instructions to its staff. In addition, the format provided in the site survey form explains VA's ability to generally complete compliance reviews in only 4 hours.<sup>968</sup> It is evident that no more than a few hours is needed to complete a seven-page, "yes-no-fill-in" check form.

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<sup>968</sup> However, when a problem or serious noncompliance is identified, the review lasts as long as is necessary to negotiate a resolution of the specific area of noncompliance.

A major weakness of VA's compliance reviews is that information obtained from both students and school officials is not generally verified by the reviewer.<sup>969</sup> One reviewer, for example, listed publications in which a school advertisement was made. However, the review report showed no indication that an attempt was made to look at copies of the publications to ensure that the advertisement was actually placed in them. In addition, the school claimed to employ 150 recruiters throughout the country who visit prospective applicants in their homes. No attempt was made to verify that prospective students were visited on a nondiscriminatory basis by checking files of a select number of recruiters.<sup>970</sup>

Another school asserted that all students were aware of the existence of a placement file and were afforded equal access to it.<sup>971</sup> The reviewer relied on this information and neglected to ask students if this was true or request a copy of any sign or publication containing this information. This same school indicated that the school fraternity operates on a nondiscriminatory basis and its members are both black and white. Interviews with fraternity officials and members, at least some of whom were black, as well as other black students, could have supplied verification of this information.

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969. Only 1 of the 13 review reports examined by Commission staff had indications of adequate attempts to verify information. The review was conducted at the American Hairstyling Academy, Jacksonville, Fla.

970. The school reviewed in this situation was Insurance Adjusters School, Inc., Miami, Fla.

971. The school reviewed in this instance was Gupton-Jones College of Mortuary Science, Atlanta, Ga.

Another school official, for example, indicated that certain companies sponsor scholarships for students at the school. The investigating official did not deem it necessary to request information as to which students received such scholarships so as to determine if those scholarships were granted on a nondiscriminatory basis.<sup>972</sup>

Further, in some cases it was apparent that reviewers did not pursue all possible indications of noncompliance. In one case, for example, a minority student who was interviewed expressed the belief that an institution was insensitive to the needs of blacks. The VA reviewer did not delve into the issue. Although this may have been due to the student's assertion that the possible discrimination may have been unintentional, it is clear that discriminatory actions are culpable whether intentional or unintentional. This student's assertion should have been carefully scrutinized.

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972. Review of Gupton-Jones College of Mortuary Science, supra note 971. Another major deficiency in VA's compliance reviews is that only minority students are interviewed. It is apparent that interviews with minority students are essential, but information can be verified and more opinions can be rendered by interviewing majority group students as well.

F. Complaints

Prior to VA's reorganization, any complaint filed with the VA alleging a Title VI violation was forwarded to VA's Contract Compliance Service where the information and data was analyzed by VA's Title VI staff.<sup>973</sup> If it was concluded that allegations seemed to involve Title VI, the complaint was referred to the Chief Benefits Director, who determined whether or not an investigation was warranted.<sup>974</sup> All complaint investigations were conducted by the staff of the Title VI Division. However, since the reorganization of January 1, 1974, complaints are investigated by a field person specializing in conducting investigations, who is made aware of the allegations and is given specific instructions from the central office regarding specific areas to probe. The investigator is to forward a copy of the findings to the central office for review by a member of the Title VI staff.<sup>975</sup> Recommendations are made by the Title VI staff member to the Director of VAS. Subsequently, reports are forwarded to the Chief Benefits Director for review. 976

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973. Complaints were not normally received in the Contract Compliance Service. They were received by the VA regional offices or other Federal agencies. VA response, supra note 869.

974. In all cases the Chief Benefits Director had concurred with the Contract Compliance Service's recommendation as to whether or not an investigation would be conducted. Authorization to conduct a complaint investigation would then be given by the Chief Benefits Director to the Contract Compliance Service. VA response, supra note 869.

975. Travers interview, supra note 877.

976. Prior to reorganization, findings were prepared by the Title VI officer and initially reviewed by the Director and the Assistant Director of VA's Contract Compliance Service.

One problem with this system is that, although the investigators are given training in conducting investigations relating to VA programs, they receive no training on Title VI matters. They are only given a copy of VA's Title VI guidelines.

The only procedures for investigating a Title VI complaint are found in the guidelines for conducting a compliance review. However, the guidelines' attention to the area is limited to one sentence--"Investigate and process all complaints arising under Title VI of the Civil Rights Act of 1964." It appears that, since VA has not seen fit to develop guidelines for complaint investigations, it feels that there is no difference between a complaint investigation and a compliance review.

A complaint investigation should include an indepth investigation of the institution with regard to the individual complaint. For example, it is entirely possible for an institution to discriminate against a particular individual on the basis of race, color, or national origin and not against other members of the same class. As a result, specific areas relating to the complaint may not be covered by conducting a Title VI compliance review and intensive scrutiny into those areas will be made only if the investigating official realizes the problem.

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977. Whenever possible, the investigator is to negotiate a complaint resolution. In cases where this is not possible, the Education and Rehabilitation Service of DVB and the General Counsel of the VA may be called upon to assist in negotiating a resolution. Where a resolution cannot be accomplished through conciliation, the Chief Benefits Director institutes enforcement action through the VA General Counsel.

As of June 1, 1974, VA had received 11 complaints, all of which alleged discrimination against blacks.<sup>978</sup> A possible reason for the small number of discrimination complaints filed with VA may be its neglect to publicize its authority to investigate complaints. VA asserts, however, that it is aware of this program weakness and is in the process of

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978. Complaints have been filed against: (1) Peoria Barber College, Tulsa, Oklahoma, where several black students alleged that school officials asked customers whether they preferred white or black students to cut their hair; (2) Continental Commercial College, Birmingham, Alabama, where two minority group females alleged that black students were being charged more tuition than white students taking the same course; (3) Indiana Baptist College, Indianapolis, Indiana, where it was alleged that the school allowed black students to enroll, but did not permit them to attend the school-affiliated church and that Sunday school buses would not pick up black children to take them to Sunday school; (4) International School of Barbering, Inc., Tulsa, Oklahoma, where three black students alleged that the school discriminates against black students in instruction practices and admission policies; (5) Allied Institute of Technology, Chicago, Illinois, where a black student maintained that he was expelled from school because of his race; (6) Farrell Academy, St. Louis, Missouri, where a black student maintained that he was experiencing discriminatory treatment based on his race; (7) Modern Barber College, Houston, Texas, where a complainant alleged differential treatment towards black customers and black students and also alleged use of degrading names for black students; (8) Orlando Barber College, Orlando, Florida, where a complainant alleged that blacks were neither permitted nor enrolled; (9) Massey Business College Jacksonville, Florida, where it was alleged that black students were not eligible to reside in the school-operated apartment complex; (10) Dallas Time Herald Printing Company, Dallas, Texas, where a black complainant alleged that he was receiving differential and inferior training; and (11) Weaver Airlines Personnel School, Kansas City, Missouri, where complainant alleged that she was denied admission because of race.

printing a poster to be displayed in all educational institutions.

Examination of several complaint investigations revealed that they covered each of the allegations made by the complainants. However, the investigations, like the VA compliance reviews, tend to be superficial. For example, although all 15 allegations made in the complaint against the International School of Barbering, Inc., in Tulsa, Oklahoma, were looked into, this was accomplished merely by interviewing the managers and president of the school. Information obtained from these sources should have been verified by questioning students or, where possible, requesting data, substantive material, or publications.

Since much information is not verified, it seems that VA investigators do not have sufficient basis upon which to make a determination of compliance. VA investigators indicated that several issues were raised which could not be substantiated or could not be interpreted as a difference in treatment due to race.

In one case, for example, it was alleged that the more desirable barber chairs are those located near the front of the school and minority group students are not allowed to occupy these chairs. Officials of the institution denied that race played any role in chair assignments; rather they contended that the best chairs are given to those students cutting hair the best. This information might have been verified by interviewing several majority and minority group students. VA should have attempted to determine the possible relationship of race to chair assignments.

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979. VA response, supra note 869. As of May 30, 1974, the Director, VAS, had no knowledge of this intention. Travers interview, supra note 877.

As a result of its failure to fully investigate all aspects of the case,  
the relief obtained by VA was not comprehensive. <sup>980</sup> The only policy change  
VA required of the institution related to those discriminatory practices  
<sup>981</sup>  
acknowledged by school officials.

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980. VA determined that only two policy changes would be required for the school to be considered in compliance: (1) Customers will be assigned to students on a rotation basis, and (2) the instructor will discontinue addressing students as "boy." Both these allegations were acknowledged by school officials.

981. An agreement obtained by school officials to adhere to these conditions resulted in a resurvey after 3 months and a subsequent determination of compliance.



As a result of the Title VI Division's recent reorganization, VA's complaint handling procedure has been hampered to some extent. One VA complaint investigation report, for example, concluded with recommendations for the conduct of periodic compliance reviews of an institution. This report was completed prior to January 1, 1974, the date VA's complaints handling responsibilities were shifted from the Washington office to the field offices. Since no copies of reports on complaints investigated prior to January 1 have been forwarded to the field offices, field personnel were not made aware of these recommendations and the Washington office had not followed up on them. It has been 8 months since the initial complaint investigation report was prepared and still no followup review has been conducted. <sup>982</sup>

G. Enforcement

Because VA's Title VI program is geared to extended negotiations to secure compliance, the agency has revoked approval of only four institutions as of June 30, 1974. On June 1, 1971, Soule College in New Orleans, Louisiana, underwent enforcement action by VA due to its segregated admissions policy. <sup>983</sup> As a result of the refusal of Eastern Baptist Bible College in Hampton, Virginia, to sign VA's statement of assurance of compliance with Title VI, its VA approval was terminated as of April 21, 1972.

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982. One VA Title VI staff member has informed this Commission that, having discovered this mistake, an immediate review will be conducted of this institution. Interview with Martin Wall, Equal Opportunity Specialist, VA, June 20, 1974.

983. This action was initiated as a result of a complaint filed with VA. Attempts were made by VA officials to assure compliance from the institution. However, Soule College refused to cooperate with VA directors. Telephone interview with Harold F. Bouton, Director, Title VI Division, VA, July 15, 1974.

VA's most controversial enforcement action was taken against Bob Jones University of Greenville, South Carolina, because of a segregated admission policy. In August 1967, HEW barred the university from receiving any financial assistance because of its longstanding and open noncompliance with Title VI.<sup>984</sup> VA had not determined that educational institutions were subject to Title VI jurisdiction until March 1968.<sup>985</sup> Even after it became clear that VA had coverage over Bob Jones' discriminatory practices, it took VA almost 4 years before it informed the university that it was in danger of losing approval of benefits by VA. In October 1972, an administrative hearing resulted in a decision favorable to the agency. The university appealed to the Federal district court in South Carolina.<sup>986</sup> The court with the agreement of the parties, stayed the effective date of the VA Administrator's order until it rendered a decision on the merits. On June 6, 1974, the case was argued on the merits. On July 25, 1974, the court ruled against the university.<sup>987</sup> On October 23, 1974, the university appealed the decision to the U.S. court of appeals, where it is currently pending.<sup>988</sup>

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984. Interagency Report, Status of Title VI Compliance, HEW, Cumulative List No. 311, June 13, 1974.

985. Fable letter, supra note 872.

986. Bob Jones University v. Donald E. Johnson, C.A. No. 72-1325 (D.C.S.C. July 25, 1974). The Federal district court in South Carolina accepted jurisdiction for this case although an appeal from agency action is not normally heard by a district court, but rather by an appeals court. Interview with Stephen Halloway, Attorney, Federal Programs Section, Civil Rights Division, U.S. Department of Justice, June 19, 1974.

987. For another discussion of this case see, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974: To Regulate in the Public Interest ch. 1 (1974).

988. Bob Jones University v. Donald Johnson, appeal docketed sub nom. Bob Jones University v. Richard L. Roudebush, C.A. No. 74-2164 (4th Cir. filed Oct. 23, 1974).

GENERAL FINDINGS AND CONCLUSIONS

1. HEW has failed to issue comprehensive guidelines to federally-aided school districts, State education agencies, nonpublic schools, and institutions of higher education outlining their civil rights responsibilities under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Titles VII and VIII of the Public Service Health Act, and Executive Order 11246, as amended, and providing instructions on what corrective action must be taken in cases of non-compliance. Key issues such as metropolitan school desegregation, differences in course offerings based on sex at educational institutions, and faculty selection criteria have not been definitively addressed in guidelines. Thus, institutions which might otherwise be willing to comply with their civil rights obligations, are not aware of the full scope of those obligations or of the corrective action which must be taken.

2. While the use of voluntary negotiations is an important tool in effecting compliance in school districts and institutions of higher education, HEW's reliance on that mechanism over protracted time periods to the virtual exclusion of the administrative sanction has seriously diminished its overall effectiveness and credibility as an enforcement agency.

## Chapter 1

FINDINGS AND CONCLUSIONS

Department of Health, Education, and Welfare (HEW)

Office for Civil Rights (OCR)

Elementary and Secondary Education

1. The Department of Health, Education, and Welfare is the Federal agency responsible for ensuring that the thousands of school districts receiving billions of dollars in Federal funds each year comply with Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin in federally-assisted programs, and Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex in federally-assisted education programs.
2. In the last few years OCR's responsibilities in the elementary and secondary school area have grown appreciably and, although productivity of existing staff could be increased by the adoption of the policy changes set forth in later recommendations, the size of the present staff is inadequate.
3. OCR has an extensive data collection system which provides OCR staff with a large quantity of important information. Although the system was improved in fiscal year 1973 to include information concerning sex discrimination, ability grouping, suspensions, and the nature of school districts' bilingual education offerings, the following shortcomings impede the operation of the program:

- a. Data on bilingual instruction by school, dropout rates, and specific regional ethnic group categories are not requested in the forms.
  - b. OCR recently changed its data collection instrument in two important respects: data on faculty are no longer obtained; and data collected for classes within grades now reflect only enrollment for minority children as a group rather than for major ethnic categories.
4. Despite the fact that OCR has developed a number of guidelines covering its equal educational opportunity responsibilities, additional efforts in this area are necessary.
- a. HEW has not published a summary of all its civil rights requirements in the area of elementary and secondary schools.
  - b. Existing guidelines do not address a number of fundamental issues, including pupil transportation, metropolitan school desegregation, and the effect of governmental bodies other than school districts on the obligations of school districts. School districts thus do not know what constitutes noncompliance and what steps must be taken to overcome discrimination policies and practices.
  - c. Existing guidelines do not impose upon school districts the responsibility for conducting a self analysis to determine if compliance problems exist and for taking corrective action with regard to each problem area uncovered in the analysis.
  - d. OCR's May 25, 1970 memorandum, which set forth the responsibilities of school districts to provide national origin minority group children with an equal educational opportunity by initiating language programs and other services needed to maximize their success in the school system, has

not been updated to inform recipients of the full scope of HEW's requirements.

(1) The memorandum's coverage, which extends to language programs, ability grouping, and practices of programs for the educable mentally retarded (EMR), has not been updated to reflect areas now covered in OCR reviews, such as discriminatory allocation of resources.

(2) Although in the last two years the principles of the memorandum have been expanded to blacks and other minorities, OCR has not revised the memorandum to reflect this change.

e. Although Title IX was passed more than 2 1/2 years ago, HEW has not published a final regulation informing districts what constitutes sex discrimination in education programs, and its proposed regulation contained a number of deficiencies.

(1) The proposed regulation failed to provide adequate guidance to districts on their obligation to identify and overcome limited participation by members of one sex in education programs and employment.

(2) Specifics concerning the conduct of compliance reviews were missing from the proposed regulation, including time limits for reviews and procedures and priorities for conducting reviews.

(3) By permitting single sex athletic teams where "selection for such teams is based upon competitive skill," the proposed regulation perpetuates a "separate but equal" policy in school athletics. The proposed regulation also fails to provide for equal per capita

expenditures for male and female athletic programs.

(4) The draft regulation for Title IX contains exemptions which are not provided for in the statute itself. For example, the proposed regulation exempts foreign trusts from Title IX coverage while the statute does not.

5. State education agencies which receive and administer billions of dollars in Federal funds each year are a potentially important resource in the effort to expand compliance with equal educational opportunity requirements, since school districts rely heavily on them for funds, policy guidance, and accreditation. However, OCR's Elementary and Secondary Education Division has not developed a program for compelling more State activity in this area, nor has it determined the extent to which State agencies are themselves administering Federal funds in a nondiscriminatory manner.

6. OCR's efforts in enforcing Title VI have improved in some respects.

a. OCR has improved its reviews of in-school discrimination against all minority students with the issuance of the May 25 memorandum and use of the equal educational services approach.

b. It has begun to review the compliance status of large city school districts.

7. Notable inadequacies remain, however, in OCR's Title VI enforcement programs.

a. There have not been enough reviews of school districts under Title VI and the May 1970 memorandum to convince school districts that the Federal Government is committed to an all out effort to ensure equal educational opportunity. For example, between January 1972 and May 1973,

OCR only conducted 134 Title VI reviews of school districts, with three of its ten regional offices conducting only one review apiece. Despite the broad potential of the May 25 memorandum, OCR has reviewed only four percent of the school districts with large concentrations of national origin minority children.

b. Although the problem of school segregation is still widespread, OCR has nevertheless avoided the issue of the discriminatory assignment of students to schools in its onsite reviews, findings, negotiations, and enforcement of Title VI.

c. Where compliance reviews have been conducted by OCR, the amounts of time consumed in the analysis of data, clearance for letters of noncompliance, and conduct of negotiations have served to undermine the effectiveness of the enforcement program.

d. Negotiated agreements are weakened by failure to utilize, except for minority faculty underrepresentation, the tool of numerical goals and timetables to correct discriminatory policies and practices. The ineffectiveness of the plans OCR negotiates is compounded by its lack of an adequate followup program.

8. OCR participation in the conduct of pregrant and postgrant reviews of programs under the Emergency School Assistance Program (ESAP) and the Emergency School Aid Act (ESAA) has been generally useful.

a. Although OCR does not spend as much time on an ESAA pregrant review as is spent conducting a Title VI review, ESAA reviews stimulate school districts to rectify discriminatory practices quickly, and they provide OCR with an opportunity to investigate, at least preliminarily, whether a school district is adequately providing equal educational services



for minority students.

b. Under ESAA, OCR is reviewing for the first time large city districts like San Francisco and Dallas which have been under court order.

c. Where violations were found, in postgrant reviews under both ESAP and ESAA, OCR has generally been able to secure compliance from districts.

d. Where OCR has not been able to secure voluntary compliance it has terminated funding of programs financed under ESAA and ESAP, but it has not begun administrative sanction proceedings under Title VI against those districts, thus enabling other Federal funds to flow to recipients with prima facie Title VI violations.

9. Although reviews of nonpublic schools are an important part of OCR's responsibility to ensure nondiscrimination in educational institutions, OCR has done little to enforce this mandate.

a. OCR accepts assurances of nondiscrimination from nonpublic schools almost automatically. Schools with "significant minority enrollment" are assumed to be in compliance, although the schools might engage in discriminatory activities such as in-school segregation.

b. Although IRS also has responsibility for ensuring nondiscrimination in nonpublic schools, cooperation between HEW and IRS is virtually non-existent. The two agencies have not attempted to develop common standards for compliance, to minimize duplication of effort, or to share information on reviews conducted.

10. Although OCR receives hundreds of complaints each year, its complaint investigation program needs to be strengthened.

- a. Regional OCR offices have large backlogs of complaints.
- b. OCR has not defined the maximum length of time a complaint investigation should take, and its inability to resolve complaints in a timely manner has a potentially adverse effect on complainants.

11. In Adams v. Richardson, a Federal court in 1973 found that HEW was negligent in its efforts to enforce Title VI of the Civil Rights Act of 1964. HEW was ordered by the court to promptly secure compliance from or begin enforcement action against school districts which the agency previously had found to be maintaining segregated schools, but against which it had taken no subsequent action. In November 1974, more than twenty months after the court order, the compliance status of 56 of the 197 school districts was still unresolved.

12. OCR's reliance on prolonged negotiations and its reluctance to utilize administrative sanction procedures under Title VI where school districts fail to develop satisfactory voluntary plans has undermined the strength of its Title VI program.

13. OCR has failed to develop a systematic method for evaluating the effectiveness of the various elements of its compliance program.

## Chapter 2

FINDINGS AND CONCLUSIONS

## Internal Revenue Service (IRS)

1. IRS's Revenue Ruling 71-447 requires that private schools receiving Federal assistance in the form of tax exemptions not discriminate against students on the basis of race. Although Title VI of the Civil Rights Act of 1964, which prohibits racial or ethnic discrimination in federally-assisted programs, was used as persuasive evidence for issuance of the ruling, IRS has unjustifiably restricted its program's coverage by not adopting the provisions and prohibitions of Title VI. IRS also has adopted other restrictive standards.
  - a. IRS has not amended the wording of Revenue Ruling 71-447 to include specifically a ban on discrimination based on ethnic origin, although it claims that such discrimination is barred by the revenue ruling.
  - b. IRS does not prohibit racial discrimination against faculty of private schools, although HEW prohibits such discrimination by federally-funded public school systems and the Title VI regulations of most Federal agencies prohibit employment discrimination when such discrimination affects the provision of services.
  - c. Although Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally-assisted education programs, exempts private schools from its admissions requirements, it clearly prohibits discrimination based on sex in private school

programs and practices. Nevertheless, IRS has not amended Revenue Ruling 71-447 to cover sex discrimination.

2. A Federal court of appeals, in Green v. Connally, imposed strict limitations on IRS for granting tax-exempt status to private schools in Mississippi. IRS, however, has refused to apply the requirements imposed on Mississippi schools to schools in other States.

a. Private schools in Mississippi must publicize their nondiscriminatory policy in all brochures, catalogues, and printed advertisements.

b. Private schools in Mississippi must furnish IRS with information as to the racial composition of students, faculty, staff, applicants for admission, and recipients of scholarships and awards. They must also provide IRS with a listing of incorporators and other administrative officials and a statement whether any of these officials can be closely identified with organizations connected with segregated school education.

c. To meet IRS requirements, a private school outside of Mississippi applying for tax-exempt status need only assert and publicize on one occasion that its policies are nondiscriminatory.

d. IRS does not require private schools outside of Mississippi to collect racial or ethnic data on students or faculty, and it makes no effort during the process of assessing the tax-exempt status of private schools outside of Mississippi to determine if the intent of those responsible for the establishment of the private school was to further public school segregation.

3. IRS's program to review compliance with Revenue Ruling 71-447 is highly deficient. The agency has so loosely defined what is expected of private schools that enforcement action is unlikely except where discrimination is overt.

a. Despite the history of segregated education in the United States and the increasing number of segregated academies that have been established, IRS's national office required in fiscal years 1973 and 1974 that its field staff examine only 2 to 4 percent of the private schools within their jurisdictions. Moreover, in fiscal year 1973 the Southeast region did not even review the minimum number of schools required by IRS.

b. The national office provides no guidelines for selecting schools to review. Therefore, standards for choosing private schools to review differ among key district offices.

c. IRS has not established formal comprehensive guidelines for reviewers.

d. Examination of a random sample of review reports revealed that they were generally inadequate. The reviews did not usually contain, for example, any analysis of the fund solicitation letters, mailing lists, or recruitment sources of schools to determine whether they were discriminatorily constituted or utilized. Further, the reports lacked uniformity. Some reports, for example, included racial data on students and scholarships, while others did not.

e. Although IRS has revoked tax-exempt status for almost 100 private schools, extremely few revocations resulted from actual reviews by IRS of the practices of private schools. Almost all of the tax exemptions revoked were of private schools which in 1970 refused to certify to IRS that their policies were non-discriminatory and that they had publicized that fact.

4. IRS has taken almost no action with regard to enforcing Revenue Ruling 71-447 in church-sponsored private schools, many of which were allegedly formed to subvert public school desegregation efforts.

a. IRS's only activity concerning church-sponsored schools was taken in June 1971, when it sent them a questionnaire to determine if they had a nondiscriminatory policy. IRS has not, however, completed its review of the responses to the questionnaire.

b. IRS attempts to justify its inactivity with regard to church-sponsored private schools by asserting that there may be legal questions with regard to its authority to review a church facility. Yet, it has been aware of this issue for more than 3 years and has still not prepared a definitive legal opinion concerning it.

5. Although both IRS and HEW have the responsibility to ensure nondiscrimination in private schools, the extent of IRS communication with HEW is limited to furnishing it with a monthly list of those private schools which have been recognized as exempt. Staff from the agencies do not meet to discuss, for example, the possibility of developing uniform compliance standards or coordinating reviews of private schools.

FINDINGS AND CONCLUSIONS

Department of Health, Education, and Welfare (HEW)

Higher Education Division

1. The Higher Education Division (HED) of HEW's Office for Civil Rights has responsibility for enforcing several civil rights statutes and Executive orders prohibiting discrimination by institutions of higher education. Title VI of the 1964 Civil Rights Act bans racial or ethnic discrimination in the distribution of benefits and services in any federally-funded program. Titles VII and VIII of the Public Health Service Act prohibit sex discrimination in health training programs. Title IX of the Education Amendments of 1972 makes unlawful sex discrimination in both employment and services by an institution of higher education receiving Federal assistance. Finally, Executive Order 11246, as amended, prohibits employment discrimination on the basis of race, color, sex, religion, or national origin by any institution of higher education which has a contract with the Federal Government. The inadequacy of HEW's enforcement effort with regard to all of these civil rights provisions permits the continuation of practices which result in the denial of equal educational and employment opportunities to women and minorities.
2. HEW has failed to issue sufficient compliance instructions to colleges and universities.
  - a. HEW has not issued guidelines detailing the Title VI responsibilities of colleges and universities receiving funds from the Federal Government,

although the Title VI program is 10 years old. HEW has failed to take a position on critical Title VI issues, such as remedial education and retention of minority students. It has also failed to require recipients of Federal funds to analyze their programs for any underrepresentation of minorities in enrollment or to develop affirmative action plans for correcting such deficiencies.

b. HEW has not issued regulations implementing Titles VII and VIII, although Congress passed these statutes almost four years ago. Proposed regulations were critically deficient, since they contained only weak requirements for affirmative action and did not provide for regular compliance reviews.

c. HEW has not issued regulations implementing Title IX, although that statute was enacted in 1972. Proposed regulations contained a number of defects, including the failure to require affirmative action to correct underrepresentation in enrollment and the allowance of sexually segregated athletic teams in some situations. The proposed Title IX regulations also failed to specify the procedures, priorities, and time limits for conducting compliance reviews.

d. HEW issued informal contract compliance guidelines in 1972 but has not updated them to comply with Executive order regulations. The guidelines suffer from serious deficiencies, such as a failure to provide instructions to colleges and universities on nondiscriminatory standards for employee selection and on the development of goals and timetables for the employment of women and minority groups.

3. HEW has failed to conduct indepth and regular compliance reviews of colleges and universities receiving Federal funds.



- a. In the 10 years since Title VI was passed, HEW has conducted only 803 Title VI compliance reviews, which means that less than 30 percent of the 2,900 campuses covered by the Act have ever been reviewed. Further, it conducted fewer reviews in fiscal year 1974 than it had in fiscal year 1969, and some of its regional offices, such as those in New York and Chicago, have conducted no reviews in the last two years. HEW's instructions for conducting Title VI compliance reviews are too broad in nature, and do not require an adequate amount of record examination and data analysis. HEW's ability to conduct adequate reviews has been seriously impaired by its failure to require colleges and universities to compile and analyze pertinent statistics and to maintain written affirmative action programs.
- b. HEW has conducted only eight Title IX reviews, although 2,700 colleges and universities have been subject to the Act for more than two years. Only three of the 1,500 colleges and universities covered by Titles VII and VIII have been reviewed for compliance with those statutes.
- c. Although 60 percent of the Higher Education Division's resources have been devoted to its contract compliance program, the Division has not reviewed a significant number of colleges and universities to determine whether they maintain and follow affirmative action plans which comply with the Executive orders. As of September 1974, HED had approved affirmative action plans of 20 colleges and universities, 2.2 percent of the total, and HED recognized that seven of the accepted plans did not conform with Executive order regulations. During fiscal

year 1974, HED conducted complete compliance reviews of only 60 colleges and universities, or six percent of the total number for which the agency is responsible. Furthermore, HEW failed to conduct its compliance reviews according to Executive order regulations.

4. HEW has repeatedly permitted civil rights violations by colleges and universities to continue without imposing sanctions.

a. In its Title VI reviews of colleges and universities, HEW routinely finds noncompliance, but it almost never imposes sanctions; instead HEW responds by making vague recommendations. Moreover, HEW does not routinely require the submission of progress reports or conduct sufficient followup to determine if its recommendations have been followed. It took a court order, under Adams v. Richardson in 1973 to force HEW to take action against 10 States, which had continued openly to operate dual systems of higher education after HEW directed them in 1969 to cease such practices.

b. Further, HEW has not taken action against State systems of higher education, other than those covered by the Adams v. Richardson decree, although it is aware that some have also remained segregated, e.g., Texas.

c. HEW has not begun to attempt to enforce Titles VII and VIII, or Title IX, because it has not yet issued implementing regulations.

d. In violation of Executive order regulations, HEW has repeatedly failed to issue show cause notices to contractors with deficient affirmative action plans. From 1971 to 1974, HEW issued only two show cause notices

although its files indicate clearly that numerous violations were uncovered. Instead of following the sanction procedures required by the Executive order, HEW pursues protracted negotiations, some lasting several years. Recently, HEW has been finding colleges and universities in compliance solely on the basis of agreements to develop legally sufficient affirmative action plans--although the standard for compliance is the existence of a plan, not an agreement to develop it. Further, experience demonstrates that such agreements have often been broken. In addition, the agreements reached thus far permit institutions to develop affirmative action plans which do not comply with the standards of Executive order regulations, since they do not provide for adequate data analysis, sufficient goals and timetables for eliminating underutilization, or adherence to all applicable nondiscrimination guidelines.

5. HEW has failed to handle complaints adequately.
  - a. HEW has not investigated or resolved a large number of Title IX complaints on the grounds that there are not Title IX regulations.
  - b. Although HEW has been required by Executive order regulations to investigate complaints, it has approved the compliance status of a number of colleges and universities without investigating or resolving all of the outstanding complaints against those institutions.

## Chapter 4

FINDINGS AND CONCLUSIONS

## Veterans Administration (VA)

1. Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs receiving Federal financial assistance, gives VA the responsibility to ensure equal educational opportunity in proprietary institutions and apprenticeship and on-the-job training programs attended by veterans using VA educational benefits. VA, however, has narrowly defined the parameters of its authority to achieve this goal.

a. Although Title IX of the Education Amendments of 1972, which in essence extends the prohibitions of Title VI to sex discrimination in education programs, covers the admissions practices of all institutions of vocational education, including proprietary institutions and training programs, VA has taken no action to enforce Title IX in these institutions.

b. VA does not consider the possibility of discrimination by an institution in the hiring or promotion of faculty to be within its jurisdiction despite the fact that HEW, the agency with major civil rights enforcement responsibility for education programs, has maintained for several years that faculty discrimination is a Title VI violation, and that the Title VI regulations of most Federal agencies have been uniformly amended to prohibit discrimination in employment involving positions which have an effect on services.

2. Although VA's recent delegation of additional civil rights responsibilities to the field offices has resulted in more compliance reviews being conducted, its overall Title VI program remains deficient in several areas.

a. While VA expects to devote 20 personyears to Title VI matters in the field offices in fiscal year 1975, no field personnel will be assigned to Title VI on a full-time basis and field personnel assigned new responsibilities for civil rights matters have received no training in Title VI.

b. It is the responsibility of the Title VI Division's central office to monitor compliance reviews and complaint investigations. However, since the regional offices do not submit copies of their review reports, no indepth monitoring is done by staff of VA's central office.

3. A veteran cannot receive VA educational benefits unless the course he or she has chosen to attend has been approved by VA. The authority to approve courses, however, has been delegated by VA to State Approval Agencies (SAA's) appointed in each State by the Governor.

a. The SAA's preapproval review of an institution's policies and courses does not contain a civil rights component.

b. The SAA's also conduct followup reviews of institutions, but these reviews also do not look for civil rights problems.

4. VA's data collection program is deficient. As a result, VA is unable to assess the degree of possible underutilization of its benefits by minority and women veterans.

a. Although, on three different occasions, VA has collected in its compliance report form racial and ethnic data on enrollment and placement, no comprehensive comparative analysis has been made of these data. Moreover, no data were collected concerning such important matters as race and ethnicity of applicants for admission and financial aid. Also the data collected were not cross-classified by sex.

b. Although VA has an accurate count of the number of veterans using its educational benefits to attend approved courses, it maintains no racial, ethnic, or sex breakdown of this figure. Thus, VA has no record of the extent to which minority and female veterans are participating in VA-approved programs. It, therefore, is unable to develop an outreach program designed specifically to keep minority and women veterans constantly informed of available benefits.

5. VA's civil rights guidelines for institutions contain a general description and examples of areas in which an institution may not discriminate. The guidelines, however, do not sufficiently indicate the steps an institution must take to correct the effects of past discrimination, and they do not require or even endorse the use of affirmative action plans.

6. VA has developed a "Site Survey Guide" and a "Site Survey Form" for use by its staff in scheduling and conducting compliance reviews and complaint investigations. The guide and form, however, are deficient in several respects.

a. VA instructions for compliance staff are so general that specific information to be sought is left to the discretion of the reviewer. For example, reviewers are told to determine whether financial assistance is available but are not specifically directed to ascertain such matters as the exact amount of financial assistance provided the members of each racial and ethnic group and the number of students of each racial and ethnic group receiving aid.

b. In many areas, reviewers are not required to verify oral information obtained from school officials by, for example, requesting substantive data on programs or recipients. Yet in the absence of this substantive information, it is impossible to make a valid determination of compliance.

c. Neither the guide nor the form offers direction on analyzing the various data which it does suggest to collect, and both fail to provide standards or criteria for determining compliance.

e. The form used by compliance reviewers, for the most part, calls for them to fill in a series of "yes-no" questions and little space is provided for detail. This type of questionnaire does not encourage the reviewer to probe into possible covert forms of discrimination.

7. Because reviewers make use of VA's inadequate site survey guide and form, VA's reviews are generally superficial and lack sufficient information upon which to base a determination of compliance.



GENERAL RECOMMENDATIONS

We recommend that the President, in the interest of accelerating and intensifying the Federal Government's program for assuring that women and members of minority groups will be granted the equal educational opportunities guaranteed them under the Constitution, direct that the following major objectives be achieved within the next twelve months:

1. That, under the direction of an appropriate Federal official to be designated by him, all of the resources and authorities of the Executive Branch be pooled in the interest of bringing about a vigorous and effective enforcement of the Constitutional mandate to desegregate elementary and secondary schools.

We are at a dangerous crossroad in connection with school desegregation in the United States. We cannot afford--because of organized resistance in Boston or any other community--to turn back. Extraordinary action is called for in order to make clear that the Nation has rejected once and for all, as the Supreme Court did in Brown v. Board of Education, as illusory and unconstitutional the doctrine of "separate but equal". The evidence that we have considered in the preparation of our report, however, leads us to the conclusion that even while renewed emphasis needs to be placed on desegregation, major activity must be undertaken to rectify the discriminatory

patterns and practices facing national origin minority and female students.

2. That HEW develop a comprehensive set of guidelines that will clearly identify the civil rights responsibilities of federally-aided school districts, State education agencies and nonpublic schools under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. These guidelines should include instructions on what corrective action must be taken in cases of noncompliance.

Guidelines are available on some issues. These have never been brought together, however, in a single document so as to clearly establish their interrelationships. Definitive guidelines on major issues such as metropolitan desegregation and pupil transportation have not been developed. Action should not be delayed in dealing with such basic issues because they are under consideration in either the Congress or the courts. Administrators are entitled to guidelines based on today's law. If the law changes, changes can be made in the guidelines.

3. That each school district in receipt of Federal funds be required to conduct a yearly analysis, pursuant to the guidelines described above, of the extent to which it offers equal educational opportunities to minorities and women; that a written affirmative action plan be adopted immediately by the school district to deal with each problem identified by the survey; and that a timetable be established for the implementation of the program.

4. That State Governments be required to submit annually to HEW a plan under which State education agencies would be held accountable for securing compliance of school districts with Title VI and Title IX; would be required to review, approve, and monitor any self-analysis and corrective action plans developed by school districts; and would establish procedures under which Federal funds allocated to school districts would be withheld in the event of noncompliance.
5. That HEW issue instructions to all institutions of higher education receiving funds from the Federal Government stating that they will be expected to be in full compliance with Executive Order 11246 and the regulations issued thereunder by the Office of Federal Contract Compliance.

The present slow, halting, and ineffective approach to implementing the constitutional rights of women and minorities for equal employment opportunities in the field of higher education is due in no small part to HEW's failure to take this action. Its recent issuance of a statement on affirmative action plans in institutions of higher education is in conflict with this recommendation and serves to undermine the credibility of the executive branch in terms of its acceptance of its responsibility to enforce constitutional rights.

6. That HEW conduct compliance reviews of at least 25 percent of recipients and contractors in the field of higher education each year, and where noncompliance is found, prompt action should be taken to bring about compliance or to cut off Federal support.
7. That HEW, without being prodded further by the courts, initiate administrative sanction proceedings against all educational institutions receiving Federal funds or contracts and known by HEW to be in probable noncompliance with Title VI, Title IX, or Executive Order 11246, as amended, who do not take acceptable corrective action within 90 days after notification of their probable noncompliance.

In line with this objective, HEW should publish regulations delineating time limits for each stage of its Title VI and Title IX review procedures, including data analysis, determination of compliance status, and negotiations. HEW should strictly adhere to the time limitations set forth in the rules and regulations published by the Office of Federal Contract Compliance to cover enforcement of Executive Order 11246, as amended.

This recommendation is a "must" if those who are the victims of discrimination are to develop confidence in the willingness and ability of their government to act in their behalf. This confidence does not exist today in many quarters:

## Chapter 1

RECOMMENDATIONS

Department of Health, Education, and Welfare (HEW)

Office for Civil Rights (OCR)

Elementary and Secondary Education Division

1. OCR should improve further its data collection system. The data collection forms should be revised to include data on faculty, bilingual instruction by school, dropout rates, and and specific regional ethnic group categories. In addition, data on all classes within each grade should be collected for separate ethnic categories rather than for minority children as a group.
2. OCR should promptly issue comprehensive guidelines relating to the equal educational opportunity responsibilities of public schools.
  - a. These guidelines should cover such important issues as allocation of resources, disciplinary action, pupil transportation, metropolitan school desegregation, and the extent to which it will consider the role which governmental bodies other than school districts, such as housing authorities, play in the creation of segregated school systems.
  - b. OCR should require each recipient school district to conduct a yearly analysis, pursuant to the above guidelines, of the extent to which it offers equal educational opportunity to minorities and women.

In all cases in which the analysis indicates that there is a discriminatory distribution of services by a school district, that district should be required to adopt immediately a written affirmative action plan to correct, within a fixed time limit, each problem identified.

c. OCR should revise the wording of the May 25, 1970, memorandum, which defines the actions expected of school districts with significant numbers of national origin minority students, to reflect its decision to apply the principles of the memorandum to all minority children rather than solely to national origin minority children.

d. HEW's proposed regulation to implement Title IX should be re-drafted in a number of respects and then issued promptly. (1) The regulation should require all elementary school athletic teams to be integrated immediately and secondary school teams to be integrated pursuant to a specified timetable. In addition, HEW should require that per capita expenditures for male and female athletic programs be equal. (2) The regulation should permit no exemptions to the coverage of Title IX other than those authorized in Title IX itself.

e. HEW should incorporate in its Title VI and Title IX regulations provisions specifying procedures for conducting compliance reviews, and complaint investigations and setting forth the maximum amount of time which it will expend in the various stages of a compliance review or

complaint investigation; e.g., no more than 60 days should expire between the completion of a review and the notification of the recipient of the findings of the review, and no more than 90 days from the notification of possible noncompliance should be allowed for negotiation prior to the initiation of administrative sanction action.

3. OCR should take steps to ensure that its compliance reviews of school districts deal effectively with the full range of possible non-compliance.

a. OCR should include in all reviews an assessment of the degree to which racially-ethnically segregated schools exist and require districts to desegregate such schools by whatever lawful measures are required.

b. In each review, OCR should determine if urban school districts have schools in which a majority of the pupils are minority group members and if the suburban school districts have few minority group pupils. To the extent the OCR finds this to be the case it should investigate the possibility that this racial-ethnic isolation was caused by an interdistrict violation of law.

c. The negotiated agreements accepted by OCR should include a delineation of goals in each area covered, the specific steps to be taken to reach the goal, and a listing of the dates when each goal will be expected to be achieved and when each implementing step is to be taken.

d. OCR should undertake a program of conducting followup reviews in those cases in which it has found areas of noncompliance which the affected school districts have agreed to rectify.

4. Although it is recognized that OCR compliance reviews are more sophisticated than in prior years and that it has begun to review large city districts the extent of its review activities must be stepped up.

5. OCR should begin to assess the compliance posture of State education agencies.

a. OCR should attempt to determine the extent to which policies and activities of State education agencies cause or contribute to discrimination against minorities and women by school districts within their jurisdiction. Particular attention should be paid to examining the role of these State agencies in the increasing amount of racial/ethnic isolation in urban areas.

b. State education agencies should be held accountable for securing compliance of school districts with Title VI and Title IX. In this regard, these State agencies should be required to review and approve any self analysis and corrective action plans developed by school districts.



6. OCR should greatly increase its efforts to ensure that nonpublic schools which receive direct or indirect Federal assistance do not discriminate on the basis of race, ethnic origin, or sex.

a. Guidelines should be issued which define the standards for compliance expected of nonpublic schools. The guidelines should address practices concerning admissions, scholarship assistance, employment and in-school programs.

b. Comprehensive reviews of nonpublic schools should be undertaken and where possible those reviews should be conducted in conjunction with reviews of public school districts.

c. HEW should meet with the Internal Revenue Service to discuss the adoption of common standards for compliance, the initiation of joint reviews, and the development of comprehensive systems for the sharing of information.

7. OCR should investigate and resolve in a timely fashion all complaints it receives.

8. In all cases in which probable noncompliance is found by OCR in which negotiations with the recipient do not result within 90 days in an adequate written agreement to take all corrective action pursuant to a fixed timetable, OCR should immediately initiate administrative sanction proceedings. Such proceedings should be completed within 90 additional days except in cases where a written extension is granted to the school district or HEW. In such instances, the Secretary of HEW must certify in writing that there was compelling evidence that the delay was caused by exceptional circumstances which HEW could not have foreseen or avoided. Each extension shall not exceed 30 days.

- a. All school districts cited in Adams v. Richardson should be brought into compliance within 90 days or be subject to administrative sanction proceedings.
  - b. OCR should not consider any school district to be in compliance unless it addresses all deficiencies, including student assignment.
  - c. OCR activities under the Emergency School Aid Act should continue, but violations under those programs should be considered as prima facie evidence of violations under Title VI and, after any additional investigation deemed necessary, enforcement proceedings should proceed on the basis of both statutes simultaneously.
  - d. OCR should develop a capacity for evaluating the extent of corrective change resulting from its enforcement program. In order to implement such a system, OCR must maintain data for each school district, for each region, and nationally, which can be compared on a year-to-year basis, on the nature of its compliance activities, e.g., compliance reviews, letters of findings, negotiations, voluntary plans accepted, cases referred to the Department of Justice, and administrative hearings. These data must be regularly compared to data on the extent of desegregation in each district.
9. After determining the extent to which the implementation of the above recommendations will increase its capacity for enforcing the law, OCR should request the additional staff necessary to fulfill all of its responsibilities.

## Chapter 2

RECOMMENDATIONS

## Internal Revenue Service (IRS)

1. IRS should acknowledge that its responsibility to prohibit private schools to which it provides a tax exemption from discriminating on the basis of race is founded not only in its Revenue Ruling 71-447, but is also dictated by Title VI of the Civil Rights Act of 1964. It should then promptly issue Title VI regulations which define in detail the duties of all exempt private schools. These regulations must:
  - a. specifically bar discrimination based on ethnic origin.
  - b. prohibit employment discrimination which has an effect on the provision of services, i.e., faculty discrimination.
  - c. based on Title IX of the Education Amendments of 1972, include a prohibition against discrimination in the provision of services based on sex.
  - d. require multiple publication by all private schools of a nondiscriminatory policy.
  - e. require all tax-exempt private schools to collect and cross-classify ethnic and sex data on students, faculty, applicants for admission, and recipients of scholarships and awards.
2. IRS should greatly increase the size and quality of its enforcement effort in the private school area.

- a. IRS should require that each year its field staff review at least 10 percent of the private schools within their jurisdiction and should provide guidelines to the field staff for selecting the schools to be reviewed.
- b. IRS should develop formal instructions for its field staff which specifically define what must be covered in a compliance review. For example, not only must all data collected by the school be analyzed, but the reviewer must look at fund solicitation letters, mailing lists, and recruitment sources to determine whether they were developed or utilized in a discriminatory manner. The reviewer also should be required to determine if the intent of those responsible for the establishment of a private school was to thwart public school desegregation.
- c. In instances in which reviews note noncompliance by private schools, IRS should demand immediate corrective action. Negotiations with non-complying private schools should not extend beyond 90 days after the investigative finding of noncompliance is made. Followup reviews should be conducted in all instances where noncompliance had been found and corrective action was promised.

3. IRS should apply the same standards and procedures to church-sponsored private schools as it does to all other private schools and in view of the fact that it has not taken any action to determine the compliance status of these schools, IRS should give priority to reviewing a broad cross section of church-sponsored private schools in the next 12 months.

4. IRS and HEW should develop uniform compliance standards and coordinate private school reviews. An information-sharing mechanism should also be adopted to avoid any duplication of effort by the agencies.

## Chapter 3

RECOMMENDATIONS

Department of Health, Education, and Welfare (HEW)

Higher Education Division

1. HEW should make a number of revisions in its Title VI regulations, including adoption of a requirement that all recipients compile and analyze enrollment data to determine if underrepresentation or underutilization of minorities exists; and if deficiencies are revealed, the regulations should require the development of a written affirmative action program, with goals and timetables, to eliminate the underutilization or underrepresentation.
  - a. Specific instructions should be included on the proper development of goals and timetables.
  - b. Guidelines should be issued explaining the institutional practices and policies which the college or university must scrutinize for any disparate impact on minorities and specifying the types of actions that are required if such an impact is determined. The guidelines should suggest specific steps to be taken to correct deficiencies in such areas as recruitment, scholarship allocation, and remedial education.
2. Regulations implementing Titles VII and VIII, as well as Title IX, should be issued forthwith.
  - a. These regulations should include the same requirements of analysis and affirmative action for eliminating sex discrimination as were recommended with regard to Title VI.

b. The Title IX regulations implementing the statute's equal employment provisions should incorporate by reference the guidelines on sex discrimination of the Equal Employment Opportunity Commission and the affirmative action requirements outlined in Revised Order No. 4 of the Department of Labor. The Title IX regulations should further specify that integration of athletic teams must be commenced according to a timetable and that per capita expenditures in sports programs for females and males must be equal. Finally, the Title IX regulations should not provide for any exemptions not expressly authorized in the statute.

3. HEW should update and expand the existing contract compliance guidelines to specify the steps that colleges and universities must take to comply with the Executive order. Revised guidelines must explain that institutions of higher education are required to identify and validate all employee selection standards and procedures which adversely affect minorities and women. The guidelines on employee selection must address employment prerequisites such as degree attainment, publication accomplishments, and favorable interviews or tenure appraisals.

4. HEW should conduct compliance reviews of at least 25 percent of recipients and contractors in the field of higher education each year; and, where noncompliance is found, no more than 90 days should be allowed to expire between the notification to the institution and the commencement of sanction proceedings.

a. Detailed instructions should be developed for the staff on the conduct of Titles VI, VII, VIII, and IX compliance reviews.

(1) Reviews should begin with the issuance of a questionnaire to the college or university specifying information to be submitted, followed by a desk audit of the institution's utilization analysis, written affirmative action plan, and report of progress in meeting the plan's objectives.

(2) The desk audit should be followed by an onsite review in most cases.

(3) The review should be completed by the issuance of a finding of compliance or noncompliance and specific instructions to the college or university within 120 days of the issuance of the questionnaire, with notice that failure to implement the instructions or refute the agency's findings will be grounds for suspending or terminating Federal financial assistance. If negotiations are necessary, they should not continue for more than 90 days; any issues unresolved in negotiations should be considered in the context of the hearing process.

b. HEW should require all institutions to submit quarterly progress reports on the status of implementation of their affirmative action plans.



- c. Based on a comprehensive analysis of the progress reports, followup reviews should be conducted for at least 20 percent of the institutions initially reviewed within the last year.
  - d. Annual followup reviews should be conducted for all of the State systems found to be in noncompliance under Adams v. Richardson.
  - e. HEW should, within 1 year, evaluate all State systems of higher education, other than those covered by the Adams v. Richardson decree, to determine if, in fact, dual systems exist for minority and majority students in any State.
  - f. HEW should conduct contract compliance reviews according to the Executive order regulation, Revised Order No. 14. The sanction procedures required in Executive order regulations should similarly be followed.
5. HEW should not approve the compliance status of any recipient or contractor without resolving complaints pending at the commencement of a compliance review.
6. HEW should discontinue its practice of clearing the compliance status of contractors in the field of education on the basis of conciliation agreements for the development of affirmative action plans and should require contractors to follow Revised Order No. 4. All conciliation agreements reached thus far should be rescinded.
7. In view of the deficiencies noted in this report, the Office of Federal Contract Compliance of the Department of Labor should consider revoking the authority it has delegated to HEW for enforcing the Executive order with regard to institutions of higher education.

## Chapter 4

RECOMMENDATIONS

## Veterans Administration (VA)

1. VA should interpret broadly its authority to prevent any discrimination based on race, national origin, and sex by those proprietary institutions and apprenticeship and on-the-job training programs it certifies.
  - a. VA should prohibit sex discrimination in all institutions and programs which it approves and should draft regulations to implement enforcement of Title IX of the Education Amendments of 1972.
  - b. VA should revise its Title VI regulations to include a prohibition against discrimination in employment involving positions, such as teachers, which have an effect on the services offered by the institutions and programs it certifies.
2. VA should strengthen the internal assignment of its staff to combat discrimination in institutions and programs it certifies.
  - a. VA should assign one member of each regional office full time Title VI compliance responsibility. This person should work directly with the Title VI Division in headquarters.
  - b. VA should develop a comprehensive training program for all staff members who will have responsibility for Title VI enforcement.
  - c. Title VI responsibilities of the central and field offices should be clearly defined in writing. Field offices should forward a percentage of the monthly review reports to headquarters for evaluation.
3. VA should assign civil rights activities to the State Approval Agencies (SAA's) and monitor the implementation of those responsibilities.
  - a. An SAA's review of an institution's policies and courses for VA approval

should be expanded to include a civil rights component, comparable to a "preaward" Title VI compliance review.

b. An SAA's followup review should also include examination of possible civil rights problems.

c. VA should develop guidelines for both preapproval and followup reviews by SAA's, which include specific criteria and standards for determining compliance.

4. VA should expand its present data collection and utilization system.

a. An indepth comparative analysis should be made of the racial and ethnic data which already have been collected in compliance report forms. This form should be revised to include data on the sex of enrollees.

b. VA's compliance report form should be revised to obtain racial, ethnic, and sex data on applicants for admission to and financial aid from, approved programs and institutions.

c. VA should revise its basic data collection form, the certificate of eligibility, to include questions on race, ethnicity, and sex.

d. VA should determine, based on the racial, ethnic, and sex data which are to be collected on the certificate of eligibility, if minorities and females share equitably in the benefits offered by the agency. If they do not, positive result-oriented programs should be initiated by VA to correct this deficiency.

5. VA should develop new guidelines for institutions on what steps they must take to correct the effects of past discrimination. The use of written affirmative action plans should be made a primary tool to accomplish this.

6. VA should revise the present guidelines and form used by its staff for scheduling and conducting compliance reviews.

a. The revised instructions should provide specific standards or criteria for determining compliance.

b. The revised instructions should require that information obtained by the reviewer by way of interview, be verified, wherever possible.

c. The revised instructions should include a section explaining the types of analysis which should be conducted on the various data which it suggests to collect.

d. Questions asked in the form used by VA staff in conducting reviews should be revised so that more substantive information be sought, rather than "yes-no" responses. For example, in the area of financial aid, the questionnaire should be worded to require the reviewer to determine the amount of total assistance given, the race or ethnicity of all recipients of assistance, and the percentage of assistance given to minorities as compared with the percentage of minorities enrolled at the institution.

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