B J Brooks

THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974

Volume VI

To Extend Federal Financial Assistance

A Report of
the United States
Commission on
Civil Rights

November 1975

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 to:

Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;

Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;

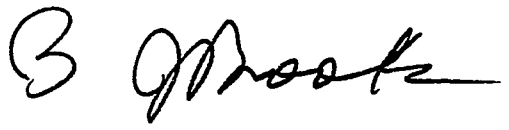
Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission:

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

John A. Buggs, Staff Director



THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT--1974

Volume VI

To Extend Federal Financial Assistance

A Report of the United States
Commission on Civil Rights
November 1975

LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C., NOVEMBER 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 civil rights activities of several Federal agencies with responsibilities for ensuring nondiscrimination in their federally assisted programs under Title VI of the Civil Rights Act of 1964: the Extension Service of the Department of Agriculture; the Health and Social Services Division of the Office for Civil Rights of the Department of Health, Education, and Welfare; the Department of the Interior; the Law Enforcement Assistance Administration of the Department of Justice; the Manpower Administration of the Department of Labor; the Federal Highway and the Urban Mass Transportation Administrations of the Department of Transportation; the Environmental Protection Agency; and the Federal Programs Section of the Civil Rights Division of the Department of Justice. It is the sixth in a series of seven 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. This series of publications represents our fourth followup to a September 1970 study of the Federal civil rights enforcement effort.

This report is based on a review of documents produced by these agencies, interviews with Federal officials, and an analysis of available literature. A draft of this report was submitted to the agencies for review and comment prior to publication.

We have concluded in this report that during the past few years dedicated staff in a number of Federal agencies have tried hard to establish viable equal opportunity programs, but, largely because of inadequate Government-wide leadership, these efforts have often been futile. As of July 1975, the Attorney General had failed to carry out the mandate, issued 18 months before under Executive Order 11764, to prescribe "standards and procedures for implementation of Title VI." Meanwhile, Federal agencies are engaged in myriad well-meaning but ineffectual tasks, ranging from assisting recipients to establish pro forma grievance procedures to drafting guidelines for weak affirmative action plans. Operating under varying laws and requirements, some Title VI offices also enforce anti-sex discrimination provisions and others do not, although sex discrimination in

federally assisted programs appears to be widespread. Most Federal agency Title VI offices are understaffed, lack sufficient authority to execute their responsibilities, do not require the necessary data for measuring Title VI compliance, and conduct too few preaward and postaward reviews. Where Title VI violations are uncovered, they are often not fully remedied.

Therefore, we ask that you direct your attention to the recommendations at the conclusion of this report. Of major importance is our recommendation that the President issue an Executive order prohibiting sex discrimination under any program of Federal financial assistance, to be enforced by each Federal agency which is empowered to assist such a program. Equally imperative is our recommendation that the President issue an Executive order transferring to the Office of Management and Budget in the Executive Office of the President the responsibility for providing Title VI coordination and direction, which is currently vested in the Attorney General under Executive Order 11764. The order should mandate that the Office of Management and Budget issue enforcement standards within 90 days of the order.

Among the goals to be achieved by these standards should be the requirement that recipients establish equal opportunity plans to analyze the quality of the services extended to minorities and women and to take affirmative action, including numerical goals and timetables, to remedy the problems identified in the analysis. The standards should also set stringent timetables for resolving complaints, conducting investigations, making determinations of compliance, and initiating enforcement action where noncompliance is not voluntarily corrected.

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.
Murray Saltzman

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. The Commission is presently in the process of releasing its most comprehensive analysis of Federal civil rights programs. We have already published the first five volumes of that study: the first on the regulatory agencies, the second on agencies with fair housing responsibilities, the third on the agencies concerned with equal educational opportunity, the fourth on the Office of Revenue Sharing of the Department of the Treasury, and the fifth on agencies with equal employment responsibilities. This sixth report is on Federal agencies with responsibilities under Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs or activities receiving Federal assistance. We will soon be publishing the final volume of this report, on Federal civil rights efforts in the area of policymaking.

This civil rights enforcement 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.

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.

The bulk of the research for this report was completed in 1974, although the Commission continuously attempted to update material on salient issues until publication of the report. To assure the accuracy of this report, before final action, the Commission forwarded copies of it in draft form to departments and agencies whose activities are discussed in detail, to obtain their comments and suggestions. Their responses were 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. Their 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 this report, Commission staff interviewed numerous Federal workers dealing with federally-assisted programs 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 Title VI duties and responsibilities should be commended for what they have done, considering the legal and policy limitations within which they have been working.

This report does 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 December 1974 the activities of a number of Federal agencies with important civil rights responsibilities.

The purpose of this series of 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 these 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 Raymundo Aleman, Dolores de la Torre Bartning, Ellerbe P. Cole, Dreda K. Ford, Kenneth L. Harriston, Peggy A. Hubble, Dennis W. Johnson, Nancy Langworthy, Joyce M. Long, and Carlton M. Terry, who wrote this report, under the direction of Richard A. Gladstone and Cynthia Norris Graae, Associate Directors, 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, Margret E. Anderson, Mary V. Avant, Randall D. Briggs, Alice R. Burruss, Joyce M. Butler, Sonja R. Butler, Patricia A. Cheatham, Josie Gonzales, Wallace Greene, Jeanette M. Johnson, Carla Knapp, Grenda L. Morris, Bruce E. Newman, Joyce A. Parker, Roderlyn Pugh, Roberta Sanders, Penny K. Smith, Shirley Staton, Rudella Vinson, Patsy L. Washington, Mary V. Watson, Brenda A. Watts, and Rita L. Young.

TABLE OF CONTENTS

EXHIBITS

Chapter 1

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

I. Introduction

For more than a decade, discrimination on the ground of race, color, or national origin in federally assisted programs has been prohibited by Title VI of the Civil Rights Act of 1964.[1] Federal assistance covered by Title VI includes grants and loans; donations of equipment and property; detail of Federal personnel; sale, lease of, or permission to use Federal property for nominal consideration; and any other arrangement by which Federal benefits are provided.[2] As a general matter, Title VI applies only to Federal assistance which is received indirectly by the intended beneficiaries, through intermediaries such as State and local governments.[3] This chapter discusses the provisions of Title VI.

Federal financial assistance covered by Title VI is extended through more than 400 programs[4] totaling an estimated $50 billion

---

1. Section 601 of the Civil Rights Act of 1964, reads:

> 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).

2. For further discussion of this point, see pp. 8-24 infra.

3. Most assistance provided directly to beneficiaries by Federal agencies is not covered by Title VI. For a more detailed discussion of the scope of Title VI, see pp. 8-24 infra.

4. Hearings on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies, Appropriations for 1973, Before a Subcomm. of The House Comm. on Appropriations, 92d Cong., 2d Sess., pt. 1, at 656.

annually.[5] These programs are administered by approximately 25 agencies, which are themselves responsible for Title VI enforcement. Chapters 2 through 8 cover seven of those agencies: the Departments of Agriculture;[6] Health, Education, and Welfare;[7] the Interior;[8] Justice; Labor;[9] and Transportation;[10] and the Environmental Protection Agency. All of these agencies operate major assistance programs.

The Federal officials administering these programs are responsible for ensuring that the programs do not function discriminatorily. In addition, most Federal agencies with assistance programs have assigned to civil rights staff the specific note of overseeing Title VI compliance through such activities as data collection, compliance reviews, and complaint investigations.

Under Executive orders, the Attorney General has for a decade been responsible for coordinating the Title VI enforcement efforts of the Title VI agencies. Execution of the Attorney General's responsibility is the mission of the Federal Programs Section of the Civil Rights Division of the Department of Justice. Chapter 9 concerns the Federal Programs Section.

---

5. Attachment to letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to Ellerbe Cole, Equal Opportunity Specialist, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 3, 1975.

6. Chapter 2 concerns the Extension Service of the Department of Agriculture.

7. Chapter 3 concerns the Health and Social Services Division of the Office for Civil Rights of the Department of Health, Education, and Welfare.

8. Chapter 5 concerns the Law Enforcement Assistance Administration of the Department of Justice.

9. Chapter 6 concerns the Manpower Administration of the Department of Labor.

10. Chapter 7 concerns the Federal Highway and Urban Mass Transportation Administrations of the Department of Transportation.

Federal financial assistance extends into every area of our national life. It affects the lives of most of the population and plays a vital role in the social and economic well-being of the country. Federal assistance, for example, has helped to build hospitals and provide health care, to construct airports and highways, to revitalize urban areas and aid them in accomplishing orderly growth, to provide housing, to improve education and recreation facilities, and to assist economically disadvantaged individuals and communities. Federal assistance has also provided foster care for children and assisted surviving spouses of veterans killed in war to further their education. Therefore, it is evident that the duty incumbent on Federal agencies to eliminate discrimination in all such programs and activities is a pervasive one, reaching practically every sector and institution of society. Title VI is, thus, the broadest instrument available for the nationwide elimination of invidious discrimination and the effects of discrimination on the basis of race or national origin.

There were a number of reasons for enactment of Title VI. First, several then-existing statutes providing financial assistance, although including prohibitions of discrimination, also contained provisions permitting separate but equal facilities for minorities and nonminorities.[11] These separate but equal provisions were enacted before the Supreme Court's decision, in Brown v. Board of Education, that separate but equal is inherently unequal,[12] but that decision did not directly invalidate those provisions. Although

---

11. Such laws include Section 622(f) of the Hospital Survey and Construction Act, formerly subsection (f) of Section 291, Title 42, 60 Stat. 1043, which provided funds for hospital construction; the second Morrill Act of 1890, 7 U.S.C. § 323 (1970), providing annual grants to land-grant colleges, and (by implication) the School Facilities Construction Act, 20 U.S.C. § 636(b)(F) (1970).

12. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

their validity after 1954 was doubtful, to establish definitively the unconstitutionality of these provisions, it would have been necessary for private plaintiffs to bring suit against each such statute. Thus, even after the Brown decision there was some concern that Federal administrators would continue to act in accord with the separate but equal statutes.[13] One of the purposes of Title VI was to override such statutes and thereby obviate any need for further resort to litigation.[14][15]

A second reason for enacting Title VI also involved difficulties regarding litigation. It was clear that Federal funding of racial or ethnic discrimination by State agencies was prohibited under the Constitution. It

---

13. See the remarks of Senator Jacob Javits, 109 Cong. Rec. 14492 (1963).

14. An attempt by private plaintiffs to end discriminatory practices in two private hospitals which were federally assisted under the Hill-Burton Act failed at the district court level. Simkins v. Moses H. Cone Memorial Hospital, 211 F. Supp. 628 (M.D.N.C. 1962). The decision was later reversed, Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied 376 U.S. 938 (1964).

15. See the remarks of Senator Hubert Humphrey, 110 Cong. Rec. 6544 (1964). The Department of Justice, which had, in an unusual move, intervened in Simkins to urge the unconstitutionality of the Hill-Burton separate but equal provision, believed Title VI would override all such existing provisions. See Department of Justice, Proposed Civil Rights Act of 1964; H.R. 7152 46 (February 1964).

was not so certain, however, whether Federal or State support of private racial or ethnic discrimination would invariably be declared unconstitutional.[16] It appeared from court decisions that litigation involving private discrimination would proceed slowly and would involve highly particularized findings of fact. The adoption of Title VI[17] was seen as an alternative to such a laborious road.

A third reason for enacting Title VI was to clarify the duties of Federal agencies. Some agencies, even before 1964, had recognized a responsibility for ensuring nondiscrimination on the basis of race or ethnic origin; others had not.[18] Enactment of Title VI could be viewed as removing any doubts regarding agency authority, and would give express legislative support for agency action. Since agencies which had not recognized any authority would be required to act, Title VI would ensure uniformity of agency position.

---

16. Under a decision of the Supreme Court, there were few hard and fast rules for determining under what circumstances Federal or State support of private discrimination would constitute sufficient governmental action to permit ending the discrimination by invoking the equal protection clause of the fourteenth amendment or the due process clause of the fifth amendment. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Moreover, in a circuit court case decided mid-way in the course of congressional deliberations regarding the proposed civil rights legislation, the court moved cautiously, and did not declare that the provision of Federal funds alone constituted sufficient governmental action to bring discrimination in otherwise private hospitals within the prohibitions of the Constitution. Simkins v. Moses H. Cone Memorial Hospital, supra note 14.

17. See the remarks of Senator Humphrey, 110 Cong. Rec. 6544 (1964).

18. Among departments and agencies which reportedly believed they had authority to withhold funds from any State programs which were segregated or discriminatory were the Post Office Department, the Departments of Commerce and Labor, and the Housing and Home Finance Agency. Remarks of Senator Javits, 109 Cong. Rec. 14492 (1963). Senator Javits stated that "The Defense Department says that it is in doubt and that it intends to consider the question further." Id.

A fourth reason for enactment of Title VI was that it was hoped that it would end the time-consuming congressional practice of considering whether to apply a nondiscrimination provision to each item of program and grant legislation coming before it.[19] Debates on this question could steal valuable time from discussion on the merits of individual program proposals.[20]

A fifth reason for enacting Title VI was that it was the moral sense of the Nation that there be no discrimination in Federal assistance programs. President Kennedy, in transmitting his proposed civil rights legislation to the Congress, expressed this sentiment:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.[21]

---

19. Congressman Adam Clayton Powell so frequently proposed a nondiscrimination amendment to single items of legislation that his amendment became known as "the Powell amendment." See the remarks of Senator Humphrey, 110 Cong. Rec. 6544 (1964); see also Comment: Title VI of the Civil Rights Act of 1964--Implementation and Impact, 36 Geo. Wash. L. Rev. 824, 829 (1968) [hereinafter cited as Comment]. The Powell amendment was used by others, but not always with the purpose of ending discrimination. For an alleged example of such use see remarks of Senator Mansfield, 109 Cong. Rec. 14907-08 (1963).

20. Senator Humphrey was among those expressing this reason for enactment of Title VI. 110 Cong. Rec. 6544 (1964).

21. President John F. Kennedy, Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963, Section 5. The President's message is reproduced in full in Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States, Before Subcomm. No. 5 of the House Comm. on the Judiciary, ser. no. 4, pt. II 1446-54 (1963).

It should be noted that early in 1963 this Commission recommended that the Congress and the President consider whether legislation was appropriate and desirable to ensure that Federal funds not be made available to any State which continued to refuse to abide by the Constitution and Federal laws. U.S. Commission on Civil Rights, Special Report With Respect to the Status of Equal Protection of the Laws in Mississippi (1963).

A sixth, and possibly the most important reason for Title VI was that it was apparent in the early 1960's that discrimination was pervasive in federally assisted programs.[22] In fiscal year 1962, for example, the States of Alabama, Georgia, Mississippi, South Carolina, and Virginia received a total of more than $35 million for public school construction and operation. Yet, for the school year 1962-63 there was virtually total segregation of blacks and whites in the schools in those States.[23] In the area of hospital construction, between 1946 and the end of 1962, the Federal Government had granted $36.8 million to 89 racially segregated medical facilities.[24]

As of 1964, there was also widespread segregation in higher education and in agricultural assistance programs. Moreover, it was stated on the floor of the Senate that:

> In particular localities it has been reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like. 25

---

22. See the remarks of Senator Humphrey, 110 Cong. Rec. 6543-47 (1964). Discrimination in federally assisted programs has continued to exist. For examples of the kinds of discrimination being found, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity chs. 1, 3, and 4 (January 1975) [hereinafter cited as To Ensure Equal Educational Opportunity]; and see other chapters in this volume.

23. 110 Cong. Rec. 6543 (Mar. 30, 1964). Alabama, Mississippi, and South Carolina were totally segregated. Georgia had only 44 blacks in integrated schools, and only about one-half of one percent of Virginia's black school children were in desegregated schools.

24. Id.

25. Id. at 6543-44.

Although most of these reasons for enactment of Title VI involve moral and legal considerations, there is also a practical reason for this provision. A program of Federal financial assistance, to the degree that it operates to discriminate, or sanctions, supports, or entrenches discrimination, fails to meet its congressionally-imposed objective. When Congress enacts program legislation, it defines the class of persons eligible to participate in or otherwise receive the benefits of the program concerned. If some persons are excluded from the class of those who are eligible because of their race, color, or national origin, then the objective of the Congress will have been frustrated.

Federal funding of State and local governments, private institutions, and business activities plays a major role in ensuring America's continued growth and orderly development. As this Commission has stated:

> When any person has been denied the benefits of these programs because of race, color, or national origin, or when the program is operated without adequate consideration for the need to overcome the effects of past discrimination, the fabric of our democratic society is weakened and our progress as a Nation is retarded. 26

II. Analysis of the Provisions of Title VI

Title VI does not cover all forms of Federal financial assistance. In most cases it does not cover direct assistance extended by the Federal

---

26. U.S. Commission on Civil Rights, Civil Rights Under Federal Programs, An Analysis of Title VI of the Civil Rights Act of 1964 7 (1968).

Government or contracts of insurance or guaranty. Moreover, its application to employment discrimination is limited; and it does not prohibit sex discrimination.

A. Direct Assistance Programs

The Federal Government administers some assistance programs directly to beneficiaries. Foremost among such direct assistance programs are those which provide income security, such as social security retirement payments. Other forms of direct assistance are medical care furnished at federally-owned hospitals, such as Veterans Administration hospitals; payments for the support of farm income, the bulk of which are administered by the Agricultural Stabilization and Conservation Service of the Department of Agriculture (USDA); direct loans to farmers for operating and emergency expenses, administered by the Farmers Home Administration of USDA, retirement benefits administered by the Railroad Retirement Board; and the operating differential subsidy provided for shipping by the Maritime Administration. Although these direct assistance programs are not covered by Title VI,[27] any discrimination practiced in them is directly attributable to the

---

27. The reasoning of the Attorney General on this matter has been that direct aid to individuals does not constitute aid to a program or activity, and thus is not within the language of the prohibition. See letter from Nicholas deB. Katzenbach, Deputy Attorney General, Department of Justice, to Rep. Emanuel Celler, Chairman, Committee on the Judiciary, House of Representatives, Dec. 2, 1963, printed in Hearings on H.R. 7152, as amended by Subcomm. No. 5, Before the House Comm. on the Judiciary, 88th Cong., 1st Sess., ser. no. 4, pt. IV 2772-79 (1963). Exceptions to the general proposition stated, however, may be in order wherever the direct aid provided to an individual is extended on condition that the aid be spent in a particular program or activity, thereby benefiting that program or activity. Thus, for example, veterans' educational assistance funds are paid out by the Veterans Administration directly to individual veterans; they must, however, for the period in which they receive the funds, be pursuing an approved educational program. See letter from the Special Assistant to the Attorney General for Title VI to the General Counsel of the Veterans Administration, Mar. 5, 1968. Loans made by the Small Business Administration are directed to individuals engaged in business, but the funds are not received free of restrictions--they must be used to support or aid the individuals' business. For a discussion of the scope and meaning of the terms and phrases used by Title VI, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 180-96, 370-71 (1971) [hereinafter cited as Enforcement Effort report].

Federal Government, and is clearly in violation of the fifth amendment to the Constitution.[28]

B. Programs of Insurance and Guaranty

Title VI places programs of insurance and guaranty outside its parameters.[29] As originally proposed and considered by the Congress, no such exclusion existed. The Congress appears to have determined that, inasmuch as the Housing and Home Finance Agency (HHFA) was extensively involved in the financing of homes for private ownership,[30] Title VI might provide a wedge for forcing desegregation of housing patterns. Congress, by excluding programs of insurance and guaranty, appears to have expressed its desire not to adopt broad equal housing opportunity legislation in 1964.[31] At the same time, Congress made clear its desire not to disturb an earlier Executive order banning discrimination on the ground of race, color, creed, or national origin in federally assisted housing.[32]

---

28. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); and Enforcement Effort report, supra note 27, at 185-86, 365.

29. 42 U.S.C. § 2000d-4 (1970) provides:

> Nothing in this [Title] shall add to or detract from any existing authority with respect to any program under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

30. Today, the successor to the HHFA, the Federal Housing Administration of the Department of Housing and Urban Development, provides insurance for private lenders against loss on mortgages financing homes, multifamily projects, land development projects, and group practice facilities projects, and against loss on loans for property improvements. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing 26, n. 63 (December 1974).

31. See Comment, supra note 19, at 837.

32. This was Executive Order No. 11063, "Equal Opportunity in Housing," Nov. 20, 1962, 3 C.F.R., 1959-1963 Comp., p. 652. By providing that nothing in Title VI was to "add to or detract from any existing authority" (note 29 supra), Congress left the President's claimed power in this area undisturbed.

C. Employment Practices

Title VI's coverage of employment practices of recipients is expressly limited to those programs where a primary objective of the assistance extended is to provide employment,[33] for example, the programs of the Economic Development Administration of the Department of Commerce. The reason for the limitation on employment discrimination is generally regarded as stemming from the fact that Title VII of the Civil Rights Act of 1964 was addressed to employment discrimination.[34] It should be noted, however, that the exemption of most employment from the coverage of Title VI, and the limitation of Title VII to private employment, meant that State and local government employment went largely unaffected by the Civil Rights Act of 1964. This situation changed in 1972, when public employment was brought within the reach of Title VII.[35]

The limited coverage of employment under Title VI was officially broadened under a set of uniform amendments to agency Title VI regulations. Approved by the President in 1973,[36] the regulations provide that where

---

33. The pertinent provision reads:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1970).

34. Comment, supra note 19, at 836-37.

35. For a discussion of this point, See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 5 (July 1975).

36. The uniform amendments are discussed in ch. 9 infra.

employment is not a primary objective of Federal assistance, employment discrimination is, nonetheless, prohibited to the extent necessary to assure nondiscrimination in the provision of services to intended program beneficiaries.[37]

The failure to employ Spanish speaking persons at a federally assisted hospital, outpatient clinic, or emergency room might gravely affect the access of persons of Spanish background to needed medical services. One who cannot communicate his or her condition and feelings to a physician becomes entirely dependent on a medical examination to detect the nature of illness or scope of injury.[38] The nexus between employment practices and services would be clear enough in such circumstances. At the same time, the failure to employ persons of Spanish speaking background or blacks as file clerks, computer programmers, and laundry personnel would rarely, and perhaps not conceivably, affect the provision of

---

37. See, e.g., regulation of the Department of Agriculture, 7 C.F.R. § 15.3(c) (1975) and of the Department of Health, Education, and Welfare (HEW), 45 C.F.R. § 80.3(c)(3) (1974). HEW adopted this position soon after 1964, when it became apparent that faculty segregation and discrimination in public schools operated to deny schoolchildren equality of educational opportunity. HEW's position was upheld by the courts as early as 1966. United States v. Jefferson County Board of Education, 327 F.2d 836 (5th Cir. 1966), aff'd, 380 F.2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967).

38. The principle has been applied to teachers, lifeguards, and public assistance program employees. For the application to teachers, see note supra. For lifeguards, see infra, ch. 4, Department of the Interior. Regarding public assistance employees, a compliance review conducted in 1972 by HEW indicated that as many as 800 to 950 Spanish surnamed persons were excluded from receiving public assistance benefits as a direct result of the failure of a county in California to employ personnel who could communicate with them in a language they could understand. Hearings on Title VI Enforcement in Medicare and Medicaid Programs Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. 150-55 (1973).

administrative and laundry services. It is, therefore, apparent that a great number of employees remain beyond the scope of Title VI.

D. Sex Discrimination

Title VI does not ban sex discrimination[39] and no statute or Executive order provides the same broad prohibition of sex discrimination as Title VI provides against discrimination on the ground of race, color, or national origin. The Congress has, however, in recent years included prohibitions of sex discrimination both under new Federal programs and, by amendment, to existing programs.[40] While these laws cover a wide spectrum of Federal programs, including, for example, elementary, secondary, and higher education, water pollution, public works development, law enforcement assistance, disaster assistance, and manpower training, not all Federal assistance programs are covered. For example, not all of the Title VI programs of the Department of Agriculture are covered.[41]

---

39. The Civil Rights Act of 1964 bans discrimination on the grounds of race, color, and national origin in a number of areas. For example, Title II applies to places of public accommodation; Title III covers public facilities; and Title VII prohibits employment discrimination. Sex discrimination, however, is prohibited only under Title VII.

40. For a compilation of Federal laws prohibiting sex discrimination, see U.S. Commission on Civil Rights, A Guide to Federal Laws Prohibiting Sex Discrimination (1974). A revision of the guide was in preparation in May 1975.

41. The Department of Agriculture (USDA) administers approximately 80 federally assisted programs. See 7 C.F.R. Part 15, Subpart A, App. (1975). Of these, USDA's Forest Service is responsible for 26. No more than 7 of these 26 appear to be covered by any of the statutory prohibitions of sex discrimination enacted in recent years. (These 7 involve funds for public schools or for research, and so may be covered by Title IX of the Education Amendments of 1972.) Moreover, although USDA has published a regulation prohibiting sex discrimination in directly-administered USDA programs, this regulation would not apply to the Forest Service's Title VI programs. See 7 C.F.R. §§ 15.50, et seq. (1975).

Although it might appear that ratification of the Equal Rights Amendment[42] (ERA) would close all existing gaps in the coverage of sex discrimination, this is not necessarily so. Ratification of the ERA would essentially make sex a suspect classification under the Constitution, but whether sex discrimination in federally assisted programs would always be considered unconstitutional would still remain a question. Just as Title VI was believed necessary to ban racial and ethnic discrimination, a provision similar to Title VI might be necessary to effectively ban sex discrimination in federally assisted programs.[43] Moreover, even after adoption of the ERA, if no provision is enacted which is a counterpart to Title VI, Federal agencies might not regard themselves as being under an obligation to seek out and remedy sex discrimination.[44]

E. Methods of Enforcement

Agencies administering Federal assistance are authorized to enforce compliance with Title VI (1) administratively, by termination of or by refusal to grant or continue assistance after opportunity for a hearing and a finding on the record of noncompliance, or (2) by any other means authorized by law.[45] The phrase "any other means authorized by law" has been interpreted as meaning that the granting agency may refer the matter to the Department of

---

42. The Equal Rights Amendment as passed by the Congress provides:

> Section 1. Equality of rights under the law shall not be denied or abridged on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall not take effect until two years after the date of ratification.

43. See discussion of Simkins v. Moses H. Cone Memorial Hospital, supra note 14.

44. See discussion on pp. 3-4 supra.

45. 42 U.S.C. § 2000d-1 (1970).

Justice[46] for judicial action.

Before taking enforcement action, notice of failure to comply with the requirement must be given by the agency concerned and there must be a determination by the agency that compliance cannot be secured by voluntary means.[47] Thus, it is inferred that the statute requires that some effort be devoted to attempts to secure voluntary compliance. The length of time involved and the nature of attempts to secure voluntary compliance will vary with such matters as the positions taken by the recipient and the individual recipient's record. Such attempts might involve Federal agency provision of technical assistance and review of detailed compliance plans. Nonetheless, a Title VI agency does not have unlimited discretion to pursue a course of negotiating voluntary compliance to the exclusion of any ultimate decision on whether to proceed through an administrative hearing or to pursue "other means authorized by law" in order to effect compliance. A Federal court has held that where a recipient is unresponsive after a reasonable time has been allowed it to comply voluntarily, the Federal agency concerned must proceed with enforcement by one of the two alternative means provided by Title VI; consistent failures by agencies so to act constitute a "dereliction of duty reviewable by the courts."[48]

---

46. The Department of Justice's Title VI regulation defines other means authorized by law:

> Such other means include, but are not limited to, (1) appropriate proceedings brought by the Department of Justice to enforce any rights of the United States under any law of the United States..., or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law. 28 C.F.R. § 42.108(a) (1974).

47. 42 U.S.C. § 2000d-1 (1970).

48. Adams v. Richardson, 480 F.2d 1159, 1163 (D.C. Cir. 1973). In charging the Federal agency concerned--the Department of Health, Education, and Welfare--with dereliction of duty, the court of appeals declared the findings of fact of the district court to be "unassailable." At 1164.

F. Sanctions

(1) Administrative Procedures for Fund Termination

When an agency chooses to enforce Title VI administratively, opportunity for a hearing must be afforded the recipient concerned. The question before the administrative law judge, who presides at a Title VI hearing, is whether the recipient is in compliance with Title VI. If there is non-compliance, the only outcome is termination of Federal funding--a refusal to grant or to continue funding.[49] The formal hearing process is not intended to lead to compliance by the recipient, but to determine the responsibility of the agency concerned to comply with the mandate that Federal funds not be spent in discriminatory programs or activities.[50] After the conclusion of administrative enforcement action terminating or refusing to grant or continue assistance, the agency must file with the appropriate committee of the House of Representatives and the Senate a report of the circumstances and grounds for the action, and any order of termination or refusal to grant or continue funds cannot take effect until after the filing of the required report.[51]

The scope of the termination sanction has been the subject of court decision. Early in 1968, a HEW hearing examiner made generalized findings that a public school district in Florida had not made adequate progress toward student body and faculty desegregation and that the district was seeking to perpetuate a dual school system through its construction program. Federal

---

49. Thus, the administrative law judge may not, for example, issue an order in the alternative, stating that the recipient must take certain actions by a certain date or have its funds terminated.

50. Of course, negotiations may continue during the hearing process, and the possibility of impending cut-off may serve to induce a recipient to satisfy the agency concerned that it is or will come into compliance without formal cut-off; but this is an effect, not a purpose, of the administrative proceeding.

51. 42 U.S.C. § 2000d-1 (1970).

funds to the district under three different statutes, one of which provided for basic adult education, were terminated. The school district sought judicial review of the administrative order. The United States Court of Appeals for the Fifth Circuit considered the question of whether HEW could cut off all funds to the district without establishing that there was discrimination in each of the programs administered by the district, or, at the least, that discrimination in one part of the district's operations so infected other federally funded parts that termination was appropriate.[52] To resolve this question, the court found it necessary to construe the "pinpoint" provision of Title VI, which provides that any fund termination:

> ...shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding [of noncompliance] has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found....[53]

HEW, which had interpreted the term "program or activity" broadly, to refer to the education program administered by the school district authorities, argued that the term did not refer to individual Federal grant statute programs. HEW also argued that Title VI in any event did

---

52. Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068 (5th Cir. 1969).

53. 42 U.S.C. § 2000d-1 (1970).

not place an affirmative obligation on Federal agencies to make "pinpoint" fact findings of discrimination, but merely created an affirmative defense for school districts and other recipients, under which they could try to exclude parts of their operations from the sweep of a termination order, by showing that those parts were untainted by discrimination.[54] The Court was not persuaded by either argument, and held that the phrase "program or activity" referred to Federal grant programs and that HEW must make specific fact findings of noncompliance with Title VI under each Federal program for which it proposed to terminate funds.[55] The decision has been criticized as a poor reading of the legislative history of Title VI[56]

---

54. See Board of Public Instruction of Taylor County, Fla. v. Finch, supra note 52, at 1076. Thus, for example, it is possible that while all public school operations for children might be segregated, the basic adult education program might be nondiscriminatory.

55. Id. at 1077-78.

56. Note, "Board of Public Instruction v. Finch: Unwarranted Compromise of Title VI's Termination Sanction," 118 U. Pa. L. Rev. 1113 (1970) [hereinafter cited as Note, Unwarranted Compromise]. Congress had two major concerns about the application of the fund cut-off provision of Title VI. One was that isolated instances of discrimination in a State might lead to statewide fund termination. The other was that funds in one operating area, such as transportation, might be terminated from a recipient solely because of discrimination in a different field, such as education. At 1119-20. The author of the Note believed that although Congress certainly intended some limitation on the termination power, the precise scope of the limitation was not defined. At 1118. The author concluded that both the wording of the pinpoint provision and the relevant legislative history did not clearly support the Fifth Circuit's restrictive interpretation. At 1124.

and for the court's failure to consider the question of the degree of deference which should be paid by the court to the interpretation of the statute by the agency charged with administering it.[57] Although another commentator conceded the correctness of the decision,[58] it was recognized generally that the decision would impose an enormous burden on HEW.[59] HEW, however, despite its broad interpretation of the term "program or activity" did not appeal this decision.

This Commission's investigation did not uncover any valid reason for not appealing this case. Indeed, HEW's position of regarding a school district as a single entity is commended by several factors. One stems from the concept of moral taint. It seems repugnant that any entity which functions as a systemic or organic whole should be able to pick and choose the areas for which it will seek Federal funding in accordance with its notions of what areas it wishes to have subject to nondiscrimination requirements and which it does not. Yet, under Title VI, as construed by the court, fund termination must be based on a linkage between discrimination and specific Federal grant programs. Thus, under Title VI, a school district could accept Federal funds for its libraries and desegregate them, but maintain segregated cafeterias, where contact between blacks and whites might be more sensitive

---

57. Id. at 1127. The Supreme Court in 1971 reaffirmed the vitality of the principle of such deference, in a civil rights case. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). Such deference has limits, however, where application of an agency's interpretation would be inconsistent with an obvious congressional content. Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94-95 (1973).

58. See, Note, "Civil Rights--Desegregation--HEW is Required to Make a Program-by-Program Finding of Discrimination in Order to Terminate Federal Funds Under Title VI of the Civil Rights Act of 1964," 23 Vand. L. Rev. 149, 155 (1969) /hereinafter cited as Note, Civil Rights--Desegregation/.

59. Id. at 155-56; Enforcement Effort report, supra note 27, at 237, n. 389.

an issue than in school libraries. Absent a showing by HEW that segregated lunchrooms so infected the library operations as to render them discriminatory, Title VI would not affect the library funds. By the same token, a department of parks and recreation could apply for Federal funds for park benches, landscaping, and water fountains, but maintain separate but equal swimming pools in a corner of otherwise desegregated parks. This would, of course, transmit an unequivocal message that the city's "official view [is] that Negroes are so inferior that they are unfit to share with whites this particular type of public facility".[60] If Title VI is founded in part upon moral considerations, it seems inappropriate for Federal agencies to pay funds into the hands of a recipient while having effectively to disregard any discrimination by the recipient.

A second consideration is that it is entirely possible that while activities funded directly by Federal grants might be operated in compliance with Title VI, other programs operated on a discriminatory basis by the same recipient might be made possible indirectly by the Federal Government. This would be the case wherever such discriminatory programs were funded with a recipient's own dollars which were made available by virtue of the

---

60. Palmer v. Thompson, 403 U.S. 217, 266 (1971) (White, J., dissenting).

receipt of Federal grant dollars.[61] Such indirect Federal subsidy to discrimination is simply another aspect of the moral dilemma suggested above.[62]

(2) Judicial Procedures

Judicial enforcement is not expressly provided for under Title VI, which states that compliance can be secured either through administrative fund termination proceedings or "by any other means authorized by law."[63] This phrase was retained after Congress rejected other language which specifically permitted enforcement by Federal suits for injunctive relief. It has been suggested that the rejection of the proposed authorization of judicial proceedings was intended to allay the fears of some members of Congress regarding "government by injunction."[64]

---

61. To illustrate: If municipal library spending were an absolute budget commitment, but a Federal grant for library book funds freed up a portion of local library funds, then the local funds could be reallocated to an entirely new program for separate but equal child care facilities for parents wishing to use the libraries. Alternatively, the funds might be reallocated to some other discriminatory part of the city's budget, such as police or fire protection services.

62. To prohibit indirect discrimination would require detailed tracing of the effects of Federal dollars on a recipient's budget. Under one Federal program, however, it has been found impossible by the agency concerned to ascertain with precision what such effects are. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance 94-99 (February 1975) [hereinafter cited as To Provide Fiscal Assistance]. The only solution for this impossibility may be to subject a recipient's entire budget to nondiscrimination requirements.

63. 42 U.S.C. § 2000d-1 (1970).

64. Comment, supra note 19, at 834; H.R. Rep. No. 914, 88th Cong., 1st Sess. 46-50 (1963). The House Judiciary Committee minority considered (correctly, see text infra) that the retention of the phrase "by any other means authorized by law" meant that judicial enforcement would still be available under Title VI. Id. at 62, 86.

Nevertheless, it is clear that agencies can refer matters to DOJ for the commencement of litigation to enforce nondiscrimination in federally assisted programs.[65] Litigation may be an entirely appropriate means for bringing about Title VI enforcement in certain circumstances; for example, if the dollar value of the Federal funding involved is small or if the Federal funding was supplied at some time in the past. What bears reaffirmation, however, is that Title VI was predicated on a preference for enforcement by administrative proceedings. That this is so is suggested by the fact that Title VI does not even mention the Attorney General, while the agencies are directed to issue rules and regulations

---

65. The phrase "other means" has been construed to include an agency referral to the Attorney General for the initiation of litigation. See the Attorney General's "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," 28 C.F.R. § 50.3 (1974). Litigation may be by suits for specific enforcement of promises made by recipients, suits under other titles of the Civil Rights Act of 1964 or under other constitutional or statutory civil rights provisions, and initiation or intervention or other participation in suits for other relief designed to secure compliance. 28 C.F.R. § 50.3B.1 (1974). In addition, several other, nonjudicial means of enforcement are set out by the Attorney General. 28 C.F.R. § 50.3I (1974).

implementing Title VI. Moreover, it appears that a primary purpose of Title VI was to involve the Executive branch of government in the process of school desegregation precisely to provide a more effective alternative to court enforcement of desegregation.[66] Indeed, there was plainly some expectation that such administrative enforcement would be faster than court proceedings.[67]

---

66. See, e.g., Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report, 41 Notre Dame Law. 906, 924 (1966) [hereinafter cited as 1966 Notre Dame Conference Report]; Report of the White House Conference, To Fulfill These Rights 63 (1966); Note, Unwarranted Compromise, supra note 56, at 1113-29; Note, Civil Rights--Desegregation, supra note 38, at 151. See also, Address, "Fund Termination as Compared to Judicial Relief in Civil Rights Cases," by Howard A. Glickstein, Director, Center for Civil Rights, University of Notre Dame, at a Law Enforcement Assistance Administration (LEAA) Policy Development Seminar on Civil Rights Compliance, Rochester, Mich., Feb. 10-11, 1975. LEAA will publish a condensation of a transcript of the conference in late 1975.

67. Earlier drafts of Title VI were unencumbered by the provisions which were enacted for opportunity for hearing, reports to the Senate and the House of Representatives, and judicial review. They were added apparently in return for providing that agency enforcement action would be mandatory instead of merely discretionary, as was provided under President Kennedy's original proposal:

It would be inconsistent with such a purpose and expectation were agencies to construe Title VI as preferring judicial enforcement;[68] school desegregation, for example, would simply shift from the court to administrative agencies to the Department of Justice and back into the courts again. This circuitous route would likely be longer than direct court enforcement itself, which was intolerably slow. Moreover, between 1965 and 1969, HEW demonstrated the efficacy of administrative action.[69] It would be inappropriate to impute to Congress a preference for any more time-consuming process.

---

68. See, for example, To Ensure Equal Educational Opportunity, supra note 22, ch. 1 (February 1975).

69. For a review of the effectiveness of administrative proceedings, see Brief for Plaintiffs-Appellees, Adams v. Richardson, Civ. Action No. 73-1273 (undated), D.C. Cir., at 6-8. This effectiveness was noted by the court of appeals. See Adams v. Richardson, 480 F.2d 1159, 1163, n. 4 (D.C. Cir. 1973) (en banc).

Chapter 2

Department of Agriculture (USDA)
Extension Service (ES)

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

USDA consists of several constituent agencies which provide assistance to programs operated by State and local governments and private institutions.[70] This report focuses on the Extension Service because, as the education arm of the Department of Agriculture

---

70. Among these are the Agricultural Marketing Service, Agricultural Research Service, Agricultural Stabilization and Conservation Service, Cooperative State Research Service, Extension Service, Farmer Cooperative Service, Farmers Home Administration, Food and Nutrition Service, Forest Service, Rural Electrification Administration, and Soil Conservation Service.

Several of these agencies operate programs of special significance to minorities and the poor. For example, the Food and Nutrition Service (FNS) administers the Special Food Service program, which provides funds for lunches to daycare centers, settlement houses, recreation centers, and day camps serving low-income areas, children with working mothers, or handicapped children; the School Breakfast program which provides funds to public or federally-tax-exempt private schools serving low-income areas; and the National School Lunch program which provides funds and food donations to public and nonprofit private schools; the Food Stamp program, which sells to low-income families coupons worth more than the purchase amount at participating grocery stores; and the Food Distribution program which provides surplus food to low-income people. FNS provides funds to 184,530 State, local government, and private agencies reaching millions of people, more than are assisted by any other USDA program. For example, in November 1972, an estimated 14.8 million people participated in USDA's Food Stamp and Food Distribution programs and 24.8 million took part in its child nutrition programs. In 1974, FNS provided over $4 billion to State and local governments.

the Extension Service has significant impact on the lives of millions[71] of families, especially in rural areas, and is the USDA assistance program with greatest breadth.[72] Whereas other USDA programs provide aid for specific purposes, such as loans to farmers for housing or funds to universities for agricultural research, the informational and educational assistance offered in Extension Service programs enables the program participants to take advantage of the full range of programs offered by USDA. The wide variety of ES programs ranges from educating farmers how best to grow specific crops to providing citizenship training to children and informing families about maximizing the nutritive values of their diets.

---

71. In youth programs alone, in fiscal year 1972 more than 2.5 million persons participated.

72. In response to this statement the Extension Service wrote:

> The rationalization of the Commission for making the Extension Service the principal subject of this portion of the report is not fully supported in the text or the footnotes.... It appears that the primary objective of the Commission is to build a "straw man" and then propose to tear it down by citing many examples of contrived discrimination. Data are not cited and many content footnotes contain inferences, innuendoes and conclusions which are unsubstantiated. Letter from Joseph R. Wright, Jr., Assistant Secretary for Administration, USDA, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 8, 1975.

The Extension Service was created by the Smith-Lever Act of 1914. Its purpose is:

> to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same....73

ES provides funds to State land grant colleges and universities for the Cooperative Extension Services[74] which offer out-of-school informal education programs. It helps train State and county extension

---

73. 7 U.S.C. §§ 341, et seq. (1970). The Smith-Lever Act further states that:

> Cooperative agricultural extension work shall consist of the giving of instructions and practical demonstrations in agriculture and home economics and subjects relating thereto to persons not attending or resident in said colleges in the several communities, and imparting information on said subjects through demonstrations, publications, and otherwise and for the necessary printing and distribution of information in connection with the foregoing. 7 U.S.C. § 342 (1970).

For a description of Extension Service programs, see W.D. Rasmussen and G.L. Baker, The Department of Agriculture 84-86 (1972).

74. The Cooperative Extension Services are the State programs, in cooperation with the Extension Service, USDA.

service workers and evaluates their programs.[75]

The Cooperative Extension Service programs fall into four broad categories: (1) 4-H clubs[76] for youth from ages 9 to 19; (2) agricultural programs for farm operators and others engaged in producing or marketing agricultural products; (3) home economics programs for homemakers and families, and (4) community development programs for persons involved in community improvement.[77] The Cooperative Extension

---

75. The programs receive Federal, State, and local funds. Federal funds, which account for more than a third of total Cooperative Extension funds, are primarily used for salaries and overhead by the county agents and specialists who conduct the educational programs of the Cooperative Extension Service. In fiscal year 1974, USDA provided over $162 million for cooperative extension work.

76. USDA stated that "clubs, camps, and projects are methods utilized to provide educational experiences to youth interested in the program." Wright letter, supra note 72.

77. USDA, Cooperative Extension Service, Staff Report (undated).

Services offer instruction in such areas as raising crops, cattle production, human nutrition, and gardening.[78]

B. Civil Rights Responsibilities

1. Prohibitions Against Racial and Ethnic Discrimination

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race or ethnic origin in federally assisted programs.[79] USDA is responsible for ensuring nondiscrimination by its recipients,[80]

---

78. See the Extension Service Review, the official magazine of the Cooperative Extension Services, published six times a year. In 1974, for example, Minnesota's Cooperative Extension Service operated a horticultural clinic which handles about 36,000 inquiries during the growing season. The Hawaii Cooperative Extension Service sponsored a plant disease clinic which diagnosed and prescribed treatment for disease-ridden plants. The Michigan State University Extension program installed a computer to help upgrade the nutrition of elderly persons and expectant mothers by measuring nutrients in their diets and making suggestions for improvements. USDA, Extension Service Review (Jan.-Feb. 1975). In the same year Virginia's Extension program sponsored a program to assist the control of wood-infesting insects such as termites, wood-boring beetles, and carpenter ants. The Maryland Extension Service held a seminar in retirement readiness to help older people cope with problems such as housing, health, finances, legal concerns, travel, and second careers. USDA, Extension Service Review (Mar.-Apr. 1975).

79. 42 U.S.C. §§ 2000d, et seq. (1970).

80. Recipients are the agencies or organizations which operate the programs receiving Federal assistance. Thus, they are responsible for passing on USDA assistance to the program participants, or the ultimate beneficiaries. USDA's Title VI regulation defines recipient:

> "Recipient" means any State, political subdivision of any State, or instrumentality of any State, or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary under any such program. 7 C.F.R. § 15.2(e) (1975).

including those receiving assistance from the Extension Service. Like other Federal agencies with Title VI responsibilities, USDA has issued a regulation for the implementation of Title VI.[81] Although Title VI covers employment only in certain circumstances,[82] USDA in 1968 promulgated a regulation prohibiting employment discrimination on the basis of race, national origin, religion, or sex[83] in the Cooperative Extension Service.[84] This regulation requires each recipient

---

81. 7 C.F.R. § 15.1, et seq. (1975).

82. The employment practices of recipients of Federal assistance are subject to Title VI coverage if a primary purpose of this assistance is to provide employment or if discriminatory employment practices will tend to exclude any individuals from participation in, to deny them the benefits of, or subject them to discrimination under any program of Federal assistance. 42 U.S.C. § 2000e-4. A relationship exists between nondiscrimination in employment and minority and female participation in many Extension Service programs, since eligible minorities and women are less likely to achieve full participation in these programs if few or no minorities or women are employed in it.

83. Sex discrimination is discussed on pp. 37-45 infra.

84. 7 C.F.R. § 18.1, et seq. (1975). The regulation was published at 33 Fed. Reg. 12173 (1968) and amended at 38 Fed. Reg. 14154 (1973).

to submit an equal employment opportunity program[85] to assure non-discrimination in employment. The program must include such elements as a statement of policy prohibiting discrimination in employment, an administrative procedure enforcing that policy, and a complaint-processing procedure. There is no comparable regulation for recipients of any other USDA constituent agency.[86]

Both USDA's Title VI regulation and its regulations relating to employment in the Cooperative Extension Service are important because the Department of Agriculture has had a history of operating and funding programs[87] which have been discriminatory in the services they offer

---

85. USDA stated:

> The precise title of the EEO program is, "Program for Equal Employment Opportunity in the State Cooperative Extension Service, Cooperating with the U.S. Department of Agriculture and County Governments." Since the Commission is reporting on the Extension Service, it should use titles of documents which are used by it. Wright letter, supra note 72.

86. USDA stated: "This paragraph is confusing...it is sandwiched between two paragraphs which discuss Title VI matters...." Wright letter, supra note 72 .

87. USDA stated:

> Here again the paragraph uses interchangeably Title VI and Title VII requirements and relates them to programs. Surely the Commission can distinguish between the two, particularly when it attempts to extend the content by footnotes. Wright letter, supra note 72.

and in their employment practices.[88] Perhaps the most serious problems have been in the Extension Service. Private citizens who have been subject to racial and ethnic discrimination in ES-funded programs have had to seek corrective action through the courts because USDA has not taken effective action to require its recipients to come into compliance with Title VI.[89] Land grant universities, which are host to the State extension service programs, have been part of a segregated system of education. This is because in the 19th century Federal law sanctioned the creation of these universities on a racially

---

88. This Commission has found that recipients of USDA-funded programs have provided less assistance to blacks than to whites, that county committees serving USDA-funded programs have been chosen by discriminatory election procedures, that blacks in the South were underutilized as employees by USDA recipients, and that USDA itself in its direct assistance programs has provided assistance to blacks which was inferior to that which it provided to whites. U.S. Commission on Civil Rights, Equal Opportunity in Farm Programs (1965); Georgia State Advisory Committee to the U.S. Commission on Civil Rights, Equal Opportunity in Federally Assisted Agricultural Programs (August 1967); Alabama State Advisory Committee to the U.S. Commission on Civil Rights, The Agricultural Stabilization and Conservation Service in the Alabama Black Belt (April 1968); U.S. Commission on Civil Rights, staff paper, Equal Opportunity in The Mississippi Cooperative Extension Service (June 1969). See also U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort (1971) /hereinafter referred to as Enforcement Effort report/; The Federal Civil Rights Enforcement Effort: One Year Later (1971) /hereinafter referred to as One Year Later/; and The Federal Civil Rights Enforcement Effort--A Reassessment /hereinafter referred to as Reassessment report/.

89. In the past several years, four State extension programs have been the subject of major suits alleging discrimination in programs receiving Extension Service funds. In each case, USDA was named as defendant. Wade v. Mississippi Cooperative Extension Service, 372 F. Supp. 126 (M.D. Miss. 1974), appeal docketed, No. 74-265, 5th Cir., Apr. 16, 1974; Strain v. Philpott, 331 F. Supp. 836 (M.D. Ala. 1971); Bazemore v. Friday, Civil No. 2879 (E.D.N.C., filed Nov. 27, 1971); and Poole v. Williams, Civil No. 72-H-150 (S.D. Tex., filed Feb.4, 1972). In Strain, USDA was dismissed from the case after the Department of Justice determined that Alabama was in violation of Title VI and that corrective action would be required by USDA. In Wade and Bazemore, USDA was dismissed from the case and the Federal Government became a plaintiff. In the pending Poole case, USDA was not initially named as defendant. USDA subsequently became a defendant through a motion of the plaintiff which was upheld by the court.

separate-but-equal basis, and as a result, in each of 17 States[90] two land grant universities were established--one predominantly nonminority and one predominantly minority institution.[91] The nonminority college administered the Cooperative Extension Service.[92] The Cooperative

---

90. These states were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Only 15 of these States operated dual Extension programs, however. Delaware and West Virginia did not.

91. In 1862 the Morrill Act authorized the donation of public land for the establishment in every State of land grant colleges (7 U.S.C. §§ 301-305, 307, 308 (1970). These colleges assumed leadership in promoting education on agricultural subjects. In 1890, the Second Morrill Act was passed, authorizing the establishment of separate-but-equal land grant colleges for blacks. This second act contained a separate-but-equal clause:

> ...the establishment and maintenance of... colleges separately for white and colored students shall be held to be a compliance...if the funds received in such State or Territory be equitably divided.... 7 U.S.C. § 323 (1970).

92. The Smith-Lever Act of 1914 provided that in States with more than one land grant college, Federal funds appropriated for extension work be paid to the college designated by the State legislature. (7 U.S.C. § 341 (1970). In each of the 17 States, the college for nonminority students was designated the recipient of all Federal funds.

USDA stated:

> The Smith-Lever Act authorized State Legislatures to designate the institution to administer the provision of the Act. Therefore, State Legislators passed enabling legislation for this designation.... the nonminority institution is not an appropriating body....State and County governments and the Federal government provide for the appropriations and not the institution. Wright letter, supra note 72 .

Extension Service was as segregated as the land grant institutions themselves.[93] Essentially, there were two separate extension programs in the South, with separate staffs and separate facilities.[94] In States outside the South there was also widespread discrimination.[95]

---

93. USDA stated:

> /This/ statement....is intended to imply that these were the only portions of society which were segregated at that time. The Commission fails to acknowledge that segregation was sanctioned during that period. Id.

94. At the nonminority land grant institutions, there were only nonminority Extension Service workers, serving only a nonminority clientele. At the minority institutions the staff was all minority, serving an all-minority population. Invariably, minorities were paid less than nonminorities for equal work. Blacks in a large number of Southern States had the prefix "Negro" before their titles. See Enforcement Effort report, supra note 88, at 332, n. 202.

95. USDA wrote to this Commission:

> The statement, "In States outside the South there is also widespread discrimination," is a generalization which is not supported by fact in this report. Wright letter, supra note 72.

This Commission notes, however, that USDA audits of States in the Northeast, West, and Midwest reveal that discrimination was widespread in State Extension Service employment and programs prior to the passage of the Civil Rights Act of 1964. USDA, 1973-1974 audits, infra note 98. USDA recently found that at least two States outside the South were in substantial noncompliance with Federal civil rights law and USDA regulations. (See p. 82 infra.) These determinations were made because States not only engaged in discriminatory practices at the present, but also because these States had a history of engaging in these practices.

Congress intended that the enactment of Title VI of the Civil Rights Act of 1964 would override provisions of Federal law which enabled the Government to provide financial assistance to separate-but-equal facilities.[96] Following the passage of Title VI, attempts were made to integrate the white Extension Services operating out of the predominantly white schools by transferring blacks to those schools from the primarily black Extension Services.[97] In accomplishing this "merger" however, blacks almost always were given positions

---

96. See remarks of Senator John Pastore, 110 Cong. Rec. 7060-7064 (1964). USDA stated, " / The Congressional intention / should also be interpreted to apply equally to all minority (For example 1890 institutions) separate but equal facilities...." Wright letter, supra note 72 .

97. USDA stated:

> This interpretation is not necessarily accurate. The attempt was to eliminate the "dual system of service" and to house the staff in a Extension Service staff, i.e. the all Black and the all White. Id.

For a discussion of the Extension Service programs in the mid-1960's, see Hearing before the U.S. Commission on Civil Rights in Montgomery, Alabama, Apr. 27-May 2, 1968; Equal Opportunity in Farm Programs, supra note 88 ; and Equal Opportunity in Federally Assisted Agricultural Programs in Georgia, supra note 88.

subordinate to whites.[98] Blacks were denied opportunities for promotion to administrative and supervisory positions. They lost the authority to hire and promote staff. At the white universities, blacks were generally assigned to serve the same black clients that they served before the merger and had larger caseloads than did the white extension workers.[99] Black extension workers were often denied the opportunity to provide instruction in areas of major economic

---

98. Historical background included in 1973 and 1974 USDA audits indicates that there were countless examples such as the following: one person, who before the merger held the title of Negro District Agent with the responsibility of supervising black professionals in 13 counties, was assigned after the merger to an advisory position with no supervisory responsibilities. He was involuntarily retired two years after the merger as part of a reduction in force. A black female agent who was in charge of the total black effort in a home demonstration program was assigned a specialist position after the merger and a white replaced her as agent, becoming her supervisor.

The audits are discussed at length on pp. 78-84, infra. This Commission is obligated not to refer to the names of individuals, counties, and States mentioned in these audits. See letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, to John A. Knebel, General Counsel, Department of Agriculture, June 18, 1974.

99. See, for example, Hearing before the U.S. Commission on Civil Rights in Montgomery, Alabama, supra note 97, pp. 758-59.

USDA stated, "The conclusion that blacks 'had larger case loads,' is a generalization and at least should be qualified." Wright letter, supra note 72.

importance, such as beef cattle and dairying, but rather were assigned to work with problems of low-income farmers.[100]

2. Prohibitions Against Sex Discrimination

Title VI does not prohibit discrimination based on sex, and there is no other law or regulation which contains a general proscription against sex discrimination in the delivery of services in USDA-assisted programs.[101] To fill the void, USDA civil rights staff have proposed to top USDA officials that USDA issue a regulation prohibiting sex discrimination, which could be enforced in the same manner as Title VI.[102] As of May 1975, however, no action had been taken on this proposal.

---

100. Telephone interview with William Payne, Deputy Chief, Program Planning and Evaluation Division, OEO, USDA, Jan. 3, 1975.

101. Since August 1973, however, USDA has had a regulation prohibiting sex discrimination in USDA direct assistance programs. This prohibition was issued as an amendment to a USDA prohibition of discrimination on the ground of race, color, creed, or national origin in USDA's direct assistance programs and activities. 7 C.F.R. §§ 15.50, et seq. (1975), Subpart B. Direct assistance programs are programs in which Federal agencies provide financial or other assistance directly to the ultimate beneficiary. For example, direct assistance includes the Farmers Home Administration loans to farmers for such purposes as farm ownership, farm operation, rural housing, and soil conservation. USDA is one of the few Federal agencies which has issued any civil rights regulations relative to its direct assistance programs. In addition, USDA's equal opportunity poster, which hangs in USDA's own offices as well as those of its recipients, advertises a policy prohibiting discrimination on the basis of race, color, national origin, sex, and religion in both services and employment in all USDA-funded programs. USDA poster no. AD 475 (October 1973). The prohibition has not been published in the Federal Register. Thus, USDA's authority to enforce the prohibitions announced in the poster may be tenuous. It has issued no guidelines to describe how the prohibition in the poster should be implemented.

102. In a background paper, USDA civil rights staff indicated that it would be desirable to issue such a regulation to make USDA's civil rights provisions consistent with those of other agencies. They also argued that USDA has the legal authority to issue such a regulation. Office of Equal Opportunity, USDA, Background Memorandum, transmitted, in memorandum from Miles S. Washington, Jr., Acting Director, Office of Equal Opportunity, USDA, to John A. Knebel, General Counsel, USDA, Prohibiting Discrimination on the Basis of Sex in USDA-Assisted Programs, Mar. 6, 1975.

While sex discrimination in USDA recipients' employment practices is not prohibited by USDA under most circumstances, USDA's equal employment opportunity regulation prohibits discrimination on the basis of race, national origin, religion, and sex in the Cooperative Extension Services.[103]

Another proscription against sex discrimination which affect many USDA programs is Title IX of the Education Amendments of 1972 which prohibits sex discrimination in employment and services in federally assisted education programs and activities.[104] Although more than three years have passed since the passage of Title IX, USDA has not determined the extent of Title IX application to the programs and activities it funds.[105] It would appear, however, that Title IX prohibits sex

---

103. 7 C.F.R. § 18.1, et seq. (1975). This regulation is described on pp. 30-31 supra.

104. 20 U.S.C. §§ 1681, et seq. (Supp. II, 1972). Title IX of the Education Amendments of 1972 provides that, with certain exceptions, no person shall, on the basis of sex, be excluded from participation in any education program receiving Federal assistance. 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 or merchant marines of the United States, and educational institutions controlled by religious organizations whose tenets are inconsistent with Title IX.

105. Telephone interviews with Sean Doherty, Attorney, Office of General Counsel, USDA, May 21, 1975, and Richard J. Peer, Chief, Compliance and Enforcement Division, Office of Equal Opportunity, USDA, Apr. 14, 1975.

discrimination in most, if not all, Extension Service programs.[106] Title IX is explicit. It covers "any education program or activity receiving Federal financial assistance"[107] and USDA refers to Extension Service programs as "education programs."[108] Although a USDA attorney commented that one argument for the lack of applicability of Title IX to Extension Service programs is that those programs are informal and conducted out of school by county civil servants,[109] Title IX coverage is not limited to programs conducted

---

106. The view that Title IX applies to all Extension Service-funded activities is held by the leader of the Department of Health, Education, and Welfare (HEW) task force which drafted HEW's Title IX regulations. Telephone interview with Gwendolyn H. Gregory, Director, Office of Policy Communication for Civil Rights (OCR), HEW, May 13, 1975. Ms. Gregory was Special Assistant to the Director of OCR at the time Title IX was passed. This view is also held by officials of the Project for Equal Educational Rights (PEER). Telephone interview with Clelia Steele, Project Associate, PEER, May 13, 1975. PEER is a project of the National Organization for Women Legal Defense and Education Fund.

USDA, however stated:

> The Commission has arrived at a conclusion that has not been firmly established by law. Until that determination has been made, such conclusions in a public document, paraded as fact, should not be permitted. Wright letter, supra note 72.

107. 20 U.S.C. § 1681 (Supp. II, 1972).

108. See, for example, OEO, USDA, Equal Opportunity Report, USDA Programs 1972 21-40 (February 1974), and Extension Service, USDA, Extension Service Review May-June 1975. Moreover, Extension Service programs are operated under the auspices of educational institutions.

109. May 21, 1975, Doherty telephone interview, supra note 105. Mr. Doherty noted that the Smith-Lever Act of 1914 specifies that enrollment as a formal student at an educational institution is not a prerequisite for participation in Extension programs and that funds for Cooperative Extension work may not be used for college course teaching. He stated that he believed that these portions of the act might be used to buttress the argument that Extension Service Programs are not education programs within the meaning of Title IX.

in the classroom or by classroom teachers. Moreover, a review of the legislative history does not indicate that any such limitation was intended.[110]

Under Title IX, each Federal agency empowered to extend such assistance is directed to issue regulations to ensure that this prohibition is carried out.[111] Responsibility for enforcing compliance with Title IX also rests with the granting agency,[112] although it is generally accepted that the Department of Health, Education, and Welfare (HEW), the major agency providing funds for education,[113] has

---

110. See, e.g., 117 Cong. Rec. 2007-09 (1971); 117 Cong. Rec. 30404-15 (1971); 118 Cong. Rec. 5803-17, 6276-77 (1972); and 118 Cong. Rec. 20277-20340 (1972); Hearings on H.R. 16098 Before the Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong. 2nd Sess. (1970).

111. 20 U.S.C. § 1682 (Supp. II, 1972).

112. Id.

113. HEW annually provides billions of dollars to elementary, secondary, and higher education programs and activities. It was estimated that HEW would provide almost $9 billion for education in fiscal year 1974, almost 56 percent of total Federal funds for education. Budget of the United States Government - Special Analysis H 123 (Fiscal Year 1975). For discussion of HEW's equal educational opportunity responsibilities, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity chs. 1 and 3 (January 1975).

the lead responsibility for Title IX regulations.[114]

USDA has been waiting for HEW to issue finalized regulations[115] before taking any action with regard to its responsibilities under Title IX.[116] USDA's inaction does not appear to be excusable. It has

---

114. This is because, in August 1972, the Deputy Director of the Office of Management and Budget (OMB) wrote to the Director of the Office for Civil Rights at HEW asking HEW to take the lead in the development of uniform regulations in conjunction with other agencies having Title IX responsibilities. Letter from Frank C. Carlucci, Deputy Director, OMB, to J. Stanley Pottinger, Director, Office for Civil Rights, HEW, Aug. 28, 1972. OMB interprets this letter broadly, as giving overall Title IX coordination responsibility to HEW. Telephone interview with James Robinson, Civil Rights Budget Examiner, Office of Management and Budget, May 15, 1975. HEW, on the other hand, interprets the directive more literally, as a mandate to take the lead in issuing regulations. Telephone interview with Burton Taylor, Chief, Policy, Planning, and Program Development Director, Higher Education Division, Office for Civil Rights, Department of Health, Education, and Welfare, May 15, 1975.

That Congress, too, wanted HEW to take the lead in issuing Title IX regulations is implied by a 1974 amendment to Title IX in which the Secretary of HEW was directed to publish proposed regulations not later than thirty days after the passage of the amendment. Congress did not direct any other agency to take such action. The amendment was not passed until August 21, 1974, Pub. L. 93-380, Title VIII, Section 844, Aug. 21, 1974 (88 Stat 612). By that time, HEW's proposed regulations had been issued. See note 115 infra.

115. HEW published proposed regulations in June 1974. 39 Fed. Reg. 22228 (1974). These regulations were signed by the President on June 4, 1975. They were then sent to Congress for review for 45 days, pursuant to Section 431(d)(1) of the General Education Amendments of 1974, P.L. 93-380, 88 Stat. 567.

116. May 21, 1975, Doherty telephone interview and April 14, 1975, Peer telephone interview, supra note 105.

not even requested a meeting with HEW to coordinate execution of Title IX responsibilities.[117] There is no indication that HEW was intended to have sole responsibility for implementing Title IX. Indeed, many of USDA's responsibilities under Title IX, such as determining which of its programs are covered by the title, are not dependent upon the nature of the regulations which HEW finally issues.

In addition, to prepare for its Title IX role, USDA could have reviewed the regulations which HEW submitted to the President for approval, determined the extent to which the proposed regulations could be adopted verbatim by USDA, and drafted any changes which might be deemed necessary. For example, regulations proposed by HEW primarily concern the implementation of Title IX for on-campus activities.[118] Adjustments in those regulations will be necessary to make them applicable to off-campus educational programs such as those funded by the Extension Service.[119]

There is a need for USDA to acknowledge its responsibilities to ensure nondiscrimination on the basis of sex in the programs it funds.

---

117. As of May 1975, neither USDA nor HEW had initiated any interagency mechanism for Title IX coordination, although there had been a few informal inquiries of HEW by USDA staff. Id.

118. 39 Fed. Reg. 22228 (1974).

119. USDA stated:

> The Commission continues to assume and or conclude Extension Service coverage under Title IX even though it admits, "...concern... for on-campus activity." It then concludes that, "Adjustments in those regulations will be necessary to make applicable to off-campus educational programs such as those funded by the Extension Service." Wright letter, supra note 72.

This Commission believes, however, that the "concern... for on campus activity" in HEW's regulations reflects the nature of HEW's programs--those programs in which HEW has responsibility for Title IX enforcement. There is no indication that Title IX, itself, applies only to on-campus activities.

Few women are farmers.[120] In agricultural communities men traditionally are responsible for such tasks as raising livestock and operating heavy farm machinery. Women have done such work as canning and sewing.[121] An examination of photographs and text in the Extension Service Review from May 1974 through June 1975 shows that although a number of ES activities are attended by both men and women,[122] in many instances only a token number of women are participating in areas which are dominated by men.[123]

---

120. In 1970 there were almost 1.5 million farmers and farm managers in the county. Only 5 percent of them were women. Department of Commerce, Bureau of the Census, 1970 Census of Population, Vol. I, Part I, Table 223.

121. This role may be expanding. See "The Rural Wife: While Keeping House, Donna Keppy Ranks As a Partner on Farm," Wall Street Journal, p. 1, June 2, 1975. In observance of International Women's Year, on June 13, 1975, USDA held a day-long forum entitled "Women, Agriculture, and the Changing World."

122. Extension Service, USDA, Extension Service Review, May-June 1974; July-Aug. 1974; Sept.-Oct. 1974; Nov.-Dec. 1974; Jan.-Feb. 1975; Mar.-Apr. 1975; and May-June 1975. Among the activities showing both men and women were a meeting of a homemakers club, preparations for Cooperative Extension Service bicentennial celebrations, a beef-cattle demonstration at a Cooperative Extension Service fair, an archeological expedition, and a class for expectant parents.

123. Women were shown in a class for women on auto mechanics and in a class for women on tractor operation. Two women were shown who recently received appointments as agricultural agents. Both were the first in their States to hold that position, which requires giving advice to farmers on a vast number of agricultural problems. The January-February 1975 issue of the Extension Service Review was directed to the performance of women in the Extension Service. It showed that women are beginning to cross sex barriers in the field of agriculture, and this clearly indicates that such barriers existed and have not been fully eradicated.

ES activities are frequently sex segregated.[124]

It should be noted that it does not appear that there are regulations or entrance requirements for Cooperative Extension Service activities which specifically exclude persons of one sex. People with personal knowledge of Extension Service programs in a number of States indicated that these activities are always open to both males and females.[125] However, there still may be barriers to female participation in traditionally male-attended activities and to male participation in traditionally female-oriented activities, which result in such sex segregation. These might include, for example, lack of adequate outreach activities, stereotyped attitudes on the part of ES aides, instructors, and participants, and unnecessary

---

124. For example, only men were shown in photographs of groups discussing the use of solar energy to warm livestock buildings, attending a clinic on pork production, learning about campground management, and studying irrigation. Only women were shown in photographs of several demonstrations, including one on clothing and another on nutrition. An all-female group was pictured studying how homemakers can conserve energy and another all-female group was shown providing assistance to women in a mental hospital.

125. Telephone interviews with Patricia Loudon, Assistant Editor, Extension Service Review, Extension Service, USDA, May 14, 1975; Deborah King, Agricultural Agent, Middlesex County (Connecticut) Extension Service, May 12, 1975; and Kathryn Brown, Agricultural Agent, Allegheny County (New York) Extension Service, May 13, 1975; and May 21, Doherty interview, supra note 105.

prerequisites for program participation.[126]

---

126. USDA stated:

> The Commission vividly demonstrates its capacity to contrive discrimination in its discussion on /pp. 42-45/. It fails to acknowledge those variables of freedom which people exercise in the selection and pursuit of a life-time career. Wright letter, supra note 72.

USDA further noted:

> The Commission devotes considerable attention to suppositions in the face of information to the contrary and cited in the footnotes. It hypothesizes about what "might be" rather than the presentation of facts which verify restrictions and entrance requirements to participation. Id.

II. Organization and Staffing

Exhibit I shows that within USDA there are persons in a number of organizational units who have Title VI responsibilities bearing on the Extension Service programs. These include the Assistant Secretary for Administration, Office of Equal Opportunity (OEO), Civil Rights Compliance Staff in the Extension Service,[127] and the Offices of Investigation (OI), Audit (OA), and General Counsel (OGC).

The USDA Assistant Secretary for Administration is responsible for setting policy relating to all aspects of the Department's civil rights program, including Title VI.[128] As shown in Exhibit I, the Assistant Secretary for Administration reports to the Under Secretary. Only two other offices with Extension Service Title VI responsibilities--the Offices of Audit and Equal Opportunity--are under the supervision

---

127. Several other USDA constituent agencies have civil rights offices with Title VI responsibilities. For example, in 1973 four other USDA constituent agencies assigned one or more persons more than half time to Title VI duties. The Food and Nutrition Service assigned six persons; the Farmers Home Administration, two; the Forest Service, two; and the Agricultural Stabilization and Conservation, one. USDA response to U.S. Commission on Civil Rights, April 1973 questionnaire /hereinafter referred to as USDA response/.

128. 7 C.F.R. § 2.25(h) (1975). See also 7 C.F.R. §§ 2.78 and 2.80 (1975), note 129 infra. The Assistant Secretary's other civil rights responsibilities include contract compliance and USDA's internal equal employment opportunity program. Non-civil rights responsibilities of the Assistant Secretary include personnel, management, and finance.

The Assistant Secretary has held formal responsibility for civil rights coordination since September 1969, when Secretary of Agriculture Clifford M. Hardin issued a memorandum to USDA staff setting forth USDA civil rights policy. This memorandum assigned "responsibility for the general direction, coordination, and implementation" for all aspects of USDA's civil rights program to the Assistant Secretary for Administration and the Secretary's Special Assistant for Civil Rights. USDA, Secretary's Memorandum No. 1662, USDA Policy on Civil Rights, Sept. 23, 1969.

of the Assistant Secretary for Administration, thus reducing the role of the Assistant Secretary in this capacity. The Offices of Investigation and General Counsel report to the Secretary, and the Civil Rights Compliance Staff within the Extension Service report to the Administrator of the Extension Service, who in turn reports to the Assistant Secretary for Conservation, Research, and Education.

OEO is responsible for the general oversight of implementation of Title VI within USDA, including the Extension Service.[129] Within OEO, there are normally four persons who have full-time Title VI responsibilities relating to the Extension Service.[130] These people evaluate the affirmative action plans of the Cooperative State

---

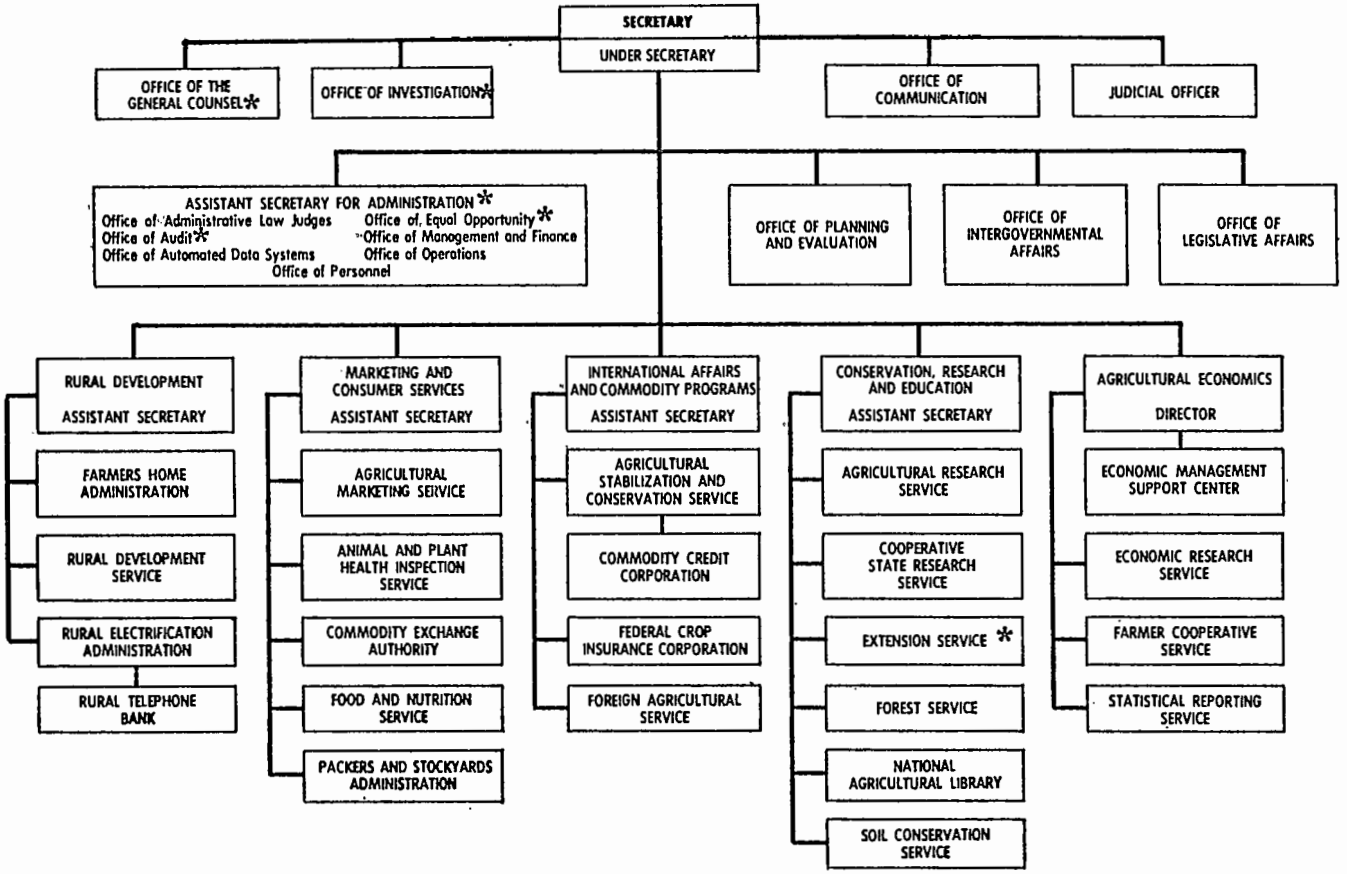
129. The Title VI duties of OEO were once assigned to the Assistant Secretary for Administration (7 C.F.R. § 2.25(h) (1975), supra note 128.) who has delegated them to OEO. 7 C.F.R. § 2.80 (1975). The Assistant Secretary for Administration also delegated contract compliance responsibility to OEO. Id. Responsibility for equal employment opportunity at USDA was delegated to the Office of Personnel which also reports to the Assistant Secretary for Administration. 7 C.F.R. § 2.78 (1975).

OEO was created in November 1971. USDA, Secretary's Memorandum No. 1756, Nov. 16, 1971. Prior to that time the Secretary had a Special Assistant for Civil Rights who worked with the Assistant Secretary for Administration in overseeing USDA's civil rights program. Secretary's Memorandum No. 1662, supra note 128.

130. April 14, 1975, Peer interview, supra note 105. As of April 1975, one of these positions had been vacant for more than three months.

Exhibit I

DEPARTMENT OF AGRICULTURE



* Unit with Extension Service Title VI Responsibilities.

July 1974

Extension Services,[131] review audits on the State programs which were conducted by OA,[132] evaluate annual reports from the States,[133] and conduct their own compliance reviews of ES programs. They provide advice to the Extension Service concerning the action which should be taken on the basis of its findings. Because of their heavy workload, they are unable to give adequate attention to all of the documents they have to review.[134] In addition, OEO's potential effectiveness has been seriously hampered during fiscal year 1975

---

131. These plans are discussed on pp. 65-78 infra.

132. These audits are discussed on pp. 78-84 infra.

133. These reports are discussed on pp. 92, 97, 98 infra.

134. In May 1975 the heavy workload was partially due to a vacancy in OEO for one of the four positions for ES work. This vacancy has since been filled. Wright letter, supra note 72. Nonetheless, a heavy workload was a problem when four staff members were working on ES. Since this Commission reviewed USDA's Title VI program only with regard to the Extension Service, it did not determine if the normally heavy workload of this staff was due to understaffing or merely to a misallocation of staff within OEO. As of May 1, 1975, OEO had 63 professional and 40 clerical staff members. Employment Statistics supplied by William C. Payne, Deputy Chief, Program Planning and Evaluation Division, OEO, USDA, May 16, 1975.

because as of May 1975 it had been without a Director[135] for more than a year.[136]

---

135. Moreover, during this time the person who serves as Acting Director has been without a deputy.

136. Concerning this analysis USDA stated:

> ...we have serious reservations about the implications made by two points [in this paragraph]. The first is in regard to our ability "to give adequate attention to all of the documents." Our quality of output is not negatively affected by our quantity of output. There appears to be no basis for this reference. It is our policy, when necessary, to adjust our work force according to the workload. This has been done previously when dealing with Extension Service. One of the more recent instances was when the Department of Justice needed additional information from Texas Extension Service. We sent additional staff to Texas for several weeks. Staff size is a budgetary issue and OEO must work within its budgetary limitations.
>
> Our second point of difference...is in regard to OEO's position of Director. It appears that the conclusion regarding our effectiveness is a judgment without foundation. It can only be assumed that this conclusion was drawn by the author with little or no basis. We have had a full time Acting Director since the position was vacated. Therefore, our effectiveness has not been hindered in any way and continuity has been maintained. Wright letter, supra note 72.

The Extension Service carries out much of the routine Title VI duties concerning its recipients. Within the Extension Service, there is a Director of Civil Rights Compliance, who is assisted by three members of the compliance staff whose responsibilities are divided between Title VI matters and equal employment programs of State Extension Services. One of these persons conducts onsite compliance reviews. Another is responsible for handling congressional inquiries regarding audits and investigations and for reviewing audit and investigation reports; and the third person analyzes the annual reports submitted by the States and prepares other needed statistical data important to the unit's overall work.[137]

The Office of Investigation investigates all complaints against any USDA programs including Extension Service Title VI complaints.[138] The Office of Audit conducts financial programmatic and civil rights reviews of USDA recipients, including Title VI audits of the Cooperative Extension Service. The Office of General Counsel serves as an advisor when regulations are being written or when noncompliance with Title VI is suspected. USDA is not able to estimate the amount of staff time spent by OI, OA, and OGC on the Extension Service Title VI program[139] because the staff members in these offices work on a variety of activities. It

---

137. Wright letter, supra note 72.

138. USDA stated "The OI played a significant role in the Department of Justice request for additional information on the Texas Cooperative Extension Service." Id.

139. Interview with Robert Hopkins, Supervisory Auditor, Office of Audit; Sean Doherty, Attorney, OGC; Dana Froe, Equal Opportunity Specialist, Compliance and Enforcement Division, OEO; and Roy Cassell, Director of Compliance, Extension Service, USDA, Apr. 25, 1975.

appears, however, that OI's role with regard to the Extension Service program has been small because from July 1973 until May 1975 there have only been three compliants against Cooperative Extension Service programs.[140] The Office of Audit, on the other hand, has spent a good deal of time on Extension Service Title VI matters.[141] It reports that in fiscal years 1973 and 1974 more than 40 auditors in OA participated in audits of 19 State Extension Service programs. Each of these audits required at least 180 person days to conduct.

III. Data Collection

It is essential that any Federal agency with Title VI responsibilities have the capacity to measure the extent to which its benefits are provided to minorities equitably. Thus, it must have a well-designed system of collecting data on the race and ethnic origin of those eligible to participate, applicants, and beneficiaries, with data on the quality of the benefits also tabulated by race and ethnic origin.[142] In addition, all data should be cross-tabulated by sex.[143]

---

140. These complaints are discussed on pp. 56-61 infra.

141. Three to five people worked for an average of 3 months on these reviews. Telephone interview with Robert Hopkins, Supervisory Auditor, Office of Audit, USDA, May 5, 1975.

142. Parameters for a racial-ethnic data collection system are discussed at length in 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).

143. This is especially important for an agency like the Extension Service with responsibilities, under Title IX, for ensuring non-discrimination on the basis of sex in its programs.

Under the Secretary of Agriculture's Memorandum No. 1662, Supplement No. 1,[144] each USDA constituent agency is required to collect extensive racial and ethnic data to ensure that all eligible recipients have equal access to the benefits of USDA programs. This memorandum directs constituent agencies to:

> (1) enumerate eligible participants; (2) establish a system for collecting and reporting racial and ethnic data on participation; (3) review programs periodically to ascertain the extent of minority group participation, as measured against equal opportunity objectives and measurable targets; and (4) report annually on progress in meeting identified objectives.[145]

In addition, USDA's Title VI regulation, like other Federal agency Title VI regulations, requires USDA recipients to collect and maintain these data for use by USDA agencies.[146]

---

144. USDA, Secretary's Memorandum No. 1662, Supplement No. 1, USDA Policy on Civil Rights, July 27, 1970.

145. Id.

146. USDA's Title VI regulation directs:

> (b) Compliance reports. Each recipient shall keep such records and submit to the Agency timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Agency may determine to be necessary to ascertain whether the recipient has complied or is complying with the regulations in this part....In general, recipients should have available for the Agency racial and ethnic data showing the extent to which members of minority groups are beneficiaries of Federally assisted programs.
> 7 C.F.R. § 15.5(b)(1975).

See also the Title VI regulation of the Department of Health, Education, and Welfare (45 C.F.R. § 80.6(b)(1974)) and of the Department of Housing and Urban Development (24 C.F.R. § 1.6(b)(1974)).

The biggest deficiency of USDA's data requirements is that they do not call for the collection of data on the basis of sex. On the whole, however, USDA has one of the most comprehensive Federal data collection requirements concerning program participation.

OEO attempts to publish an annual statistical report on program participation, but this report has not been a source of up-to-date information. As of May 1975, the most recent report, published in February 1974, was entitled Equal Opportunity Report, USDA Programs 1972;[147] a volume covering 1973 and 1974 was in the process of being printed.

The data used in these reports are supposed to be compiled from that collected and maintained in the field, pursuant to USDA's data collection requirements. However, compliance reviews conducted by OEO frequently indicate that the data maintained in the field are so inadequate that no meaningful compilations could be made from them. In some cases no data are maintained. In others, the methods of data collection are too crude to be accurate. It would appear that some State and county Extension offices fabricate data for submission to

---

147. OEO, USDA, Equal Opportunity Report, USDA Programs 1972 (February 1974).

148

USDA in lieu of complying with USDA's data collection requirement.

In addition to relying on data compiled with faulty methods by State and local ES offices, the 1972 Equal Opportunity Report is not very informative. With regard to the Extension Service, for example,

---

148. A 1973 compliance review conducted in Fayette County, Tennessee, revealed that although county Extension personnel were aware of USDA's data collection requirement, no such collection has taken place. Compliance Review of Fayette County, Tennessee, Aug. 13-16, 1973. A review in Charles County, Maryland, in 1975 found that the county Extension Service Office had not established a system of collecting, coding, and reporting racial data for all program activities. Compliance Review of Charles County, Maryland, May 1, 1975.

Concerning this Commission's analysis of Extension Service data collection, USDA stated:

> The Extension Management Information System specifies that contact data of clientele participation by race be collected and reported. This is being done to a very high degree when one recognizes there are large numbers of Extension personnel reporting on a continuing basis. The deficiency is the recording of racial information with a specific individual in county records. The Commission makes the supposition "...that some State and County Extension offices fabricate data ..." which is not supported by fact in the report. The citation of one county in each of two States in a footnote and generalizing these conditions over 3,100 counties is not objective writing. Wright letter, supra note 72.

This Commission notes, however, that OEO staff stated that findings showing lack of adequate data collection are very common in its reviews. OEO has found that many Cooperative Extension Services offices are unaware of their responsibility to collect data, sometimes indicating to OEO compliance reviewers that they are not supposed to keep such data. Some offices use such techniques as substituting racial and ethnic data on club membership for racial and ethnic data on attendance at a specific club function. Interview with Richard Peer, Director, Compliance and Enforcement Division, OEO, USDA, and Dana Froe, Equal Opportunity Specialist, OEO, USDA, May 30, 1975.

the report supplied data on the percentage of participants who were minority, frequently failing to indicate the total number of participants or the number of minorities and nonminorities eligible to participate. Thus, it was not possible to determine if minority participation was at an acceptable level.[149] OEO's unpublished analyses of more recent data continue to fail to address the important issues of whether USDA programs are reaching minorities on an equitable basis. To illustrate, the 1974 analysis of Extension Service programs shows the percentage change in minority participation in these programs from 1971-73, but there is no indication of whether the earlier rates of participation were adequate.[150]

IV. Complaint Investigations

When a complaint is received by OEO it is sent to the constituent

---

149. Similarly, in the section on the Food and Nutrition Service, there were tables showing, by State, the participation of Asian Americans, blacks, Native Americans, and persons of Spanish speaking background in the Food Stamp and Food Distribution programs. There were no comparable data on nonminority participation and thus it was not possible to determine if minority participation was at an acceptable level. Moreover, data were presented in such a way that the extent of participation by one minority group could not even be compared with that of other minority groups. For example, the tables on blacks and persons of Spanish speaking background showed participation as a percentage of persons with incomes below the poverty level, while data on Native Americans and Asian Americans showed participation as a percentage of total population.

150. Attachment entitled, "Participation by Ethnic Groups in the ES Expanded Food and Nutrition Education Program, Fiscal Years 1971, 1972, and 1973," to memorandum from Percy R. Luney, Chief, Program Planning and Evaluation Division, OEO, USDA, to Roy D. Cassell, Director, Civil Rights Compliance, Extension Service, USDA "Special Report on the Expanded Food and Nutrition Education Program 1973," Sept. 26, 1974.

agency involved, which then turns it over to OI.[151] OI evaluates the complaint in order to determine if an investigation is warranted. If OI determines that the complaint presents a serious matter, it is sent to the OI regional office for investigation. If, on the other hand, the matter involved is deemed a minor problem, the complaint is sent back to the agency involved for a preliminary investigation.

OI collects all the information on an investigated complaint and transmits it to OEO and the constituent agency involved. OI makes no conclusions or recommendations in regard to complaints. It is the responsibility of OEO and the agency to resolve the matter. If there is disagreement between OEO and the agency, the matter could ultimately go to the Secretary of Agriculture for resolution.

In fiscal years 1974 and 1975 combined, only three complaints were received regarding the Extension Service.[152] One of these was

---

151. USDA's Office of Investigation has the principal responsibility for carrying out investigations of Title VI and all other complaints. See pp. 51-52 supra.

152. In fiscal year 1974, OEO received 205 complaints, 120 of which concerned direct assistance programs. It closed 120 complaints; 11 of these were referred to the Department of Justice. In fiscal year 1975, through April 1975, OEO received 205 complaints, approximately 105 of which concerned direct assistance programs; 160 were closed. The majority of direct assistance complaints concerned Farmers Home Administration loans. Telephone interview with James Hood, Deputy Director, Compliance and Enforcement Division, OEO, USDA, May 13, 1975.

USDA stated that:

> /This/ footnote supports the contention of the Commission's efforts to contrive discrimination in Extension Services. Certainly the number of complaints cited regarding direct assistance programs fails to support the Commission's rationalization. Wright letter, supra note 72.

USDA seems inured to the extensive evidence, produced through its own audits and compliance reviews, of discrimination in its programs.

a complaint alleging sex discrimination in USDA's internal employment practices.[153] The other two were related to services rendered by the Extension Service. The first of these two complaints was lodged against the Extension Homemaker Association of Hertford County, North Carolina, by a woman who alleged that separate homemaker clubs were being held for blacks and whites.[154]

---

153. This complaint was filed by a woman on August 3, 1973, against the Assistant Administrator, Rural Development Staff, Extension Service, for failing to hire her to fill a vacancy on his staff for which she believed she was more qualified than the man who was eventually hired. The complainant also claimed that the Administrator of the Extension Service had tried to discourage her from filing a formal complaint of discrimination because of the time and cost involved, an allegation which the Administrator denied. The person against whom the complaint was brought, as well as the three other members of the selection panel, felt the selection was fair although they did not give reasons for their conclusion.

USDA determined that the ensuing investigation did not sustain the allegation. The investigation report, however, revealed that in GS levels 11-18 in the ES there were only 28 women, although there were 81 men. No women held positions in grades 16-18. At the time of the complaint, there were no women professionals on the Rural Development Staff, and few, if any, women professionals elsewhere in the Extension Service in the field of Manpower Development and Community Facilities, in which the position vacancy occurred. Moreover, the investigators do not appear to have evaluated the complainant's qualifications or those of the man who was hired. They did not evaluate the position vacancy to determine what set of qualifications were necessary to fill the position. Rather, they seem to have merely cited denials, by the selection panel and the Administrator of the Extension Service, of the complainant's allegations of superior qualifications.

154. The complainant was particularly concerned with the status of what had been the Negro Home Demonstration Club before the enactment of the Civil Rights Act of 1964. Following the enactment of the Civil Rights Act of 1964, the club's name was changed to the Hertford County Extension Homemakers Association to create the appearance of compliance with the act, even though separate meetings were maintained. The only integrated meetings were held quarterly for the entire county.

An investigation undertaken in October 1973 revealed that of the 27 extension homemaker clubs[155] in Hertford County, 15 had all-black memberships and 12 had all-white memberships. Both county agents, a black who served black clubs exclusively and a white who served white clubs exclusively, said that segregation was due to the clubs' being formed on a neighborhood concept. Neither knew of any efforts to integrate the clubs, but felt that integration would cause few negative reactions among club members. Club members were also interviewed and upheld the agents' statements. The Hertford County Extension Chairman was interviewed as well and acknowledged the separate meetings but believed membership would drop if they were integrated. It should also be added that a charge by the complainant that 4-H clubs in the area were also segregated was concurrently investigated and little integration was discovered.[156]

In December 1973, the Administrator of the Extension Service made clear that no administrative action or recommendations to the North Carolina Cooperative Extension Service concerning the investigative report would be forthcoming until the civil action against the North Carolina Cooperative Extension Service[157] was adjudicated.[158]

---

155. At the time of investigation, most of the homemaker clubs in the county had from 12 to 20 members. Investigation Report, Atlanta Office, File No. A-603-36, Oct. 15, 1973.

156. Id.

157. Bazemore v. North Carolina Cooperative Extension Service, supra note 89.

158. Letter from Edwin L. Kirby, Administrator, Extension Service, Washington, D.C., USDA, to R.E. Magee, Acting Regional Director, Office of Investigation, Region III (Atlanta, Ga.), USDA, Dec. 27, 1973. The Administrator sent a similar letter to Atlanta's Acting Regional Director again on August 8, 1974.

He stated that, "the Civil Rights Division of the Department of Justice instructed the Extension Service not to discuss or provide assistance to the State in any matters pertaining to this case."[159]

An official at the Department of Justice confirmed these instructions, stating that it would be desirable if an agreement between the Washington and the county Extension Service could be negotiated in this instance without prejudicing the suit, but she doubted this could be achieved. She believed that any remedial action taken by the county Extension Service in this case would be seen by them as having nullified the basis for the suit.[160]

While the situation is admittedly not clearcut, the Extension Service is under obligation to abide by Title VI. Considering this, all efforts should be made with the assistance of DOJ to resolve the complaint in a manner which would not affect the suit.

The second complaint alleged racial discrimination in 4-H programs. It was lodged on October 9, 1974, in St. Helena Parish, Louisiana. The investigation of the complaint was completed February 26, 1975.

---

159. Id.

160. Telephone interview with Mary Planty, Deputy Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Dec. 10, 1974. Ms. Planty also indicated that the Department of Justice would ask that all remedial action taken by the Cooperative Extension Services in North Carolina meet uniform guidelines which DOJ would necessarily promulgate if the suit were successful.

The complainant, a white former Assistant County Agent, had served as such from June 1972 to October 1974. He alleged that a young black 4-H club member had been discriminated against during this period by being denied participation in two demonstrations. He also alleged that he and the county agent had participated in a racially segregated function during normal working hours. The complaint investigation provided considerable evidence to corroborate these allegations but the files on this case indicate that, as of June 1975, it had not yet been resolved.[161]

161. Telephone interview with Roy Cassell, Director, Civil Rights Compliance, ES, USDA, June 6, 1975.

V. Compliance Efforts

A. Background

In 1965, USDA audits of Extension Service programs showed that civil rights violations were blatant and widespread, especially in Southern States where the merger of the formerly dual State Extension programs had created new problems of discrimination.[162] Similar audit findings were repeated over the course of 10 years: in 1967, 1969, and in 1973-74.[163]

USDA did not demand immediate correction of the noncompliance it found in the States, nor did it take enforcement action where it was clear that voluntary compliance had not been and could not be achieved. As a result, private citizens stepped in to fill the void, and four lawsuits were filed against State programs.[164] The

---

162. Conditions after the merger are discussed on pp. 35-37 supra.

163. The 1973-74 audits are discussed at length on pp. 78-84 infra.

164. These cases are listed in note 89 supra.

first of these was Strain v. Philpott.[165] In that case,[166] the court found that the discriminatory practices of the Alabama Cooperative Extension Service were unjustified and unconstitutional. These practices included the following: (1) All black employees who held supervisory positions under the former dual system were deprived of such responsibilities under the merger. (2) Blacks were not considered for supervisory positions because they allegedly lacked the necessary expertise provided by Auburn University, Alabama's white land grant institution which until 1964 excluded blacks. (3) Under the merger blacks were assigned

---

165. Strain v. Philpott, supra note 89.

166. In another case, Wade v. Mississippi, a judgment was handed down against the Mississippi Cooperative Extension Service (MCES), in which MCES was found to be discriminating against blacks with regard to promotions, hiring, assignments, and salaries. The court ordered MCES to grant immediate promotions with back pay to two named plaintiffs; to give blacks currently employed "first priority for consideration for all future promotions" to top positions within the Service; to adopt a "promotion goal" whereby blacks would fill a substantial number of forthcoming vacancies; to use its best efforts to devise a nondiscriminatory personnel evaluation system in accordance with standards required by the Equal Employment Opportunity Commission's (EEOC) Guidelines on Employment Selection Procedures; to develop a salary schedule which will eliminate the effects of discrimination between white and black employees; and to adopt an affirmative minority recruitment plan reasonably calculated to ensure immediate results. Although the court refused to impose specific quotas, it expressly reserved the power to set minimum requirements if MCES failed to hire or promote qualified blacks within a reasonable period of time.

The court also found discrimination within the MCES-sponsored 4-H homemaker clubs. The court ordered that each local club adopt a written affirmative action plan designed to eliminate discrimination in its membership and program practices. In addition, MCES was enjoined from prohibiting club activities in the State's integrated public schools and was ordered to discontinue sponsorship of club events in schools having racially discriminatory policies. Wade v. Mississippi Cooperative Extension Service, supra note 89.

only to counties which prior to the merger had Negro Extension offices. (4) Blacks were assigned to subject matters dealing primarily with the problems of low-income farmers.

In Strain, the court ordered an end to the techniques which had been used by the Alabama Cooperative Extension Service (ACES) to deny blacks positions of responsibility under the merger. Some of the elements of that order, which formed the basis for subsequent USDA compliance activities in the Extension Service, were:

> 1. The Alabama Cooperative Extension Service was directed to give first priority to eligible blacks for consideration for all future promotions to County Extension Chairman and Associate Chairman positions, the highest Extension positions at the county level.
>
> 2. ACES was prohibited from considering as a factor in promoting blacks to the positions of County Extension Chairman and Associate County Extension Chairman whether a black is acceptable to a county governing body.
>
> 3. ACES was enjoined from eliminating black applicants from consideration for the position of County Extension Chairman and Associate County Extension Chairman because they do not have a technical agricultural background from Auburn University, the predominantly white land grant institution in Alabama.
>
> 4. ACES was ordered to formulate and present to the court for review a salary schedule for black employees which would equalize their salaries with those of comparable white employees. In evaluating the similarity of qualifications of various employees, the court suggested to ACES that it consider such criteria as educational background and length of service with ACES.
>
> 5. The ACES was ordered to discontinue its practice of hiring only whites to fill positions vacated by whites and only blacks for positions vacated by blacks. 167

---

167. Strain v. Philpott, supra note 89, unreported, Civil No. 840-E (M.D. Ala. Sept. 1, 1971).

B. Affirmative Action

The Strain case had a significant impact on the Extension Service civil rights compliance program. USDA, in conjunction with the Department of Justice, determined that the court order in Strain should be adopted for application to all State ES programs. Thus, in February 1972, the two agencies issued a model affirmative action plan based on that order to ensure civil rights compliance in employment and services in the Cooperative Extension Services.[168]

1. Employment

There are several deficiencies in the model plan. First, the goal of the USDA's model plan, as it deals with employment, is not full equal employment opportunity. Rather, the plan has set forth a number of specific goals for all States as well as several additional goals for States in the South.[169] The goals for all States include: (1) providing minority employees an opportunity to work with white clients; (2) providing minority clerical employees an opportunity to work with white professionals;

---

168. USDA, "Affirmative Action Plan for Meeting Nondiscriminatory Legal Standards in Employment and the Conduct of all Programs by State Cooperative Extension Services," Feb. 28, 1972 /hereinafter referred to as Affirmative Action Plan/.

169. The model is in two sections. The first applies only to the Southern States which operated dual systems prior to the passage of the Civil Rights Act of 1964. The second applies nationwide. Three States which were sued because of allegations of discrimination in their Cooperative Extension programs were exempt from both sections of the plan. These States are Mississippi, North Carolina, and Alabama. Thus, the first section applies to 12 States: Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Missouri, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

(3) hiring minorities to fill vacancies left by nonminorities as well as minorities; (4) providing all professional employees an opportunity to apply for vacant positions; (5) eliminating salary differential based on race, national origin, or sex; and (6) eliminating sex as a requirement for employment except where it is a bona fide occupational qualification.[170] For Southern States, the goals also include: (1) giving priority in consideration for promotion to blacks demoted by the merger; (2) eliminating patterns of whites replacing whites and blacks replacing blacks; (3) making the proportion of black employees equal to their proportion in the population; and (4) adopting nondiscriminatory standards for selection, assignment, transfer, promotion, and termination.[171] These goals, even taken together, do not constitute a complete prescription for equal employment opportunity, and even if all these goals were achieved it would be possible for discrimination to continue. Most notable among the deficiencies of the model plan is the inadequate provision for equal opportunity for nonblack minorities and women.[172] Moreover, the plan calls for treatment

---

170. Affirmative Action Plan, supra note 168.

171. Id.

172. If the goals for the South, which deal only with blacks, were expanded to include nonblack minorities and women and used in all States, the plan would be improved.

of minorities which could result in only minimum integration.[173]

Second, the model plan does not meet the standards set forth in the guidelines of the Office of Federal Contract Compliance of the

---

173. For example, one goal of the model plan is expanding opportunities for minorities to work with clientele other than members of their own group. The plan does not set as a goal assigning whites to positions where they would work with minority clients. The model plan also specifies that minority secretarial and clerical employees should not be limited to working in offices where their supervisors are members of the same minority group, but there is no suggestion that whites be given the opportunity to work under minority supervisors. The limitations of the model plan can be seen by an examination of a State plan which showed that in many counties, service was along racial lines--white agents served primarily whites and black agents served primarily blacks. The State's proposed remedy of this problem called for a greater opportunity for minorities to serve whites. It said nothing of increasing the opportunity of whites to serve minorities.

By agreement with the Director of USDA's Division of Compliance and Enforcement, Office of Equal Opportunity, this Commission has not used names of persons or States or other identifying features in referring to the affirmative action plans. See letter from Jeffrey M. Miller, Assistant Staff Director for Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to Richard J. Peer, Director, Division of Compliance and Enforcement, Office of Equal Opportunity, U.S. Department of Agriculture, Feb. 6, 1975.

Department of Labor and the Equal Employment Opportunity Commission.[174] An affirmative action plan should contain a work force analysis to determine if there are fewer women or minorities employed in each

---

174. See Office of Federal Contract Compliance, Revised Order No. 4, 41 C.F.R. § 60-2.1, et seq. (1974). Revised Order No. 4 outlines requirements by the Office of Federal Contract Compliance of the Department of Labor for compliance with Executive Order 11246 by nonconstruction contractors.

USDA noted,

> The Commission fails to acknowledge that the prototype plan was issued based solely upon the Alabama decree. The "Affirmative Action Plan" in this instance was not necessarily developed to meet the criteria of a hypothetically named "affirmative action plan" of other agencies. The Commission should also be aware that the Office of Federal Contracts Compliance Authority does not apply to Grants-in-Aid. Wright letter, supra note 72.

While the authority of this Order extends only to companies that are nonconstruction contractors of the Federal Government, the Order describes the steps necessary for any employer to ensure nondiscrimination in employment practices and to affirmatively eliminate underutilization of minorities and women. Revised Order No. 4 is discussed at length in United States Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities, (Feb. 1973). See also Equal Employment Opportunity Commission, Affirmative Action: A Guidebook for Employers (1974); and U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 1974, Vol. V, To Eliminate Employment Discrimination ch. 3, (July 1975).

job category than would be expected by their availability for the job.[175] If this analysis shows that women and minorities are underutilized in the employer's work force, then the employer should be required to develop numerical goals and timetables, or measurable targets, which must be directed to obtaining prompt and full utilization of minorities and women. Goals and objectives must be developed by job classification and organizational unit.[176] Additional required elements of an affirmative action plan include the development and implementation of internal auditing systems to measure the effectiveness of the plan, the development or reaffirmation of an equal employment opportunity policy and dissemination of the policy,

---

175. 41 C.F.R. § 60-2.11(a) (1974), as revised, 39 Fed. Reg. 25654 (1974). Availability is determined in the area's work force, the number of minorities and women having the necessary skills for the jobs, the existence of training institutions, and the size of minority and female unemployment in the surrounding area. The employer must also consider the availability of promotable and transferable minority and female employees within its organization. See 41 C.F.R. § 60-2.11(b) (1974), and memorandum from Philip J. Davis, Director, OFCC, to Heads of All Agencies, Technical Guidance Memo. No. 1 on Revised Order No. 4, Feb. 23, 1974.

176. See 41 C.F.R. § 60-2.10 (1974). Goals are not quotas which must be met but, rather, objectives by which good faith efforts may be measured. 41 C.F.R. § 60-2.12 (1974). Determination of whether a contractor is in compliance with the Executive orders is not judged solely by whether or not it reaches its goals; instead, a contractor's compliance status is reviewed in light of the contents of the total affirmative action plan and the extent of adherence to the plan. 41 C.F.R. § 60-2.14 (1974). A failure of a contractor to meet its goals may result in the issuance of a show-cause notice. On August 11, 1972, President Nixon issued a letter to all agencies cautioning against the use of numerical goals predicated on proportional representation or applied as if they were quotas. In September 1972, OFCC reviewed its regulations and orders and found that they were not in conflict with the President's directive. Memorandum to All Heads of Agencies, from James D. Hodgson, Secretary of Labor, Sept. 15, 1972. For further discussion of the concepts of goals and timetables, see Statement on Affirmative Action for Equal Employment Opportunities, supra note 174.

the development and implementation of "action oriented" programs (such as validation of tests and other selection techniques to assure their job-relatedness[177] and elimination of barriers to minority and female recruitment),[178] and support of outside programs designed to improve employment opportunities for minorities and women.

USDA's model plan does not require a work force analysis by job category. It does not require the setting of numerical goals and it does not require the validation of selection techniques to assure

---

177. The Supreme Court has held that if a selection procedure which results in a disproportionate rejection of minority applicants cannot be shown to be related to job performance, that practice is prohibited. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

178. This Commission has identified some common examples of discriminatory recruitment barriers:

> When an employer...relies upon word-of-mouth contact for recruitment, minority persons who have less access than other persons to informal networks of employment information, such as through present employees or officials, are denied equal access to available opportunities. Recruitment at schools or colleges with a predominantly nonminority or male makeup is discriminatory when comparable recruitment is not done in predominantly minority or co-ed institutions. Statement on Affirmative Action for Equal Employment Opportunities, supra note 174, at 5.

their job-relatedness.[179] Essentially, USDA's model plan only requires analysis to measure conformance with its narrow goals.

---

179. However, the model plan does require that State Extension programs in the South "evaluate present minimum qualification requirement standards" for selection, assignment, promotion, and transfer to determine if they present barriers to equal employment opportunity. It contains no comparable requirement for other States. It does not provide any instruction to the Southern States for how the required evaluation should be made. It did not, for example, refer States to the selection criteria set by the Equal Employment Opportunity Commission for guidance in this area. EEOC's employee selection guidelines are published at 29 C.F.R. § 1607.1, et seq. (1974). OFCC has published guidelines on employee selection similar to those of EEOC at 41 C.F.R. § 60-3.

2. Services

The principles behind affirmative action plans for the delivery of services should be the same as those in the area of employment.[180] For example, the plan should include data on the race, ethnic origin, and sex of program participants. This should be compared with racial, ethnic, and sexual data on the number of persons eligible to participate.[181] Where minorities or women are underrepresented as program participants, a comprehensive affirmative action plan should include an assessment of what barriers to minority and female participation exist.[182] The plan should then specify changes to be made for elimination of these barriers and it should set numerical goals and timetables for increasing minority and female participation.

---

180. USDA stated:

> Title VI of the Civil Rights Act of 1964 cites three criteria as the basis of discrimination, i.e., race, color, and national origin. Therefore, the first sentence is supposition and the remainder of the paragraph is based upon it. /F/ootnote /182/ is conjecture also. Wright letter, supra note 72.

181. See U.S. Commission on Civil Rights, To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs, supra note 142, 15-17, 26-29 (1973).

182. In Extension Service programs such barriers might include blatant exclusion of minorities from organizations receiving ES assistance or from ES programs themselves, establishment of geographic boundaries for participation so as to segregate minorities from nonminorities, failure to ensure that adequate information about planned activities reaches minorities and women, setting meeting times and places which make activities inaccessible to minorities, or setting exclusionary criteria for participation (for example, requiring that participants in a sewing class possess sewing machines of their own).

USDA's model plan requires data analysis on basic units of program participation; for example, the racial and ethnic composition of 4-H and homemakers clubs must be compared with the racial and ethnic composition of the population eligible to participate in these clubs. The plan also requires States to specify the action to be taken where there are civil rights violations.

USDA's model plan, however, is deficient in a number of respects. One of its limitations is that it was drafted prior to the passage of Title IX of the Education Amendments[183] at a time when there was no prohibition against sex discrimination in the delivery of services in Extension Service programs. Thus, although it provides for affirmative action with regard to racial and ethnic discrimination, it does not cover sex discrimination.

Another limitation is that it requires data collection only on basic units of program participation, such as 4-H club membership and membership in special interest groups. Data on minority participation in supplementary activities, such as individual 4-H camps, workshops, and State and national conferences, is not required. The most serious limitation of the model plan with respect to services, however, is that where data reveal segregation or underrepresentation, the plan does not

---

183. USDA stated: "The Commission continues to labor under its own assumption of coverage of Title IX when in fact this has not been determined." Wright letter, supra note 72.

Note: The coverage of Title IX is discussed on pp. 38-42 supra.

require a comprehensive analysis to identify barriers to participation,[184] nor does it require numerical goals and timetables to increase minority participation.

3. Approved Plans

At first, State plans were required to be submitted to USDA for approval by July 1, 1972, with full implementation to occur by December 31, 1972. The deadlines were then extended to September 1, 1972, and February 28, 1973, respectively, giving the State Extension Services 10 months to develop plans and a full year to implement them.[185] Nevertheless, in June 1973 final approval was still pending on the plans of 14 States and it was not until January 1974, more than 15 months after the plans were due, that the final State plan, that of Virginia, was approved.

A review of several of these plans indicates that in many instances civil rights compliance was inadequate. For example, one State plan declared that service in that State is across racial lines, but this was not documented by data in the plan. Indeed, those data showed that: (a) 23 percent of the State's Extension Service clientele were black and 77 percent of the clientele were white, (b) 19 percent of the clientele served by white agents were black and 81 percent were white, (c) 35 percent of the clientele served by black agents were white and

---

184. The plan, instead, asks recipients to set remedies on the basis of the underrepresentation or segregation without requiring that the recipient identify the causes of the discrimination, and thus the plan does not necessarily direct that the causes be eradicated.

A comprehensive analysis would, at a minimum, include an assessment of the extent to which possible barriers, such as each of those mentioned in note 182 supra, impact upon minority participation.

185. In its Reassessment report this Commission noted that the Office of Equal Opportunity objected to extending the deadlines, but was overruled. Reassessment report, supra note 88, at 273.

65 percent were black.[186] Thus, the black agents were largely serving blacks. Although the service patterns of the black agents are probably attributable to discrimination, the plan sets no goals for remedying the problem.

In the same plan, an analysis by race and sex indicated that blacks and women had salaries lower than those of white males in the same job. Salary differentials based on race, ethnic origin, or sex are outlawed by Title VII of the Civil Rights Act of 1964, as amended.[187] Salary differentials based on sex are also outlawed by the Equal Pay Act.[188] Moreover, both laws authorize the payment

---

186. USDA stated, however, "The data cited in this paragraph confirm the States' evaluation that service is performed across racial lines." Wright letter, supra note 72.

187. Title VII states:

> It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.... 42 U.S.C. § 2000e-(2)(a)(1)(1970).

188. The Equal Pay Act of 1963, (29 U.S.C. § 206(1970)), which amends Section 6 of the Fair Labor Standards Act of 1938, as amended (codified in scattered sections of 29, 42 U.S.C. (1970)) provides that:

> No employer having employees subject to any provisions of this Section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.... 29 U.S.C. § 206(d)(1)(1970).

of back wages where violations are found,[189] and both apply to the employment practices of State governments.[190] Despite the fact that salary differentials based on race and sex are illegal, the State's affirmative action plan sets no concrete plan to remedy the problem,

---

189. Title VII provides that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a change with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.... 42 U.S.C. § 2000e-5(g)(Supp. II, 1972).

The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1970), which is enforced by the Secretary of Labor, provides that in the event of violations of the Equal Pay Act, the Secretary may file for back wages of generally up to two years. 29 U.S.C. § 217 (1970). If the Secretary elects to have the suit heard in a jury trial, the suit may be not only for back wages lost but additionally for damages equal to those back wages. 29 U.S.C.A. § 216(c) (Cum. 1975).

190. In 1972, Title VII was amended by the Equal Employment Opportunity Act of 1972 to include State and local government employees. 42 U.S.C. § 2000e(a)(Supp. II, 1972). Activities of public employers are also covered by the Equal Pay Act. 29 U.S.C.A. § 203(s)(5)(Cum. 1975).

but provided only that salary differentials would be eliminated "as rapidly as budgetary procedures and resources will allow."[191] It would appear that the State can indefinitely postpone action to eliminate the salary differentials if it claims that it has insufficient funds to do so, and that USDA will not require immediate equalization and an award of back wages. By accepting excuses for inaction, USDA is encouraging the violation of Federal law in the Cooperative Extension Services.

A second plan evidenced clear deficiencies in the State ES's service to persons of Spanish speaking background. According to the plan, this group constituted an estimated 13 percent of the population eligible to participate in the State ES programs and comprised a significant population within the State. Nonetheless, the State affirmative action plan did not analyze the extent to which persons of Spanish speaking background were employed in the ES program within the State and did not direct any of its plans toward improved employment practices vis-a-vis this group.[192]

---

191. In another plan, USDA permitted similar lack of commitment to correcting salary differentials. The plan merely promised that "efforts will be made to make adjustments within the limits of available funds."

192. For example, the plan promised an active employment recruitment program at colleges and universities attended by blacks. There was no plan to recruit at institutions attended by persons of Spanish speaking background.

A third plan had faulty methods for determining the number of potential participants, but apparently this had been undetected by USDA. The number of potential participants is the number of persons eligible to participate in Extension Service programs, whether or not they are actually participating. The State plan, however, determined that for one ES activity the total number of potential participants among the State's black population was only 44. Yet 942 blacks were actually participating in that activity.

In that State plan, affidavits by professionals and program specialists employed by the ES stating that there is no discrimination in the ES programs were substituted for factual data on minority participation.[193] One of these persons indicated that since more than 99 percent of all persons in one activity were white, "it is considered that the problem of discrimination does not exist and no action is required." Thus, the question of whether blacks or persons of Spanish speaking background might be excluded from that activity was not addressed.

VI. Audits

In fiscal year 1974, USDA conducted audits of equal opportunity in employment and services in 19 State Extension Services.[194] The

---

193. The inadequacy of assurances as the central mechanism in a compliance program is discussed in Reassessment report, supra note 88, 149-50. (1973).

194. The States audited were Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, New Jersey, New York, Ohio, Oklahoma, South Carolina, and Texas. The first audit, of Texas, was completed in September 1973. The last audit, of Florida, was completed in March 1974.

audits were conducted to ascertain the level of compliance by State Extension Services with the Civil Rights Act of 1964. It was the understanding of OEO staff that if these audits demonstrated non-compliance with Title VI, no further efforts would be made toward conciliation.[195] The process of attempting to achieve voluntary compliance had gone on too long. USDA had been seeking full compliance since the first audits in 1965 had shown Title VI violations. The affirmative action plans were a commitment by State Extension Services to end voluntarily the effects of past discrimination and States which did not honor that commitment were to be the subject of enforcement action.[196]

The audits were conducted onsite and the audit reports contained vast amounts of data, often by county,[197] on employment and delivery of services. Generally, the audits reported on recruitment practices,

---

195. In 1973 this Commission noted, "No excuse will remain for delay by /USDA/ in terminating assistance to recipients if discrimination is found in either their employment or services." Reassessment report, supra note 88 at 273.

196. USDA intentions to take enforcement action against ES recipients found to be out of compliance with their affirmative action plans are discussed in greater detail on pp. 92-93 infra.

197. In each State several counties were visited.

salaries, job descriptions, staff training, advisory committees, affirmative action plans, types of services offered, number and race or ethnic origin of participants, and integration of participation.

The audits showed that progress had been made in bringing nondiscrimination to the Cooperative Extension Service. USDA found that in some States salary discrepancies between minorities and nonminorities and between males and females were beginning to decrease.[198] In some States there was an increase in minority participation in nutrition programs and homemaker clubs. Sometimes an increase in the number of integrated activities was reported. The gains were generally not dramatic, however.[199]

---

198. One State had drawn up guidelines for salary equalization. In another State, the university adjusted 18 women's salaries an average of $1,052 with a special fund it had reserved for that purpose. In other States salary equalization had been assisted by promoting minorities and women.

199. For example, in one State the auditors perceived that the increase in minority participation in homemaker clubs was significant enough to mention in the audit summary. The actual increase had been from 182 minority participants in 1972 to 289 in 1974, an increase from 1.2 percent of total participation to a mere 1.8 percent. Moreover, the auditors considered all homemaker clubs in the State to be integrated, but did not provide a definition of "integrated." Since fewer than 2 of every 100 participants were minority, any integration would only have been nominal. In 1970, minorities constituted more than 10 percent of the population in that State.

Indeed, no definition of integration was supplied in any audits. It is thus possible that the inclusion of only one black in an otherwise all-white activity would qualify that activity for being listed as integrated. Another State audit indicated that 42 homemaker clubs were integrated. These 42 clubs enrolled a total of 96 minority and 808 nonminority members, an average of about 19 nonminority members and 2 minority members per club. In 1970, minorities constituted more than 16 percent of the population in that State.

Overall, the audits showed that, despite affirmative action requirements, discrimination continued to permeate the State Extension Services. Salary differentials were found between blacks and whites in the same jobs, with the same tenure and educational background.[200] The 1973-74 audits showed that in some States blacks held few supervisory positions.[201] Segregation, too, was evident in many States.[202]

---

200. In at least one State these differentials had been called to the State's attention 4 years earlier as a result of a USDA audit in 1969. To illustrate the differentials found, in one State the average salary of white female home economists was $9,883 per year. For black female home economists, the average salary was $9,045. The salary differentials could not be attributed to differences in education or tenure, as the white females averaged 7 years tenure and the minority females averaged 17 years tenure, and the minority females averaged a greater number of years of education than did the nonminority females. In another State the average salary of the minority agents was about $2,000 less than the average salary of the white agents. In another State the auditors reported that salary differentials were accomplished by giving blacks and whites different job descriptions for the same jobs.

201. In one State, among more than 100 county and area directors, none was a minority. In another State there were few blacks in management positions. Promotional opportunities were poor because blacks were hired only to fill positions vacated by blacks.

202. Within at least one State, two separate Extension programs appeared to continue. An all-black staff at a predominantly black university served a black clientele. Whites at the predominantly white university served both blacks and whites. The State held two livestock shows, one at the white land grant college and another at the black land grant college. The black show was managed by a black male and the white show was managed by a white male. Both shows were officially open to all, regardless of race or ethnic origin. Nonetheless, the auditors reported that few blacks entered the white show and few whites entered the black show. The State Extension Service maintained that it had given no thought to combining the two shows.

In that State and others, homemaker and 4-H clubs had generally not been integrated. Often the predominantly black or white clubs were located in mixed communities. In one State 88 percent of the 4-H clubs were not integrated and 70 percent of the nonintegrated clubs were located in mixed communities.

As a result of the audit findings,[203] OEO and ES determined that about one-third of the States audited were in substantial noncompliance with the law. They also determined that all other States needed at least some corrective action.[204] The Department of Justice[205] tentatively identified a number of States as having more civil rights problems than others.[206] For the most part, these were the same States which USDA identified as being in substantial noncompliance.

It should be noted, however, that although the audits clearly demonstrated instances of civil rights noncompliance, this Commission believes that the audits did not contain sufficient information to evaluate fully the State programs. For example, most data were

---

203. The audit reports contained no recommendations. These were to be written by OEO and ES following their reviews of the audit reports.

204. Hopkins et al. interview, supra note 139, and Peer and Froe interview, supra note 148.

205. The Department of Justice has become a participant in Extension Service compliance activities as a result of lawsuits filed against the Extension Service. These suits are listed in note 89 supra.

206. Telephone interview with Mary Planty, Deputy Chief, Federal Programs Section, Civil Rights Division, Department of Justice, May 29, 1975. At the request of DOJ staff, this Commission has agreed not to reveal the names of these States or the exact number.

presented by race and ethnic origin and sex, but with only infrequent cross-tabulation by race, ethnic origin, and sex.[207] At least one review of a State with a substantial Spanish speaking background population did not cover employment of or service to that population. In another review of a State with a substantial Spanish speaking background population, that group was generally combined with blacks and other minorities to form the general category of "minority."[208]

Employee categories used by the auditors were often not broken down by job. While within the State Extension Services there are many categories of professionals, including home economists, agricultural agents, program leaders, and county and area directors, one review listed data only for professionals, paraprofessionals, and clericals. Another provided racial, ethnic, and sex data on Extension Service agents, but not any employees in management, supervisory, or clerical positions.

Findings concerning delivery of services pertained primarily to such matters as whether service was across racial lines, clubs were integrated, civil rights assurances had been signed, and club

---

207. The need for cross-tabulation of racial and ethnic data by sex is discussed in note 143 supra.

208. Thus, although the ES practices may have differed with regard to each minority group, this would not be revealed in the analysis.

bylaws and constitutions contained nondiscrimination provisions.[209]

A serious deficiency was that the audits did not assess the quality of services rendered to minorities.[210]

---

209. For example, in one State, the auditors found that homemaker clubs had signed assurances of compliance with Title VI; bylaws of 4-H clubs provided for membership open to all regardless of race, color, or national origin; 4-H and homemaker club activities, such as projects, contests, meetings and homes, were open to all, but clubs remained nonintegrated. Another audit showed that only a small fraction of homemaker clubs were integrated, that there was a increase in the number of integrated 4-H camps, that there was an increase in minority youth attending those camps, and that there was a decrease in nonminority youths attending those camps.

210. USDA did not compare the frequency of assistance to minorities with that received by nonminorities. It did not compare the types and variety of programs in which minorities and nonminorities were enrolled to determine, for example, if minorities achieved equitable participation in economically significant programs, such as cattle breeding and dairying. USDA did not ascertain if demonstrations were designed to suit needs of both minorities and nonminorities.

That such measures can reveal serious Title VI problems is illustrated by a paper prepared by staff of this Commission which showed that in 1968 in 10 select Mississippi counties white youth in 4-H clubs engaged in an average of 3.5 projects per youth and black youth engaged in an average of only 2.0 projects per youth. Black youths predominated in the following types of projects: clothing, food preservation, gardening, and home improvement. White youth predominated in beef, conservation, dairying, electricity, entomology, nutrition, leadership, personal development, safety, and tractor. In counties where there were no black extension workers, black youth in 4-H clubs engaged in the fewest and least diversified projects. U.S. Commission on Civil Rights, Staff paper prepared for the Mississippi State Advisory Committee of the U.S. Commission on Civil Rights, Equal Opportunity in The Mississippit Cooperative Extension Service (June 1969).

USDA stated:

> The portion of the footnote regarding 4-H Youth Development program participation is designed to purposely mislead and misinform. The agency does not provide projects to any youth engaged in project work. Projects engaged in by youths are individually chosen by them and their parents and are based upon the personal preferences and interests of the youths and the ability of the family to provide the facilities and other needs to conduct the project. There is a high correlation between the farming enterprises of a family and the interests of the youths of that family. Wright letter, supra note 72.

VII. Enforcement Action

A. Sanctions Available to USDA

When an applicant for or a recipient of Federal assistance is found to discriminate on the basis of race or national origin, and compliance cannot be achieved by voluntary means, Title VI provides several alternatives. If the discrimination is in an applicant's program, USDA can defer making a grant to the applicant until it has had the opportunity to verify full compliance. If the grant has been made, USDA may initiate administrative proceedings[211] for the termination of funding,[212] Alternatively, USDA may enforce Title VI by "any other means authorized by law." Although not explicity stated in Title VI, such other means include referral to the Civil Rights Division of the Department of Justice for

---

211. USDA regulations concerning administrative proceedings are found at 7 C.F.R. § 15.60, et seq. (1975), Subpart C. Rules of Practice and Procedures for Hearings, Decisions and Administrative Review Under the Civil Rights Act of 1964.

212. Title VI of the Civil Rights Act of 1964 states in part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.... 42 U.S.C. § 2000d-1(1) (1970).

the initiation of civil action.[213]

No order suspending, terminating, or refusing to grant assistance to a USDA recipient can become effective until the USDA constituent agency granting the assistance has (a) advised the recipient of its failure to comply and (b) determined that compliance cannot be secured by voluntary means.[214] Thus, there can be no use of the sanction of fund termination if the constituent agency has not certified that voluntary compliance efforts have been unsatisfactory, no matter what position is taken by OEO. Thus, Extension Service resistance to taking enforcement action[215] has been seen as a major obstacle to effecting

---

213. The Department of Agriculture Title VI regulation, like other Federal agency Title VI regulations, defines other means authorized by law:

> Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States...or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law. 7 U.S.C. § 15.8(a)(1975).

See also 45 C.F.R. § 80.8(a) (1974) (Department of Health, Education, and Welfare) and 28 C.F.R. § 42.108(a) (1974) (Department of Justice).

214. 7 C.F.R. § 15.8(c) (1975). In addition: (a) There must have been "an express finding on the record, after opportunity for a hearing" of a failure by the applicant or recipient to comply with Title VI; (b) the Secretary must have approved the termination or deferral action; (c) 30 days must have expired after the filing of a report on the circumstances and grounds for enforcement action with the committees of Congress having jurisdiction over the program involved. Id.

215. ES reluctance to effect compliance by its recipients is illustrated by a 1973 USDA compliance review of a Tennessee county Extension program. The county reviewed was found to have a history of segregated clubs and services. As a result, OEO recommended that the county: (1) provide services across racial lines and (2) integrate special interest groups and home demonstration clubs. The State ES office responded that it would exert a "reasonable effort" toward integration. OEO concluded that such a general response was inadequate. The Administrator of the Extension Service, however, stated his intent to inform the Tennessee Cooperative ES that it was "in compliance." Letter from Edwin L. Kirby, Administrator, ES, USDA, to Richard J. Peer, Chief, Compliance and Enforcement Division, Feb. 13, 1974.

compliance in the State Extension programs. Indeed, as of May 1975, this was the position of OEO's Acting Director.[216]

However, that position is only partially correct. USDA constituent agencies only have final authority in determining that noncompliance cannot be achieved voluntarily if administrative action is planned. OEO, and not the constituent agency, has the authority to determine whether voluntary compliance is achievable when referral to the Department of Justice is contemplated.[217] Thus, within USDA, OEO and ES each have independent authority to take some type of enforcement action should either independently perceive that voluntary compliance cannot be achieved.

B. USDA's Record in Enforcement

USDA has rarely taken action against any recipient[218] unless there is noncompliance which is as blatant as the outright refusal to promise

---

216. Interview with Miles S. Washington, Jr., Acting Director, Office of Equal Opportunity, USDA, May 30, 1975.

217. USDA Title VI regulations assign this responsibility to the Secretary of Agriculture. 7 C.F.R. § 15.8(d)(1) (1975). The Secretary of Agriculture has delegated this authority to the Assistant Secretary for Administration, along with the responsibility for making the referrals. 7 C.F.R. § 2.25(h)(5), (7), and (8) (1975). The Assistant Secretary has in turn delegated this authority to OEO. 7 C.F.R. § 2.80(a)(4), (6), and (7) (1975). The Acting Director of OEO was not fully aware of this delegation of responsibility. When informed of it, the Acting Director stated that he might try to use this authority on a trial basis. Washington interview, supra note 216.

218. For example, of 974 preapproval reviews performed by the Farmers Home Administration and the Rural Electrification Administration in 1972, only one applicant was barred from participation. Attachment to letter from Frank B. Elliott, Assistant Secretary for Administration, USDA, to Caspar W. Weinberger, Director, Office of Management and Budget, July 21, 1972.

compliance with Title VI.[219] In the case of the Extension Service, USDA's record is even worse. Despite the findings of its audits, USDA has never terminated or deferred funds to a recipient of an Extension Service program. Absent a private suit, it has never referred the case of such a recipient to the Department of Justice for judicial enforcement.[220] The end result is that USDA leaves responsibilities for enforcing nondiscrimination in Extension programs to private citizens.[221]

Both the Attorney General and the White House have commented on

---

219. In several cases, when noncompliance has been a clearcut failure of a recipient to sign an assurance, USDA has referred the matter to the Department of Justice. For example, in September 1971, the Department of Justice issued an opinion extending Title VI coverage to approximately 2,000 recreation associations which were granted loans by the Farmers Home Administration between January 1965 and May 1968. Loans subsequent to May 1968 had previously been determined to be subject to Title VI. The FmHA Administrator, in transmitting this information to State and county FmHA offices, ordered that recreation association borrowers should remove any restrictive membership clause from their bylaws. This order is discussed in the Reassessment report, supra note 88. (January 1973). The cases of 7 associations which refused to comply were referred to the Department of Justice for possible action. Telephone interview with William Tippins, Equal Opportunity Officer, FmHA, USDA, Aug. 5, 1974.

220. The case of Bazemore v. Friday was referred to DOJ after a private suit was filed against the North Carolina Cooperative Extension Service and USDA.

221. See Strain v. Philpott, supra note 88; Wade v. Mississippi, supra note 88; Bazemore v. Friday, supra note 88; and Poole v. Williams, supra note 88.

USDA's failure to take enforcement action.[222] In 1972 this Commission referred to "the blatant acquiescence by the Extension Service on the continued overt discrimination by many of its recipients,"[223] and in 1973, this Commission referred to the Federal Extension Service's "proclivity for delaying compliance."[224]

C. Obstacles to USDA Enforcement Action

USDA has engaged in a series of ineffectual attempts at achieving voluntary compliance instead of demanding immediate compliance or taking enforcement action when faced with clearcut and repeated civil rights violations in the Cooperative Extension Services. The pattern has been

---

222. In 1971 this Commission noted that:

> Continuing failure of the Department of Agriculture to adequately enforce civil rights in its Title VI programs is underlined in a letter from the Attorney General to the Secretary of Agriculture (Apr. 6, 1969) when the Attorney General stated: "Despite the evidence of these widespread violations of law disclosed by your Department's investigations, I am not aware of any meaningful action which has been taken to correct the situation...." Enforcement Effort report, supra note 88, at 226, n. 303.

This Commission also observed that even where the White House staff attempted to get the Department of Agriculture to enforce civil rights compliance in the Cooperative Extension Services, USDA was not cooperative. This Commission further stated:

> ...the White House staff raised questions with Cabinet Secretaries about rampant discrimination in the Department of Agriculture's Federal Extension Service....Yet no significant action was taken by Secretary Freeman to enforce Title VI with regard to the Extension Service....Id. at 335, n. 216, information taken from interview with Joseph A. Califano, Jr., Special Assistant to President Lyndon B. Johnson, Mar. 24, 1970.

223. One Year Later, supra note 88, at 126.

224. Reassessment report, supra note 88, at 240.

to provide recipients with a new procedure which would give them another chance to achieve compliance voluntarily and thus entitle them to be free of Federal enforcement action until their performance on this new opportunity had been judged by USDA. Each new procedure was to be the last -- recipients who did not comply were to be subject to enforcement actions. However, these promises to resort to sanctions have never been executed. Instead, USDA has shied away from enforcement action, appearing to hope that the noncompliance will go away by itself. As a result, the net effect of the series of new procedures to effect compliance has been to give recipients more time to continue their illegal practices.

An early requirement,[225] which amounted to nothing more than a procedural

---

225. There was an even earlier requirement in 1965. Plans for implementing Title VI were required by December 31, 1965, from the 15 Southern States with formerly dual Extension programs. Extension Service, USDA, Supplemental Instruction for Administration of Title VI, July 2, 1965 (as amended). As of 1968 not all States had submitted acceptable plans and no enforcement action had been taken. U.S. Commission on Civil Rights, staff paper, The Mechanism for Implementing and Enforcing Title VI of the Civil Rights Act of 1964: U.S. Department of Agriculture (July 1968).

delay, was the issuance by USDA of regulations calling for equal employment opportunity programs. These were proposed in 1966, but because USDA harkened to the objections of the State ES directors to these procedures, it took USDA 2 years to finally issue them,[226] and then they were never fully implemented.[227]

---

226. 7 C.F.R. § 18.1, et seq. (1975). These regulations are discussed on PP. 30-32 supra. About this regulation, this Commission noted:

> In July 1966...the Assistant to the Secretary initiated, staffed, and received approval for a departmental complaint procedure for extension workers who felt they had been denied equal employment opportunity because of racial discrimination. The procedure, although signed by the Assistant Secretary for Administration, was withdrawn by Department officials upon the report of the Administrator of the Federal Extension Service that it would meet resistance from the States. Thereafter it was agreed that a committee of the Association of Land Grant College Presidents would work cooperatively with the Department of Agriculture to develop a more acceptable procedure. Although this was anticipated by January 1967, it was not until January 1968, following an opinion by the Department of Justice supporting the Assistant to the Secretary's efforts, that the decision was taken to promulgate essentially the same procedures which had been suggested 18 months earlier. In May 1968, the proposed regulation was published in the Federal Register. Enforcement Effort report, supra note 88, at 202.

227. Peer and Froe interview, supra note 148.

A subsequent procedural requirement[228] was USDA's request for affirmative action plans.[229] The plans were to be the final chance of the States to come into compliance. If they were not fully implemented by February 28, 1973, enforcement action was to be taken.[230] After the plans were approved, USDA required ES recipients to submit annual reports so that USDA could determine if the plans

---

228. Additional procedural requirements which effected delays are discussed on pp. 88-91 supra.

229. These plans are discussed on pp. 65-78 supra.

230. The instructions for those plans state:

> Failure of a State Cooperative Extension Service to comply with the deadlines specified herein.../for transmission of the plans and for their full implementation/...will subject the State Cooperative Extension Service to proceedings under Title VI of the Civil Rights Act of 1964 and the Smith-Lever Act of May 8, 1914, as amended, which could result in a suspension or termination or refusal to grant or to continue Federal financial assistance, or court action by the Department of Justice to enforce compliance. Affirmative Action Plan, supra note 168.

were being implemented. These reports indicated that a fair number of States were not in full compliance,[231] but again USDA took no action against the noncomplying recipients.

---

231. The States are expected to submit reports annually which show progress in achieving the goals set forth in the plans. USDA, Guidelines, State Cooperative Extension Service Civil Rights and Equal Employment Compliance Report, June 30, 1973, and USDA, General Guidelines, State Cooperative Extension Service, Civil Rights and Equal Employment Opportunity Compliance Report (July 1, 1973-June 30, 1974).

In 1973, OEO reported that it reviewed only 15 of the 48 reports. Of those, 6 States were found to be implementing their affirmative action plans at an acceptable level and 9 were not. Those jurisdictions found acceptable were Alaska, Florida, Ohio, Oklahoma, West Virginia, and Washington, D.C. Those judged to be deficient were Georgia, Hawaii, Illinois, Kentucky, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Utah. Telephone interview with Melvin Fowler, Equal Opportunity Specialist, Compliance and Enforcement Division, OEO, USDA, Mar. 12, 1975.

As of April 1975, 14 of the 1974 reports were reviewed by OEO. Eight States' reports indicated acceptable progress and six indicated that progress was deficient. The acceptable States were Florida, Idaho, Minnesota, Nevada, New Hampshire, Ohio, Pennsylvania, and Vermont. Deficient States were Georgia, Kansas, Maine, Michigan, Montana, and Washington. Id.

When, in 1973 and 1974, USDA conducted audits of compliance with affirmative action plans of 19 States,[232] OEO and ES agreed that the audits would be the final step in the compliance process -- if the audits revealed that the plans were not being implemented, USDA would carry out its commitment to take enforcement action.[233] This agreement was not in writing[234] and was not adhered to. OEO's interpretation of the agreement is reflected in one of its objectives for fiscal year 1974. The objective was "To bring all State Cooperative Extension Services audited by the Office of Audit...into full compliance by June 30, 1975...."[235] One of the steps OEO planned in order to achieve that objective was to send a "10-day

---

232. The affirmative action plans are discussed on pp. 65-78 supra.

233. Peer and Froe interview, supra note 148. This commitment is made in the Affirmative Action Plan, supra note 168.

234. Peer and Froe interview, supra note 148.

235. OEO, USDA "FY 1975 Objectives." OEO's progress with its objectives to bring the State Extension Services into compliance is supposed to be tracked by staff who will report to the Secretary of Agriculture on OEO's progress.

letter"[236] announcing USDA's intention to take enforcement action against all States where "major" noncompliance was found by the audits to exist. While it is appropriate that OEO would take this first step in initiating enforcement proceedings where noncompliance existed, it was not correct to distinguish instances of "major" noncompliance from any other instances of noncompliance. All racial and ethnic discrimination and segregation in ES programs are violations of the law.

---

236. A "10-day letter" is a letter to a USDA recipient announcing that noncompliance exists, that voluntary compliance has not been achieved, and announcing USDA's intention to take enforcement action. No enforcement action can be taken until 10 days after the mailing of the notice to the recipient. During that period, additional efforts must be made to persuade the recipient to come into compliance. 7 C.F.R. § 15.8(d)(3) (1975).

D. USDA's Internal Agreement to Enforce the Law

A new agreement, superseding the oral agreement between ES and OEO,[237] was signed in August 1974, when the Extension Service and the Office of Equal Opportunity effected a Memorandum of Understanding. This memorandum defined the working relationship between the two units in the processing of audit reports[238] and revised the procedures to be followed where substantial noncompliance is found. It introduced a new step, of providing, in cases of noncompliance, the State ES with a copy of USDA's recommendations and allowing the State 20 days to submit a report of the corrective action it had taken. Only after receipt of a report which shows inadequate corrective action would USDA initiate enforcement action by sending a 10-day letter.[239]

---

237. This agreement is discussed on pp. 94 supra.

238. Memorandum of Understanding Between the Extension Service and the Office of Equal Opportunity, United States Department of Agriculture, signed by Edwin L. Kirby, Administrator, Extension Service, USDA, July 31, 1974, and Miles S. Washington /Acting/ Director, Office of Equal Opportunity, USDA, Aug. 1, 1974; initialed by John A. Knebel, General Counsel, USDA, Aug. 2, 1974. The memorandum provided that OEO and ES would independently review the audit reports. In cases of disagreements as to whether substantial noncompliance exists, a meeting was to be held between the two units, invoking opinions of the Office of General Counsel and the Department of Justice, if necessary.

239. The written procedures stated that:

> a copy of the audit report will be provided to the State Director of Extension....The State Director will be allowed 20 days after receipt of the...letter to...submit a report of corrective action taken as a result of the audit findings. OEO and ES will evaluate the State Director's response and, with the counsel and advice of OGC, make a determination whether the State is in compliance. If...it is determined that a State is not in substantial compliance, OEO will commence formal enforcement action.... Memorandum of Understanding, supra note 238. /Emphases added./

Twenty additional days seems like a relatively short period of time, especially in the light of 10 years of noncompliance, and one to which no reasonable person could object. Indeed, if there were any chance that providing States an additional 20 days to achieve compliance would bring USDA closer to the goal of achieving equal opportunity in State Extension programs, this additional time would have to be supported. However, in the light of USDA's history of procedural delays, this step appears to have been a subtle erosion of the expressed intent of the original agreement to take enforcement action where necessary. This step appears to have no other function than to provide more time to States for remaining in noncompliance. State reports would have to be read for approval by USDA. If the reports again showed noncompliance, there was no guarantee that USDA would take immediate enforcement action. USDA might instead seek improved reports.

Further, as an alternative to providing a report on corrective action taken, a State Extension Director may, within the 20 day period for implementing recommendations, "raise questions concerning or points of difference in the report content for possible adjustments." This loophole could likely enable any State to postpone indefinitely compliance without losing funds or being sued.[240] Moreover, weak as the agreement was, it has not been

---

240. Moreover, States which are not found in substantial noncompliance but which are sent USDA recommendations for corrective action are allowed 20 days merely to "agree to implement the recommendations or raise questions concerning or points of difference in the report content for possible adjustment." Id. USDA stated, "Those States are required to submit plans for corrective action of those deficiencies noted." Wright letter, supra note 72.

adhered to.[241]

There appear to have been at least three principal violations of the memorandum. First, USDA has introduced still another step into the compliance process which was not anticipated by the informal agreement or the memorandum -- the requirement of plans rather than reports of corrective action from the noncomplying States. Although the distinction is subtle, it is important. The plans are to indicate merely what action will be taken, and USDA is apparently imposing no deadline for the action.[242] The reports anticipated in the memorandum, however, were to have demonstrated that all action was completed.

As of May 1975, recommendations had been sent to only 5 of the 19 States audited, including one State which USDA determined was in substantial noncompliance. These States were all given 20 days to provide USDA with plans stating what action they intended to take to come into compliance. USDA then determined whether these plans were acceptable. One was found by USDA to be unacceptable. USDA still did not take enforcement action,

---

241. Washington interview, supra note 216. While OEO's Acting Director refused to discuss the substance of any agreement between OEO and ES, he did indicate that an agreement concerning the processing of the audit reports existed and that it has not been adhered to. It is assumed that the agreement to which he referred is the Memorandum of Understanding, supra note 238.

242. This subtle erosion of the memorandum's stated intent to take enforcement action against noncomplying recipients has been the subject of internal USDA conflict. ES proposed giving one State more than 20 days to come into compliance. OEO objected on the ground that this was violation of the memorandum. Memorandum from Miles Washington, Acting Director, OEO, USDA, to Edwin L. Kirby, Director, ES, USDA, Audit Report No. 60164-11-Hq, Oct. 7, 1974. ES responded stating, erroneously, that the memorandum allowed 20 days for a plan for corrective action. Memorandum from George Hull, Acting Administrator, ES, to Miles Washington, Acting Director, OEO, USDA, Audit Report No. 60164-11-Hq, Oct. 17, 1974.

however, but instead was deliberating over what action to take next.[243]

Second, in the great bulk of the cases in which USDA determined that there was substantial noncompliance, the Memorandum of Understanding was never invoked because the memorandum neglected to take into account the role the Department of Justice would assume in the process of handling the audits. In late August 1974, less than a month after the memorandum had been signed, representatives of OEO, ES, and OGC met with the Assistant Secretary for Administration.[244] They determined that where in USDA's judgment the audits revealed substantial noncompliance, USDA would consult with the Department of Justice concerning the disposition of the case, rather than invoke the procedures outlined in the Memorandum of Understanding. This new procedure appears to have been at least partially adhered to.

As of May 1975, DOJ was conducting a more complete analysis of the compliance problems of these States in order to determine what action should be taken to bring them into compliance.[245] As of May 1975, DOJ had not made these determinations. In the meantime, USDA believes it would

---

243. Hopkins et al. interview, supra note 139. All five States provided plans to USDA, although not all were provided within the 20 days allotted. Two were acceptable to USDA. Two had not been reviewed by USDA as of May 1975. Id.

244. In addition, USDA's Deputy Assistant Secretary for Conservation, Research, and Education attended this meeting. As shown in Exhibit I, the Administrator of the Extension Service reports to the Assistant Secretary for Conservation, Research, and Education.

245. May 1975 Planty interview, supra note 206.

be pointless to send recommendations to the States. It anticipates that the Department of Justice may believe action beyond that set forth in USDA's recommendations is necessary to bring about compliance.[246] Thus, as of May 1975, these cases were in limbo. More than 14 months after the last audit was completed, USDA had not ensured that corrective action had been taken.

Although files on most States determined by USDA to be in substantial noncompliance have been sent to the Department of Justice,[247] there has been no formal referral of any cases.[248] The Acting Director of OEO stated that no such referrals would be made unless the Department of Justice requested them. In the case of the Texas Cooperative Extension Service (TCES), however, the Department of Justice has requested a formal referral,[249] and USDA has effectively refused to make the referral. DOJ noted that: (1) Both the USDA audit and a DOJ investigation revealed "actionable" noncompliance in employment and services. (2) TCES was in violation of its affirmative action plan approved by USDA more than 18 months earlier, indicating that further efforts at achieving voluntary compliance would be fruitless. (3) A

---

246. Washington interview, supra note 216.

247. DOJ has asked USDA for information, including affirmative action plans and status reports on the States which DOJ tentatively identified as having more problems than the others.

248. Washington interview, supra note 216.

249. Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to John A. Knebel, General Counsel, USDA, Feb. 21, 1975.

referral would assist DOJ in its representation of USDA officials in the Poole case.[250]

Nonetheless, USDA effectively refused to make a formal referral on the grounds that it had not yet informed the Texas Cooperative Extension Service that USDA found that compliance could not achieved by voluntary means.[251] Clearly, there was sufficient evidence for USDA to send such a letter to TCES,[252] but USDA apparently chose not to do so. As of May 1975, USDA had not even sent Texas recommendations resulting

---

250. Poole v. Williams, supra note 89.

251. Letter from John A. Knebel, General Counsel, USDA, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, Mar. 14, 1975. Mr Knebel stated:

> No referral is necessary and no objection is raised to your bringing action to correct employment discrimination under Title VII of the Civil Rights Act of 1964. This position has been previously voiced to your staff....
>
> In this instance...I find no way that we can agree...with respect to the appropriateness of a referral under Title VI. Id.

252. See Pottinger letter, supra note 249.

from the audit.[253]

Third, in fall 1974, State Extension Directors were reportedly sent copies of the audit reports,[254] and State Extension Directors have been involved in the process of planning USDA's strategy for corrective action.[255] In the past, such involvement has been counterproductive

---

253. USDA stated:

> We take issue with the wording of /this/ paragraph....It refers to USDA's alleged refusal to make formal referral of the Texas Extension Service to the Department of Justice. USDA did not, as stated, refuse referral but rather declined to immediately refer the matter on the basis that requirements of the Department's regulations 7 C.F.R. 15.8(d) had not been met and the areas of remedial action proposed by the Department of Justice did not include all areas of concern to USDA. The Department proposed to take immediate action to fulfill the prescribed requirements and invited the Department of Justice to participate in such efforts. Wright letter, supra note 72.

This Commission notes that despite the Department of Justice's finding that "further efforts at achieving voluntary compliance are likely to be unavailing" (Pottinger letter, supra note 249), USDA stated that it could not make a referral because according to its regulations at 7 C.F.R. Part 15 Subpart A, "no such action shall be taken until the department or agency concerned...has determined that compliance cannot be secured by voluntary means." Knebel letter, supra note 251.

254. The ostensible reason for providing these reports to the States was that some States requested them in order to correct whatever problems had been found. However, the audit reports contained no recommendations. A number of Federal officials provided this Commission with information concerning USDA handling of compliance problems while requesting that the Commission not reveal its sources. The Commission has decided to honor their requests.

255. Involvement of State Extension Directors in the development of the ES equal employment opportunity regulations is discussed in note 226 supra.

and it appears that it will be so again.

At a regularly scheduled meeting of State Extension directors in November 1974, the directors reportedly voiced concern about the nature of the action which they might be required to take. In response, the Secretary called a meeting of USDA officials[257] on November 19, 1974. The purpose of the meeting was to prepare for a second, impromptu,[258] meeting on November 20, 1974, between these USDA

---

256. USDA staff with knowledge of the meeting state that they are not at liberty to indicate what transpired at the meeting.

257. Attendees at the meeting included the Under Secretary, the Director of the Extension Service, the General Counsel, and the Chief of Compliance and Enforcement Division, OEO. No minorities or women attended this meeting.

258. The two meetings seemed to have been hastily called. At the time, the Acting Director of OEO was on a field trip in California. Reportedly, prior to leaving Washington for this field trip, the Acting Director did not know that such meetings were planned. In his stead, the Chief of OEO's Compliance and Enforcement Division attended the meeting.

officials and selected State Extension Directors, at which time a strategy which has effectively delayed compliance even further was devised.[259]

As a result of the second meeting, a task force was formed.[260] The Acting Director of OEO stated that the purpose of the task force is to

---

259. USDA stated:

> During the course of the meeting with the State Extension Directors, they demonstrated deep concern with the employment situation in the State Extension Services, and in those areas in services which were, in varying degrees, in noncompliance.
>
> This attitude expressed by the directors indicates a strong desire to accelerate full compliance rather than "effectively delay" such action, as stated in the report....
>
> An open discussion by all participants to solve compliance problems was in evidence. The course of action chosen as a result of this meeting was to appoint a high level task force to achieve, at the earliest practicable date, full compliance by all State Extension Directors. We would hope that your report would reflect this attitude. Wright letter, supra note 72.

260. The May 1975 membership in the task force included the Deputy Director of the Extension Service, the Acting Director of OEO, a representative from OGC, and the Director of the Office of Audit. The counselor to the Secretary was placed in charge of the task force. The ES Director of Civil Rights Compliance is the Executive Secretary of the task force. In this capacity, he is not a participating member. He is supposed to take notes and write the minutes of the meeting and, upon request, provide statistics for the use of the task force. Washington interview, supra note 216.

USDA stated, "This footnote is in error, in that only USDA members are identified." Wright letter, supra note 72.

During the course of interviews with USDA officials, Commission staff attempted to confirm allegations by other USDA staff that State Directors served on this task force. Their membership was denied by the Acting Director of OEO and not mentioned by the Extension Service Director of Civil Rights Compliance when he listed the task force membership. Washington interview, supra note 216, and Hopkins et al. interview, supra note 139.

devise methods of bringing State Extension Services into compliance.[261] If the Memorandum of Understanding were being followed, such a task force would not be necessary. States would either come into compliance immediately or be the subject of enforcement action. The stated purpose of the task force is exactly what USDA and DOJ have been trying to achieve for years, and, indeed, the Acting Director of OEO admits that the job of the task force is not essentially different from that of earlier compliance efforts.[262] Moreover, most previous compliance efforts have been the joint product of USDA and the Department of Justice. Yet, no one from the Department of Justice has been invited to participate on the task force,[263] consulted concerning task force activities, or even informed about its functions.[264]

---

261. Id. The Executive Secretary stated that the purpose of the task force is to "take a look at all Departmental aspects of civil rights as it relates to the Extension Service." He readily admits, however, that this description of the purpose "is really general," but stated that he was unable to say more at that time. Hopkins et al. interview, supra note . The task force has met about once a month since November 1974 and most meetings generally consume the better part of a working day. Washington interview, supra note 216.

USDA stated:

> This footnote implies additional meaning to the statement of the Executive Secretary. The implication of withholding information about the Task Force's efforts was not the intent of the reply. The Task Force had met only twice at the time of the interview, January 3, 1975 and April 23, 1975 and its efforts and direction were subject to change. Wright letter, supra note 72.

262. Washington interview, supra note 216.

263. With the exception of the material in notes 265 and 267 infra, the Acting Director of OEO declined to discuss the work of the task force.

264. Washington interview, supra note 216. Indeed, the Deputy Chief of the Federal Program Section of DOJ knew nothing of the task force's activities, although she is the principal DOJ official routinely concerned with USDA affairs. Planty interview, supra note 206.

It is difficult to obtain information on the work of the task force.[265] Its duties appear to be ones which properly belong to the States,[266] and

---

265. One of the main duties of the task force is to identify pools of qualified minorities available for employment by State Extension Services. The task force is using State Extension Service selection criteria in identifying these sources of talent. For example, if a State requires certain employees to have masters degrees, the task force looks only for sources of potential employees with masters degrees. It has not attempted to determine if these selection criteria disproportionately exclude minorities or women or if they are job-related. The Acting Director of OEO stated that there were other duties but would not elaborate. Washington interview, supra note 216.

266. Id. The Acting Director of OEO was unaware that the work described in note 265 supra is the type of work the Federal Government expects its contractors to perform. See Revised Order No. 4, supra note 174.

they appear to be of particular interest to certain States.[267]

Whatever its work, the task force appears to be one more link in USDA's endless chain of procedural delays. Even the Acting Director of OEO has stated that he sees the task force as a tactic for stalling--

---

267. The task force has been concerned primarily with the States of Illinois, Georgia, Tennessee, and Wyoming. The Acting Director noted that the State of Wyoming, which was not among the States audited, was included because it has few minorities and the task force wanted to determine how any recommendation it makes would impact upon such a State. The Acting Director of OEO stated that the State of Tennessee, which was also not among the States audited, was included because it had been more successful than some other States in achieving equal opportunity. Washington interview, supra note 216. Yet, OEO in compliance reviews of one county in that State in 1973 showed that homemaker clubs which were segregated were disbanded when informed of USDA's requirement that they integrate and that county agent service to clients was almost exclusively along racial lines. OEO files indicate that as of May 1975, USDA does not have sufficient evidence of corrective action. Despite the ostensible use of these States as models, the Extension Service has sent at least one memorandum to the States involved concerning the work of the task force. Extension Service memorandum to J.B. Claar, Illinois; Charles P. Ellington, Georgia; William D. Bishop, Tennessee; and Robert F. Frary, Wyoming, Jan. 16, 1975. Some USDA officials believe that the Extension Service Directors from these States constitute an advisory committee to the task force. This is denied by the Acting Director of OEO.

The Extension Service stated, however:

> This footnote is not factual. The first sentence is incorrect as stated; the sixth sentence and remaining portion of footnote are inaccurate. The persons cited are members of the Task Force. Wright letter supra note 72.

268

compliance will be achieved.

The end result of USDA's inactivity is that although noncompliance has been documented in State Extension programs for over 10 years, USDA has not required that this noncompliance be corrected and it continues to provide funds for the operation of the programs. The role of the task force in perpetuating this situation clearly demonstrates that this blatant violation of civil rights law has the continuing complicity of the USDA Secretaries and other high level USDA officials. USDA appears more concerned about protecting noncomplying recipients than those people whom the law seeks to protect.

Title VI requires that, where noncompliance exists in a federally funded program and is not corrected voluntarily within a reasonable time, funds to the noncomplying recipient be terminated. In an analogous situation, the Department of Health, Education, and Welfare (HEW) was ordered to begin enforcement action against noncomplying recipients.[269] The Department of Justice has repeatedly cautioned USDA officials that the same principles are applicable to USDA's continued finding of discriminatory programs, but even this warning has been to no avail.

---

268. Washington interview, supra note 216.

269. See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). Plaintiffs alleged that HEW violated the Civil Rights Act of 1964 and the 5th 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. 356 F. Supp. 82 (D.D.C. 1973). The decision was upheld on appeal in the U.S. Court of Appeals for the District of Columbia. 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. Declaratory Judgment and Injunctive Order, filed February 16, 1973.

Chapter 3

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (HEW)
HEALTH AND SOCIAL SERVICES (HSS) 270

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

The major health and social service activities sponsored by the Department of Health, Education, and Welfare are Medicare, Medicaid, and categorical grants for health and welfare aid. Medicare is the largest Federal health activity. The basic Medicare program, Hospital

---

270. Concerning this chapter, in July 1975 HEW wrote to the Staff Director of this Commission:

> As you may know, although there are instances in which our conclusions and interpretations of fact differ from those of your staff, the Commission's reports on our Title VI activities often provide us with a reference point for our own self-evaluation.
>
> However, the draft Health and Social Services report contains numerous conceptual flaws and is ridden with erroneous and misleading statements. We do not believe that it can be treated as a serious and objective study of [the Office for Civil Rights (OCR) of HEW] operations.
>
> Unfortunately, due to the timeframe imposed, OCR staff did not have an opportunity to carefully check the report's references to various specific cases and to fully examine and comment on many allusions and statements that serve to indict the compliance program....
>
> The enclosed comments, therefore, only address what we believe to be some of the report's more serious shortcomings. Letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 8, 1975.

This Commission notes that HEW's statement is a sweeping generalization not supported by specific information provided to this Commission.

Insurance Benefits for the Aged, provides medical insurance for over 23 million persons over 65 who are recipients of social security for the costs of inpatient hospital care and post-hospital care in nursing facilities and at home.[271] An additional Medicare program, Supplemental Medical Insurance Benefits for the Aged, provides insurance for the costs of physicians' services and other outpatient medical services and therapy.[272] Approximately

---

271. Medicare is authorized by the Social Security Amendments of 1965, Title XVIII, 42 U.S.C. § 1395 et seq. (1970). Part A of the act is entitled "Hospital Insurance Benefits for the Aged." Part B is designated "Supplemental Medical Insurance Benefits for the Aged." It was anticipated that Medicare would account for 40 percent of all Federal health outlays in fiscal year 1975 and that in that year Medicare would contribute to hospital benefits for more than 5.1 million aged and disabled persons and for outpatient benefits for more than 12.2 million such persons; total Medicare outlays were expected to reach $14.2 billion, an increase of $2 billion over fiscal year 1974. The bulk of these outlays were expected to go to hospitals and physicians for their services. In fiscal year 1975 an estimated 21.6 million persons, comprising over 95 percent of the Nation's aged population, were enrolled in Medicare. In addition, 1.9 million persons eligible for social security disability benefits were eligible for Medicare. Budget of the United States Government, Fiscal Year 1975, Special Analysis J, Federal Health Programs 147.

272. 42 U.S.C. § 1395, et seq. (1970).

7,000 hospitals, 4,000 skilled nursing facilities,[273] and 2,000 home health agencies[274] across the country, all of which are referred to by HEW as "providers,"[275] are the recipients of Medicare funds.

Medicaid is the second largest Federal health activity.[276] It is a program for the poor funded by the States and the Federal Government. The extent of the program varies from State to State. Arizona, for example, had no Medicaid program as of September 1975. Medicaid benefits reach over 27 million persons. These benefits provide for inpatient treatment in

---

273. Skilled nursing facilities are nursing homes which are supposed to provide a high level of inpatient health care to patients following their hospitalization for injury, disability, or other illness and which have been approved by the Bureau of Health Insurance at HEW for participation in the Medicare program.

274. Home health agencies are agencies which supply skilled nursing care to recipients of Medicare confined to their homes.

275. Office of Research and Statistics, Social Security Administration, HEW, Health Insurance Statistics, Apr. 2, 1974. For a detailed explanation of the provider certification process see, Office of Research and Statistics, Social Security Administration, HEW, Health Insurance for the Aged, 1968: Section 3.1; Participating Hospitals xvi (November 1971).

276. Medicaid is authorized by Title XIX of the Social Security Amendments of 1965, 42 U.S.C. § 1396, et seq. (1970). In fiscal year 1974, Federal Medicaid payments accounted for about 30 percent of all Federal health outlays. They totalled an estimated $6.1 billion and provided assistance to 27.2 million welfare recipients. It was expected that in fiscal year 1975, Federal outlays for this program would be $6.5 billion, reaching 28.6 million persons. Special Analysis J, supra note 271 at 149. Medicaid is financed jointly by States and the Federal Government. Under Medicaid, States pay from 17 to 50 percent of the costs for Medicaid services and the Federal Government finances the remaining amount. According to a Federal-State formula, the amount each State pays is determined by its relative wealth. For example, based on this formula, New York is required to finance its Medicaid program substantially more than is Alabama.

hospitals, skilled nursing homes, and intermediate care facilities;[277] outpatient hospital, clinic, and home health agency services; diagnostic services for children; prescription drugs and eye glasses; and rehabilitation services. Through Medicaid, HEW provides funds for the care of patients under the Medicaid programs to State health and welfare agencies,[278] which in turn fund over 10,000 hospitals, nursing homes, and other health care institutions. HEW refers to these Medicaid-funded institutions as "vendors."

The various categorical grant welfare programs funded by HEW[279] include Aid to Families with Dependent Children (AFDC), Vocational

---

277. Intermediate care facilities are nursing homes for persons who are too ill to remain at home, but not sick enough to be placed in hospitals or skilled nursing homes. Standards which must be met by nursing homes receiving HEW assistance for intermediate care are not as high as those for homes receiving assistance for skilled care.

278. Throughout the country, there are about 250 State health and welfare agencies which receive funds from HEW through Medicaid or HEW categorical grant programs. Interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, Office for Civil Rights, HEW, Feb. 15, 1974. The number and types of agencies related to health and social services vary among the different States. In Texas, for example, there are seven agencies which administer State health and social services programs: the Commission for the Blind, Department of Health, Department of Mental Health and Mental Retardation, Department of Welfare, Commission on Aging, Department of Health Planning, and the Rehabilitation Agency. Arkansas has three such agencies: the Department of Social and Rehabilitation Services, (a relatively new umbrella agency which encompasses many former health and welfare departments), the Department of Health, and the Comprehensive Health Planning agency.

279. Until January 1974, three major State programs which received HEW funding were Aid to the Blind, Aid to the Permanently and Totally Disabled, and Old Age Assistance. Beginning in January 1974, these programs were replaced by a Federal Supplemental Security Income program which guaranteed a minimum income to all eligible disabled and elderly persons.

Rehabilitation,[280] Children's Service, Foster Homes, Adoption Services and special programs for the aging.[281] Some of the major categorical grants for health programs include Family Planning, Maternal and Child Health Services, and Health Care Facilities Services.[282] As with the Medicaid program, HEW funds

---

280. Vocational rehabilitation provides funds to States to train persons with mental and physical handicaps for gainful employment. It also provides small business opportunities for the blind to operate vending stands on Federal property. Estimated outlays for vocational rehabilitation for fiscal year 1975 were $779 million.

281. Children's Service, Foster Homes, and Adoptive Services are intended to establish and strengthen State and local public welfare programs to prevent the neglect, abuse, exploitation, and delinquency of children. Estimated outlays for these programs for fiscal year 1975 were $278 million. Special programs for the aging provides aid to State and local agencies operating programs for the aging.

282. Family Planning provides funds to States for the medical and social services to enable individuals to determine the number and spacing of their children; Maternal and Child Health Services provides financial assistance to States for programs to reduce infant mortality and upgrade the health of mothers and children. In fiscal year 1975, anticipated outlays for these two programs were $100.6 million and $284.9 million, respectively. Health Care Facilities Services, commonly referred to as the "Hill-Burton program," provides grants to assist States in planning for and building hospitals, health centers, laboratories, and other health-related facilities. In 1974, $196.8 million was allocated for Hill-Burton projects to cover a three year period. HEW is attempting to phase this program out. Telephone interview with Charles J. Rukus, Budget Analyst, Division of Financial Management, Budget Branch, Public Health Service, HEW, Sept. 11, 1974.

these programs through State health and welfare agencies, which in turn fund vendors. These include local welfare agencies and foster homes. HEW categorical grant programs provide assistance for almost 16 million people a year.

B. Civil Rights Responsibilities

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in federally-assisted programs.[283] HEW is responsible for ensuring compliance with Title VI by its recipients, including hospitals and nursing homes which are Medicare providers, as well as State agencies and vendors which are recipients of HEW health and social services programs.[284] Moreover, HEW's Title VI responsibilities extend to medical facilities funded by other Federal agencies,[285] including

---

283. 42 U.S.C. § 2000d, et seq. (1970).

284. The other major category of recipients for which HEW has Title VI responsibilities are educational institutions. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort---1974, Vol. III, To Ensure Equal Educational Opportunity chs. 1 and 3 (January 1975).

285. To avoid burdening recipients which receive aid from more than one Federal agency with duplicative compliance reviews and reporting requirements, in February 1966 the Department of Justice promulgated a plan giving HEW responsibility for coordinating all Federal agency Title VI enforcement procedures for medical facilities. The plan requires that the agencies involved assign to HEW responsibility for acting on their behalf with respect to investigations, compliance reviews, and formal proceedings. Under the plan, HEW must publish an interagency report listing recipients believed to be in noncompliance. HEW is required to notify all agencies if a recipient is in noncompliance and efforts to secure voluntary compliance have failed. At such time, the concerned agencies are to decide on appropriate action. The coordination plan makes it clear that "assignments of responsibilities to HEW does not include the decision on whether or not to commence formal enforcement proceedings in behalf of any other agency." In addition, participating agencies may be assessed for a reasonable pro rata share of the costs of a compliance program based on the amount of Federal financial assistance extended to medical facilities. Department of Justice, Coordinated Enforcement Procedures for Medical Facilities Under Title VI of the Civil Rights Act of 1964 (February 1966).

the Departments of Agriculture, Housing and Urban Development, and Commerce; the former Atomic Energy Commission;[286] General Services Administration; the former Office of Economic Opportunity;[287] Small Business Administration; and Veterans Administration.

In the area of health and social services, Title VI is an important mandate. Prior to the passage of Title VI and in that title's early years, HEW and many other Federal agencies had a flagrant history of funding discriminatory activities.[288] The most notable early example was HEW's program to provide assistance for hospital construction. The Hill-Burton[289] legislation, creating that program, permitted HEW assistance to be furnished for segregated facilities.[290] The existence of discrimination in the Hill-Burton program was one of the reasons Congress perceived the need for delaying the time when civil rights

---

286. In January 1975, the Atomic Energy Commission was replaced by the U.S. Energy Research and Development Administration and the Nuclear Regulatory Commission.

287. In January 1975, the Office of Economic Opportunity was replaced by the Community Services Administration at HEW.

288. For a history of discrimination in HEW's health programs, see Comment, "The Impact of Title VI in Health Facilities," 36 Geo. Wash. L. Rev. 980 (1968).

289. 42 U.S.C. § 291, et seq. (1970). The Hill-Burton Hospital Survey and Construction Act is discussed in note 282 supra.

290. 42 U.S.C. § 291e(f) (1970). In Simkins vs. Moses H. Cone Memorial Hospital, a case concerning two Greensboro, North Carolina hospitals, the court held the portion of the Hill-Burton Act permitting "separate-but-equal" facilities for separate population groups and regulations implementing that provision unconstitutional under the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment. 323 F.2d 959 (4th Cir. 1963), cert, denied, 376 U.S. 938 (1964).

enactment of Title VI.[291]

Even as late as the 1970's, HEW found such blatant discrimination as segregated waiting rooms and different hours for black and white patients by physicians receiving HEW funds,[292] inadequate minority representation on a State health planning council,[293] use of "Mr.," "Mrs.," and "Miss" to address white but not black patients,[294] and segregation in HEW-funded day care centers.[295]

A 1972 report by the Comptroller General found that this country has essentially a dual health care system for minorities and nonminorities. It showed that minority group patients often received their health care from public hospitals; that minorities were sometimes unaware that their Medicare or Medicaid coverage entitled them to use private hospitals; and that many hospitals and nursing homes were treating patients of only one

---

291. See remarks of Senator John Pastore, 110 Cong. Rec. 7054-7055 (1974). Even after the passage of Title VI, some States avoided making integrated hospital room assignments by using HEW funds to construct single-bed facilities, i.e., hospitals with only single rooms.

292. HEW, Compliance Review of Medicaid Commission, Oct. 28, 1970; and HEW Compliance Review of Alabama Department of Public Health, November 1970.

293. HEW, Compliance Review of California State Department of Public Health, March 1971.

294. HEW, Compliance Review of Alabama Department of Public Health, supra note 292.

295. HEW, Compliance Review of Alabama Department of Pensions and Security, November 1970.

race even though they had published open admission policies.[296]

HEW's principal instruction for the implementation of Title VI is its Title VI regulation.[297] This regulation, revised most recently in July 1973, is substantially the same as the Title VI regulations of other Federal agencies.[298] With regard to health and social services, the regulation states that both "discrimination in the selection or eligibility of individuals to receive the services and segregation or other discriminatory practices in the manner of providing them, are prohibited."[299] The regulation does not elaborate on the term "other discriminatory practices."

---

296. Comptroller General of the United States, Compliance With Antidiscrimination Provision of Civil Rights Act by Hospitals and Other Facilities under Medicare and Medicaid (July 13, 1972) [hereinafter referred to as Compliance Under Medicare and Medicaid]. This General Accounting Office (GAO) report was prepared at the request of the former Chairman of the House of Representatives Committee on the Judiciary, Emanuel Celler, to assist the Committee in evaluating Medicare-Medicaid programs in selected areas. Specifically, the report was to analyze whether the benefits of Medicare-Medicaid programs were being made available to minority groups to the same degree as to others. In an October 1973 update of this study, GAO reported that an apparent dual health care system continued to exist.

297. HEW regulations implementing Title VI are found at 45 C.F.R. § 80, et seq. (1974). Hearings on Title VI Enforcement in Medicare and Medicaid Programs Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. (1973) [hereinafter referred to as Title VI Hearings]. HEW confirms that these findings are irrefutable.

298. On July 5, 1973, revisions which standardized Federal agency Title VI regulations were published in the Federal Register for Federal agencies with Title VI responsibilities. 38 Fed. Reg. 17919. A general evaluation of these regulations is made in ch. 10 , infra, Department of Justice.

299. 45 C.F.R. § 80.5(a) (1974).

There is a major gap in the coverage of Title VI with regard to HEW's programs. In the 1970's, through its Medicaid reviews, HEW has observed [300] and reports to have corrected instances of segregated waiting facilities in physicians' offices. [301] Thus, although discrimination by physicians can be a problem according to instructions issued by HEW program staff, services provided by physicians and other medical suppliers under Medicare's Supplemental Insurance Benefits Program are not covered by Title VI. [302] HEW's support of its position [303] evidences

---

300. HEW, Compliance Review of Alabama Department of Public Health, supra note 292.

301. HEW indicated recently that:

> These instances of non-compliance were found and corrected under the Medicaid Program, a program clearly covered by Title VI. These findings were not made...under Part B of Medicare (the Supplemental Insurance Benefits program)--a program not clearly covered by Title VI. July 1975 Holmes letter, supra note 270.

302. Social Security Administration, HEW, Claims Manual, ch. X, 10,069 May 1970, revised June 1972.

303. HEW's stated that:

> [The Health and Social Services Division of its Office for Civil Rights] does question this long-standing interpretation and is currently conducting a study of the issue. The Commission's report further notes: "...the little HEW has written to support its position evidences varying rationales" and backs this statement up with a footnote referencing two program agency publications, one of which "is no longer used by HEW." (My emphasis.) We believe these passages reflect a misunderstanding of the differences in our authorities under Part A and Part B of the Medicare program, and under the Medicaid program. July 1975 Holmes letter, supra note 270.

varying rationales,[304] and it is not clear whether the gap is due to a defect in the law or a faulty interpretation of the law by HEW staff. HEW's civil rights staff is currently conducting a study of the application of Title VI to physicians' services under Medicare's Supplemental Medical Insurance Benefits program.

If the study determines that such services are not covered, HEW could recommend legislation or an Executive order[305] to improve Title VI coverage.

There is another gap in HEW's program to ensure nondiscrimination in the delivery of health and social services. Neither Title VI of the Civil Rights Act of 1964 nor any other Federal statute prohibits discrimination

---

304. The Manual states that:

> Title VI does not apply to physicians and other providers of medical services under [Supplemental Medical Insurance Benefits] for the reason that the voluntary insurance system created by [Supplemental Medical Insurance Benefits] is contractual in nature. The system, therefore, even if it might otherwise fall within the scope of Title VI, is excluded as a contract of insurance. Claims Manual, supra note 302, at 10,069.

In another publication, HEW wrote regarding Supplemental Medical Insurance Benefits, "Title VI does not apply...because [the benefits] are paid directly to individual beneficiaries (or to physicians, etc. for them)." Social Security Administration, HEW, Health Insurance Handbook (June 1966). This Handbook is no longer used by HEW.

305. In the area of housing programs, insurance for home mortgages is exempt from Title VI, but discrimination on the basis of race, religion, and national origin is nonetheless prohibited by Executive Order 11063 which was issued in 1962. Exec. Order No. 11063, 3 C.F.R., 1959-1963 Comp., p. 652.

based on sex in the delivery of health and welfare services.[306] As of September 1974, the degree and depth of any sex discrimination in health and welfare programs was not known, because HEW had conducted no extensive study of sex discrimination in its programs.[307] This omission is particularly important because women are beneficiaries of a large

---

306. However, sex discrimination is prohibited in education and training programs for health workers, including doctors and nurses. The Comprehensive Health Manpower Training Act of 1971, Pub. L. 92-157 (codified in scattered sections of 42 U.S.C.), and the Nurse Training Act of 1971, Pub. L. 92-152 (codified in scattered sections of 42 U.S.C.) 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 nurse training program unless the institution providing the training submits, prior to the award of funds, satisfactory assurances that it will not discriminate on the basis of sex in the admission of individuals to its training programs. 42 U.S.C. § 295h-9 (Supp. II, 1972). Approximately 1,500 campuses are covered by these provisions.

Title IX of the Education Amendments of 1972 prohibits educational institutions, with certain exceptions, from discrimation on the basis of sex. 20 U.S.C. § 1681, et seq. (Supp. II, 1972). 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. Title IX covers health professions training.

307. On at least one occasion, however, HEW included sex as one of a number of variables in a study of delivery of services. When the Social and Rehabilitation Service attempted to determine whether there were disparties in the delivery of vocational rehabilitation services on the basis of race and type of disability, sex was one variable in the study. Interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, Office for Civil Rights, HEW, Sept. 19, 1974.

HEW stated:

> The sentence immediately preceding had already indicated that Title VI does not prohibit discrimination on the basis of sex in the delivery of health and social services programs. Thus, the report appears to indict [HEW's civil rights office] for failing to act where, admittedly, no authority exists. July 1975 Holmes letter, supra note 270.

This Commission believes, however, that the omission of a prohibition against sex discrimination in HEW-funded health and social services programs is so serious, that it is incumbent upon HEW civil rights staff to provide the Secretary with data showing the need for such a prohibition and request that the Secretary issue it under the general rulemaking authority of that Office.

number of health and welfare programs[308] and sex discrimination has been alleged in at least some of them. For example, one HEW office noted "extensive" discrimination against women in referral to employment training programs.[309]

Some other Federal agencies facing the need for a proscription against sex discrimination have, in the absence of a statutory prohibition, issued orders or regulations prohibiting sex discrimination in the programs they

---

308. These include Medicaid, family planning, Medicare (according to the 1970 census, about 58 percent of the 20 million people over 65 in the United States are women) and Aid to Families with Dependent Children (in 1971 about 68 percent of all AFDC families had a mother, but no father, present in the home. HEW, Findings of the 1971 AFDC Study (1971).

309. Memorandum from Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Regional Office, to J. Stanley Pottinger, Director, Office for Civil Rights, HEW, "Planning for New Health and Social Services Programs," Sept. 5, 1972. The memorandum urged OCR "to research the extent of sex discrimination in health and social service programs...." In addition, a Women's Action Program was convened by former Secretary of HEW Elliot Richardson in early 1971 primarily to review HEW's internal employment practices with regard to women, but also to survey the impact of HEW programs upon women. While the Women's Action Program did not thoroughly review the types and extent of sex discrimination in HEW's programs of Federal assistance, it did determine that sex typing in health professions and lack of freedom for family planning were among the greatest problems for women within the umbrella of HEW's health and social service programs. HEW, Report of the Women's Action Program (1972).

HEW noted:

> Although the report notes irrelevantly that one HEW office noted extensive discrimination against women in referral to employment training programs, it fails to add that OCR is developing a compliance program under Titles VII and VIII of the Public Health Service Act which prohibits discrimination on the basis of sex in admissions to health training programs. July 1975 Holmes letter, supra note 270.

fund, under the general rulemaking authority of the agency head.[310] As of April 1975, however, HEW had not issued a prohibition against sex discrimination in the delivery of services in HEW-funded health and social services programs.[311]

HEW officials in the San Francisco region[312] have urged their agency to recommend that Title VI be amended to cover sex discrimination,[313] but HEW has not considered action to ensure protection against sex discrimination in its health and social services programs as a priority item.[314] One HEW official stated that HEW did not have enough staff to monitor adequately the existing health and welfare areas and that including sex discrimination

---

310. For example, the Secretary of Labor issued an order prohibiting discrimination on the basis of sex in programs operated by or financed through the Manpower Administration. Secretary's Order 16-66, Compliance Officer's Handbook, Department of Labor, 17, 18. (January 1972). The Secretary of Agriculture has prohibited sex discrimination in all of the Department of Agriculture's direct assistance programs. 7 C.F.R. § 15.51(b) (1974). The Secretary of the Interior has issued regulations prohibiting sex discrimination in the distribution of assistance by the Department of the Interior (USDI) 43 C.F.R. § 17(b) (1974). The method used by the Secretary of the Interior to prohibit sex discrimination, however, is questionable, as it appears that the prohibition was issued as an amendment to USDI's Title VI regulation. This regulation may be amended only with the approval of the President, who by Executive Order 11764 delegated this authority to the Attorney General. 39 Fed. Reg. 2575 (1974). See ch. 4 infra, Department of the Interior.

311. Telephone interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, Office for Civil Rights, HEW, Apr. 17, 1975.

312. HEW regional structure is discussed on p. 123 infra.

313. Pierce memorandum, supra note 395.

314. Interview with Louis M. Rives, Jr., former Director, Health and Social Services Division, Office for Civil Rights, HEW, June 26, 1973.

in HEW reviews would only further stretch the resources available to ensure nondiscrimination on the basis of race and ethnic origin in health and social services programs.[315]

II. Organization and Staffing

HEW is composed of a large number of constituent agencies which operate various assistance programs.[316] Three of these agencies have special responsibilities for HEW's health and social service programs. The Social Security Administration operates Medicare. The Social and Rehabilitation Service operates Medicaid and many of HEW's other categorical welfare aid programs. The Public Health Service operates many HEW categorical grant programs for health services.

Responsibility for ensuring that all elements of the Department discharge their Title VI compliance responsibilities with regard to HEW programs lies with the Office for Civil Rights (OCR) within the Office of the Secretary.[317] OCR has regional offices in each of the 10 standard Federal regions, in addition to its headquarters in Washington.[318] Although OCR's regional offices are located within HEW's regional offices, the regional directors of

---

315. Id.

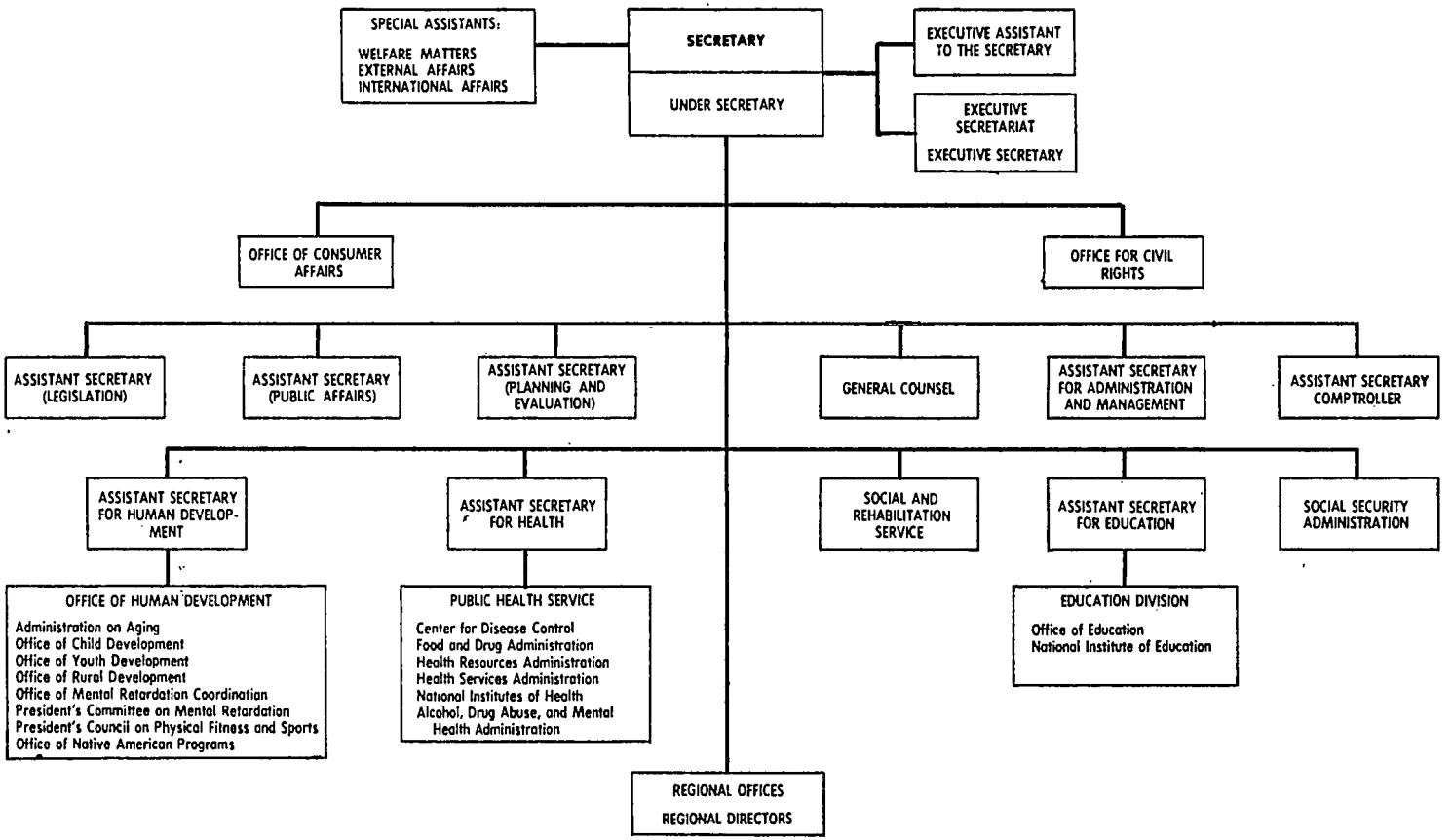
316. See Exhibit 1 on p. 124 infra.

317. See Exhibit 2 on p. 125 infra.

318. See map (Exhibit 3) on p. 127 . In connection with this report, Commission staff visited HEW offices in Region I (Boston), Region V (Chicago), Region VI (Dallas), and Region IX (San Francisco).

Exhibit 2

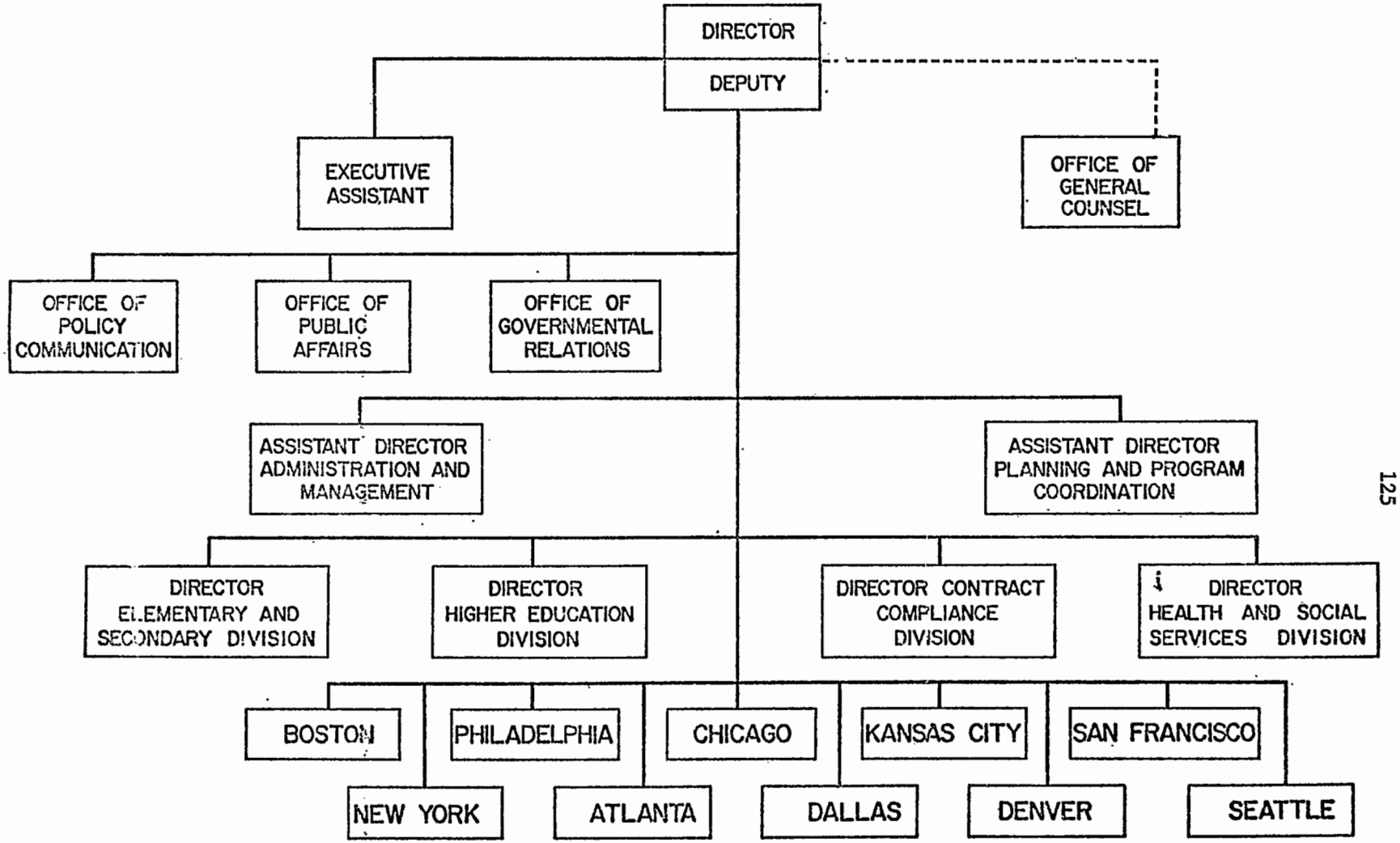
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE



September 1974

Exhibit 3

HEW OFFICE FOR CIVIL RIGHTS



April 1975

OCR report to the Director of OCR in Washington[319] and not to the regional directors of HEW, thus giving OCR headquarters considerably more influence over regional civil rights compliance activities than is found in many other agencies.[320]

The Office for Civil Rights has a Health and Social Services Division (HSSD) in Washington; and a Health and Social Services Branch (HSSB) in each of OCR's 10 regional offices. HSSB staff are responsible for the day-to-day execution of the HSS compliance program. In this capacity they are responsible for investigating complaints concerning health and social service matters, review civil rights assurances in applications for Medicare participation and hospital construction, monitoring the civil rights activities of State agencies operating HEW-funded programs, reviewing for approval the compliance programs of those State agencies, conducting onsite compliance

---

319. This arrangement is shown in Exhibit 2 on p. 125 supra.

320. At the Department of Housing and Urban Development, for example, civil rights staff in the regional, area, and insuring offices report to their office directors rather than to the Office of the Assistant Secretary for Equal Opportunity which is located in Washington. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing (December 1974). Similarly, equal opportunity staff at the Manpower Administration within the Department of Labor report to the Assistant Regional Directors for Manpower. See, Ch. 6 infra. In both cases, the civil rights program of the agency has suffered because of the organizational structure.

Exhibit 4

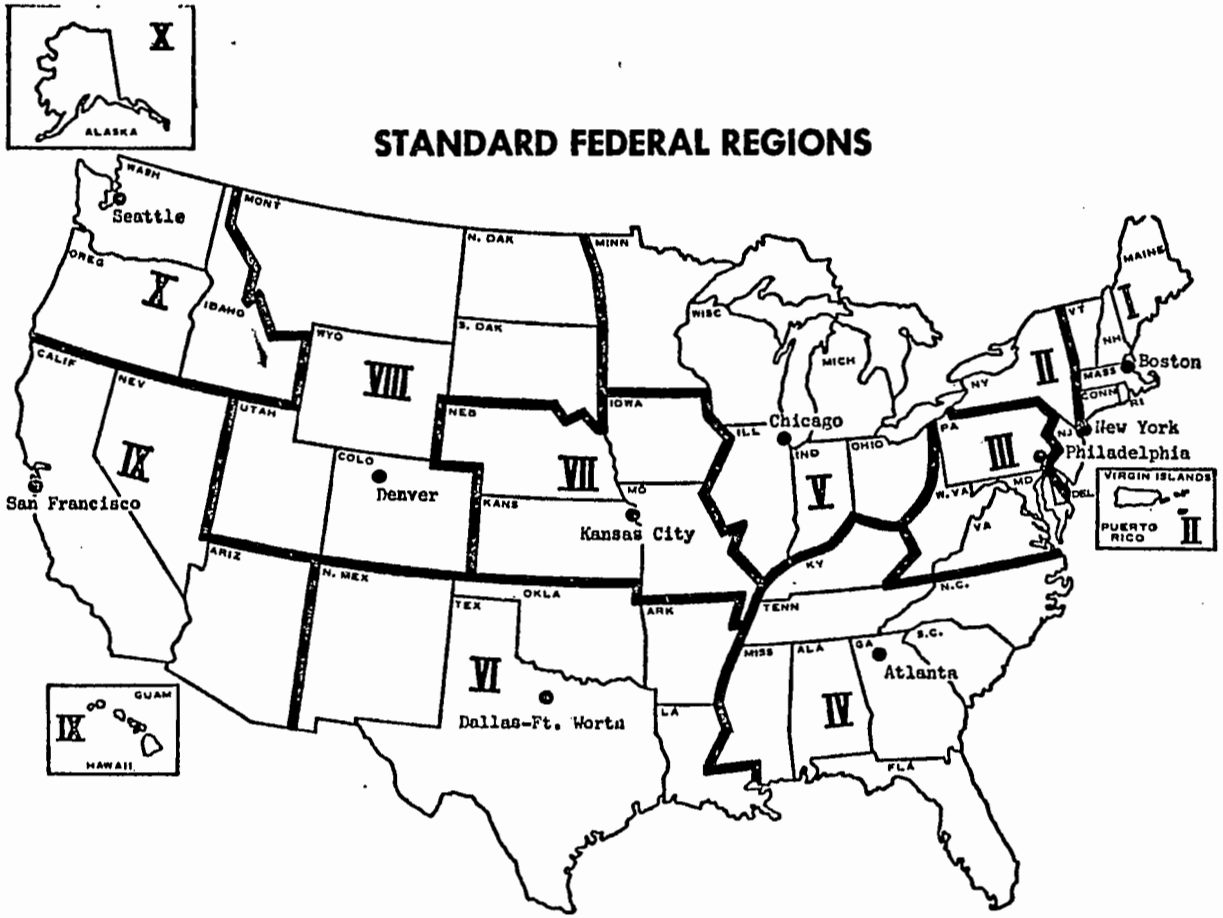


Exhibit 7

reviews, and attempting to negotiate compliance with Title VI when corrective action is necessary.[321]

HSSD[322] is responsible for policy formation and oversight of the regional HSSB activities.[323] HSSD is organized along functional lines. There are three branches: Policy and Program Development, Operations, and Technical Support. The Policy and Program Development Branch is responsible for coordinating overall policy development and disseminating it within HSSD and the HSSBs. It advises and assists the regional civil rights offices in determining workload priorities and in developing long range planning. In addition, this branch evaluates the performance of the 10 HSS regional offices.[324] The Operations Branch also is responsible for the development and improvement of Title VI enforcement procedures to be followed by each State that receives HEW funds for administering health

---

321. Office for Civil Rights, HEW, Health and Social Services Enforcement Plan, Fiscal Year 1974 (draft, Sept. 28, 1973) [hereinafter referred to as 1974 Enforcement Plan].

322. HSSD is headed by the Director, a GS-15, and a Deputy Director, also a GS-15. Telephone interview with Mary McGilton, Fiscal and Budget Office, Office for Civil Rights, HEW, Sept. 13, 1974.

323. Until June 30, 1973, HSSD operated along geographic lines. It was headed by the Director, a GS-15, and had three Regional Coordinators who each had supervisory responsibilities for several regional offices. The Director of OCR stated that the functional organization would give the Division a better focus on the programs it monitors. Interview with Peter E. Holmes, Director, Office for Civil Rights, HEW, June 29, 1973.

324. February 1974 Foley interview, supra note 278.

and social service programs.[325] The Technical Support Branch provides training, ing, technical assistance, and guidance to the headquarters and regional OCR staffs. It is directly responsible for the planning and development of comprehensive Title VI training programs for OCR staff. This branch assists in the development of techniques to enable OCR staff in Washington and its regional offices to evaluate Title VI compliance through the use of available data.[326]

As of June 30, 1974, HEW had allocated 81 full-time professional positions to Title VI compliance activities in the area of health and social services.[327] Eleven of these positions were allotted to the Washington OCR,[328] and seventy to the regional HSSBs.[329] HEW's June

---

325. Id.

326. Id. See also telephone interview with Richard Foley, Chief, Operations Branch, OCR, HEW, Apr. 1, 1975.

327. McGilton interview, supra note 322. OCR was authorized a total of 872 fulltime positions for fiscal year 1974. It requested 28 additional positions for fiscal year 1975, 17 of which were to be designated for health and social services. Id.

328. Id. Only 9 of these were filled. OCR was authorized 170 fulltime professionals in its Washington office. Only 135 of these positions were filled. Id.

329. Only 59 of these were filled. The sizes of the HSSBs varied considerably and were roughly correspondent with the number of health and welfare facilities in each region. The HSSB in Atlanta was the largest with 12 professionals; Philadelphia had 7; Dallas had 9; San Francisco had 3; Chicago had 8; New York had 6; Boston and Seattle offices each had 4; Denver and Kansas City each had 3. McGilton interview, supra note 322.

1974 staffing represents almost a 50 percent increase from June 1972.[330] Nonetheless, the total staff size is still very small in comparison to HEW's 1966 efforts,[331] although HEW's responsibilities in the area of health and social services have been greatly increased since that time.[332]

III. Compliance Program

Until 1974, HEW's compliance program was essentially divided into two parts which differed radically from each other: (1) HEW directly engaged in compliance activity with Medicare providers and other directly federally funded programs to ensure that they did not discriminate in the delivery of services. (2) Under Medicaid and HEW categorical grant programs,[333] HEW required compliance activity, by State agencies which dispense HEW funds to vendors and are responsible for the overall

---

330. In June 1972 there were 55 professional staff members assigned Title VI responsibilities in the area of health and social services.

331. In 1966 HEW assigned 500 people to its compliance activities of hospitals. See note 419 infra.

332. In 1966, HEW expended $2.5 billion for health and welfare programs. Budget of the United States, Special Analysis 113 (Fiscal Year 1968). In 1975, it was estimated that HEW would spend $118.5 billion for such programs. Budget of the United States, Special Analysis 195, 207 (Fiscal Year 1976).

333. July 1975 Holmes letter, supra note 270. Mr. Holmes stated:

> HEW has never "delegated" its Title VI responsibilities to State agencies, but does, in accordance with the Title VI regulation, require State agencies to administer their programs in accordance with the requirements of Title VI and to undertake various forms of compliance activity. Id.

administration of State health and/or welfare programs.[334] HEW monitors the State agencies' guidance to and surveillance of vendors. Beginning in 1974, it also conducted a limited number of reviews[335] of individual facilities.[336]

---

334. The Director of OCR stated:

> Recognizing that OCR could not alone assure the continued compliance of the thousands of facilities subject to Title VI at any one point in time, we have attempted to enlist the resources of the State agencies. Each State agency must abide by methods of administration which generally require the conduct of Title VI reviews, the dissemination of information about nondiscrimination standards to agency personnel and beneficiaries, and a mechanism to consider and resolve complaints. As indicated, the OCR State agency reviews have in part concentrated on the extent to which the State agencies were carrying out these obligations. It was precisely because of our limited manpower, and the fact that our area of Title VI jurisdiction extends beyond the compliance of hospitals and skilled nursing homes, that OCR decided to review State agencies and focus on their ability to help carry out compliance activity. Title VI Hearings, supra note 297 at 132.

335. These reviews are discussed on pp. 177-179 infra.

336. HEW stated:

> The crucial point is but vaguely alluded to in the last sentence of this paragraph. In the past OCR has placed a primary emphasis on the Title VI role of State agencies; however, in 1974, a decision was made to shift away from the State agency review process in order to place greater emphasis on our own in-depth review of health and social services systems. July 1975 Holmes letter, supra note 270.

A. Guidelines

Despite the important role HEW expects State agencies to play in compliance programs, it has not drafted, in addition to its Title VI regulation, a single set of uniform guidelines detailing the actions expected of all States agencies[337] to ensure that there is no racial

---

337. HEW has issued a variety of instructions concerning State agencies, but none provides a clear and comprehensive statement of their duties. The available instructions include the HEW, Handbook of Public Assistance Administration, Supplement C--Handbook for Child Welfare Service: Nondiscrimination in Federally Assisted Programs (1965); State Letter No. 937, Memorandum from Fred H. Steinger, Director, Bureau of Family Services, HEW, to State Agencies Administering Public Assistance Plans, "Clarification of Policy and Procedures in Respect to Methods for Determining Compliance with Title VI of the Civil Rights Act of 1964 by Nursing Homes," Nov. 17, 1966; and Memorandum from Howard Newman, Commissioner, Medical Services Administration, to State Agencies Administering Approved Public Assistance and Medical Assistance Plans, Information Memorandum, Oct. 17, 1973, transmitted by Louis H. Rives, Jr., Director, Health and Social Services Division, Office for Civil Rights, HEW, to Directors, Office for Civil Rights, "Reissuance of State Letter No. 937," Feb. 7, 1974; HEW, "Title VI of the Civil Rights Act of 1964, Questions and Answers" (undated).

or ethnic discrimination in HEW-funded programs.[338] There are also no HEW guidelines for vendors, unless they are also Medicare providers.[339]

---

338. HEW commented, "We believe this statement is much too sweeping in light of the variety of instructions issued to State agencies as noted in /note 337 supra/...." July 1975 Holmes letter, supra note 270.

HEW also stated:

> Health and Social Services Division has drafted a set of uniform Title VI guidelines for State agencies. A first draft of the guidelines was circulated to program agencies and other interested groups for their comment in November 1974. A second draft incorporating the comments received was circulated in March [1975]. The guidelines will be completed and disseminated to State agencies in the fall of this year [1975].
>
> If the report can refer to information which was obtained in June 1975, with respect to the proposed procedural regulations as it does, it is obvious that OCR/H&SS activities in developing Title VI guidelines for State agencies should also be updated. Instead, it appears that the author of the draft report either did not bother to obtain the most recent information (clearly available at least since November of 1974), or has deliberately chosen to leave the reader with the impression that OCR/H&SS has done nothing in this area. July 1975 Holmes letter, supra note 270.

These draft guidelines are discussed on pp. 143 infra. Moreover, it should be noted that Commission staff repeatedly inquired of HEW concerning these draft guidelines. A copy was requested as early as February 1974, but the request was denied and Commission staff were told that the guidelines would be published in the Federal Register for comment. February 1974 Foley interview, supra note 278. In September 1974 and again in January 1975, Commission staff were informed that OCR was in the midst of writing these guidelines. September 1974 Foley interview, supra note 307, and telephone interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, OCR, Jan. 7, 1975.

339. See p. 164 infra for a discussion of the overlap between vendors and Medicare providers.

HEW has issued Title VI compliance guidelines for two categories of Medicare providers--hospitals[340] and nursing homes.[341] The guidelines relate to ensuring nondiscrimination in such aspects of the providers' programs as admission to the facilities, services provided, room assignments, staff privileges, and notification of nondiscrimination policy. For example, the guidelines require that policies regarding deposits and extension of credit be applied without regard to race and that dining rooms and social services are to be provided and used without discrimination.

HEW's Title VI regulation requires that its recipients take affirmative action to remedy past discrimination,[342] but HEW has not informed its recipients how this requirement should be executed. Indeed, the biggest

---

340. OCR, HEW, Guidelines for Compliance of Hospitals with Title VI of the Civil Rights Act of 1964, November 1969.

341. OCR, HEW, Guidelines for Compliance of Nursing Homes and Similar Facilities with Title VI of the Civil Rights Act of 1964, November 1969.

342. 45 C.F.R. § 80.3(b)(6)(i) (1974). Moreover, HEW's VI regulation also permits recipients to take affirmative action in the absence of past discrimination in order to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. 45 C.F.R. § 80.3(b)(6)(ii)(1974). It should be noted, however, that this latter provision of HEW's regulation is weaker than a similar provision in the Title VI regulation of the Department of Housing and Urban Development which states that affirmative action "should" be taken to overcome such effects. 24 C.F.R. § 1.4(b)(6)(ii)(1974).

deficiencies in HEW's guidance to recipients are that it has failed to require, either formally or informally, that they conduct an analysis of their delivery mechanisms to determine the extent to which services are distributed to minorities on an equitable basis,[343] and that it has not required recipients to set goals and timetables for the correction of any deficiencies.

OCR has no uniform instruction[344] to ensure that health and welfare clients who have marginal or no ability to understand English will receive

---

343. Recipients should be informed about such factors as the extent to which eligible beneficiaries of various racial and ethnic groups are participating in this program, the quantity and quality of benefits reaching beneficiaries of all racial and ethnic groups, and the extent to which the services provided are integrated. A comprehensive analysis of benefit distribution requires racial and ethnic data on persons eligible to become beneficiaries of the programs involved, applicants, and beneficiaries; where applications for admission are being rejected, racial and ethnic data on rejected applicants should also be collected and reviewed.

344. HEW has requirements for bilingual assistance in only one health and social service program area. Portions of the Social and Rehabilitation Service regulation governing programs for the aged, blind, and disabled persons provide for bilingual assistance. Where there are "substantial numbers of non-English-speaking applicants" a State requesting funding beyond a certain level must provide for bilingual staff or interpreters [45 C.F.R. § 222.26 (1974)] and must provide informational materials regarding the services available and guidance on how such services may be secured "in the native language most commonly used in the area." (45 C.F.R. § 222.28 (1974).) In addition, among "services to meet health needs," States must provide "as necessary" the services of bilingual interpreters. (45 C.F.R. § 222.44(f) (1974)). OCR does not monitor these requirements, however, and HEW plans to revoke them effective September 30, 1975. 39 Fed. Reg. 45238 (Dec. 31, 1974).

equal treatment to that given persons fluent in English.[345] It has not detailed criteria for determining when it is necessary to have bilingual services,[346] the extent to which such services must be provided,[347] or

345. February 1974 Foley interview, supra note 278. The Connecticut State Advisory Committee to this Commission in October 1971 discovered that in selected Connecticut cities, the language barrier between Spanish-speaking patients and English medical personnel limited access for Puerto Ricans to public health facilities. The report found that while hospitals and health centers were by and large aware of the problem, they "have been slow to adjust health care services and staff to meet the needs of Spanish-speaking patients." Connecticut State Advisory Committee to U.S. Commission on Civil Rights, El Boricua: The Puerto Rican Community in Bridgeport and New Haven 10 (January 1973). Similar findings were made in Massachusetts and California. The Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, Issues of Concern to Puerto Ricans in Boston and Springfield (February 1972). The California State Advisory Committee to the U.S. Commission on Civil Rights, A Dream Unfulfilled: Korean and Pilipino Health Professionals in California 3-4 (May 1975). Similarly, the Minnesota Advisory Committee found that few Native American personnel were employed by Twin Cities' hospitals and by the State of Minnesota in programs affecting Indian health. For further discussion of Native American health problems, see the Minnesota Advisory Committee to the United States Commission on Civil Rights, Bridging the Gap: The Twin Cities Native American Community 76-88 (January 1975).

346. Such services might be required whenever a specific number or percentage of persons of non-English speaking background within a geographic area were eligible to participate in an HEW program.

347. For example, HEW could make clear when it was necessary to have bilingual staff and when printed bilingual materials would suffice.

the nature of assistance HEW could make available in the area of bilingual services.[348] HEW reports that in the course of its reviews of medical facilities and State agencies it requires "that there be adequate means of communications with substantial client groups that cannot speak English,"[349] but this requirement is ad hoc and not contained in the Medicare guidelines.[350] The lack of explicit guidelines

---

348. Such assistance might include, for example, the development of model brochures and posters and the maintenance of a list of bilingual organizations which might assist recipients in providing services to non-English speaking communities.

349. HEW response to U.S. Commission on Civil Rights questionnaire, June 18, 1973 [hereinafter referred to as HEW response].

350. HEW stated:

> [I]t is misleading to write that no "uniform guidelines" exist in regard to "ethnic discrimination" without making reference to the comprehensive reviews of the California and Connecticut State welfare systems and the detailed requirements imposed by OCR to correct discriminatory practices. Such requirements indicate clearly the standards established by OCR for compliance with Title VI. July 1975 Holmes letter, supra note 270.

This Commission notes, however, that there is no indication that these "standards established by OCR" concerning "ethnic discrimination" have been transmitted to all HEW recipients.

351

may make it difficult for HEW to enforce this requirement.

---

351. In April 1972, the Connecticut Legal Aid Association filed a complaint with HEW on behalf of the Puerto Rican community against the Connecticut State Department of Welfare (CDW) alleging discrimination against Spanish speaking clients due to the lack of bilingual social workers and interpreters in local welfare offices. Letter from Ann C. Hill, Attorney, New Haven (Connecticut) Legal Assistance Association, to John D. Twinaime, Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, Apr. 10, 1972. In April 1973, the complainants filed suit against CDW, naming HEW as a co-defendant. The plaintiffs accused HEW of inadequate Title VI enforcement due to failure to monitor the Connecticut Department of Welfare. Sanchez v. Norton, Civil Action No. 15732 (D. Conn., June 24, 1974). HEW reported to the Department of Justice (DOJ) that its own investigation corroborated the plaintiffs' allegations of discrimination against Spanish speaking clients and expressed an interest in becoming a plaintiff in the suit. However, HEW was never named a plaintiff in the suit, as an independent DOJ investigation did not bear out HEW's findings. It appears that the absence of HEW guidelines concerning bilingual services made it difficult for DOJ to demonstrate noncompliance by CDW.

HEW's involvement in the case was ended in May 1974 when the court dismissed HEW as a defendant. The terms of the dismissal were that (1) HEW instruct CDW to hire 20 additional bilingual members; (2) HEW continue to monitor CDW; and (3) that HEW and CDW agree on a new reporting system.

The 1974 U.S. Supreme Court decision in Lau v. Nichols provides special impetus for the development of guidelines on providing services to non-English speaking groups. In that case, the Court decided that in school districts with large non-English speaking student populations inadequate English language instruction denies such students meaningful participation in public education and, thus, violates Title VI of the Civil Rights Act of 1964.[352] Under the rationale of Lau, agencies and facilities receiving Federal funds for health and social services are required by Title VI to provide adequate guidance in languages other than English to non-English speaking client groups. In a letter to all Federal departments and agencies, the Department of Justice stated:

---

352. 414 U.S. 563 (1974). In this class action suit, Chinese parents argued that the San Francisco school system should be compelled to provide all non-English speaking Chinese students with bilingual compensatory education. The United States Supreme Court ruled that because the San Francisco public school system had failed to provide bilingual compensatory education to Chinese children, it violated their constitutional rights, effectively excluding them from participating in the school district's educational program, and that the absence of bilingual textbooks and other instructional material in all probability would make a classroom situation incomprehensible. Id.

In another area, guidelines on providing services to non-English speaking groups have been developed by HEW. The purpose of these guidelines was to overcome discrimination in the education of national origin minority group children. Memorandum from J. Stanley Pottinger, Director, Office of 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. In Lau, the Court upheld HEW's interpretation of the memorandum that special education programs should be provided where national origin minority students have been denied equal educational opportunity.

> This case has significance for federal grant agencies in two respects. First, it imposes a responsibility on federal agencies to review the federal assistance programs they administer to determine if the beneficiaries of such programs may be denied equal participation due to language barriers created by their inability to communicate effectively in English. As a corollary matter, it may be appropriate for federal agencies to review their direct assistance programs (not covered by Title VI) to determine if beneficiaries are inhibited from full participation because of language barriers. 353

HEW's Title VI regulation prohibits recipients from denying anyone, because of race, color, or national origin, the opportunity to participate as a member of a planning or advisory board which is an integral part of an HEW-assisted program. HEW, however, has not issued an instruction to all recipients which would assist them in coming into compliance with this directive and guide them in assuring adequate advisory input from minorities. Such a guideline would make clear that inadequate representation of minorities on advisory boards would be an indication of a Title VI violation. It would define what is meant by adequate and inadequate minority representation, and suggest steps for remedying inadequate representation.

---

353. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 25 Federal agencies, June 13, 1974.

HEW guidelines for hospitals do not address the issue of hospitals abandoning the inner city,[354] although the relocation to rural or suburban areas by hospitals which have traditionally served inner city areas

---

354. Two such relocations were successfully averted in Connecticut due to efforts by the Boston HSSB staff. St. Vincent's Hospital in Bridgeport, Connecticut, and McCook Hospital in the north end of Hartford, Connecticut, both in areas heavily populated with minorities, had initiated plans to move their facilities to outlaying regions, away from concentrations of minority and poor clients. In the case of St. Vincent's Hospital, the HSSB brought pressure upon the Connecticut Department of Health to reconsider its previous position to relocate the hospital. It cautioned the department that if St. Vincent were to relocate outside the central city, it "could adversely affect the delivery of health services to minorities living in the inner city." The Department of Health ultimately decided to rebuild a new hospital on the old site.

In the case of McCook Hospital, the Connecticut State legislature had determined to relocate the facility, which is a part of the University of Connecticut medical complex. It was to be relocated in Farmington, Connecticut, a rural, wealthy community about ten miles outside of Hartford. The Boston HSSB argued that the new location would cause undue and extreme hardship on inner-city residents who neither could afford the long trip nor had adequate access to transportation. The outcome was that the University of Connecticut would retain McCook Hospital as a "training facility" for medical students and proceed with plans to build a new facility in Farmington. Telephone interview with Marcus V. Brewster, Chief, Health and Social Services Branch, Office for Civil Rights, HEW, Boston Regional Office, Apr. 4, 1974.

can have a devastating effect on the availability of health care services in those areas.[355] Minorities, the aged, and the poor are likely to be the most adversely affected by such decisions to relocate.

---

355. As of June 1973 several hospitals in the Chicago region had already moved or were making serious efforts to move: St. George's Hospital of Chicago, Illinois, had moved to suburban Palos; Presbyterian-St. Luke's Hospital in Evanston was anticipating the opening of a satellite facility in suburban areas; Methodist Hospital in Gary, Indiana, anticipated moving its facilities to suburban Ross Township; and Gary Mercy Hospital in Gary intended to move to nearby Hobart, Indiana. In each of these instance, hospitals which once served a significant minority population were abandoning that clientele or were shifting emphasis to nearly all-white clientele. In total, HEW identified about 20 urban hospitals within the Chicago region whose intended relocations would make them less accessible to minority communities. Interview with Alfred Sanchez, Civil Rights Specialist, HSSB, OCR, HEW, Chicago Regional Office, in Chicago, Ill., May 14, 1973, and interview with Richard Foley, Regional Coordinator (Regions I, V, VI, and VIII), Health and Social Services Division, Office for Civil Rights, HEW, June 28, 1973.

In June 1974, the Alexandria (Virginia) Hospital closed a 120-bed branch which was located adjacent to a predominantly black community in order to expand its facilities several miles away in a predominantly white area. HEW staff knew nothing about this relocation of facilities either before or after the move took place. Telephone interview with Edward Redman, Chief, HSSB, OCR, HEW, Philadelphia Regional Office, Apr. 10, 1975, and April 1975 Foley interview, supra note 311.

To remedy the lack of instruction to its recipients, HEW plans to develop uniform and comprehensive guidelines for State agencies.[356] It anticipates no revision of its hospital and nursing home guidelines,[357] despite their inadequacy. It expects, however, to develop the State agency guidelines in two parts. The first part will be uniformly applied to all State agencies under HEW's jurisdication. It will address such matters as the number of reviews State agencies must conduct of vendor facilities, the selection of sites for health care facilities, the steps which must be taken to disseminate Title VI information to the community and to the State agency staff, the complaint procedures the State agency must follow, and the racial and ethnic data the agencies must collect. HEW anticipates that these guidelines will address the need for bilingual services in programs with a substantial Spanish speaking or other non-English speaking group.[358] The second part will be "particularized guidelines" giving special instruction for each of the 10 most significant health and social services programs.[359]

---

356. Health and Social Services Division, OCR, HEW, Annual Enforcement Plan, Fiscal Year 1975, Aug. 14, 1974, [hereinafter referred to as 1975 Enforcement Plan.]

357. Telephone interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, Office for Civil Rights, HEW, Jan. 7, 1975.

358. 1975 Enforcement Plan, supra note 356.

359. Id. These include health service, mental health service, vocational rehabilitation, children's services, and family planning.

The project is a major one and HSSD anticipates that it will take over 8 person years and $185,000 to complete.[360] In mid-1973, HEW stated that these guidelines would be completed by June 1974.[361] However, as of August 1974, the target date for submission to HEW's Secretary was postponed until April 30, 1975.[362] Moreover, as of mid-April 1975, it was clear that this target date would not be met, but no new date had been set.[363] Thus, lack of guidance to recipients continues to be an impediment to the effective operation of HEW's compliance program.

---

360. Id. The OCR national office is currently developing these new guidelines with the help of an HSS Task Force. The HSS Task Force consists of staff members from headquarters, a representative from each of the 10 regional offices, and representatives of the Office of the General Counsel. The task force is to convene approximately every two months to discuss specific proposals and policy matters, and to develop reporting systems and procedures for use by the State agencies. HEW expects that the task force will be the main vehicle for seeking and providing regional input. HEW is also seeking the advice of non-Federal experts such as the National Organization for Women and the Leadership Conference on Civil Rights. September 1974 Foley interview, supra note 307 . A spokesperson for the Leadership Conference, stated that "It has been very frustrating dealing with HEW. HEW has not been actively seeking the advice of the Leadership Conference or following their suggestions." Telephone interview with Marilyn G. Rose, Chairperson, Health Task Force, Leadership Conference on Civil Rights, Mar. 19, 1975. As of March 1975, the Leadership Conference had not been consulted by HEW since summer of 1974. Id. The Leadership Conference on Civil Rights is an umbrella organization of approximately 137 civil rights, labor, civic, professional, and religious groups.

361. 1974 Enforcement Plan, supra note 321.

362. Id.

363. In mid-April, a second draft of the guidelines had been circulated to HEW program agencies for comment. Telephone interview with Richard Foley, Chief, Operations Branch, OCR, HEW, Apr. 10, 1975.

B. State Agencies

1. Methods of Administration

The only uniform requirements HEW has placed on State agencies is that they submit and implement (1) a Statement of Compliance (SOC) and (2) a Method of Administration (MOA).[364] The SOC is a form of paper assurance. The MOA is a description of how the SOC will be implemented.

---

364. HEW's Title VI regulation requires that every application by a State agency to carry out a program involving continuing financial assistance shall as a condition of approval:

> (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation. 45 C.F.R. § 80.4 (b) (1) and (2) (1974).

The submission of SOCs and MOAs is a one-time requirement. HEW sometimes requires that they be revised when (1) a reorganization of a State agency occurs; (2) a new program is initiated; (3) a problem arises which warrants such a change; and (4) when a program comes under Title VI for the first time. September 1974 Foley interview, supra note 307.

HEW's guidance to State agencies for developing Statements of Compliance is limited to providing a copy of a model statement.[365] This model asserts that no individual will be subjected to discrimination in any program or activity for which the State agency receives Federal financial assistance and that it will establish and submit to HEW Methods of Administration in order to ensure that each such program will be operated in a nondiscriminatory manner. The model Statement of Compliance affirms the Federal Government's right to seek administrative or judicial enforcement[366] of the statement if noncompliance is observed. The language contained in the model SOC is not mandatory. State agencies may develop their own language for the Statement of Compliance, and they do.[367]

---

365. Department of Health, Education, and Welfare, Simplified Statement of Compliance (undated).

366. The sanctions available to HEW for enforcement of Title VI are discussed on pp. 202-209 infra.

367. For example, the SOC used by the Texas Rehabilitation Commission is more detailed than HEW's model in its assertion that no individual will be subjected to discrimination in HEW-assisted programs. It outlines the provisions of Title VI and its implementing regulations. It describes some of the practices which are prohibited by Title VI, such as: assigning employees caseloads or clientele on the basis of race, color, or national origin; or subjecting individuals to segregated or separate treatment, such as separate hours, on the basis of race or ethnic origin. It commits the State agency to obtaining assurances of compliance from vendors before approving an application for the establishment of a rehabilitation facility and requires the State agency to make available to all persons information regarding Title VI and the implementing regulations. The SOC used by the Texas Rehabilitation Commission does not, however, affirm the Federal Government's right to seek administrative or judicial enforcement although HEW's model SOC suggests that State agency SOCs contain such a provision. Texas Rehabilitation Commission, Civil Rights and Equal Opportunity (April 1972).

In general, HEW expects that MOAs will contain four elements. They must (1) indicate how State agencies will inform and instruct their personnel and vendors of their responsibilities under Title VI; (2) include direction for instructing and informing beneficiaries, potential beneficiaries, and other interested persons that services, financial aid, and other benefits under the programs are provided on a nondiscriminatory basis; (3) contain the procedures the State agency will follow in its investigation and resolution of Title VI complaints; and (4) describe the methods the State agency will use to ensure that vendors are operating in accordance with Title VI.[368]

The contents of each MOA are negotiated individually with each State agency, and thus they vary, depending on the particular problems in

---

368. "Title VI of the Civil Rights Act of 1964, Questions and Answers," supra note 337.

the State.[369] The final product is sometimes inadequate. This may in part be due to the fact that HEW has not issued comprehensive instructions for each of these four elements.[370]

Despite the lack of formal guidelines, HEW has unwritten standards for the content of MOAs. For example, HEW staff require that all Methods of Administration provide for periodic onsite visits by State agencies to enable them to assess compliance by their local offices

---

369. September 1974 Foley interview, supra note 307.

370. In a draft report assessing HEW's Title VI program in health and social services, the Department of Justice commented:

> In the case of a State agency unwilling to use initiative, the Methods /of Administration/ were not adequate because they provided only general guidance regarding the procedures to be adopted. Nothing in the instructions sent by HEW to the States, or by the States to HEW, outlines what would constitute adequate "staff indoctrination." No guides were sent to instruct the State agency as to the data the agency would be expected to gather during its "annual on-site inspections." Department of Justice, Draft Report, Implementation of Title VI by the Department of Health, Education, and Welfare in the areas of health and welfare, Sept. 28, 1972.

and vendors with the Title VI regulation.[371] Similarly, as part of all Methods of Administration, HEW urges each State agency to assign someone to coordinate and carry out Title VI responsibilities at the State and local level.[372] HEW does not, however, require that this person be a fulltime Title VI coordinator, especially if HEW is aware of no Title VI problems in the State agency.[373] Indeed, many State agencies do not have fulltime Title VI coordinators, but instead designate as coordinator a person with many duties other than Title VI.[374]

---

371. February 1974 Foley interview, supra note 278 .

372. This person acts as liaison between the State agency, its vendors, and local offices and the HEW regional office. He or she develops written material concerning Title VI for use by the State agency and the vendors. In some cases, the Title VI coordinator is responsible for developing inservice Title VI training programs. Interview with Richard Foley, Chief, Operations Branch, HSSD, Office for Civil Rights, HEW, May 30, 1974.

373. Id.

374. Telephone interviews with Alfred Sanchez, Civil Rights Specialist, HSSB, OCR, HEW, Chicago Regional Office, Sept. 25, 1974, and Bruce Lowe, Civil Rights Specialist, HSSB, OCR, HEW, Dallas Regional Office, Sept. 26, 1974.

The time spent by State agencies in the administration of Title VI varies from State to State.[375] For example, none of the Indiana or Michigan health and welfare agencies had fulltime Title VI coordinators;[376] Arkansas was the only State in the Dallas region which had a fulltime Title VI coordinator and staff[377]

In order for a State agency to carry out an effective Title VI program, Title VI coordinators as well as other State agency staff must be fully informed about the requirements of the law. HEW does not, however, specify how much or what kind of Title VI training is necessary for instructing State agency staff and vendors concerning their responsibilities in this area. It does not even state that Title VI training is necessary. As a result, State agencies have not provided

---

375. May 1974 Foley interview, supra note 372.

376. Interview with Thomas Janzer, Civil Rights Specialist, HSSB, OCR, HEW, Chicago Regional Office, in Chicago, Ill., May 14, 1973. The Indiana Department of Mental Health has three people working on Title VI problems, but only 50 percent of their time is spent in this area. In Michigan's Department of Social Services, from 40 to 50 percent of the time of the Executive Assistant to the Director, the only person with Title VI responsibilities, is spent on Title VI and related problems. September 1974 Sanchez interview, supra note 374.

377. September 1974 Lowe interview, supra note 374. The Arkansas Department of Social and Rehabilitative Services has a staff of six civil rights coordinators.

sufficient detail in their MOAs about training plans. For example, the Texas Rehabilitation Commission stated it would undertake such actions as (1) making available copies of all pertinent documents concerning Title VI to all staff, and (2) explaining these documents and instructing staff on their obligations as part of regular training.[378] It did not indicate how extensive this instruction would be.

The Arkansas State Department of Health MOA, which was only a little more comprehensive on this issue, stated that every staff member would receive copies of the Civil Rights Act of 1964, HEW's Title VI regulations, and the Arkansas State Department of Health's Statement of Compliance. Staff would be notified by memorandum of any policy changes, and meetings explaining their responsibilities would be conducted for all staff.[379] It did not indicate whether

---

378. Civil Rights and Equal Opportunity, supra note 367.

379. Arkansas State Department of Health, Plan of Organization (1971). During the past two years, the Arkansas State Department of Health has periodically conducted seminars for top-level supervisors. These seminars are designed to enable supervisors to understand their Title VI function. Among the matters that are taught are methodologies for conducting compliance reviews and complaint investigations. Telephone interview with Robert Carter, Civil Rights Specialist, HSSB, OCR, HEW, Dallas Regional Office, Mar. 12, 1973.

these meetings would provide formal civil rights training, and if so, the number of hours and type of training to be provided.[380]

2. State Agency Reviews

In 1968, OCR embarked upon a program of reviewing State agencies.[381] OCR's objective was to review each of the approximately 250 State agencies in order to investigate the extent to which their Methods of Administration were being implemented. The reviews were also designed to provide technical assistance to States to help

---

380. The HSSB in the Dallas region has conducted training sessions with nearly all of the State agencies in that region. This training, however, has not been specifically directed toward the State agency Title VI coordinators. Id.

381. The Chairperson of the Health Task Force of the Leadership Conference on Civil Rights, has written to Commission staff,

> The major program activity of HEW-OCR in the health and welfare area since 1968 has been on the "State Agency" review. An inordinate amount of staff time has gone into this process but.... /b/latant discrimination by the vendors of those State Agencies has been either not uncovered or has been ignored..../There are/ instances where even a primary review of the activities of the vendors would have revealed discriminatory practices, but HEW has failed to so find in its review of the State Agency procedures. In other instances, any review of the State reports would have revealed discriminatory practices, but these have been merely filed away. In still other instances efforts to secure voluntary compliance have extended over years without any action on the part of HEW--either to cut-off the recipients or refer actions to Justice for specific performance lawsuits. Letter from Marilyn G. Rosse, Chairperson, Health Task Force, Leadership Conference on Civil Rights, to Cynthis N. Graae, Associate Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 20, 1975.

them establish effective nondiscrimination programs.[382] More than six years later, these reviews were not entirely completed, although the reviews were the principal activity of the HSSBs during that time. As of September 1974, HEW reported that it had completed State agency reviews in all States but Alaska and Hawaii.[383] OCR did not have plans to conduct any review in Hawaii, and it did not know when its review of Alaska would be completed.[384] It appears, however, that even within the States in which the reviews are regarded by HEW

---

382. In the fall of 1973 the Director of OCR stated:

> A major aspect of the State agency review process has been the provision of training to State agency staff who are responsible for assuring compliance in facilities from which the agency purchases services in behalf of its beneficiaries. In this regard, OCR regional staff have attempted to help State agency personnel develop competence in undertaking Title VI onsite reviews. Since July of 1970, training programs involving approximately 1,000 members of State staffs have been conducted in 29 States. Testimony of Peter E. Holmes, Director, OCR, HEW, Title VI Hearings, supra note 297 at 129.

383. The overwhelming majority of reviews were completed by 1971. These reviews are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort -- A Reassessment 310-11 (1973).

384. September 1974 Foley interview, supra note 307.

as completed,[385] not every State agency had been reviewed.

Reviews were conducted by teams of about six people. It took approximately one year from the time preliminary data gathering was started until the completion of a written report on the review. The actual onsite investigation took about one month.[386] On the average 150 personhours were spent on a State agency review.[387]

State agency reviews generally involved investigation of the headquarters office of each State agency had two or three county, district,

---

385. For example, in 1972 HEW stated that reviews of all recipient State agencies had been completed except those in Massachusetts, Tennessee, Alaska, and Hawaii. HEW response to U.S. Commission on Civil Rights questionnaire, Aug. 8, 1972 /hereinafter referred to as 1972 HEW response./ At least five State agencies outside those four States had not been reviewed, however. These were the Commission on Aging, the Department of Public Health, and the Comprehensive Health Planning Agency in Mississippi, the Department of Mental Retardation in Arizona, and the Department of Social and Rehabilitative Services in Arkansas. HEW files indicated that the Mississippi agencies had not been reviewed because other agencies in the State were given higher priority. HEW files indicated that the agencies in Arizona and Arkansas were not reviewed in 1973 because they were created after HEW's onsite reviews in those States, but it appeared that as of September 1974 onsite reviews of these agencies still had not been conducted. Health and Social Services Division, OCR, HEW, Files on the Status of the Statement of Compliance and Methods of Administration (November 1973) /hereinafter referred to as Status reports/, and OCR, HEW, HSS State Agency Assessment Reports, 1974 /hereinafter referred to as Assessment Reports/.

386. February 1974 Foley interview, supra note 278.

387. 1972 HEW response, supra note 385.

or city offices.[388] Since the focus of the reviews was on implementation of MOAs, the principal emphasis was on the structure of the State agency nondiscrimination program. For example, OCR looked at how well Title VI policies were being publicized and whether this information was clearly getting across to State agency staffs, local offices, vendors, beneficiaries, potential beneficiaries, and other members of the public. Although HEW did some spot checks of vendor compliance, the reviews were not generally compliance reviews in that they did not attempt to determine whether HEW-funded health and social service programs were being operated without racial or ethnic discrimination.

As a result, blatant discrimination in programs funded through State agencies sometimes remained unnoticed by HEW. For example, a State agency review of the Alabama Department of Pensions and Security (ADPS) in November 1970 revealed that ADPS had failed to conduct Title VI reviews of local offices and vendors and that it had made payments to vendors which maintained segregated facilities.[389] Within a short time after HEW submitted

---

388. February 1974 Foley interview, supra note 278. For example, the Chicago regional office operated its State agency reviews on a three-county concept. State agency facilities were reviewed in a large metropolitan county, the county in which the State capital is located, and a rural county. The areas selected were also ones which either had a relatively large minority concentration or which the HSSB believed would yield the best raw data. When the Chicago office reviewed Michigan in 1970, it concentrated on Wayne County (Detroit), Ingham County (Lansing), and Berrien County (St. Joseph and Benton Harbor). HEW attempted to select offices which would be representative of the entire effort of the State. HEW generally selected one or two local offices on the basis of population so that the largest urban areas would be reviewed. One area reviewed for each agency was generally nonurban, and HEW attempted to review an area with a large Spanish speaking population. Id.

389. HEW found that ADPS made payments to physicians who maintained segregated facilities.

its recommendations to ADPS, a lawsuit was filed against the State agency, indicating that there were unresolved Title VI problems in ADPS' program which had not been uncovered in HEW's reviews.[390]

HEW's State agency reviews have shown that State agency compliance programs were not adequate. In the course of its reviews, HEW often found that one or more key elements of a Title VI program was missing.[391] HEW files show many examples of State agencies' failure to conduct adequate reviews of local welfare offices and vendors.[392]

---

390. In its compliance review, HEW did not determine that discriminatory child care referrals were being made unofficially by ADPS staff. The lawsuit which ultimately brought evidence of such a practice to light was Player v. State of Alabama Department of Pensions and Security, Civil No. 3835-N (M.D. Ala., filed Nov. 17, 1972). In this case, private plaintiffs accused the Alabama Department of Pensions and Security of making referrals to child care institutions on a discriminatory basis--the plaintiffs alleged that ADPS referred white children to homes, licensed by ADPS, which admitted only white children. The court ordered the Department of Justice to participate in the case as a friend of the court (amicus curiae) and a party. As of January 1975, this case was awaiting adjudication. The judge's order permitted the Department of Justice to participate in the suit as if the Department had been a plaintiff from the outset of the suit.

391. HEW files indicate that just about all State agencies experience Title VI compliance difficulties. The most common problems have been: (1) little or no Title VI training of staff; (2) inadequate dissemination of Title VI information to the community; (3) inadequate minority membership on planning and advisory boards; and (4) lack of bilingual staffing in areas with a substantial non-English speaking population. Assessment Reports, supra note 385

392. The Alabama Commission on Aging (ACA) failed to monitor local welfare offices and Medicaid vendors. In September 1973, ACA and the Office for Civil Rights met to discuss the findings and recommendations from the investigation, and in November 1973 ACA was beginning to incorporate OCR recommendations into its MOA. Id. The Mississippi Department of Public Welfare, the Mississippi Department of Vocational Rehabilitation, the Florida Division of Vocational Rehabilitation, and the Florida Division of Health and its subagencies are just a few of the other State agencies which have shown poor or no monitoring of their local operations. Status reports, supra note 385.

The Dallas HSSB found that the Texas Department of Public Welfare (TDPW) lacked a fundamental understanding of its Title VI duties. HEW's findings showed that TDPW was unable to recognize obvious discrimination in its vendors' health and welfare programs. Staff of TDPW were, for example, apparently permitting hospitals and nursing homes to retain segregated facilities when these recipients provided the State agency with such explanations for segregation of blacks as "they are more comfortable together"; or that they "could not assign a Negro to a white nursing home."[393]

---

393. Memorandum from T. Rue Conditt, Regional Program Representative, OCR, to William M. Fleming, Chief, Health and Social Services Branch, Office for Civil Rights, HEW, Dallas Regional Office, "Report of Meeting with Texas DPW Officials, re: Training Program for Their Training Specialists," Oct. 27, 1970.

Moreover, if HEW discovered that a State agency was not adequately implementing Title VI--for example, if a State agency had not provided adequate Title VI training for its staff -- many months or even years were sometimes spent in negotiations to correct the problems. When confronted with Title VI compliance problems which were not willingly corrected by the State agency, HEW merely continued to make recommendations. It did not demand that the problems be corrected immediately. For example, the California Department of Health Care Services (CDHCS), the single State agency responsible for the administration of Medicaid in California,[394] was reviewed by the HSSB staff in February 1971. It was found to have several deficiencies in its civil rights monitoring program.[395] OCR urged CDHCS to remedy these problems, but no action was taken to correct them.[396] Thus, a review one year later by the Medical Services Administration (MSA) of HEW's Social and Rehabilitation

---

394. In California, the Medicaid program is Medi-Cal.

395. Letter from Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Regional Office, to Dr. Earl W. Brian, M.D., Director, California Department of Health Care Services, July 14, 1971. Deficiencies noted were: (1) No one had been assigned the specific responsibility for coordinating CDHCS's implementation of Title VI; (2) CDHCS relied on the Department of Public Health's Licensing and Certification Unit to make Title VI onsite reviews of vendor facilities, yet CDHCS had no system for reviewing and following up any reviews by that department. (3) Complaints against providers of service were referred to the Department of Public Health for investigation, but CDHCS had no system for evaluating and following up on that department's work.

396. Id.

Service found that the California agency was delinquent in conducting onsite Title VI compliance reviews of skilled nursing homes. In the fifty nursing home files MSA examined, it discovered no evidence that any onsite reviews had been conducted. MSA recommended that the State agency establish a procedure for annual onsite Title VI visits to skilled nursing homes.[397]

CDHCS expressed reluctance to comply with HEW's recommendations,[398] and HEW continually failed to use its full powers to require prompt corrections of Title VI violations. For almost two years following the February 1971 reviews of CDHCS, HEW merely informed CDHCS of deficiencies in its Title VI compliance program and made recommendations for their correction, without giving CDHCS formal notification that it was in noncompliance.[399] Thus, in late 1972, when the San Francisco Regional Office for Civil Rights recommended that the national OCR

---

397. Medical Services Administration, SRS, HEW, San Francisco Regional Office, California Skilled Nursing Home Certification Review Followup, Aug. 9, 1972.

398. For example, in response to the MSA recommendations, the director of CDHCS stated that it was "difficult to comply" with Title VI requirements because of the shortage of State agency inspectors. CDHCS noted that nursing facilities which are Medicare providers are monitored by Federal officials and suggested that CDHCS monitoring responsibilities could be shifted to the Federal Government. Letter from Dwight Geduldig, Director, CDHCS, to Gene Beach, Associate Regional Commissioner, MSA, SRS, HEW, San Francisco Regional Office, Nov. 2, 1972. While many nursing homes which are Medicaid vendors are also Medicare providers, OCR correctly reminded CDHCS that monitoring of Medicaid providers is the responsibility of the State agency, not OCR. Letter from Floyd L. Pierce to Dwight Geduldig, Dec. 8, 1972. CDHCS' methods of administration did not, however, commit CDHCS to conduct such reviews. See letter from Merle L. Shields, Assistant Director, Program Division, CDHCS, to Charles A. Woffinder, Medical Services Specialist, SRS, HEW, San Francisco Regional Office, Feb. 5, 1973.

399. July 1971 Pierce letter, supra note 395; letter from Floyd L. Pierce to Dwight Geduldig, Nov. 7, 1972; and December 1972 letter, supra note 398.

institute enforcement actions against CDHCS,[400] HSSD responded that enforcement action would be premature.[401] The California State agency[402] was not formally notified by the San Francisco HSSB of its noncompliance with Title VI until early 1973.[403] At that time, it was informed that it was required to take corrective action by April 1973. In December 1974, about 3 1/2 years after the original review, the California agency finally expressed commitment to effect the changes requested by OCR,[404] but it had not begun to conduct the required compliance reviews. Nevertheless, it was still receiving HEW funds.

---

400. Memorandum from Floyd L. Pierce, Director, OCR, HEW, San Francisco Regional Office, to Louis H. Rives, Jr., Director, Health and Social Services Division, OCR, HEW, "Recommended Administrative Enforcement Action Against the California Department of Health Care Services," Dec. 29, 1972.

401. Memorandum from Louis H. Rives, Director, Health and Social Services Division, OCR, HEW, to Floyd L. Pierce, Director, OCR, San Francisco Regional Office, "Your December 29, 1972, Memorandum Recommending Administrative Enforcement Action Against the California Department of Health Care Services," Jan. 19, 1973.

402. In 1973, the CDHCS became the California Department of Health.

403. Status reports, supra note 385.

404. See letter from William Mayer, M.D., Director of Health, California Department of Health, to Floyd L. Pierce, Director, OCR, HEW, San Francisco Regional Office, Dec. 2, 1974. Dr. Mayer promised that "annual on-site inspections will begin immediately."

Similarly, as of March 1973 the Louisiana Department of Health[405] had conducted no Title VI compliance reviews of nursing homes, hospitals, local health departments, or any other federally assisted facility under its jurisdiction.[406] Although failure to make such reviews is a clear violation of the agency's Methods of Administration, HEW failed to take any action in this case. HEW excused the Louisiana Department of Health from conducting compliance reviews because the Louisiana agency stated that it did not have enough staff to conduct them. The Dallas HSSB agreed that the Louisiana agency would rely on the HSSB Medicare hospital reviews instead of conducting its own investigations under Medicaid.[407] The HSSB, however, had conducted no hospital reviews in Louisiana.

In the Chicago region, a number of State agencies had not implemented their Methods of Administration. The Michigan Department of Health (MDH) and the Michigan Department of Social Services had not made Title VI reviews of their vendors or grantees.[408] HEW also discovered that MDH

---

405. The Louisiana Department of Health is a division of the Louisiana Health, Social, and Rehabilitation Services Administration, an umbrella agency established in January 1973, which encompasses 58 former district health and welfare agencies in the State. Interview with Dr. Charles C. Mary, Jr., Commissioner, Louisiana Health, Social, and Rehabilitation Services Administration, in New Orleans, La., Feb. 6, 1973.

406. Telephone interview with William M. Fleming, Chief, Health and Social Services Branch, OCR, HEW, Dallas Regional Office, Mar. 7, 1973.

407. See HSS Statement of Compliance/Methods of Administration Status Reports, November 1973, supra note 385. There appears to have been confusion as to who was responsible for conducting compliance reviews. The Department of Justice staff noted this confusion in their review of HSS operations in Mississippi and South Carolina:

> HSS personnel carrying out the State agency reviews were not, themselves, clear as to whether they or the State agencies rather than others, bore the responsibility for assuring compliance by facilities for which there were several bases of coverage. Department of Justice, supra note 370.

408. See Status reports, supra note 385.

had failed to disseminate Title VI information to staff, grantees, beneficiaries, and to the public and had failed to publicize complaint procedures. Moreover, MDH had few minorities on its planning board.[409] While these problems continued to exist as of September 1974, HEW had not taken enforcement action against the MDH.[410]

HEW also failed to require correction of major Title VI problems in the Indiana Division of Vocational Rehabilitation,[411] the Indiana State Department of Public Welfare,[412] and the Indiana State Board of Health.[413] While the Indiana State Board of Health made some gains in resolving its Title VI problems, as of September 1974 the Indiana

---

409. Id.

410. September 1974 Sanchez interview, supra note 374.

411. HEW found that the Indiana Division of Vocational Rehabilitation had: (1) conducted no Title VI reviews of vendors and grantees; (2) collected no racial or ethnic data to measure compliance; (3) obtained no assurances of compliance from some vendors; (4) failed to publicize the requirements of Title VI; (5) failed to publicize its complaint procedures; and (6) employed too few minorities. Status report, supra note 385.

412. The deficiencies in the Indiana State Department of Public Welfare were outlined as follows: (1) Assignment of Title VI responsibility at State and county levels was unclear. (2) Reviews of county policies and practices had not been conducted. (3) No Title VI reviews of vendors and grantees had been conducted except of nursing homes. (4) There was no documentation of dissemination of information to clients. (5) There was no documentation of implementation of complaint procedures. Status reports, supra note 385.

413. The Indiana Board of Health had the following problems: (1) there had been no Title VI reviews of grantees and local health boards; (2) there were few minorities on councils and committees; and (3) the agreement between the Board of Health and the Welfare Department on division of assignments for conducting hospital and nursing home reviews was not in writing. Id.

Division of Vocational Rehabilitation and the Indiana State Department of Public Welfare had not corrected their Title VI deficiencies. Still, HEW had taken no enforcement action against them.[414]

The State agencies were subject to systematic reviews by HSSB and HEW program staff only once.[415] The agencies were informed of the HSSB findings and recommendations and were requested to come into compliance with the Title VI standards. OCR's policy was for the HSSBs to continue monitoring the agencies periodically by onsite visits and reports received from State agencies.[416] The followup action was to ensure that the recommendations were implemented; to assist State agencies in training their staffs; and to provide ongoing contact between HEW and the State agencies. Despite the fact that corrections were required in virtually all State agency programs, there were major exceptions to the policy of conducting followup reviews.[417]

---

414. September 1974 Sanchez interview, supra note 374.

415. HEW stated, "Reviewing is an on-going process. The direction and depth depends on the problems and the available staff." HEW response, supra note 270.

416. May 1973 Sanchez interview, supra note 355; September 1974 Lowe interview, supra note 374; and February 1974 Foley interview, supra note 278.

417. For example, the Dallas regional staff conducted a State agency review in Arkansas in 1968; however, as of January 1973 there had been no followup reviews of Arkansas State agencies. Letter and attachments from William M. Fleming, Chief, HSSB, OCR, HEW, Dallas Regional Office, to Louis H. Rives, Jr., Director, HSSD, OCR, HEW, Jan. 10, 1973.

C. Compliance Reviews of Medicare Facilities

Most hospitals and nursing homes which are recipients of Medicare funds are also recipients of Medicaid funds, and thus come under the monitoring jurisdiction of State agencies as well as under HEW's authority.[418] In the past few years HEW has done little direct monitoring of Medicare facilities. It has relied heavily on State agencies to monitor hospitals and nursing homes, essentially abdicating its Medicare responsibility. A 1972 report by the Comptroller General alleged that shortly after the passage of Medicare and Medicaid, HEW's efforts to effect compliance with Title VI in federally assisted health programs were extensive, but that in later years this activity

---

418. Responsibilities for monitoring Medicare providers and Medicaid vendors is discussed on p. 130 supra.

419
was reduced.

---

419. Compliance Under Medicare and Medicaid, supra note 296. See U.S. Commission on Civil Rights, HEW and Title VI 43-47 (1970). The Commission noted that in July 1966 almost 500 persons were engaged in HEW's hospital compliance program, but that by mid-1967, HEW's compliance activity had declined sharply. Id. See also Rose letter, supra note 387 Ms. Rose stated:

> HEW-OCR virtually ceased any review of services by Medicare hospitals to minorities, has never developed any indepth analysis of practices and policies of hospitals which have the effect of denying access to minorities, and has inadequate affirmative action requirements to address the real issues.

The Director of OCR has given the following response to allegations that HEW's hospital compliance program has decreased its efforts.

> At the inception of the medicare program, the Department made extensive efforts to secure satisfactory assurances of compliance with Title VI from participating facilities and to correct discriminatory practices that would have precluded participation of the facilities. Needless to say, without such efforts, it would have been difficult if not impossible to get the medicare program off the ground.
>
> To suggest that this initial, broad-based compliance effort should have continued with full force into the future is to misunderstand its transitory purposes and to argue, by inference, that reviews, including onsite visits, of individual hospitals and nursing homes facilities must constitute a first and consuming program priority for OCR. I should stress that the 1965-66 compliance effort was essentially a clearance function to get the medicare program underway. Statement of Peter E. Holmes, Title VI Hearings, supra note 297, at 129-30.

During fiscal year 1973, HSSBs conducted 588 reviews of hospitals, skilled nursing homes, and other Medicare-funded facilities. Of these, only 43.9 percent were onsite.[420] Included in the total number of reviews were 254 reviews of State, city, and private hospitals, of which 53, or 20.9 percent, were onsite; 152 reviews of skilled nursing homes, of which 45, or 29.6 percent, were onsite; and 182 postaward reviews of other Medicare-funded facilities, such as home health agencies, and child care facilities, of which 160, or 87.9 percent, were onsite.

---

420. A breakdown of these reviews and the number which were onsite is shown by region in Exhibit 4.

Exhibit 5

Regional Title VI Reviews for Fiscal Year 1973
(Numbers in Parentheses are Onsite)

Region	Hospitals	Skilled Nursing Homes	Other Recipients	Total
I	14	6	15(15)	35(15)
II	34	30	1(1)	65(1)
III	65(16)	37(2)	59(45)	161(63)
IV	87(20)	21(7)	10(2)	118(29)
V	25(13)	30(24)	17(17)	72(54)
VI	18	3	42(42)	63(42)
VII	*	*	*	*
VIII	**	**	**	**
IX	5(4)	12(12)	38(38)	55(54)
X	6	13	0	19(0)
Total 8 Regions	254(53)	152(45)	182(160)	588(258)

Source

HEW response to U.S. Commission on Civil Rights questionnaire, June 18, 1973

*No regional HSSB prior to 1973.

**These data were requested from HEW by the U.S. Commission on Civil Rights in an April 1973 questionnaire. They were not, however, supplied by HEW.

The percentage of HEW-funded facilities reviewed was small.[421] For example, reviews were conducted of fewer than 4 percent of hospitals and skilled nursing facilities and fewer than 1 percent of all other facilities. In the San Francisco and Dallas regions, the percentage of facilities reviewed was especially low.[422] The low number of facilities reviewed by onsite inspection was, therefore, even smaller. For example, in the San Francisco region, there were approximately 679 public and private hospitals receiving Medicare funds, but only 5 (0.7 percent) were reviewed, and only 4, or 0.6 percent, were subject to onsite inspection by the San Francisco

---

421. The percentage of hospitals and skilled nursing homes reviewed by region is shown in Exhibit 5.

422. In 1969, in New Orleans, several hospitals cleared for participation in the Medicare program by HEW served almost no blacks. The most striking example was Southern Baptist Hospital, located on the borders of two large black communities. It served almost 20,000 patients that year, including only about 13 blacks. Similarly patients at the Hotel Dieu Hospital and the Oschner Foundation Hospital, both located on the borders of two large black communities, were only 2.6 percent and 3.5 percent black, respectively. The failure of these three hospitals to serve blacks is contrasted with the New Orleans Charity Hospital which had 75 percent black patients. Title VI Hearings, supra note 297. In 1971, the Health Task Force of the Leadership Conference on Civil Rights forwarded data on these hospitals to HEW, but none of them were investigated until the spring of 1974. Rose letter, supra note 381.

HEW stated that:

> Since early 1974, the Health and Social Services Division has been involved in a major investigation of the compliance status of the New Orleans Metropolitan Hospital System. This investigation, which is part of the Cook v. Oschner case, has included a large scale data collection and analysis efforts and on-site activities. These current activities by far override the historical actions of 1969 where the report chooses to to leave off. July 1975 Holmes letter, supra note 270.

HSSB.[423] There were 936 skilled nursing facilities in that region, but only 12 (1.3 percent) were reviewed onsite.[424] The Chief of the San Francisco HSSB stated that reviews of hospitals and nursing homes were of relatively low priority in his office and that reviews of State agencies were of considerably more importance.[425]

---

423. HEW response, supra note 385.

424. Id.

425. Interview with Hal Freeman, Chief, Health and Social Services Branch, OCR, HEW, San Francisco Regional Office, in San Francisco, Cal., Mar. 19, 1973.

Exhibit 6

Number of Medicare Providers
and Percent Reviewed by Region
Fiscal Year 1973

Region	Hospitals		Skilled Nursing Homes	
	Total Number	(Percent Reviewed)	Total Number	(Percent Reviewed)
I	359	(3.9)	286	(2.1)
II	594	(5.7)	447	(6.7)
III	567	(11.5)	357	(10.4)
IV	1,118	(7.8)	586	(3.6)
V	1,211	(2.0)	777	(3.9)
VI	910	(2.0)	106	(2.8)
VII	630	(*)	157	(*)
VIII	335	(**)	117	(**)
IX	679	(0.7)	936	(1.3)
X	272	(2.2)	191	(6.8)
Total 8 Regions	6,685	(3.8)	3,960	(3.8)

Source: HEW response to U.S. Commission on Civil Rights questionnaire, June 18, 1973, and interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, Office for Civil Rights, HEW, Sept. 19, 1974.

* No regional HSSB prior to 1973.

** Data necessary to calculate these percentages were requested from HEW. They were not, however, supplied by HEW.

Where noncompliance by Medicare facilities has been uncovered, HEW often failed to take the steps necessary to require immediate correction. For example, in June 1973, HEW notified the Golden Isles Convalescent Center in Hallendale, Florida, that it was in probable noncompliance with Title VI because its admissions policy and referral practices discriminated against minorities.[426] The center had, in fact, admitted no minority patients. It agreed to take corrective action and HEW thus determined that the facility was in compliance.[427] As of September 1974, however, the center had not admitted any minority patients.[428]

---

426. HEW response, supra note 385.

427. Id.

428. Telephone interview with Marie Chretien, Chief, Health and Social Services Branch, OCR, HEW, Atlanta Regional Office, Sept. 25, 1974.

One of the most serious instances of HEW inaction involves the Michigan Masonic Home. Information obtained during onsite reviews of the facility, beginning in August 1970, indicated that the home effectively excluded blacks.[429] HEW attempted informally to bring about compliance with Title VI. Although the home would not take corrective action, HEW did not formally notify the home that it was in noncompliance. Although it is clear that the policy of the home violates Title VI, and HEW regional staff determined that further negotiations with the home would not be fruitful,[430] in 1973 HEW was still collecting information to evaluate whether to make a formal determination of noncompliance. As of late December 1974, the Masonic Home still did not admit blacks, and was still receiving HEW funding.[431]

---

429. As with the Indiana Masonic Home (see p. 203 infra), HEW found that admission to the home was limited to Masons and their wives, and that in Michigan, blacks were excluded from becoming Masons. 1972 HEW response, supra note 385. See also letter from John R. Hodgdon, Regional Civil Rights Director, HEW, Chicago Regional Office, to Norman L. Ryburn, Administrator, Michigan Masonic Home, Feb. 14, 1972.

430. Memorandum from Davis A. Sanders, Deputy Branch Chief, HSSB, OCR, HEW, Chicago Regional Office, to Louis H. Rives, Jr., Director, HSSD, OCR, HEW, "Masonic Homes--Franklin, Indiana, and Alma, Michigan," June 14, 1972.

431. In December 1974 an amendment was attached to a bill to set up a White House Conference on Library Services, which in effect would have permitted segregated nursing homes and hospitals operated by Masonic orders or other fraternal organizations to receive Medicare payments. Amendment to S.J. Res. 40. This amendment was passed in the Senate, but later deleted in the House-Senate conference committee.

HEW was in the process of negotiating a plan to correct the situation,[432] more than four years after it had discovered noncompliance.

Through a HEW questionnaire concerning Indian health care[433] sent to 10 Arizona hospitals in December 1972, HEW[434] determined that although

---

432. Telephone interview with Alfred Sanchez, Civil Rights Specialist, HSSB, OCR, HEW, Chicago Regional Office, Dec. 31, 1974. See also letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to Hicks G. Griffiths, Attorney for the Michigan Masonic Home, Jan. 24, 1974. Mr. Sanchez noted that at one point in the negotiations, the Masonic Home indicated that it had 15 black patients. HEW's check of the death certificates of these patients, however, indicated that none were black.

433. One HEW staff member listed the following Native American health care problems: (1) in recent years many Native Americans have been leaving reservations to live in rural communities and urban centers where health and social services for Native Americans are less extensive than on reservations; (2) communication between Native Americans and health officials was often poor because many health providers are not culturally aware of some traditions which Native Americans value highly, such as that of the "medicine man" and (3) few public programs employ Native Americans as health workers. Telephone interview with Hal Freeman, Chief, HSSB, OCR, HEW, San Francisco Regional Office, Apr. 4, 1974. For a further discussion of Native American health problems, see Montana-North Dakota-South Dakota Joint Advisory Committee to the U.S. Commission on Civil Rights, Indian Civil Rights Issues in Montana, North Dakota, and South Dakota 25-33 (August 1974); Oklahoma State Advisory Committee to the U.S. Commission on Civil Rights, Indian Civil Rights Issues in Oklahoma 53-64 (January 1974); and Bridging the Gap: The Twin Cities Native American Community, supra note 345.

434. This Commission held a hearing in Phoeniz, Arizona, in November 1972. (See Hearing Before The U.S. Commission on Civil Rights, Phoenix, Arizona, November 17-18, 1972). In the course of that hearing the Commission found that there was inadequate health care treatment for Native Americans and that there was evidence that county hospitals receiving Federal funds would refer Native American applicants to Indian Health Service facilities rather than admit them. It therefore recommended that OCR "investigate possible denials of Title VI...with respect to the denial of equal access by American Indians into county hospitals that refer Indian applicants to Indian Health Service facilities." U.S. Commission on Civil Rights, The Southwest Indian Report 160, 161 (May 1973). The HEW questionnaire was sent as a result of findings and recommendations resulting from the Commission's hearing. Letter from Frank Carlucci, Acting Secretary, Department of Health, Education, and Welfare, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 13, 1973.

the Maricopa County General Hospital claimed to serve everyone on an equal basis,[435] it did not provide Indian patients with emergency and outpatient service in the same manner as it did to other persons. HEW found that Native Americans were often referred to the Phoenix Indian Medical Center and to the Indian Health Service[436] facility, instead of being admitted to the county hospital.[437] On May 23, 1973, the Office

---

435. The Maricopa County General Hospital policy as described in its response to the HEW questionnaire was that:

> ...emergency service is available to everyone. If in-patient care is necessary on an emergency or urgent basis, the patient is admitted and Indian Hospital later contacted in reference to transfer or reimbursement. Maricopa County General Hospital response to HEW questionnaire, Jan. 8, 1973.

436. For a discussion of the Indian Health Service, see Department of Health, Education, and Welfare, The Indian Health Program (1972).

437. The Maricopa County General Hospital stated that it could not provide health care services to Native Americans eligible for Indian Health Service care and that "We assume all Indians are eligible for IHS care until a rejection is received." Maricopa County General Hospital response, supra note 435.

Similarly, on June 12, 1973, OCR notified the Hoemako Cooperative Hospital in Casa Grande, Arizona, that it had been found in noncompliance because hospital authorities would refer Native Americans to the Sacaton Hospital, an Indian Health Service facility about 20 miles away, for all medical needs. Letter from Martin H. Gerry, Assistant Director, Policy Planning and Program Development, OCR, HEW, to Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 24, 1973. In January 1974, after months of negotiation with OCR, Hoemako Cooperative Hospital agreed to dissolve the policy used to refer Native Americans to the Sacaton facility. Telephone interview with Hal Freeman, Chief, HSSB, OCR, HEW, San Francisco Regional Office, Mar. 7, 1974.

for Civil Rights warned Maricopa County Hospital that it had been found in noncompliance with Title VI and that it had 30 days to inform OCR of the corrective action it would take.[438]

The hospital delayed responding to HEW, and when it did, it took issue with HEW's finding of noncompliance. It indicated no intention of taking steps to come into compliance.[439] It was not until January 3, 1974, that the Maricopa County General Hospital revised its admissions policy.[440]

---

438. Letter from Floyd L. Pierce, Regional Civil Rights Director, Office of Civil Rights, HEW, to S.F. Farnsworth, M.D., Acting Administrator, Maricopa County General Hospital, Phoenix, Ariz., May 23, 1973. See also HEW response, supra note 385.

439. Letter from Stanford F. Farnsworth, M.D., Assistant County Manager for Health Services, Maricopa County General Hospital, Phoenix, Ariz., to Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Regional Office, June 25, 1973.

440. Among the changes were that (1) Native Americans were to be eligible to receive medical services at the hospital even though they were also eligible for care at the Indian Health Service; (2) Native Americans were to be assigned to rooms regardless of race; and (3) records were to be maintained of all languages spoken by hospital employees, especially those fluent in Spanish and Indian languages and such records were to be forwarded to OCR periodically. Letter from S.F. Farnsworth, M.D., Assistant County Manager for Health Services, Maricopa County General Hospital, to Charles S. McCannon, M.D., Director, Phoenix, Arizona Indian Health Service, HEW, Jan. 3, 1974.

Without conducting a compliance review of the facility to ensure that the new policy was properly implemented, HEW notified the institution that it had come into compliance with Title VI.[441]

HEW recently informed this Commission that:

> [P]artially as a result of the findings in that case, OCR has developed a tripartite memorandum of agreement with the Indian Health Service and the Social Rehabilitation Service which establishes that eligibility for services in an Indian Health Services facility is a residual rather than a primary health service resource. The procedures adopted under this policy will preclude the recurrence of the situation uncovered in the Maricopa County Hospital case. 442

---

441. Letter from Floyd L. Pierce, Director, Office for Civil Rights, HEW, San Francisco Regional Office, to S. F. Farnsworth, Assistant County Manager for Health Services, Maricopa County General Hospital, Jan. 18, 1974.

442. July 1975 Holmes letter, supra note 270.

D. Indepth Reviews

In 1974, OCR embarked on a program of indepth field investigations of important HEW program areas. The reviews were designed to serve as a prototype for future evaluations and to assist HEW in the development of guidelines for State agency monitoring of Title VI.[443] These reviews were to be OCR's principal field activity in the area of health and social services.[444] The investigations were conducted in 10 localities[445] and were aimed at four major sectors of HEW's health programs: (1) nursing homes; (2) Native American health facilities; (3) mental health facilities; and (4) Aid to Families with Dependent Children (AFDC) programs.[446] These reviews constituted the first HEW attempt to investigate systematically the delivery of services to minorities in programs administered through State agencies. HEW anticipated that the results would indicate (1) whether services of current programs in local communities were being delivered equitably to

---

443. 1974 Enforcement Plan, supra note 321. The proposed guidelines are discussed on p. 143 supra. See also letter from Peter E. Holmes, Director, OCR, HEW, to Congressman Don Edwards, Chairman Subcomm. No. 4, Comm. on the Judiciary, House of Representatives, Oct. 31, 1973.

444. Letter from Peter E. Holmes, Director, OCR, HEW, to Allen Koplin, M.D., Chairman Committee on Equal Health Opportunity, American Public Health Association, Sept. 17, 1973.

445. Four reviews of nursing homes were conducted in New York City, N.Y., Baltimore, Md., Montgomery, Ala., and Houston, Tex. Two reviews of Native American health facilities were conducted in Anadarko, Okla., and in Humboldt County, Cal. Two mental health facilities were reviewed in Providence, R.I., and in San Francisco, Cal. Two AFDC programs were investigated in Philadelphia, Pa., and in Atlanta, Ga. The review locations were selected by the OCR Washington office in conjunction with the regional civil rights directors. In making its selection, OCR attempted to insure that (1) coverage included blacks, Mexican Americans, Puerto Ricans, Asian Americans, and Native Americans; (2) sites represented cities, counties, and rural areas; and that (3) there was wide geographical representation. September 1974 Foley interview, supra note 307.

446. Id.

minorities; (2) whether health services were being fully utilized by minorities at the same level as by nonminorities; and (3) whether the current health programs were meeting the needs of all minorities regardless of age, handicap, or cultural and linguistic background.[447]

As of September 1974, all 10 indepth reviews had been completed.[448] In April 1975, however, a representative of HSSD informed Commission staff that the Washington office had received the results of only one review,[449] but in July 1975 HEW stated that:

> This is not the case. All of the reports have been submitted and reviewed. It should be noted that a primary purpose of the reviews was to assist the Washington office in developing the State agency guidelines referred to [on p. 143 supra]. The materials and information needed to develop the guidelines were submitted to Washington and reviewed by the Washington office in January of 1975.[450]

---

447. Statement by Peter E. Holmes, Director, OCR, in Title VI Hearings, supra note 297 at 140, and February 1974 Foley interview, supra note 278.

448. September 1974 Foley interview, supra note 307.

449. April 1975 Foley interview, supra note 311.

450. July 1975 Holmes letter, supra note 270.

Moreover, on the basis of the one 1974 review OCR reported it had received, it would appear that HEW should not rely upon the review process as a principal field investigative technique. This is because the review received was essentially a statistical study of the process of referrals to nursing homes. It looked at the nature of the referral services and the factors involved in the selection of nursing homes for both minorities and nonminorities. It did not attempt to determine the extent to which there was racial or ethnic discrimination in the referral process,[451] and thus it would not be a satisfactory tool for assessing compliance by HEW recipients.[452]

In addition to the indepth reviews, during fiscal year 1974 HEW conducted reviews of home health agencies in 50 specially selected areas around the country. These reviews were undertaken to give detailed attention to the delivery of health services to persons of Spanish speaking background.[453]

---

451. Attachment to memorandum from Marie Chretien, Chief, HSSB, OCR, HEW, Atlanta Regional Office, to Barbara Walker, Acting Director, Health and Social Services Division, Apr. 12, 1974. According to one HSSD staff member, the indepth reviews on nursing referrals were the only ones which did not examine the extent of discrimination. September 1974 Foley interview, supra note 307.

452. HEW responded to this judgment by stating that:

> It is surprising to note that....it is concluded that HEW should not rely upon the review process as a principal field investigative technique. Inasmuch as the information in this paragraph confuses OCR/H&SS activities of 1974 with its activities of 1975, it is difficult to ascertain the basis of this conclusion. July 1975 Holmes letter, supra note 270.

Note: Because of the time frame of this chapter, it is not intended to evaluate HEW's 1975 reviews.

453. 1974 Enforcement plan, supra note 321.

E. Complaint Handling

During fiscal year 1973, HSS received approximately 250 complaints alleging racial or ethnic discrimination in HEW-funded health and social service programs. In fiscal year 1974, HEW received about 300 such complaints.[454] The number of complaints received varies greatly from region to region.[455]

Of the 300 complaints received in fiscal year 1974, approximately 70 were made against State agencies; 150 against hospitals, and the rest, against other health-related institutions. Approximately 85 to 95 percent of the health and social service complaints received each year are from black complainants. Complaints received from the Spanish speaking community comprise fewer than 5 percent of complaints received.[456] Investigation and resolution of complaints takes about 10 percent of HSSB staff time.

---

454. February 1974 Foley interview, supra note 278. OCR receives five or six times as many complaints, but most are program complaints and do not allege discrimination. For example, many complaints relate to eligibility for receiving welfare services. Complaint letters which HEW reviews and determines are not civil rights complaints are referred by OCR to staff in the various HEW program agencies. Id.

455. For example, during the first three quarters of fiscal year 1973, the New York HSSB received only 2 complaints, while the Dallas HSSB received 45.

456. These estimates are based on an HSS study conducted several years ago. February 1974 Foley interview, supra note 278.

Title VI complaints received in the Washington HSSD are referred to the regional offices for handling.[457] If a complaint concerns a program funded through a State agency or vendor and if HEW has confidence in the State agency's ability to handle a complaint, the regional office may refer the complaint to the State agency for handling. In all other cases, complaints are investigated by the regional HSSBs.

The Washington office has little knowledge of the regional offices' handling of complaints unless a complaint investigation reveals discrimination which cannot be resolved voluntarily. In 1974, an HEW representative informed Commission staff that regional offices report to Washington the number of complaints received and the number resolved, but that no data are reported or even tabulated on the nature of the complaint resolutions.[458] Without such data HEW would not be able to know the number of complaints resolved in favor of the complainants,[459]

---

457. Complaint processing is one of the responsibilities of the regional offices. See p. supra.

458. February 1974 Foley interview, supra note 278.

459. Complaints may be marked as resolved, for example, because they are withdrawn, because an investigation reveals no discrimination, or because discrimination is found and corrected.

the severity of the issues, or whether patterns of discrimination are indicated.

In 1975, however, HEW reported that:

> The statement that "HEW does not know the number of complaints resolved in favor of the complainants, the severity of the issues, or whether patterns of discrimination are indicated" reportedly obtained from an early 1974 interview, is simply not accurate. Each regional office periodically reports data on the status of complaints--the number received, the type of complaint, the number closed, and the number resolved in favor of the complainant. 460

HEW did not make clear whether it has instituted since early 1974 a new system of regional reporting on complaints or whether the information it provided in early 1974 was inaccurate at the time it was provided.

---

460. July 1975 Holmes letter, supra note 270.

A review of HEW complaint files from the four regions visited by Commission staff indicated that the investigations were reasonably thorough, frequently uncovering discrimination, and often resulting in corrections of the alleged violations. For example, in Region I (Boston), a complaint filed with HEW by a black registered physical therapist against the Southington, Connecticut, Public Health Association was closed following the resignation of the hospital official who openly discriminated against the complainant by not referring any hospital patients to him.[461] Since that time, the complainant has reported that he receives referrals from the Connecticut Public Health Association.[462]

In an investigation of the Resthaven Community Mental Health Center in Los Angeles, California, by HSS Branch staff in San Francisco, following a complaint lodged against it by the Asian American Civil Rights Union, HEW found "gross insensitivity and unresponsiveness" on the part of Resthaven's administration to the problems of the local minority communities.[463] The investigation also showed that minorities were treated in far smaller numbers than their percentages in the community; that the facility had not provided adequate professional bilingual and bicultural

---

461. Boston HSSB Complaint Log, fiscal year 1972.

462. Letter from complainant, to John G. Bynoe, Regional Director, Office for Civil Rights, HEW, Boston Regional Office, Mar. 29, 1972.

463. HSSB, OCR, HEW, San Francisco Regional Office, Findings and Recommendations of the Complaint Against Resthaven Community Mental Health Center, Los Angeles, Cal., May 17, 1971. Although the complaint concerned Asian Americans, the investigation included blacks, persons of Spanish speaking background, and Native Americans as well.

personnel; that there was no adequate outreach program to help make the minority community aware of the programs available; and that minorities were not represented on the board of trustees. Through subsequent reviews and correspondence with the administrator of Resthaven, HEW concluded that the facility had made substantial progress in its services to minority individuals,[464] and it was deemed in compliance.

In January 1972, a black female surgeon had her privileges to practice surgery at the Park City Hospital in Bridgeport, Connecticut terminated by that hospital. In her complaint filed with the OCR office in Region I, the surgeon alleged that she had been a victim of racial discrimination. Park City Hospital responded that the complainant was incompetent to perform surgery.[465]

---

464. As of August 1972, HEW noted the following progress in Resthaven's program: (1) 40.0 percent of the patients served were minority as compared with 6.7 percent in 1970; (2) 45.5 percent of all staff were minority as compared with 34.9 percent in 1970; (3) 9.2 percent of the professional staff were minority as compared with 7.2 percent in 1970; (4) the facility maintained a 24-hour interpretative service available in four Chinese dialects, Japanese, and Spanish; (5) it provided a community outreach program, staffed by 12 persons representing all major racial and ethnic groups; (6) it established an on-going community council of 25-30 members of the community, which is accorded 3 votes on the Board of Trustees; and (7) there were 9-10 minority group representatives on the 30-seat board of trustees. HSS Branch, OCR, HEW, San Francisco Regional Office, Analysis of Resthaven's Current Quarterly Report, with a Recapitualation of its Program for the Past Eighteen Months, Aug. 2, 1972.

465. February 1974 Foley interview, supra note 278.

In order to resolve the matter, HEW employed two surgeons as medical consultants[466] to investigate the charges and report their findings to OCR.[467] Their report concluded that the hospital's position could not be substantiated by medical records and that the complainant had been treated differently from other surgeons because of her race.[468] On September 12, 1974, OCR notified Park City Hospital that it was in noncompliance with Title VI, and that failure to comply with Title VI could lead to administrative hearings and termination of all Federal funds if the hospital did not take steps within 30 days to come into compliance.[469] On January 22, 1975, OCR met with Park City Hospital in an effort to resolve the matter, but was unsuccessful. On February 20, 1975, OCR informed Park City Hospital of what steps it must voluntarily take to avoid HEW enforcement proceedings or be faced with the

---

466. HEW itself does not assess medical qualifications, but hires consultants in cases such as this. Id.

467. Telephone interview with John G. Bynoe, Regional Director, OCR, HEW, Boston Regional Office, Nov. 13, 1974.

468. Id.

469. Letter from John G. Bynoe, Regional Director, OCR, HEW, Boston Regional Office, to Thomas Mangines, President, Board of Trustees, Park City Hospital, Bridgeport, Conn., Sept. 12, 1974.

initiation of enforcement proceedings by March 31, 1975.[470]

When Humboldt County,[471] California, assumed the administration of a formerly private hospital, three Native American employees were removed from the staff. In an ensuing complaint filed with the Equal Employment Opportunity Commission (EEOC) and the California Fair Employment Practices Commission (FEPC) by one of the former employees and the California Indian Legal Services Association, the complainants charged that the county had discriminated against the Native American former staff members. According to HEW staff, the EEOC and FEPC failed to resolve the complaint and it was brought to the attention of the San Francisco HSSB. Following an HSSB investigation, one of the Native American employees was rehired; the other two were offered their former positions, but they decided to work elsewhere.[472]

---

470. Letter from John G. Bynoe, Regional Director, OCR, HEW, Boston Regional Office, to Sigmund L. Miller, P.C., Bridgeport, Conn., Mar. 5, 1975. In this letter, HEW required Park City Hospital, as a condition for Title VI compliance, to reinstate immediately the dismissed surgeon to courtesy privileges in general surgery. In addition, the following conditions were placed on the hospital should privileges be terminated to the surgeon at any time prior to the end of the first year: (1) that Park City Hospital adhere to its own rules and regulations as well as those of its medical staff; and (2) that a panel of three surgeons be created to review the medical records and evidence of both the surgeon and Park City Hospital and to determine if sufficient evidence exists to support the termination action of the hospital. The hospital was also required to compensate the surgeon for income lost during the period of revocation of courtesy privileges.

471. In 1970, Humboldt County, on the Pacific Ocean in northwest California, had a Native American population of 3,055 (3.06 percent of the total county population of 99,692). U.S. Department of Commerce, Bureau of the Census. Census of Population: 1970, General Population Characteristics. Final Report DC(1)-B6 (California), Table 34: "Race by Sex, for Counties: 1970."

472. Telephone interview with Hal Freeman, Chief, HSSB, OCR, HEW, San Francisco Regional Office, July 9, 1973.

On June 4, 1975, HEW proposed a radical change in its procedures for handling almost all civil rights complaints within its jurisdiction.[473] These draft procedures are part of a proposed regulation for administration and enforcement of most HEW civil rights responsibilities.[474] Under the proposed procedures HEW would largely abandon its investigation of individual complaints and instead concentrate on the identification and correction of systemic discrimination.[475]

---

473. 40 Fed. Reg. 24148 et seq. (June 4, 1975). The proposed regulation, if adopted, will be published at 45 C.F.R. § 81. This Commission's comments in this chapter are largely confined to § 81.6 of the proposed regulation. Moreover, the comments are confined exclusively to the impact of the proposal on civil rights compliance in the area of health and social services. No effort has been made here to analyze its impact upon other areas such as elementary, secondary, or higher education.

474. The regulation, if implemented, will apply to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, sections 799A and 845 of the Public Health Service Act, section 504 of the Rehabilitation Act of 1973, section 407 of the Alcohol and Drug Abuse and Treatment Act of 1972, and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970. It will not apply to the Department's enforcement activities under Executive Order 11246, since HEW is not the lead agency under the Executive Order, but rather, undertakes its enforcement efforts pursuant to the regulations of the Department of Labor's Office of Federal Contract Compliance.

475. See statement by Caspar W. Weinberger, Secretary of Health, Education, and Welfare, June 3, 1975, and HEW, Fact Sheet, "Proposed Procedural Regulation For Civil Rights Enforcement" June 1975, for HEW's explanation of the rationale behind this proposed new emphasis.

HEW noted that as its statutory responsibilities have increased, its limited personnel resources in the area of compliance enforcement have been significantly diluted. Under the current approach, HEW was expected to investigate all complaints fully regardless of their importance. The investigation of some individual complaints, HEW maintains, can consume HEW staff time beyond that which would be required to monitor an entire school system. Thus, the amount of time spent in investigation, negotiation, and enforcement proceedings with a grantee agency is oftentimes "drastically disproportionate to the expenditure of enforcement resources required." Fact Sheet, supra this note 475.

This Commission is strongly supportive of compliance systems which are based on the systematic conduct of compliance reviews.[476] It has also noted the importance of investigating individual complaints.[477] Although in the area of health and social services it is clear that a strong and systematic program of compliance reviews would be desirable, HEW's continued investigation of individual complaints is also extremely important. This is because HSS compliance reviews have not been of adequate number or quality.[478] Moreover, HEW has not established a sufficiently comprehensive data collection system to enable it to measure the compliance status of recipients of its health and social service programs.[479]

---

476. See, for example, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing (December 1974) and Vol. IV, To Provide Fiscal Assistance (February 1975); and To Know or Not To Know: Collection and Use of Racial and Ethnic Data (February 1973).

477. To Provide...For Fair Housing, supra note 476, at 30, 329, and 346.

478. Reviews of State agencies are discussed on p. 152 supra. Reviews of hospitals are discussed on p. 164 supra.

479. Data collection is discussed on p. 190 supra.

In addition, while HEW has received only a moderate number of health and social services complaints,[480] their investigation has been an important component of the health and social service compliance program. Indeed, complaint handling appears to be the principal compliance tool with which HEW has produced any positive results in the area of health and social services.[481] The diminished use of this tool could have a seriously negative impact on its compliance program.

---

480. As noted on p. 180 supra, in fiscal year 1974 HEW received about 300 such complaints.

481. As noted on p. 183 supra, the investigations examined by Commission staff tended to be reasonably thorough, often resulting in correction of the alleged violations.

F. Reporting Systems

1. Racial and Ethnic Data Collection

A system for civil rights monitoring of a federally assisted program must rely to a great degree on accurate, current, and complete data on the race, ethnic origin, and sex of potential and actual beneficiaries of that program.[482] Without such data, there can be no effective appraisals of the extent to which the program is reaching minorities and women. Since 1973, HEW's Title VI regulation has required recipients of HEW programs to collect racial and ethnic data on the beneficiaries of HEW programs. It states:

> Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient to carry out its obligation.... /Emphasis added./ [483]

HEW has no comparable requirement for collection of data on sex.[484]

---

482. See 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) and Interagency Racial Data Committee, Establishing a Federal Racial Data System (1972).

483. 45 C.F.R. § 80.6(b) (1974). Other Federal Title VI regulations agencies have similar provisions. See for example, the regulation of the Department of Housing and Urban Development (24 C.F.R. § 1.6(b) (1974)) and the regulation of the Department of Commerce (15 C.F.R. § 8.7(b) (1974)).

484. HEW stated:

> We have already indicated that OCR has no authority to investigate and seek correction of cases of sex discrimination. As a result, we have no legal basis for gathering survey data in this area. July 1975 Holmes letter, supra note 270.

HEW has conducted three surveys in which hospitals and skilled nursing homes were asked to supply data on the racial and ethnic composition of patients, staff, and population served. HEW uses the information from these survey forms to determine what medical facilities should be reviewed thoroughly.[485] The most recent survey, conducted in 1973,[486] was HEW's most comprehensive. In addition to the racial and ethnic data collected, the survey also gathered information to help assess reasons for hospital selection by minorities and non-minorities. This included information on the methods of payment used by patients,[487] the sources of admission for patients,[488] and ability to communicate with non-English speaking staff. It was mailed to 3,500 hospitals and 2,500 skilled nursing homes.[489]

---

485. February 1974 Foley interview, supra note 278.

486. Two other surveys were conducted in 1966 and 1969.

487. In addition to patients paying their own bills, methods of payment included Medicare, Medicaid, and private insurance.

488. For example, HEW attempted to determine the number of patients admitted by private physicians.

489. This survey was sent to all hospitals and nursing homes in communities with a minority population of 5 percent or more and to 15 percent of hospitals and nursing homes in the remaining communities.

HEW has not collected comparable racial and ethnic data from State agencies on a nationwide scale. It has not told State agencies that they must collect and maintain[490] racial and ethnic data on the beneficiaries, applicants, and potential beneficiaries of each HEW-funded program they administer or which is administered by their subrecipients.[491] For example, it has not directed that data must be kept by each vendor separately rather than for the State agency as a whole,[492] and that data must be gathered separately for

---

490. Without data on individual vendors, it is difficult to locate the source of any deficiencies in delivery of benefits.

491. February 1974 Foley interview, supra note 278. HEW commented that the draft report "again ignores the State agency guidelines mentioned /in note 377 supra/ which outline requirements for the collection and maintenance of racial and ethnic data by State agencies." July 1975 Holmes letter, supra note 270. The Commission notes, however, that these guidelines' reference to racial and ethnic data collection do not require mandatory data collection, with the exception of instructions concerning HEW's periodic survey of nursing homes. State agencies are instructed racial and ethnic identification on records is not to be considered discriminatory and may be used to demonstrate compliance with Title VI." "Title VI of the Civil Rights Act of 1964, Questions and Answers," supra note 337.

492. Without data on individual vendors, it is difficult to locate the source of any deficiencies in delivery of benefits.

Asian Americans, blacks, Native Americans, persons of Spanish speaking background, and others.[493] HEW has not told State agencies to cross-tabulate racial and ethnic data by type or amount of benefit. It has not indicated how frequently such data should be collected.

HEW states that such specific details are negotiated with each State as part of the Methods of Administration. But at least some MOA's have unsatisfactory provisions for data collection.[494] In some cases, HEW has met great opposition to racial and ethnic data collection, but it has not been willing to take firm action to require the States to comply with its Title VI regulation. For example, OCR in the San Francisco

---

493. These categories are the minimum which are necessary. This Commission has recommended further breakdown of these categories, for example, the breakdown of persons of Spanish speaking background to such groups as Mexican American and Puerto Rican, in certain geographic areas. See To Know or Not to Know, supra note 482 at 30-33 and 88.

494. For example, the Methods of Administration of the Arkansas State Department of Health contained no data collection requirement although some racial data were appended to the MOA. Data were displayed by county and not separately for each vendor. Data were aggregated for all recipients and not broken out by type of benefit received. Arkansas State Department of Health, supra note 379. The Methods of Administration of the Texas Rehabilitation Commission contained no provision for racial and ethnic data collection. Texas Rehabilitation Commission, supra note 367.

region requested from California's Department of Health Care Services (CDHCS) a racial and ethnic breakdown of the recipients of medical care showing: the basis of the recipient's eligibility; total expenditure for general hospital care, nursing home care and physicians' services; and number of drug prescriptions.[495] CDHCS responded that such information was not available because statistics on health care are not maintained by race or ethnic origin.[496] HEW accepted CDHCS' statement and apparently did not require it to collect the necessary data.[497]

HEW reported that it could not get sufficient usable racial and ethnic data from State agencies in New York but has not required New York to submit those data.[498] Similarly, HEW was unable to obtain adequate racial and ethnic data from the Arizona Department of Public Welfare

---

495. Pierce letter, supra note 395.

496. Letter from Earl W. Brian, M.D., Director, CDHCS, to Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Regional Office, Oct. 15, 1971.

497. The California State Health Agency, which has been out of compliance with Title VI (see p. 158 supra), has indicated willingness to come into compliance and has drafted an affirmative action plan for implementing Title VI. The plan does not mention the collection of racial and ethnic data. Attachment to letter from William Mayer, M.D., Director of Health, California Department of Health, to Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Regional Office, June 25, 1974.

498. February 1974 Foley interview, supra note 278.

(DPW) regarding its staff and their case loads and language skills.[499] Yet, HEW's San Francisco Regional Office recommended that no action be taken against the Arizona Welfare Department.[500] On the whole, both HEW staff and the staff of State agencies have frequently been misinformed as to the number of the racial and ethnic minorities participating in a particular program.[501]

---

499. March 1973 Freeman interview, supra note 425. See also letter from John O. Graham, Commissioner, Arizona DPW, to Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Region, Mar. 14, 1972, and letter from Floyd L. Pierce, to John O. Graham, Oct. 3, 1972.

500. March 1973 Freeman interview, supra note 425..

501. A Study of the Impact of Decentralization Within the Department of Health, Education, and Welfare on Services to Ethnic Minorities, prepared by Urban Associates, Inc., Arlington, Va., for Office of Special Concerns, Office of the Assistant Secretary for Planning and Evaluation, HEW, April 1974. The Dallas HSSB staff member believes that HEW's 1973 issuance of a data collection requirement (see note 483 supra) has resulted in better data collection in that region. Telephone interview with Bruce Lowe, Civil Rights Specialist, HSSB, OCR, HEW, Dallas Regional Office, Apr. 3, 1975. In 1973 only Oklahoma and Texas collected racial and ethnic data. Telephone interview with William M. Fleming, Chief, Health and Social Services Branch, OCR, HEW, Dallas Regional Office, Mar. 7, 1973. As of 1975, all five States in the region were collecting such data. Lowe interview, supra note 374.

HEW offers several reasons for the lack of stringent enforcement of racial and ethnic data collection.[502] However, none of them can excuse the severe impediment[503] to HEW's nondiscrimination effort caused by lack of data. For example, HEW does not require the collection of racial and ethnic data in all programs because it believes the collection of these data may operate against potential beneficiaries.[504] It contends that in order to protect the applicant from rejection because of his or her race or ethnic origin, this information should not be collected.[505] However, failure to collect racial and ethnic data on applicants affords them little protection against discrimination. Without

---

502. September 1974 Foley interview, supra note 307. Mr. Foley noted that HEW is considering major guidelines with regard to the collection of racial and ethnic data for fiscal year 1975. The proposed guidelines are discussed on p. 143.

503. See A Study of the Impact of Decentralization Within the Department of Health, Education, and Welfare on Services to Ethnic Minorities, supra note 501.

504. September 1974 Foley interview, supra note 307. Mr. Foley stated that applicants for welfare, for example, no longer have to apply in person for welfare assistance and thus welfare agencies have no way of checking their race or ethnic origin.

505. Id.

these data, civil rights monitors cannot determine whether across-the-board discrimination is occurring and thus cannot stop it when it does occur. Indeed, the potential protections afforded by racial and ethnic data outweigh their potential misuse.[506]

Similarly, a spokesperson for HEW stated that HEW cannot enforce a data collection requirement because of the existence of State laws which prohibit the collection of racial and ethnic data.[507] While HEW stated that it does not believe that "it is unable to enforce a data collection requirement because of existence of State laws which prohibit the collection of racial and ethnic data,"[508] HEW staff have noted cases in which State laws restricting data collection have created obstacles for the collection of racial and ethnic data on beneficiaries of health and social service programs.[509]

2. Compliance Reports[510]

One tool which HEW could use to obtain information on the compliance status of State agencies is a reporting system which would indicate

---

506. See To Know or Not to Know, supra note 482, at 27-28, and 76-81. It should be noted that even if HEW's argument were valid, it does not provide a rationale for failing to collect post-application racial and ethnic data.

507. February 1974 Foley interview, supra note 278.

508. July 1975 Holmes letter, supra note 270. Any argument that HEW is legally restricted from collecting such data from States because of State laws would be faulty because it does not take into account that Federal regulations promulgated to enforce Title VI take precedence over contrary State laws. When a Federal law is constitutional and its enforcement follows the intent of Congress, it is supreme over conflicting State laws. McCulloch v. Maryland, 4 Wheat. 316 (1819). Regulations implementing such law are also supreme over conflicing State laws. See To Know or Not to Know, supra note 482, at 82-84.

509. February 1974 and September 1974 Foley interviews, supra notes 278 and 307.

510. HEW recently stated, "The material discussed in the section entitled 'Compliance Reports' again ignores the draft State agency guidelines which address this question." July 1975 Holmes letter, supra note 270. See p. 143 supra.

the activities of State agencies, including the number, scope, and findings of compliance reviews conducted by State agencies of vendors; the number and nature of complaints received; the findings of complaint investigations; the number and types of actions taken to effectuate compliance; and the number and status of all compliance problems. HEW, however, does not require that State agencies routinely submit reports regarding such civil rights activities, although on occasion it may request them. Thus, HEW gets little compliance information from State agencies on a regular basis. For example, in September 1974 of the 21 State agencies under the HSSB jurisdiction in the Dallas region, only 3 submitted periodic reports to the HSSB regarding civil rights activities.[511]

Furthermore, these periodic reports indicated a definite lack of sophistication and were inappropriate as civil rights reporting instruments. To illustrate, the Arkansas State Department of Health submitted to the HSS Branch office a quarterly civil rights report that was essentially a tally sheet, listing the number of field visits, complaints, and compliance reviews conducted each quarter for local health units and medical facilities. The agency also submitted "summary reports" of each field visit, which added only the name and location of the facilities visited and a description of any deficiencies found. These civil rights reports are not at all adequate in identifying the nature of the complaints received, the scope

---

511. September 1974 Lowe interview, supra note 374. The three State agencies submitting reports were the Arkansas State Departments of Health and Social and Rehabilitation Services and the Texas State Department of Health.

of complaint investigations, the nature of the field visits, or the resulting corrective action.

The reporting system of the Texas State Department of Health was no more than a monthly itinerary which is wholly unacceptable as a civil rights reporting instrument.[512] In fact, it was called "Record of Transportation and Duties Performed." This report listed the cities and institutions visited by State agencies, giving a brief description of the kind of review performed.[513]

Not only were the State agency reports insufficient, but HEW's review of these reports has also been poor. In the Dallas regional office, summary reports from State agencies are, in most cases, merely placed in HSS Branch office files and are rarely checked for Title VI irregularities. As a result, HEW was unaware of some serious Title VI problems which were indicated in these reports. For example, HEW staff were unaware that a report in its files from the Arkansas State Department of Health concerning a review the Arkansas department conducted of the Dardanelle Hospital in Dardanelle, Arkansas,[514] revealed that (1) there

---

512. Information on these reports on civil rights review is minimal. For example, one report stated: "12-4-72; conducted a hospital licensing inspection and a Title VI Civil Rights follow-up survey (at Jefferson Davis Hospital, Houston). Another monthly report stated: "Note: All trips made this month include Civil Rights Surveys." Texas State Department of Health, Record of Transportation and Duties Performed, December 1972.

513. The civil rights coordinator for the Texas State Department of Health stated that he does not inform OCR of the complaints received by the State. Interview with Bert L. Hall, Civil Rights Coordinator, Texas State Department of Health, in Austin, Tex., Feb. 2, 1973.

514. Arkansas State Department of Health, Summary Report of Review of Dardanelle Hospital, Dardanelle, Ark., Jan. 12, 1972.

were possible compliance problems at the hospital and (2) the State agency staff had not taken appropriate steps to correct the problems which it found.[515]

In another report from the Arkansas State Department of Health, the State agency reported that the Star City Convalescent Manor, Inc., in Star City, Arkansas, had no obvious deficiencies. Yet, this report also noted that:

> This home admitted 24 white and 7 black patients during the past year. They have 62 white and 10 black patients at this time. The black patients are in rooms together. [Emphasis added.] [516]

Segregation of room assignments is a clear violation of Title VI and yet the State agency did not require that the Star City home correct

---

515. The State agency report showed that the Dardanelle Hospital had no nondiscriminatory policy and that it had "colored" and "white" entered on medical records. Racial and ethnic notations are allowable under Title VI if they are made for the purposes of measuring the extent of nondiscrimination in the hospital's delivery of services, but apparently these notations were not used for equal opportunity purposes.

The Arkansas State agency report concluded that there were "no deficiencies" at the hospital. The State agency apparently believed that the problems it uncovered had been corrected. It appears, however, that only ad hoc corrections were made. The State agency posted a sample copy of HEW's nondiscrimination policy at the hospital, and at the time of the review the hospital administrator reported that he would discontinue the use of racial descriptions on hospital records.

516. Arkansas State Department of Health, Summary Report of Review of Star City Convalescent Manor, Inc., Jan. 12, 1972.

this violation. Again, although the report of the Star City home was in HEW files, HEW staff were unaware of its contents, and thus had not required the Arkansas Department of Health or the vendor institution involved to make the necessary corrections.[517]

As of fall 1974, HEW was looking into the feasibility of embarking on a standardized State agency reporting system. Both the Denver and Chicago regions have tested reporting systems which had been examined by the Washington office.[518] The Denver system provides statistical information such as the number of complaints received by a State agency and the number of compliance reviews, but it was considered deficient because it did not produce information which would enable an evaluation of the quality of reviews and investigations.[519] The Chicago system attempts to assess the delivery of health services by the racial and ethnic origin of the beneficiary.[520] The Washington office of OCR hopes to use the results of the test of this system in developing guidelines for State agencies.[521]

---

517. When questioned about the Dardanelle Hospital and the Star City Convalescent Manor, Inc., one HSSB staff member, formerly the State coordinator in charge of monitoring Arkansas programs, admitted not knowing about these deficiencies and stated that "nothing had been done" about the two reports. He also admitted that the deficiencies in the reporting system "should have been caught a long time ago." Telephone interview with Bruce Lowe, Civil Rights Specialist, HSSB, OCR, HEW, Dallas Regional Office, Mar. 14, 1973.

518. September 1974 Foley interview, supra note 387.

519. Id.

520. This system reports information on program results, such as the number of persons, by race or ethnic origin, in a rehabilitation program who have been rehabilitated and obtained employment. September 1974 Sanchez interview, supra note 374.

521. These guidelines are discussed on p. 143 supra.

G. Enforcement Efforts

When HEW finds a recipient to be in noncompliance with Title VI, it attempts to secure compliance by voluntary means. If compliance cannot be achieved voluntarily, HEW may initiate administrative action against the recipient to suspend, terminate, or refuse to grant or continue Federal financial assistance, or may refer the case to the Department of Justice.[522] Despite the large number of unresolved Title VI problems in HEW health and social services programs,[523] HEW has not referred any instances of discrimination prohibited by Title VI to the Department of Justice for action.[524] As of January 1975, there were no outstanding

---

522. Title VI provides that where noncompliance cannot be corrected informally, compliance may be effected "(1) by the termination of or refusal to grant or to continue assistance...or (2) by any other means authorized by law." 42 U.S.C. § 2000d-1 (1970); 45 C.F.R. § 80.8 (1974). Referral to the Department of Justice is the principal "other means" authorized by law. HEW regulations provide that no "other means" to effect compliance may be taken until 10 days after a notification to the recipient of noncompliance, during which additional efforts have been made to pursuade the recipient to come into compliance. 45 C.F.R. § 80.8(d)(1974).

523. See pp. 155-162 supra.

524. OCR, however, did ask for assistance from the Department of Justice in obtaining compliance information from the Escambia County, Alabama, Welfare Department when the welfare department refused to permit OCR access to its records, by court order. United States v. Alabama Department of Pensions and Security and Ruben K. King, Civil Action No. 4154-N (M.D. Ala., filed Aug. 23, 1973).

Moreover, in July 1975, HEW informed this Commission that "In March of 1975, [the Health and Social Services Division of the Office for Civil Rights] referred two cases involving the issue of access of information to the Department of Justice for legal action." July 1975 Holmes letter, supra note 270. These referrals, however, were not made because of failure to resolve voluntarily instances of discrimination but, rather, resulted from procedural problems.

orders terminating HEW assistance to recipients of health or social service programs[525] and administrative proceedings for fund termination have been initiated against only five recipients who were formally considered to be in noncompliance.[526] These were the Indiana Masonic Home-Hospital, the Mississippi Board of Mental Institutions, the East Mississippi State Hospital, the Ellisville (Mississippi) State School and Hospital,[527] and the Mississippi State Hospital.

HEW found the Indiana Masonic Home-Hospital to be in noncompliance because it effectively excluded minorities from treatment at the Home-Hospital. This exclusion occurred because the Home-Hospital was limited to Masons and their wives and in Indiana blacks were not admitted to the

---

525. Telephone interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, OCR, HEW, Jan. 20, 1975.

526. HEW, Status of Title VI Compliance, Interagency Report, (recorded through January 30, 1975) [hereinafter referred to as Interagency Report].

527. Id.

Masonic order. HEW found that the Mississippi Board of Mental Institutions (MBMI) was in noncompliance with Title VI because it allowed the three institutions it covered, the Mississippi Hospital, East Mississippi State Hospital, and the Ellisville State School, to operate on a discriminatory basis. One facility served only whites; another served only blacks; another was integrated, but had segregated facilities.[528] Although MBMI has agreed to eliminate its discriminatory policies and integrate all facilities,[529] as of January 1975, the institutions continued to have some Title VI problems in their operations.[530] For

---

528. Telephone interview with Richard Foley, Chief, Operations Branch, Health and Social Services Division, OCR, HEW, Jan. 9, 1975.

529. Since the Mississippi Board of Mental Institutions was found in noncompliance May 1968, it has transferred a large number of black patients to the white facility and, in turn, transferred white patients to the previously all-black institution. HEW maintains that the Mississippi Board of Mental Institutions has taken several years to develop an integrated rehabilitation program, but has accomplished a great deal. Id.

530. January 1975 Foley interview, supra note 528.

example, a halfway house with which MBMI has contracted still continues to refuse to accept blacks.[531] In addition, some training facilities are still segregated.[532] HEW plans to conduct a compliance review of the Mississippi mental health system within the next year,[533] but does not yet plan to initiate formal enforcement proceedings against these institutions. Hearings had been held for none of them,[534] although in all but one case,[535] formal notification of noncompliance was made in 1968, over six years ago.[536]

HEW Title VI regulations state that if an applicant fails to comply with an HEW Title VI requirement, HEW "shall not be required to provide assistance in such a case during the pendency of" Title VI administrative proceedings.[537] Yet of the five health care facilities deemed in noncompliance, HEW has deferred funds[538] to only

---

531. The Mississippi Board of Mental Institutions is currently trying to resolve this matter or it will find an alternative halfway house for blacks. Id.

532. Id. HEW refers to these remaining problems as minor.

533. Id.

534. HEW has outlined seven stages which occur in administrative proceedings between a determination of noncompliance and the termination of funds: (1) notice of intention to initiate formal enforcement proceedings; (2) hearing before an administrative law judge; (3) decision of noncompliance by administrative law judge; (4) appeal; (5) decision of noncompliance by reviewing authority; (6) report of final decision to House of Representatives and Senate committees having legislative jurisdiction over the program involved; and (7) order terminating funds. Interagency Report, supra note 526.

535. This was the Indiana Masonic Home-Hospital. Formal notification of noncompliance was made to this institution in 1974.

536. Interagency Report, supra note 526.

537. 45 C.F.R. § 80.8(b) (1974).

538. Id. If compliance cannot be achieved voluntarily, HEW is permitted to defer the approval of applications for new funds pending the completion of administration proceedings.

one of these institutions, the Indiana Masonic Home-Hospital. This institution had in fact withdrawn from Medicaid,[539] apparently in order to avoid falling under the Title VI proscription against discrimination. It did not appear likely that the Home-Hospital would submit further applications for Federal assistance. Thus, ironically, the only decision to defer funds was made in a case in which it would provide no leverage for assuring Title VI compliance.

HEW has, in the past, terminated funding to recipients;[540] however, either funding has subsequently been restored or the facility is no longer in existence. For example, in a September 1970 review of admission policies of the California Odd Fellows Infirmary in Saratoga, California, a skilled nursing facility which is a Medicaid provider, HEW found evidence that the infirmary was in noncompliance

---

539. September 1974 Sanchez interview, supra note 374.

540. In the 1960's and early 1970's HEW terminated funding to at least 16 hospitals. Between 1968 and 1971 HEW found that all of these hospitals had come into compliance and the fund terminations were rescinded.

with Title VI.[541] HEW was told by the infirmary's superintendent that there had never been a minority admitted to the infirmary.[542] HEW found that to be eligible for admission to the infirmary, a person must have been, for 20 years, a member in good standing of the Independent Order of Odd Fellows, which operated the infirmary. HEW also found that most minorities were excluded from membership in the

---

541. In another case, on January 2, 1972, HEW terminated assistance to the Ville Platte Medical Center in Ville Platte, Louisiana, as a Medicare provider because it did not meet minimal standards of safety, and because it discriminated against blacks. In a compliance review of July 13, 1971, HEW found segregated entrances and waiting rooms, room assignments based on race, and lack of use of courtesy titles. 1972 HEW response, supra note 385. The Ville Platte Medical Center was later shut down because of dilapidated conditions. Another hospital has now been constructed in its place by the Humana Corporation which operates about 40 additional hospitals throughout the county. The new facility has received Title VI approval from HEW. September 1974 Lowe interview, supra note 374.

542. Memorandum from Daniel R. Huerta, Civil Rights Specialist, HSSB, to Hal M. Freeman, Chief, HSSB, OCR, HEW, San Francisco Regional Office, "Special Review of Odd Fellows Home in California," Sept. 10, 1970. HEW reported that another staff member, in an unofficial statement to HEW, indicated that in the 4 or 5 years she had been at the infirmary, she had never seen a black, Native American, or Asian American patient although she believed that there had been one Mexican American patient in the previous years. Id.

order prior to 1968,[543] and concluded that they were not eligible to use the infirmary. In May 1972, HEW informed the Odd Fellows Home and Infirmary that it was in noncompliance with Title VI and that any application for funds for new programs would be deferred. In September 1973, after an administrative law judge determined that the Odd Fellows Infirmary was in noncompliance, the infirmary was terminated as a Medicaid provider.

In November 1973, the Odd Fellows Infirmary proposed to revise its admissions policy, contact minority organizations and inform them of the revised policy, adopt new standards and procedures for selecting patients from among the applicants for admission, and maintain three beds for nonpaying patients.[544] Although

---

543. HEW determined that the Independent Order of the Odd Fellows was established as an organization of "free white males," which according to its constitution were "of the pure white Caucasian race." All other "races and colors" were excluded from membership. For many years the qualifications for membership contained numerous other references to a variety of racial and ethnic groups indicating whether they were acceptable for membership. For example, Chinese, Japanese, and Polynesians were specifically excluded. Mexicans were eligible provided that they were of "full white blood." The constitution instructed that "a Syrian" was a "white man," but that "an Arab" was not entitled to membership in the order. Representatives of the Odd Fellows asserted to HEW that most racial restrictions were dropped from the Odd Fellows' constitution in 1968, although the constitution continued to state that "a member of lodge...who subsequently learns that he has some colored blood in his veins is not eligible to be advanced in the Order." Memorandum from Floyd L. Pierce, Regional Civil Rights Director, HEW, San Francisco Regional Office, to Louis H. Rives, Director, Operations Division, OCR, HEW, "Compliance of Nursing Homes Operated by Traditional Organizations," Sept. 10, 1970.

544. Letter from R. Range Conklin, Superintendent, Odd Fellows Infirmary, to Peter Holmes, Director, Office for Civil Rights, HEW, Nov. 16, 1973.

the infirmary did not demonstrate that it was in compliance with Title VI by admitting minority patients, funding to the infirmary was resumed solely on the basis of the infirmary's written commitment. Retroactive payments were also made to cover the funds which had been withheld. For the better part of a year the infirmary was required to report racial and ethnic data on the patient population.

As of November 1974, the infirmary still had admitted no minorities. Nonetheless, HEW informed the infirmary that it was in compliance with Title VI and it was no longer required to submit reports on its patients.[545]

---

545. Telephone interview with Ronald Lucas, Equal Opportunity Specialist, HSSB, OCR, HEW, San Francisco Regional Office, Jan. 2, 1975.

Chapter 4

DEPARTMENT OF THE INTERIOR (USDI)[546]

I. Program and Civil Rights Responsibilities

A. Program and Title VI Responsibilities

The Department of the Interior operates several programs which are subject to Title VI of the Civil Rights Act of 1964. For almost ten years after the passage of that act, the Department of the Interior had not identified the Title VI implications of most of those programs.[547] In the past, most of USDI's emphasis was on the monitoring of Title VI problems relating to the Bureau of Outdoor Recreation's (BOR) assistance.[548] During fiscal year 1974, however, USDI made an attempt to determine

---

546. In the course of collecting information for this chapter, no regional offices were reviewed since USDI's Office for Equal Opportunity has no Title VI regional offices (see Section II infra). USDI, itself, has no regional offices. The regional offices of USDI's constituent agencies do not follow the 10 standard Federal region patterns. Office locations vary by the constituent agency.

547. USDI recently informed Commission staff that this "is not a true statement. Our first analysis of our programs was in 1967 which resulted in an agreement with HEW". Letter from William W. Lyons, Deputy Under Secretary, U. S. Department of the Interior, to John A. Buggs, Staff Director, U. S. Commission on Civil Rights, July 2, 1975. The Commission notes, however, that this agreement, which provides for the delegation of certain compliance responsibilities from USDI to HEW, only concerns educational institutions; and less than 11 percent of USDI's budget is spent on education. Budget of the United States Government, at 261 and Special Analyses, at 155, fiscal year 1976.

548. USDI stated:

> In 1972 we sent a questionnaire survey to bureaus and offices on their programs having Title VI implications. We followed up on this questionnaire with interviews with bureau and office officials. The fact that this was done was recognized in the Commission's January 1973 report. The paragraph should reflect our work in this area. Lyons letter, supra note 547.

the civil rights implications of eight other programs, which are operated by the Bureaus of Reclamation and Land Management, the U. S. Fish and Wildlife Service, and the National Park Service.[549]

1. Bureau of Outdoor Recreation

BOR provides grants for the acquisition and development[550] of outdoor recreational facilities.[551] These grants may be used for a wide variety of projects, including acquiring and developing land for picnic areas, inner-city parks, campgrounds, tennis courts, boat launching ramps, bike trails, outdoor swimming pools, and support facilities such as roads and water supplies. All USDI-assisted facilities must be open to the general public and may not be limited exclusively to special groups. BOR encourages States to give priority consideration to project funding in Standard Metropolitan Statistical Areas.

---

549. Interview with John L. Fulbright, Assistant Director for Title VI, and Richard Qualters, Special Assistant to the Assistant Director for Title VI, Office of Equal Opportunity, USDI, September 6, 1974. These eight programs are Small Reclamation projects and Rehabilitation and Betterment projects of the Bureau of Reclamation; Public Land for Recreation of the Bureau of Land Management; Anadromous Fish Conservation, Fish Restoration, and Wildlife Restoration of the U. S. Fish and Wildlife Service; Historic Preservation of the National Park Service; and Youth Corps Conservation program of the Office of Manpower Training and Youth Activities. The Department of the Interior has 58 programs, not including programs of the Bureau of Indian Affairs, with Title VI implications. USDI considers the above nine programs as those having major Title VI implications. Id.

550. The sponsoring agency is responsible for maintenance and upkeep of the project.

551. During fiscal years 1972 and 1973, $200 million and $220 million, respectively, were spent on approximately 7,000 projects. In addition, about $4 million was granted each year to about 20 States for outdoor recreational planning.

Each State must designate an agency through which BOR grant applications are submitted.[552] The State liaison officer, appointed by the Governor to administer the program in the State, has the initial responsibility for determining project eligibility, project need, and priority for fund assistance within the State.

Projects must conform to the requirements of the statewide outdoor recreation plans which each State agency is required by USDI to formulate. These plans attempt to evaluate present and future needs of the States and establish an orderly process for acquisition and development of recreational facilities. Since the civil rights responsibilities of BOR include ensuring that the use of funded facilities is available to all persons, and that equal employment opportunities exist within the park system,[553] USDI could require that project plans include an identification of any special recreational problems or needs of minorities[554] and an outline of steps to remedy these situations. However, no civil rights considerations are required to be included in these plans. Further, no

---

552. State agencies or agencies of political subdivisions, such as cities, counties, and park districts, may apply for assistance. In addition, Indian tribes which are organized to govern themselves and perform the function of a municipal government qualify for assistance under the program. The State or other sponsoring agency must match BOR funds to be used on the project.

553. The applicability of Title VI to the employment practices of recipients is discussed further in Section B 2 infra.

554. For example, deficiencies might include absence of adequate facilities accessible to minority communities or inferior development of such sites.

attempt is made to determine whether facilities are planned for residents in all income groups or to ascertain if all sections of the State or within a large urban area are equitably funded. In fact, as late as 1974 the State plans were not reviewed by USDI's civil rights office, although in July 1975 USDI informed this Commission that this was no longer the case.[555]

2. Bureau of Reclamation

The Bureau of Reclamation operates programs dealing with the development of water resources.[556] It provides Federal loans to organized irrigation districts within congressionally-authorized reclamation projects for planning, designing, and constructing irrigation and water distribution systems in lieu of Federal construction[557] It also provides loans and grants for rehabilitation, improvement, and construction of water resource development projects, including irrigation, municipal and industrial water supplies, hydro-

---

555. Lyons letter, supra note 547. Mr. Lyons stated that "We are now working with BOR and State officials to analyze possible problems and subsequently make recommendations if warranted." Id.

556. The Bureau of Reclamation operates only in the 17 contingous Western States. Regional offices are located in Boise, Idaho; Sacramento, Calif.; and Denver, Colo.

557. From 1956 through fiscal year 1973, only 10 projects had been funded. Funds are advanced annually for these projects. In fiscal years 1972 and 1973, the funds totalled approximately $1,950,000 and $932,000, respectively.

electric power, flood control and river regulation, water quality control, outdoor recreation, and fish and wildlife enhancement.[558]

Throughout the country there are relatively few minorities who own land and water rights in the Bureau of Reclamation's irrigation districts. Since minorities are not traditionally members of such groups as Chambers of Commerce, which are usually responsible for organizing irrigation districts, the boundaries of the districts may be drawn to exclude them.[559] USDI staff speculated that many minorities may have been squeezed out of irrigation districts when they were first being formed. For instance, nonminorities, aware that irrigation districts were being formed and that these districts would bring a marked increase in the price of land, may have persuaded minorities to sell land which was within the boundaries

---

558. Authorization for such projects is provided by The Small Reclamations Projects Act of 1956 (43 U.S.C. §§ 422a, et seq. (1970)) and The Reclamation Act of 1902 (43 U.S.C. §§ 372-3, 383, 391-2, 411, 416, 419, 421, 431-2, 434, 439, 461, 491, 498, (1970)). As of fiscal year 1973, fifty projects were financed under The Small Reclamations Projects Act. During fiscal years 1972 and 1973, total loans advanced under this Act were worth $13,754,000 and $18,047,000, respectively. Under The Reclamation Act of 1902, funds expended during this same period totalled approximately $400 million annually.

The Bureau of Reclamation also provides for rehabilitation and improvement of irrigation facilities on projects which were constructed by the Bureau of Reclamation and to which the United States holds title. Approximately $5,255,000 in loans to nine projects were provided during fiscal year 1973.

559. Such problems have previously been noted by this Commission. See letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to Donald G. Waldon, Principal Budget Examiner, Natural Resources Program Division, Office of Management and Budget, June 14, 1972.

of the planned irrigation district.[560] Title VI staff claim, however, that under Title VI, there is little that USDI could do to remedy any exclusions which occurred prior to the passage of the Civil Rights Act of 1964. They state that the major factor excluding minorities in recent years is that many minorities cannot afford to buy land within the irrigation districts.[561]

The problem of excluding minorities from irrigation districts today, however, is much more complex than simply not being able to afford land within a district. For example, many poor persons of Spanish speaking background live in unincorporated rural colonias[562] in the Rio Grande Valley in Texas. Many of these colonias remain waterless. They have no water lines, no sewer systems, and no drainage systems; but nearby water districts have denied them service.[563]

---

560. Fulbright and Qualters interview, supra note 549. USDI later stated that it had "no evidence that any of this speculation is true". Lyons letter, supra note 547.

561. Id.

562. Colonias are rural communities usually consisting of from 10 to 50 families which, in Texas, are made up almost exclusively of persons of Spanish speaking background.

563. One recent example of such a case occurred with regard to the McAllen, Texas, Water District, which is not a USDI recipient. A nearby colonia, Balboa, had been applying for annexation with the city of McAllen's water district for years. Although Balboa's needs amounted to only one percent of McAllen's daily water supply, in August 1974 the city's public utilities board insisted that water could not be provided until McAllen's new water plant was completed. Yet at the same time, the city had just extended water lines out beyond the city limits to a new Free Trade Zone Building. Northcott, The Texas Observer, "The Observer goes to the Valley," August 23, 1974.

USDI stated that:

> When situations similar to this are brought to the attention of our Title VI staff, we attempt to resolve the problem through investigation and/or coordination with Bureaus within the Department. Bureau of Reclamation officials have been especially helpful in these problems.... Additionally, a top official in the Title VI Division was suspended for not investigating a case of this type. Lyons letter, supra note 547.

Irrigators not only do not want to share the water, but they also do not want the expense of treating it for consumption. Thus, those colonias which are within the boundaries of a water district often are not provided with treated potable water. As a result, in 1971 irrigators influenced the passage of a bill allowing water districts in rural areas to exclude urbanized areas such as colonias from water districts.[564] As soon as the law was passed, Rio Grande Valley water districts started excluding colonias from their boundaries.[565]

Thus, there is evidence that minorities even today are being blatantly excluded from irrigation districts. This evidence strongly contradicts USDI's assertion that it cannot intervene because such problems occurred prior to the passage of Title VI. Further, USDI staff were unaware that pockets of minority farmers even existed. They have never collected sufficient data to make this determination, as they believe this is not a responsibility of the Title VI office.[566]

---

564. Vernon's Annotated Texas Civil Statutes, Article 8280-3.2.

565. Another piece of legislation, House Bill 1668, was proposed by the Texas House Interim Water Study Committee which would make it even more difficult for colonias to enter water districts and would abolish the water control and improvement districts that presently have the powers to provide water to the colonias. In May 1975, however, the legislation automatically died because it never reached the house floor for a vote before the Congress adjourned for the year.

566. Fulbright and Qualters interview, supra note 549.

Exclusion of minorities from irrigation districts is possibly exacerbated because the Office of Management and Budget (OMB) requires a favorable ratio between the cost of an irrigation project and the benefits derived from it. Thus, pockets of minority farmers living outside the boundaries of a proposed district could be excluded if extending the district to encompass their farms would result in an unfavorable ratio between benefits and cost. USDI has not, however, proposed to OMB new procedures allowing a less favorable cost-benefit ratio for the express purpose of extending irrigation to minority farmers.[567]

USDI has taken no responsibility for ensuring that minorities located outside irrigation districts receive USDI benefits. In June 1972, the Commission recommended that USDI conduct a survey of potential beneficiaries of reclamation projects, and compare the race and ethnicity of potential beneficiaries with actual beneficiaries, in

---

567. Procedures enabling special assistance to minority farmers might be established analogously to principles followed by the Federal Government under Executive Orders 11458 and 11625 which prescribe a policy of fostering the development of minority business enterprise. Further, more flexible procedures would not appear to be unreasonable in light of the fact that USDI has funded many projects in which the anticipated cost-benefit ratio was not realized because of cost overruns and overestimations of the anticipated benefit. R.L. Berkman and W. Viscusi, Damming the West 78-81 (1973). In addition, USDI has not attempted to include in its analysis a quantification of the benefits to the Nation of equal opportunity in its programs. Taking these benefits into account would provide a more favorable cost-benefit ratio.

order to establish who is benefiting from reclamation programs.[568] If it were disclosed that the nature of the program regulations or the practices of recipients have resulted in a disproportionate exclusion of minorities, steps would have to be taken to remove any impediments to equitable distribution of benefits. In addition, measures would have to be taken to correct the effects of past discrimination and to prevent the continuation of such discriminatory practices and procedures. As of April 1975, USDI had undertaken no such survey.

3. Bureau of Land Management (BLM)

The Bureau of Land Management operates programs which provide use of public lands at a minimum charge to groups or individuals under certain circumstances. Persons owning land adjacent to public lands may lease such lands at less than market value for such purposes as grazing or mineral use. In addition, BLM makes grants of public lands to State and local governments for recreational or other purposes.

---

568. Miller letter, supra note 559. USDI staff stated that:

> We have not surveyed water districts as recommended by the Commission because of manpower limitations and program priorities. We have surveyed those districts we reviewed onsite. Illustrative of these surveys is the information on page [256] of the report which gives minority percentages for the Donna Irrigation District. Lyons letter, supra note 547.

In the spring of 1973, USDI had begun to study the possible ways in which discrimination might occur in these programs;[569] to ascertain, for example, if lands used by such groups as Boy Scouts, Girl Scouts, gun clubs, and archery clubs did not serve to benefit minority group members proportionately. USDI requires that recipients of Federal property promise not to discriminate in the use of that property and it has begun to monitor the recipients to ensure that this policy is being carried out.

4. U.S. Fish and Wildlife Service (FWS)

The U.S. Fish and Wildlife Service provides both financial and technical assistance to States, municipalities, Indian tribes, and individuals in order to preserve or improve sport fishing and hunting facilities.[570] The principal recipients of FWS funding are fish and game commissions which use USDI funding for such purposes as developing and managing fishing and hunting areas, restoring wildlife areas, financing ocean laboratories, and conducting biological research and a Hunters

---

569. Response to this Commission's April 1973 questionnaire [hereinafter referred to as USDI response] contained in a letter from Edward E. Shelton, Director, Office for Equal Opportunity, USDI, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, June 13, 1973.

570. The following were the fiscal year 1973 apportionments by the U.S. Fish and Wildlife Service: Federal wildlife restoration -- $37,263,500 and Federal fish restoration--$12,100,000. Wildlife restoration funds come from the 11 percent excise tax on sporting arms and ammunition and the 10 percent excise tax on pistols and revolvers. Distribution is based on a formula taking into account the number of hunting license holders in each State. Fish restoration funds come from the 10 percent excise tax on certain articles of fishing tackle. Distribution is made from the number of fishing license holders in each State.

Safety Program.[571] After reviewing the FWS in fiscal year 1974 to determine the possible ways in which discrimination could occur in its programs,[572] USDI determined that one of the biggest problems in all States is the failure to employ women and minorities in professional positions in various fish and game commissions and in their programs.[573]

5. National Park Service

The only program under the National Park Service covered by Title VI is the Historic Preservation Program which provides for the restoration and preservation of national historic sites under the National Historic Preservation Act of 1966. Under this act the Secretary of the Interior is authorized to maintain a National Register of Historic Places as an inventory of districts, sites, structures, buildings, and objects significant in American history, architecture, archaeology, and culture.[574]

---

571. USDI's staff reported that it was difficult to influence nondiscriminatory policies for fish and game agencies, as their principal source of funding comes from license and permit fees collected by State and local agencies. Fulbright and Qualters interview, supra note 549.

572. In 1973, the only program USDI was reviewing for distribution of services was the Hunter Safety Program which provides funds for firearms safety training. See pp. 256-57 infra.

573. For example, as late as 1971, the State of Florida told a woman with a masters degree in biology applying for a scientific research position that they only hired women for clerical positions. USDI reported that this policy has now been changed. Fulbright and Qualters interview, supra note 549.

574. As of September 1974, approximately 9,500 historic properties were listed on the National Register, which is growing at the rate of 40 percent a year.

Grants are awarded to the National Trust for Historic Preservation[575] and to States and territories for carrying out projects.[576] Projects[577] must involve historic places listed on the National Register in order for funding to be awarded.[578] Of the funded projects, few appear to concern minority and/or female history.[579]

The National Park System is not covered by Title VI, since this is a direct assistance program.[580] In this case, USDI itself is responsible for operating a park system which does not discriminate against minorities or women. In accordance with this responsibility, in July 1974 the National Park Service named 13 black historic sites within its park

---

575. The National Trust for Historic Preservation is a nongovernmental agency which maintains 12 National Historic Properties. Funds received are used to maintain these properties and develop projects on the sites of these properties. In addition, the National Trust provides educational and technical assistance to the States in acquiring and developing historic sites.

576. Since the inception of the program until fiscal year 1973, there was a total of approximately 470 grants, with nearly $51 million having been granted to States and more than $4 million having been granted to the National Trust. Grants for fiscal year 1972 totalled $5,535,950 and for fiscal year 1973 equalled $5,800,000.

577. Projects are for a wide variety of activities including research, development, renovation, and acquisition.

578. Each State and territory must submit an annual State Historic Preservation Plan to USDI listing proposed projects.

579. USDI, National Park Service, Historic Preservation Grants-in-Aid (December 1972). USDI does not maintain a separate list of minority-oriented historical sites.

580. Direct assistance is assistance which is provided to the beneficiary by the Federal Government without passing through an intermediary such as a State government.

581

system. USDI, however, does not monitor national parks to ensure that nondiscrimination is practiced throughout.

581. These included the Dexter Avenue Baptist Church in Montgomery, Ala., of which Martin Luther King, Jr., was pastor from 1954-59; Fort Des Moines Provisional Army Officer Training School in Des Moines, Iowa, the base of the first black officers training camp in 1917; the Harriet Tubman Home for the Aged in Auburn, N.Y., established by Harriet Tubman, one of the most famous conductors of the Underground Railroad.

While the USDI's selection of these 13 sites associated with the history of blacks in America is both historically and culturally significant, it is not considered by many blacks to be as important as the need for more top-level blacks in policymaking positions at USDI. Telephone interview with John Duncan, former Special Assistant to Secretary of the Interior Stewart Udall, under the Johnson administration, Sept. 10, 1974. Mr. Duncan stated that for historical purposes these sites were noteworthy, but for purposes of economic development and affirmative action programs for blacks, the sites should not be considered a significant step forward for blacks at Interior.

The counsel for the Washington bureau of the National Association for the Advancement of Colored People (NAACP) stated that he believed that USDI had an extremely poor hiring record for blacks in comparison to other Federal agencies and indicated that a new hiring policy would be more significant than the selection of historical landmarks. He said the agency had not encouraged blacks to go into technical professions such as mining engineering. Telephone interview with Frank Pohlhaus, Counsel, Washington Bureau, National Association for the Advancement of Colored People, Sept. 10, 1974. Employment statistics from 1974 showed that out of 58,961 fulltime permanent employees at USDI, only 4.4 percent of USDI's total employment were black, 2.1 percent were of Spanish speaking background, and 0.8 percent were Asian American. U.S. Department of the Interior Output Format 03, Dec. 31, 1974. Compared with total employment in the Federal Government, USDI's record is extremely poor. Of the total Federal employment in 1973, 16.1 percent were black, 3.2 percent were of Spanish speaking background, and 0.9 percent were Asian American. Minority Group Employment in the Federal Government, Nov. 1973, prepared by the United States Civil Service Commission. USDI is even more deficient in employment in higher grade levels. Of the total USDI employees occupying top-level positions of Grades 13-18, only 0.9 percent were black, 0.6 percent were of Spanish speaking background, and 1.0 percent were Asian American. U.S. Department of Interior Output Format 03, Dec. 31, 1974. Native American employment is relatively higher as a result of the Indian Reorganization Act of 1934 which provides for an employment preference policy for qualified Native Americans in USDI's Bureau of Indian Affairs (BIA). The policy is designed to further the cause of Native American self-government and to make BIA more responsive to the needs of its constitutent groups. Indian Reorganization Act, 25 U.S.C. § 472 (1970). See also Morton v. Mancuri, 417 U.S. 535 (1974). Congress also enacted new Indian preference laws as part of the Education Amendments of 1972, giving Native Americans preference in Government programs for training teachers of Native American children.

USDI wrote to this Commission:

> We are concerned about paragraphs 2 and 3 in this footnote. Your report was to evaluate Interior's Title VI enforcement. Paragraphs 2 and 3 deal exclusively with Federal employment. These paragraphs detract from the purpose of the report and should be deleted. Lyons letter, supra note 547.

6. Youth Conservation Corps (YCC)

The Youth Conservation Corps, which began in 1971, is a summer program of work camps for youths between the ages of 15 and 18. This program hires youths to work in camps in various locations including national parks, forests, fish hatcheries, wildlife refuges, and Indian reservations. There were 52 camps operated by the Bureaus of Reclamation, Land Management, and Indian Affairs, the U.S. Fish and Wildlife Service, and the National Park Service.[582] Camps are both residential and non-residential and all USDI camps are coeducational. Unlike most other Federal work programs,[583] YCC is not limited to the poor but draws from all income levels. Title VI responsibilities include monitoring the enrollment in camps to ensure that minorities are provided equal opportunity for participating in the program.[584]

B. Other Civil Rights Responsibilities

1. Coverage of Sex Discrimination

A serious limitation of the Civil Rights Act of 1964 is that it does not prohibit sex discrimination in the distribution of Federal assistance. To compensate for this limitation, in March 1973 USDI promulgated regulations prohibiting discrimination on the

---

582. The program enrolled approximately 1,500 youths annually. The Forest Service of the Department of Agriculture (USDA) enrolled an additional 1,500. Funds for operating the camps were $3.5 million total for both USDI and USDA for the summer of 1973. For 1974, $10 million was requested.

583. These include such Department of Labor programs as the Job Corps, Operation Mainstream, Neighborhood Youth Corps, and the Concentrated Employment Program.

584. See pp. 257-58 infra.

basis of sex in its federally-assisted programs.[585] USDI used the Secretary of the Interior's statutory authority[586] as the basis for this change, which was made in the form of an amendment to the Title VI regulations. The new language reads as follows:

> Wherever the term "on the grounds of race, color, or national origin" appears in this part, it is changed to read "on the grounds of race, color, sex, or national origin."[587]

Although this is a creditable accomplishment which few other agencies have attempted, unfortunately, USDI's action may have been illegal, since it did not obtain the required Presidential approval for amendment.[588] There is, however, at least one other way in which USDI could have effected a prohibition of sex discrimination in the programs which it funds. USDI could have issued a regulation prohibiting

---

585. 43 C.F.R. §§ 17.1, et seq. (1974).

586. 5 U.S.C. §§ 301, et seq. (1970), 3 U.S.C. §§ 301, et seq. (1970), and 42 U.S.C. § 2000d-1 (1970).

587. 43 C.F.R. § 17.1 (1974).

588. Section 602 of the Civil Rights Act of 1964 states that each Federal agency extending Federal financial assistance is authorized and directed to issue rules and regulations for the implementation of Title VI. 42 U.S.C. § 2000d-1 (1970). However, no such regulations can become effective unless approved by the President. This authority was delegated to the Attorney General through Executive Order 11764 in January 1974.

sex discrimination independently of its Title VI regulations.[589] USDI's unfortunate choice of methods to accomplish a prohibition against sex discrimination in its programs probably arose out of its failure to coordinate with the Department of Justice on how best to accomplish its goals.[590]

USDI has begun to implement its prohibition against sex discrimination. During fiscal year 1974, compliance reviews included an assessment of possible sex discrimination. This assessment often focused primarily on

---

589. It appears that the Secretary of the Interior has the authority to issue such regulations under the general grant of power in 5 U.S.C. § 301 (1970):

> The head of an Executive Department or military departments may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

590. In response to this evaluation, USDI stated:

> Since no one has passed on the legality of this regulation, we are of the opinion that the sentence beginning with "USDI's unfortunate choice ..." should be deleted from the report. Lyons letter, supra note 547.

advisory boards and employment, especially in the BOR-funded park systems. In addition, data on sex of participants in the Youth Conservation Corps program and Hunter Safety Programs were being monitored. As of April 1975, however, one problem concerning women which USDI did not look into was that of sex segregation in sports events held at BOR-funded park systems. For example, parks were permitting the use of such facilities as baseball diamonds and basketball courts by private groups which refused to utilize women players, and USDI did not know if funded parks were permitting use of picnic or campsites and other facilities by clubs or other groups which restrict their membership to only one sex. Moreover as of July 1975 USDI stated that it had no plans to investigate this problem systematically.[591]

2. Coverage of Employment Practices of Recipients

The employment practices of recipients of Federal assistance are subject to Title VI coverage if a primary purpose of this assistance is to provide employment or if discriminatory employment practices will tend to exclude any individuals from participation in, to deny them the benefits of, or subject them to discrimination under any program of Federal assistance.[592] USDI officials have concluded that a relationship exists between nondiscrimination in employment and minority and female participation in many USDI programs,[593] since they believe that eligible minority and female group members are less likely to achieve full participa-

---

591. USDI stated that:

> Our enforcement in this area must be decided on a case by case basis. To date, no cases related to this aspect of our program has been brought to our attention. Additionally, in light of the fact that this is a recent decision, we have had little opportunity to explore this area. Id.

592. 42 U.S.C. § 2000d-3 (1970).

593. USDI response, supra note 569.

tion in a program if no or few minorities or women are employed in it.[594] Applicants for assistance are now required to commit themselves to nondiscrimination in their employment practices when they sign the assurance of compliance required of all applicants for these programs.[595] USDI, however, has not informed its applicants what actions constitute employment discrimination[596] or what is expected of them in complying with the assurance. A comprehensive set of standards concerning equal opportunity in employment are those reflected in the guidelines and decisions of the Equal Employment Opportunity Commission[597] (EEOC); but USDI has not adopted those standards as its own by incorporation into its own regulations so that its applicants will be on formal notification that to be in compliance with the assurances they sign, they must be in compliance with EEOC standards.

Similarly, USDI requires applicants and recipients to have an affirmative action plan on file, although the plans are only required if a primary purpose of the assistance is employment or if employment practices tend

---

594. Id.

595. This assurance is part of the standardized Federal grant-in-aid application and is discussed further in Section III B, infra.

596. For example, a recipient may not know that terminating female employees because they are pregnant constitutes sex discrimination.

597. EEOC's sex discrimination guidelines are published at 29 C.F.R. §§ 1604 et seq. (1974). Its guidelines for employee selection procedures are published at 29 C.F.R. §§ 1607, et seq. (1974). Its guidelines on discrimination because of national origin are published at 29 C.F.R. § 1606 (1974).

to affect the services and benefits rendered.[598] The plans are not required to conform to the standards set forth in Revised Order No. 4, issued by the Office of Federal Contract Compliance of the Department of Labor.[599] This order requires a utilization analysis of the employer's work force to determine if there are fewer minorities or women in each job category than would be expected by their availability for the job. If minorities are underutilized in any job category, the order requires the employer to take appropriate steps, including the

---

598. USDI Departmental Manual, Part 506 DM 1-5, 506.2.4A(13), (May 10, 1974). Commission staff comments concerning USDI's affirmative action requirement are contained in letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to John L. Fulbright, Assistant Director for Title VI, USDI, Nov. 29, 1973.

599. Revised Order No. 4 outlines requirements by the Office of Federal Contract Compliance of the Department of Labor for being in compliance with Executive Order 11246 by nonconstruction contractors. Executive Order 11246, 3 C.F.R. 173 (1973), 42 U.S.C. § 2000e (1970). Office of Federal Contract Compliance, Revised Order No. 4, 41 C.F.R. §§ 60-2, et seq. (1974). While the authority of this order itself extends only to companies that are contractors of the Federal Government, the order describes the steps an employer should take to ensure nondiscrimination in employment practices and to eliminate affirmatively underutilization of minorities and women. Revised Order No. 4 is discussed at length in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 3 (July 1975).

development of numerical goals and timetables, to remedy the underutilization.[600]

USDI does not generally review the required affirmative action plans except in the course of compliance reviews or if USDI has an indication that there may be noncompliance.[601] Moreover, even where USDI reviews the plans, it does not approve or disapprove them.[602] This gives less credence to

---

600. USDI staff stated that:

> Order No. 4 is not used in connection with our program. We request that States use the guidelines "Affirmative Action for State and Local Governments" published by the U. S. Civil Service Commission. Lyons letter, supra note 547.

This Commission believes that:

> ...the [Civil Service] Commission's guidelines do not require Federal agencies adequately to assess the disparities in their employment profiles, or to develop goals or annual objectives for eliminating such disparities, or to report on any progress made in improving the status of minority and female employment in their work forces. Instead,...the Commission's guidelines emphasize the development of vaguely described personnel programs.... To Eliminate Employment Discrimination, supra note 599, at 89.

601. USDI believes that this is a responsibility of the State civil service commissions or the Equal Employment Opportunity Commission. Fulbright and Qualters interview, supra note 549. This is not, however, a responsibility which is carried out by either of these agencies. See To Eliminate Employment Discrimination, supra note 599, at chs. 1,2, and 5.

602. USDI stated:

> We do not approve or disapprove affirmative action plans in order to avoid duplication of effort or conflict with other agencies. During 1974 we attempted to negotiate an agreement with EEOC. The efforts to reach an agreement failed. Lyons letter, supra note 547.

This Commission notes, however, that interagency coordination prior to setting requirements for recipients' plans is far more likely to reduce duplication of effort or conflict with other agencies than is abdication of responsibility for monitoring the plans once they have been developed.

USDI's requirements for the contents of these plans because, if USDI looks at an inadequate plan[603] and does not require changes, approval is implicit and the employer would have a logical reason for assuming that the plan was adequate.

Despite these deficiencies, the requirement of an affirmative action plan is an improvement over the past system. During fiscal year 1973, plans were required to be developed only for those recipients which were reviewed and were found to be deficient in minority and female employment.

II. Organization and Staffing

The Title VI staff of USDI's Office for Equal Opportunity (OEO) is located in the headquarters office. This staff is headed by the Assistant Director for Title VI, a GS-15,[604] whose major responsibilities include developing and implementing civil rights programs, training staff, processing complaints, and providing technical assistance to program staff.[605] Although he also spends time drafting regulations and instructions, he has insufficient status

---

603. In response to the Commission's request for affirmative action plans, the only plan submitted as a sample by USDI did not even meet USDI's requirement for setting numerical goals and timetables but merely stated that it would set equitable goals.

604. John L. Fulbright, the Assistant Director for Title VI, had been in this position for almost three years. He had previously worked for two years as an Equal Employment Opportunity Officer in the U.S. Fish and Wildlife Service.

605. Lyons letter, supra note 547.

for ensuring that these are fully executed, as his position in USDI does not enable him to critically advise the program staff[606] of the bureaus with significant Title VI responsibilities.[607] The Assistant Director reports to the the Director of OEO, who in turn reports to the Under Secretary of USDI.[608] There are a total of 100 staff members within OEO,[609] of whom only 11 are in the Title VI office. In addition to the Assistant Director these include a special assistant, five compliance officers, one equal opportunity trainee, and three support staff.[610]

---

606. Title VI responsibilities for program staff in constituent USDI agencies include: disseminating to applicants and recipients information on USDI Title VI policies, requiring that applicants and recipients submit signed assurances of Title VI compliance, requiring applicants and recipients to collect and maintain data on minority and female participation in Federal assistance programs, and ensuring minority and female participation in the planning and development of federally-assisted projects. USDI Departmental Manual, supra note 598.

607. USDI stated:

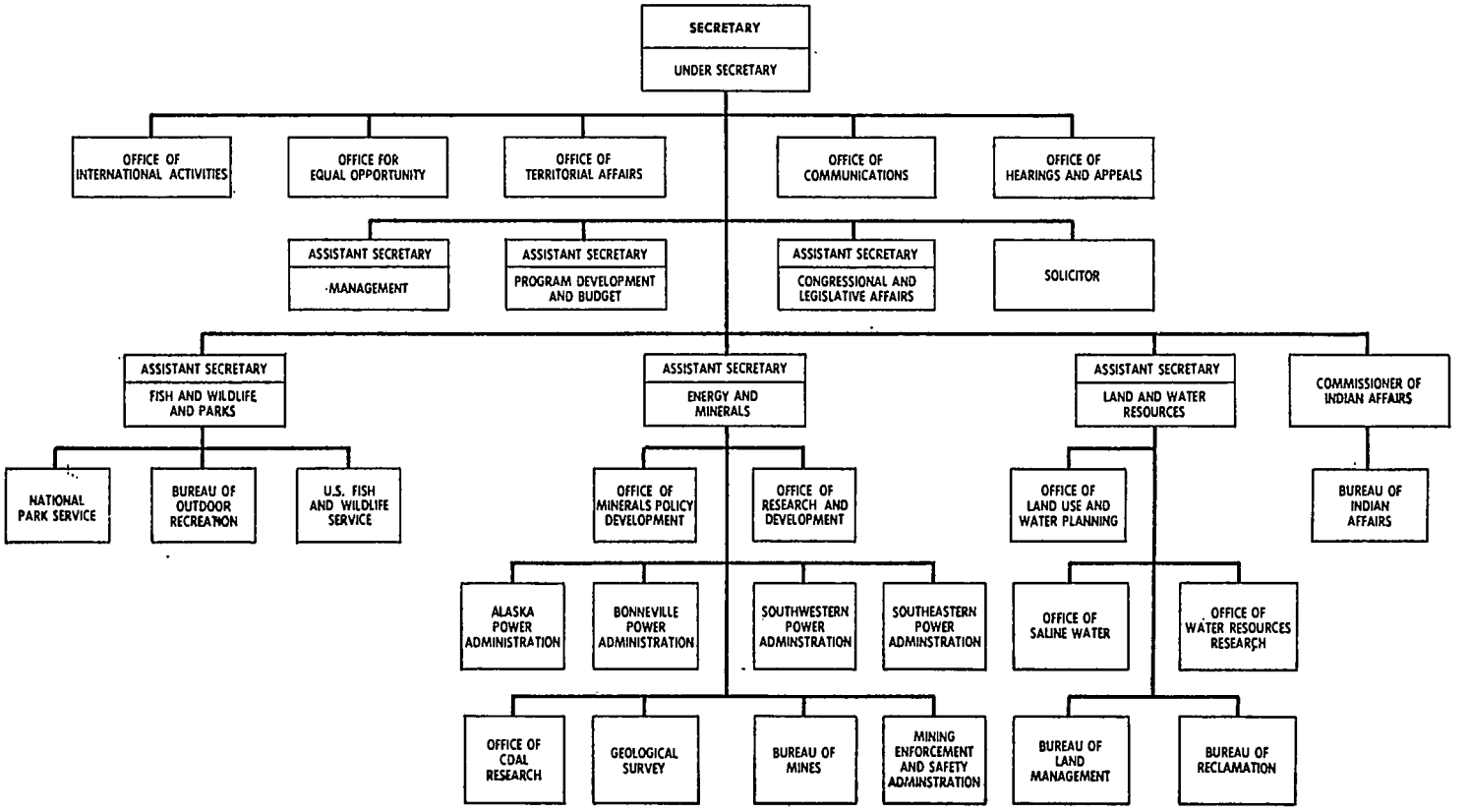
> The Assistant Director under the authority of the Director through the provisions of Part 210 /of USDI's Department Manual/ has full authority for ensuring that all Title VI regulations and instructions are executed by program staff of the bureaus. Lyons letter, supra note 547.

608. See Exhibit 6 on p. 232 infra.

609. The bulk of USDI's Office for Equal Opportunity staff is assigned to contract compliance. Seventy staff members, allocated among Washington, D.C.; Anchorage, Alaska; Denver, Colo.; and Arlington, Va. offices, are assigned to contract compliance. Twelve others are assigned to the Department's Federal Employment Program in Washington, D.C. and seven are in the Office of the Director of OEO.

610. The equal opportunity trainee and one of the support staff are temporary positions.

DEPARTMENT OF THE INTERIOR



July 1, 1974

Title VI officials have often expressed frustration with the limited size of their staff and the difficulty they have in carrying out many of their objectives with so few people.[611] For example, USDI hopes to be able to expand the coverage of its Title VI efforts beyond the nine programs it has already begun to review.[612] Moreover, the small staff limits the amount of followup activity conducted.

In addition, USDI expects to receive more complaints of discrimination as a result of its effort to publicize the requirements of Title VI.[613] If this happens, more staff will be needed to investigate and handle the additional complaints. Further, USDI believes that its programs and requirements could be more effectively carried out if it were able to establish Title VI field offices.

---

611. Fulbright and Qualters interview, supra note 549.

612. Telephone interview with Richard Qualters, Special Assistant to the Assistant Director for Title VI, USDI, Sept. 12, 1974. These nine programs are identified in note 549 supra. USDI has a total of 58 grant programs subject to Title VI.

613. September 1974 Qualters interview, supra note 612. In the course of its compliance reviews in fiscal year 1974, OEO contacted local minority groups. See note 643 infra. These groups often indicated that they had previously been unaware that USDI had a civil rights program and expressed an interest in bringing relevant problems to USDI's attention. Fulbright and Qualters interview, supra note 549. In early 1975 USDI published a Title VI brochure to inform the public of the obligations and prohibitions imposed by Title VI. See note 704 infra.

III. Compliance Mechanisms

A. Departmental Manual

USDI took an inordinate amount of time in issuing the comprehensive[614] administrative procedures necessary for an effective compliance program.[615] These procedures are contained in a May 1974 chapter on Federal assistance programs which is included in USDI's Departmental Manual for the use of USDI staff.[616] The chapter outlines the specific civil rights responsibilities of the Office for Equal Opportunity, of USDI's constituent agencies, and of their recipients. It addresses such issues as affirmative action plans, racial, ethnic, and sex data collection, appointment of minorities and women to advisory boards, and requirements for carrying out complaint investigations[617] and preaward and postaward compliance reviews.

The manual chapter lacks some important sections which had been included in earlier draft versions. For example, in a 1973 draft of this chapter, USDI had planned to require a Minority Impact Statement to be submitted with all initial applications for Federal assistance to the bureau granting such assistance. The proposed

---

614. USDI stated that, "/this/ is an incorrect statement. Prior to the centralization of enforcement in the office for Equal Opportunity, Title VI was covered in /a 1966 Departmental Manual/." Lyons letter, supra note 547.

615. USDI staff stated that preparation of this chapter began in April 1971. The first draft of this chapter took 18 months to complete. This draft contained no complaint resolution procedures and no listing of civil rights responsibilities of the State officials involved in its programs. These omissions have been corrected in the final chapter. Thus, it took USDI over three years to issue these procedures.

616. USDI Departmental Manual, supra note 598 at 506.2.1, et seq.

617. The Manual's treatment of each of these issues will be discussed further throughout this section. These issues and others were discussed in comments made by this Commission on the proposed chapter. See Miller letter, supra note 598.

statement would have included a report of how minorities would be affected by any land acquisition process involved in the grant and how minorities would be informed that programs were operated in a nondiscriminatory fashion. Also to be included in the statement were racial, ethnic, and sex data on the members of any advisory committees used in the program as well as information on action taken to involve minority citizens in all phases of the program. Although the requirement for a Minority Impact Statement would have been an asset to USDI's Title VI program,[618] this requirement has been deleted from the final version of the chapter.

Another deficiency of the manual chapter is that the requirement that an applicant or recipient have an affirmative action plan deals only with employment.[619] Although an early draft extended the requirement to deficiencies in program delivery and, therefore, mandated that goals be set to ensure that the services provided by the recipients are equitably utilized by minorities and women, no mention is now made concerning this aspect of affirmative action.

---

618. For maximum effect, however, it would have been necessary for USDI to strengthen the proposed requirement. See Miller letter, supra note 598. The major deficiency of the statement was its failure to require an analysis of the anticipated impact of a proposed project on women or minorities. For example, the applicants would not have been required to assess the effects upon the minority community of constructing a recreational facility at a particular location or to determine whether a proposed irrigation project would adequately serve minority farmers in the location of that project.

619. USDI Departmental Manual, supra note 598, at 506.2.4.A (13). The limitations on employment requirements are discussed earlier in Section I B 2 supra.

B. Assurances

Prior to fiscal year 1973, all applicants for USDI assistance were required to sign DI Form 1350, assurance of compliance. In a signing this form, applicants agreed not to deny benefits to, exclude from participation in, or otherwise discriminate against any person on the grounds of race, color, or national origin in its programs.

During fiscal year 1973, USDI replaced DI-1350 with a standardized grant-in-aid application for State and local governments which are recipients of Federal aid.[620] Circular A-102, which is the General Services Administration's instruction for uniform administrative requirements for Federal grants-in-aid to State and local governments, requires applicants to sign a commitment to comply with Title VI. In the case of nonconstruction grants, the applicant is required to commit itself, in accordance with Title VI, to refrain from employment discrimination where discriminatory employment practices will result in unequal treatment of persons who are or should be benefitting from the federally-assisted activity.[621] In the case of construction grants, however, the assurance contains no provision relating to employment discrimination.

Thus, Circular A-102 does not require that there be nondiscrimination in the employment practices of a facility constructed with Federal money.

---

620. Office of Management and Budget Circular A-102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments," Attachment M, Standard Forms for Applying for Federal Assistance, Sept. 8, 1972. Responsibility for this Circular and its implementation was transferred to the General Services Administration by the Office of Management and Budget, Bulletin No. 74-4, "Transferring Circular Responsibility to the General Services Administration," Aug. 31, 1973.

621. In the case of nonconstruction grants applicants also must promise not to discriminate in employment where a primary purpose of the grant is to provide employment.

omission is serious because, for example, even if a park has received no Federal financial assistance other than for construction, the employment of park personnel serving the public, such as lifeguards, sports directors, and other park attendants, is covered by Title VI.[622] Since the bulk of BOR funds are used for construction and land acquisition, OMB Circular A-102 undercuts the requirements which USDI believes should be imposed on its recipients.[623]

A further weakness of A-102[624] is that it does not require the applicant to commit itself to nondiscrimination on the basis of sex. However sex discrimination is prohibited by USDI regulations. Thus, applicants

---

622. Id. USDI believes that its recipients' employment practices are often covered under Title VI. Coverage of employment practices of Title VI recipients is discussed in detail in Section I B 2 supra.

623. USDI's position regarding this omission is unclear. In June 1973, USDI's Office for Equal Opportunity, speaking on behalf of the Department, informed this Commission that:

> What we feel is not taken under consideration is that once a project is developed and the construction of the facility is completed, the facility comes under the purview of Title VI....We were not consulted on this matter until the circular was completed. USDI response, supra note 569.

In July 1975, however, USDI informed this Commission that:

> Our discussion with OMB about A-102 took place prior to final printing. OMB did not undercut our requirements. In fact, the reason we did not pursue the question further was on advice from our Solicitor. It was his opinion that the assurance was sufficient to cover employment if it became necessary to pursue employment with a recipient. Lyons letter, supra note 547.

624. Limitations of Circular A-102 are discussed in more detail in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort --1974, Vol. VII, ch. 1 (in preparation).

for USDI assistance may be unaware of their obligation to provide equal opportunity on the basis of sex in USDI-assisted programs.

C. Preaward Reviews

A preaward review is a compliance technique which is used to determine the Title VI compliance status of an applicant prior to the award of Federal financial assistance. Few onsite preaward Title VI reviews were performed by USDI in the past, as OEO officials stated that there was an absence of such authority in its departmental regulations.[625] However, with the issuance of USDI's new manual chapter in 1974 came the sanction for performing such reviews. USDI designates for a preaward review all applicants applying for Federal financial assistance of $500,000 or more, applicants which have not complied with recommendations by OEO, and applicants which have previously discriminated against persons on the grounds of race, color, sex, or national origin.[626]

Among those items which applicants subject to a preaward review are required to submit include: (1) a map indicating the project location, the location of facilities and/or projects of a similar nature, and the areas where there are concentrations of members of minority groups; (2) brochures and literature relating to the project and/or program under which the project is administered; (3) a description

---

625. Interview with John L. Fulbright, Assistant Director for Title VI, Office of Equal Opportunity, USDI, June 26, 1973.

626. USDI Departmental Manual, supra note 598, at 506.3.1, et seq.

of advisory board or commission membership detailing the participation of members of minority groups and women; (4) statistics which show the total employment of members of minority groups and women by category[627]; and (5) if available, a copy of the applicant's civil rights policy statement and affirmative action plan.[628] USDI fails to request, however, racial, ethnic, and sex data on those persons served by the project or program. Thus, USDI cannot determine whether the project or program will reach minorities or women on an equitable basis.

The fact that USDI has added preaward reviews to its compliance program is an important step forward, as it should enable USDI to correct Title VI deficiencies prior to the release of funds. For example, if, prior to awarding BOR grants for the acquisition of land for recreation purposes, a review discloses deficiencies, such as in site selection, the applicant can be required to correct them prior to the release of funds.[629]

---

627. According to the manual, the following employment categories should be used: supervisory, professional, technical or skilled, clerical, and laborers. Id., at 506.3.7 (2)(g).

628. Id., at 506.3.7 (2)(h).

629. The Commission has previously recommended that preaward reviews be performed to ensure that applicants meet the conditions required by Title VI before any assistance is given. See U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 230 (1970), The Federal Civil Rights Enforcement Effort: One Year Later 142-43 (1971), and The Federal Civil Rights Enforcement Effort--A Reassessment 95-96 (1973).

The location of a park and the type of facilities provided can easily determine who will use them. Only through preaward reviews can OEO effectively enforce a requirement that park locations and other facilities will be planned so that all groups will be served.

It should be noted that these reviews are essentially desk audits and not onsite reviews. As of April 1975 USDI had conducted only one onsite preaward review; this was in a parish[630] in Louisiana where there had been a request for money for land acquisition for a community center.[631] In its June 1974 investigation, USDI found that there had been little consultation with community participants in the parish's recreational system and no effort had been made to remedy any past discrimination.[632] For example, rather than integrate the city's pools, city officials closed them. The white pool, however, only had its pump cut off, whereas the black pool had been filled with dirt. USDI temporarily and unofficially deferred funding in this area while awaiting a legal opinion from Interior's Solicitor[633] as to what action it could take. By May 1975 compliance had

---

630. A parish is a civil division in Louisiana, corresponding to a county.

631. The review was conducted in the Parish of West Baton Rouge, Louisiana.

632. Fulbright and Qualters interview, supra note 549.

633. Id.

not been achieved and USDI informed the Louisiana State Parks and Recreation Commission that action would be initiated to debar West Baton Rouge from participating in USDI's program.[634]

D. Postaward Reviews

At the outset of fiscal year 1972, USDI embarked upon a program of postaward statewide reviews of local park systems.[635] Its goal was to review parks in all States. USDI conducted reviews in thirty-five States during fiscal year 1972 and in 12 States and the District of Columbia during fiscal year 1973.[636] Despite the potential for discrimination in many USDI programs,[637] through fiscal year 1972 USDI postaward onsite compliance reviews were limited to recipients under programs administered by the Bureau of Outdoor Recreation.

In fiscal year 1973, USDI conducted a few reviews of other USDI programs, principally water and irrigation assistance.[638] By fiscal

---

634. Letter from Edward E. Shelton, Director, Office for Equal Opportunity, USDI, to Gilbert C. Lagasse, Director, Louisiana State Parks and Recreation Commission, May 14, 1975.

635. Although most recipients of USDI assistance are local jurisdictions, reviews are generally done on a statewide basis.

636. California was reviewed in both 1972 and 1973. See discussion on pp. 250-52 infra. The four States not reviewed during this period were Alaska, Hawaii, Nebraska, and Wisconsin. Alaska and Hawaii were never reviewed because the travel expenses for onsite reviews were prohibitive. Nebraska and Wisconsin parks were reviewed during fiscal year 1974.

637. See Section II supra, Civil Rights and Program Responsibilities.

638. These are discussed on pp. 250-52 infra.

year 1974, USDI had expanded its reviews to cover the nine major USDI programs with Title VI implications;[639] however, Land and Water Conservation Fund programs continued to receive major priority.[640] During that year 113 recipients were reviewed.[641] These reviews served a dual purpose. Not only were they used to assess compliance with Title VI by individual USDI recipients, but they also were used by USDI staff to attempt to determine the types of Title VI problems which occur in USDI-funded programs and to get an idea of how best to marshall USDI resources to combat the problems they found.

In each statewide park system review, USDI selected approximately five local park systems to be examined. USDI officials stated that their selections were based on whether any problems were encountered in a previous review of a park system, whether any complaints had been received, the size of the park system, and the number of minorities residing in the area of the park system.[642] In the majority of these reviews, the focus was on evaluating employment data in the State and county park systems, making visual checks to determine minority use of park and recreation facilities, and talking with leaders and members of minority group organizations to

---

639. These programs are listed in note 549 supra.

640. Lyons letter, supra note 547.

641. The majority of the Title VI staff was in the field from April to September of 1974 conducting these compliance reviews. The 113 recipients reviewed included reviews of 322 projects. During these reviews, 21 minority organizations and 129 minority individuals were contacted. Women's groups were not represented in these figures, although USDI staff plan to include them in their 1975 reviews. Telephone interview with John L. Fulbright, Assistant Director for Title VI, Office of Equal Opportunity, USDI, Apr. 8, 1975.

642. Telephone interview with John L. Fulbright, Assistant Director for Title VI, Office of Equal Opportunity, USDI, Nov. 19, 1973.

determine if park sites were meeting the needs of the minority community.[643]

In most States, USDI made recommendations for the improvement of the State's program. The States were generally asked to take some or all of these steps: (1) to establish a system for collecting and reporting racial and ethnic data on utilization of facilities, (2) to increase employment opportunities for minorities at all grade levels, (3) to make efforts to improve communication with minority communities in order to give them an opportunity to become involved in the planning process, (4) to include minority group members on appointed advisory board and commissions, and (5) to ensure that State park system's brochures and booklets include pictures and illustrations depicting minority group members participating in recreational activities.[644]

In most cases, the Director of the State Park System submitted a letter to USDI indicating what action had been or would be taken on each of the recommendations. OEO staff reported that since States generally agreed to adopt their recommendations, no findings of non-

---

643. These minority organizations included such groups as the National Association for the Advancement of Colored People (NAACP), the National Urban League, and the League of United Latin American Citizens (LULAC). Fulbright and Qualters interview, supra note 549.

644. Women were not mentioned in these recommendations because the bulk of USDI statewide park system reviews were conducted prior to USDI's amendment of its Title VI regulations to include a proscription of sex discrimination.

compliance were made and no funds were terminated.[645]

Where States promised to correct deficiencies, USDI accepted these promises almost unquestioningly. This passive approach to enforcing its recommendations allowed the many effectively segregated park systems in this country to remain as such.[646] This is well illustrated by USDI's compliance activities in Louisiana. During fiscal year 1972, USDI made findings of segregation in the park systems of New Iberia, Rayne, and Ville Platte, Louisiana.[647] In the city of New Iberia, the USDI report quoted the Superintendent of Parks and Recreation as stating that recreation programs were segregated by choice, and that it was

---

645. USDI officials noted that the Department of Justice has authority to issue guidelines for determining how long successful negotiations should be permitted to continue before fund termination, but had not done so. Fulbright and Qualters interview, supra note 549. USDI staff stated that currently if a State resisted adopting their recommendations they believed that they would have to continue negotiating indefinitely, in that top USDI officials would not support fund termination, unless every conceivable effort to achieve voluntary compliance had been exhausted.

USDI stated that the Shelton letter mentioned in note 634 supra "is a clear indication that it is not our policy to negotiate indefinitely. The word 'indefinitely' should be removed." Lyons letter, supra note 547. This letter, which was dated May 14, 1975, requires one noncompliant applicant to provide USDI with an acceptable affirmative action plan within 30 days or face debarment from program participation. This letter was provided to this Commission on July 2, 1975. USDI stated that its purpose in providing the letter was to "update the Commission on our progress on this case." Id. Since no other documents were supplied, it would appear that as of July 2, 1975, more than two weeks after the plan was due, USDI had neither received the plan nor carried through with its warning that it would initiate sanctions against the recipient.

646. USDI stated that this allegation "is not descriptive of our approach to enforcement. Again, we would refer you to /the Shelton letter, supra note 634/. Similar action has been taken against other recipients." Lyons letter, supra note 547.

647. USDI Title VI Compliance Evaluation, Louisiana State Parks and Recreation Commission (undated).

not practical for black recreation supervisors to coach integrated or white groups. In the city of Rayne, minority residents provided USDI with evidence that the two swimming pools in the town were operated on a segregated basis. These residents were not permitted to utilize Rayne's Recreation Center, and the mayor of Rayne had publicly stated that the pools would remain segregated. In Ville Platte, USDI found that the two segregated pools had been integrated, but then closed because the white and black children had started to "co-mingle." A private pool was available for whites only.

USDI recommended that the park system take action to:

> actively seek minority group membership on recreation boards and commissions,
>
> exert leadership and take positive steps to integrate recreation staffs and open facilities to everyone,
>
> remind local officials that projects and recreational programs receiving Federal financial assistance must be operated on a nondiscriminatory basis. 648

The Louisiana State Parks and Recreation Commission (LSPRC), together with the Louisiana Recreational Advisory Council, formed an ad hoc committee which concluded that the parks and recreation programs in both Rayne and New Iberia were completely integrated. USDI did not, however, question the committee's definition of "integrated." This definition clearly did not mean that minorities and nonminorities were using the same park system freely. The committee communicated its awareness of the effectively segregated usage of the park systems when

---

648. Id.

it reported that parks in both minority and nonminority areas were excellently maintained and that any de facto segregation was due to "freedom of choice."[649] It argued that USDI's recommendations were already in effect. In addition, the State commission claimed that it had no jurisdiction over the park system of Ville Platte and could make no changes.

After an exchange of correspondence on the matter, USDI accepted the committee's explanations and did not require further action by the State. With regard to Ville Platte, USDI did not attempt to determine whether it had jurisdiction to require corrections, nor did it share its findings with the Department of Justice.[650] As of April 1975, no full reviews of any of these three areas in Louisiana

---

649. See letter from Lamar Gibson, Director-Liaison Officer, Louisiana State Parks and Recreation Commission, to Edward E. Shelton, Director, Office for Equal Opportunity, USDI, June 7, 1972.

650. If, in fact, there is no USDI jurisdiction in Ville Platte, its findings concerning that community should have been forwarded to the Department of Justice for a determination of whether a lawsuit charging a violation of Title III of the Civil Rights Act of 1964 could have been brought. For a discussion of Title III, see note 709 infra.

had been conducted.[651]

Even where the State agrees to take USDI's recommendations, noncompliance may continue. For example, in 1972, USDI reviewed a private club, the Crab Orchard Boat and Yacht Club, in Crab Orchard, Illinois, which used USDI land for its facilities and had an all-white membership. USDI became aware of this situation in January 1972 during a review of the Illinois Park System.[652] In March 1972, the Club amended its bylaws to include a nondiscriminatory statement on membership and promised to

---

651. April 1975 Fulbright interview, supra note 641. See also Fulbright and Qualters interview, supra note 549. In July 1975, USDI stated that "the situations in Louisiana were inaccurately reported by professionals who are no longer with our program." Lyons letter, supra note 547. However, USDI did not provide any information as to what the inaccuracies were or how USDI discovered them.

USDI did conduct a compliance review of Louisiana in June 1974, but did not include any of the areas where noncompliance had been found in its 1972 review. It did, however, conduct an onsite inspection of the City of Rayne swimming pool situation and discovered that at the Edward Morris Clark Swimming Pool, a predominantly black pool, a sign was displayed stating that "Rayne Recreational Facilities are open to all persons regardless of race, color, sex, or national origin." There was no such sign, however, at the Rayne Municipal Swimming Pool, a predominantly white pool. As a result USDI included in its recommendations to its 1974 review that "the City of Rayne erect a sign at Rayne Municipal Swimming Pool using identical language to the sign at Edward Morris Clark Swimming Pool." Id. and letter from Edward E. Shelton, Director, Office for Equal Opportunity, USDI, to Mr. Gilbert C. Lagasse, Director, Louisiana State Parks and Recreation Commission, Aug. 2, 1974. USDI later received a response from the City of Rayne with a picture of the sign which had been erected to comply with USDI's request. Letter from Joseph S. Richard, City Clerk, City of Rayne, La., to Mr. Gilbert C. Lagasse, Director, Louisiana State Parks and Recreation Commission, Oct. 28, 1974.

652. Memorandum from John J. Scott, Assistant Solicitor, Civil Rights, Office of the Solicitor, USDI, to the Director, Office for Equal Opportunity, USDI, "Crab Orchard Boat and Yacht Club--A private club on public use lands," Jan. 13, 1972. The park system itself was found in compliance.

recruit minorities.[653] Although this commitment is commendable, when USDI visited Crab Orchard during its 1974 reviews, there were still no minority members in the Club, even though the Club had reserved 40 memberships for minority applicants. Other than encouraging the Club to advertise these memberships, USDI has not taken steps to determine what obstacles may still exist to minority membership or to ensure that the Club has taken additional affirmative steps to recruit minorities.[654]

USDI has conducted few followup reviews to ensure that its recommendations are carried out. A review of Virginia in the summer of 1971[655] found that there were some park areas with very little black use. For example, Goodwin Lake State Park, historically a white park, continued to be used almost exclusively by whites,[656] although it is adjacent to Prince Edward Lake State Park, historically a black park,

---

653. November 1973 Fulbright interview, supra note 642.

654. In response to this, USDI stated:

> Your description of our compliance work with the Crab Orchard Boat and Yacht Club appears unfair. We got 40 slots reserved for minorities and we required that these slots be advertised in the media serving the minority community. These are important affirmative action steps to ensure nondiscrimination and should not be given negative implications. Lyons letter, supra note 547.

655. USDI Title VI On-Site Inspection Report of the Commonwealth of Virginia State and Other Municipal Parks, June 20-28, 1971, by Anthony M. Stefano, Contract Compliance Officer, Office for Equal Opportunity, USDI.

656. At the time of the compliance review, no blacks were among the approximately 200 visitors.

which continued to be used almost exclusively by blacks.[657] At Prince Edward Lake State Park, with one exception, all employees and concessionaires were black. At all other Virginia parks all employees and concessionaires were white. USDI informed Virginia of its findings. As a result, Virginia agreed:

> (1) to post signs throughout the park system stating that all facilities are open without regard to race, color, or national origin and to insure that all news releases would carry the same assurances;
>
> (2) to review park brochures to display integrated use of park facilities and contain information on how to file grievances;
>
> (3) to submit to USDI a revised affirmative action plan for the employment of minority park personnel;
>
> (4) to include provisions in all future contracts with concession areas for equal employment opportunity and equal access to services; and
>
> (5) to submit a plan for resolving the de facto segregation of Prince Edward and Goodwin Lake State Parks. 658

---

657. At the time of the compliance review, no white visitors were observed at this park. At one time this was called Prince Edward Lake Negro State Park. Several years after the name had been changed, however, the State of Virginia continued to indicate through pictures in brochures that this park was for blacks. See U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 17 (1971).

658. Letter from H. Jack Bluestein, Assistant Director, Contract and Title VI Compliance, USDI, to Elbert Cox, Director, Commission on Outdoor Recreation, Commonwealth of Virginia, Sept. 16, 1971.

Although correspondence from Virginia park officials indicated that these suggested plans were being carried out, as of April 1975, USDI had not conducted a followup review of Virginia to ensure that the Commonwealth had fulfilled its promises adequately.[659]

During fiscal year 1973, USDI conducted a followup review of only one site which was reviewed in 1972.[660] Few of the fiscal year 1974 reviews included followup concerning recipients which were previously found to be in noncompliance. USDI staff stated that this was partly due to their new review process and partly because it did not think that the 1972 and 1973 reviews were thorough enough and felt that time would be better spent starting over again.[661] Nonetheless, since followup was not included in the majority of 1974 reviews, the noncompliance found in earlier years may not have been totally erased and USDI will not be cognizant of that fact.

USDI rarely required progress reports of a State's implementation of USDI recommendations. In those instances where progress reports were required, however, it appears that USDI did not ensure that the reports were actually completed. For example, during a review of the

---

659. USDI staff stated, however, that they planned to go back to Virginia during 1975 to follow up on their findings of noncompliance. April 1975. Fulbright interview, supra note 641.

660. This review was of the Monterey, California County Park System, discussed in note 662 infra.

661. Fulbright and Qualters interview, supra note 549.

Bureau of Reclamation programs in California in fiscal year 1973,[662] attempts were made to assess the compliance of water and irrigation districts with Title VI.[663] All of the five districts reviewed were

---

662. California was selected for this review because it has a full range of USDI programs. In addition, this review included a follow-up on the Monterey County Park Department which during a review in 1972 had refused to provide racial and ethnic data on employment. Other local park departments reviewed included North Bakersfield, Long Beach, Channel Coast Area, Berkeley, and Marin County. As in 1972, no communities were found to be in noncompliance. A second program examined for the first time in California by USDI during fiscal year 1973 was the National Historic Sites program, administered by the National Park Service. The review included monitoring minority and female employment on the staff of the California State agency responsible for researching sites. USDI also looked at the racial, ethnic, and sexual composition of the board which recommends sites to go on the National Register. In addition, USDI checked sites for inclusion of historic contributions by minorities. USDI planned to check sites for inclusion of historic contributions by women in its fiscal year 1974 reviews. USDI made no recommendations for improvements in the National Historic Sites program. During the California review, USDI also reviewed five private organizations which lease lands, at less than fair market value, from the Bureau of Land Management. All such organizations are required to have non-discriminatory membership policies. USDI determined that the organizations were in compliance, although a report on this aspect of the review was not available from USDI. September 1974 Qualters interview, supra note 612.

663. See letter from Edward E. Shelton, Director, Office for Equal Opportunity, USDI, to R. J. Pafford, Jr. Director, Mid-Pacific Region, Bureau of Reclamation, July 13, 1973.

required to implement a system of racial and ethnic data collection on beneficiaries of the district in order to determine whether minority group members were being equitably served by the projects in the district.[664] Reports from California on progress made in carrying out this requirement were due by December 31, 1973. In addition, two of the districts, Casitas Municipal and South San Joaquin, were required to develop and implement an affirmative action plan for placing minorities in all job categories.[665] Neither the progress reports nor the affirmative action plans were in OEO files in April 1975 and although OEO staff made attempts to secure them from California, they were unsuccessful.[666]

E. Racial, Ethnic, and Sex Data Collection

USDI's manual chapter[667] requires that applicants and recipients collect and maintain racial and ethnic data showing the extent to which members of minority groups and women participate in federally-assisted

---

664. This determination would be made by comparing actual beneficiaries with potential beneficiaries. Racial and ethnic identification is to be done on visual basis only.

665. The Casitas Municipal Irrigation District had only three minority employees (all laborers) out of a total of 59 permanent positions. The South San Joaquin Irrigation District did not have any minority employees on its permanent staff of 52 employees. USDI did not indicate the percentage of minorities residing in the area.

666. The South San Joaquin irrigation district was one of the few areas previously found in noncompliance which USDI included in its 1974 reviews. At that time, the Title VI compliance team noted that there had been an increase in minority employment and encouraged the district to continue recruiting minorities. No other areas, such as the data collection on beneficiaries, were mentioned and no recommendations were made by USDI in this district. Letter from Edward E. Shelton, Director, OEO, USDI, to Mr. H.K. Horton, Mid-Pacific Regional Director, Bureau of Reclamation, Apr. 18, 1974.

667. USDI Departmental Manual, supra note 598.

programs.[668] These data may be estimates or actual counts and are required to be done on a visual basis only.

The manual chapter instructions are considerably weaker than those in an early draft of the chapter. In that draft, USDI had included a requirement of estimating the numbers of users of parks during periods of peak use, such as Labor Day, Memorial Day, and Independence Day weekends.[669] In addition, the chapter specifically mentioned that visitors were to be identified as American Indian, Negro/Black, Spanish-surname, Oriental, or Caucasian. The new chapter no longer includes these requirements.

There are also several other deficiencies in USDI's data collection requirement. The chapter provides no details on which personnel, e.g., park rangers or summer interns, are to collect data. Also, no safeguards to ensure the accuracy of these data are listed in the chapter.[670] In addition, the data are to be available to USDI only on demand, with no requirement that they be forwarded on a regular basis. If data are not

---

668. USDI stated:

> Racial, Ethnic and Sex Data Collection is a tool used by the Title VI Division to ensure nondiscrimination. We have requested this data in programs where we could effectively monitor the incoming results and where it is necessary to determine the extent to which females and minorities participate. Lyons letter, supra note 547.

669. This information would be useful since it is at these times when park usage by the public is at its highest.

670. For example, if State park officials are not told to count each visitor, nothing prohibits making gross estimates at the end of the day which would undoubtedly be inaccurate. In addition, it is difficult to make accurate visual checks of all five categories noted above, and therefore it is essential to check on a regular basis the realiability of data gathered. See U.S. Commission on Civil Rights, To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs 55 (1973).

submitted to OEO and used, the recipients may lose interest in keeping it accurately and the process is likely to deteriorate.

The manual does not speak of the collection of data on sex, although in the section on racial and ethnic data collection it makes an obscure reference to female participation. The manual requires that:

> ...applicants and recipients collect and maintain racial/ethnic data showing the extent to which members of minority groups and women participate in federally assisted programs....Racial/ethnic data should be available when requested by an authorized official. /Emphasis added./ 671

It is unfortunate that USDI's data collection requirements regarding sex are vague because although women are not generally excluded from using parks, they may not always able to use park facilities, such as baseball diamonds, basketball courts, or other facilities, which in the past have more commonly been used by men. Not only does USDI need to collect data to ensure that all park facilities are equally available to women, but it must also determine that both minority and nonminority women have access to such facilities.[672]

---

671. Departmental Manual, supra note 598.

672. USDI staff stated that "This paragraph appears to be an unfounded assumption and contrary to our observations." Lyons letter, supra note 547.

Another deficiency of the chapter is its failure to require racial, ethnic, and sex data collection relating to board members. USDI acknowledges that planning, supervisory, and advisory boards of States, counties, and municipalities are subject to Title VI, but little had been done prior to fiscal year 1973 to ensure minority representation on these boards.[673] USDI stated that minorities and women generally were not represented on these boards, but that States have "responded favorably to recommendations that minorities and women be appointed to these boards as vacancies occur."[674]

USDI's view appears to be overly optimistic, however. Preliminary findings of a review in the Donna, Texas irrigation district[675]

---

673. USDI agencies with programs served by advisory boards include the Bureau of Outdoor Recreation and the Bureau of Reclamation. In some areas boards are elected, but they are generally appointed.

674. USDI response, supra note 569.

675. Colonias del Valle, a Mexican American community development organization, alleges that the Mexican American residential district of Donna, Texas, Colonia Nueva, was excluded from the Donna Irrigation District in 1962. Colonias del Valle persuaded the City of Donna to supply water to Colonia Nueva. Telephone interview with Alejandro Moreno, Executive Director, Colonias del Valle, Dec. 12, 1973.

indicated that although 426 (35.4 percent) of the 1,187 landowners in the district were Mexican Americans, all five members of the elected board of directors of the district were Anglos. In addition, the three members of the Board of Equalization, which sets land values for irrigation tax purposes, were appointed by the board of directors and were also Anglos.[676] Although by 1974 regional staff of the Bureau of Reclamation reported the appointment of a minority person on this board, the person was an Asian American[677] and, therefore, was not representative of the great number of Mexican American landowners.

The principal program specifically identified by USDI as requiring data collection on the race and ethnicity of beneficiaries is the Hunter Safety Program.[678] This program is sponsored by the U.S.

---

676. November 1973 Fulbright interview, supra note 642.

677. Fulbright and Qualters interview, supra note 549, and letter from Dale B. Ranf, acting for J.A. Bradley, Regional Director, Bureau of Reclamation, Southwest Region, Amarillo, Texas, to Edward E. Shelton, Director, Office for Equal Opportunity, USDI, July 18, 1974.

678. June 1973 Fulbright interview, supra note 625, and Fulbright and Qualters interview, supra note 549.

Fish and Wildlife Service and provides instructions on firearms safety in classes administered by State Fish and Game Departments. Beneficiaries have traditionally been white males and data on sex as well as race will be required on the beneficiaries of this program.[679]

Data were also used to uncover disparities in the Youth Conservation Corps (YCC) Program. The first YCC program in the summer of 1971 had enrolled 2,676 youths, of whom one-third were women and 23 percent represented minority groups.[680] These figures included both the USDI and the Department of Agriculture (USDA) components of the program.[681] A review of enrollment and employment data for 20 camps in the summer of 1973[682] indicated that

---

679. Id.

680. Undated YCC report, United States Conservation Corps, A Status Report. USDI did not further break out statistics on minority enrollment on blacks, Puerto Ricans, Mexican Americans, American Indians, or Asian Americans. Nor did USDI cross-tabulate the data by race and sex, thus allowing for the possibility that minority females were double-counted.

681. For the summer of 1973, however, USDA set minority enrollment goals of 17.5 percent. USDA indicated that national performance in minority enrollment during 1972 had been poor, although some regions had done well. No goals were set for participation by women. See letter from Robert M. Lake, Director of Manpower and Youth Conservation Programs, USDA, to Forest Service Regional Foresters, Regional Directors, and Area Directors, Jan. 31, 1973.

682. There were a total of 53 camps funded by USDI during the summer of 1973.

female and minority participation was relatively high in enrollment and somewhat lower in employment.[683] In the 20 camps, female enrollment was 260 (46 percent) out of a total of 569 enrollees. Among male enrollees, 25 percent were minority group members and among female enrollees, 20 percent were minorities.[684] Among the YCC staff, there were 52 females (36 percent) and 94 males; 125 staff members (more than 85 percent) were white and only 6 (4 percent) were black.[685]

F. Complaint Handling

USDI's manual chapter provides for a complaint procedure system for accepting, processing, and resolving complaints. This complaint resolution process is decentralized and attempts are made to resolve all complaints at the State or regional level.

---

683. November 1973 Fulbright interview, supra note 642.

684. Male enrollees included 232 whites, 35 blacks, 23 persons of Spanish speaking background, 14 American Indians, and 5 Asian Americans. Among female enrollees there were 208 whites, 34 blacks, 11 persons of Spanish speaking background, and 7 American Indians. There were no Asian Americans among this group.

685. Male staff members included 81 whites, 4 blacks, 4 persons of Spanish speaking background, and 5 American Indians. Female staff members included 44 whites, 2 blacks, 2 persons of Spanish speaking background, 3 American Indians, and 1 Asian American. November 1973 Fulbright interview, supra note 642. As of September 1974, final results of this study had not been made public.

A complaint may be referred for resolution by OEO to the primary recipient, such as the State, in which case the primary recipient attempts to resolve the complaint informally. The bureau or office which provides Federal assistance coordinates referred complaints and OEO monitors such complaints and may assume jurisdiction at any time.[686]

Regardless of whether the investigation is conducted by USDI or the State, the investigation must be concluded, with a determination made, within 40 days, unless an extension is granted by the Director of OEO. OEO is to be informed by USDI bureaus and offices of all complaints of discrimination received.

---

686. USDI Departmental Manual, supra note 598, at 506.4.1, et seq.

During fiscal year 1973, OEO received only three complaints, only two of which related to Title VI.[687] All were received in March 1973

---

687. The third case did not allege discrimination on the basis of race, color, national origin, or sex. It was from a white man who was asked to leave a State park after his permit had expired. The complainant believed that he was being asked to leave because of his appearance.

Two complaints were received in fiscal year 1974. One was an employment discrimination complaint filed by a black woman against the Colorado Division of Parks and Outdoor Recreation. Although there was evidence of discrimination, the complaint was dropped unresolved when the complainant passed away. The other complaint was filed by a black man alleging inadequate facilities in minority neighborhood parks as compared with nonminority neighborhood parks in Jacksonville, Florida. USDI closed the complaint after obtaining an agreement from Jacksonville to improve specific facilities in the complainant's nearby park. USDI conducted a review of the Jacksonville Park and Recreation system during the same time it was investigating the complaint. Lyons letter, supra note 547.

As of April 1975, two complaints were also received in fiscal year 1975. One complaint was from the Connecticut Commission on Human Rights and Opportunities alleging the lack of fair housing and equal employment opportunities in Redding, Connecticut, a jurisdiction which was expected to apply for BOR funding for an open space acquisition. As of April 1975, USDI had not received the application and thus the complaint remained uninvestigated. In July 1975, USDI stated that this case was in the courts, but gave no indication of what its role was in the case. Id. The second complaint concerned the lack of minority employees in a State Fish and Wildlife Service. Statistics on minority employment in that agency indicated a severe lack of employment opportunities for minorities, and as a result of the complaint, USDI included the Fish and Wildlife Service in its review of that State in 1975. Id.

and dealt with parks and recreation programs. Of these three cases, the first best illustrates OEO's complaint resolution process. This complaint, alleging discriminatory practices in the site selection of a proposed swimming pool in Ypsilanti, Michigan, was originally filed with the Bureau of Outdoor Recreation in Washington, D.C., by the Michigan Civil Rights Commission.[688] The city had proposed to build a pool in Recreation Park, a white area, which was inaccessible to blacks.[689] Further, no comparable facilities were proposed for availability in Parkridge, the city's black area.

The Assistant Director for State Programs at BOR in Washington forwarded the letter to OEO requesting that OEO work with the State personnel to resolve the complaint.[690] Two months elapsed before OEO sent a letter to the Michigan commission[691] stating that it had attempted to resolve the problem through discussions rather than conducting an investigation of the complaint.

---

688. The complaint included a copy of a letter to the City Manager of Ypsilanti. See letter from Donald J. Bauder, Acting Director, Community Services Division, Michigan Civil Rights Commission, to Peter Caputo, City Manager, City of Ypsilanti, Mich., Mar. 6, 1973.

689. There were already four pools located in the white area, while the only facilities in the black area were three ball parks.

690. See letter from A. Heaton Underhill, Assistant Director for State Programs, BOR, USDI, to Edward E. Shelton, Director, OEO, USDI, Mar. 9, 1973.

691. In this letter, OEO informed the Michigan Civil Rights Commission that the State Liaison Officer and the BOR Regional Director had held a meeting on April 17, 1973, which had been inconclusive. The Michigan commission was also told that if the situation was not resolved within 50 days, it should request, in writing, a meeting with the BOR Regional Director, and list issues not resolved and the proposed solutions. If these meetings were not successful and the complainants were satisfied that a Title VI violation existed, the complainants should request OEO and BOR to take formal enforcement action within 15 days after the cessation of these meetings. If a solution were agreed upon, the Directors of OEO and BOR were to be notified of the terms. Letter from Edward E. Shelton, Director, OEO, USDI, to Donald J. Bauder, Acting Director, Community Services Division, Michigan Civil Rights Commission, May 9, 1973.

On June 6, 1973, a public hearing was held in Ypsilanti at which time approximately 100 whites and only five blacks appeared to speak. Most whites, however, agreed that the pool should be in Parkridge, although the city planner testified that the pool would be a neighborhood rather than a citywide facility if located in this area. The implication was that many whites would not wish to go into the black area to use the pool. No decision was made at that time on the location of the pool.

On June 28, 1973, the civil rights commission wrote to the BOR Regional Director that the complaint was being dropped, and the civil rights commission would agree to locating the pool in Recreation Park.[692]

---

692. See letter from Donald J. Bauder, Assistant Director, Community Services Division, Michigan Civil Rights Commission, to John D. Cherry, Regional Director, Lake Central (Midwest), BOR, USDI, June 28, 1973.

Representatives of the Michigan commission informed OEO that the case had been dropped because the minority community was not showing much interest regarding the location of the pool. Moreover, the Mayor and the Recreation Director of Ypsilanti, both of whom were black, favored locating the pool in the white residential area. Although they agreed that Parkridge had poor facilities, they indicated that there were plans to improve Parkridge.[693]

---

693. OEO later learned that Ypsilanti had set aside $53,000 from Revenue Sharing funds for improving facilities at Parkridge. Letter from Edward E. Shelton, Director, OEO, USDI, to Peter Caputo, City Manager, City of Ypsilanti, Michigan, June 28, 1973. The case was, therefore, closed and the Regional Director's office was assigned to follow up on action taken to improve Parkridge. Letter from Edward E. Shelton, Director, OEO, USDI, to John D. Cherry, Regional Director, Lake Central (Midwest), BOR, USDI, July 25, 1973. During its 1974 reviews USDI visited Ypsilanti. The Park and Recreation Director said that there had been some improvements in Parkridge's recreation and entertainment facilities and that negotiations were underway for purchasing property for a pool. He said, however, that progress was slow. Memo for the Files, Follow-up Review - Ypsilanti, Michigan, Aug. 13, 1974.

As can be noted from the handling of this complaint, the complaint process is rather confusing. OEO's role throughout this matter was to discuss the problem over the telephone with the Lake Central Regional Director for BOR, the Michigan State Liaison Officer, and the Michigan Civil Rights Commission rather than to take the matter into its own hands by assuming jurisdiction. OEO should have conducted an onsite review at that time to determine whether minorities in Ypsilanti were, in fact, being discriminated against in the distribution of assistance.[694] USDI's obligation is not solely to assure that complaints are resolved to the satisfaction of the specific complainants, but also to assure non-discrimination in the distribution of Federal assistance. The fact that the minority community was not demonstrating much interest should not be taken as an indication that there was no Title VI problem. Minorities may have given up hope by that time or they may have felt a need to direct their attention to other problems in the community.

The second case[695] alleged racial discrimination in the judging of the National Field Archery Championship.[696] Allegations were made that a young black woman, who led the tournament through the preliminary rounds,

---

694. USDI stated, "We conducted an onsite review on August 13, 1974....We also have pictures of the facilities at Park Ridge...." Lyons letter, supra note 547. Nonetheless, it should be noted that this was a follow up review, conducted for the purpose of determining if the situation had improved at Park Ridge, after the complaint had been dropped. Follow-up Review - Ypsilanti, Michigan, supra note 693..

695. The complaint was received by the Title VI office from the U.S. Commission on Civil Rights on March 26, 1973. The complainant's letter was dated August 3, 1972.

696. The tournament was held in a USDI-funded park in Ludlow, Massachusetts.

was prevented from winning by the scorekeeper who distracted her and tutored her closest opponent.[697] In response to an inquiry by OEO, the National Field Archery Association (NFAA) indicated that the association had held a hearing immediately after the tournament, at which time the protest made by the young woman had been disallowed.[698]

OEO indicated to the youth director, who had filed the complaint on behalf of the young woman, that an investigation would be difficult as no record had been kept of the hearing.[699] The youth director then stated that he had dropped the complaint.[700] OEO then closed its file on the case, since in its view the case had been resolved to the satisfaction of the complainant.[701]

In this case, as in the Ypsilanti case, USDI accepted a resolution reached by the parties involved without making an investigation to determine if indeed there had been any violation of Title VI. NFAA stated that it would not be possible to investigate the case because the

---

697. Written statement of Herbert Griffin, Director, East Harlem Federation Youth Association, Inc., Aug. 3, 1973.

698. See letter from Pat Wingfield, President, NFAA, to Congressman Charles B. Rangel, Aug. 29, 1972, enclosed in a letter from Ervin Belt, Executive Director, NFAA, to John L. Fulbright, Assistant Director for Title VI, OEO, USDI, June 14, 1973.

699. USDI notes of telephone interview between John L. Fulbright, Assistant Director for Title VI, OEO, USDI, and Herbert Griffin, Director, East Harlem Federation Youth Association, Inc., July 31, 1973.

700. Id.

701. See letter from Edward E. Shelton, Director, OEO, USDI, to Herbert Griffin, Director, East Harlem Federation Youth Association, Inc., Aug. 17, 1973.

scorekeeper's testimony had been the only basis on which the case had been decided. Yet USDI made no effort to learn if other participants in the tournament could have contradicted this. USDI accepted irrelevant factors as evidence that there was no discrimination in the tournament, such as NFAA's statements that no questions on race were asked on entry forms and that NFAA has "been one of the most enlightened groups in the field of race relations."[702]

G. Informational Materials

In fiscal years 1974 and 1975, USDI placed heavy emphasis on providing technical assistance to States. A brochure, "Equal Opportunity thru Title VI," was written to inform recipients and applicants of Federal assistance administered by bureaus and offices of USDI of obligations and prohibitions imposed by Title VI for federally assisted programs.[703] In addition, USDI provided materials to some of its beneficiaries concerning their rights under Title VI.[704]

---

702. Wingfield letter, supra note 698. USDI stated that "Your description of how we handled this complaint is not justified." Lyons letter, supra note 547.

703. Hundreds of these brochures have been sent to USDI bureaus and regional offices for disbursement. They have also been distributed at meetings, conferences, and workshops, and have been included in letters to minority organizations. April 1975 Fulbright interview, supra note 641.

704. A brochure on Title VI was written for disbursement at a gathering of State liaison officers of the National Park Preservation Program in the spring of 1974. OEO, USDI, "Equal Opportunity Under Title VI: Historic Sites" (undated). Another was for workshops of the Youth Conservation Corps which is operated by the Office of Manpower and Youth Activities. These workshops were held in the States of California, Colorado, Florida, Kentucky, and Pennsylvania. OEO, USDI, "Equal Opportunity Under Title VI: Youth Conservation Corps" (undated).

Prior to 1974, USDI did not require States to provide their informational materials such as pamphlets, posters, or instructions in any language other than English in areas of high concentration of national origin minorities.[705] Such a requirement is particularly important for the Bureau of Outdoor Recreation, for example, in brochures and pamphlets describing the State parks and other facilities, and for bilingual posters announcing the park system's policy of nondiscrimination. Yet, in early 1974, with the exception of one Spanish pamphlet published by New Jersey describing its State parks, all the materials provided by the States to USDI describing their parks and recreation systems were in English. In July 1975, USDI reported that it recommended that Colorado's Division of Wildlife "print official literature in Spanish, especially in areas with an appreciable number of Spanish speaking citizens,"[706] and noted that "similar recommendations have been made in other States."[707] Nonetheless, USDI has not undertaken any studies to ascertain the need for bilingual material and is not aware if all States provide such materials on their own initiative.

---

705. The Commission has previously recommended this step. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--A Reassessment 326 (1973).

706. Letter from Edward E. Shelton, Director, Office for Equal Opportunity, USDI, to Jack R. Grieb, Director, Division of Wildlife, Denver, Colorado, Nov. 13, 1974, attached to Lyons letter, supra note 547.

707. Lyons letter, supra note 547.

Many State park systems, although no longer segregated by law, continue indirectly to advertise that some parks are for minority use while others are for use by the majority race.[708] They distribute brochures with photographs clearly indicating the segregated nature of the park system--a blatant violation of Title III of the Civil Rights Act of 1964.[709]

An important step to be taken in order to integrate park systems is for the recreation officials to include pictures of both minorities and nonminorities in their brochures advertising the parks. In fiscal year 1973, USDI requested several States to incorporate pictures and illustrations of minority participation in programs in the brochures provided to the public describing their park systems. USDI provided this Commission with brochures from a variety of States which have complied with USDI's request.[710] Several States indicated that they were not currently in a position to revise their discriminatory brochures, however, and USDI accepted a mere promise to revise these brochures in the future, thus permitting States to continue to advertise the segregated

---

708. USDI stated that similar violations "are handled routinely through Title VI reviews." Lyons letter, supra note 547.

709. Title III prohibits the denial, on the basis of race, color, or national origin, of the utilization of facilities (other than schools or colleges) owned, operated or managed by a State or subdivision of a State. 42 U.S.C. §§ 2000b, et seq. (1970). The discriminatory nature of such brochures has been called to the attention of the Department of the Interior several times by this Commission. The first time was in 1970 when Commission staff noted that the publications used by the State of Virginia showed whites using all of the parks except one. Blacks were shown using the Prince Edward Lake State Park, formerly the Prince Edward Lake Negro State Park. Letter from Martin E. Sloane, Assistant Staff Director, U.S. Commission on Civil Rights, to Edward E. Shelton, Director, OEO, USDI, May 8, 1970.

710. USDI response, supra note 569.

nature of their parks. USDI stated that since it "cannot order States to destroy their existing supply of advertising brochures, compliance in intent is acceptable pending a followup review."[711] USDI has not required State brochures to include illustrations of women participating in sports such as football and baseball which have traditionally been all-male sports because USDI has not been concerned with sex discrimination and segregation in athletics, programs, and facilities provided by States.[712]

---

711. Id. The States have promised to revise their brochures at some time in the future. Some of these brochures continued to show primarily pictures of segregated groups. For example, a Kentucky brochure showed an apparently all-white swimming pool, senior citizens club, playground scene, fishing derby, and tennis lessons. One black was shown watching two whites play shuffleboard.

712. USDI's activities with regard to sex discrimination are discussed in Section I B 1 supra.

Chapter 5

DEPARTMENT OF JUSTICE (DOJ)

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA)

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

The Law Enforcement Assistance Administration was established by the Omnibus Crime Control and Safe Streets Act of 1968.[713] Its purpose is to provide funds[714] and technical assistance to State and local governments for reducing crime and juvenile delinquency and for improving criminal justice.[715]

The bulk of LEAA funds are awarded in two stages. First, it provides funds, which it refers to as "block planning grants," for the establishment and maintenance of State Planning Agencies (SPAs)[716] which are

---

713. Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. § 3701, et. seq. (Supp. III, 1973). The 1968 act defines law enforcement as encompassing all activities pertaining to crime prevention or reduction and the enforcement of criminal laws. 42 U.S.C. § 3781 (Supp. III, 1973).

714. In fiscal year 1973, LEAA allocated $841 million to States and local governments, bringing the total aid LEAA had allocated since its creation to $2.4 billion. Annual Report of the Attorney General of the United States, 1973 at 179.

715. LEAA priorities are set forth in LEAA, Department of Justice, "Fact Sheet 1974," and Statements by Richard W. Velde, Administrator, Law Enforcement Assistance Administration, Department of Justice, Sept. 9, 1974, and Dec. 9, 1974, (LEAA, DOJ, reprints). LEAA's long term priorities include implementation of nationwide criminal justice standards, establishment of prompt adjudication procedures in all State and local courts, and combating the causes of juvenile delinquency. Id.

716. A State planning agency may be an agency created expressely for the purpose of participation in the LEAA program or it may be a component of an existing State crime commission, planning agency, or other unit of State government. LEAA, Department of Justice, Guideline Manual: State Planning Agency Grants 5, 6 (1974). A SPA must be a "definable agency" charged with carrying out responsibilities imposed by the Omnibus Crime Control and Safe Streets Act, as amended; have a supervisory board which reviews the State plan for approval and oversees its implementation; and have administration and staff who devote full time to SPA work.

to develop comprehensive annual statewide law enforcement plans.[717] The plans must be approved by LEAA, but the States have broad discretion[718] in drafting them. The plans, which are supposed to establish priorities for the improvement of law emforcement and criminal justice throughout each State, contain an analysis of law enforcement problems and describe anticipated activities. The plans cover such areas as the development and evaluation of methods to increase public protection; the purchase of devices, facilities, and equipment designed to improve law enforcement and criminal justice; the recruitment and training of law enforcement and criminal justice personnel;

---

717. In fiscal year 1973, LEAA awarded $48.5 million to States for planning. Planning grants are awarded to States by a formula which allocates a share of $200,000 for each State with the remainder distributed on the basis of population. The population counts used are provided by the Bureau of the Census based on the latest census data available. For a schedule of State allocations see Id. at Appendix 2-6. The States in turn provide 40 percent of the funds they receive to local agencies which assist in the development of the State plan.

718. LEAA sees the act as shifting authority to State and local governments and decentralizing Federal Government operations. It states that the principal responsibility for law enforcement resides with State and local government and views its own role in strengthening law enforcement as that of a "partner" with the States and localities. LEAA, Department of Justice, LEAA 1973: LEAA Activities July 1, 1972, to June 30, 1973 /hereinafter referred to as LEAA 1973/.

the improvement of police-community relations; the education of the public relating to crime prevention; and the construction of law enforcement facilities, including local correctional institutions, centers for the treatment of narcotic addicts, and temporary courtroom facilities in areas of high crime incidence.[719]

Second, after the plans are approved, the States are awarded funds, termed by LEAA as "block action grants."[720] The funds are used by State and local governments to carry out their law enforcement programs without further approval from LEAA. The State and local institutions which ultimately receive LEAA block action funds include State, county, and municipal police departments, State highway patrols, sheriffs' offices, juvenile and adult correctional institutions, probation and parole facilities, and State and local court systems.[721]

In addition to block grants, LEAA also provides what it terms "discretionary grants" to State and local governments for law enforcement programs which are not included in State plans but are of national priority.[722] It also awards funds to colleges and universities

---

719. 42 U.S.C. § 3701, et seq. (Supp. III, 1973). The plans must be organized by areas such as legislation; planning and evaluation; crime prevention and detection; adjudication; and institutional rehabilitation. See Guideline Manual: State Planning Agency Grants, supra note 716 at 93.

720. In fiscal year 1973, LEAA awarded $480.2 million in block action grants. LEAA 1973, supra note 718 at 17. The Federal Government's share for most action grants is 75 percent. The State must pay the remaining amount.

721. In fiscal year 1973, there were 12,374 recipients of LEAA assistance. Among the major categories of recipients were: (a) 2248 law enforcement agencies such as police departments, sheriffs' offices, and State highway patrols, which together received $72 million in LEAA funds that year; (b) 750 court systems, which received $20.9 million in LEAA funds; and (c) 429 correctional facilities, which received $44.7 million.

722. In 1973 LEAA awarded $86.9 million in discretionary grants for programs of national priority. LEAA 1973, supra note 718 at 17.

for training[723] and research[724] in the area of law enforcement.

B. Civil Rights Responsibilities[725]

Both Title VI of the Civil Rights Act of 1964[726] and the Omnibus Crime Control and Safe Streets Act of 1968 as amended [hereinafter referred to as the Crime Control Act][727] prohibit discrimination on the grounds of race, color, and national origin in services provided by LEAA-

---

723. LEAA estimates that approximately 10 percent of the Nation's uniformed police have attended college courses with LEAA education grants. In 1973 LEAA provided $44 million for education and training programs.

724. In 1973, LEAA provided $31.6 million for research and development to study criminal behavior and devise innovative techniques for crime research.

725. LEAA stated:

> We in LEAA view the orderly development and implementation of its civil rights compliance program as an important national priority. To the end that problems relating to its compliance program might be fully considered, a Policy Development Seminar on Civil Rights Compliance at Meadowbrook Hall was convened at Rochester, Michigan, in February of this year. On the basis of these proceedings, LEAA's Office of Civil Rights Compliance prepared a Master Plan for Civil Rights Compliance and a Statement of Priorities (hereinafter referred to as the Master Plan). The Master Plan has been completed, and a second draft of the document will shortly be distributed for external review. Letter from Richard W. Velde, Administrator, LEAA, Department of Justice to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, June 27, 1975.

726. 42 U.S.C. § 2000d, et seq. (1970).

727. The Omnibus Crime Control and Safe Streets Act as amended by the Crime Control Act of 1973. 42 U.S.C. § 3701, et seq. (Supp. III, 1973). LEAA commented:

> The discussion in the...report of the United States Commission on Civil Rights...of new Section 518(c), the nondiscrimination provisions of the Crime Control Act of 1973, is parochial. June 1975 Velde letter, supra note 725.

funded programs.[728] The Crime Control Act also prohibits discrimination on the ground of sex in services provided by LEAA-funded programs.

Both nondiscrimination provisions prohibit a wide variety of discriminatory activities. For example, police departments receiving LEAA funds cannot discriminate against minorities by providing minority neighborhoods less than their equitable share of police protection, or by the differential enforcement of laws in minority and nonminority neighborhoods. Similarly, LEAA-funded correctional institutions cannot segregate residents on the basis of race or ethnic origin; nor may they differentially provide services on the basis of race, ethnic origin, or sex. Proceedings in courts receiving LEAA funds must not be discriminatory on the basis of race, ethnic origin, or sex.

---

728. In addition, the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. § 5601, et seq. (Supp., 1975)), which was enacted to provide Federal assistance to reduce and prevent delinquency, prohibits discrimination on the basis of race, creed, color, sex, or national origin in programs receiving assistance under the Juvenile Justice Act. As of January 1975, however, no appropriations had been made for programs under the Juvenile Justice Act. Interview with Herbert C. Rice, Director; Winifred Dunton, Attorney Advisor; Andrew Strojny, Chief, Compliance Review Division; and Henry C. Tribble, Chief, Complaint Resolution Division, Office of Civil Rights Compliance, LEAA, DOJ, Feb. 3, 1975.

Title VI prohibits employment discrimination on the basis of race or ethnic origin only when a primary object of Federal assistance is to provide employment[729] or when equal employment opportunity is necessary to assure equal opportunity for beneficiaries.[730] Although providing employment is not frequently a primary object of LEAA assistance,[731] there is a clear relationship between equal employment opportunity and equal

---

729. Title VI states:

> Nothing contained in this /title/ shall be construed to authorize action under this /title/ by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1970).

730. 28 C.F.R. § 42.104(c)(2) (1974). See also 45 C.F.R. § 80.3(c)(3) (1974) (Department of Health, Education, and Welfare) and 24 C.F.R. § 1.4(c)(2) (1974) (Department of Housing and Urban Development).

Beneficiaries are those persons to whom assistance is ultimately provided. Among the beneficiaries of LEAA-funded programs are the general public, which benefits from police protection; residents of correctional institutions; and persons appearing before criminal courts.

731. Not more than one-third of any block action grant may be used for salaries of police or other law enforcement personnel. 42 U.S.C. § 3701.

opportunity in the LEAA-funded program benefits;[732] and, therefore, Title VI

---

732. For example, the Commission has observed that where minorities are inadequately represented in police departments, frequently there are complaints of police misconduct by the minority community, and police department relations with the minority community are often poor. U.S. Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest 78 (1970) and Hearing Before the United States Commission on Civil Rights, Cairo, Illinois 41 (1972) /hereinafter referred to as Cairo Hearing/. Testimony has indicated that where minorities were employed by the police department, police-community relations were better. Mexican Americans and the Administration of Justice in the Southwest, supra this note. Similarly, the New York Advisory Committee to this Commission wrote:

> The gulf between correction officer and inmate based on race, language, culture, and life style, where combined with the lack of adequate human relations training for correction officers, is a serious obstacle to the development at the institutional level of the kind of environment in which rehabilitation can take place. New York Advisory Committee to the U.S. Commission on Civil Rights, Warehousing Human Beings 29 (December 1974).

The New York Committee also wrote:

> The total absence of black correction officers /at the Clinton, New York, correctional facility/ indicates many weaknesses in the institution's employment systems. This factor, combined with numerous written and verbal comments by inmates, suggests that inmate-guard relations were poor. Id. at 39.

See also Indiana State Advisory Committee to the U.S. Commission on Civil Rights, Racial Conditions in Indiana Rehabilitation Institutions 17 (July 1971), and speech by a former Attorney General of the United States who urged:

> ...large corrections institutions at all levels to make an extraordinary effort to find and recruit minority personnel - not only because it is the law; not only because it is fair, but because it can genuinely benefit the corrections process. John N. Mitchell, Attorney General, Speech at the National Conference on Corrections, Dec. 6, 1971.

would prohibit most[733] racial and ethnic employment discrimination. Moreover, unlike Title VI, the Crime Control Act's prohibition against discrimination[734] contains no limitations in the area of employment. The Crime Control Act, thus, prohibits all employment discrimination based on sex, race, and ethnic origin in LEAA-funded programs, including that racial and ethnic discrimination which might not be proscribed by Title VI.

LEAA, however, has expressed different opinions. The Administrator has stated, in effect, that the application of the Crime Control Act to employment[735] is the same as that of Title VI. LEAA civil rights

---

733. Title VI may not prohibit employment discrimination in custodial or clerical positions where there is little or no contact with beneficiaries and the relationship between equal opportunity in employment and in delivery of service is not obvious.

734. See note 729 supra.

735. Letter from Richard W. Velde, Administrator, LEAA, DOJ, to Congressman Charles B. Rangel, Jan. 10, 1975. In that letter, the Administrator stated:

> LEAA's view of Section 518(c)(1) of the Act is that it applies to employment matters where the primary purpose of a program or activity, funded under the Omnibus Crime Control and Safe Streets Act, is employment related or where discrimination in the employment practices of a recipient of LEAA funds could cause a beneficiary to be excluded from a LEAA-funded activity on the ground of race, color, national origin, or sex. Id.

In June 1975, LEAA noted:

> In order to settle the question, regulations implementing Section 518(c) of the Act will issue in the fall as proposed rule-making, inviting public comment on the inclusion or exclusion of employment discrimination as a prohibited act under Section 518(c). Until comments on the proposed rules implementing 518(c) are fully considered and final rules issued, the Commission errs in assuming any attitude by the Administrator or the LEAA staff has been articulated. June 1975 Velde letter, supra note 725 .

officials have taken a position which is not quite as strong as the Administrator's: They have indicated that their review of the legislative histories of the Crime Control Act and Title VI lead them to question whether the Crime Control Act's coverage of employment discrimination is any broader than Title VI.[736] They have not, however, definitively stated that the act's coverage of employment discrimination is limited to Title VI-type coverage.

We believe that LEAA's argument is unsound. First, if LEAA were correct, a similar point would have likely been raised with regard to the State and Local Fiscal Assistance Act of 1972.[737] The nondiscrimination provision of that act,[738] like the nondiscrimination provision in the Crime Control Act, is similar to Title VI but does not contain the Title VI restriction on the coverage of employment discrimination.

---

736. LEAA civil rights officials state that they have reviewed the legislative history of the Crime Control Act and that because they have found nothing relating to employment discrimination, they assume that the coverage of the Crime Control Act is intended to be similar to that of Title VI. These officials concluded that the legislative history of Title VI indicates that Title VI would not cover employment discrimination even if it did not contain specific restrictions on the issue. They further said that during the past year they have asked the Office of Legal Counsel of the Department of Justice to provide them with a legal opinion as to whether the Crime Control Act has an outright prohibition of employment discrimination in programs or activities receiving LEAA funds. LEAA officials anticipate that the Office of Legal Counsel will not respond directly to the issue, but rather will suggest that when LEAA issues its proposed rulemaking to implement the Crime Control Act, it also seek public opinion as to the coverage of that act over employment discrimination. The proposed rulemaking is discussed on p. 296 infra. 1975 Rice et al. interview, supra note 728 .

737. 31 U.S.C. §§ 1221-1263 (Supp. III, 1973) and 26 U.S.C. §§ 6017A and 6687 (Supp. III, 1973).

738. 31 U.S.C. § 1242(a) (Supp. III, 1973).

Actions by the Office of Revenue Sharing (ORS) of the Department of the Treasury, the agency responsible for administering the State and Local Fiscal Assistance Act of 1972, indicate that ORS officials interpret that act as broadly prohibiting employment discrimination.[739]

Second, there is evidence within the Crime Control Act of 1973 that the nondiscrimination provision is meant to include recipient employment practices. Proximate to the nondiscrimination provision in the Crime Control Act of 1973, there is a prohibition on the use of quota systems.[740] It would appear that this prohibition applies to the employment practices of law enforcement agencies, as it proscribes quotas "to achieve racial balance...in any law enforcement agency." It seems reasonable to assume that the prohibition against quotas was included to limit the scope of the nondiscrimination provision. Thus, it is inferred that the nondiscrimination provision must also extend to recipient employment practices.

---

739. For example, ORS has entered into an agreement with the Equal Employment Opportunity Commission (EEOC) which provides, in part, that when EEOC has found probable cause to believe that employment discrimination exists in a revenue sharing-funded activity, the Director of ORS will proceed to seek to secure compliance. Memorandum of Agreement between the Office of Revenue Sharing and the Equal Employment Opportunity Commission, signed by John H. Powell, Jr., Chairman, EEOC, and Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, Oct. 11, 1974.

In June 1975 LEAA commented:

> One Federal Circuit Court of Appeals has found that employment is covered under a nondiscrimination provision of the revenue sharing legislation, but the question is still arguable. U.S. v. City of Chicago, 9 EPD 10,085 at P. 7438. June 1975 Velde letter, supra note 725 .

740. This prohibition is discussed on p. 301 infra.

The issue of whether or not the Crime Control Act's prohibition against discrimination broadly prohibits employment discrimination in LEAA-funded programs is an important one.[741] As LEAA stated:

> Coverage of employment considerations by Section 518(c)(1) of the Act is important principally in clarifying LEAA's rights to use 518(c) as an enforcement tool in cases where a recipient is believed by LEAA not to meet Equal Employment Opportunity Standards.[742]

While LEAA also has separate regulations which prohibit such discrimination[743] and it might be assumed that the existence of these regulations might obviate the need to assess definitively the act's coverage of employment discrimination, the fact that the regulations' provisions for sanctions are not

---

741. LEAA remarked:

> Of far more consequence to the compliance program of LEAA are the procedural problems under Section 518(c)(2) of the Act, touched upon but not fully considered in the Commissions's draft report (See p. /382/, termination of funding). July 1975 Velde letter, supra note 725.

742. Id.

743. These regulations were issued pursuant to the rulemaking authority of the LEAA Administrator. 5 U.S.C. § 301 et seq. (1970) and 42 U.S.C. § 3751 (Supp. III, 1973). Their purpose is:

> to enforce the provisions of the 14th amendment to the Constitution by eliminating discrimination on the grounds of race, color, creed, sex, or national origin in the employment practices of State agencies or offices receiving financial assistance extended by /the Department of Justice/. 28 C.F.R. § 42.201 (1974).

They are discussed further on pp. 295 infra.

adequate makes the question a pertinent one.[744] The act's provision for sanctions when employment discrimination cannot be voluntarily corrected is stronger than that provided by the regulations.[745]

Despite these civil rights requirements, there is abundant evidence that racial and ethnic discrimination continues in many law enforcement activities, including those of police departments, courts, and correctional institutions. Police departments often appear to provide inadequate police protection in minority neighborhoods in comparison to that in other neighborhoods,[746] and yet certain laws are

---

744. LEAA stated:

> The draft report at pages [274-280 supra] deals exclusively with whether the provisions of 518(c)(1) apply to employment matters. The Commission's concern that Section 518(c) be found to extend to employment matters apparently stems from a concern that LEAA move administratively to terminate funding in cases of noncompliance, a concern which seems curious given LEAA's recent action to defer or suspend funding to a number of recipients or applicants pending resolution of compliance problems. Indeed, the entire pre-award review program of LEAA is predicated on the idea that funding of a particular grant will be deferred until any compliance problems presented by the application are adequately addressed. June 1975 Velde letter, supra note 725.

The issues of preaward reviews and fund termination are discussed in detail on pp. 348 and 382 respectively.

745. See p. 376 infra for a discussion of the sanctions available to LEAA under its regulations and under the Crime Control Act.

746. Mexican Americans and the Administration of Justice in the Southwest, supra note 732, at 12-13.

frequently more strongly enforced in minority neighborhoods[747] or against minorities, for example, laws against gambling, prostitution, and night parking.[748] Police sometimes harrass or are discourteous to minority men and women.[749] Minorities are seriously underrepresented on grand and petit juries in some States.[750] Minorities are sentenced to prison more frequently and receive longer sentences than nonminorities who have been convicted of the same offenses.[751] Minorities are sometimes assigned to prisons lacking educational, vocational, and work-release programs more frequently than nonminorities.[752] The better prison work assignments are often reserved for

---

747. Wisconsin State Advisory Committee to the U.S. Commission on Civil Rights, Police Isolation and Community Needs 124 (December 1974).

748. Mexican Americans and the Administration of Justice in the Southwest, supra note 732. See also Minnesota State Advisory Committee to the United States Commission on Civil Rights, Bridging the Gap: The Twin Cities Native American Community (1975), and Police Isolation and Community Needs, supra note 747. Various reports on arrest procedures have produced evidence that there is a disproportionate number of minority arrests for certain crimes in relation to the minority percentage of the population. E.g., although blacks comprise approximately 7 percent of the population of the State of California, they account for 45 percent of all suspicion arrests, which are arrests made without specific charges. Lawyers Committee for Civil Rights Under Law, Law and Disorder III 32 (1972).

749. Cairo Hearing, supra note 732; Mexican Americans and the Administration of Justice in the Southwest, supra note 732; and Pennsylvania State Advisory Committee to the U.S. Commission on Civil Rights, Police-Community Relations in Philadelphia (June 1972).

750. Mexican Americans and the Administration of Justice in the Southwest, supra note 732; at 36-46. The Commission found that judges and jury commissions frequently do not make affirmative efforts to obtain a representative cross-section of the community for jury service and that the underrepresentation of Mexican Americans on juries resulted in distrust by Mexican Americans of the impartiality of verdicts. Id.

751. See Debro, "The Black Offender and Victim," Paper Prepared for 1973 Conference on Minorities and Correction (Chicago State University, Oct. 24-26, 1973).

752. Alabama State Advisory Committee to the U.S. Commission on Civil Rights, Alabama Prisons (1975).

nonminorities,[753] and housing within prisons and halfway houses is sometimes segregated by race.[754]

Similarly, laws may be differentially enforced depending on the sex of the alleged offender. For example, laws against prostitution have sometimes been enforced against the female prostitute but not against the male customer who solicits or accepts solicitation of prostitutes, although prostitution is defined by law as a crime for both prostitute and customer.[755] Further, police have mistreated women who are rape victims by intimidating them and questioning them excessively.[756] The female victims of marital violence are singled out for special treatment, usually in an attempt to discourage prosecution.[757] Women are denied the opportunity to

---

753. Warehousing Human Beings, supra note 732. For a general discussion of racial discrimination in the criminal justice system see D.S. Skoler, "The Black Experience and the Criminal Justice System," Paper Presented at the Fourth Alabama Symposium on Justice and the Behavorial Sciences (February 1974), reprinted by the Commission on Correctional Facilities and Services, American Bar Association.

754. Arizona State Advisory Committee to U.S. Commission on Civil Rights, Adult Corrections in Arizona (1974).

755. In March 1974, District of Columbia Superior Court Judge David L. Norman ruled as unconstitutional as applied, a District of Columbia statute prohibiting prostitution because of the police practice of arresting only female prostitutes and not male customers. United States v. Wilson, Criminal No. 69760-73 (Super. Ct. D.C., Mar. 14, 1974.) Subsequently, the Metropolitan Police Department of the District of Columbia made a good faith effort to enforce the statute against both males and females and, thus, in a later case the court did not find the statute to be unconstitutional as applied. United States v. Dinkins, Criminal No. 52179-74, (Super. Ct. D.C., Oct. 4, 1974).

756. Report of The Prince George's County Task Force to Study the Treatment of the Victims of Sexual Assault, March 1973.

757. Truninger, Marital Violence: The Legal Solutions, 23 Hastings L. J. 259 (1971).

serve on juries.[758] Communities frequently fail to provide halfway houses and detoxification centers for women even where such facilities are provided for men. Women who are incarcerated are offered fewer opportunities for training and education than are men, and those programs which are provided frequently offer training only in sex-stereotyped, menial occupations.[759]

Employment discrimination on the basis of race, ethnic origin, and sex by police departments[760] also appears to be widespread.[761] For example, fewer than 10 percent of all employees of police departments are minorities.[762] In contrast, minorities account for at least 17 percent of the population in

---

758. Taylor v. Louisiana, 43 U.S.L.W. 4167 (1975).

759. Women's Prison Association, A Study in Neglect: Report on Women Prisoners (1972).

760. Police departments are not the only law enforcement institutions which fail to provide equal employment opportunity. Correctional facilities also have poor employment records. See, for example, Alabama Prisons, supra note 752; Adult Corrections in Arizona, supra note 754; Commission on Correctional Facilities and Services, American Bar Association, "A Correctional Must... Increased Staff Recruitment from Minority Groups" (Monograph, 1972) and IMAGE (Incorporated Mexican American Government Employees) Position Paper on the Administration of Justice and the Spanish Speaking presented before the LEAA Policy Development Seminar on Civil Rights Compliance, Feb. 10-11, 1975.

761. See J. Egerton, "A National Survey, Minority Policemen; How many are there?" Race Rel. Rep., Vol. 5, No. 21, 19 (November 1974).

762. In 1973, according to data maintained by the Equal Employment Opportunity Commission, 6.3 percent of all fulltime police department employees were black; 2.3 percent were of Spanish speaking background; 0.2 percent were Asian American; 0.2 percent were Native American; and 0.3 percent were other minority, including Aleuts, Eskimos, Malayans, and Thais. Equal Employment Opportunity Commission, Minorities and Women in State and Local Government: United States Summary, Vol. 1 49 (1973).

this country[763] and comprise more than 18 percent of all State and local government employment.[764] Lack of participation by minorities as employees in law enforcement agencies is even more striking when the practices of some individual agencies are examined.[765] Frequently, the low proportion of minorities in police departments is directly attributable to discriminatory selection procedures, such as height requirements,[766] unvalidated

---

763. The U.S. Bureau of the Census has determined that in 1970, of the 203.2 million Americans it counted, 11.1 percent were black, 1.4 percent were of other races, and 4.5 percent were of Spanish origin. U.S. Bureau of the Census, Department of Commerce, PC (1)-B1, 1970 Census of Population: Current Population Characteristics - United States Summary 22 (January 1972) and PC(2)-1(c), 1970 Census of Population: Subject Reports--Persons of Spanish Origin at IX (June 1973).

764. In 1973, according to data maintained by the Equal Employment Opportunity Commission, 13.7 percent of all fulltime State and local employees were black; 3.3 percent were of Spanish speaking background; 0.6 percent were other minority. Minorities and Women in State and Local Government, supra note 762 at 9.

765. For example, at the time of the Commission's hearing in Cairo, Illinois, 38 percent of the Cairo community was black. The Cairo police force employed 17 men including the chief, but only 1 was black. See Cairo Hearing, supra note 732, and U.S. Commission on Civil Rights, Cairo Illinois: A Symbol of Racial Polarization 13 (February 1973). Similarly, in 1972 the Wisconsin State Advisory Committee to the United States Commission on Civil Rights estimated that only 3 percent of Milwaukee's police force was minority while minorities constituted 17 percent of the city's population. Police Isolation and Community Needs, supra note 747.

766. Discriminatory height requirements and LEAA's position with regard to these requirements are discussed on p. 308 infra.

testing,[767] and preemployment residency requirements.[768]

Exclusion of women from employment in police departments on the same basis as men has been more blatant. Only 12.0 percent of all police

---

767. The Supreme Court has held that if a selection procedure which results in a disproportionate rejection of minorities cannot be shown to be related to job performance, that practice is prohibited. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Equal Employment Opportunity Commission guidelines prohibit the use of employment tests which disproportionately exclude minorities or women, unless those tests have scientifically been demonstrated to be related to job performance and no less discriminatory tests are available. 29 C.F.R. §1607. Yet selection procedures used by police departments have often not been proved to be related to job performance. A background paper on a research project conducted at the Industrial Relations Center of the University of Chicago notes:

> The majority of the tests used presently to screen applicants for police service deal with an applicant's ability to understand language and apply reason in the solution of verbal problems. While these skills are undeniably related to success in police training schools, scores on tests of this type have not been shown to be related to the on-the-job performance of police officers. Since officers with high general reasoning ability, or "I.Q.," do not necessarily perform better than officers with less of this ability, the general "I.Q." type of test has not been proved valid for the selection of police officers. John Furcon, Occasional Paper 35: Some Questions and Answers About Police Officer Selection Testing (1972).

Selection procedures are also discussed in Police Foundation, Police Personnel Administration 69-100 (1974).

768. For example, in 1972 the Milwaukee Police Department required a one year Wisconsin residency in order to accept an applicant for employment, excluding from police department employment the large number of minorities in Milwaukee who were recent arrivals from other States. Police Isolation and Community Needs, supra note 747, at 16 and 117. Residency requirements, however, may be protective of minorities in cities with large minority populations. In New York City for example, the Guardians, a black police officer's association, have charged that the elimination of New York City Police Department's residency requirement has permitted the police department to hire white suburbanites for jobs which could be held by black residents of New York City. Telephone interview with Sergeant Howard L. Sheffy, Equal Opportunity Unit, New York Police Department, Apr. 1, 1975.

department employees are women and most of these are in clerical positions. Only about 2 percent of all police officers are women,[769] as compared with 34.7 of all State and local government employees.[770] Height, weight, and agility requirements exclude many women,[771] and many police departments have refused to accept female applicants, either outright[772] or for certain positions.[773] In 1972, as noted by the Assistant Director of the Police Foundation,[774] there were

> approximately 1,000 policewomen in the United States. The vast majority of these women have been hired to do jobs that women are thought to perform better than men, such as working with juveniles, female prisoners and typewriters. 775

---

769. Minorities and Women in State and Local Government, supra note 762 at 49.

770. Id. at 9.

771. International Association of Chiefs of Police and the Police Foundation, Deployment of Female Police Officers in the United States (1974).

772. Catherine Milton, Assistant Director, Police Foundation, Women in Policing (1972).

773. For a review of information gathered in recent years about women in policing, see Police Foundation, Women in Policing: A Manual (1974).

774. The Police Foundation is a nonprofit funding agency established in 1970 by the Ford Foundation "to help American police agencies realize their fullest potential by developing and funding promising programs of innovation and improvement." Id.

775. Id. at 3.

Although the number of policewomen appears to be increasing, progress is slight. For example, a 1974 survey of approximately 400 State and local police departments showed that about 270 of them employed no women on patrol.[776] With the exception of the Washington, D.C., Police Department, in 1972 the Police Foundation had found no police department which had made all entrance requirements the same for men and women.[777]

II. Organization and Staffing

Responsibility for ensuring compliance with civil rights laws and regulations by LEAA recipients lies with the Office of Civil Rights Compliance (OCRC).[778] The staff of OCRC are located in Washington but spend about 30 percent of their time in the field.[779] There are no plans, however, to locate civil rights compliance staff in LEAA's regional offices.[780]

---

776. Deployment of Female Police Officers in the United States, supra note 771. Also included in the survey of the respondents was the National Park Service of the Department of the Interior headquarters office and the Department of Army Military Police headquarters office.

777. Women in Policing, supra note 773 at 17.

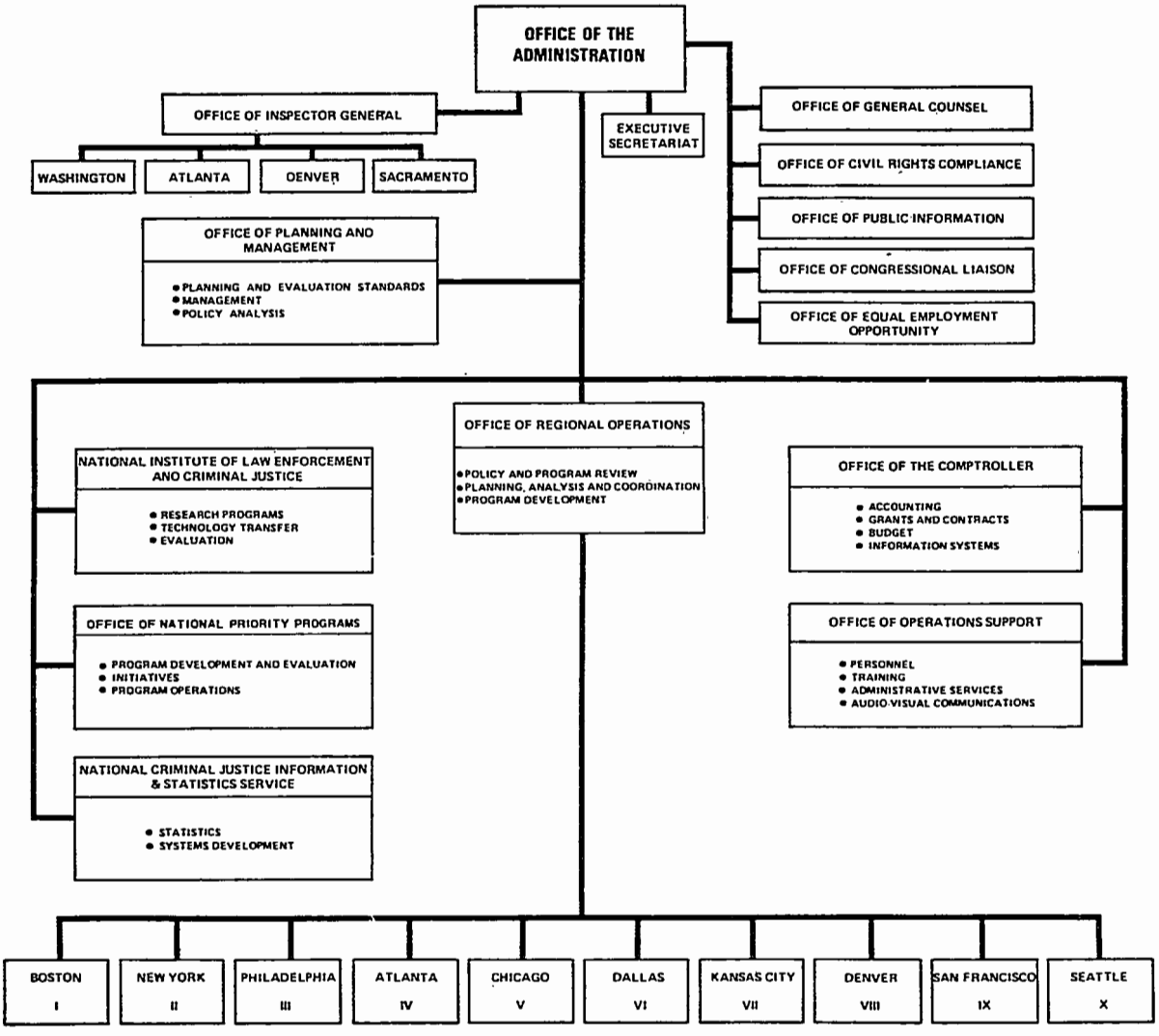
778. OCRC was established in May 1971. By October 1971 it had three staff members. Prior to May 1971 LEAA civil rights responsibilities were handled on a part-time basis in LEAA's Office of General Counsel. LEAA's organizational structure is discussed in detail in LEAA, Department of Justice, Handbook: Organizations and Functions (February 1975).

779. This varies from as little as 25 percent for some staff members to as much as 50 percent for others. 1975 Rice et al. interview, supra note 728.

780. LEAA's regional offices are located in the 10 standard Federal regions. See map (Exhibit 3) on p.127 infra. None of the regional offices were visited by Commission staff, since no civil rights functions are conducted in the regional offices. The OCRC Director does not believe that even with a staff increase, regionalization of the civil rights program would be workable. In order to provide the needed depth for civil rights monitoring, the Director maintains that more than one person is needed in each regional office. The Director describes the civil rights operation of LEAA as somewhat regionalized at present in that program staff in the field offices are kept abreast of civil rights activities in their region and frequently provide input, information, and coordination assistance to the OCRC staff in compliance reviews and complaint investigations. However, information provided to the OCRC by regional offices is usually generated by complaints received within the region.

Exhibit 8

LEAA ORGANIZATION CHART



February 1975

The Director of OCRC[781] reports to the LEAA Administrator.[782]

As of February 1975, the OCRC Director was assisted by a fulltime professional staff of 16.[783] This is an increase of 8 persons (100 percent)

---

781. The Director is at the GS-15 level. The LEAA organizational structure is shown in Exhibit 7 on p. 289 supra.

782. During fiscal year 1975, the LEAA Administrator, Richard W. Velde, has shown a personal interest in the LEAA civil rights program. This is exemplified by the fact that he arranged for and participated in a two-day conference in February 1975 of 32 experts in the field of civil rights and law enforcement to discuss LEAA's compliance program. In February 1975 the Administrator also spoke at a conference of black law enforcement officials sponsored by the Center of Correctional Psychology at the University of Alabama. The text of this speech was not available from the LEAA Office of Information at the time this report was written.

783. 1975 Rice et al. interview, supra note 728. This number does not reflect student assistants employed by OCRC or other part-time employees and private contractors and consultants who contribute to LEAA's civil rights operation.

since mid-1972.[784] This increase is not as much as the OCRC Director would have liked.[785] Even though LEAA program personnel assist OCRC in its compliance program,[786] OCRC is understaffed--in fact, the staff resources available are almost inconsequential in comparison to the civil rights problems facing LEAA.[787]

---

784. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--A Reassessment 352 (1973).

785. OCRC requested a seven-person increase for fiscal year 1974. It received only four additional positions.

786. Interview with Herbert C. Rice, Director, OCRC, LEAA, DOJ, Mar. 20, 1974. Mr. Rice indicated that, for example, personnel from LEAA's Systems Division assist the OCRC by retrieving material from law enforcement agencies or by taking such information off data tapes from police departments with a processing system. OCRC uses this information in preparation for compliance reviews to make preliminary determinations on which areas will require more indepth scrutiny. The assistance of this Division to OCRC accounts for less than one person year. LEAA's audit staff conduct routine checks to ensure that affirmative action programs have been drafted (see section pp. 306-07 infra), and whether they contain the required components, but they do not assess the adequacy of the plans. Also, LEAA's program staff function as advisors to the OCRC in structuring compliance review and investigative materials.

787. In June 1975 LEAA wrote to this Commission:

> Adequate staffing of the various offices within LEAA remains a major concern for the LEAA Administration...While OCRC's professional staff is admittedly small, it compares favorably with other staff and line components of LEAA, both as to number and grade of employees.
>
> The salient fact is that no new positions are provided to LEAA under its FY 1976 budget. June 1975 Velde letter, supra note 725.

Understaffing has long been a problem of OCRC, and was noted by the Civil Rights Division of the Department of Justice in its review of LEAA in 1972. DOJ, "The Civil Rights Compliance Program of the Law Enforcement Assistance Administration" (September 1972). This review is discussed in chapter 9, Coordination and Direction, infra.

Moreover, not all OCRC staff members work on Title VI. Within the Office there are four divisions: Compliance Review, Complaints Resolution, Reports, and Contracts Compliance.[788] The Compliance Review, Complaints Resolution, and Reports Divisions[789] have Title VI responsibilities. The Compliance Review Division with a staff of four professionals is responsible for preaward reviews, postaward reviews, and evaluation of recipients' equal employment opportunity programs.[790] The Complaints Resolution Division, with a staff of six professionals, investigates complaints. The Reports Division, staffed with one professional, develops and implements reporting systems for law enforcement and correction agencies. Three other professional persons are on the immediate staff of OCRC's Director and are responsible for myriad functions including legal, personnel, and administrative matters.[791]

Although most staff members are given areas of specific responsibility, there is a great deal of flexibility in assignments so that the entire staff can assist on whatever projects are

---

788. See Exhibit 8 on p. 293, infra.

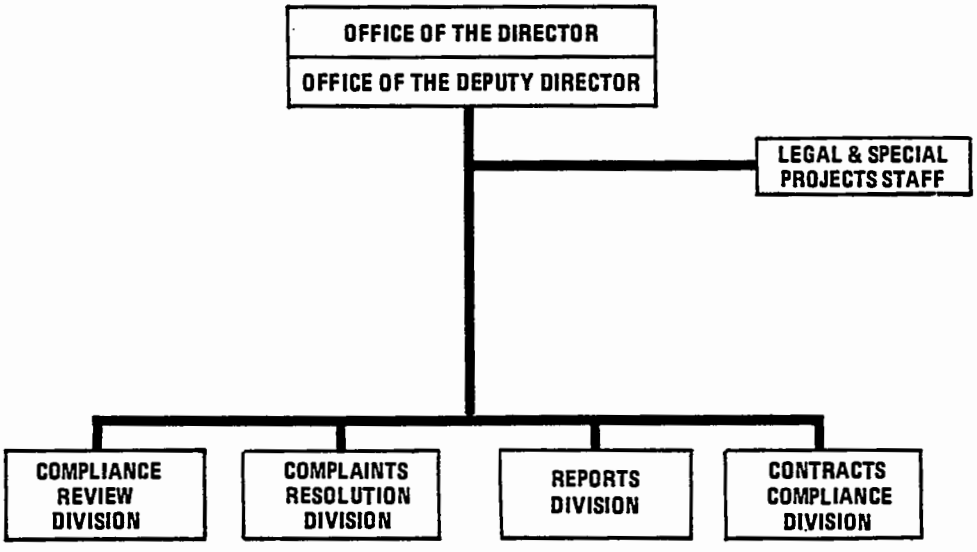
789. The Contracts Compliance Division is responsibile for monitoring the employment practices of contractors awarded contracts for construction or renovation of criminal justice facilities with LEAA financial assistance to ensure that these LEAA-assisted contractors are in compliance with Executive Order 11246 as amended, which prohibits discrimination on the basis of race, national origin, or sex in Federal and federally-assisted contracts. This division has two fulltime professional staff members.

790. These duties are discussed on pp. 348, 353, and 306, infra. respectively.

791. 1975 Rice et al. interview, supra note 728.

Exhibit 9

OFFICE OF CIVIL RIGHTS COMPLIANCE ORGANIZATION CHART



February 1975

necessary, and it is difficult to pinpoint which professional works on any specific area of responsibility.[792] As a result, OCRC staff say that they cannot tell with any accuracy how much time they spend on Title VI.[793]

It is clear, however, that as a result of its small size, OCRC has not been able to review systematically and thoroughly LEAA recipients to ensure that they are in compliance with LEAA's civil rights requirements. Instead, it appears that LEAA's approach has been to focus primarily on large recipients and on particular issues--most notably, employment discrimination by police departments.

---

792. March 1974 Rice interview, supra note 786.

793. 1975 Rice et al. interview, supra note 728.

III. Regulations and Guidelines

There are a number of regulations and guidelines detailing how nondiscrimination is to be implemented in LEAA-funded programs. The Department of Justice has issued a Title VI regulation covering LEAA-funded programs.[794] The regulation is similar to those issued by other Federal agencies with Title VI responsibilities.[795] In addition, LEAA's employment regulation requires applicants for LEAA assistance to submit assurances that they will comply with the prohibition.[796] LEAA has also issued equal employment opportunity guidelines, which require certain recipients to write equal employment opportunity plans;[797] guidelines on minimum height requirements;[798] and instructions on site selection for community-based correctional facilities.[799] It is to LEAA's credit that it has issued these requirements.

---

794. 28 C.F.R. § 42.101.

795. See, for example, Department of Health, Education, and Welfare Title VI regulations 45 C.F.R. § 80.3, and Department of Housing and Urban Development regulations 24 C.F.R. § 1.4.

796. 28 C.F.R. § 42.201. This regulation requires nondiscrimination on the basis of race, color, creed, sex, or national origin in LEAA-funded programs.

797. 28 C.F.R. § 42.301. These guidelines are discussed on pp. 297 infra.

798. These guidelines are discussed on p. 308 infra.

799. These instructions are discussed on p. 314 infra.

Nonetheless, these regulations do not fully describe LEAA and LEAA recipient responsibilities for ensuring nondiscrimination in LEAA-funded programs. For example, as of February 1975, more than a year and a half had elapsed since the passage of the Crime Control Act of 1973. Nonetheless, LEAA had not issued a regulation to implement that act, but was in the process of drafting one which it hoped to issue for public comment in mid-1975.[800]

Recipients of LEAA assistance will have some understanding of their civil rights responsibilities under the Crime Control Act because they are in many instances outlined in the Title VI and equal employment opportunity regulations. If these were adequate, they might, to some extent, obviate the need for other detailed regulations. But they are not.[801] There is, moreover, one major area, covered by the Crime Control Act but not covered by any LEAA regulation: sex discrimination in the delivery of services, which continues to be a major problem in law enforcement programs.[802] In April 1975, LEAA announced that it had issued a contract for the development of a sex discrimination regulation and that LEAA aimed to publish it for comment in fall 1975.[803]

---

800. 1975 Rice et al. interview, supra note 728.

801. Deficiencies of the uniform Federal agency Title VI regulations are discussed in chapter 9 infra, The Department of Justice.

802. Examples of these problems are discussed on p. 283 supra.

803. Telephone interview with Herbert C. Rice, Director, Office of Civil Rights, LEAA, DOJ, Apr. 27, 1975.

A. Employment

1. Affirmative Action

LEAA's equal employment opportunity guidelines[804] are the core of its equal opportunity activities.[805] These guidelines require that each recipient with 50 or more employees and with a service population which is 3 percent or more minority establish an equal employment opportunity program (EEOP) in order to ensure that minorities and women are not discriminated against in employment within the criminal justice system. Where a recipient with 50 or more employees has a service population of which is less than 3 percent minority, an affirmative action plan relating to employment practices affecting women must be developed.[806]

---

804. 28 C.F.R. § 42.301, et seq. (1974).

805. These guidelines form the basis for most of LEAA's desk and onsite review activity.

806. 28 C.F.R. § 42.302(d) (1974). Commission staff have recommended that any recipient with 25 or more employees which receives assistance in excess of $10,000, or which has been found to have discriminatory employment practices, be required to implement an EEOP. Letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights to Herbert C. Rice, Director, Office of Civil Rights Compliance, Law Enforcement Assistance Administration, DOJ, Nov. 27, 1972.

Many of LEAA's requirements for an EEOP are similiar to those contained in Revised Order No. 4,[807] the Office of Federal Contract Compliance instructions for an affirmative action plan. The EEOP must contain data classified by race, ethnic origin, and sex on employees by job category, disciplinary actions, applications, promotions, transfers, and terminations. It also requires racial, ethnic, and sex data on the population of the community, the work force, and the unemployed population. It also requires information on the employers' selection policies and practices, including testing procedures.

---

807. 41 C.F.R. § 60.2.1, et seq. (1974). Revised Order No. 4 outlines requirements by the Office of Federal Contract Compliance of the Department of Labor for being in compliance with Executive Order 11246, as amended (3 C.F.R. 339 (Comp. 1964-65), 42 U.S.C. § 200e (1970)). While the authority of this order itself extends only to companies which held procurement or service contracts with the Federal Government, the order describes the steps an employer should take to ensure nondiscrimination in employment practices and to eliminate affirmatively underutilization of minorities and women. Revised Order No. 4 is discussed further in Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 3 (July 1975).

As part of an affirmative action plan, the employer should be required to conduct a thorough analysis of his or her utilization of minorities and women in every job category. Where the analysis reveals underutilization of women or minorities, numerical goals with timetables for their achievement should be set. To ensure against further discrimination by the employer, the employer must also assess his or her employment practices and make appropriate changes in any instance in which the employer's practices disproportionately exclude minorities or women. For example, if the employer's selection criteria disproportionately exclude minorities or women and are not job related, these selection criteria must be replaced by criteria which are job related.[808]

There is a fundamental disagreement between the Law Enforcement Assistance Administration and the Commission on Civil Rights on the question of goals and timetables for affirmative action. LEAA does not believe that goals and timetables should be required in its recipients' affirmative

---

808. For further details concerning the requirements of an affirmative action plan, see Equal Employment Opportunity Commission, Affirmative Action and Equal Employment: A Guidebook for Employers (1974); Revised Order No. 4, supra note 808; U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination (July 1975) and Statement on Affirmative Action for Equal Employment Opportunities (1974); and ch. 2 supra, p. 65. Selection criteria are discussed in note 767 supra.

action plans, but rather should be required only when it has been determined that a recipient has engaged in discriminatory employment practices.[809] It is the position of the Commission on Civil Rights that goals and timetables must be employed wherever there is an underutilization of minorities and women, regardless of whether the recipient currently is found to be discriminating against minorities or women.[810]

Thus, the Commission believes that the greatest deficiency of the LEAA guidelines is that although LEAA had the authority to do so, it did not require an EEOP to include written goals and timetables to[811]

---

809. LEAA stated:

> LEAA does not believe that the Commission and it differ appreciably in the belief that goals and timetables are required to overcome the effects of past unlawful discrimination. The difference lies in the point at which goals and timetables are required. LEAA's present approach of not requiring goals and timetables until it has been determined that a recipient has engaged in unlawful discriminatory practices is well supported by the case law, and is philosophically sound. See for example, NAACP v. Allen, 493 F.2d 614 (5 C.A., 1974); federal policy, see for example the federal four agency agreement of March 23, 1973. June 1975 Velde letter, supra note 725.

810. As the Commission has previously noted, serious underutilization of minorities and women has long been held under Title VII of the Civil Rights Act of 1964 to constitute a prima facie violation of the act, requiring the imposition of broad relief by the court if the employer fails to come forward with sufficient justification. Similarly, under Executive Order 11246, as amended, unjustified underutilization requires the establishment of goals and timetables for eliminating underutilization. Statement on Affirmative Action for Equal Employment Opportunities, supra note 808.

811. LEAA staff indicated that the required plans are called "equal employment opportunity plans" rather than affirmative action plans because they are not required to include goals and timetables. 1975 Rice et al. interview, supra note 728.

812

overcome underutilization of women or minorities. For some time LEAA staff stated that they had not required goals and timetables because the Crime Control Act prohibits quota systems or percentage ratios to eliminate

---

812. LEAA stated:

> /The Commission's approach/ will encourage recipients to treat goals and timetables as a permanent cure rather than encourage them to deal with the basic inequities which created the need for goals and timetables, i.e., there will be little incentive to deal with these inequities because it is easier to meet the goals than undertake the expensive task of validating selection procedures. This, in turn, leads to an impression that racial, sexual, and ethnic groups are entitled to certain proportions of the available jobs based upon their proportions in the hiring area as a matter of right. This is quite different from the idea that in a non-discriminatory world racial, sexual, and ethnic groups will hold a proportion of jobs roughly representative of their proportions in the hiring area. The /Commission's approach/ carries the implicit assumption that racial, sexual, and ethnic groups cannot equally compete for jobs. /LEAA's approach/ has the implicit assumption that given fair and equitable employment procedures all groups can compete equally. We feel LEAA's approach is more sound. June 1975 Velde letter, supra note 725..

LEAA representation of this Commission's position is not accurate. This Commission agrees with LEAA that affirmative action plans must contain action items to ensure that the employer's practices, including selection and recruitment practices, are nondiscriminatory. We concur that it is necessary to change procedures which are not job-related but which have a disparate impact upon minorities and women in order to avoid discrimination in future hiring and promotion. Goals and timetables to remedy existing underutilization of minorities and women are also necessary, however, because action items alone would not be sufficient to remedy the effects of past discrimination.

racial imbalance or achieve racial balance in a law enforcement agency,[813] but in July 1974 LEAA issued an instruction which stated that it is permitted to seek the imposition of goals and timetables "to overcome the effects of past discrimination believed to exist in the employment practices of a recipient agency."[814]

---

813. Interview with Herbert C. Rice, Director, OCRC, LEAA, DOJ, July 5, 1973. Section 518(b) of the Crime Control Act of 1973 (now codified, 42 U.S.C. § 3766 (b)(1) and (2) (Supp. III, 1973)) states:

> ...nothing contained in this title shall be construed to authorize the /Law Enforcement Assistance/ Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

In January 1974, however, LEAA's Office of General Counsel issued a legal opinion stating that the imposition of goals and timetables was not violative of the Crime Control Act. Rather, in some instances, the adoption of such procedures would be required by it. LEAA Legal Opinion No. 74-54 "Goals and Timetables Relationship to Section 518(b)," Jan. 21, 1974.

814. LEAA, DOJ, Instruction I 7330.1, "Equal Employment Opportunity Goals and Timetables Under Section 518(b) of the Crime Control Act of 1973," July 19, 1974. LEAA cautioned, however, that:

> In fact, both LEAA Legal Opinion No. 74-54 and LEAA Instruction I 7330.1, cited in the draft report /supra note 813 and this note, respectively/, authorize the requiring of goals and timetables only after a recipient agency has been determined to have engaged in unlawfully discriminatory employment practices. June 1975 Velde letter, supra note 725. /Emphasis added/.

LEAA staff state that in accordance with this instruction, they have required goals and timetables in individual instances.[815] As of February 1975, however, LEAA had not issued a broad requirement that its recipients develop goals and timetables where underutilization of minorities and women exists.[816] LEAA stated:

> ...this office, upon discovering an underutilization of minorities in a recipient agency, puts the burden on the recipient of either providing a legally sufficient explanation for such underutilization or, failing that, instituting goals and timetables as well as taking action to correct the systemic problems which led to underutilization.[817]

Before requiring any recipient to adopt goals and timetables, LEAA officials analyze the causes and then attempt to get recipients to resolve "the basic problems, which led to employment inequities

---

815. 1975 Rice et al. interview, supra note 728.

816. This Commission's endorsement of goals and timetables is outlined in its Statement on Affirmative Action for Equal Employment Opportunities, supra note 808. The Commission stated:

> To the extent...that a problem exists with regard to the utilization of minority groups and women by the employer, then the matter must be treated in the same manner as other management questions. Goals, which are reasonably attainable by applying good faith efforts, should be established to overcome the underutilization. Id. at 16.

817. Letter from Herbert C. Rice, Director, Office of Civil Rights Compliance, LEAA, DOJ, to Cynthia N. Graae, Associate Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Feb. 19, 1975.

in the first place."[818] While it is important that basic problems are resolved, goals and timetables are also essential to remedy the effects of past discrimination.[819]

---

818. For example, if "LEAA discovers an underutilization of minorities that has resulted from a selection device with an adverse impact," ORGR first requires the recipient to demonstrate the validity of the selection device altogether. Id.

819. Under Revised Order No. 4, employers underutilizing minorities or women are required both to correct underlying causes of discrimination and to adopt goals and timetables. Revised Order No. 4, supra note 807. LEAA stated, however:

> It has been our experience that the whole concept of goals and timetables is misunderstood outside the bureaucratic circles of Washington and, in many instances, is looked upon as a permanent cure rather than a temporary measure to overcome the effects of past unlawfully discriminatory practices. June 1975 Velde letter, supra note 725.

The Commission notes that OFCC's Order No. 4 has required goals and timetables from nonconstruction Government contractors since 1970 and that such contractors employ more than 30 percent of the Nation's total civilian work force.

LEAA stated, however:

> ...it is our view that the underutilization of females or minorities shifts the burden to the employer to explain that underutilization.... i.e., it creates a rebuttable presumption of discrimination. 820 ...The question thus becomes, do we treat that presumption 821 as practically conclusive and require goals and timetables unless challenged or do we provide the recipient the opportunity to rebut the presumption, if he can, or provide information about current practices before requiring goals and timetables....This agency, as a policy matter has opted for the second alternative. 822

---

820. LEAA referred this Commission to "...Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8 C.A., 1970) at 426 /and/ Rowe v. General Motor, 457 F.2d 348 (5 C.A., 1972) at 358...." and stated, "Even the Parham court gives support to the second approach when it states "an employer's more recent practices may bear upon the remedy sought" (emphasis added)." June 1975 Velde letter, supra note 725.

821. LEAA stated:

> This is not to say that some presumption cannot be built into our regulations. For example, it may be advisable to amend our regulations to require goals and timetables where a recipient uses selection devices with an adverse impact which have not been validated in accordance with EEOC Guidelines. They would administratively recognize that goals and timetables are required by this unlawful practice. Id.

Such an amendment would be insufficient. As discussed at note 810 supra, a statistical showing of underutilization of minorities or women should mandate the setting of goals and timetables. Recipients with nondiscriminatory selection devises may have an underutilization of minorities or women because of past discrimination which has never been remedied.

822. Id.

For LEAA to require goals and timetables only after reviewing individual recipients' evidence that there is underutilization of minorities and women is inadequate because LEAA does not review the plans of most recipients.[823] Thus, despite the underutilization of minorities and women by a large number of LEAA recipients, under present LEAA practices, in only a few instances could LEAA require goals and timetables.

Once an EEOP is drafted, it generally remains only in the files of the recipient. There is no requirement that the EEOPs be sent by the recipients of the SPAs or to LEAA for review.[824] LEAA's audit staff,[825]

---

823. LEAA commented:

> LEAA does not review the plans of most recipients. However, to take the report's approach and equate underutilization with a simplistic requirement of goals and timetables will in our view have undesirable effects. June 1975 Velde letter, supra note 725.

This Commission believes that there is no reason that a requirement for goals and timetables should be simplistic. As discussed on p. 300 supra, employers should set goals and timetables in every instance in which their own analyses of their work force reveals unjustified underutilization.

824 LEAA stated:

> The discussion relating to enforcement of the requirement that principal recipients of LEAA funds develop and implement equal employment opportunity programs, does not fully consider the fact that the basic enforcement falls on the SPA or LEAA regional office, which offices must require certification that the applicant has developed and is implementing an EEOP as a prerequisite to further funding. June 1975 Velde letter, supra note 725.

This Commission notes, however, that a requirement for certification that EEOPs have been developed is a poor substitute for review of those plans.

825. The audit staff are located in the Office of Audit.

as part of a financial audit of SPAs, check to see if plans have been developed and if the required components are included, but they do not review the plans for adequacy.[826] SPAs are beginning to review plans of agencies to which they pass on money, and in some instances have not passed on money until plans have been completed; but this is not done by all SPAs,[827] and uniformly high standards are not applied by all SPAs.

LEAA staff began indepth reviews of a sample of the plans in October 1974. Between that time and February 1975 it had requested eight recipients to submit plans for review. EEOPs are also examined in conjunction with complaint investigations,[828] but in that case generally the review is only partial. For example, if a complaint concerns discrimination in employee selection, the review of the plan may be largely limited to that portion of the plan on employee selection procedures.[829]

---

826. 1975 Rice et al. interview, supra note 728.

827. Id. The role of SPAs in LEAA's civil rights compliance program is discussed on pp. 325 infra.

828. The Chief of the Complaints Resolution Division requests a copy of the EEOP in conjunction with every employment discrimination complaint investigation. 1975 Rice et al. interview, supra note 728.

829. Id. The Complaints Resolution Division also checks each plan it reviews to ensure that it contains the required components.

2. Guidelines on Minimum Height Requirements

Many police departments have placed a minimum limit on the height of persons that they will employ.[830] The limit varies from department to department and may be as high as 5'9".[831] But because the minimum height acceptable to many police departments is above the average female height,[832] such limits exclude a large proportion of all women from police department employment. LEAA states that they also tend disproportionately to exclude minorities.[833]

---

830. In response to a survey taken by the International Association of Chiefs of Police and the Police Foundation of 386 law enforcement agencies, 205 agencies answered a question on height requirements. Of the 205 respondents, 123 (60 percent) had height requirements and 82 (40 percent) did not. Deployment of Female Police Officers in the United States, supra note 771. Height requirements differ from State to State. For example, the height requirement for police officers in Daytona Beach, Florida, as of 1974, was 5'7", with a minimum weight requirement of 136 lbs. At the same time the Des Moines, Iowa, Police Department had a minimum height requirement of 5'9" and minimum weight requirement of 150 lbs, and the Ames, Iowa, Police Department had a minimum height requirement of 5'9" with a minimum weight requirement of 160 lbs. That height requirements are more capricious than job-related is evidenced by the fact that a person who is 5'8 1/2" tall, and thus too short for employment in the Des Moines or Ames, Iowa, police departments, might herself or himself have been too tall for the Cincinnati Police Department which in 1974 had a maximum height limit on its police officers of 5'8". Id. There is no evidence of superior performance by law enforcement officials in States with higher minimum limits.

831. Id.

832. The average height of women is 5'3" as compared with 5'8" for men. National Center for Health Statistics, Department of Health, Education, and Welfare, Weight, Height, and Selective Body Dimensions of Adults, United States, 1960-62, Series 11, No. 8 (June 1965).

833. LEAA, DOJ, Guideline G 7400.2A, June 18, 1974.

In order to ensure equal employment opportunity in the programs it funds,[834] LEAA has issued a guideline on minimum height requirements. It states that height requirements are prohibited as criteria for employee selection or assignment where they tend to discriminate against women and minorities, unless the recipient can adequately demonstrate the relationship between the requirement and job performance.[835]

When LEAA was asked how many law enforcement agencies have complied with the minimum height guideline, LEAA responded:

> We have no specific knowledge as to the scope of compliance with the height guideline. Following complaint investigations or compliance reviews, a number of recipient law enforcement agencies have lowered significantly, or dropped entirely minimum height requirements.[836]

---

834. Id.

835. The guideline states that minimum height requirement will not be considered discriminatory where the recipient of Federal assistance is able to:

> demonstrate convincingly through the use of supportive factual data such as professionally validated studies that such minimum height requirements...is /sic/ an operational necessity for designated job categories....Id.

836. Letter from Donald E. Santarelli, Administrator, Law Enforcement Assistance Administration, DOJ, to Congressman Charles B. Rangel, May 28, 1974. In July 1975, LEAA stated:

> There is no question that the adoption of the LEAA minimum height guidelines has led to the reduction or elimination of minimum height standards in many police agencies in the United States. June 1975 Velde letter, supra note 725.

Thus, it appears that mere promulgation of the guideline has been insufficient impetus for most police departments to change their height requirements. LEAA has had to rely upon compliance reviews and complaint investigations to enforce the guideline. This practice seems inefficient, for very few LEAA recipients come under scrutiny through these mechanisms. It would have been far more effective if LEAA had determined the extent of compliance with this guideline through a questionnaire, and then relied upon SPAs to effect change where noncompliance was found.[837]

LEAA has permitted police agencies to lower significantly, rather than eliminate their height requirements. LEAA stated:

> Substantial equity to the rights of classes affected adversely by the imposition of a minimum height standard may be reached significantly lowering, not eliminating, a height standard in a specific agency, particularly when considered in the context of the overall resolution of matters. 838

---

837. LEAA stated:

> The Commission's consideration of the impact of a minimum height standard seems narrow. The effect of a minimum height in a specific police agency is only one of many factors to be considered in approaching a voluntary resolution of matters in a particular employment discrimination case. July 1975 Velde letter, supra note 725.

838. Id. LEAA also stated:

> Beyond this, LEAA takes administrative notice of the fact that individuals above a certain height will have difficulty in gaining access to, or egress from, the standard production line vehicles used as patrol cars in most municipal and state police departments. Similarly, there would seem to be a need that a patrol officer be tall enough for the foot of the officer to reach the accelerator pedal in such a police vehicle, and that the officer be able to see over the dashboard. Id.

3. Equal Employment Opportunity Commission Standards

The sum total of LEAA's employment regulation and guidelines is insufficient. A comprehensive set of standards concerning equal opportunity in employment are those reflected in the guidelines and decisions of the Equal Employment Opportunity Commission.[839] LEAA has included these guidelines in its Equal Employment Opportunity Program Manual,[840] which was issued in 1974 to assist its recipients in complying with its equal employment opportunity requirements. The Manual is a comprehensive compilation of relevant laws and regulations in the area of equal employment opportunity. Including EEOC guidelines in this Manual, and thus transmitting them to recipients, is a good first step, but LEAA has not gone far enough. It has not adopted EEOC standards as its own by incorporation into its own regulations. Until it does so, its recipients will not be on formal notification that to be in compliance with the LEAA nondiscrimination requirements, they must be in compliance with EEOC standards.[841]

---

839. EEOC's sex discrimination guidelines are published at 29 C.F.R. § 1604.1, et seq. (1974). Its guidelines for employment selection procedures are published at 29 C.F.R. § 1607.1, et seq. (1974). Its guidelines on discrimination because of national origin are published at 29 C.F.R. § 1606.1, et seq. (1974).

840. LEAA, DOJ, Equal Employment Opportunity Program Manual 116 (1974).

841. In June 1975, LEAA stated that it places priority on its plans to issue "regulations, as proposed rules, in the fall of 1975, adopting the EEOC regulations relating to sex discrimination, employee selection procedures and national origin." June 1975 Velde letter, supra note 725.

B. Bilingual Assistance

There are many instances in which persons whose primary language is not English have received inadequate assistance from the law enforcement process. For example, police departments have hired too few bilingual officers and other staff and, thus, Spanish speaking citizens often cannot communicate with police officers if they need assistance or are arrested. Interpreters are not available in many Southwestern courts even though in this area Spanish speaking persons are often involved in court proceedings. As a result, defendants, plaintiffs, and witnesses may not understand fully the proceedings of the court. Courts have provided inadequate counsel for Spanish speaking defendants, who may not even comprehend the charges against them.[842] Similarly, Spanish speaking inmates in correctional institutions have been denied the educational opportunities available to their English speaking peers because of lack of bilingual assistance.[843]

---

842. Mexican Americans and the Administration of Justice, supra note 732. The need for bilingual court services for Native Americans is discussed in New Mexico State Advisory Committee to the U.S. Commission on Civil Rights, The Farmington Report: A Conflict of Cultures (in preparation).

843. Warehousing Human Beings, supra note 732 at 30, 45, 51.

Under Title VI, recipients of Federal assistance are required to provide adequate second-language assistance to ensure that persons who do not speak English are not denied meaningful participation in the federally assisted programs.[844] LEAA has advised its regional offices

---

844. In the case of Lau v. Nichols, the United States Supreme Court held that, in school districts with large non-English-speaking student populations, inadequate English-language instruction, which thus denies such students meaningful participation in the public education program, violates Title VI of the Civil Rights Act of 1964. 414 U.S. 563 (1974). In this class action suit, Chinese parents argued that the San Francisco school system should be compelled to provide all non-English-speaking Chinese students with bilingual compensatory education. The Supreme Court concluded that the failure of the San Francisco public school system to provide bilingual compensatory education violates the rights of Chinese children by "effectively...excluding them from participation in the educational program offered by a school district" and that the absence of bilingual textbooks and other instructional material in all probability would make a classroom situation "wholly incomprehensible and in no way meaningful." Id. at 566. Similarly, the Lau rationale would appear to require agencies and facilities receiving funds for law enforcement and the administration of justice to provide adequate guidance in languages other than English to non-English speaking client groups.

In a letter to all Federal departments and agencies concerning this decision, the Justice Department stated:

> This case has significance for federal grant agencies in two respects. First, it imposes a responsibility on federal agencies to review the federal assistance programs they administer to determine if the beneficiaries of such programs may be denied equal participation due to language barriers created by their inability to communicate effectively in English. As a corollary matter, it may be appropriate for federal agencies to review their direct assistance programs (not covered by Title VI) to determine if beneficiaries are inhibited from full participation because of language barriers. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 25 Federal agencies, June 13, 1974.

and the SPA's that:

> As a civil rights compliance matter, care should be exercised by Central LEAA, LEAA Regional Offices, and the SPA's, in funding programs, that linguistic barriers do not operate to exclude non-English speaking persons, in the enjoyment of the benefits of these programs. [845]

C. Site Selection

Written into each LEAA contract are guidelines for site selection of physical facilities which might be built with Federal assistance.[846] The guidelines direct that such facilities may not be constructed with the effect or purpose of excluding individuals on the basis of race, color, or national origin from use of the facility. They provide illustrative examples of unlawful site locations[847] and instruct recipients to submit a statement setting forth the factors used to

---

845. LEAA memorandum to SPA's and LEAA regional offices, July 8, 1974, cited in June 1975 Velde letter, supra note 725. The memorandum also stated:

> Attached is a copy of Lau v. Nichols, 414 U.S. 563 (1974), a recent decision of the U.S. Supreme Court relating to the constitutional responsibility of the San Francisco school system to provide English language training to Chinese-American students who do not speak English.
>
> Linguistic difficulties have many times had the effect of denying citizens whose original tongue is not English equal access to the American criminal justice system. Id.

846. LEAA, DOJ, Standard Form 26 (sample copy of a completed form).

847. These include placing a halfway house or drug treatment center so that minorities are excluded from activities of that facility and locating a correctional facility so that minority employment at the facility would be precluded. Id.

determine if any site locations would be discriminatory.[848] It is commendable that LEAA has included this site selection requirement in its contracts. Indeed few, if any, other Federal agencies have provided such instruction to their recipients.[849] It would, however, be desirable if this requirement were also made a part of the body of LEAA regulations and guidelines published in the Code of Federal Regulations. As a mere provision in individual contracts, without incorporation into LEAA regulation, it can be dropped from individual contracts with no public explanation. OCRC has not, however, taken steps to ensure that it is made a permanent requirement.

D. Minority Representation on State Planning Agency (SPA) Supervisory Boards and Regional Planning Units

The Department of Justice Title VI regulation, like those of other Federal agencies, prohibits recipients on the ground of race, color, or national origin from denying a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the federally-assisted program. The regulation does not explain how this provision will be enforced.[850]

---

848. The recipient must consider such factors as the demographic population characteristics of the service area, the racial and ethnic characteristics of the population to be served by the proposed program, the alternative locations under consideration, the impact of the alternative locations on minorities and nonminorities, the availability and type of public transportation, and the availability of low- and moderate-income housing. Id.

849. Although a civil rights impact statement which includes a provision requiring that sites selected for Government offices must be accessible to minorities has been drafted within the Department of Agriculture, it has not been finalized or adopted. The Department of Health, Education, and Welfare has a provision covering the accessibility of minorities to HEW-funded facilities which is contained in HEW's Title VI regulations, 45 C.F.R. § 80.3(3) as amended through July 5, 1973.

850. 28 C.F.R. § 42.104(b)(vii)(1974).

In 1972 LEAA proposed a guideline relating to minority representation on SPA supervisory boards.[851] The proposed guideline stated that:

> Where the proportion of members of a particular minority group on any such supervisory board is substantially less than the proportion of members of that group in the general population of the State or region, a violation of Title VI...shall be presumed. 852

This guideline was deficient in that although it provided for minority representation on the supervisory boards no provision was made to cover female participation. Another deficiency of the proposed guideline was its failure to make clear what constitutes illegal minority underrepresentation. More specifically, although the guideline indicated that a violation of the civil rights act is presumed if the proportion of minorities on the board is "substantially less" than the proportion of minorities in the State, it did not define the term "substantially less."

This proposed guideline was revised and issued in final form in September 1974. This issuance of this guideline was a positive step,

---

851. Proposed Guideline Relating to Title VI Implications of Minority Representation on SPA Supervisory Boards and Regional Planning Units, attached to letter from Herbert C. Rice, Director, Office of Civil Rights Compliance, LEAA, to Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Aug. 9, 1972. This guideline was suggested to LEAA by the Center for National Policy Review on behalf of the Leadership Conference on Civil Rights: Attachment to letter from Arthur M. Jefferson, Attorney, Center for National Policy Review, to Cynthia N. Graae, Associate Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 24, 1975.

852. Id.

which has been taken by few other agencies with Title VI responsibilities.[853]

In its final form the guideline clearly states that failure to appoint "otherwise qualified"[854] minorities or women to supervisory boards

---

853. The Department of Labor (DOL) has a comparable provision for the inclusion of women, persons of limited English-speaking ability, and other minority groups on its Manpower Planning Councils under the Concentrated Employment and Training Act of 1973 (Pub. L. 93-203, 87 Stat. 839 as codified in various sections of 18, 29, and 42 U.S.C. (Supp. III, 1973)). It has issued no similar guidelines with regard to any other DOL-funded programs. Similarly, the Departments of Agriculture and Health, Education, and Welfare have issued no guidelines concerning the presence of minorities or women on advisory councils beyond that contained in their Title VI regulations.

LEAA stated:

> Possibly no part of the LEAA Program has been the subject of more discussion than composition of state planning agency (SPA) and regional planning units (RPU) supervisory boards. It would not necessarily be helpful to fully track the legislative history and other materials historically relevant to this matter. June 1975 Velde letter, supra note 725.

854. LEAA stated:

> ...legislative history of the Crime Control Act of 1973 clearly indicates the will of the Congress to restrict mandatory membership on SPA and RPU supervisory boards to "law enforcement agencies, units of local government, and public agencies maintaining programs to control crime. . ." SPA and RPU supervisory boards may permissably, "include representatives of citizen, professional, and community organizations." See Section 203(a) of the Crime Control Act of 1973.
>
> "Otherwise qualified," as used in the guideline refers to the classes of persons mandatorily entitled to serve on...supervisory boards. Hence, a discriminatory denial of membership on an SPA or RPU supervisory board of, say, a black or female criminal court judge would be violative of the Guideline. June 1975 Velde letter, supra note 725.

would constitute a violation of Title VI.[855] The fact that concern for female representation has been added is an improvement over the proposed measure. However, LEAA has weakened the guideline by removing the proposed provision which would have required a comparison of the proportion of minorities on the board with the proportion of minorities in the State population.[856] LEAA has, thus, eliminated the mechanism which would trigger a presumption of a violation on the guidelines.

---

855. The guideline provides that:

> No individuals on the basis of race, color, sex, or national origin shall be denied appointment or selection to serve on supervisory boards of SPAs or regional planning units....The failure of the chief executive of a State to select...otherwise qualified minority or female members of the law enforcement and criminal justice agencies, units of general local government, and public agencies maintaining programs to reduce and control crime, may constitute a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and 518(c) of the Crime Control Act of 1973. LEAA guideline G 7400.4 "Supervisory Boards of Criminal Justice State Planning Agencies and Regional Planning Units, Guidelines Regarding Representation of Minorities and Women," Aug. 19, 1974.

856. LEAA stated:

> After the proposed rule relating to minority representation on SPA and RPU supervisory boards was issued, regulations amending Department of Justice regulations implementing Title VI of the Civil Rights Act of 1964 (see 28 C.F.R. 42.104(b)) were issued, making denial to, "a person the opportunity to participate as a member of a planning or advisory board which is an integral part of the program," a prohibited action. This amendment to the Title VI regulations is applicable to SPA and RPU supervisory boards participating in the LEAA Program. Conspicuously lacking from the Title VI regulations is any discussion of proportionality of representation of minorities or women on planning or advisory bodies. It may be questioned whether LEAA has the authority, as an agency, to adopt guidelines which would amend the departmental regulations in this regard. June 1975 Velde letter, supra note 725.

OCRC staff indicated that due to staff limitations, they had no plans to monitor the selection of minorities and females for advisory boards.[857] LEAA has not reviewed female participation on advisory boards and only surveyed the racial and ethnic composition of SPA boards and regional planning units on one occasion, more than two years ago.[858] In October 1972, LEAA issued the results of this survey. Included were tables for each State indicating the minority representation on LEAA State and regional[859] boards. In order to compare each board's minority composition with the State's overall minority population, a compliance ratio was developed. This figure was calculated by dividing the percentage of each board which was minority by the percentage of the State population which was minority.

---

857. 1975 Rice et al. interview, supra note 728. In June 1975, LEAA stated:

> It seems a vain act to monitor minority or female representation on SPA and RPU supervisory boards, since the appointing authority must mandatorily select for membership only those persons drawn from the criminal justice community mentioned in the statute. Presumably, an argument could be made that a marked underrepresentation of minorities or females among those permissibly selected for membership on SPA and RPU boards might infer discrimination by the appointing authority. In LEAA's experience, however, exercise of the permissive authority to choose, "citizen, professional, and community organization," representatives is used to include minority and female members, rather than to exclude them, since the numbers of such people appointed or elected to positions of responsibility within agencies required to be represented under Section 203(a) is limited in many communities. July 1975 Velde letter, supra note 727.

858. Memorandum from George E. Hall, Director, Statistics Division, LEAA, to Herbert C. Rice, Director, Office of Civil Rights Compliance, LEAA, DOJ, "Minority Representation on State Supervisory Boards and Regional Supervisory and Advisory Boards," Oct. 16, 1972.

859. State boards are advisory boards to the State planning agencies. Regional boards advise local planning agencies.

A compliance ratio of 100.00 reflected that the percentage of minorities on the board was identical with the percentage of minorities in the population. A compliance ratio of 0.00 indicated that there were no minorities on the advisory board. A compliance ratio of more than 100.00 indicated that the percentage of minorities on the board was greater than the percentage of minorities in the population. While some States had favorable compliance ratios, the vast majority did not. As Exhibit 10 indicates, at the time of this survey, 7 States had compliance ratios of 0.00 for their State boards[860] and 4 States had compliance ratios of 0.00 for the regional boards.[861] Twenty-one States had compliance ratios of 60.00 or less for the State boards; thirty-eight States had compliance ratios of less than 60.00 for the regional boards.

The overall compliance ratio for State boards in all States was 69.27, compared to a 31.46 overall ratio for regional boards. There are no plans to update the survey or to determine the female composition on the boards.[862]

---

860. They were Alabama, Arkansas, Idaho, Iowa, Nebraska, New Hampshire, and Utah.

861. They were Idaho, New Hampshire, Maine, and Vermont.

862. 1975 Rice et al. interview, supra note 728.

Exhibit 10

DISTRIBUTION OF COMPLIANCE RATIO[A]

COMPLIANCE RATIO	Number of States[B]	
	State boards	Regional boards
100.00+	20	9
90.00-99.99	2	1
80.00-89.99	3	0
70.00-79.99	4	1
60.00-69.99	1	2
50.00-59.99	5	2
40.00-49.99	4	4
30.00-39.99	0	6
20.00-29.99	3	7
10.00-19.99	1	6
0.01-9.99	1	1
0.00	7	4
No board	0	8
Total	51	51

A
Compliance ratios are calculated by dividing the percent of each board which was minority by the percent of the State population which was minority. See text on p. 320 supra for a more detailed explanation.

B
Includes the District of Columbia.

E. Courts

Although LEAA funds go to State and local courts, LEAA has not attempted to assess the extent to which court activity may be discriminatory.[863] Nevertheless, an abundance of evidence suggests frequent exclusion of minorities and women from juries or as judges and that treatment of minority and female defendants can be discriminatory and is sometimes reflected in sentencing.[864]

LEAA has issued no regulations or guidelines which pertain specifically to courts. To some extent, guidelines issued pursuant to Title VII of the Civil Rights Act of 1964 may be applicable to employment discrimination which arises in the courts, but Title VII coverage has not been

---

863. In June 1975, LEAA informed this Commission that "LEAA will undertake a compliance review of a major criminal court system during /fiscal year/ 1976." June 1975 Velde letter, supra note 725.

864. See Babcock, "Women and the Criminal Law," Amer. Crim. Law Rev., Vol. II, No. 2 (Winter 1973); Virginia State Advisory Committee to the U.S. Commission on Civil Rights Judicial Selection in Virginia: The Absence of Black Judges (January 1974); Mexican Americans and the Administration of Justice, supra note 732, at 36-46; Debro paper, supra note 751, Joint Center for Political Studies, National Roster of Black Elected Officials Table III (April 1974) and Taylor v. Louisiana, supra note 758.

clearly established with respect to all forms of courtroom employment.[865] Moreover, there are no Federal agency regulations or guidelines covering nondiscrimination in the services provided by State or local courts. The Crime Control Act clearly could be used to terminate discrimination in the court systems if LEAA would issue appropriate regulations and monitor them.

---

865. The Equal Employment Opportunity Commission (EEOC) has not considered whether the selection of juries comes within the coverage of Title VII. One EEOC official indicated that whether jurors are covered by Title VII would depend upon whether it could be shown that jury selection procedures are a form of employment selection procedures. This official also indicated that discrimination in the appointment of judges is covered by Title VII although EEOC has issued no formal opinion in this issue. Telephone interview with Roberta Romberg, Chief, Litigation Services Branch, Office of General Counsel, Equal Employment Opportunity Commission, Feb. 14, 1975.

The coverage of appointed judges is inferred because appointed judges do not appear to be listed in the following exceptions from Title VII:

> ...any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personnel staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. 42 U.S.C. § 2000c.

There have been no court cases which alleged a Title VII violation in the appointment of a judge. Romberg interview, supra this note. Elected judges are not covered by Title VII, although requirements which must be met by a person in order to be placed on the ballot may be discriminatory. Selection criteria of judges is discussed in LEAA, DOJ, National Survey of Court Organizations (1971).

OCRC officials express trepidation about attempting to assure non-discrimination in the courtroom, indicating that under the Constitution they may not have adequate authority.[866] OCR has not, however, requested legal opinions from LEAA's General Counsel or DOJ's Civil Rights Division as to its authority in this area.[867]

---

866. 1975 Rice et al. interview, supra note 728. In June 1975 LEAA pointed out that with respect to one aspect of court systems LEAA would be taking action. LEAA stated:

> Provision of services, by race and sex, in juvenile detention facilities under control of juvenile courts will be monitored by the corrections compliance report forms soon to be issued by LEAA, discussed by the Commission at pages /338 infra/. June 1975 Velde letter, supra note 725 .

867. 1975 Rice et al. interview, supra note 728.

IV. Compliance Program

A. The Role of the State Planning Agencies

Each State Planning Agency which accepts an LEAA grant must sign an assurance to LEAA that it will comply and ensure compliance by its subgrantees and contractors with Title VI of the Civil Rights Act of 1964 and with LEAA's equal employment opportunity guidelines. One weakness of these assurances is that they do not include a promise of compliance with the Crime Control Act of 1973 and, thus, recipients apparently are not required to promise that law enforcement programs funded with LEAA assistance will not discriminate in the delivery of services on the basis of sex. Especially in absence of any LEAA regulations concerning sex discrimination in LEAA-funded programs, this is a serious omission. Indeed, it appears that LEAA recipients have not been informed by LEAA of any responsibility to make certain that their delivery of program benefits is not discriminatory on the basis of sex.

Unlike assurances used by some other Federal agencies, LEAA's assurances are not mere paper promises of compliance.[868] In signing the assurance, each SPA agrees to designate at least one staff member to

---

868. Experience with Federal programs has shown that paper assurances are a poor basis for a civil rights compliance program. Most Federal recipients are willing to sign assurances, but this has little impact on ending discriminatory practices. Paper assurances are used by the Office of Revenue Sharing at the Department of the Treasury. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance (February 1975). They are also used by the Veterans Administration in its fair housing program. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing (December 1974).

be known as a Civil Rights Compliance Officer, to review the compliance of the SPA and its subgrantees and contractors.[869] The SPA must also provide its entire staff with appropriate training and information concerning the SPAs civil rights obligations. It must submit to LEAA, as part of its application for LEAA funds, a timetable for this training. The SPA must instruct all applicants for and recipients of financial aid of their obligations to comply with the nondiscrimination requirements and obtain assurances from them. It must inform the public of its rights to nondiscrimination under LEAA-funded programs. SPAs must also establish complaint procedures and participate with LEAA in compliance reviews of criminal justice agencies.[870]

While these requirements are important, LEAA could provide SPAs with an even more meaningful role in the enforcement of LEAA civil rights requirements. It could require the SPAs to review for approval all subgrantees' EEOPs.[871] It could require the SPAs

---

869. LEAA has described the civil rights responsibilities of SPAs in Guideline Manual: State Planning Agency Grants, supra note 716 at 42-46.

870. Id.

871. EEOPs are discussed on pp. 297 supra.

to undertake complaint investigations,[872] conduct pre- and post-award compliance reviews of subgrantees, and to collect and review data on the subgrantees' activities.[873] If such requirements were adequately implemented, LEAA could restrict its own activities largely to a review of SPA compliance programs, greatly increasing the efficiency with which LEAA's small compliance staff could be used.

Although LEAA has not yet effected such a shift in responsibility, it is leaning in that direction. In June 1975 LEAA informed this Commission:

> In order to make better use of its limited staff, LEAA in its Master Plan for civil rights compliance[874] now proposes to limit its complaint investigations to those involving significant systemic problems of discrimination, establish a mechanism under which

---

872. One of the recommendations made by participants at LEAA's February 1975 civil rights conference was that State agencies should be notified of complaints in their States, advised of their contents, and given an opportunity to achieve compliance. LEAA Policy Development Seminar on Civil Rights Compliance, Rochester, Mich., Feb. 10-11, 1975.

873. Other Federal agencies expect that the State agencies receiving Federal funds will engage in some of these activities although in all cases these requirements as implemented are insufficient. See chapter 3, supra, Department of Health, Education, and Welfare; and chapter 6, infra, Department of Labor.

874. The Master Plan is discussed in note 875 infra.

> SPAs may more broadly participate in the compliance program, and, finally, expand the pre-award and post-award compliance review program. 875

One of the SPA's major concerns has been the failure of LEAA to define the responsibilities of the SPAs.[876] In September 1972,

---

875. June 1975 Velde letter, supra note 725. LEAA also stated:

> LEAA is pleased that the Commission has seen fit to commend LEAA in its desire to involve the SPAs directly in the implementation of the compliance program. This program, which will involve the SPAs directly in enforcement of compliance programs, would, under the LEAA Master Plan, be expanded to allow SPAs that qualify to assume "Priority Status" in civil rights compliance. LEAA is planning to give SPAs, who designate civil rights compliance as a priority in their state plans, increased responsibility for carrying out those compliance functions they indicate a desire and have a capacity to undertake. An SPA interested in conducting the initial investigation and voluntary resolution of allegations of unlawful discrimination, or undertaking civil rights compliance reviews of recipients, or both, would qualify the SPA for "Priority Status." LEAA envisions a limited number of pilot programs will be approved, and these in those jurisdictions that submit plans for "Priority Status." Strong LEAA oversight will be exercised to assure full implementation of compliance programs at the state level. Id.

LEAA also stated:

> The LEAA /has drafted a/ Master Plan /which/ requires that SPAs establishing "Priority Programs" to enforce compliance obligations at the state level must indicate, as part of their plan, the method by which they intend to audit compliance by their recipients with /LEAA's equal employment opportunity guidelines/ 28 C.F.R. 42.301, et seq., Subpart E. Id.

876. Statements of Saul Arrington, Executive Director, State of Washington SPA (Office of Community Development, Law and Justice Planning Office) and Lee Thomas, Executive Director, South Carolina SPA (Law Enforcement Assistance Programs) at LEAA Policy Development Seminar on Civil Rights Compliance, supra note 872.

LEAA noted that, "The most significant shift in OCRC's emphasis during the next six months will be to give technical assistance to the State Planning Agencies (SPAs)...."[877] By January 1974, technical assistance had been provided to the SPAs in the form of training sessions to assist them in their respective equal employment opportunity programs. In conjunction with this, LEAA entered into a $99,500 contract with the International Association of Official Human Rights Agencies to train staffs of SPAs and local criminal justice planning councils in the various civil rights laws and regulations covering their respective programs and activities.[878] LEAA also provided funds to the Marquette Center for Criminal Justice Agency Organization and Minority Employment Opportunities to supply technical assistance on minority employment to criminal justice agencies which request such assistance.[879] Although failure of criminal justice agencies to employ women on the same basis as men is a widespread, serious problem, the technical assistance provided by Marquette is directed only at providing equal opportunity

---

877. LEAA response to U.S. Commission on Civil Rights questionnaire, Sept. 15, 1972 /hereinafter referred to as 1972 LEAA response/.

878. Id.

879. See Marquette University Law School, Center for Criminal Justice Agency Organization and Minority Employment Opportunities, Report on Preliminary Technical Assistance Visit to the Evansville, Indiana Police Department (1974).

for minority men and women, but not for women as a class.[880]

Requests for the type of assistance that this center can offer are not plentiful, due to the fact that such a request may be considered to involve some admission of deficiencies within the agencies.[881] From July 1972 to June 1973, the center afforded assistance and consultative services to only 18 law enforcement agencies.[882]

---

880. LEAA recently informed this Commission:

> The Center recently has undertaken an ambitious program to examine the expanding opportunities for women in policing, with a view toward possible development of draft guidelines relative to sex discrimination in police work, which LEAA could then consider adopting for the guidance of its police constituency in this area. June 1975 Velde letter, supra note 725.

881. July 1973 Rice interview, supra note 813.

882. LEAA 1973, supra note 718. Most of the agencies assisted by the center were metropolitan police departments. The remaining agencies were either State highway patrols, municipal police departments, State police departments, county sheriffs departments, and State civil service and personnel departments.

Despite the lack of adequate training of all relevant SPA officials, currently OCRC does little monitoring of the few civil rights requirements placed on SPAs. The State Planning Agency, in its application must describe how it has carried out the requirements LEAA has placed on it.[883] OCRC, however, does not review this description. Responsibility for its review lies entirely with LEAA field staff, who review all sections of LEAA applications.[884]

While this arrangement relieves some of the duties which could be placed on OCRC and, thus, may serve somewhat to extend LEAA's resources for civil rights, it may not be satisfactory. The LEAA field staff who review the plans are program staff responsible for most contact with the SPAs.[885] Generally, they have not been provided with civil rights training, and, moreover, they do not operate under the tutelage of OCRC, even on civil rights matters.

OCRC staff have expressed satisfication with the review process and have indicated that they believe it is functioning well.[886] They may not have adequate information to make this judgment, however, since they do

---

883. Guideline Manual: State Planning Agency Grants, supra note 716.

884. 1975 Rice et al. interview, supra note 728.

885. These staff are referred to by LEAA as State representatives.

886. 1975 Rice et al. interview, supra note 728.

not even review a random sample of the civil rights sections in the SPA applications.

The most significant criticism of LEAA's assurances, however, is that although they require SPAs to demonstrate active commitment to Title VI compliance, once the SPA procedures for a Title VI program have been established,[887] there is no regular monitoring of the program to ensure that it is fully carried out and that it is effective in achieving its goals. OCRC staff have frequent contact with the SPA Civil Rights Compliance Officers, and indicate that many SPA Compliance Officers are becoming knowledgeable and effective in the area of civil rights,[888] but OCRC maintains no records to corroborate this conclusion.

B. Reporting Systems

Concerning the use of compliance report forms, LEAA informed this Commission:

> LEAA's position is that such forms can provide data useful in its compliance program, but such forms should be utilized only where it can be projected that the data generated by the form will be reasonably reliable and productive of information from which significant statistical disparities, by race and sex, may be gleaned.[889]

The Biennial Civil Rights Compliance Report Form[890] was a civil rights reporting form to be completed every two years by State and city police departments and highway patrols. If focused almost entirely on

---

887. Id.

888. Id.

889. June 1975 Velde letter, supra note 725. LEAA also stated: "Questions relating to the use of report forms as a tool in the enforcement of compliance obligations can be argued interminably." Id.

890. LEAA Form 2000.1(11-71).

employment matters. The principal question on the form concerned the race and ethnic origin, cross-tabulated by sex and rank, of the employees of the police department. It also asked about the sources for recruiting new employees and the number of minority group promotions and terminations. These data were not broken out by race or ethnic origin or cross-tabulated by sex. In addition to the employment questions, the form inquired about the methods used by police agencies to publicize the requirements of Title VI, the existence of nondiscrimination policies in serving the public, and the number of lawsuits and complaints alleging discriminatory practices by the recipient agency.[891]

---

891. Data on services provided by recipient agencies were not solicited on this form. LEAA staff stated that the quantification of services on a form of this type would be difficult. July 1973 Rice interview, supra note 813.

In June 1972, a total of 7,817 police agencies were directed by LEAA to complete this questionnaire.[892] Police departments in towns and villages with populations of less than 1,000 were not required to fill out the form.[893]

LEAA staff had optimistically anticipated that 75 to 80 percent of those departments required to submit the form would have filed by October 1972.[894] However, as of March 1974, only about 4,000 of the total police agencies required to file had complied,[895] and LEAA had not

---

892. Completed copies of this form were not made available to this Commission. This Commission specifically requested copies of the forms completed by the Alabama, Arizona, California, Connecticut, Colorado, Georgia, Illinois, Louisiana, Massachusetts, Mississippi, New York, South Carolina, and Texas State police or highway patrol departments. Copies of this report were also requested from LEAA for the following city police departments: Albuquerque, Atlanta, Boston, Bridgeport, Chicago, Dallas, Los Angeles, New Orleans, New York City, San Antonio, and Tucson. The request for these forms was denied due to LEAA's view that this was necessary to preserve the confidentiality of responding law enforcement agencies. LEAA response, supra note 877.

893. LEAA response to U.S. Commission on Civil Rights April 1973 questionnaire contained in a letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, DOJ, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, June 8, 1973. Towns of this size would have very small, if any, police departments. LEAA officials report that the rule of thumb of estimating the size of a police department is that there will be one police officer for every 1,000 population. Moreover, many small towns do not have police departments but may, for example, contract with a larger nearby jurisdiction to provide police services. 1975 Rice et al. interview, supra note 728.

894. March 1974 Rice interview, supra note 786.

895. Id.

taken action against any nonrespondents. LEAA officials stated that none of the agencies not responding had refused to file.[896] LEAA ultimately obtained forms from all police departments serving populations of 100,000 or more.[897]

Most frequently it was the small agencies which did not respond. Gathering compliance data from small agencies was a low priority for LEAA, which observed that frequently small departments have only one constable and the effort to collect the data was too costly vis-a-vis the usefulness and reliability of the data generated.[898]

The fact that many nonrespondents were small police departments is a poor excuse for failing to compel recipients to complete the reporting form, especially since many of the worst cases of

---

896. Id. OCRC assumed that those not filing were tardy rather than reluctant to file.

897. 1975 Rice et al. interview, supra note 728.

898. LEAA officials stated that even those small departments which did file correctly provided negligible compliance data for the purpose of the collection. Id. Moreover, LEAA commented:

> To remind the Commission, LEAA undertook monitoring of smaller agencies only because of the insistance of the Commission that it do so. As LEAA feared, much of data generated was unreliable and much of the data produced was of limited utility from a compliance point of view. From a "cost-effectiveness" point of view, expenditure of further funds in the collection of delinquent forms of such marginal utility, seemed unwise. June 1975 Velde letter, supra note 727.

discriminatory treatment of minorities takes place in small departments.[899] First, because smaller recipients have fewer employees, they should find the task of completing the form easier than would larger agencies. Thus, it is not unreasonable to ask them to comply. Second, and more significantly, no matter what the size of the nonrespondent departments, for OCRC to fail to require them to carry out an LEAA instruction without informing them that the instruction was rescinded is tantamount to informing them that LEAA is not serious about requiring civil rights compliance.

Overall, the use of the questionnaire did not prove to be highly successful. It was supposed to assist OCRC as a factor in ascertaining possible noncompliance. OCRC had anticipated that the questionnaire would assist it in setting priorities for conducting compliance reviews,[900] but it never completed a full review of the questionnaires which were

---

899. Attachment to Jefferson letter, supra note 851. An example of a small police agency with severe minority underutilization was the police department in North Augusta, S.C. North Augusta is in Aiken County, which according to the 1970 census was 23 percent black. The North Augusta police department had never employed a black. From fiscal year 1970 through 1973 it had received over $150,000 in LEAA grants but no one from LEAA had discussed with the department its employment practices. Id.

900. In 1972 LEAA wrote to this Commission:

> Employment data from the law enforcement agencies will be tabulated and matched with data indicating the racial and ethnic makeup for the states, counties and cities they serve, so as to indicate those recipient agencies with the greatest statistical disparities or exceptions between their law enforcement staff and population statistics. These tabulations are meant to provide initial indication of the places where noncompliance is most likely to exist, and will be used with other relevant information as can be obtained to make final judgments as to noncompliance. 1972 LEAA response, supra note 877.

returned. OCRC did examine completed forms from the 50 largest cities to uncover any statistical disparities between minority representation on the police force and in the population at large. It found disparities in 38 cities.[901] Although LEAA originally planned to repeat the administration of this questionnaire in 1974, it has been discontinued. LEAA intends, instead, to rely on data gathered by the Equal Employment Opportunity Commission (EEOC).[902] Currently, LEAA is obtaining any information it needs on an individual, city-by-city basis.[903] The employment categories used by EEOC, however, are of limited use in

---

901. Of the 38 cities, LEAA eliminated 26 as possibilities for review because there was Federal or private litigation alleging discrimination in those cities' police forces. Of the remaining 12, LEAA selected 5 for review. 1975 Rice et al. interview, supra note 728.

902. EEOC requires employers, including State and local governments, to compile data on the race, ethnicity, and sex of all employees and new hires. Employers having 100 or more employees must report this information to EEOC annually; employers with between 15 and 99 employees must compile such information and have it available for a period of three years. In addition, a rotating sample of employers having between 15 and 99 employees are required each year to submit the employment data to the EEOC. See, for example, Equal Employment Opportunity Commission, EEOC Form 164, State and Local Government Information (EEO-4), Instruction Booklet (1974).

903. LEAA coordination with EEOC is discussed on pp. 390 infra.

analyzing the adequacy of minority and female utilization in police departments.[904]

LEAA has drafted a similar compliance report form to monitor community-based and other correctional facilities.[905] Originally, OCRC anticipated that this form would be completed and distributed by mid-1972.[906] In March 1974 the form was being reviewed by the Office of Management and Budget (OMB).[907] As of February 1975, a revised form was being circulated to the SPAs for comment,[908] and LEAA expected that the form would be distributed by May 1, 1975, with return requested within a month of that date.[909]

---

904. EEOC gathers data by the following job categories: office/clerical, para-professionals, protective service, technicians, professionals, officials/administrators, skilled craft, and service/maintenance. The Biennial Civil Rights Compliance Report Form contained categories which were much more useful for an analysis of police department employment. They were: chief inspector/chief of police/colonel, assistant inspector/assistant chief of police, deputy inspector/deputy chief/or lieutenant colonel, inspector/major, captain, lieutenant, sergeant, patrolman private, police auxiliary, meter maid, non-uniformed professional, and office clerical.

905. Community-based facilities include halfway houses, probation and parole service institutions, and juvenile detention centers.

906. LEAA response, supra note 877.

907. March 1974 Rice interview, supra note 786.

908. Interview with Roberta Dorn, Corrections Specialist, OCRC, LEAA, DOJ, Feb. 11, 1975. As of that date, the SPAs had posed no objection to the substance of the form. They had, however, suggested that only those recipients required to file an Equal Employment Opportunity Program should complete this questionnaire.

909. Commission staff comments were sent to LEAA in a letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U. S. Commission on Civil Rights, to Herbert C. Rice, Director, Office of Civil Rights Compliance, LEAA, DOJ, Nov. 6, 1973.

One area of prime importance which is not covered[910] by this draft is that of services provided by contractors and subcontractors.[911] A second major omission is that the form does not solicit information on whether or not there is a pattern in certain localities of courts assigning minorities to a particular institution with an already high minority population, or sentencing nonminorities to correctional

---

910. LEAA stated:

> For LEAA to expand its data collection base, until it has broader experience based on the analysis of forms presently in use or considered, would similarly be unwise.
>
> Suggestions by the Commission that other questions might be posed by LEAA in its corrections report form are interesting, and themselves spawn further questions which might be asked, from which usuable compliance data might be gleaned. At some point though, the length and complexity of a form interferes with a need that data generated by the form be collected with relative ease and at a reasonable cost.
>
> Without expanding it, the corrections report form is long and will be somewhat difficult for some agencies to complete, particularly those correctional agencies having primitive record-keeping systems. June 1975 Velde letter, supra note 725.

911. The Commission has been informed that frequently where a juvenile institution has insufficient space in its own correctional institutions, it will contract to "buy" a private institution's facilities, especially for juvenile cases, making such an institution an indirect recipient of LEAA funds. LEAA does not make clear, however, that such contractors and subcontractors must file this form. Contractors and subcontractors may also provide services within a correctional facility, such as training programs and legal assistance. As the form is now worded, respondents are not asked to list all such services they purchase and indicate for each the race, ethnic origin, and sex of participants.

centers that are predominately white.[912] To make this determination, respondents could be asked to identify all similar institutions, e.g., juvenile treatment centers, within the same jurisdiction and to describe the methods of assignment of inmates to each correctional facility. In localities with jurisdiction over more than one facility of the same type, LEAA could then compare the racial and ethnic

---

912. OCRC staff admit difficulty in handling the matter of court referrals. Rather than examine court assignments to institutions for discriminatory impact, OCRC staff anticipate that if a form discloses that a particular correctional facility has a disproportionately large minority population, referral patterns relative to this institution would be subsequently examined if a compliance review were undertaken of the recipient. Dorn interview, supra note 908. Data have been used successfully to measure referral patterns in other fields. For example, referral patterns (to foster care facilities) were the subject of a Department of Justice suit on behalf of the Department of Health, Education, and Welfare, Player v. State of Alabama Department of Pensions and Security, Civil No. 3835-N (M.D. Ala. filed Nov. 17, 1972). The Department of Justice devised detailed methods of using data to study these referral patterns which they believe might be usable to measure foster care referrals in a number of States. The Commission believes, therefore, that a question of referral patterns to correctional institutions is probably best studied with data and that a questionnaire would likely be the best instrument for obtaining at least preliminary data to study the question.

913

composition of all like facilities.

The area of disciplinary actions and special privileges is a third area in which the form is lacking. Limited inquiries concerning disciplinary actions are made: Specifically, the form solicits data on the amount of "loss of good time" and the number of disciplinary actions imposed for minorities and nonminorities of both sexes. This information, however, is not sufficient to determine if disciplinary

---

913. It is possible that where there is a tendency to sentence minorities disproportionately to one institution rather than to another, the minority institution will have inferior facilities. Similarly, there may be inequities between separate institutions for men and women within the same jurisdiction. However, the form does not solicit adequate information to make determinations concerning, for example, the adequacy of staffing and equipment for vocational and academic training; the sufficiency of beds, attendants, and medication in infirmaries; the presence of a well-stocked and current library; and the availability of adequate recreational facilities. The form should also cover all significant services provided within a correctional facility, for example, whether legal, psychiatric, or psychological counseling is available and provided to residents on a nondiscriminatory basis. Clearly, if such services are provided, it would be valuable to LEAA to know the number of inmates by race, ethnicity, and sex who avail themselves of these services. If a disproportionate number of minorities do not take advantage of these benefits, there might be cause to determine whether these services are distributed on a discriminatory basis.

actions and privileges are inequitably administered.[914] A fourth area in which the questionnaire is noticeably deficient is that of parole procedures.[915] A fifth area of importance which was insufficiently treated in the questionnaire is that of special services for particular groups, such as persons of Spanish speaking background and Native Americans.[916]

---

914. LEAA should inquire concerning the type of punishment given. There should be a delineation, by race, ethnicity, and sex, of physical disciplinary actions such as solitary confinement and of actions involving loss of privileges, such as restrictions on the number of visitors allowed.

In order to determine whether privileges are granted on an equitable basis, LEAA should request information on what rewards are offered for "good behavior" and whether they are standarized or implemented on an ad hoc basis. If such standards exist, a question should be included on the form as who formulates and implements them. If no such guidelines are available, a determination should be made as to why not. A breakdown by race, ethnicity, and sex should be requested on the number of inmates who have been granted special privileges, such as home visits or special freedom of movement within the institution. Additionally, discipline which is administered by guards on an ad hoc basis may be more discriminatory than that meted out by a committee which impartially reviews the gravity of any reported infraction of institution rules. Therefore, a question should be included concerning the existence of standards governing such disciplinary actions.

915. Clearly, questions are needed in order to ascertain whether hearings and paroles are granted on an equitable basis by parole board members who adequately reflect a balanced composition of race and sex. Specifically, data should be requested by race, ethnicity, and sex on those persons making application for parole and those who are awarded parole. Further, because allegations are often made that the decision to grant parole hearings is discriminatory, inquiry should be made on the process of granting parole hearings: Are they held monthly, annually, or are the dates irregularly set? Are residents given adequate notice of those hearings and informed of the necessary qualifications? In addition, the form should solicit information on the race, ethnicity, and sex of parole board members as well as the method for choosing these panelists.

916. The form attempts to determine the availability of interpreter services and translated materials for persons of Spanish speaking background in the areas of institution regulations, training, and medical treatment. It should also inquire as to such assistance in all phases of institution life including legal and psychiatric counseling, recreation, and entertainment. LEAA should ascertain, by language spoken, the ratio of non-English speaking guards and professional staff to non-English speaking inmates. Similarly, the form neglects to determine if Black Muslims are free to practice their religion during incarceration and whether they are given a selection of food so that religious dietary restrictions are not violated. The importance of such considerations has been made apparent in the aftermath of Attica and other correctional tragedies.

Finally, the form uses the broad categories of minority and nonminority cross classified by sex for data collection. All data should be collected on each minority group separately, for example, on blacks, persons of Spanish speaking background, Native Americans, and Asian Americans.[917]

LEAA at one time had planned to issue a similar form to cover court systems[918] but in March 1974 indicated that such a form would no longer be possible.[919] According to OCRC staff, it is difficult to determine who

---

917. These data should continue to be cross-classified by sex.

918. In addition to police departments, correctional institutions, and court systems, there are other LEAA recipients. For example, in fiscal year 1973 LEAA provided $19.5 million to 415 institutions of higher education in the form of grants for research in the area of law enforcement and scholarships for the study of criminal justice. LEAA also provides assistance which reaches hospitals with drug or alcohol rehabilitation programs. LEAA has delegated responsibility for determining the compliance status of institutions of higher education receiving LEAA funds to the Department of Health, Education, and Welfare (HEW) in accordance with a Plan for Coordinated Enforcement Procedure for Higher Education developed by the Department of Justice in 1966. LEAA delegated similar responsibilities with regard to hospitals to HEW, as well. LEAA retains the responsibility for administrative action or referral to the Civil Rights Division of the Department of Justice (see p. 376 infra) in the event that HEW cannot achieve compliance voluntarily with those LEAA recipients. Letters from John N. Mitchell, Attorney General, to Elliot L. Richardson, Secretary of Health, Education, and Welfare, Aug. 19, 1970.

919. March 1974 Rice interview, supra note 786.

is the beneficiary within a court system.[920] Given this confusion, various sets of forms would have to be devised in order to cover the myriad possible beneficiaries. OCRC staff believe that such an assignment is beyond its present capabilities.[921]

C. Compliance Review Manual

In June 1973, OCRC issued a draft Manual[922] for its own staff to aid them in conducting reviews of compliance by police departments[923] with Titles VI and VII of the Civil Rights Act of 1964 and the Crime Control Act of 1973. As of January 1975, this Manual was still in draft form.[924]

---

920. March 1974 Rice interview, supra note 786.

921. Id.

922. OCRC, LEAA, DOJ, Civil Rights Compliance Review Manual for Police Agencies (1973) [hereinafter referred to as Compliance Review Manual].

923. OCRC describes a compliance review as:

> a detailed and systematic investigation of the activities of a law enforcement agency receiving LEAA funds. Its purpose is to:
>
> (1) Determine the agency's degree of compliance with existing statutes regarding civil rights, with court decisions interpreting those statutes and with rules and regulations implementing those statutes.
>
> (a) Recommend ways by which an agency may achieve compliance in problem areas. Id. at 2.

924. 1975 Rice et al. interview, supra note 728. According to OCRC staff, there are no plans to devise a final form of this Manual. Rather, it is their intention to keep it in draft form and update sections as necessary. March 1974 Rice interview, supra note 786. As of early 1975, the latest revision of this Manual had been in October 1973.

The Manual was designed as an information gathering tool to be used to outline areas of inquiry to be covered in compliance reviews of police departments by OCRC staff. It was intended to simplify and expedite the data collection process as well as to expand the scope of concerns of compliance reviews.

One of the biggest deficiencies of the Manual is that although it is the principal guide for conducting police department compliance reviews, it is focused primarily on employment, and frequently on employment of minorities as a class to the exclusion of employment of females as a class. It gives little attention to equal opportunity in the delivery of services. For example, the recipients to be reviewed are selected on the basis of their minority employment patterns.[925] Of the nine areas for inquiry listed in Manual, only one category, that of response times,[926] related to service to the community. The other

---

925. LEAA guidelines instruct:

> Postaward compliance reviews of recipient agencies will be scheduled by LEAA giving priority to any recipient agencies which have a significant disparity between the percentage of minority persons in the service population and the percentage of minority employees in the agency....A significant disparity...may be deemed to exist if the percentage of minority group in the employment of the agency is not at least seventy (70) percent of the percentage of that minority in the service population. 28 C.F.R. § 42.306(b)(1974).

926. To determine the equitability of services to the minority community, LEAA measures the response times of the police department to calls from minority communities and compares them with response times to calls from nonminority communities. LEAA staff have indicated that many factors, such as reason for calls to the police, are involved in determining response times, and that even when response times are compared for specific types of calls, this measure has not been very successful. Interview with Winifred Dunton, Attorney Advisor, and Andrew Strojny, Chief, Compliance Review Division, OCRC, LEAA, DOJ, Feb. 5, 1975. In many cases this has been because police departments do not maintain adequate data for measuring response times. See Santarelli letter, supra note 836.

categories, which included entrance standards and selection procedures, recruitment, promotion, training and education, and employment and utilization of women, all related to employment.

LEAA staff indicated that one reason for the almost exclusive attention to employment is that apart from the measurement of response times, no other tools have been developed for measuring nondiscrimination in the delivery of services by police departments.[927] It would be absurd to believe that such tools cannot be developed.[928] For example, LEAA could look at the quality of police investigations of crimes in minority and nonminority neighborhoods, numbers of patrol officers and patrol cars per 10,000 population in minority neighborhoods, police officer workloads, and frequency of patrols.[929] It could compare the quality of facilities available to police stationed in precincts in minority neighborhoods with facilities in nonminority neighborhoods.[930]

---

927. 1975 Rice et al. interview, supra note 728.

928. Measures to determine whether police services are being distributed equally have been studied by the Urban Institute, a nonprofit research corporation in Washington, D.C. The measures examined included assignment of police proportionate to demand for services and effectiveness of police against crime. P. Bloch, Equality of Distribution of Police Services - A Case Study of Washington, D.C. (February 1974).

929. Undoubtedly there are many factors, such as prior incidence of crime, and density of population that bear on allocation of police resources. It might be necessary to take such factors into account in calculating equitability of distribution of officers and cars. Nevertheless, assignment patterns which have a discriminatory effect could be certainly made evident if a comprehensive analysis were made. If, in a city with 30 percent minority population concentrated in three of the city's ten precincts, only 5 percent of its patrol force were assigned to the three precincts, this would clearly establish a prima facie case of discrimination.

930. It is presumed that there is some correlation between the proficiency with which police officers can carry out their duties and the facilities provided to assist them in these duties.

Although not included in the Manual, LEAA staff have stated that their compliance reviews now include measures of service to non-English speaking populations. The principal factor examined is whether the communications branch of the police department has a capability for communicating with such populations when they are located within the service area of the recipient police department.[931]

The Manual could serve a useful purpose. However, as it stood in early 1975, the Manual's language was vague and its queries could not elicit the type of responses necessary to produce comprehensive compliance information,[932] even in the area of employment. Throughout the Manual there is unspecific and undefined use of adjectives and adverbial phrases such as "Do female officers have an equitable opportunity for promotion...." or "Are females assigned to operational units of the department in reasonable proportion to their number in department...." or "Are examinations held frequently enough[933] so as not to be discouraging...." [Emphases added].[934] Such terms are ambiguous and lend themselves to convenient interpretations. LEAA has not provided unequivocal standards or definitions so that

---

931. For example, in communities with significant Spanish speaking populations which have an emergency police telephone number, LEAA determines if there are Spanish speaking operators to answer that number.

932. A copy of this Manual was submitted to the Commission in July of 1973 for comment and the Commission responded in August of 1973. Letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to Herbert C. Rice, Director, OCRC, LEAA, Aug. 8, 1973. LEAA attempted to reflect several of the Commission's comments in its revised draft. For example, the Commission noted that in the first draft, the Manual failed to make as many inquiries regarding ethnic and sex discrimination as it did with regard to race. The October 1973 revision (see note 922 supra) rectified this problem.

933. For example, the LEAA Manual query concerning whether or not examinations are held frequently enough does not indicate whether frequently means every six weeks, every two months, or any specific interval.

934. Compliance Review Manual, supra note 922.

subjective interpretations can be avoided.

Although OCRC has responsibility for ensuring compliance by all LEAA recipients, not merely police departments, it has not developed manuals for conducting reviews of other recipients. LEAA has plans to expand the Manual so that it can be used for reviewing correctional institutions and expects that in this area it will be able to make measurements of delivery of services.[935] It has no plans for expanding the Manual to include juvenile or community-based facilities, nor does it anticipate that the Manual will be broadened to cover court systems.[936]

D. Preapproval Reviews

Until mid-1973, LEAA officials doubted that it would conduct any preaward reviews. In October 1973, LEAA took a significant step forward by initiating a program of onsite preaward compliance reviews.[937] Nonetheless, the program is restricted in scope. It is limited to a review of potential recipients of discretionary grants of $750,000 or more.[938] There is no similar mechanism for preaward

---

935. 1975 Rice et al. interview, supra note 728.

936. Id.

937. OCRC's Compliance Review Manual, as well as principles from relevant court decisions, are used to a limited extent as staff instruction for conducting these reviews. Dunton and Strojny interview, supra note 926.

938. OCRC participates in LEAA's computerized grants tracking system so that it will be immediately apprised of the number and location of grants of $750,000 or more to be reviewed. Moreover, as a double check, the procedure for processing discretionary grants has been amended to require that OCRC be advised of all discretionary grants over the amount of $750,000 by the regional offices. Applications for these grants are generally submitted to the regional offices.

reviews of LEAA's principal type of funding--block grants.[939]

Although at one point LEAA officials informed Commission staff that preaward reviews were not conducted of block grant recipients because they believed that such reviews might interfere with the "delicate balance between Federal/State relations,"[940] the LEAA position appears to be changing. As of February 1975, the reasons given for failure to conduct such reviews were "lack of staff," and LEAA's inability to determine in advance of funding the SPAs to which State or local law enforcement agencies funds will be distributed and how they will be spent.[941] Moreover, LEAA staff stated that they hope that at some point in the future preaward reviews of block grants may be conducted, and they indicate that there is authority to defer funding if such reviews indicated noncompliance.[942]

---

939. This deficiency was noted by attendees at LEAA's 1975 civil rights conference, who recommended that LEAA increase its emphasis on preaward compliance. LEAA Policy Development Seminar on Civil Rights Compliance, supra note 872.

940. July 1973 Rice interview, supra note 813.

941. Because all LEAA block funds pass through the SPAs and because the SPAs have considerable leeway in how the funds are channeled (see p. 270 supra) LEAA reports that it is difficult to tell how the block grants will be used. Dunton and Strojny interview, supra note 926.

942. 1975 Rice et al. interview, supra note 728. Deferral of funds is discussed further on pp. 376 infra.

In June 1975, LEAA indicated that it was attempting to to assign this responsibility to the SPAs.[943] This Commission notes that this assignment could solve the problem of inadequate staff for reviews. Moreover, the SPAs should know to whom LEAA funds will go, since they distribute the LEAA funds; and, thus, this assignment could also solve LEAA's problem of not knowing whom to review on a preaward basis.

From October 1973 through the end of fiscal year 1974, LEAA conducted about 70 preaward compliance reviews of discretionary grant programs.[944] As of February 1975, LEAA did not have any data on the number of preaward reviews which had been conducted in fiscal year 1975,[945] but OCRC staff

---

943. LEAA stated:

> LEAA conducts a pre-award review function with respect to block grants to the states. As noted by the Commission, at pages /325-329 infra/ the SPAs establish and maintain a civil rights compliance coordinative mechanism at the state level.
>
> In accordance with the Master Plan [see note 825 supra], SPAs wishing to assume "Priority Status" in civil rights compliance matters as they are affecting administration of block grant funds in their respective states, will assume responsibility to conduct pre-award reviews at the state level. June 1975 Velde letter, supra note 725.

944. 1975 Rice et al. interview and Dunton and Strojny interview, supra note 728.

945. LEAA stated:

> This is true since statistical summaries are prepared at the conclusion of the fiscal year. During fiscal year 1975, as of June 27, 1975 we have received 39 grant applications for review. Review of some of those applications are pending. Six of these grants have been funded and had special conditions attached as a result of pre-award reviews. Drawdowns on four of these grants were held up by special conditioning the drawdown to insure compliance with relevant court orders. June 1975 Velde letter, supra note 725.

"Special conditions" are defined on p. 352 infra.

stated that preaward reviews have been conducted on all grants of $750,000 or more made since the initiation of the preaward review program.[946]

---

946. 1975 Rice et al. interview, supra note 728.

Of the 70 reviews conducted in fiscal year 1974, 21 resulted in OCRC's placing "special conditions" on the grant contract.[947] These special conditions are placed on the contract when there is a civil rights problem; they specify the steps to be taken to ensure that LEAA does not fund a discriminatory program. For example, special conditions may include requiring a recipient to report to LEAA concerning new hires and promotions by race, ethnic origin, and sex.

LEAA may specify that funding of the grant be deferred until the required actions have been taken.[948] As of February 1975 LEAA officials stated that LEAA does not maintain data on the number of instances in which the special condition required deferral,[949] although on request, LEAA sometimes compiles it.[950]

---

947. 1975 Rice et al. interview, supra note 728.

948. In February 1975, LEAA did not have data available on the nature of the special conditions which were placed on these 21 grant contracts. Id. Nonetheless, in January 1974, after OCRC staff had conducted 15 preliminary preaward reviews in the States of Oregon, Iowa, Oklahoma, and Pennsylvania, OCRC staff indicated that the recommendations made in these preliminary reviews fell into two major categories. First, OCRC staff recommended that recruiting methods be improved in those programs requesting LEAA grants which require employment. For example, OCRC staff suggested that the race and sex of correctional personnel be proportionate to the resident population of the institution and not to the total population of the locale in which the facility is situated. Second, OCRC recommended that special projects such as drug detoxification programs increase their service to minorities and females. Interview with John Burns, Compliance Review Coordinator, OCRC, LEAA, DOJ, Jan. 29, 1974.

949. 1975 Rice et al. interview, supra note 728.

950. In June 1975 LEAA informed this Commission concerning the number of preaward reviews resulting in funds being withheld. See note 945 supra.

E. Compliance Reviews

In 1973, OCRC purported to examine the following factors in selecting recipient agencies for a compliance review:

> a. Bureau of Census data relative to the minority population to be served by the law enforcement agency and in terms of the number of minorities in the available work force.
>
> b. The presence of LEAA block or discretionary funds.
>
> c. The amount of funds received by the agency from other Federal sources.
>
> d. The presence or absence of equal employment opportunity complaints regarding the employment practices of the agency as well as the presence or absence of litigation which would address similar civil rights compliance issues.
>
> e. Departmental staffing patterns as reported by the International Association of Chiefs of Police in 1971.
>
> f. The number and nature of complaints referred to the Criminal Division of the Department of Justice.
>
> g. The Biennial Civil Rights Compliance Report Form[951] in order to assess the number of minorities employed by the law enforcement agency. 952

---

951. This form is discussed on p. 332 supra.

952. LEAA response, supra note 877. In addition, LEAA has given priority for review to the eight impact cities which have received large grants from LEAA. These cities are Newark, N.J.; Baltimore, Md.; Cleveland, Ohio; Atlanta, Ga.; St. Louis, Mo.; Dallas, Tex.; Denver, Colo.; and Portland, Ore.

This selection procedure places overemphasis on employment of minorities, but makes no mention of equal opportunity in the delivery of services; nor is mention made either of delivery of services to or employment of women.[953] Nonetheless, it appears to provide LEAA with some semblance of a system for selecting recipients for review, which is preferable to conducting compliance reviews only in response to complaints.[954]

---

953. LEAA responded to this criticism:

> The Commission should note, in faulting LEAA for putting overemphasis on the employment of minorities in the process of selecting sites for compliance reviews, that generating information indicating statistically significant data indicating underutilization of women is almost impossible, since broad utilization of women in police and other criminal justice work is a practice of recent origin. Hence, establishing a reasonably reliable statistical rationale for the selection of sites for compliance reviews based on utilization of female labor is practically not feasible. June 1975 Velde letter, supra note 725.

954. The majority of the Title VI compliance reviews conducted by the Department of Housing and Urban Development are conducted in response to complaints. To Provide...For Fair Housing, supra note 868 at 56.

However, the existence of this procedure has become irrelevant as LEAA rarely conducts compliance reviews. Although LEAA has thousands of recipients,[955] from the time of its creation through January 1975, OCRC had conducted only 18 postaward compliance reviews.[956] Moreover, at least 14 of these were completed before July 1973 and only one was completed since May 1974.[957] LEAA stated that postaward compliance review activities have been drastically reduced in recent years because of its emphasis on preaward reviews.[958] This explanation is not fully accurate,

---

955. Statistics on LEAA recipients are provided in note 721 supra.

956. 1975 Rice et al. interview, supra note 728. See also Velde letter, supra note 725. LEAA has executed a Memorandum of Understanding with the Federal Programs Section of the Civil Rights Division of the Department of Justice. The memorandum obligates the Federal Programs Section "to undertake a number of major compliance reviews on behalf of LEAA each year." LEAA response, supra note 877..

957. These 14 reviews included 11 municipal police departments, one State department of corrections, one State highway patrol and one sheriffs' department. LEAA response, supra note 877. As of May 28, 1974, LEAA had conducted a total of 17 compliance reviews. These included police departments in Dallas, Tex.; St. Louis, Mo.; Cleveland, Ohio; Portland, Ore.; Baltimore, Md.; Phoenix, Ariz.; New Orleans, La.; Atlanta, Ga.; Berkeley, San Francisco and San Diego, Cal.; Newark, N.J.; and Denver, Colo.; the South Carolina State Highway Patrol; the Clark County, Nevada, Sheriffs' Department; the Rhode Island Department of Corrections; and the Union Correctional Institution in Raiford, Florida. An 18th review of the Norfolk, Virginia, Police Department was in process as of May 1974. Santarelli letter, supra note 836. The Norfolk review was completed prior to February 1975.

958. Velde letter, supra note 725. OCRC reports that conducting a postaward compliance review is a lengthy procedure. The LEAA review process requires weeks of staff preparation prior to the actual visit and the review itself generally takes at least one work week at the review location and weeks subsequent to the onsite visit to draft an evaluation and any necessary recommendations. The entire OCRC staff participated in most reviews. This involvement of the total staff was necessary due to the large volume of material and information to be gathered and evaluated, which included general population statistics; number of employees by race, ethnicity, and sex; types of assignments; and response times to calls for police assistance. OCRC staff estimated that a compliance review takes approximately 100 person days on the average for a large recipient agency. It was estimated that 25 percent of this time was spent in preparation prior to the visit; 50 percent was devoted to onsite work; and the remaining 25 percent was used in the subsequent evaluation and recommendation process. Rice interview, supra note 728.

since the emphasis on preaward reviews has been limited to the Compliance Review Division, which is far too small. It is clear from LEAA's allocation of staff between the Compliance Review and Complaint Investigation Divisions, that LEAA places little emphasis on preaward or postaward compliance reviews. Rather, its greatest emphasis is on complaint processing.[959]

This current review of LEAA marked the first time that OCRC staff has shared with this Commission any tangible information concerning their civil rights operation. Previous Commission reviews of LEAA's compliance program were severely limited by LEAA's refusal to make copies of its complaint investigations and compliance reviews available to Commission staff.[960] In the course of the current review, LEAA made available sections from two compliance reviews of municipal police departments.[961] Nonetheless, LEAA continued to impose unnecessary restrictions on Commission use of OCRC files.

---

959. Four persons are assigned to the Compliance Review Division, which conducts preaward and postaward compliance reviews and reviews equal employment opportunity plans. Six persons are assigned to the Complaint Resolution Division. See p. 292 supra.

960. This Commission evaluated LEAA in 1970, 1971, and 1973. See U.S. Commission in Civil Rights, The Federal Civil Rights Enforcement Effort (1970); The Federal Civil Rights Enforcement Effort: One Year Later (1971); and The Federal Civil Rights Enforcement Effort--A Reassessment (1973).

961. Review Nos. 73-R-03 and 73-R-07.

Unlike other Federal agencies reviewed in The Federal Civil Rights Enforcement Effort--1974, LEAA did not permit Commission staff to examine freely its compliance review and complaint investigation files. Moreover, those files OCRC did share with Commission staff were provided only after LEAA obliterated all reference to locations.

LEAA stated that it was obligated to protect the confidentiality of the recipients it investigates.[962] LEAA's interpretation of its obligation to

---

962. Letter from Herbert C. Rice, Director, Office of Civil Rights Compliance, LEAA, DOJ, to Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, July 16, 1973.

LEAA also stated:

> ...disclosure of the contents of investigative files relating to law enforcement is wisely excepted from the provisions of the Freedom of Information Act. As a final matter, premature release of information relating to a compliance review or complaint investigation makes more difficult the discussions leading to the voluntary resolution of matters, in accordance with relevant civil rights laws and regulations. June 1975 Velde letter, supra note 725.

This Commission finds several weaknesses in LEAA's argument. The Commission notes that the Freedom of Information Act does not apply to Federal agencies and that, in any case, the act does not restrict the information which LEAA is permitted to make available outside the agency. The purpose of the act is to ensure public access to certain information held by the Federal Government.

Moreover, this Commission does not believe that if LEAA revealed the names of jurisdictions reviewed by LEAA this would impede the voluntary resolution of any matter. Other Federal agencies which have wished to keep information requested by the Commission confidential have provided the information with the request that the Commission not publicly release it.

Finally, this Commission notes that the Civil Rights Act of 1957, which created the Commission, requires all Federal agencies to "cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." As mentioned in note 963 infra, LEAA's failure to provide certain information has created obstacles to the Commission's evaluation of LEAA.

ensure confidentiality poses a major stumbling block for this Commission in its attempt to evaluate LEAA's compliance mechanisms.[963] Moreover, OCRC's insistence on confidentiality is unwarranted. There is no law that authorizes this nor is such confidentiality authorized by Title VI. No

---

963. For example, in the reviews examined there were no categories for ethnicity determinations in the review reports. The category of race was only divided into the categories of black or white with no provision for Spanish speaking applicants. LEAA staff stated that data on persons of Spanish speaking background were collected where it was appropriate. Dunton and Strojny interview, supra note 926. Nonetheless, without knowing the cities for which reviews were supplied, this Commission cannot evaluate whether the omission of ethnic origin categories from those reviews was justifiable.

Furthermore, since this Commission was only provided with those portions of the reports that could easily be reproduced without divulging the identity of the department reviewed, it cannot be ascertained whether or not the entire review was conducted with the same degree of thoroughness as the sections provided. Even more serious was the fact that without the names of the cities reviewed, this Commission was unable to compare LEAA's findings and recommendations resulting from the reviews with allegations and court holdings in any lawsuits which may have been filed in these cities. This Commission could thus not determine the extent to which all civil rights problems were found in the review.

964

other Title VI agency espouses this position.

The principal matters evaluated by the OCRC staff included employee selection and recruitment, testing, community services, complaint resolution, assignment of both sworn and civilian personnel, codification of policies and procedures, and general personnel information. A serious

---

964. LEAA stated:

> LEAA's principal concern with allowing access to its records is to protect the legitimate privacy rights of persons filing complaints with these agencies, and the rights of those persons whose personnel or investigative files might be examined by OCRC in the course of a review.
>
> Further, much more subtle information relating to individuals is secured during a compliance review. For instance, we might track the employment history of a particular police officer through the disposition of various disciplinary charges, which history, if disclosed, could be to that officer's personal embarrassment, if not financial loss.
>
> Beyond this, the great national concern for the rights of the individual, as against the Federal government, has found its most recent manifestation in the Privacy Act (P.L. No. 93-579). This Act imposes severe penalties on Federal employees who would release information maintained by the government relating to an individual without that individual's permission....
>
> That LEAA should by the draft report be placed in the position of having to again summarize its position on this issue is, euphemistically, curious. It is after all, the Commission's statutory duty to protect the human and civil rights of the persons whose records it would now have us disclose. June 1975 Velde letter, supra note 725.

This Commission again notes that it is not recommending the public release of confidential information, but merely recommending sufficient access to LEAA investigative records to determine if LEAA investigations and reviews are adequate to ensure that minorities and women are not the object of discrimination in LEAA-funded programs.

deficiency of OCRC's operation is that emphasis in reviews was primarily placed on issues relating to employment discrimination with lesser importance given to services. Yet the principal purpose of Title VI is to eliminate discrimination in services provided by federally assisted programs.

Moreover, the sections of the reviews relating to employment were entirely inadequate.[965] Considerable amounts of information were collected, but it did not appear that all of what was gathered was useful to LEAA, that LEAA gathered everything it needed, or that LEAA conducted sufficient analysis of the useful information it did collect.

An example of LEAA's inadequate treatment of an issue is found in its apparent failure to use data contained in one review which showed assignment of police officers, by race, to division and districts[966] within the police department. These data revealed that within one police department, the proportion of minority patrol officers ranged from 7.6 percent in one district office to 21.9 percent in another. If assignments had been made without regard to race or ethnic origin, it is not likely that such variation

---

965. This included application blanks, medical forms, policy statements and data on testing of applicants, assignments of officers, and complaints received.

966. As used herein, divisions are major organizational units of the headquarters, including such areas as traffic, communications, and criminal investigation. Districts are geographic units of the police department.

would have occurred. It was also clear from the data that black captains, the top ranking officers in district offices, were assigned to districts with the greatest proportion of black patrol officers. In addition, some divisions, such as planning and research and public information, contained almost no black police officers. LEAA appeared to make inadequate use of these possibly discriminatory assignment patterns in its evaluation of the police departments in question. With respect to officer assignments LEAA's findings only noted, "while aware of the necessity to place black officers in 'visible' assignments, it was noted that some units contained substantially higher numbers of blacks." Although segregation of black officers to certain units is a serious civil rights violation, LEAA avoided making this clear to the police department. Instead, in an apparent attempt to soften the impact of its finding, LEAA added: "We did note a generally high morale and good rapport...in units with high numbers of minorities."[967]

F. Attempts to Secure Compliance

LEAA has generally submitted a number of recommendations to the recipients reviewed. In some cases, the recommendations have been procedural, as for the increased collection of data, but in many cases LEAA has recommended that discriminatory practices be eliminated.[968]

967. LEAA Review No. 73-R-03.

968. LEAA staff have stated that the majority of LEAA recipients it has reviewed were found to engage in some form of discriminatory practice. July 1973 Rice interview, supra note 813.

LEAA's recommendations, like the reviews themselves, tended to focus on employment. In one review, for example, LEAA made eight recommendations, seven of which dealt with employment matters. Only one cited a need for an improvement by a municipal police department in its delivery of services to its population.[969]

LEAA's recommendations have not been sufficiently detailed.[970] For example, one recommendation stated:

---

969. Sample recommendations concerning services are listed in Santarelli letter, supra note 836. These recommendations were largely for the collection and analysis of data on delivery of services.

970. LEAA responded to this criticism:

> ...lengthy and detailed recommendations to a recipient agency may not be useful, and even be counterproductive. To draw a useful analogy, the Civil Rights Commission repeatedly expresses the need that OCRC more closely examine the services of criminal justice agencies, but suggests few areas which might be examined to establish disparate treatment of minorities or females. Similarly, LEAA considers the manner in which a particular agency overcomes specific compliance problems as the responsibility of the agency under review, once LEAA has outlined for that agency general areas of concern. June 1975 Velde letter, supra note 725.

This Commission disagrees. Unless Federal agencies provide recipients a clear statement of the remedies to be taken, the process of trying to seek a voluntary resolution of noncompliance can be greatly extended while the recipient and the agency negotiate over what remedies are necessary.

Parenthetically, this Commission refers LEAA to pp. 281 and 362 supra for a suggestion of areas which might be examined to determine if a recipient provides discriminatory treatment of minorities and females.

> The process whereby a candidate is requested to recall in accurate detail for a previous period of ten years, all civil and criminal transgressions, credit status and employment, however temporary, or be charged with falsifying information, should be altered. 971

Undeniably, this is too vague to generate the type of alteration necessary. LEAA should have offered specific guidance as to how the recipient's application process should be modified.

Other recommendations were stated in such a fashion that the reviewed department was given a specified number of days to rectify the problems or deficiencies revealed.[972] Then they were to report their solutions to LEAA for approval or rejection. This process of trying to achieve mutually agreeable resolutions to deficiencies could be decreased considerably if LEAA would outline suggestions for correcting shortcomings in the initial correspondence.

---

971. LEAA Review No. 73-R-07.

972. The time period ranged from 30 to 60 days.

Despite the apparent frequency, diversity, and severity of civil rights problems uncovered by LEAA in its compliance reviews, none of these reviews resulted in LEAA's finding recipients to be in noncompliance. This may well be because of OCRC's failure to define what constitutes noncompliance. OCRC staff remarked that various combinations of deficiencies could constitute noncompliance; yet, there is no definite formula which specifically delineates those factors which constitute noncompliance.[973] This is a serious deficiency in OCRC's compliance mechanism which, if uncorrected, invites subjective interpretations of what constitutes noncompliance of recipients of LEAA funds. The only explanation offered by the OCRC for this posture is that noncompliance is regarded as a legal determination and would only be used if the reviewed departments did not respond voluntarily to the recommendations made by the OCRC staff. Generally, according to the OCRC staff, the recipients reviewed have been responsive to the recommendations put forth by the review team, yet this trend does not obviate the need for guidelines detailing noncompliance.[974]

973. July 1973 Rice interview, supra note 813..

974. Id. LEAA stated:

> LEAA has under advisement...the Commission urging that LEAA adopt "Guidelines detailing non-compliance." Not only would action by LEAA in this regard make its regulatory scheme more "myriad", we, frankly, wonder if the Commission is seriously suggesting that LEAA set about to comprehensively detail in its guidelines the infinite and, "various combinations of deficiencies (which) could constitute(s) non-compliance," by LEAA's vast and diverse criminal justice constitutency. June 1975 Velde letter, supra note 725.

This Commission believes that in order for full compliance to be achieved with LEAA's civil rights requirements, it is essential that clear and unambiguous guidelines be issued. Such guidelines should not only provide detailed instructions on how to come into compliance, but should set the tone for the enforcement program. If they indicate unqualified agency support for the goal to be attained, then voluntary conformity with the law is more likely.

In at least one instance, moreover, LEAA has permitted its negotiations for compliance to continue indefinitely.[975] According to OCRC staff recollections, in late 1973 a letter was sent to an LEAA-funded police department[976] informing the recipient to take actions, including increased recruitment of minorities and women, the validation of the procedures for selecting employees, the elimination of discriminatory height requirements, and the assignment of women to patrol.[977] LEAA staff report that the recipient immediately indicated willingness to take action on the first three recommendations, but continued to make assignments of police officers on the basis of sex, refusing to place women on patrol. In late spring 1974, members of OCRC along with members from the Civil Rights Division of the Department of Justice visited the recalcitrant recipient, and informed it that a suit would be brought by the Department of Justice if action were not taken on the fourth recommendation.[978]

The recipient did not take action. OCRC did not follow through with its threat, however. Instead, the following sequence of events ensued: An official representative of the recipient expressed personal doubts about the wisdom of assigning women to patrol and received a sympathetic response from LEAA.[979] To assuage the official's doubts, LEAA collected information for

---

975. It would appear that protracted negotiations are frequent. One of the recommendations of attendees at LEAA's 1975 civil rights conference was that LEAA develop a more orderly procedure for conducting compliance reviews which would include goals for carrying out a fixed number of reviews and set time limits for correcting deficiencies. LEAA Policy Development Seminar on Civil Rights Compliance, supra note 872.

976. The letter was sent as the result of an August 1973 compliance review.

977. The recipient had assigned no women to patrol duty.

978. Dunton and Strojny interview, supra note 926.

979. One LEAA official stated about the police department representative, "his doubts about women are real." Id.

the recipient on the deployment of women on patrol when given the opportunity. LEAA even conducted an impromptu telephone survey of a sample of police departments to assure the recipient that women had patrol assignments elsewhere.[980] While it is commendable for OCRC officials to be cooperative in assisting LEAA recipients, it would appear that this type of support is counterproductive to civil rights enforcement.

LEAA has indicated that its reason for not enforcing equal employment opportunity of women is that it believes sex may be a valid criterion for selecting persons for police work.[981] This position ignores the fact that

---

980. Id.

981. LEAA stated:

> The novelty of the question of utilization of women in police service was and still is in need of resolution in a court of law. Reed v. Reed, 401 U.S. 71 (1971) extended coverage of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to women. This coverage was broadened to include discrimination in employment Frontiero v. Laird, 411 U.S. 677 (1973), but no Federal Court above the District Court level has yet considered comprehensively the critical issue as to whether sex is a valid criterion for selecting persons for police work from a Fourteenth Amendment - equal protection - point of view, or from the point of view of statutory provisions such as Section 518(c)(1), which are derived from the Fourteenth Amendment. LEAA thought it desirable to obtain a more authoritative ruling of the Federal courts on this issue before attempting to enforce compliance....Velde letter, supra note 725.

policewomen perform effectively on patrol[982] and civil rights law requires equal employment opportunity for women. To give credence to the personal doubts of those who do not support the full implementation of the law is to abet its nonenforcement.

By late 1974, LEAA's efforts to assist the recipient did not move the recipient to take corrective action, and LEAA finally sent a letter to the recipient stating that if compliance were not forthcoming, further action would be taken.[983] As of February 1975, the recipient had not informed LEAA that it would come into compliance.[984]

G. Followup Reviews

In order to determine whether mutally agreed upon solutions are in fact implemented, regular monitoring and followup reviews must be conducted. Although civil rights problems requiring correction were uncovered in the majority of LEAA's compliance reviews, the LEAA program for conducting followup reviews has been inadequate. Prior to March 1974, only one such review had been completed.[985] At that time the OCRC Director

---

982. P. Bloch and D. Anderson, Policewomen on Patrol, Final Report (1970). This report is an evaluation of policewomen in Washington, D.C., conducted for the Police Foundation by the Urban Institute.

983. Dunton and Strojny interview, supra note 926.

984. OCRC had not determined what action it would take if futher action is necessary, although it expects that judicial enforcement would be most effective. The recipient has received only $75,000 in LEAA funds, two years ago. It has refused further funding and so LEAA staff expect that an affirmative order terminating further funding would have a negligible effect on the practices of the recipient. Id.

985. March 1974 Rice interview, supra note 786.

stated that six were planned for the summer when added assistance could be provided by summer student employees. These reviews were conducted.[986]

Similarly, LEAA has conducted very little followup to ensure compliance with the special conditions[987] it has attached to grant contracts as a result of its preaward reviews. Of 13 discretionary grants[988] which were awarded with special conditions after preaward reviews in fiscal year 1974, LEAA has conducted followup investigations to ensure that the recipient had complied with those special conditions in only 2 cases.[989] Thus, it appears that where LEAA has worked hard to obtain a recipient's commitment to achieve civil rights compliance, it often neglects to be certain that the required actions are properly taken.

---

986. 1975 Rice et al. interview, supra note 728.

987. Special conditions are discussed on pp. 352 supra.

988. Only 13 of the 21 grants upon which civil rights special conditions were placed (see p. 352 supra) were subsequently awarded. Civil rights played no role in the failure to award the other 8 grants, however. They were not awarded for programmatic reasons. Dunton and Strojny interview, supra note 926.

989. Data on special conditions was provided by Andrew Strojny, Chief, Compliance Review Division, OCRC, LEAA, DOJ, Feb. 7, 1975.

H. Complaint Handling

The principal means employed by LEAA to apprise citizens of how to register a complaint against a recipient of LEAA funds is the use of a standard poster.[990] This poster is distributed through the State Planning Agencies to all recipients, which are required to display them. The poster cites the provisions of Title VI of the Civil Rights Act of 1964 as well as the equal employment opportunity requirements imposed by LEAA. It advises potential complainants to contact either OCRC or the appropriate State Planning Agency. This poster was printed only in English until March 1974 when copies were printed in Spanish. There are no immediate plans to translate it into other languages, such as Chinese. Possibly because the poster is an inadequate mechanism to inform citizens of their rights to nondiscrimination,[991] many complaints against police departments have apparently not been brought to the attention of SPAs or OCRC and were, thus, not given sufficient opportunity for resolution.[992]

---

990. OCRC estimated that approximately 80,000 of these posters have been distributed. It indicated that requests from the SPAs for these posters are received regularly. LEAA has also issued a manual for SPAs which focuses solely on employment matters. LEAA, DOJ, Equal Employment Opportunity Program Development Manual (July 1974). It has also issued a pamphlet for general distribution which describes LEAA's compliance program, including Title VI. LEAA, LEAA and Civil Rights (Undated).

991. In 1973 private civil rights groups sensed a void in LEAA's methods of apprising citizens of its equal opportunity requirements and issued a pamphlet concerning LEAA's equal employment opportunity requirements. Leadership Conference on Civil Rights and the Center for National Policy Review, Equal Job Opportunity in Law Enforcement (June 1973).

992. Pennsylvania State Advisory Committee to the U.S. Commission on Civil Rights, Police-Community Relations in Philadelphia (1972) and Cairo Hearing, supra note 732.

From the time that OCRC was established in May 1971 until February 1975, LEAA had received more than 275 complaints of discrimination.[993] Forty-three of these were received in fiscal year 1972 (July 1, 1971 through June 30, 1972)[994] and 64 were received in fiscal year 1973.[995] The great bulk of the complaints, however, were received in fiscal years 1974 and 1975; 101 were received in 1974 and 71 in the first 7 months of fiscal year 1975.[996]

---

993. LEAA, DOJ, "A Summary of LEAA's Compliance Program," Xerox circulated at LEAA Policy Development Seminar on Civil Rights Compliance, Feb. 10, 11, 1975. This conference is discussed at note 872 supra.

994. LEAA response, supra note 877.

995. Letter from Henry C. Tribble, Chief, Complaints Resolution Division, Office of Civil Rights Compliance, LEAA, DOJ, to Dreda K. Ford, Writer-Editor, U.S. Commission on Civil Rights, Feb. 26, 1975.

996. Id.

Over 90 percent of these complaints concerned employment,[997] and a sizable number concerned sex discrimination in employment. To illustrate, the OCRC staff indicated that approximately 33 percent of the complaints received in fiscal year 1973 involved employment-related sex discrimination grievances.[998] In fiscal year 1974, the number of complaints alleging sex discrimination increased to more than 50 percent of the complaints LEAA received.[999] This trend continued in fiscal year 1975.[1000]

Although one LEAA staff member indicated that an optimistic estimation of the LEAA resolution time for complaints would be two or three months,[1001] it is difficult to determine independently whether LEAA's complaint processing is that expeditious. Of the 43 complaints received in fiscal year 1972, only 23 were closed as of June 1973 and by February 1974, 7 remained open.[1002] Six still remained open as of February 1975.[1003] Of 64 complaints received in fiscal year 1973,

---

997. Employment complaints constituted 90.4 percent of OCRS's complaints in fiscal year 1972; 93.8 percent in fiscal year 1973; 91.0 percent in fiscal year 1974; and 91.5 percent in fiscal year 1975. Id.

998. Interview with Henry Tribble, Civil Rights Specialist, OCRC, LEAA, DOJ, July 5, 1973.

999. Attachment to Santarelli letter, supra note 836. In fiscal year 1972 only 4.7 percent of OCRC's complaints alleged sex discrimination. In fiscal year 1973, 32.7 percent alleged sex discrimination. Tribble letter, supra note 995. These figures include complaints alleging discrimination on more than one ground, for example, race and sex discrimination.

1000. Tribble interview, supra note 998.

1001. LEAA response, supra note 877.

1002. Tribble letter, supra note 995.

1003. Id.

at least 39 were still open in June 1973,[1004] and 37 remained open in February 1975. In June 1973, of 94 complaints received between July 1, 1971 and April 30, 1973, only 35 complaints (37 percent) were closed.[1005] In February 1975, a total of only 51 had been closed--only 16 more than in June 1973.[1006] LEAA has indicated that "A particular case may be carried as open when it is in fact resolved, subject to monitoring," but it is has not informed this Commission how many of its cases fall into the category of "resolved, subject to monitoring." To the extent that LEAA does not close a case until followup monitoring reveals that the

---

1004. OFRC, LEAA, DOJ, "Status of Complaints for FY 1972 and 1973," supplied by Henry Tribble, Chief, Complaint Resolution Division, Office of Civil Rights Compliance, LEAA, DOJ, Feb. 25, 1975. /Hereinafter referred to as "Status of Complaints."/

1005. LEAA response, supra note 877.

1006. "Status of Complaints," supra note 1004.

required actions have been implemented, LEAA is to be commended.[1007]

Some of these cases, too, may have been closed prematurely. For example, one complaint file reviewed by Commission staff was closed after OCRC had found that "the reports of the grants are not sufficiently detailed to provide information as to specific subgrantees or users of the funds." LEAA concluded that "...the nexus of the grant is not close enough to the nexus of the complaint to enable us to proceed on the basis of Title VI."[1008] The appropriate course of action would have been for OCRC

1007. LEAA stated:

> OCRC has maintained a posture of not designating its cases as "closed" as soon as apparent resolution of the identified problems have been reached. Rather, there is a system of periodic monitoring following resolution. This period of monitoring, generally over the course of the subsequent eighteen months, permits an adequate period of time to determine whether or not all systemic problems have been adequately identified and appropriately addressed. During this monitoring period, subsequent to apparent resolution, the case file is still designated as "open", and not yet "closed"....They are not. A large portion of those cases within OCRC that are designated as "open" have already been resolved. June 1975 Velde letter, supra note 725.

1008. LEAA Complaint No. 73-C-007.

to require the recipient to maintain records sufficiently comprehensive to document where LEAA funds are being used. LEAA's complaint files contained no indication that LEAA imposed such a requirement. Thus, it is difficult to determine whether this complaint was closed out of convenience or if, in fact, the complaint alleged discrimination over which LEAA had no jurisdiction.

When more substantial LEAA involvement was required, LEAA was slow to investigate its complaints. Of the 43 complaints received in fiscal year 1972, LEAA determined that investigation was necessary in about 26 cases.[1009] Five of these cases were investigated as of June 1973. Of the 51 cases filed in the first three-quarters of fiscal year 1973, LEAA determined that 42 needed investigation. It appeared that only 11 of these had been investigated as of June 1973.[1010]

LEAA's complaint investigations were not always thorough. In one complaint file reviewed by Commission staff, letters from the complainants alleged discrimination against blacks in the employment practices of a correctional institution.[1011] Some of the specific allegations appeared

---

1009. In some cases it was inferred that investigation had been necessary because LEAA stated that it was negotiating with the respondent for compliance or monitoring the recipient's action. LEAA response, supra note 877.

1010. While it might be unreasonable to expect that all complaints received in April 1973 be resolved two months later, it is clear that this low rate of closure was not entirely due to the fact that the complaints had been received too recently to be resolved. Many of the complaints unresolved in June 1973 had been in LEAA's files long enough to be resolved. For example, as of June 1973, 15 of 19 complaints received between July 1, 1972, and September 30, 1972, were unresolved.

1011. LEAA Complaint No. 73-C-002.

to have been at least partially investigated, for example, that there were too few blacks in supervisory positions and that blacks were passed over for promotion. The complainants also alleged that the work schedules of black employees were improperly set, but there is no indication in the file that this allegation was investigated. In addition, the complainants alleged a number of programmatic problems, such as failure of corrections employees to be paid their full salaries and the placing of inmates in solitary confinement on trumped up charges. These latter charges did not allege racial or ethnic discrimination and, thus, were considered outside OCRC's jurisdiction. There is, however, no indication in the file that OCRC attempted to determine if they had racial implications or referred them to LEAA program officials who have authority to handle such matters.[1012]

The explanation offered by OCRC staff for the slow pace in processing complaints[1013] is the lack of staff assigned to this operation, but it is clear that the delays are also due to LEAA's reluctance to take enforcement action when the recipients are resistant to coming into compliance voluntarily. Indeed, when LEAA determined that corrective action by a

---

1012. This complaint, received early in fiscal year 1973, was not resolved as of February 1975. "Status of Complaints," supra note 1004.

1013. Attendees at LEAA's 1975 civil rights conference noted undue delays in LEAA complaint processing and recommended that LEAA determine the merit of complaints more expeditiously. LEAA Policy Development Seminar on Civil Rights Compliance, supra note 872.

recipient was necessary,[1014] LEAA had very little success in resolving complaints. Although at least one-third of the complaints filed with LEAA between July 1972 and April 1973 fell into this category, as of May 1973, LEAA reported only 3 of these cases as closed.

I. Enforcement Action

1. Deferral of Funding

Like all Title VI agencies, LEAA has a number of tools at its disposal when it finds noncompliance by its recipients or potential recipients. Under Title VI, if a grant has not been made or funding has not been awarded, LEAA can defer making the grant or awarding funds until it has had the opportunity to verify full compliance. Such deferral would be appropriate, for example, whenever a lawsuit against an LEAA recipient or applicant or an LEAA compliance review indicates a prima facie case of discrimination prohibited by one of LEAA's civil rights requirements.[1015] The purpose of this tool is to protect Federal agencies

---

1014. In counting the number of cases in which LEAA required corrective action, Commission staff included both those cases in which LEAA stated that it was negotiating with the recipient and those in which monitoring was taking place. LEAA response, supra note 877.

1015. The Department of Justice's Title VI regulation provides:

> If an applicant or recipient fails or refuses to furnish an assurance...or fails or refuses to comply with the provisions of the assurance it has furnished, or otherwise fails or refuses to comply with [Title VI or the regulations implementing that title].... The Department shall not be required....to provide assistance in such a case during the pendency of administrative proceedings...except that the Department [of Justice] will continue assistance during the pendency of such proceedings whenever such assistance is due and payable to a final commitment made or an application finally approved prior to the effective date of this subpart. 28 C.F.R. § 42.108(b) (1974).

See also Department of Justice, Guidelines for the Enforcement of Title VI, 28 C.F.R. § 50.3 (1974).

from funding discriminatory programs and it has been confirmed both by the Congress[1016] and the courts.[1017]

OCRC staff state that LEAA has deferred funding of discretionary grants in some instances in which a preaward review showed possible noncompliance because EEOPs had not been written or were incomplete.[1018] LEAA staff did not indicate in how many cases such deferral has occurred because, they note, LEAA does not maintain data on the number of fund deferrals it has made. LEAA has not itself deferred any block grant funding, but in "two or three cases" LEAA has asked SPAs, through which all block grant funding passes, to defer funding when recipients or potential recipients do not have complete affirmative action plans, and SPAs have complied.[1019]

Except when potential recipients have inadequate equal employment opportunity programs, LEAA has demonstrated great reluctance to defer funding. As a result of its resistance to the use of this enforcement

---

1016. In the 1960's, the Commissioner of Education of the Department of Health, Education, and Welfare developed the practice of deferring funds to school districts which appeared not to be in compliance with the dictates of Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny. As passed in 1964, Title VI contained no explicit provisions concerning deferral of funds. In 1966, however, Congress passed an amendment to Title VI which places a limit on the length of time funds could be deferred in educational programs. 42 U.S.C. § 2000d-5 (1970).

1017. Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); Board of Public Instruction of Palm Beach v. Cohen, 413 F.2d 1201 (5th Cir. 1969); Taylor v. Cohen, 405 F.2d 277, 28 (4th Cir. 1968).

1018. Dunton and Strojny interview, supra note 926.

1019. Id.

tool,[1020] LEAA continues to fund jurisdictions in which there is *prima facie* evidence of civil rights violations. For example, LEAA provides funds to the Philadelphia Police Department although LEAA has referred the matter to the Civil Rights Division of the Department of Justice for action because the police department blatantly discriminates against women[1021] and has refused to take adequate corrective action.[1022]

1020. Of nineteen job classifications of sworn officers in the Philadelphia Police Department, only four classifications are open to females. These classifications authorize the employment of 86 females. The remaining classifications authorize the employment of 8,276 males. Thus, only 1.03 percent of the sworn officers may be women. No female sworn officer is permitted to supervise any male sworn officer on a permanent basis.

1021. On July 18, 1973, a policewoman with the Philadelphia Police Department filed a charge of employment discrimination based upon sex with the Equal Employment Opportunity Commission. Two days later, she mailed a similar complaint of employment discrimination based upon sex to LEAA. In that complaint she requested LEAA to "consider holding up funding for the Police Department of Philadelphia until such time as my complaint is resolved." Letter from Penelope Brace to the Law Enforcement Assistance Administration, July 30, 1973. In February 1974, LEAA informed her that the City of Philadelphia had failed to undertake "voluntary compliance with the civil rights laws and regulations affecting the Philadelphia Police Department as a recipient of funds from the Law Enforcement Assistance Administration." Letter from Herbert C. Rice, Director, OCRC, LEAA, DOJ, to Penelope Brace, Feb. 4, 1974.

1022. The only corrective action the Philadelphia Police Department has taken has been insufficient. During the fall of 1974, the Philadelphia Police Department established a "pilot project" whereby it temporarily employed twenty-two women as police officers with the same duties and responsibilities of the more than 6,000 current "patrolmen."

The fact that the Philadelphia Police Department continues to receive funds means that not only is LEAA funding a discriminatory program, in violation of both LEAA's equal employment opportunity regulation and the Crime Control Act,[1023] but that LEAA's credibility as a law enforcement agency is diminished.[1024] Other police departments with discriminatory practices similar to those followed in Philadelphia can observe that no Federal action has required their immediate correction.

1023. LEAA stated:

> LEAA has moved swiftly in civil rights matters, consonant with careful investigation and development of the facts, to protect the rights of individuals concerned, and to effect broad systemic changes in the practices of criminal justice agencies receiving LEAA funds. In so doing, LEAA believes that it has fully complied with all applicable laws, regulations, and guidelines. June 1975 Velde letter, supra note 725.

1024. LEAA stated:

> LEAA's position with respect to enforcement of compliance responsibilities of the Philadelphia Police Department and relative to discrimination because of sex has been fully articulated elsewhere (See letter of Richard W. Velde, Administrator of LEAA, to Congressman Charles B. Rangel, January 10, 1975, referred to at page /277/ of /this report/.

In that letter, Mr. Velde stated:

> With the complainant...reinstated to her position with the Philadelphia Police Department, and the difficult issues of discrimination because of sex being considered in an orderly manner by the court, institution of proceedings to defer, suspend, or terminate funding seems inappropriate in this case.
>
> The impact upon all citizens of Philadelphia of withdrawing the additional police protection being provided was deemed to be on balance of more immediate consequence. These grants were specifically oriented to provision of better police protection in the high crime areas of the city and the effect of withdrawal of this protection would impact harshly on the citizens least able to protect themselves. January 1975 Velde letter, supra note 725.

Many LEAA recipients are parties to lawsuits alleging discriminatory practices. For example, of the 50 largest police departments receiving LEAA funds, 26 were parties to such suits.[1025] Yet as of February 1975, LEAA had not examined these cases to ascertain if they show prima facie civil rights violations, and to defer funds on that basis. LEAA officials contend that LEAA cannot defer funding to a recipient who is in violation of an LEAA civil rights requirement if the matter is to be referred to the Civil Rights Division for civil action, or if the matter is already before a court of law.[1026]

LEAA's position is not supported by regulation.[1027] There are no

---

1025. 1975 Rice et al. interview, supra note 728.

1026. Id.

1027. In June 1975, LEAA stated:

> Because of the procedural and substantial problems relating to enforcement of compliance responsibilities of LEAA recipients, pursuant to the terms of Section 518(c) of the Crime Control Act of 1973, LEAA will issue, as proposed rules, in the fall of 1975, regulations implementing Section 518(c), and consider, at an informal conference, other modifications in the regulations and guidelines affecting LEAA's operations relating to civil rights compliance....
>
> LEAA will, in the fall of this year, propose strong regulations implementing Section 518(c) of the Crime Control Act of 1973, including procedures to defer, suspend, or terminate funding, as appropriate, but the methods by which compliance may be reached, by voluntary means or otherwise, are as varied as the number of matters needing resolution themselves. June 1975 Velde letter, supra note 725..

regulations which limit LEAA's actions in the event of private litigation. There is a regulation concerning LEAA action once the Civil Rights Division has filed suit against a noncomplying recipient, but this regulation is aimed at coordination. It merely requires that LEAA consult with the Civil Rights Division before taking further action with respect to the noncomplying party.[1028] It does not prohibit any LEAA action.

In at least one case, a court has ordered a Federal agency to defer funding where, in the face of an apparent civil rights violation, the agency has failed on its own initiative to defer funding.[1029] LEAA itself has deferred funding to the Chicago Police Department which is involved in litigation as a result of a referral by LEAA to the Civil Rights Division, and the Illinois State Planning Agency has deferred funding to the Chicago Police Department pending its adoption of an

---

1028. 28 C.F.R. § 50.3 (1974). This is the Department of Justice Guidelines for the Enforcement of Title VI.

1029. This was the Office of Revenue Sharing of the Department of the Treasury which was ordered to defer funds to the city of Chicago. Robinson v. Shultz, Civ. No. 74-248 (D.D.C. Dec. 18, 1974) (Interim Order). The Department of Justice had filed suit against the city of Chicago after LEAA had referred the case to the Civil Rights Division on the basis of its findings of discriminatory employment practices in the Chicago Police Department. See The Chicago Police Department: An Evaluation of Personnel Practices, prepared for LEAA by consultants P. Whisehand, R. Hoffman, L. Sealy, and J. Boyer (1972). The Federal district court in Chicago had entered findings of fact showing discrimination in certain employment practices of the Chicago Police Department. United States v. City of Chicago, Civ. No. 73 C 2080, 8 EPD Para. 9783 (N.D. Ill. Nov. 7, 1974) (Interim Order).

acceptable equal employment opportunity program.[1030]

LEAA officials also contend that to engage in deferral activity at the same time the Government is engaged in a court action would be confusing to the recipient.[1031] With proper coordination between the Civil Rights Division and LEAA, however, this need not be the case. Indeed, if LEAA's investigation and accompanying findings and recommendations are thorough, both should be seeking the same remedies.[1032]

2. Termination of Funding

If funding has been awarded and the recipient is in noncompliance, Title VI specifically provides that the granting agency can initiate administrative proceedings for the termination of funding.[1033] Although not explicitly stated in Title VI, the granting agency may alternatively refer

---

1030. Dunton and Strojny interview, supra note 926.

1031. 1975 Rice et al. interview, supra note 728.

1032. There would be serious deficiencies in the Federal Government's Title VI program: (a) to the extent that the Civil Rights Division of the Department of Justice conducts its own investigations of the cases referred to it and discovers that its findings differ from those of the referring agency and (b) to the extent that the Civil Rights Division asks the court for remedies which differ from the corrective action sought by the referring agency, in its attempt to secure voluntary compliance. Such deficiencies would need to be corrected by increased guidance to Federal agencies from the Federal Programs Section of the Civil Rights Division. See chapter 9 infra.

1033. LEAA informed this Commission, "Problems relating to deferral, suspension, or termination of funding, and the application of judicial sanctions, are considered in some detail in the Master Plan [described in note 825 supra]...." June 1975 Velde letter, supra note 725.

the matter to the Civil Rights Division of the Department of Justice.[1034] LEAA has made little use of these sanctions, especially the sanction of fund termination. LEAA staff states that the agency has never terminated funding because of a civil rights violation. It has referred four cases to the Civil Rights Division of the Department of Justice.[1035] Two of these cases have been in the public eye and LEAA admits to their identity:

1034. Title VI of the Civil Rights Act of 1964 states:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirements, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so formal, or (2) by any other means authorized by law. [Emphasis added.] 42 U.S.C. § 2000d-1 (1974).

The Department of Justice's Title VI regulation defines 'other means authorized by law:

> Such other means include, but are not limited to, (1) appropriate proceedings brought by the Department of Justice to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law. 28 C.F.R. § 42.108(d) (1974).

1035. Dunton and Strojny interview, supra note 926.

the Chicago and Philadelphia Police Departments.[1036] LEAA would not provide Commission staff with the names of the other two departments.[1037]

One argument set forth by the Department of Justice against fund termination is that it risks "potential injury" to the intended beneficiaries of Federal assistance.[1038] And the Director of OCRC has argued that fund termination would only serve to hurt those programs that LEAA funding was designed to help.[1039] This Commission believes that, on the contrary, fund termination can be extremely effective, with minimal injury to intended beneficiaries. For example, between the passage of the Civil Rights Act in 1964 and March 1970, HEW initiated approximately 600 administrative proceedings against noncomplying school districts.[1040] In 400 of these cases, HEW found that the school districts came into compliance following the threat of termination, with no need for termination. In only 200 cases were funds

---

1036. Id. The Philadelphia and Chicago cases are discussed on p. 378 and p. 381 supra, respectively.

1037. 1975 Rice et al. interview, supra note 728.

1038. Brief for United States of America as Amicus Curiae at 88, Player v. State of Alabama Department of Pensions and Security, Civil No. 3835-N (M.D. Ala., filed Nov. 17, 1972.)

1039. July 1973 Rice interview, supra note 813.

1040. These districts received notices for hearings. Brief for Plaintiffs-Appellees at 7 Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

terminated. HEW subsequently determined that compliance was achieved and Federal assistance was restored in all but four of these districts.[1041]

The principle reason for LEAA's failure to use the sanction of fund termination has been that LEAA has a strong preference for judicial rather than administrative remedies for Title VI violations.[1042] This preference is reflected in LEAA's equal employment opportunity regulations, which provide that:

> Where the responsible Department official determines that judicial proceedings...are as likely or more likely to result in compliance than administrative proceedings..., he shall invoke the judicial remedy rather than the administrative remedy.[1043]

Moreover, the Department of Justice in an amicus brief in Player v. State of Alabama Department of Pensions and Security argued that "the legislative history of Title VI supports use of the injunctive remedy in preference to

---

1041. HEW restored funding upon receipt of a satisfactory desegregation plan or assurances that the district would comply with a pending court order.

1042. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--A Reassessment 346 (1973).

1043. 28 C.F.R. § 42.206 (1974). This section permits LEAA to use the procedures provided for in the Department of Justice Title VI regulation to effect compliance with the equal employment opportunity regulation.

'termination' of assistance."[1044] This Commission believes, however, that no such preference was intended in Title VI,[1045] which lists fund termination as the first remedy when compliance cannot be achieved voluntarily and does not specifically mention judicial remedies. Further, the LEAA Administrator recently expressed dissatisfaction

---

1044. To support their argument, Department of Justice attorneys quoted Senator Hubert Humphrey:

> ..[T]he purpose of Title VI is not to cut off funds, but to end racial discrimination....In general, cut off of funds would not be consistent with the objectives of the Federal assistance statute if there are available other effective means of ending discrimination. (Sen. Hubert Humphrey, Mar. 30, 1964), 110 Cong. Rec. 6544. Cited in Brief For United States of America as Amicus Curiae at 87, Player v. State of Alabama Department of Pensions and Security, Civil No. 3835-N (M.D. Ala., filed Nov. 17, 1972).

1045. It is noted, too, that using essentially the same body of facts, other civil rights scholars have argued that Congress intended to make fund cut offs mandatory when compliance could not be achieved voluntarily. Brief for Kenneth Adams, supra note 1040. The appellees noted that Title VI originated in the 1963 proposals of President Kennedy which permitted, but did not require, the withholding of funds. (See House Document 124, 88th Cong., 1st Sess. Message from the President of the United States Relative to Civil Rights (June 19, 1963)). They noted that Roy Wilkins, representing the Leadership Conference on Civil Rights, testified to the need for mandatory withholding funds from recipients which discriminate on the basis of race or ethnic origin (Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on Judiciary, 88th Cong. 1st Sess., pt. III, at 2161.) They argued that this view ultimately prevailed, and cite statements by Senator Hubert Humphrey as testimony to the rejection of the discretionary approach. They quote Senator Humphrey as having stated that Title VI:

> ...requires Federal agencies to take action to effectuate the nondiscrimination policies. This is necessary. If, as I deeply feel, it is contrary to our basic political and moral principles to allow Federal funds to be used to support and perpetuate racial discrimination, then it is right for Congress to require every Federal department and agency, without exception to act to eliminate any such discrimination. Statement of Senator Humphrey, supra note 1044.

See also speech by Howard A. Glickstein at LEAA Policy Development Seminar on Civil Rights Compliance, supra note 872. at 94.

with LEAA's reliance on judicial remedies. He stated:

> I think it is a very accurate observation that we perhaps have excessively relied on judicial remedies where in fact we could have been more successful in pursuing an administrative course of action too. 1046

It is clear that one of Congress' principal purposes in enacting Title VI was to provide an administrative means for desegregation.[1047] Two years after the passage of Title VI, the report of the White House Conference, "To Fulfill These Rights," spoke of this matter:

> It was the Congressional purpose, in Title VI of the Civil Rights Act of 1964, to remove school desegregation efforts from the courts, where they had been bogged down for more than a decade. Unless the power of the Federal purse is more effectively utilized, resistance to national policy will continue and, in fact, will be reinforced....Judicial proceedings by the Attorney General can play an important role in enforcement, but litigation cannot be made a substitute for the administrative proceedings prescribed by Congress as the primary device of enforcing Title VI. Those school districts which remain in outright defiance of national policy should be subjected immediately to administrative action, lest the credibility of the national policy remain any longer in doubt. 1048

1046. Statement by Richard W. Velde, Administrator, LEAA, at LEAA Policy Development Seminar on Civil Rights Compliance, supra note 872. At that seminar, attendees recommended that LEAA amend Section 42.206 of its regulations which gives preference to judicial remedies and provide a preference for administrative proceedings instead.

1047. This Commission has earlier noted that, to an extent, the mere fact of the passage of Title VI indicates some dissatisfaction with the pace set by the courts. U.S. Commission on Civil Rights, Federal Enforcement of School Desegregation 33 (1969).

1048. Report of the White House Conference, "To Fulfill These Rights," at 63. The Conference was held June 1-2, 1966.

It also appears that the courts share this view. Indeed, they have viewed the passage of Title VI as placing the burden of desegregation on Federal agencies.[1049]

Moreover, no such preference is contained in the Omnibus Crime Control Act which has the broadest prohibition against racial, ethnic origin, or sex discrimination in LEAA-funded programs and contains the strongest sanctions: mandatory fund-cut off, with the additional option of referral to the Civil Rights Division.[1050]

1049. The Supreme Court, for instance, stated:

> Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. Green v. County School Board of New Kent County, 391 U.S. 430, 433 n. 2 (1968).

The Fifth Circuit went into greater detail:

> We read Title VI as a congressional mandate for change - change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy. But Congress was dissatisfied with the slow progress inherent in the judicial adversary process. Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.

U.S. v. Jefferson County Board of Education, 372 F.2d.836, 852-53 (5th Cir. 1966)

1050. LEAA informed this Commission:

> No consensus on...problems [relating to Section 518(c)(2) of the Crime Control Act] was reached at the Meadowbrook Hall Seminar /note 872 supra/. LEAA's Master Plan [see note 825 supra] does consider these problems, resolution of them being a part of the regulations being issued by LEAA as proposed rules in the fall of this year. June 1975 Velde letter, supra note 725.

Section 509 of the act states that whenever LEAA "after reasonable notice and opportunity of a hearing to an applicant or a grantee" finds that "there is a substantial failure to comply" with the act, its implementing regulations, or plans or applications submitted in accordance with the act,[1051] LEAA

> "shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is a failure), until there is no longer such a failure." [1052]

However, for civil rights violations by States or units of local governments,[1053] the act also authorizes LEAA to institute an appropriate civil action,[1054] concurrent with the exercise of section 509. This would be carried out by referring the case to the Civil Rights Division of the Department of Justice. LEAA, however, has not yet taken the enforcement action required under this act.

1051. 42 U.S.C. § 3757 (Supp. III, 1973). This sanction is required for failure to comply with all provisions of the act, not merely its civil rights provisions. Not only does section 509 contain language making fund termination mandatory, in the event of failure to comply with the act, section 518 of the act makes clear that the exercise of section 509 is mandatory for civil rights violations.

1052. Id.

1053. The act does not appear to provide specific remedies for civil rights violations for nonpublic LEAA recipients, such as hospitals or universities. It appears that of such recipients, only the provisions of section 509 would apply.

1054. 42 U.S.C. § 3766(c)(3) (Supp. III, 1973). LEAA is also authorized concurrently with the exercise of section 509 to exercise the powers and functions pursuant to Title VI of the Civil Rights Act of 1964 or take such action as may be provided by law.

J. Interagency Coordination

Since the passage of the Equal Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964,[1055] State and local governments have been prohibited from discriminating in their employment practices, and the Equal Employment Opportunity Commission (EEOC) has been responsible for enforcing this provision through the processing of complaints.[1056]

Thus, EEOC and LEAA have an overlapping responsibility for equal employment opportunity in State and local government law enforcement programs. Another Federal agency which also shares with LEAA the responsibility for ensuring equal opportunity in some law enforcement programs is the Office of Revenue Sharing (ORS) of the Department of the Treasury. ORS provides Federal assistance to State and local governments which may be used for a broad range of programs, including police and correctional activities.[1057]

1055. 42 U.S.C. § 2000e et seq. (Supp. II, 1972).

1056. While EEOC may sue noncomplying private employers, EEOC does not have the power to sue noncomplying State and local governments. EEOC can refer State and local government cases to the Department of Justice for action. 42 U.S.C. § 2000e-5 (Supp. II, 1972). The responsibilities of EEOC are discussed further in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 5 (July 1975).

1057. The responsibilities of the Office of Revenue Sharing are discussed further in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance (February 1975).

ORS and EEOC have entered into an agreement which should ensure partial coordination between the two agencies.[1058] For example, among the terms of the agreement are that EEOC will routinely furnish copies of Letters of Determination[1059] and Decisions[1060] involving employers in revenue sharing-funded activities to ORS.[1061] Upon receipt of a Letter of Determination or a Decision indicating that EEOC has found probable cause to believe that discrimination exists in a GRS-funded activity, the Director of ORS will proceed to seek to secure compliance in accordance with ORS' regulations.[1062] LEAA has no such arrangement with either ORS or EEOC.

1058. Memorandum of Agreement Between the Office of Revenue Sharing and the Equal Employment Opportunity Commission, signed by John H. Powell, Jr., Chairman, EEOC, and Graham W. Watt, Director, ORS, Oct. 11, 1974. This agreement is discussed further in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance 120 (February 1975).

1059. Where an EEOC investigation finds facts analogous to those in a case previously decided by EEOC, a Letter of Determination is sent from an EEOC district director to the respondent and the charging party, citing the relevant facts and issues in the case and stating EEOC's determination as to whether there is reasonable cause to believe the charge is true.

1060. In cases in which there is no EEOC precedent concerning the facts found by an EEOC district office investigation, the Commissioners render a decision as to whether there is reasonable cause to believe the charge is true.

1061. Memorandum of Agreement, supra note 1058.

1062. If the Director of ORS finds that information furnished is insufficient to enable him or her to make a determination, the Director must then send a letter to the chief executive officer of the jurisdiction in question, requesting a response to the Commission's findings within 15 days. Memorandum of Agreement, supra note 1058.

Clearly there is a need for coordination among these agencies. For example, it is confusing to State and local governments to be confronted with different standards or investigators from different agencies reviewing the same matter. Lack of uniformity in either policy or enforcement can only reduce the credibility of Federal agencies and adversely affect the protection of the rights of minorities and women.[1063] Yet LEAA has not agreed with the other two agencies upon a uniform standard of compliance for law enforcement agencies. Moreover, there have been inadequate efforts between LEAA and ORS and between LEAA and EEOC to share information concerning complaints received, investigations conducted, the results of investigations, and the contents of any compliance agreements.

Although LEAA has no such arrangement with either ORS or EEOC, in fact, the extent of coordination between LEAA and EEOC has been dependent upon the extent to which the LEAA regional offices have established a working relationship with EEOC regional and district offices.[1064] The

---

1063. Differing standards have been a problem for EEOC and LEAA. For example, LEAA reports that if it is called in to investigate a complaint and learns that the complaint has already been investigated and decided by EEOC, it would like to be able to accept EEOC's decision and begin immediately with the conciliation process. Sometimes, however, LEAA has not been satisfied with EEOC's work and has had to do investigations of its own. 1975 Rice et al. interview, supra note 728.

1064. Id.

extent of coordination between LEAA and ORS is only a little more comprehensive. When OCRC receives a complaint, it inquires of that government if it has received general revenue sharing funds. If the answer is affirmative, LEAA will contact ORS. Whether such a complaint will be investigated by ORS or LEAA is determined by the two agencies and whether the findings of that agency will be accepted by the other is on an ad hoc basis.

Chapter 6

DEPARTMENT OF LABOR (DOL)

MANPOWER ADMINISTRATION (MA)

I. Program and Civil Rights Responsibilities

The Manpower Administration of the Department of Labor has two major programs. It provides financial and technical assistance to State employment security agencies,[1065] which operate State employment service (ES) and unemployment insurance (UI) offices, and it gives similar aid to State and local governments to operate manpower training programs. This report primarily concerns MA monitoring of ES and UI offices.[1066] These programs are of special interest to minorities and women, who have much higher rates of unemployment than nonminority males.[1067]

1065. Generally, the State agency operating the employment service and unemployment insurance offices are titled "employment security" agencies or departments. About 10 of the 50 State agencies have other titles. For example, in Alabama, the State agency is the Alabama Department of Industrial Relations.

1066. Interviews to collect information for this report from DOL regional offices were conducted during fiscal year 1973. It was after these interviews were conducted, in December 1973, that Congress passed the Comprehensive Employment and Training Act, radically changing DOL's responsibilities in this area. As a result, this report deals only briefly with DOL's manpower programs. They are discussed on pp. 403-410 infra.

1067. Nationwide, in 1974, only 3.8 percent of all nonminority males were unemployed, as compared with 6.3 percent of all black females, 8.7 percent of all black males, and 10.5 percent of all black females. In 1974, 7.5 percent of all males of Spanish speaking background and 9.8 percent of all females of Spanish speaking background were unemployed. Telephone interviews with Thomas J. Plewes, Senior Economist, Bureau of Labor Statistics, DOL, Sept. 23, 1974 and John Stinson, Economist, Bureau of Labor Statistics, DOL, Apr. 9, 1975.

A. Employment Security Systems

1. Program Responsibilities

Under the provisions of the Wagner-Peyser National Employment System Act,[1068] the Manpower Administration provides assistance to States for establishing and maintaining systems of public employment offices.[1069] The primary duties of these offices include testing, counseling, referral to manpower training, job placement, and followup activities for persons who are seeking employment.[1070] The ES offices take job orders from employers and provide them with technical assistance in such areas as job development.[1071] In fiscal year 1974, ES offices in all States received 10,600,000 new applications, made 4,600,000 nonagricultural and 2,200,000 agricultural placements, counseled 2,200,000 persons, and administered 1,480,000 tests.

1068. Wagner-Peyser National Employment System Act of 1933, 29 U.S.C. § 49-49c, 49d, 49g, 49h, 49j, 49k, 557 (1970). The Manpower Administration budget for State employment services for fiscal year 1974 was $433,800,000. Telephone interview with Dorothy Riefkin, Director, Program and Management Services Staff for Employment Security, DOL, Mar. 27, 1974.

1069. There are approximately 2,400 ES offices and 30,600 staff members spread over the ten Federal regions. Telephone interview with Albert Cruz, Special Assistant to Associate Manpower Administrator for Employment Security, DOL, Nov. 8, 1973.

1070. Riefkin interview, supra note 1068. These figures reflect employment service activity and not the number of individuals who were placed, counseled, or tested, as many people were placed or counseled twice and several tests were often administered to the same person. The ES offices placed 3,088,000 individuals in nonagricultural positions and 220,000 individuals in agricultural positions, counseled 1,100,000 individuals, and tested 915,000 individuals. Id.

1071. Job development is a process of contacting employers to promote jobs for listing with the employment services. Often this may involve the identification of tasks involved in a particular job and the analysis of the skills required to carry out those tasks. The goal is to divide the job into two or more lower-level, lower-paying positions in order to provide employment to more persons without increasing the cost to the employers.

Everyone is eligible for ES office services,[1072] including job-ready applicants who need job referrals, semiprepared applicants in need of only some ES services such as counseling and referral, and persons with few or no skills who require the entire scope of ES services, including testing, counseling, training, and referral.

The unemployment insurance offices operate under the general provisions of several Federal[1073] and 50 State laws. States have direct responsibility for establishing and operating their own UI programs, although the Manpower Administration provides leadership for their development, improvement, and operation.[1074] State unemployment insurance offices are funded partly through Federal monies under the Social Security Act and the Federal Unemployment Tax Act[1075] and in part through State tax collection.[1076] Employers also pay into UI

1072. Applicants to a particular ES office must reside in the area served by that office.

1073. These include the Wagner-Peyser National Employment System Act of 1933, 29 U.S.C. § 49-49c, 49d, 49g, 49h, 49j, 49k, 557 (1970); Social Security Act, 42 U.S.C. § 501-504, § 1101-1108, § 1321-1324 (1970); Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq., (1964); Manpower Development and Training Act, 42 U.S.C. § 2571 et seq., (1964); Emergency Unemployment Compensation Act, as amended, 26 U.S.C. §§ 3301, 3302 (1964); Employment Security Amendments, 26 U.S.C. § 3301 et seq. (1964); 29 U.S.C. §§ 49d (1964); 42 U.S.C. § 1101 et seq., § 1321 et seq., § 1400c (1964).

1074. There are approximately 18,000 UI offices, some of which are seasonal or temporary, and approximately 35,000 persons staffing those offices. Attachment to letter from Sally Ehrle, Special Assistant to the Associate Manpower Administrator for Unemployment Insurance, to Dolores Bartning, Equal Opportunity Specialisty, U.S. Commission on Civil Rights, Nov. 8, 1973.

1075. Social Security Act, 42 U.S.C. § 501-504, § 1101-1108, § 1321-1324 (1970), and the Federal Unemployment Tax Act, 26 U.S.C. § 1301 et seq. (1964).

1076. Telephone interview with Sally Ehrle, Special Assistant to the Associate Manpower Administrator for Unemployment Insurance, DOL, Feb. 19, 1974.

a certain percentage, generally about 2.5 percent, of their total payroll. To be eligible for UI, the UI applicant's job may be terminated either by the employer or by the employee.[1077] The amount of money the person will receive varies according to State law and previous salary.[1078] In fiscal year 1973, UI offices made $4.9 billion in payments to 5.5 million unemployed persons.[1079]

2. Civil Rights Responsibilities

There are several laws, regulations, and directives which require nondiscrimination in State employment security systems. Most notably, the operations of the State employment service and unemployment insurance offices are covered by Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance.[1080]

Title VI of the Civil Rights Act does not prohibit sex discrimination. In 1966, the Secretary of Labor issued Secretary's Order 16-66 which prohibited sex discrimination in programs operated by or financed through

---

1077. However, if the employment was terminated voluntarily by the employee, he or she must wait for a period of time before becoming eligible for unemployment insurance payments. The length of time varies from State to State.

1078. Examiners from the UI offices attempt to interview every two weeks all persons receiving unemployment insurance. The interview serves to determine how available the person is for employment and gives proof to the UI office that, if the person is able to work, he or she has been looking for employment. Due to the examiners' heavy schedules, these interviews are generally superficial.

1079. Ehrle interview, supra note 1076.

1080. 42 U.S.C. §§ 2000d, et seq. (1970).

the Manpower Administration.[1081] The Manpower Administration was given authority to enforce this order, using Equal Employment Opportunity Commission (EEOC) sex discrimination guidelines,[1082] but DOL did not adequately inform its recipients that this requirement must be followed[1083] and the order was not enforced.[1084] The order had expired in 1971,[1085] but until the end of fiscal year 1974, Department of Labor staff were apparently unaware of its expiration.[1086] As of April 1975, it had not been reissued.

Regulations implementing the Wagner-Peyser Act also provide authority for nondiscrimination in Manpower Administration-assisted programs.[1087] A section of the regulations states that it is Federal policy to provide nondiscrimination in State employment services on the basis of race,

---

1081. Department of Labor, Manpower Administration, Manpower Administration Manual, Title 5500 Equal Employment Opportunity, Chapter 5510 General Administrative Responsibility, Secretary's Order 16-66, Plate 5511, at 5.

1082. 29 C.F.R. § 1604 (1974). These guidelines are the most comprehensive of Federal agency guidelines on sex discrimination. Their strengths and weaknesses are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974 Vol. V, To Eliminate Employment Discrimination ch. 5 (July 1975).

1083. Contracts with recipients, which required compliance with Title VI, made no mention of the Secretary's Order.

1084. Telephone interview with Michael Battles, Attorney, Solicitor's Office, DOL, Oct. 18, 1974.

1085. In mid-1974, DOL officials became aware of a little-known Secretary's Order directing that all Secretary's Orders could expire 5 years after their issuance unless other provisions were made. Id.

1086. Telephone interview with William Harris, Director, Office of Investigation and Compliance, Manpower Administration, DOL, Apr. 8, 1975.

1087. 20 C.F.R. §§ 600, et seq. (1974).

creed, color, or national origin.[1088] No provision is made in the regulations for enforcement of this section, however, and MA has not published in the Federal Register formal guidelines for its implementation.[1089] A separate section of the regulations, containing much weaker language, states that it is Federal policy to "promote" equal opportunity on the basis of sex.[1090] Sex discrimination is, thus, not clearly prohibited and this regulation does not fill the gap left by the expiration of the Secretary's Order 16-66.

Title VII of the Civil Rights Act of 1964 prohibits the State Employment services from discriminating on the basis of race, color, religion, sex, and national origin in the services they provide and the Manpower Administration requires compliance with that provision.[1091] Although enforcement of Title VII is the responsibility of the Equal Employment Opportunity Commission, Manpower Administration staff are instructed to work with EEOC to ensure compliance with this title by State employment security systems.[1092]

The principal document outlining the Manpower Administration's interpretation of its civil rights requirements is the Compliance Officers

---

1088. 20 C.F.R. § 604.8 (1974)..

1089. DOL informed this Commission:

> Guidelines were issued by General Administration Letter [GAL] No. 750 in 1964 establishing the position and responsibilities of Minority Groups Representatives . It is true it was a suggested position and not mandatory. GALs 1367 [Mar. 25, 1970] and 1381 [May 11, 1970] established guidelines for minority group staffing in State Employment Security Agencies and called for the incorporation of proposed procedures into the respective agencies' plans of service. Letter from William H. Kolberg, Assistant Secretary for Manpower, DOL, to John A. Buggs, Staff Director, CCR, July 3, 1975.

1090. 20 C.F.R. § 604.20 (1974).

1091. 42 U.S.C. § 2000e(c) (1970); 42 U.S.C. § 2000e-2(b) (1970).

1092. Department of Labor, Manpower Administration, Office of Equal Employment Opportunity Compliance Officers Handbook, (Revised January 1972) at 16-17. Department of Labor, Manpower Administration, MA Manual, Title 5500, Equal Opportunity (August 1971).

Handbook.[1093] The Handbook provides an analysis of the section of DOL's Title VI regulations[1094] entitled "Discriminatory Acts Prohibited." This analysis, prepared by DOL's Solicitor's Office, gives examples of how the Civil Rights Act of 1964 applies to Manpower Administration programs.[1095] However, this analysis is shortsighted.[1096] Most of the examples used made reference only to the general category of "minority," without defining it. Sometimes the analysis used the terms "Negro" and "white," but no examples referred to Asian Americans or persons of Spanish speaking background. Only one referred to Native Americans.

Admittedly, if the reader of the Handbook had imagination, he or she could speculate as to how some of the examples might apply to a variety of racial and ethnic groups. Some forms of discrimination, however, which

---

1093. Compliance Officers Handbook, supra note 1092. The handbook provides guidelines to equal opportunity and program staff for implementing DOL equal opportunity policies and requirements.

1094. 29 C.F.R. § 31, et seq. (1974).

1095. Some of the examples listed are:

> Job development is done for whites but not for minorities....Employment Services refers whites but not minorities to jobs as receptionists. Posted or de facto segregation in seating arrangements for applicants....State employment service fails to notify minority community that job placement services are available on a nondiscriminatory basis....Negro waitresses are referred to Negro operated restaurants or restaurants located in predominately Negro neighborhoods; white waitresses are not referred on these orders.... Negroes addressed by first names while white applicants are addressed by their last names with courtesy titles....Negro high school youths are counseled to enter Job Corps while white youths are counseled to vocational schools and institutions of higher learning. Compliance Officers Handbook, supra note 1092, 23-30.

1096. In July 1975, DOL wrote to this Commission:

> The Compliance Officer's Handbook has been revised since your investigation and is now in clearance. The revised edition acknowledges the discriminatory use of tests and an oversight responsibility imposed by the Department of Justice. Kolberg letter, supra note 1089.

occur primarily with regard to non-black minority groups were not mentioned. For example, language requirements have been used to discriminate against persons whose first language is not English. Yet the Handbook did not suggest that it would be discriminatory to use English employment tests for persons who speak little or no English where speaking English is not a bona fide occupational qualification. Similarly, although height requirements may be used disproportionately to disqualify women, Mexican Americans, Puerto Ricans, and Asian Americans,[1097] the Handbook does not specify that employment service offices must refuse to accept job orders from employers who specify height requirements[1098] which are not bona fide occupational qualifications in a job order for, as an example, a private security or detective force.

Moreover, the analysis did not make clear that the activities prohibited with regard to minorities were also prohibited with regard to women.[1099] For example, while the Handbook notes that it would be

---

1097. The Law Enforcement Assistance Administration, Department of Justice, notes in its Equal Rights Guidelines of March 9, 1973, that such discrimination may occur. 38 Fed. Reg. 6415 (1973).

1098. For a further discussion of height requirements see ch.5, Law Enforcement Assistance Administration, p. 308 supra.

1099. For example, the Handbook notes that it would be discriminatory if whites on unemployment were considered unsuitable for menial jobs and blacks were not. Compliance Officers Handbook, supra note 1092 at 33. Such a characterization would permit whites, but not blacks, to receive unemployment compensation despite vacancies for menial jobs. The Handbook does not note that if women on unemployment were characterized as suitable for traditional female employment such as clerical or domestic work, while men were not, this also would be discriminatory.

Only a few of the examples would not be applicable to women. In particular, one referring to minority neighborhoods seems inapplicable, since in general residential housing is not sex-segregated. The Handbook does contain an analysis of what constitutes sex discrimination, but this is limited to a short discussion of bona fide occupational qualifications. The Handbook notes, for example, that preferences of coworkers and beliefs about women in general cannot be used to set bona fide occupational qualifications, Compliance Officers Handbook, supra note 1092, at 83.

discriminatory if blacks were addressed by first names and whites addressed by last names with courtesy titles, it does not suggest that women too should be addressed by their last names with a courtesy title. Further, there were no examples showing the types of actions which could constitute sex discrimination by employment service or unemployment insurance offices. For example, DOL staff are not informed that State employment services cannot accept job orders from employers who refuse to hire pregnant women or who will hire women only for sex-stereotyped positions. To make clear what is required to ensure nondiscrimination on the basis of sex, the Manpower Administration should incorporate by reference into its regulations EEOC's sex discrimination guidelines.[1100] Indeed, although comprehensive standards of equal employment opportunity in general have been set by the guidelines and decisions of EEOC,[1101] DOL has not incorporated these into its own regulations.

1100. The guidelines are found at 29 C.F.R. § 1604, et seq. (1974).

1101. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Efforts, Vol. V, To Eliminate Employment Discrimination ch. 5 (July 1975).

B. Manpower Training and Work Incentive Programs

The other major MA activity is to provide funding for training and work incentive programs for the unemployed and the underemployed.[1102] Through 1973 most of these programs were funded under the Manpower Development and Training Act of 1962,[1103] Title I of the Economic Opportunity Act of 1964,[1104] and the Emergency Employment Act of 1971.[1105] In December 1973, the Comprehensive Employment and Training Act (CETA) was passed,[1106] creating a manpower revenue sharing program to replace most of earlier manpower

---

1102. Underemployed workers are on part-time schedules and/or are looking for, but failing to find fulltime employment; or have had their workweeks reduced below 35 hours. Department of Labor, Manpower Report of the President (March 1973).

1103. Manpower Development and Training Act of 1962, as amended, 42 U.S.C. §§ 2571-2574, 2581-2588, 2601-2603, 2610-2620 (Supp. III, 1973).

1104. Title I of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. §§ 2700, et seq. (1970).

1105. Emergency Employment Act of 1971, 42 U.S.C. §§ 4871-4883 (Supp. II, 1972).

1106. Comprehensive Employment and Training Act of 1973, 18 U.S.C.A. §§ 665 (Cum. 1975); 29 U.S.C. §§ 801, 802, 811-822, 841-851, 871-875, 881-885, 911-929, 951-956, 981-992 (Supp. III, 1973); 42 U.S.C. §§ 2571 note (Supp. III, 1973).

programs.[1107] As with the earlier programs, the purpose of CETA is to[1108] enhance job training and employment opportunities for the unemployed and underemployed.[1109]

1107. DOL stated:

> It is true that categorical programs have been replaced by manpower revenue sharing programs. However, the program models indicated under Title III of CETA generally follow the outline of the former categorical programs. Consequently, the prime sponsors do have precedents for program development. Kolberg letter, supra note 1089.

1108. Some of the programs being phased out are: (1) Job Optional Programs (JOPS); (2) Job Opportunities in the Business Sectors (JOBS); (3) Manpower Training and Development Act (MDTA); (4) Neighborhood Youth Corps (NYC); (5) Public Employment Programs (PEP); and (6) Operation Mainstream (OM).

JOPS was a program to assist private employers in hiring and training disadvantaged and nondisadvantaged persons for permanent employment in jobs with advancement possibilities, and to upgrade present employees into higher skill positions. The employer was reimbursed for the costs of training.

JOBS was a program to assist private employers to hire unemployed and underemployed disadvantaged persons and train them to be productive. The participants received supportive services to enable them to perform successfully in meaningful jobs. Employers were repaid on a fixed unit cost basis incurred by hiring disadvantaged persons.

MDTA provided vocational skill training as well as basic and remedial education, prevocational and refresher training, and orientation under the supervision of public and private educational institutions.

NYC had three major components: Out-of-School, to give high school dropouts work experience, skill training, counseling, education, and supportive services; In-School to provide disadvantaged 10th, 11th and 12th graders (or equivalent ages) paid work experience in order that they continue attendance or return to school; and Summer Program to enable In-School program enrollees to earn money to stay in school.

PEP provided unemployed and underemployed persons with transitional jobs in times of high unemployment. Participants were assisted to move to regular jobs as soon as possible.

Operation Mainstream was a program for rural areas to provide chronically unemployed adults, 22 to 55 years of age, work experience and training.

Only a few programs, including the Work Incentive Program (WIN), which is the largest Federal manpower program, will not be affected by CETA. WIN, established by amendments to the Social Security Act (42 U.S.C. §§ 630 et seq. (Supp. II, 1972), provides training primarily for welfare recipients.

1109. A brief discussion of CETA is contained in U.S. Commission on Civil Rights, Making Civil Rights Sense Out of Revenue Sharing Dollars (February 1975).

It provides for manpower services such as counseling; testing, with the ultimate goal of job placement; classroom skill training and remedial education; on-the-job training with public and private employers; work experience and public service employment; and supportive services such as child care assistance, health services, and allowances. CETA permits State and local governments[1110] to decide the nature and scope of their manpower activities.[1111] Under CETA these jurisdictions must submit general plans for these activities, rather than applications for each activity they wish to undertake. Once DOL has approved the plans, it provides State and local governments with funds for implementing the plans. State and local governments, in turn, provide funds to agencies and organizations for the operation of manpower programs.

The act prohibits discrimination on the grounds of race, creed, color,

---

1110. All State governments are eligible for CETA funds. Local governments and consortia of local governments serving populations of 100,000 or more are also eligible for CETA funds. The Secretary of Labor can also approve grants to entities which would otherwise be ineligible if these entities can prove exceptional needs or if they have had effective manpower programs in the past.

1111. At the 1974 annual convention of the National Association for the Advancement of Colored People (NAACP), a resolution was adopted calling upon the Secretary of Labor to direct sponsors to ensure maximum participation of minority members in decisionmaking at the local level. The convention also called on the Secretary to withhold funds from any region or State that is not in compliance with the legislation, legislative history, and legislative intent that established CETA. Resolutions by the Sixty-fifth Annual Convention of the NAACP at New Orleans, Louisiana, July 1-5, 1974, reprinted in The Crisis 136 (April 1975).

handicap, national origin, sex, age, and political affiliations or beliefs.[1112] As of February 1975 DOL had not begun active monitoring of this provision. Indeed, most monitoring of nondiscrimination in manpower activities was to be conducted by the prime sponsors; i.e., the State or local governments receiving CETA funds. The prime sponsors are not required to report on their

---

1112. The prohibition also covers anyone who contracts or subcontracts with any funded program as well as the funded program itself. CETA regulations issued by DOL describe the means by which compliance with this provision will be maintained by DOL:

> The grantee shall be responsible for assuring that no discrimination prohibited by this section occurs in any program for which it has responsibility and shall establish an effective mechanism for this purpose. The grantee may, as one possible means of establishing this mechanism, assign the responsibility for administering the Equal Employment Opportunity (EEO) program to one individual and require subgrantees and contractors to prepare affirmative action plans. In such cases, the grantee may include in its comprehensive manpower plan a description of its EEO program and the related affirmative action plans of its subgrantees and contractors, including the procedures established for monitoring these activities. Proposed § 98.21(f). 39 Fed. Reg. 19917, June 4, 1974.

Grantees are required to submit statements of assurance that they are complying with nondiscrimination provisions.

Complaints may be filled with DOL as well as with the grantee. The Assistant Regional Director for Manpower (ARDM) in each Department of Labor region is required to make prompt investigations of all formal allegations. In addition to investigations initiated by a complaint, DOL may choose to conduct onsite periodic compliance reviews of grantees even in the absence of complaints, to ensure that programs are operated without discrimination.

Where a finding of noncompliance with the civil rights provisions is made, the Secretary of Labor will notify the grantee and request compliance. If, after 60 days, compliance is not achieved, then the Secretary may terminate funds or refer the matter to the Attorney General for appropriate action.

compliance activities to the Manpower Administration. DOL stated:

> Compliance activities are mandatory and each prime sponsor indicates an understanding of these requirements by signing the Assurances and Certifications statements which are a part of his grant package. Prime sponsors also agree that they will set up controls and evaluative procedures which will assure their compliance with all activities including equal opportunity and non-discrimination. Manpower Administration's regional and area offices have an oversight responsibility to see that this is done. 1113

CETA regulations do not make clear what constitutes discrimination in CETA-funded programs.[1114] Although DOL notes that its Title VI regulations provide this information and apply to CETA programs,[1115] DOL has provided no guidelines as to what constitutes sex discrimination.

Experience with MA's attempt to secure civil rights compliance in the earlier manpower training programs indicates that DOL should take firm steps to ensure civil rights compliance in CETA programs.[1116] First, complaint investigations and compliance reviews of the earlier programs sometimes indicated serious noncompliance with Title VI. Among the more common equal employment opportunity deficiencies were: training programs employed too few minority staff;[1117] there were no equal opportunity posters, or other civil rights information available for the program participants; there were no equal opportunity grievance procedures; and

---

1113. Kolberg letter, supra note 1089.

1114. 29 C.F.R. § 94, 95, 96, 98 et seq.

1115. Letter from Pierce A. Quinlan, Associate Manpower Administrator, Department of Labor, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, June 13, 1974.

1116. For a more extensive discussion on how a CETA program can fail to adequately serve the minority population by underrepresentation and underutilization in advisory planning councils, staffing patterns, subcontracts and placements, see New Jersey State Advisory Committee to the U.S. Commission on Civil Rights, Hispanic Participation in Manpower Programs in Newark, New Jersey (June 1975).

1117. There is no written directive or regulation concerning the level of minority staffing in manpower training programs, but MA staff treat ES directives concerning minority staff (see note 1158, infra) as being applicable for manpower training programs. Telephone interview with William Harris, Director, Office of Investigations and Compliance, Manpower Administration, DOL, Feb. 28, 1975.

work crews were segregated by race.[1118] During fiscal year 1973, the Manpower Administration conducted 196 compliance reviews and found nine program sponsors in noncompliance with Federal nondiscrimination provisions.[1119]

Second, it would be disastrous if the Manpower Administration's lack of focus on equal employment opportunity for women were to be repeated in the CETA compliance program. Under the manpower training

---

1118. Response to U.S. Commission on Civil Rights April 1973 questionnaire contained in a letter from Peter J. Brennan, Secretary of Labor, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, July 3, 1973 /hereinafter referred to as DOL response/.

1119. Four of the nine program sponsors were in Region VI (Dallas): the Allen Action Agency, a contractor in Louisiana; the Gary, Texas, Job Center; the Galveston (Texas) Neighborhood Youth Corps Out-of-School program; and the Greater Jonesboro (Arkansas) Chamber of Commerce, which sponsored a JOBS contract. A fifth determination of noncompliance or probable noncompliance was a JOBS contract in Portland, Oregon. The other four programs found in noncompliance were an ES agency in Memphis, Tennessee; an Opportunities Industrialization Center in Indianapolis; Operation Mainstream in Saint Cloud, Minnesota, and a Neighborhood Youth Corps in Saint Cloud. Among DOL's findings in these cases were that the minority percentage of staff did not reflect minority trainee percentage; the black staff persons received lower salaries than whites; work sites were segregated; too few Mexican Americans were in professional jobs; there was lack of communication to enrollees of their rights to equal employment opportunity; equal opportunity posters were not displayed; no equal opportunity coordinator had been appointed; and there was no equal opportunity grievance procedure.

In fiscal year 1974, MA conducted 112 compliance reviews and according to Manpower Administration records, found no program sponsors in noncompliance. The number of findings of noncompliance is smaller than the total number of violations uncovered. Whether or not MA terms a recipient who is in violation of Title VI to be "in noncompliance" depends on the staff handling the case. This is discussed in p. 458 infra. The Director of the Office of Investigation and Compliance stated that he doubts that all program sponsors were in compliance in fiscal year 1974. One of his goals is to improve the quality of MA's civil rights monitoring. Telephone interview with William Harris, Director, Office of Investigation and Compliance, Manpower Administration, DOL, Mar. 8, 1975.

DOL further stated:

> During this conversation, Mr. Harris was discussing the reporting instruments and stated that these instruments were not adequate to do a proper job. For example, the reporting instruments were not providing the national office (and to some extent regional offices) with data sufficient enough to make valid compliance determinations. He also advised that we were in the process of correcting this deficiency through the introduction of new or revised reporting systems which would provide us with more and better information. Kolberg letter, supra note 1089.

programs, despite authority to do so,[1120] MA compliance reviews rarely examined equal opportunity for women.[1121] Yet independent studies revealed manpower training programs have not been very successful for women.[1122]

Third, the CETA enforcement program cannot be successful unless firm action is taken when noncompliance is found. The Manpower Administration continued to aid some manpower training programs which operated in a discriminatory fashion although it had known for many

---

1120. Secretary of Labor, Order 16-66, August 1966, supra note 1081.

1121. See, for example, Region IX (San Francisco) reviews. Five reviews were examined by Commission staff. Four of those reviews made no mention of an investigation of sex discrimination. Review Nos. 1X-R-73-CR-6, 1X-R-73-CR-7, 1X-R-73-CR-8, 1X-R-73-CR-9.

1122. A March 1974 study done for the Department of Labor showed that women in manpower training programs were being trained primarily for traditionally female occupations. One working year after completion of training, 70 percent of female enrollees were employed in clerical or health care jobs. Efforts to expand training opportunities did not include opening nontraditional training options to women. Mark Battle Associates, Evaluation of the Availability and Effectiveness of MDTA Institutional and Training Services for Women (1974).

Data in the Manpower Report of the President showed that the average salary for women completing certain manpower training programs was always less than that for men. In the On-The-Job-Training program, the disparity was the greatest. Women earned only slightly more than 50 percent of what men earned. Data from U.S. Department of Labor, Manpower Report of the President (1974). A more complete discussion of the impact on women of Federal manpower programs is contained in U.S. Commission on Civil Rights, Women in Poverty (June 1974).

In June 1974 this Commission held hearings in Chicago on the effect of Manpower Administration programs on women. Those hearings revealed that minority women trainees were not counseled to enter nontraditional occupations. In fact, program counselors would often suggest only female-dominated occupations as options for skill training; for example, counselors would refer minority female trainees to domestic work. Counselors in the programs testified to the lack of any guidelines or enforcement mechanisms for ensuring compliance with anti-sex discrimination laws. The hearings also revealed that MA programs gave priority in job placement to unemployed male household heads over unemployed female household heads. Even when women were placed, they were given the lowest-paid work with the least chance of advancement. Hearings Before the U.S. Commission on Civil Rights, in Chicago, Illinois, June 17-19, 1974 (unpublished transcript).

1123

years that the discrimination existed. This created the impression that its recommendations for compliance need not be taken seriously.

1123. For example, as of July 1973, two skills centers in Boston had been in noncompliance since 1971. The skills centers were sponsored by the Boston School Committee, administered by the Department of Labor's U.S. Training and Employment Service (USTES) and Department of Health, Education, and Welfare's (HEW) Office of Education, and funded by HEW. The Manpower Administration was involved in the skills centers principally because of the centers' referral and job placement activities. The Manpower Administration found extensive program deficiencies and violations of contractual provisions, as well as violations of Title VI. It discovered that inferior services were provided to Spanish-surnamed beneficiaries in counseling and testing and that there were different types of training offered for minorities and nonminorities.

The Department of Labor provided this inadequate excuse to this Commission for permitting noncompliance to continue at the centers:

> There has been difficulty in securing agreements for a unified course of action from HEW. There has been satisfactory improvement in achieving a proper racial balance of clients of the center, but the staff is not yet fully integrated. The regional office is phasing out the project and the enrollment has been reduced from 450 to 160. Negotiations are continuing. DOL response, supra note 1118.

The Commission does not know if this noncompliance was ever resolved. In April 1975, the most recent information in the files of these cases in the Boston regional office was a letter of August 1971 sent to the Massachusetts Commission on Education and the Massachusetts Division of Employment Security stating that funds to these skills centers would be terminated in February 1972 if the problems were not corrected. Telephone interview with James Stevens, Equal Employment Opportunity Representative, Manpower Administration, Boston Regional Office, DOL, Apr. 23, 1975.

II. Organization and Staffing

The Manpower Administration is the principal unit within the Department of Labor to provide financial assistance to State and local governments and private organizations.[1124] It is headed by an Assistant Secretary for Manpower who reports to the Under Secretary of Labor.

The Manpower Administration has a small Division of Equal Employment Opportunity (DEEO) located in Washington, D.C.[1125] The DEEO once was an Office reporting directly to the Assistant Secretary for Manpower,[1126] the chief official of the Manpower Administration. In January 1974[1127] the office was made a Division located within an Office, the Office of Investigation and Compliance.[1128] The Director of Equal

---

1124. The other units, which provide such assistance as advisory services, counseling, technical assistance, and some direct payments, include the Employment Standards Administration, the Labor-Management Services Administration, and the Occupational Safety and Health Administration.

1125. Although the physical location of the equal opportunity staff was once in the main building of the Department of Labor, in 1974, the staff was moved to another office building several blocks away.

1126. The Assistant Secretary for Manpower is the chief official of the Manpower Administration.

1127. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort (1970) /hereinafter referred to as the Enforcement Effort report/. Although in 1969 and 1970, the Office of Equal Employment Opportunity, DEEO's predecessor unit, had the power to exercise more influence than the DEEO, the Commission noted that even that organization was "likely to vitiate any effective compliance activity." Id. at 203.

1128. The Office of Investigation and Compliance has two Divisions; the other is the Division of Special Review which is responsible for conducting fiscal reviews of MA recipients to ensure soundness and to protect against fraud.

Employment Opportunity no longer has direct access to the Assistant Secretary for Manpower. The DEEO reports to the Director of Investigation and Compliance[1129] who in turn reports to the Assistant Secretary.[1130] The Director of Investigations and Compliance had taken an active role in the implementation of MA's Title VI program. He reported that he has received support in this role from the Federal Programs Section of the Department of Justice under Executive Order 11764.[1131]

1129. DOL informed this Commission:

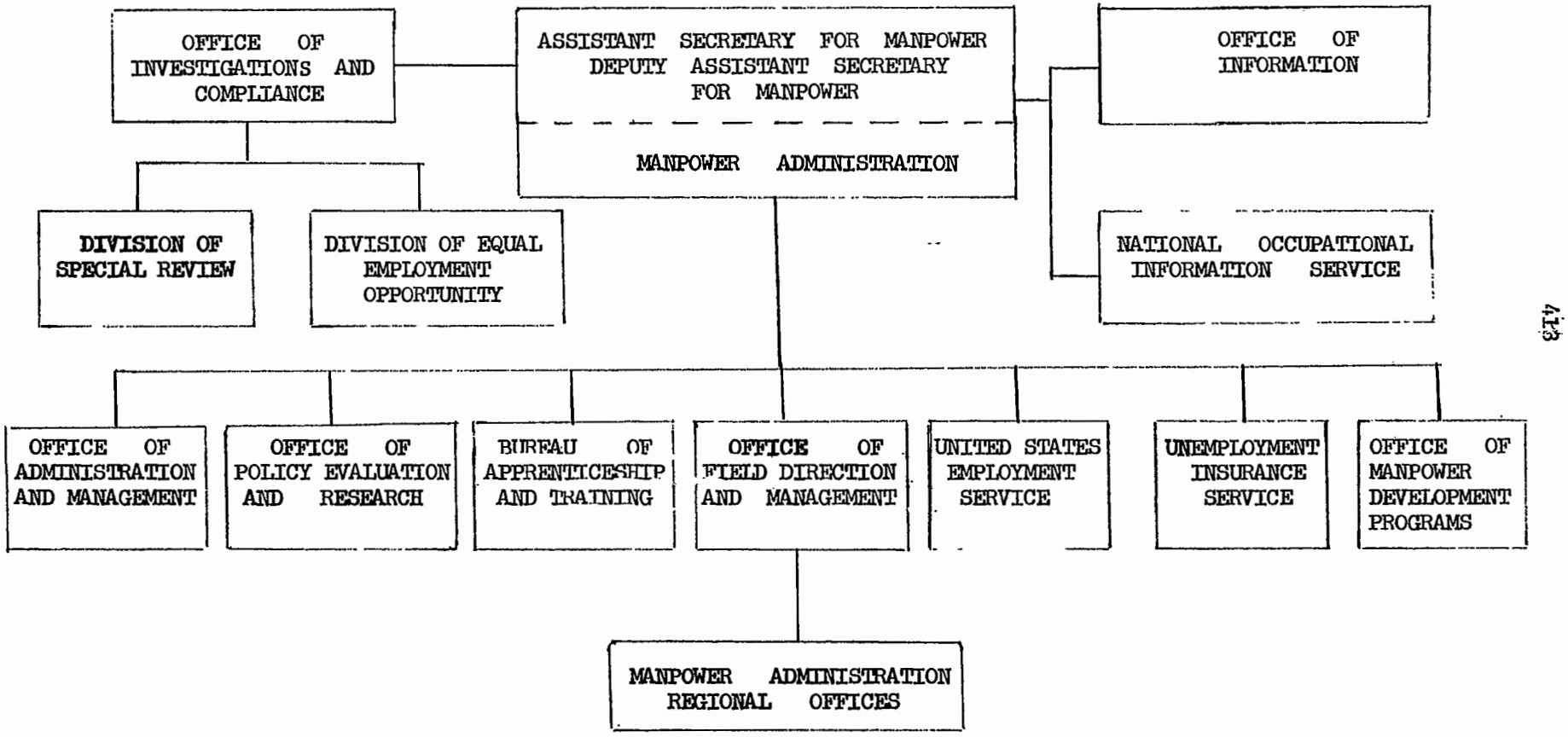
> /T/he Director of the Office of Investigation and Compliance (OI&C)...is a member of the Assistant Secretary's Executive staff. The Director of OI&C has a responsibility for promulgating EEO policy, guidelines, and procedures....Kolberg letter, supra note 1089.

1130. See Exhibit 10 on p. 413 infra.

1131. April 1975 Harris interview, supra note 1086. Executive Order No. 11764 (1974) gives the Department of Justice responsibility for overseeing Federal agency Title VI enforcement. Staff of the Federal Programs Section of the Department of Justice have been in the process of conducting an intensive review of Title VI enforcement in State employment services. See chapter 9 infra for a discussion of Department of Justice responsibilities under Executive Order 11764.

Exhibit 11

MANPOWER ADMINISTRATION ORGANIZATION CHART



September 1974

Among the specific functions of the DEEO relative to employment security and unemployment insurance offices are to:

--Develop policies, objectives, regulations, procedures, and guidelines to ensure fulfillment of the Manpower Administration's civil rights responsibilities.[1132]

--Develop and coordinate, through the Deputy Manpower Administrator, an effective system for complaint investigation.

--Review and evaluate reports of complaint investigations and compliance reviews; monitor these activities through data collection and field visits.

--Conduct or coordinate, as directed by the Assistant Secretary for Manpower, complaint investigations and compliance reviews of special importance.

--Provide technical assistance to national, regional, and State agency staff.

--Develop training and informational material for regional staff and State agencies; conduct training for regional staff.

--Maintain liaison with the Office of Federal Contract Compliance, the Equal Employment Commission, and other Government agencies and private organizations concerned with equal opportunity.[1133]

1132. Compliance Officers Handbook, supra note 1092, at 3-6.

1133. The Division produced a guide to assist the prime sponsors and their staff in meeting the equal opportunity requirements of the act. U.S. Department of Labor, Manpower Administration, Office of Equal Employment Opportunity, The Comprehensive Employment and Training Act of 1973: Equal Employment Opportunity Guide (July 1974). The Division also monitored contracts for development of technical assistance guides for State agencies. Department of Labor, Manpower Administration, Office of Equal Employment Opportunity, Student Discussion Guide (January 1974) and Lesson Plan Notebook (December 1973). DOL reported, "These guides were developed in modular fashion...and some of the modules could be easily adapted to CETA activities." Kolberg letter, supra note 1089.

During fiscal year 1974, the principal activity of this Division was to develop guidelines for the Comprehensive Employment and Training Act of 1973.[1134] Activities relative to the employment service and unemployment insurance offices, such as monitoring of field staff compliance activities, were minimal. DEEO regularly received monthly statistical reports summarizing regional compliance activity.[1135] While these reports indicated the number of reviews and investigations, they told nothing of the nature of the findings or the quality of the compliance activity, information vital for the DEEO to carry out its functions adequately. Moreover, although DEEO staff made quarterly trips to the regions,[1136] in September 1974 the DEEO did not know the cumulative number or quality of complaint investigations or compliance reviews conducted by the regional offices in fiscal year 1974.[1137] It did not know whether agreements had been reached with the seven State agencies which had been found in noncompliance or probable noncompliance more than a year before[1138] or whether any followup activities had occurred in these cases.

1134. These responsibilities are outlined on pp. 403-310 supra. In addition, this Division has limited responsibility under the Age Discrimination in Employment Act of 1967, which prohibits age discrimination against persons between 40 and 65 years of age. Whereas the Wage and Hour Administration of the Department of Labor has primary enforcement responsibility for this act, it has delegated, by agreement, to the Manpower Administration responsibility for investigating complaints alleging violations of the act by State employment services. Compliance Officers Handbook, supra note 1092, at 18.

1135. U.S. Department of Labor, Manpower Administration "OPCS" [Operational Planning and Control System] Regional EEO Activity Report;" "Statistics Complaints Activity;" and "Statistical Log--Review and Training Activity."

1136. Telephone interview with Arthur A. Chapin, Director, Division of Equal Employment Opportunity, Office of Investigation and Compliance, Manpower Administration, DOL, Sept. 23, 1974.

1137. Interview with Arthur A. Chapin, Chief, and George Pfaus, Equal Opportunity Specialist, Division of Equal Employment Opportunity, Office of Investigation and Compliance, Manpower Administration, DOL, Sept. 18, 1975. Mr. Chapin and Mr. Pfaus noted that this information would be most easily obtained from the regional offices themselves. Apparently, the DEEO never computed annual totals from the monthly summaries they received from the regions. See note 398 supra.

1138. Id. These cases are discussed further on pp. 458-465 infra.

The chief responsibility for implementing the Manpower Administration's equal opportunity program lies with the regional staff.[1139] The ten Assistant Regional Directors for Manpower (ARDMs)[1140] of the Department of Labor are responsible for carrying out the "Manpower Administration's policies, regulations, and procedures relating to the elimination of discrimination in the operation of its programs...."[1141] It is the ARDM's duty to conduct any negotiations necessary to obtain voluntary compliance with MA's civil rights requirements. Within each region, ARDMs are assisted in their equal opportunity functions by Equal Employment Opportunity Representatives (EEORs), and the ARDMs are directed to use the EEORs in conducting compliance reviews and complaint investigations. EEORs are also required to provide training to other regional staff and State agency staff.[1142]

1139. This assignment of responsibility is not atypical for the Manpower Administration. Responsibility for actual operation of all of its programs lies with regional staff. The Manpower Administration has offices in each of the Department of Labor offices in the 10 standard Federal regions. See map on p. 127 supra.

1140. The Assistant Regional Directors of the Department of Labor for Manpower are the chief regional officials in charge of regional manpower operations.

1141. Compliance Officers Handbook, supra note 1092, at 7.

1142. Id. at 7-10.

The DEEO provides policy guidance to the EEORs, but it has never had any direct authority over them, nor is there any mechanism to enable to review routinely the activities of regional offices. The relationship between the regional and Washington equal opportunity staffs has become more distant over the past several years, reducing the policy influence of the DEEO upon the regions. Prior to 1972, the Washington civil rights staff communicated to the regional civil rights staff through the Deputy Manpower Administrator for Employment Security[1143] and the Regional Manpower Administrators.[1144] As of 1972, however, any communications to the regional offices from the DEEO must additionally be cleared by the Director of Investigations and Compliance.[1145] Any communication from the regional EEORs to Washington must be cleared by the ARDMs and the Regional Director of Labor. In making decisions about Title VI matters, the Regional Director and the ARDM may consult with many people with no special responsibilities for the day to day execution of DOL's equal opportunity enforcement such as program or legal staff, including the regional solicitor. This lengthy channel of communication can present obstacles to effective equal opportunity enforcement. This is illustrated by the case of a Mexican American female whose employment with the Arizona Employment Commission was terminated by that Commission. The San Francisco EEOR investigated the case and found that discrimination had occurred. The Regional Solicitor, however, overruled the EEOR's findings. The ARDM

1143. The Manpower Administrator is a subordinate of the Assistant Secretary for Manpower.

1144. This line of communication is discussed in the Enforcement Effort report, supra note 1082, at 204.

1145. In 1972 the Department of Labor reorganized its regional offices. Prior to this time, each constituent agency of the Department of Labor such as the Manpower Administration and the Office of Federal Contract Compliance directed its own regional offices from Washington. The reorganization created in each region the position of Regional Director of the Department of Labor to coordinate all DOL's regional activities. Evelyn Gansglass, Special Assistant to Benjamin Burdetsky, Assistant Manpower Administrator, DOL, Sept. 30, 1974.

accepted the Regional Solicitor's ruling as final and there was no further action the EEOR was permitted to take, within the confines of the formal lines of communication at the Manpower Administration. The case would have been closed at that point, but a member of the Washington equal employment opportunity staff informally learned about the matter and requested that the Solicitor's Office in Washington be consulted. The Solicitor confirmed the findings of the EEOR and ultimately the complainant's position at the Arizona Commission was restored.[1146] This resolution could also have been achieved if DOL had instated regular review by the DEEO of regional office activities.

In April 1975, the Manpower Administration had 37 full-time equal employment opportunity specialists with Title VI responsibilities. Twelve of these persons were in the DEEO,[1147] which oversees the drafting of regulations and manuals, is responsible for monitoring regional operations, and develops

---

1146. The complainant charged that in being passed over for the position of Equal Opportunity Representative in the Arizona ESC, she was discriminated against because of her ethnic origin and her sex. In addition, (a) the Equal Employment Opportunity Compliance Unit, in which she was employed, was dissolved; and (b) the complainant was transferred against her wishes to the Mesa, Arizona office. The EEOR in Region IX made an onsite investigation of this complaint and concluded that the charge of discrimination was a valid one. The Regional Solicitor, in an unwritten opinion, did not support the EEO unit's contention that there was a violation of Title VI. Consequently, no further action was taken in the Regional Office.

The opinion of the Office of the Solicitor in Washinggon reaffirmed the finding of the Region IX EEO Unit, and directed that the EEOR, together with a number of the national equal opportunity staff begin conciliation and mediation efforts "to effectuate voluntary compliance with Title VI by recommending the promotion of the complainant to the position of Equal Opportunity Representative at the stated salary with backpay." Memorandum from William J. Kilberg, Associate Solicitor, DOL, to Arthur A. Chapin, Director, Office of Equal Employment Opportunity, Oct. 12, 1972. The complainant subsequently was restored to her former position, but she did not obtain backpay. Telephone interview with Gary DeRosa, Equal Employment Opportunity Representative, Manpower Administration; San Francisco Regional Office, DOL, Sept. 20, 1974.

1147. The DEEO is headed by a GS-15 Division Chief.

training and technical assistance programs. There were 25 positions for fulltime equal opportunity specialists in the regions,[1148] an average of 2.5 positions per region.[1149]

The grade levels of the equal opportunity staff in the Manpower Administration have been a handicap to effective execution of civil rights responsibilities.[1150] The grade level of the Division Chief is below that of most program administrators in the Manpower Administration[1151] and these officials may frequently have more influence than the Division Chief in decisions concerning termination of funds to noncomplying

---

1148. As of April 1975, there were two EEORs in Region I (Boston); three EEORs in Region II (New York); two EEORs in Region III (Philadelphia); four EEORs in Region IV (Atlanta); three EEORs in Region V (Chicago); two EEORs in Region VI (Dallas); two EEORs in Region VII (Kansas City); one EEOR in Region VIII (Denver); five EEORs in Region IX (San Francisco); and one EEOR in Region X (Seattle). Telephone interview with Clifford Russell, Equal Employment Opportunity Specialist, Division of Equal Employment Opportunity, Office of Investigation and Compliance, Manpower Administration, DOL, April 24, 1975.

1149. There was a noticeable absence of females of all races and national origins among the Manpower Administration equal employment opportunity staff. In the national office there were only two female professionals, one of whom was a trainee, and of the professionals in the regions, only six were women.

1150. See Enforcement Effort, supra note 1082, at 203.

1151. In fiscal year 1973, the latest year for which actual figures were available, the Manpower Administration staff included one person at Executive Level IV, one at Executive Level V, six at the GS-18 level; 12 at the GS-17 level; and 31 at the GS-16 level.

recipients.[1152]

III. Staffing of the State Employment Security Systems

Although Title VI does not cover employment practices of recipients under all conditions,[1153] DOL Title VI regulations, like those of other Federal agencies make clear that employment discrimination is prohibited where:

> discrimination on the ground of race, color, or national origin in the employment practices of the recipient tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies.... [1154]

1152. The highest EEO position in the region has been a GS-14 for the lead EEOR.

1153. Section 604 of the Civil Rights Act of 1964 states:

> Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice or any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1970).

1154. 29 C.F.R. § 31.3(c) (1974).

The internal employment practices of the State employment services are intimately related to their ability to practice equal opportunity in their own programs, and thus it seems clear that this provision of the Title VI regulations applies to ES staffing. Indeed, the Solicitor's Office at the Department of Labor interprets Title VI to require that ES staff must be selected in a nondiscriminatory manner.[1155]

Staffing of the State employment security systems is, in fact, an area which needs close attention.[1156] One of the most critical shortcomings of the equal employment opportunity programs of State employment security systems has been their minority and female staffing. Exhibit 11 indicates the 13 State Employment Security Systems which in 1972 had minority staffing[1157] at percentages considerably below

---

1155. Chapin and Pfaus interview, supra note 1137.

1156. In the late 1960's the Tennessee and Oklahoma State Advisory Committees to this Commission noted the need for more minority staff, including counselors and applicant interviewers, in the State employment service. Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Employment, Administration of Justice, and Health Services in Memphis-Shelby County, Tennessee (August 1967), and Oklahoma State Advisory Committee to the U.S. Commission on Civil Rights, Equal Employment Opportunity in Lawton, Oklahoma (September 1968).

1157. These were the latest data available as of September 1974. See p. 423 infra.

the respective State minority population percentage in the 1970 census.[1158] It shows that in Mississippi and Alabama the probability that a nonminority would be hired by the State employment security system was more than eight times greater than the probability that a minority would be hired.[1159]

1158. In March 1970, a General Administration letter from Malcolm R. Lovell, Deputy Assistant Secretary for Manpower and Manpower Administration was sent to all State Employment Security Agencies instructing all ES agencies to improve internal minority staffing by taking into account the minority population of the area and the actual numbers of minorities utilizing ES facilities. General Administration Letter No. 1367, DOL, MA, Mar. 25, 1970.

The use of State population figures to evaluate employment security system staffing is conservative. For State employment security systems to be responsive to their clientele, their employment should reflect racial and ethnic composition of their clientele. Their clientele is generally more heavily minority than the State population. This was true, for example, in all four regions visited by Commission staff. In fiscal year 1974, 13.1 percent of the total new applications in Region I's (Boston) ES offices were minority while 5.1 percent of that region's population was minority; in Region V (Chicago) minority applications accounted for 24.1 percent of total new applications while that region's population was 11.7 percent minority. In Region VI (Dallas), 44.0 percent of new ES applications were from minorities, while the population of the region was 27.6 percent minority; in Region IX, 36.3 percent of new applications were from minorities, while the population of the region was 24.1 percent minority. The ES data were taken from DOL, Employment Service Automated Reporting System, Employment Service Performance Indicators, by State, fiscal year 1974, Tables 2 and 6.
Population data were taken from the 1970 census.

1159. In Mississippi, for example, minorities comprise 37.5 percent of the population, but hold only 5.8 percent of the jobs at the State employment service. Comparing minority representation in the population with minority representation in the employment service it is seen that minorities are only .155 times as likely to be employed by the State employment service than would be predicted on the basis of their frequency in the population (5.8÷37.5 = .155). Nonminorities, on the other hand, who comprise 62.5 percent of the population, hold 94.2 percent of the jobs at the State employment service. Thus, nonminorities are 1.507 times more likely to be employed by the State employment service than would be predicted by their frequency in the population (94.2÷62.5 = 1.507) and the relative likelihood of nonminority employment at the State employment service is 9.7 times that for nonminorities (1.507÷.155 = 9.7).

Exhibit 11
Minority and Nonminority Employment in 13 ES Systems

State	Percent of Population		Percent of ES Staff		Frequency of Representation on ES Staff in comparison to frequency of Representation in the population		Relative Probability of Emplcyment in ES Nonminority / Minority Ratio
	Minority (A)	Nonminority (B)	Minority (C)	Nonminority (D)	Minority (E)	Nonminority (F)	(G)
Mississippi	37.5	62.5	5.8	94.2	.155	1.507	9.7
Alabama	26.8	73.2	4.3	95.7	.160	1.307	8.2
South Carolina	31.1	68.9	12.7	87.3	.408	1.267	3.1
Louisiana	31.8	68.2	14.1	85.9	.443	1.260	2.8
Wyoming	8.8	91.2	4.0	96.0	.455	1.053	2.3
North Carolina	23.6	76.4	12.9	87.1	.547	1.140	2.1
Georgia	27.1	72.9	19.6	80.4	.723	1.103	1.5
Virginia	19.5	80.5	14.2	85.8	.728	1.1066	1.5
Texas	30.5	69.5	22.3	77.7	.731	1.118	1.5
Arkansas	18.3	81.7	14.9	85.1	.814	1.042	1.3
Florida	22.6	77.4	17.9	82.1	.792	1.061	1.3
Tennessee	16.3	83.7	13.6	86.4	.834	1.032	1.2
Alaska	19.9	80.1	16.7	83.3	.839	1.040	1.2

Sources:
(A) 1970 Census
(B) 1970 Census
(C) 1972 DOL figures
(D) 1972 DOL figures
(E) (C) ÷ (A)
(F) (D) ÷ (B)
(G) (F) ÷ (E)

The low employment levels of minorities in these States are inexcusable.[1160] In at least one case, the Mississippi employment security system, the 1972 level represented a decrease in minority staffing from previous years. As of August 1970, minority group employment in that employment security system was 9.5 percent.[1161] This was an increase from 1967, when minority employment in that system was 5.8 percent. By 1972, however, minority employment had dropped to its 1967 level.[1162] This drop is particularly disturbing, since it occurred after the Mississippi system had submitted to the Manpower Administration a goal that 45 percent of its new hires would be minority. If this goal had been met, at the conclusion of fiscal year 1972, 17 percent of the employees in the Mississippi system would have been minority.[1163]

1160. Deficiencies in ES minority staffing are also discussed in: The Lawyers Committee for Civil Rights Under Law and the National Urban Coalition, Falling Down on the Job: The United States Employment Service and the Disadvantaged 64-68 (June 1971).

1161. The total employment in the Mississippi ES was about 800.

1162. See Exhibit 11 p. 423 supra. The unacceptable staffing patterns in State employment security agencies are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment 359-362 (1973); The Federal Civil Rights Enforcement Effort: One Year Later 154, 155 (1971). In the latter report this Commission stated:

> Although DOL stressed the need for minority employment to approximate the levels of minority applicants being served, it is uncertain how long DOL will allow the States to take to achieve these levels. Id. at 155.

1163. This Commission has previously stated that even this total would have been far too low for a State which is almost 40 percent minority. Id.

These gross statistics do not fully depict the seriousness of the total range of deficiencies in employment security system staffing. Minorities and women are often greatly underrepresented in the managerial and executive positions within the employment security systems.[1164] In fact, in only three State ES systems--Michigan, Tennessee, and West Virginia--were female employees at the executive managerial level "nearly commensurate"[1165] with their number in the labor force.

Much of the data available in 1972 were obtained from the State Plan of Service submitted annually by each State Employment Security system.[1166]

1164. In Region VI (Dallas), for example, female employment in executive-managerial positions in the State employment security system was; (1) Louisiana, 10.6 percent (15 positions out of 142); (2) Oklahoma, 12.9 percent (18 positions out of 139); (3) Arkansas, 13.7 percent (13 positions out of 95); (4) New Mexico, 22.1 percent (38.5 positions out of 173); and (5) Texas, 6.5 percent (25 positions out of 382). Statistics were compiled as of February 1972. U.S. Civil Service Commission, Consolidated State Report, Equal Employment Opportunity Survey of Grant-Aided State and local agencies (Form OS-100).

For minorities, the disparity in executive-managerial positions was also pronounced. In Louisiana, Arkansas, and Texas, minorities' employment in such positions was (1) Louisiana, 4.2 percent (4 blacks, 1 Native American, and 1 person of Spanish speaking background, out of 142 positions); (2) Arkansas, 2.1 percent (2 blacks out of 95 positions) and (3) Texas, 6.5 percent (4 blacks and 21 persons of Spanish speaking background out of 383 positions). Form OS-100. Minority females suffered the greatest under-utilization at these levels. Only one of the minorities in executive-managerial positions in these three States was a female. This was a person of Spanish speaking background in Louisiana.

1165. DOL response, supra note 1118.

1166. Each State, in order to get funds for State employment service and unemployment insurance operations, has to submit an annual State Plan of Service. This report covers such issues as how the State will spend its funds, how funds were spent in past, who will be the beneficiaries, and how large the staffing will be. Through 1972 MA required that data on the race or ethnic origin of ES employees, cross-tabulated by sex, be included in this plan.

In addition to these data, the State Plan also required that each State submit goals for minority and female staffing. However, it contained no guidelines for how these goals were to be set.[1167] The State Plans were reviewed by MA program staff who were responsible for getting State systems to correct deficiencies in minority and female staffing. Program staff reported that after this review, States with poor records of hiring minorities and females were simply provided with information on affirmative action.[1168]

A MA staff member stated that no sanctions were ever imposed on States with poor records because no sanctions were available.[1169] DOL has also reported that its reason for not taking actions against any of the State ES systems which have failed to make a good faith effort to meet their established goals was that:

> to do so would prescribe the concept of quotas and the establishment of fixed numbers or proportions which must be attained rather than asking for

---

1167. DOL could have written instructions for developing goals for minority and female employment similar to those contained in Revised Order 4, 41 C.F.R. § 60-2.1, et seq. (1974), of the Office of Federal Contract Compliance. Although these instructions are mandatory only for Federal nonconstruction contractors, the principles for setting goals and timetables contained in that order are applicable to any employer.

1168. Telephone interview with Samuel Becton, Personnel Specialist, Office of of Administration and Management, Manpower Administration, DOL, Sept. 20, 1974.

1169. Id.

> projections of a goal which is realistic and which is attainable provided skilled workers are available and job opportunities are present. 1170

The principal obstacle to DOL's enforcement of the goals State ES offices set for their own staffing, however, lies, not as DOL implies, with a prohibition against enforcement, but rather with DOL's lack of guidance concerning proper methods of setting goals.[1171] If goals are set in accordance with Federal requirements, employers can be held accountable for making a good faith effort to meet their goals.

Federal policy recognizes that goals which are "numerical objectives, fixed realistically in terms of number of vacancies expected and the number of qualified applicants available in the relevant job market,"[1172] are appropriate means to ensure equal employment opportunity. Federal policy is clear that if, through no fault of the employer, the goals cannot be met, the employer would not be subjected to sanctions.[1173] The policy is equally clear, however, that the employer is required to make a good faith effort to meet those goals.

1170. DOL response, supra note 1118.

1171. DOL's lack of guidance in this area is discussed on p. 426 supra.

1172. Memorandum from Robert Hampton, Chairman, U.S. Civil Service Commission; J. Stanley Pottinger, Assistant Attorney General for Civil Rights; William Brown, Chairman, Equal Employment Opportunity Commission; and Philip J. Davis, Acting Director, Office of Federal Contract Compliance; to U.S. Attorneys, Field Representatives of the Civil Service Commission, Field Representatives of the Equal Employment Opportunity Commission, and Field Representatives of the Office of Federal Contract Compliance, Federal Policy on Remedies concerning Equal Employment Opportunity in State and Local Government Personnel Systems, Mar. 23, 1973 /hereinafter referred to as Four Agency Agreement/. See also, letter from Richard M. Nixon, President, White House, to Phillip E. Hoffman, President, American Jewish Committee, Aug. 11, 1972, and remarks by Leonard Garment, Special Consultant to President Nixon, to the Equal Employment Opportunity Officers of the Department of the Interior, in Gaithersburg, Md., Mar. 21, 1973.

1173. Four Agency Agreement, supra note 1172.

Contrary to the understanding of DOL program staff,[1174] sanctions can be applied by DOL to ES offices which do not take adequate steps to improve their minority staffing patterns. In the case of inadequate minority staffing patterns which interfere with the delivery of services to minorities, Title VI of the Civil Rights Act of 1964 permits Federal agencies to terminate funding of recipients which discriminate in their distribution of Federal assistance or to refer cases of recalcitrant recipients to the Department of Justice for civil suit.

The Manpower Administration gave even less attention to the minority and female staffing of State employment security systems in late 1974 than it had in 1973. It no longer collected data on the minority and female staffing of State employment security systems. Data were to to be obtained by the Federal Government on Form EEO-4 submitted to the Equal Employment Opportunity Commission,[1175] and DOL

1174. Becton interview, supra note 1168.

1175. Equal Employment Opportunity Commission, Form EEO-4. This form, which must be completed by State and local governments, solicits data on the race, ethnicity, and sex of all employees and new hires by job category (e.g., separately for officials and administrators, professionals, technicians, service-maintenance). Employers having 100 or more employees must report this information to EEOC annually; employers with between 15 and 99 employees must compile such information and have it available for a period of three years. In addition, a rotating sample of employers having between 15 and 99 employees will be required each year to submit the employment data to the EEOC. See, for example Equal Employment Opportunity Commission, EEOC Form 164, State and Local Information (EEO-4). Instruction Booklet (1974).

staff stated that DOL is no longer responsible for assuring non-discrimination in ES staffing,[1176] in apparent contradiction to DOL responsibility as reaffirmed in July 1975.[1177]

IV. Compliance Program

A. State System Role-- The Minority Group Representatives (MGRs)

The Manpower Administration has attempted to have the State employment security systems absorb some of the responsibility for ensuring Title VI compliance. It requires that each State appoint a Minority Group Representative (MGR) to coordinate Title VI compliance in the local ES and UI offices. The Manpower Administration does not, however, require that the MGRs undertake any particular activities.[1178] It merely recommends that they carry out such functions as investigating complaints, conducting routine compliance reviews of ES program operations, providing training and technical assistance to local

---

1176. The Director of DEEO stated that the Civil Service Commission had largely assumed this role under its responsibilities for State Merit Systems. Chapin and Pfaus interview, supra note 1137. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1975, Vol. V, To Eliminate Employment Discrimination ch. 2 (1975). Program staff indicated that this responsibility had been largely assumed by the Equal Employment Opportunity Act of 1972 which gives the EEOC responsibility for enforcing equal employment opportunity in State and local government employment. Becton interview, supra note 1168

1177. DOL stated:

> As stated earlier, guidelines were issued concerning non-discrimination in Employment Security (ES) internal staffing. The fact that the U.S. Civil Service Commission has assumed an oversight responsibility in EEO matters of internal staffing does not negate our responsibility to monitor our own programs. Kolberg letter, supra 1089 note.

1178. Chapin and Pfaus interviews, supra note 1137.

local ES offices, and sponsoring affirmative action both in the State system and with community and employer groups.[1179]

A Manpower Administration official stated that the equal employment opportunity duties of the MGRs relate to both minorities and women.[1180] In February 1975, DOL requested the States to change the MGR's title to State Equal Employment Opportunity Representative.[1181] It should be noted however that neither the Compliance Officers Handbook nor the State Employment Security Agency, Self-Approval Handbook refers to responsibilities of MGRs concerning sex discrimination.[1182] The activities of the MGRs vary greatly from State to State. Some States place heavy emphasis on the MGRs and some do not. Some MGRs coordinate equal employment opportunity services to minority group clients on a State level.[1183] Some are assigned to minority recruiting and staffing for the employment service. In the Dallas region, some MGRs investigate complaints; some conduct their own compliance reviews, and others assume only superficial duties.[1184] Whether their equal employment opportunity responsibilities extend to women also varies from State to State.

1179. Compliance Officers Handbook, supra note 1092 at 14. See also U.S. Department of Labor, Manpower Administration, State Employment Security Agency, Self-Approval Handbook at IV-75 (Rev. Sept. 1972).

1180. Telephone interview with William Harris, Director, Office of Investigation and Compliance, Manpower Administration, DOL, Jan. 20, 1975. MGR's responsibilities also include age and disabilities.

1181. Kolberg letter, supra note 1089.

1182. Compliance Officers Handbook, supra note 1092, and State Employment Security Agency, Self-Approval Handbook, supra note 1179.

1183. Telephone interview with Gary DeRosa, Regional Director of EEO, Manpower Administration, San Francisco Regional Office, DOL, Sept. 23, 1974.

1184. Interview with Lester Williams, EEOR, Manpower Administration, Dallas Regional Office, in Dallas, Tex., Jan. 29, 1973.

There are also great differences in the structure in State equal opportunity systems. In many States there is a network of MGRs--a lead MGR at the State agency administration office supported by additional MGRs in some local offices. The size of the network varies from State to State[1185] as does its status and authority.[1186]

One of the key variables in determining the effectiveness of a State MGR network is the percentage of the time spent by the MGRs on equal opportunity functions. Many carry out these functions in addition to other assignments. In Rhode Island and Indiana, for example, the MGRs devote only 5 percent of their time to equal opportunity and

---

1185. For example, in Boston, Massachusetts, alone there were 12 MGRs. Hyannis, Glynn, and Gloverton, Massachusetts, each had one. Listing from Massachusetts Division of Employment Security, Dec. 19, 1972. The Indiana system included 25 local MGRs and a State MGR. In contrast, New Mexico, Oklahoma, Arkansas, and Louisiana were among the States with only one MGR. Williams interview, supra note 1184.

1186. In Connecticut, the State MGR was the third-ranking person in the State ES division. Telephone interview with James B. James, Jr., Minority Group Representative, Connecticut State Employment Security Division, Manpower Administration, DOL, Dec. 7, 1973. In Massachusetts, where the State MGR once had a low rank in the State employment security division, the MGR was on the staff of the director of that division.

In Michigan, where the State MGR reported directly to the Administrator of the State Employment Security Commission, the equal employment opportunity system was considered by a Federal civil rights official to be very effective. Telephone interview with Daniel Harley, Equal Employment Opportunity Representative, Manpower Administration, Chicago Regional Office, DOL, Nov. 15, 1973. Mr. Harley stated that Michigan had a well-organized MGR network in the State, that there was a clear understanding between the State MGR and local MGR as to each one's role, and that commitment from the top was largely responsible for the success of the system. Id.

the other 95 percent to directing federally-funded training programs.[1187]

In Illinois and Minnesota the MGRs spend no time on equal employment opportunity matters.[1188] The MGRs in Vermont, New Hampshire, and Maine were virtually nonfunctioning.[1189] Although some of these States have few minorities, there is a responsibility to ensure equal opportunity for the minorities who do reside in these States.[1190] Moreover, the absence of a viable MGR program in these States is particularly serious in view of the MGRs' responsibility for equal opportunity for women, and emphasizes the need for the Manpower Administration to make clear to States the duties of the MGRs.[1191]

1187. Telephone interview with Ronald Powell, EEOR, Manpower Administration, Boston Regional Office, Dec. 13, 1972. Interview with Daniel Harley, EEOR Manpower Administration, Chicago Regional Office, in Chicago, Ill., May 15, 1973. Generally, the work other than equal opportunity to which many MGRs devoted their time was administering State activities on Manpower Development Training Programs, such as Job Corps.

1188. Harley interview, supra note 1187.

1189. Telephone interview with James Stevens, EEOR, Manpower Administration, Boston Regional Office, DOL, Dec. 13, 1972.

1190. Blacks, persons of Spanish speaking background, Asian Americans, and Native Americans comprise less than 1 percent of the populations according to the 1970 census. Despite the small size, the problems of discrimination against these groups are serious. See, for example, Maine State Advisory Committee to the U.S. Commission on Civil Rights, Federal and State Services and the American Indian (December 1974).

1191. For example, the Maine Commission on Human Rights processed 225 complaints alleging discrimination on the basis of sex in 1974. Telephone interview with Gary Libby, staff member, Maine Commission on Human Rights, Jan. 16, 1975.

Another variable in the success of the MGR system is the extent to which the EEORs are able to make use of the MGRs. In the Dallas region, most MGRs accompany Manpower Administration EEO staff on Federal reviews of local ES offices.[1192] In the San Francisco region, the EEOR has almost no contact with the MGRs and is unable to describe the duties or evaluate the performances of the State and local MGRs.[1193]

In July 1975, DOL reported that it had sponsored five, 3 1/2 day training sessions on equal employment opportunity officers' duties and responsibilites in the second quarter of fiscal year 1975. The session was given for all Federal, State and CETA equal employment opportunity officers.[1194]

1192. The MGRs in the Dallas region adjusted their schedules so as to be able to accommodate the activities of the EEOR. Williams interview, supra note 1184. The only exceptions were the MGRs from the Texas Employment Commission who assisted in Manpower Administration compliance reviews only if it was convenient for their own schedules.

1193. The San Francisco EEOR did not have such elementary and vital information as whether or not the MGRs conducted equal opportunity training sessions, made independent compliance reviews, or investigated complaints. Interview with Ross Ruiz, Manpower Administration, San Francisco Regional Office, DOL, in San Francisco, Cal., Mar. 21, 1973. In contrast, the EEOR in Chicago was able to provide this Commission with a State-by-State rundown on the strengths and weaknesses of the equal employment opportunity program in each State in the region. Harley interview, supra note 1187.

1194. Kolberg with, supra note 1087. DOL also stated that "509 /equal employment officers/ attended 5 sessions nationwide. These workshop sessions were reported to be successful." Id.

> In November 1972, an annual national training sessions for State MGRs was held in Miami Beach, Florida. It was a two-day meeting, with over 140 participants. At the meeting, representatives from Department of Justice, Department of Housing and Urban Development, Equal Employment Opportunity Commission, Office of Federal Contract Compliance of DOL, and the U.S. Civil Service Commission explained their respective equal opportunity programs to the MGRs. Some of the sessions were entitled: "An Assessment of EEO in the Florida Agency," "An Assessment of EEO in the Regional and State EEO Reporting Practices and Procedures," "Promoting Nondiscrimination in State ES Agencies," "Responsibilities of MGRs for EEO," "Minority Testing in Manpower Programs," and "The EEO Act of 1972." DOL response, supra note 1118.

In July 1973, DOL also reported that its regional EEO units provided some training for the MGRs. Although the length of these sessions and depth of training varied from region to region, for the most part this training has been provided once a year, for periods of three hours to three days.[1195] As of September 1974, MGR training was centered exclusively in the MA regional offices. DOL staff reported that five sessions were scheduled, to be attended by MGRs, EEORs, Manpower Administration program staff, and State equal opportunity representatives for CETA.[1196]

1195. DOL stated that training for MGRs in the San Francisco region was for one day, once a year. Id. The San Francisco EEOR stated that there was no training program maintained by his unit for the State personnel and he did not anticipate any such training programs. Furthermore, he stated that he did not feel that such programs were even necessary. Ruiz interview, supra note 1193.

1196. Chapin and Pfaus interview, supra note 1137. CETA, manpower revenue-sharing, is described on pp. 403-410 supra.

B. Data Collection and Use

The Department of Labor has one of the more comprehensive systems for collecting nationwide data on a Federal program, called the Manpower Operating Data (MOD) System.[1197] It is DOL's principal source of data for program monitoring of State security systems and manpower training activities.[1198] It enables DOL to determine, for example, the number of persons using the State employment services. It also can provide general purpose data on the labor force and on unemployment.[1199]

The data are submitted by each local office to the State employment security offices, which process the data and submit them on computer tape to DOL's regional offices on a monthly basis.[1200] At the regional offices, the Offices of Program and Technical Services (OPTS) review the data.

Such a system could be useful in measuring the civil rights compliance status of the local offices. Indeed, data on the number of referrals and

---

1197. Until mid-1974, the forerunner of MOD, the Employment Service Automated Reporting System (ESARS) was used. A major difference between the two systems is that under ESARS, applicants to the ES offices supplied information specifically for ESARS use, for example, on experience and job need. Under MOD, applicants no longer supply information specifically for the data system. MOD data are obtained from the information provided to the ES. Telephone interview with T.J. Williams, Information Systems Officer, DOL, Sept. 26, 1974.

1198. DOL reported:

> A procedure has been written which when published will provide /equal employment opportunity/ data on all ES activities. Testing of this procedure is now being contracted out to two State ES agencies. These agencies will write the programs and test the procedure. If successful, materials will be developed and carried to the field for training and subsequent use. Kolberg letter supra note 1089.

1199. Department of Labor, ESARS Handbook (1969). This handbook continues to be used under MOD.

1200. MOD data are compiled and available on each job bank area. A job bank area usually comprises a city or several cities in a Standard Metropolitan Statistical Area. The Department of Labor together with the State employment security division determines the job bank area.

placements for various fields of employment are maintained by race and ethnic origin,[1201] cross-tabulated by sex. In theory, such information could be tabulated to show, at a glance, the status of minority and female participation in ES programs, information that it might take a civil rights review team several days to determine onsite.

In fact, in 1971, the equal opportunity staff expressed great hope that this system would be of use to them.[1202] This hope has never come to fruition. Regional EEO staff do not review MOD reports on a regular basis. The regional OPTS is supposed to interpret the information and alert the EEO unit if it discovers any civil rights-related problems in the computed information.[1203] Yet, it appears that OPTS staff are not provided with EEO training to aid them in detecting such problems.

1201. Data are recorded for blacks, persons of Spanish speaking background, Native Americans, whites, and other (including Asian Americans.) In some local areas data are collected on other groups such as Puerto Ricans in New York and Aleuts and Eskimos in Alaska. Chapin and Pfaus interview, supra note 1137. In the Boston region, however, no data on French-speaking persons or on persons of Portuguese extraction are collected although both groups are concentrated in New England. Thus, data for New Hampshire ES offices, for example, where a considerable portion of the State's minority group population is French-speaking, do not reflect the existence of that group. Interview with James Q. Stevens, Equal Employment Opportunity Representative, Manpower Administration, Boston Regional Office, in Boston, Mass., DOL, Nov. 14, 1972.

1202. Interview with Arthur A. Chapin, Director, Office of Equal Employment Opportunity, and Manpower Administration staff, DOL, Sept. 17, 1971.

1203. Stevens interview, supra note 1189, and interview with Ronald Powell, EEOR, Manpower Administration, Boston Regional Office, in Boston, Mass., Nov. 13, 1972. The OPTS staff is charged with such duties as "interpreting, adopting, or supplementing national office-program guidelines" and must "constantly be aware of the EEO aspects of /their/ program and the effect /their/ program or technical area has on the implementation of the EEO responsibilities of the region as a whole." Compliance Officers Handbook, supra note 1092 at 11.

EEO staff apparently have not been provided with adequate training to read MOD reports, as they have had difficulty in deciphering the computed information.[1204]

In mid-1974 the DEEO Director expressed disappointment with the MOD system.[1205] He noted that, moreover, because of different ways of counting was questionable and that, moreover, because of different ways of counting from State to State, the data are not comparable enough to enable nationwide use.[1206] He observed, too, that the employment categories used are too general to be used to determine whether applicants are being placed according to their qualifications.[1207]

1204. Interview with Arthur A. Chapin, Director, DEEO, Manpower Administration, DOL, Jan. 22, 1973. The Department of Labor staff member working with MOD system stated that the printouts from the system are not difficult to read and that the only problem has been the sheer volume of data produced. T.J. Williams interview, supra note 1197.

1205. Chapin and Pfaus interview, supra note 1137. See also January 1973 Chapin interview, supra note 1204.

1206. This is due to the lack of uniformity in data processing systems and methods of compiling the data. In addition, local offices interpret some data categories, such as "Job Ready Applicants" and "Employability Development" differently and the resulting data vary accordingly. Stevens interview, supra note 1189.

1207. These categories do not classify jobs by type of work, such as bookkeeping or dishwashing, but only according to industry such as banking or textiles, and thus are not, in fact, really employment categories.

The DEEO also noted that the MOD data are four or five months out of date by the time they are tabulated in computer printout form.[1208] It would appear, however, that this latter argument is somewhat tenuous in light of the fact that the problems of discrimination encountered by the MA have been essentially the same for many years.[1209]

1208. Chapin and Pfaus interview, supra note 1137.

1209. See pp. 454-460 infra for a comparison of findings of MA compliance reviews in 1968 and 1973.

C. Complaints

Complaint handling does not appear to have been an important part of the MA program for ensuring Title VI compliance by the State employment services.[1210] First, the number of such complaints investigated is small, and second, regional offices place greater emphasis on systematically reviewing employment service offices.[1211] In fiscal year 1973, the Manpower Administration received over 250 complaints concerning all of its assistance programs.[1212] About 100 were investigated.[1213] Many of these were handled over the telephone, a highly questionable procedure.[1214] About 59 of those investigated resulted in

---

1210. This contrasts with MA's handling of complaints in its training and work incentive programs. For these programs, complaint handling was generally the backbone of a regional office compliance program. Compliance reviews of manpower training program sponsors were rarely conducted except when complaints were received.

1211. See p. 441 infra for a discussion of MA's compliance reviews.

1212. An undetermined number of these were frivolous or not within the Manpower Administration's authority to investigate. The regional offices provide information to the DEEO only on the number of complaints investigated. They do not routinely report the number of frivolous or nonjurisdictional complaints.

1213. In fiscal year 1974, the Manpower Administration investigated 117 complaints. Manpower Administration, DEEO, Quarterly Review and Analysis Report for June 30, 1974. The DEEO did not have information on hand indicating the number of complaints received during that year. Chapin and Pfaus interview, supra note 1137.

1214. A telephone resolution generally would not uncover the type of systematic problems which would be found through an onsite review. If a complaint is handled by telephone, the investigator is unlikely to be able to review the documents necessary for a thorough investigation and would have difficulty resolving adequately any conflicts between the allegations of the complainant and the account given by the respondent. Further, any agreements made would be informal and not designed to correct recurrent violations, unless oral agreements were followed by a letter indicating the terms of the agreement. Nonetheless, at least one EEOR indicated a preference for telephone resolution of complaints. Interview with Ross Ruiz, EEOR, Manpower Administration, San Francisco Regional Office, DOL, in San Francisco, Cal., Mar. 21, 1973.

compliance reviews.[1215] As of July 1973, of the 250 complaints received in fiscal year 1973, 33 were unresolved and had been unresolved for three months or more.[1216]

Forty-two of the 59 complaints which resulted in compliance reviews concerned manpower training programs.[1217] The other 17 concerned State employment services. Most of these appeared to be employment complaints filed by State employment service staff members.[1218] In 14 of the 17 cases DOL concluded that the investigation did not support the complaint. Only in one case,[1219] against the Texas Employment Commission (TEC), was any remedial action directed.[1220]

1215. The Boston region conducted 3 compliance reviews in response to complaints; New York conducted 5; Philadelphia, 2; Atlanta, 3; Chicago, 8; Dallas, 25; Kansas City, 1; Denver, 0; San Francisco, 3; Seattle, 4; and the District of Columbia Manpower Administration, 5. DOL supplementary response to U.S. Commission on Civil Rights questionnaire, contained in letter from Peter J. Brennan, Secretary of Labor, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, July 3, 1973 /hereinafter referred to as DOL supplementary response/.

1216. Id.

1217. In 5 of the 42 manpower training program complaints, the investigation was not completed. In 2 cases the complaints were withdrawn. In 25 cases the investigation uncovered no civil rights violation. In 10 cases corrective action was requested by MA or volunteered by the respondent.

1218. This is the impression created by a survey of a sample of Biweekly OE Activities Report Forms (MA 7-91) filed by regional offices with the DEEO during fiscal year 1973.

1219. In two of the 17 cases the investigations were not completed.

1220. DOL supplementary response, supra note 1215. The complainant alleged that TEC was not referring him to jobs for which he was qualified because of his race. As a result of the complaint investigation and subsequent negotiations, TEC agreed to refer the complainant to jobs for which he qualified. Id.

D. Compliance Reviews of State Employment Security Systems

1. Coverage of the Reviews

The equal employment opportunity section of the Manpower Administration Manual requires that every year each regional EEO Unit conduct an onsite compliance review in at least one local ES office in each State in the region.[1221] This standard is far too low, especially considering the great number of ES offices in the more populous States. As a result of this standard,[1222] the EEO Units simply conduct too few compliance reviews.

The scope of the compliance reviews is left up to individual regional offices' discretion. The Manpower Administration directs that:

> Investigators must make initial or preliminary determinations as to the scope and extent of the compliance review. This involves analysis of the nature and extent of the ES operation, applicable laws and regulations, and allegations of complaints, if any. In particular cases, the review may be limited to a single operational area which is particularly suspect or for which an immediate factual documentation is needed for the institution of an enforcement hearing. In other cases it may be necessary to conduct a complete review of the entire ES operations and facilities at the discretion of the /Assistant Regional Director for Manpower/.... [1223]

1221. U.S. Department of Labor, Manpower Administration, Manual, Title 5500, Equal Employment Opportunity, Section 5513, Compliance Program (August 1971).

1222. In Region VI (Dallas) during fiscal year 1973 through January 1973, only 1.25 percent (3 of approximately 240) of the ES offices were reviewed. From August 1972 through February 1973, the EEO Unit in Region IX (San Francisco) conducted 8 onsite compliance reviews of ES offices. This represented only 1.3 percent of the 605 ES system offices in the region. Manpower Administration, Region IX, Statistical Complaints Activity Log, August 1972 - February 1973. The Region V (Chicago) EEO Unit conducted 22 onsite reviews of ES offices from July 1972 through May of 1973; this represented 4.3 percent of the approximately 510 local ES offices. Harley interview, supra note 1187.

1223. Manpower Administration, Manual, supra note 1221, Section 5522, Compliance Procedures (October 1971).

When compliance reviews of State UI offices are conducted, this is usually in conjunction with reviews of State Employment Security offices.[1224] Generally, separate UI reviews are not conducted. DOL staff note that this is because the administration of State employment service and unemployment insurance offices is closely intertwined and that often ES and UI offices are in the same building and even the same room, with desks side by side.[1225] As there are many more UI offices than ES offices[1226] it appears that many UI offices will never be reviewed.

There were, however, possibilities of Title VI violations occurring in UI offices. For example, in 1967, the Manpower Administration found that scheduling of interviews for UI claimants with UI officials was sometimes based on race and that group interviews on benefit rights were held on a racially segregated basis. MA also found that claimants were being unjustly disqualified for employment insurance because of race.[1227] Since UI offices are rarely reviewed, Manpower Administration

---

1224. In some regions UI offices are hardly ever reviewed. In the Boston and Atlanta regions, for example, the Manpower Administration had never conducted a review of the UI offices. Stevens interview, supra note 1189. Telephone interview with Linda Norris, Equal Employment Opportunity Compliance Officer, Manpower Administration, Atlanta Regional Office, DOL, Sept. 19, 1974.

1225. Lester Williams interview, supra note 1184.

1226. There are approximately 2,400 ES offices and 18,000 UI offices. See notes 1069 and 1074 supra.

1227. Department of Labor, Equality of Opportunity in Manpower Programs (September 1968).

files do not indicate if such practices continue in the mid-1970's. There are other possibilities of Title VI violations as well. Minority and female claimants may be employed in occupations where employers sometimes fail to report their employment or to pay the required employer portion of unemployment insurance. Employers may state that minorities and women have resigned when in reality they had been fired, thus making them appear ineligible for the full amount of unemployment insurance.[1228] UI offices may perpetuate such discrimination by failing to investigate exhaustively all claims by minorities.

2. Findings

In virtually all of the ES office compliance reviews, the EEO Units discovered weaknesses in the nondiscrimination programs and made recommendations.[1229] For example DOL found:

1. Undercoding[1230] in assignment of occupational classification for

---

1228. Staff in the San Francisco Regional Office believed that this was an unexplored, but potentially serious problem. Interview with John Diggins, Supervisory Unemployment Insurance Program Specialist, Manpower Administration, San Francisco Regional Office, DOL, in San Francisco, Cal. Jan. 31, 1973. Mr. Diggins also noted that UI staff might erroneously determine that a minority was not actively looking for work when he or she had been refused employment because of racial discrimination, thus making the claimant ineligible for unemployment insurance payments.

1229. DOL response, supra note 1118.

1230. DOL requires that all of a person's relevant experience be coded on his or her application card, but in many cases all experience of minorities was not recorded. Such undercoding decreases the likelihood that minorities will be hired or placed in positions for which they possess skills.

minorities. Reviews revealed that a number of minorities[1231] were not being given credit for their skills, experience, and education.[1232]

2. Entry of extraneous characteristics on application cards. Interviewers in ES offices in some instances made extraneous comments on application forms concerning such matters as family history, number of persons in the family, prison records, comments on applicant's appearance and manner, such as "Afro hair," "beat the draft type," or "mod clothes."[1233]

3. Discriminatory job referrals. Reviews of local ES offices uncovered many instances in which minorities were referred primarily to "stereotypic" occupations. For example, 93.2 percent of all referrals for domestic

---

1231. In the reviews examined from the Boston, Dallas, San Francisco, and Chicago regional offices, there was no mention that undercoding of women was a problem. It could not be determined from the reviews whether this failure to mention undercoding of women was because undercoding of women was not a problem or because it was not studied by the Manpower Administration. See, for example, memorandum from Lester L. Williams, EEO Representative, to T. C. Murrell, Acting RMA, Dallas Regional Office, "Compliance Review of Victoria Texas, Local ES Office," Apr. 6, 1972 and letter from T.C. Murrell to Louis R. Bachicha, Director, Employment Security Commission of New Mexico, "Compliance Review of Clovis, New Mexico Employment Security Office," Feb. 23, 1972.

1232. This was noted for example in compliance reviews of the Baton Rouge, La.; Clovis, N.M.; and Forrest City and Malvern, Ark., ES offices.

1233. Such comments were found in application cards in Forrest City, Arkansas, files. Subjective comments on applicant appearance and manner were found in the Clovis, New Mexico, files. Extraneous comments were also found in minority application forms in the files of the Waterbury, Connecticut, Employment Service Office. Manpower Administration, Dallas Regional Office and Boston Regional Office Compliance Review Reports, 1971 and 1972. For many years employment service application cards were color coded by sex to aid in sex-segregated job referrals. This practice was terminated in September 1972. Department of Labor, Manpower Administration, Training and Employment Service Program Letter No. 2750, Sept. 5, 1972.

help in the Baton Rouge, Louisiana, ES office were blacks. The Dallas EEO Unit reported that it was "an undisputable fact that very little effort is being exerted" by the Baton Rouge local ES office to refer blacks to high-level jobs.[1234] In a review of the Tucson, Arizona, ES office the EEO unit in Region IX (San Francisco) found that minorities were systematically excluded from referral and hires to jobs as waitresses, auto service station attendants, clericals and skilled professionals.[1235]

Women have also been subject to discrimination in job referral patterns. For example, in Connecticut ES offices, women were generally referred to traditionally female jobs such as receptionist, maid, and telephone operator, but rarely to traditionally male jobs such as driver, salesperson, janitor, or service station attendant. When one firm in the Dallas region placed a job order for electrical motor assemblers, a position which has traditionally been held by women, 262 women and 1 man were referred. In traditionally male-oriented positions, such as machine operators, all referrals were men. The local office manager stated that "the companies preferred ladies for light assembly jobs, and males for heavy assembly jobs."[1236] Discriminatory job

---

1234. Manpower Administration, Dallas Regional Office, Compliance Review of Baton Rouge, La., ES Office, December 1971.

1235. Similarly, a review of the Reno, Nevada, Employment Service Office showed that persons of Spanish speaking background were being referred to positions at a rate substantially below their proportion of the active applicant file and that almost all minority referrals from that office were for unskilled positions such as day workers, dishwashers, casual laborers, and maids.

1236. Manpower Administration, Dallas Regional Office, Compliance Review of the Forrest City, Arkansas, Employment Security Division Local Office, October 1972. Similarly the New Haven, Connecticut, Employment Security Office job listings contained sex preferences where sex was not a bona fide occupational qualification. U.S. Department of Labor, Manpower Administration and Connecticut Employment Security Division, Joint Compliance Review, 1971.

orders, for example, indicating that student wives need not apply, were accepted by the State employment services.

4. Discriminatory placement. The disparities in job placement mirrored the inequities found in referral of applicants. In Louisiana the entire ES system placed relatively few female and minority applicants in occupations other than traditionally menial ones. Similarly, in Victoria, Texas, placement of blacks in professional positions was low.

5. Discriminatory counseling and selection criteria.[1237] Discriminatory counseling and selection criteria have been problems in public and private employment for many years. There are indications that widely-used employment entrance tests discriminate against minorities[1238] because they have not been validated as predictors of job performance. Women, too, are sometimes disproportionately rejected for employment because of entrance tests and requirements which are discriminatory and are not job related.[1239] Yet there was no mention made of counseling and testing in compliance reviews from Regions I, VI, and IX. Staff in Region VI did note sex discrimination in criteria for employment,

---

1237. As of 1971 the ES relied heavily on discriminatory testing. Falling Down on the Job: The United States Employment Service and the Disadvantaged, supra note 1160 at 71.

1238. Equal Employment Opportunity Commission, Personnel Testing and Equal Employment Opportunity (1970). This report is a compendium of papers concerning the impact of employment tests on minorities. See also, Equality of Opportunity in Manpower Programs, supra note 1227.

1239. There are no broad studies concerning sex discrimination in employment tests. Telephone interview with James Taylor, Assistant to the Director, Office of Research, Equal Employment Opportunity Commission, Oct. 7, 1974. Mechanical aptitude tests and weight lifting and minimum height requirements are among the selection criteria which have been used to exclude women from employment.

however. They discovered that women but not men were subject to height and weight requirements when job orders were placed by two local firms.[1240]

6. Inadequate attention to equal opportunity in administrative functions. EEO Unit reports have also revealed that the local offices often have not placed the required EEO nondiscrimination literature and posters in conspicuous locations. At times there were no Spanish-language posters or other material in offices that served Spanish speaking clients.[1241]

1240. The rationale given by the companies and accepted by the ES office manager was that "women were too big (weight) or too short (under 5 feet) or would not be able to stand up for long periods of time." Compliance Review of Forrest City, Arkansas, Employment Security Division Local Office, supra note 1236.

1241. Although there is no Manpower Administration requirement that MA staff monitor State employment service use of second-language information materials, MA staff have often taken such monitoring upon themselves. Telephone interview with Gary DeRosa, Regional Director of EEO, Manpower Administration, San Francisco Regional Office, DOL, Feb. 28, 1975. Lack of provisions for Spanish speaking clients was noted in reviews conducted in Nevada in January 1972 by the San Francisco Regional Office of the Las Vegas Unemployment Insurance Office, the Reno Employment Service Office, the Reno Rural Manpower Services and Farm Labor Office, and the Reno Unemployment Insurance Office. U.S. Department of Labor, Manpower Administration, Compliance Review IX-R-72-CR3-Reno Area Employment Security Office, Jan. 17-21, 1972. This problem was also made evident by reviews of the Texas Employment Commission offices in Lubbock and other sections of West Texas. Lester Williams interview, supra note 1184.

E. Rural Manpower Services (RMS) Reviews

The Rural Manpower Services, formerly called Farm Labor Services, are units of State ES systems which concentrate on employment for agricultural positions. So many farmworkers' complaints were received by minority group and other social action organizations[1242] that in April 1971, the Migrant Legal Action Program, Inc., California Rural Legal Assistance, and the Mexican American Legal Defense and Educational Fund filed, on behalf of 16 organizations and 398 specifically named individuals, a complaint against the Department of Labor and the Rural Manpower Service (RMS) charging serious violations of the civil rights of black and Spanish speaking farmworkers.[1243] Most of these violations were alleged to exist in the California Farm Labor Service offices, the Florida Farm Labor offices, and the Texas Employment Commission offices. Illinois, Georgia, Minnesota, Washington, Michigan, Oregon, New York, and Montana Farm Labor offices were also cited in the complaint.[1244]

In response to this complaint, DOL initiated a special review in the spring of 1972 of 73 RMS local offices in the 11 States cited in the complaint.[1245] The DOL review confirmed the fundamental conclusion

---

1242. Telephone interview with James A. Hermann, Attorney, Migrant Legal Action Program, Oct. 8, 1974.

1243. Administrative Complaint filed by NAACP, Western Region, et al. before Secretary of Labor, Rural Manpower Services, against All Farm Labor Services in the Nation.

1244. Id.

1245. U.S. Department of Labor, Manpower Administration, Special Review Staff, Review of the Rural Manpower Service, 1972.

of the complainants: that the RMS has traditionally served the employers, not the workers.[1246] Civil rights violations were found to be extensive in many areas: RMS local offices were not staffed with a sufficient number of minority and bilingual employees; local offices practiced selective recruiting, limiting job requests to certain States or areas for the purpose of excluding certain racial and ethnic groups;[1247] local offices referred workers to employers who maintained segregated housing; ES offices often assumed that any person of Spanish speaking background, especially a Mexican American, was a farmworker, and referred persons of Spanish speaking background only to the RMS office handling agricultural employment without first giving them the benefits of ES testing, counseling, training, or consideration for nonagricultural placement; job orders were allowed to contain discriminatory requests that were unrelated to the job, such as "must speak English" or "must speak Spanish";[1248] RMS offices often failed to follow through on complaints of discrimination; there were numerous violations of child labor laws, and severe discrepancies between the wage scale and payments to the workers.[1249] The agencies which filed the complaint believed, however, that the only outcome of the review

---

1246. For a more thorough discussion of conditions under which migrant farmworkers live, see, Indiana Advisory Committee to the United States Commission on Civil Rights, Indiana Migrants: Blighted Hopes, Slighted Rights (March 1975).

1247. The Rural Manpower Services suggested to employers the technique of limiting job requests to certain States in order to exclude certain racial and ethnic groups. For example, the Florida Rural Manpower Service wrote to one employer warning against placing job requests in Texas unless the employer wanted to obtain Mexican American workers.

1248. The agricultural jobs in which farmworkers are placed entail picking crops, manual labor which could be performed by persons who speak any language. Language skills are not an important factor in assessing ability to carry out these jobs.

1249. Review of the Rural Manpower Service, supra note 1245.

was a DOL memorandum to State agencies[1250] and that the RMS treatment of migrant workers did not change.[1251] As a result, on October 6, 1972, several months after the special review of RMS services conducted by the national review team, representatives from 17 civil rights and farmworkers organizations, together with 88 individual harvesters, sued DOL, asking a Federal district court to prohibit DOL from financing State ES agencies that practiced racial and sex discrimination. The suit made similar charges to those in the complaint filed in 1971--that harvesters, mostly black and Mexican American-- were denied the same counseling and job training that the State ES provided for nonminorities; were arbitrarily restricted to low-paying field work; were assigned to racially segregated housing; and were referred to growers who failed to make social security payments to their accounts.[1252]

On May 31, 1973, the court ordered DOL to stop participating in federally-funded State programs that discriminated against migratory or seasonal farmworkers. It warned DOL that it could cut off Federal funds if DOL continued to support the discriminatory State programs.[1253]

1250. Training and Employment Service Program Letter No. 2763 from Paul J. Fasser, Jr., Deputy Assistant Secretary of Labor of Manpower and Manpower Administration to all State ES agencies (Undated.) The purpose of the letter was "to inform State Agencies of findings of a review of Rural Manpower Service operations and to direct them to identify and eliminate discriminatory practices in State employment services which may exist in their operations." Id.

1251. Herrmann interview, supra note 1242.

1252. NAACP, Western Region, et al. v. Peter J. Brennan, et al., No. 2010-72 (D.D.C., May 3, 1973).

1253. The court ruled that DOL was illegally supporting State agencies which (a) denied the full range of employment services, such as testing and counseling, to migrant workers; (b) referred migrant farmworkers to employers who had violated the minimum wage and child labor laws; (c) processed discriminatory interstate clearance orders; (d) referred farmworkers to jobs where the living and working conditions violated housing, health, and sanitation laws; and (e) referred farmworkers to unlicensed crew leaders or crewleaders who operated illegally. NAACP, Western Region v. Peter J. Brennan, supra note 1243, Declaratory Judgment and Injunctive Order, May 31, 1973.

The regional EEO Units of the Manpower Administration were charged with performing followup reviews in fiscal year 1973 of the special RMS review to check on the progress of local RMS offices.

The followup reviews had some critical weaknesses. In at least one region,[1254] the reviews lasted only one hour each, and in general they resulted only in findings which could have been obtained from available statistical information. Furthermore, while some staff members of the RMS local offices were interviewed, no recipients were asked about the services they received, and additionally, the review team did not study the referral patterns on the basis of sex.[1255] Finally, RMS offices, contrary to all Manpower Administration standard review procedures,[1256] were given copies of the questions to be asked two weeks before the followup reviews were conducted.[1257] Thus, the RMS offices were prepared to present a favorable picture.

In late 1972, the Region IX (San Francisco) EEO Unit, together representatives of the California Department of Human Resources Development, conducted its followup review to the national review of the spring before.

1254. September 1974 DeRosa interview, supra note 1146. The RMA report implied that each lasted one day. Ruiz memorandum, infra note 1258.

1255. Memorandum from Floyd E. Edwards, RMA, San Francisco Regional Office, DOL, to Ross Ruiz, EEOR, Manpower Administration, San Francisco Regional Office, DOL, Subject: Rural Manpower Service Review, Dec. 22, 1972.

1256. These procedures for investigation are not in writing, but are given orally in training courses for MA investigations. Telephone interview with Gary DeRosa, EEOR, Manpower Administration, San Francisco Regional Office, DOL, Apr. 22, 1975.

1257. April 1975 DeRosa interview, supra note 1256.

This review covered ten RMS offices in California.[1258] The followup report offered no documentation, no statistical illustrations, and no information that would clearly indicate the Title VI compliance posture of the RMS offices. These offices were merely rated "good," "fair," or "poor," on a standard checklist with only slight references to the deficiencies found.[1259]

Region V (Chicago) Manpower Administration conducted followup reviews of 16 RMS offices in Wisconsin, Indiana, Michigan, Illinois, and Ohio.[1260] These reviews appeared to be as disappointing as those conducted

---

1258. The ten offices were in Salinas, Watsonville, Gilroy, Stockton, Modesto, Merced, Visalia, Fresno, Madera, and Calexico. Memorandum from Ross Ruiz, EEO Representative to Donald Balcer, Deputy Regional Manpower Administrator, DOL, Rural Manpower Service Reviews, Dec. 12, 1972.

1259. The checklist questions and findings included:

> 1. Is the percentage of minority applicants referred to nonagricultural jobs reasonable compared to clientele served? Finding: Nine offices rated "good" because more minorities were referred than their percentage as clients; one rated "fair" because it provided equal referrals to minorities.
>
> 2. Do job orders specify an English or Spanish requirement? If so, is the requirement really necessary? Finding: Three offices rated "good", with no job orders specifying any language requirement; three rated "fair" because they had "a few orders" indicating that the employer or foreman spoke one language; two rated "poor", with five or more orders requesting Spanish with little supporting justification.

An attached chart showed that the Modesto RMS rated three of the four "poor" marks given. Ruiz memorandum, supra note 1258.

1260. The Chicago reports were written by Manpower Administration area operations officers who were accompanied by a member of the EEO Unit staff. The scheduling and RMS office selection was instigated in the regional office, with no input at all from the national OEEO.

in the San Francisco region. They contained little reference to the number of referrals or other RMS services provided for Spanish speaking, blacks, and other minorities, or females. The reports, in effect, told the reader little about the treatment of minorities and women by RMS offices.[1261]

After these followup reviews DOL took little further action. It set up an advocacy system to ensure that complaints against the RMS were handled promptly.[1262] Although DOL has no hard evidence that the deficiencies found in RMS have all been corrected, no further followup reviews were planned. DOL oversight of the Federal court's order was unsuccessful[1263] and the court asked the Department of Labor and

---

1261. Commission staff examined two of the 16 RMS followup reviews. Manpower Administration, Region V (Chicago), Rural Manpower Reviews of the Rural Manpower Services of Anderson, Indiana, local office, Mar. 20, 1973 and of Lafayette, Indiana, local office, Mar. 6-7, 1973.

1262. Telephone interview with Elmer Golts, Chief, Division of Rural Manpower Services, Manpower Administration, DOL, Sept. 27, 1974.

1263. The Urban Law Institute of Antioch School of Law, after conducting a series of onsite reviews, concluded that:

> ...neither the On-Site Report, nor the underlying data provides any basis for concluding that substantial compliance with the Court's Order of May 31 has been achieved. The assertions made in the On-Site Report by the defendant do not demonstrate either logically or empirically that the discrimination and illegal practices enjoined by the Court have been substantially eliminated or even significantly alleviated over the past months.
>
> Amicus curia memorandum filed by Edgar S. Cahn, Attorney, Urban Law Institute of Antioch School of Law, Apr. 18, 1974. NAACP Western Region v. Peter J. Brennan, supra note 1252.

the Migrant Legal Action Program to reach an agreement as to how the order should be monitored, so as to avoid a prolonged trial. A consent decree was agreed upon on August 9, 1974.[1264] Under this agreement the Department of Labor was given 60 days to establish a special review committee to review compliance with the court order. The committee is comprised of three members selected by the Department of Labor, including one from the Office of the Secretary or Under Secretary; three selected by the plaintiffs, and a seventh representative to be chosen by the first six.[1265] The committee is required to meet quarterly for two years from its establishment and to file semiannual reports with the court. As of mid-September 1974, it appeared that the Department of Labor had not asked any representative from the DEEO to assist this committee.[1266]

F. Corrective Action

It is clear that the Manpower Administration has failed to take the steps necessary to ensure that all civil rights violations are corrected in a timely manner. The findings of its 1972 and 1973 reviews

---

1264. NAACP Western Region v. Peter J. Brennan, supra note 1252. Order issued by Judge Charles R. Richey, Aug. 9, 1974. One issue not included in the decree, because agreement had not been reached, was that of whether the judge's order should be extended to manpower training programs funded under CETA. Herrmann interview, supra note 1242.

1265. This person serves as chairperson of the committee.

1266. This is inferred because the DEEO had no up-to-date information on the status of this lawsuit. Chapin and Pfaus interview, supra note 1137.

are those which have been repeated year after year,[1267] even in the same offices.[1268]

The corrective action necessary would appear to be fairly straightforward. After any review in which Title VI violations are uncovered, the offending State agency should promptly be informed of its noncompliance. If corrective action is not forthcoming in a reasonable time,[1269] Federal funds to the noncompliant employment

---

1267. For example, over 100 compliance reviews in 47 States and more than 200 complaint investigations, all conducted by the Office of Equal Opportunity for Manpower Programs from November 1966 to October 1967, revealed a wide variety of discriminatory practices. The Manpower Administration found that black applicants with college or even graduate degrees were consistently assigned occupational classifications for low-skilled jobs, often as casual laborers or domestic day workers. In contrast, nonminority applicants with the same or even inferior qualifications were assigned higher classifications.

The Manpower Administration found that referrals were made to employers on the basis of race. Minorities were given fewer referrals than nonminorities and to lower-paying jobs. Blacks were not referred to jobs in retail stores, banks, financial loan firms, and other businesses. Black applicants were counseled toward menial jobs despite qualifications for employment at higher levels. Counseling services for blacks were inferior to those of whites. Segregated facilities were common. In one office, black and white staff were segregated by a planter. Services were provided at county courthouses with segregated restrooms and drinking fountains. Applications cards bore comments on hair length and color, skin color, and appearance which suggested race. Racial and sexually discriminatory job orders were accepted. See Equality of Opportunity in Manpower Programs, supra note 1227, and see also Department of Labor, Manpower Administration, Report on the Office of Equal Employment Opportunity (Nov. 1, 1967 to Dec. 31, 1970).

1268. This was true in Huntsville, Ala., Reno, Nev., and Tucson, Ariz. ES offices in these cities are discussed on p. 461 and p. 464 infra.

1269. Sixty days might be allowed for the State agency to develop a comprehensive action plan for remedying all Title VI problems. Another 180 days might be allowed for execution of the major elements of the plan and substantial correction of all violations. A major weakness of Federal agency Title VI regulations is that they do not set any time limits for securing full compliance.

service should be terminated.[1270]

Indeed, this is essentially what is provided for by DOL's Title VI regulations. Those regulations provide that the Secretary will:

> make a prompt investigation whenever a compliance review, report, complaint or any other information indicates a possible failure to comply with this part. If /such/ an investigation...indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means wherever possible. If it has been determined that the matter cannot be resolved by informal means...compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law.[1271]

The Manpower Administration has often failed to provide prompt formal notification to the employment services where MA investigations indicate a failure to comply with Title VI or with the Manpower Administration's regulations implementing Title VI. In some instances the EEOR's have attempted to effect correction informally,[1272] and, thus, there is no record

---

1270. An order suspending, terminating, or refusing to grant or continue Federal financial assistance cannot become effective, however:

> until (1) the Secretary has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary, and (4) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. 29 C.F.R. § 31.8 (b) (1974).

1271. 29 C.F.R. § 31.8(c)(d) and 31.9(a), (1973).

1272. The formal notification begins the administrative process which would lead to fund termination of a noncomplying State agency. See note 1270 supra.

of the violation and no follow up to ensure that corrections are made. Moreover, in these cases there is no written notification to the State administrator of the ES that such deficiencies should be corrected in all ES offices with the State.

Usually, however, the first action by the MA where it finds a Title VI violation has been for the Assistant Regional Director of the Manpower Administration to write to the State ES administrator informing him or her of the problems and making recommendations for their improvement.[1273] This communication is not a formal notification of noncompliance[1274] and may be followed by months of discussions before corrective action is taken.[1275] Rarely do the regional offices provide State agencies with formal notification of noncompliance. A formal notification of noncompliance would be sent to the recipient only if DOL had determined that compliance could not be voluntarily achieved. DOL is reluctant to conclude that its negotiations are not productive.

1273. Chapin and Pfaus interview, supra note 1137. In addition, the EEOR provides this information informally to the manager of the employment service office in a "close out conference" at the end of each review.

1274. The regional office does, however, have the authority to provide the State ES with a formal notification of noncompliance. Chapin and Pfaus interview, supra note 1137.

1275. Chapin and Pfaus interview, supra note 1137.

In fiscal year 1973, the Manpower Administration provided only these seven local ES offices with formal notification of noncompliance or probable noncompliance[1276] with Title VI: Huntsville, Alabama; Charleston and Spartanburg, South Carolina; Asheville, North Carolina; Bloomington, Indiana; and Malvern and Forrest City, Arkansas.[1277] It would appear, however, that the number of findings of noncompliance made by DOL in fiscal year 1973 should have been considerably greater. The problems found in these offices were also found in other ES offices throughout the country.[1278] For example, in October 1972, the Huntsville, Alabama, ES office was reviewed by the Region IV (Atlanta) EEO Unit and the findings were listed as: lack of minority staff; lack of EO knowledge

---

1276. A recipient of Federal funds which is in noncompliance with Title VI is a recipient which is engaged in an activity or practice in violation of Title VI. When a recipient is found in probable noncompliance by a Federal agency, this means that the agency is factually unsure of what the recipient is doing, or uncertain of what Title VI requires. Nonetheless, Manpower Administration officials stated that most regional offices do not make a clear distinction between "noncompliance" and "probable noncompliance" and that there is likely to be no rationale behind a regional office's choice of terminology. Chapin and Pfaus interview, supra note 1137. Indeed, DOL regional staff gave a wide variety of answers when asked why one term might be used in preference to the other. One regional staff member stated that "probable noncompliance" referred to unintentional discrimination, while "noncompliance" referred to intentional discrimination. Thus, for example, she would be likely to include deliberate undercoding of minorities as "noncompliance" and use of unvalidated test without awareness that the tests were discriminatory as "probable noncompliance." Another regional staff member stated that "noncompliance" was used when Title VI violations had occurred after the ES had spent DOL funds and "probable noncompliance" was used if discrimination was found where DOL funds had not yet been spent.

1277. DOL response, supra note 1118. The Washington office staff stated that although they were uncertain, they believe that no findings of noncompliance were made in fiscal year 1974. Chapin and Pfaus interview, supra note 1137.

1278. See p. 443 supra for a description of some of the other findings made in ES offices in fiscal year 1973.

by staff; separate files for domestic workers;[1279] segregated waiting areas; and no control list[1280] for discriminatory orders.[1281]

Similarly, Region IV EEO staff found that in the Charleston, South Carolina, office in November 1972 the minority staffing goal was set too low; there was no control list; and there was lack of equal opportunity training. Region VI found these deficiencies in the Forrest City, Arkansas, ES office as of October 1972: inadequate referral of minorities to jobs; discrimination against females in referrals; and entry codes and

---

1279. By using separate files for domestic workers, persons who were qualified for other work but would accept a position as domestic workers would be likely to be considered only for positions as domestic workers.

1280. DOL's Compliance Officers Handbook states:

> Any job order that indicates race, either white or nonwhite, as a requirement or which contains job specifications requiring a member of a particular race, is considered a discriminatory order. Any ES office which serves such an order is in violation of Title VI of the Civil Rights Act....Compliance Officers Handbook, supra note 1092, at 51.

If such an order is received, the employer trying to fill the order is supposed to be placed on a control list and may not be served by the ES until the employer corrects the discriminatory order and promises, in writing, not to discriminate. DOL requires that any employer who engages in any form of racial or ethnic or sex discrimination be placed on the control list, but DOL officials are not directed to review each employer submitting a job order to ensure that the employer does not discriminate. Thus, if employers are placed on the control list, it would be only for blatant discrimination which happened to come to the attention of the EEOR such as submitting a discriminatory job order or maintaining separate restrooms for blacks and whites. Chapin interview, supra note 1204. There is no requirement that State employment services review affirmative action plans of the employers they serve to ensure that these employers do not discriminate. The Montana State Advisory Committee to this Commission has commented on the need for such review, Montana State Advisory Committee to U.S. Commission on Civil Rights, Employment Practices in Montana: The Effects on American Indians and Women (August 1974).

1281. DOL response, supra note 1118.

testing based on sex.[1282] Indeed, even ES staff did not know why these offices had been singled out, as being in noncompliance or probable noncompliance, from a large number of offices with similar problems.[1283]

1282. Other findings in Asheville, North Carolina, in September 1972; Spartanburg, South Carolina in September 1972; Bloomington, Indiana in August 1972; and Malvern, Arkansas, in October 1972 were similar. Examples of findings in those ES offices were: few minority staff; insufficient minority referrals; and inadequate minority coding. DOL response, supra note 1118 and telephone interview with Linda Norris, Equal Employment Opportunity Representative, Manpower Administration, Atlanta Regional Office, DOL, Sept. 19, 1974.

1283. Id.

Another problem which has prevented the prompt remedy of Title VI violations is that the recommendations drafted by the regional staff in response to their findings have been alarmingly poor. For example, in Huntsville, Alabama, where MA found lack of minority staff, the MA recommended only that the State ES "fill the one staff vacancy with a minority." The Huntsville office had a staff of about 38 people, only three of whom were minority although the population of the Huntsville metropolitan area was over 16 percent minority[1284] and the clientele served was 32 percent minority.[1285] Moreover, MA did not require the development of an affirmative action plan with goals and timetables. As of June 1974, only 5 of the 46 ES staff members (11 percent) were minority.[1286]

In other equally disturbing cases the Manpower Administration merely reiterated its findings by combining them with simplistic terms to create such recommendations as "improve minority staffing" and "improve EO training."[1287] Some recommendations were so weak as to state simply "erase above problems," or to call for "removal of all above deficiencies." Overall, the recommendations were quite nebulous and lacking in specificity.

1284. According to the 1970 census, in 1970 the total population of the Huntsville metropolitan area was 228,289. Of these, 35,120 persons were black; 120, Native American; 396, Asian American; and 1,737, of Spanish speaking background.

1285. Telephone interview with Warren Robeson, Personnel Management Advisor and Chief, Personnel and Training, Manpower Administration, Atlanta Regional Office, DOL, Jan. 15, 1975

1286. Id.

1287. Unless State agencies are given more specific advice, for example, concerning the amount or type of training to be provided, State agencies will not know how to implement the recommendations for training.

Another reason for continual violations in the employment service is that in response to regional office findings, State Employment Services often provide flimsy excuses for their illegal actions which are accepted by the regional offices. For example, in response to a finding of undercoding in Bloomington, Indiana, the Bloomington ES responded that minorities were provided with only one job code to expedite their placement.[1288] Since the greater the number of qualifications coded on the applicant's card, the greater the job possibilities for this person, it is difficult to see how undercoding would improve the applicant's chances of finding a job quickly. Yet this excuse was accepted by the regional equal opportunity staff.

Similarly, in Huntsville, Alabama, segregated waiting areas were explained by the State agency as being separate waiting areas for casual[1289] and regular workers. However, the casual workers were almost all black and the regular workers largely white. As long as the waiting areas remained separated, blacks were likely to perceive that casual work was the only work available to them. In response to MA's

---

1288. Telephone interview with Daniel Harley, Equal Employment Opportunity Representative, Manpower Administration, Chicago Regional Office, DOL, Sept. 19, 1974. DOL requires that all job experience be coded on the application card.

1289. "Casual" work is defined by the Manpower Administration as being only for one or two days duration. Chapin and Pfaus interview, supra note 1137.

requirement that the separate waiting areas be eliminated, the Huntsville ES stated that when this had been tried, it created too much confusion, since its office was small.[1290] The regional office talked vaguely of of the possibility of the ES moving to a larger building, tacitly accepting the ES argument that under the present conditions the waiting areas could not be conveniently combined.

In some cases where DOL staff found Title VI violations, no followup reviews were conducted. For example, the Chicago office staff did not know if a followup review had been conducted in Bloomington, Indiana.[1291] Further, where followup reviews were conducted they sometimes revealed that the required corrective action had not been taken by the employment service office. For example, although the Huntsville, Alabama, ES had been instructed to increase its minority staffing, months after the recommendations had been made, the number of minorities on the Huntsville staff had decreased.[1292]

1290. Norris interview, supra note 1282.

1291. Telephone interview with Daniel Harley, EEOR, Manpower Administration, Chicago Regional Office, DOL, Sept. 19, 1974. Telephone interview with Ira Bush, EEO Specialist, Manpower Administration, Chicago Regional Office, DOL, Sept. 20, 1974.

1292. On January 30, 1973, the Huntsville ES wrote to DOL that it would carry out DOL's recommendations. Nonetheless, a followup review on April 10, 1973, indicated that no additional minority staff had been hired and that one minority receptionist had been released from the ES for being unable to pass the State merit system test. The ES also had failed to eliminate segregated waiting areas. Norris interview, supra note 1282. As of September 1974 these problems had not been corrected.

When followup reviews revealed that deficiencies had not been corrected, the Manpower Administration continued with negotiations and technical assistance, but made no move to cut off funds of noncomplying recipients. It permitted noncompliance to continue indefinitely. For example, the followup review in March and November 1973 to the June 1972 review of Reno, Nevada, revealed that problems of sex discrimination in that office remained uncorrected.[1293] Similarly, a November 1973 review of the Tucson office of the Arizona ES revealed that Tucson had not corrected sex discrimination which had been noted in a 1971 review of the same office.[1294]

1293. Telephone interview with Gary DeRosa, Regional Director for EEO, Manpower Administration, San Francisco Regional Office, DOL, Sept. 23, 1974.

1294. Id.

What is perhaps most unconscionable is that in some cases, the State employment service failed to respond to the recommendations made by the Manpower Administration and the Manpower Administration was unaware of this. For example, although Charleston and Spartanburg, South Carolina, and Asheville, North Carolina, were apprised of their possible noncompliance in 1972, as of September 1974, these employment service offices had not responded to the recommendations and DOL had taken no action to require responses.[1295] Sometime during early 1975 the Atlanta regional office again requested a response to these recommendations.[1296] But as of April 1975, it had received no response.

1295. Telephone interview with Benjamin Jorge, Equal Employment Opportunity Representative, Manpower Administration, Atlanta Regional Office, DOL, Sept. 20, 1974. Mr. Jorge stated that no one in the Atlanta office had been aware that these responses had not been received until this Commission inquired in September 1974 about the status of these cases. He promised that action would be taken on them immediately. A followup review had earlier been scheduled in Spartanburg for November 1974, but Mr. Jorge noted that it would be necessary to obtain a response to DOL's recommendations prior to conducting the review. No followup reviews had been conducted or scheduled in Charleston or Asheville. Id.

1296. This followup request was made in direct response to this Commission staff's 1974 inquiry about the compliance status of these cities. Telephone interview with Benjamin Jorge, EEOR, MA, Atlanta Regional Office, DOL, May 1, 1975.

Chapter 7

DEPARTMENT OF TRANSPORTATION (DOT)

Part A

FEDERAL HIGHWAY ADMINISTRATION (FHWA)

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

The Federal Highway Administration provides assistance to States for building interstate highways,[1297] other roads, including urban streets, and related structures, such as bridges, bikeways, pedestrian walkways, parking facilities, and rest areas. FHWA assistance may be used for planning, surveying, research, design, right-of-way acquisition, construction, reconstruction, repair, and roadside beautification.[1298]

1297. Interstate highways scheduled to be completed by 1980 will extend for 42,500 miles at a total cost of more than $80 billion.

1298. Federal-Aid Highway Act of 1968, 82 Stat. 815 (codified in scattered sections of 15, 23, 28 U.S.C.); Federal-Aid Highway Act of 1970, Title I, 84 Stat. 1713 (codified in scattered sections of 23, 33 U.S.C.); and Federal-Aid Highway Act of 1973, Title I, §§ 105-109, 110(a), (b), 111(a), 112-115, 116(a), 117-120, 121(a), 122, 123(a), 124(a), 125(a), 126(a), 127(a)(1), 128(a), 129(a), 132, 133(b), 137, 139, 142(a), 145(a), 148(a)-(c), (e), 150-152, 156, 157(a), 162(a), 164, 87 Stat. 253, 255-278, 280-282.

The Federal-Aid Highway program specifically provides for the construction of 42,500 miles of interstate highways and for the construction or reconstruction of primary, secondary and urban highways; which are designated as part of the Federal-Aid Highway system.

Federal-aid highway funds are apportioned to the States by statutory formula depending on the particular class of funds.[1299] These funds are used on projects which are selected by the States and which are subject to FHWA approval or disapproval at various stages in their development.[1300] The Federal Government generally pays for 90 percent of approved interstate highway projects, and the States pay the remaining 10 percent. For most other projects, the Federal share is generally 70 percent and the State share, 30 percent.[1301] In fiscal year 1974, Federal outlays for roads and highways were almost $4.5 billion,[1302] which is close to 10 percent of all Federal aid to States.

B. Civil Rights Responsibilities

Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally-assisted programs, and like other Federal agencies which provide assistance to States and other recipients, FHWA is required to effectuate that prohibition in the programs it funds.[1303] In addition, there are several other laws which require nondiscrimination in FHWA-assisted programs.

1299. DOT states that these classes include "Interstate, primary, secondary, urban, safety, etc." Letter from William T. Coleman, Jr., Secretary of Transportation, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 14, 1975.

1300. Id.

1301. Motor fuel and other automotive-based taxes are used to finance the Federal share of Federal-aid highway projects. These funds are deposited in the Highway Trust Fund, which was established exclusively for purposes of providing revenue for highway and highway-related improvements.

1302. Department of the Treasury, Federal Aid to States, Fiscal Year 1974.

1303. 42 U.S.C. § 2000d, et seq. (1970). Like other Federal agencies with Title VI responsibilities, FHWA has issued regulations implementing Title VI. 49 C.F.R. § 21.1, et seq. (1974).

Section 162(a) of the Federal-Aid Highway Act of 1973 prohibits discrimination on the basis of sex in FHWA-assisted programs.[1304] Thus, Title VI is effectively extended to cover sex discrimination. FHWA, however, has not published regulations in the Federal Register stating what actions recipients must take to implement Section 162(a).[1305]

1304. 23 U.S.C. § 324 (Supp. III, 1973). DOT stated:

> We found the inclusion of sex and employment discrimination in the report somewhat confusing, inasmuch as our authority in those areas is generally based not on Title VI but rather on provisions of Federal-aid highway legislation. For example, the Federal-Aid Highway Act of 1973 contains the prohibition against sex discrimination in FHWA and UMTA programs. Previous deficiencies in these areas may have been corrected by improved statutory authority as well as by program developments. Coleman letter, supra note 1299.

This Commission believes that the inclusion of sex discrimination is appropriate in this report. One of the matters being evaluated is the adequacy of the coverage of that law, including the need for and feasibility of expanding Title VI to include a prohibition against sex discrimination. This necessarily entails an evaluation of the enforcement of existing laws prohibiting sex discrimination in federally assisted programs. Moreover, where laws prohibit sex discrimination in federally assisted programs, these laws affect the same recipients and beneficiaries as Title VI. Since enforcement of these laws affects the enforcement of Title VI, it is important that such laws be examined in conjunction with a review of Title VI. Finally, sex discrimination and racial-ethnic discrimination are often closely connected, especially in the case of minority women who are affected by both. Any recommendations of eliminating discrimination against minority must consider both racial-ethnic and sex discrimination.

1305. DOT notes that its Civil Rights Equal Opportunity Manual mentions that Section 162(a) prohibits sex discrimination and that its contracting procedures prohibits sex discrimination. Id.

Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,[1306] Department of Transportation regulations require that dwellings located for displaced persons be "Open to all persons regardless of race, color, religion, sex, or national origin and consistent with the requirements of Title VIII of the Civil Rights Act of 1968."[1307] Thus, to the extent that persons are displaced from their homes because of the construction of FHWA-funded projects, DOT must ensure that there is nondiscrimination in replacement housing.[1308]

1306. 42 U.S.C. §§ 1415, 2473, 3307, 4601, 4602, 4621-4638, 4651-4655 and 49 U.S.C. § 1606 (1970).

1307. 49 C.F.R. § 25.17(a)(12) (1974).

1308. This requirement, in contrast to other requirements for replacement housing, is immutable. DOT requires that the dwelling be decent, safe, and sanitary, but provides that in cases of extreme hardship, its requirement may be waived. No such waiver is provided for in the case of the open housing requirement. 49 C.F.R. § 25.17(c) (1974).

In the last 50 years highway construction and automobile production have revolutionized the Nation, creating vast new opportunities for growth and enabling industry to locate outside urban areas.[1309] The highway boom which has brought with it a rise in suburban housing and employment has been less to the advantage of minorities and women than it has to the rest of the country. As of 1972, 80 percent of American households owned automobiles. Only about 50 percent of all minority families, however, owned cars.[1310] In 1970,[1311] 68.4 percent of all whites,[1312]

1309. The relationship between the rise in automobiles and the exodus of industry to the suburbs is discussed in U.S. Commission on Civil Rights, Federal Installations and Equal Housing Opportunity (1970); Helen Leavitt, Superhighway-Superhoax (1970); and Lewis Mumford, The Highway and the City (1963). In 1920 there were slightly more than 8 million motor vehicle registrations. In 1973, there were nearly 124.5 million. United States Bureau of the Census, Department of Commerce, Statistical Abstract of the United States: 1974 (95th Edition) 555.

1310. Statistics on automobile ownership are presented in note 1416 infra.

1311. DOT stated:

> /We r/ecommend that the statistics provided be consistent as to the time period. In one case, 1972 data are shown. In another case, 1970 data are reflected. For comparability, the data should be consistent with the requirements of 42 U.S.C. 3601-3691 and 3631. Coleman letter, supra note 1299.

This Commission attempted to use the most recent data available at the time the report was written. There is little reason to expect that patterns of automobile ownership and use will alter dramatically between 1970 and 1972.

1312. Data for whites do not include persons of Spanish speaking background.

but only 47.0 percent of all blacks and 61.6 percent of persons of Spanish speaking background drove their own automobiles to work.[1313] Similarly, 73.7 percent of all employed males, but only 53.7 percent of all employed females drove their own automobiles to work.[1314] Thus, although minorities derive some benefit from highways,[1315] they are not the principal highway users.

1313. U.S. Bureau of the Census, Department of Commerce, Census of Population: 1970, Vol. I, Characteristics of the Population, United States Summary, Table 87. DOT queried this Commission:

> What inferences are intended to be made from /these statistics/? Does this mean whites are not near or do not choose to use public transportation, or that a greater percentage of minorities are near jobs which they can walk or prefer public transportation? Coleman letter, supra note 1299.

This Commission notes that these statistics show that nonminorities derive proportionately more benefit from public roads than do minorities.

1314. U.S. Bureau of the Census, Department of Commerce, Census of Population, 1970, Vol. I, Characteristics of the Population, United States Summary, at Table 242.

1315. DOT stated:

> While white suburbanites may use urban freeways for commuting to work, that is not the sole requirement to support the freeways. Urban freeways are used by vacationers, business people, ambulances, and fire trucks. Commercial trucks bringing supplies and passenger buses providing transportation are vital to the entire urban community, particularly the ghetto area. Coleman letter, supra note 1299.

In addition to bringing benefits, highway construction can have adverse effects on the communities surrounding it,[1316] and has sometimes taken a disproportionately heavy toll from inner-city minority neighborhoods. Highways surrounding cities define the boundaries between the white suburbs and the more heavily populated inner-city areas; urban freeways have disrupted ghettos in order to facilitate travel by white suburbanites from their homes to downtown employment; minorities have been forced to relocate because of highway construction;[1317] access to minority business and neighboorhoods has been impeded; and within

---

1316. DOT commented:

> Highways are essential to the economy, defense, and social life of the entire country. Where highways are built, there must be some relocation of people and businesses. Whites as well as minorities must be relocated. Id.

1317. DOT stated:

> The statement /that "minorities have been forced to relocate because of highway construction"/, intimates that highways are built only where minorities are affected, or that highways should be built only through white communities so no minorities would need to be relocated. This does not truly reflect the total highway situation. In many cases, through the required relocation, the individual's housing standards are upgraded. Coleman letter, supra note 1299.

This Commission believes that, in many cases, the negative effects of highway construction have disproportionately impacted upon minority communities.

cities barriers have been constructed between minority and nonminority areas.[1318]

Under Title VI and FHWA's other civil rights mandates, FHWA has a responsibility to ensure that minorities and women are not denied the benefits of FHWA assistance and that FHWA-assisted programs do not exert a disproportionately negative impact upon them. Clearly, FHWA has a responsibility to ensure that federally-aided highways do not increase or accelerate the racial-ethnic polarization of urban areas.[1319]

1318. U.S. Commission on Civil Rights, Above Property Rights 15-16 (December 1972) and Equal Opportunity in Suburbia 44-46 (July 1974); and Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, Route 128: Boston's Road to Segregation (January 1975). In La Raza Unida v. Volpe, a group of Mexican Americans in the Haywood, California, area filed a class action suit and successfully enjoined proposed Route 238 on the basis that relocation assistance was inadequate and that displacees would confront a discriminatory and tight housing market. The court held that the harm to the plaintiffs would be irreparable and ordered that the highway construction be discontinued. 337 F. Supp. 221 (N.D. Cal. 1971).

1319. DOT stated:

> /This/ sentence may be true in some instances, but not all. The Washington beltway surrounds the city of Washington, but there is not black on one side and white on the other. All city highways or all beltways of all cities do not divide whites and blacks. Coleman letter, supra note 1299.

The Commission notes that within the Washington, D.C., metropolitan area, blacks are concentrated disproportionately within the urban side of the beltway. Moreover, the fact that some beltways may not contribute to racial or ethnic polarization does not obviate the need for FHWA to execute its responsibilities in the areas in which highways contribute to such polarization.

In a recent case, DOT reported that it expressed concern about a proposed route which was projected to have a disparate impact upon minorities,[1320] but often the Department of Transportation has denied such responsibilities.[1321] FHWA staff have stated, for example, that FHWA's

---

1320. DOT stated:

> In the recent case of alternate route 4A in Fort Madison, Iowa, the Director of Civil Rights in effect advised FHWA and the Iowa State Highway Commission that a complaint with regard to a proposed route, which route included among the displacees a greater percentage of minority persons than the percentage of the minority population in the entire city, would be considered as making out a prima facie case of unlawful discrimination. Thus, the route could not be approved unless there was adequate countervailing, nonracial justification. Coleman letter, supra note 1299.

1321. Testimony of August Schofer, Regional Administrator, Federal Highway Administration, Baltimore Regional Office, Department of Transportation, Hearing Before the U.S. Commission on Civil Rights, Baltimore, Maryland (1970) and testimonies of John Volpe, Secretary of Transportation and Frank Turner, Administrator, Federal Highway Administration, Department of Transportation, Hearing Before the U.S. Commission on Civil Rights, Washington, D.C. (1971).

mandate does not permit FHWA to impose industrial hiring or fair housing requirements upon communities which may experience enlarged commercial opportunities because of better roads.[1322] The main emphasis of FHWA's civil rights program has been on issues such as minority employment in highway construction projects[1323] and satisfactory relocation of minority displacees.

1322. Department of Transportation response to U.S. Commission on Civil Rights questionnaire, June 28, 1973 [hereinafter referred to as DOT response].

1323. FHWA reported that due to its priorities and staffing, a determination was made that the employment practices of direct Federal and Federal-aid contractors (approximately 5,000 annually) warranted primary staff attention. FHWA holds that the greatest immediate benefit to the minority population affected by the highway program will be achieved through the equal employment opportunity program as required by Executive Order 11246. FHWA indicated that its primary effort with regard to Title VI enforcement has been directed to assuring that the States do not discriminate in program areas such as the selection of contractors, route location, relocation assistance programs, and highway planning. Id.

In 1974 FHWA regional directors were informed that FHWA's priorities were to: (a) increase minority hiring and promotion by State highway departments, (b) establish an equal opportunity officer in State highway departments with access to the top State highway official, and (c) increase the number of minority contractors and consultants used by State highway departments. Memorandum from L. P. Lamm, Executive Director, FHWA, DOT, to FHWA regional administrators, Action: Civil Rights and Equal Opportunity Policy, Mar. 14, 1974.

Section 136(b) of the Federal-Aid Highway Act of 1970 requires that the Secretary of Transportation develop guidelines to assure full consideration of possible adverse economic, social, and environmental effects in the development of federally-aided highway systems. The guidelines, promulgated in June 1973, require each State highway agency to develop an Action Plan describing the proposed development of highway projects.[1324] DOT stated:

> Process Guidelines were initially promulgated in 1972 and subsequently revised in 1974, to provide guidance to the State highway agencies in fulfillment of the requirements of the 1970 Highway Act. The States were required to prepare an "Action Plan" in which they outlined their procedures to ensure that economic, social, and environmental effects were fully considered in their highway project development procedures. 1325

Thus, the act, in combination with Title VI, might be used to ensure that federally-aided highways are planned around the needs of all groups, including minorities and women. FHWA, however, has not made as much use of these laws as we believe it should, although DOT believes that it has done what is required.[1326] DOT commented:

1324. 23 C.F.R. § 25.1 et seq. (1974).

1325. Id.

1326. Id. DOT stated:

> The...areas of concern /mentioned in note 1325 supra/ were fully addressed in workshops on the development of Action Plans and were part of the field reviews conducted by FHWA Regional and Division Offices of State Action Plans. We, therefore, believe that all of the Action Plans fully cover these areas of concern. Id.

> We cannot agree...that FHWA is not fully utilizing Section 136(b) of the Federal-Aid Highway Act of 1970 to include minorities and women....We believe FHWA has taken positive steps in this area....1327

DOT informed this Commission:

> The guidelines promulgated by FHWA specifically require that:
>
> (1) Procedures be developed by the States to ensure that timely information be provided on social, economic, and environmental effects which indicate the manner and extent to which specific groups and interests, including minority groups, are beneficially and/or adversely affected by alternative proposed improvements.
>
> (2) Alternatives which might minimize or avoid adverse social, economic, or environmental effects should be studied and described, particularly in terms of impacts upon specific groups and in relationship to Title VI of Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968.
>
> (3) Information is made available to the public concerning the effects of alternatives, both beneficial and adverse, and extent to which specific groups and interests, including minority groups, are affected. 1328

The Commission notes that while the guidelines appear to require that States analyze the adverse impacts upon minorities of the actions proposed, they require only that alternative solutions to such adverse

---

1327. Id.

1328. Coleman letter, supra note 1299.

1329

impacts be studied. They do not require that a solution be adopted.

We believe that the following additions should be made to the guidelines:

a. The guidelines should require that the Action Plan demonstrates how minorities and women will be included in the public planning process. If the interests of minorities and women were represented in the planning phases, some possibly discriminatory effects of proposed FHWA funded projects might be averted.

b. The guidelines should require that where an Action Plan's analysis of a proposed project indicates that the project will have a negative impact to be borne disproportionately by minorities, that the State set forth the actions it will take to eliminate the inequity.

c. Where a proposed project will have an impact which violates FHWA's civil rights requirements, the project should not be permitted to continue unless the anticipated illegal impact can be avoided. The Action Plan should include procedures for ensuring that minorities and

---

1329. DOT noted:

> In the event that a proposal would have a significant negative impact on any group, FHPM 7-7-2 does require that this be discussed in the EIS and that there be consideration given to alternatives to avoid or mitigate such impacts for further consideration in the decisions involved in a proposal. Id.

The Commission observes that the requirement is, thus, only that remedies for negative impacts upon minorities be considered. Remedial action is not mandatory.

women share equitably in the benefits of the proposed project. The guidelines should suggest positive actions which the State should include in its plan such as the enforcement of State laws requiring fair housing and equal employment opportunity, the elimination of exclusionary zoning laws,[1330] and the provision for adequate low and moderate income housing in suburban areas.

1330. Exclusionary zoning ordinances may limit the construction of multi-dwelling buildings, specify a minimum acreage for residential housing, or limit occupancy in private dwellings to persons related by blood or marriage. They often discriminate against such groups as racial and ethnic minorities and single women with children. See U.S. Commission on Civil Rights Equal Opportunity in Suburbia 31 (1974).

Another criticism of the guidelines is that although environmental impact statements are required, which must show the impact of the proposed projects on specific groups, including the aged, handicapped, bicyclists, and racial, ethnic, and religious minorities, there is no requirement that the impact of the proposed project upon women be considered.[1331] As of July 1975, FHWA had no plans to improve its guidelines, Action Plan, or environmental impact statement.

1331. DOT stated:

> Concerning environmental impact statements (EIS's), we do not agree that FHWA procedures for preparation of EIS's (FHPM 7-7-2) are inadequate with respect to any aspects of Title VI. As noted, EIS's are to consider the impacts of the proposal on specific groups. A list of examples of groups that may have special problems and require special consideration is included in FHPM 7-7-2. Included are low income, racial, ethnic, or religious groups. Obviously, this list of examples cannot be all inclusive. Coleman letter, supra note 1299.

II. Organization and Staffing

FHWA civil rights responsibilities are divided among a small departmental Office of Civil Rights,[1332] the FHWA Office of Civil Rights (OCR), and civil rights specialists in FHWA field offices. The departmental Office of Civil Rights is charged with establishing overall civil rights policy for DOT and monitoring the Department's performance. It is responsible for handling Title VI complaints concerning FHWA's programs, although sometimes these complaints are referred to OCR for investigation.[1333] In all other areas, its relationship to OCR is advisory.

Responsibility for writing guidelines and manuals, monitoring field office compliance reviews, and developing civil rights training programs for FHWA staff is located within OCR.[1334] This Office, which is one of

---

1332. There are 18 professionals on the staff of the departmental Office of Civil Rights, two of whom spend fulltime on Title VI matters relating to all of DOT's constituent agencies. See Exhibit 12 on p. 482 infra.

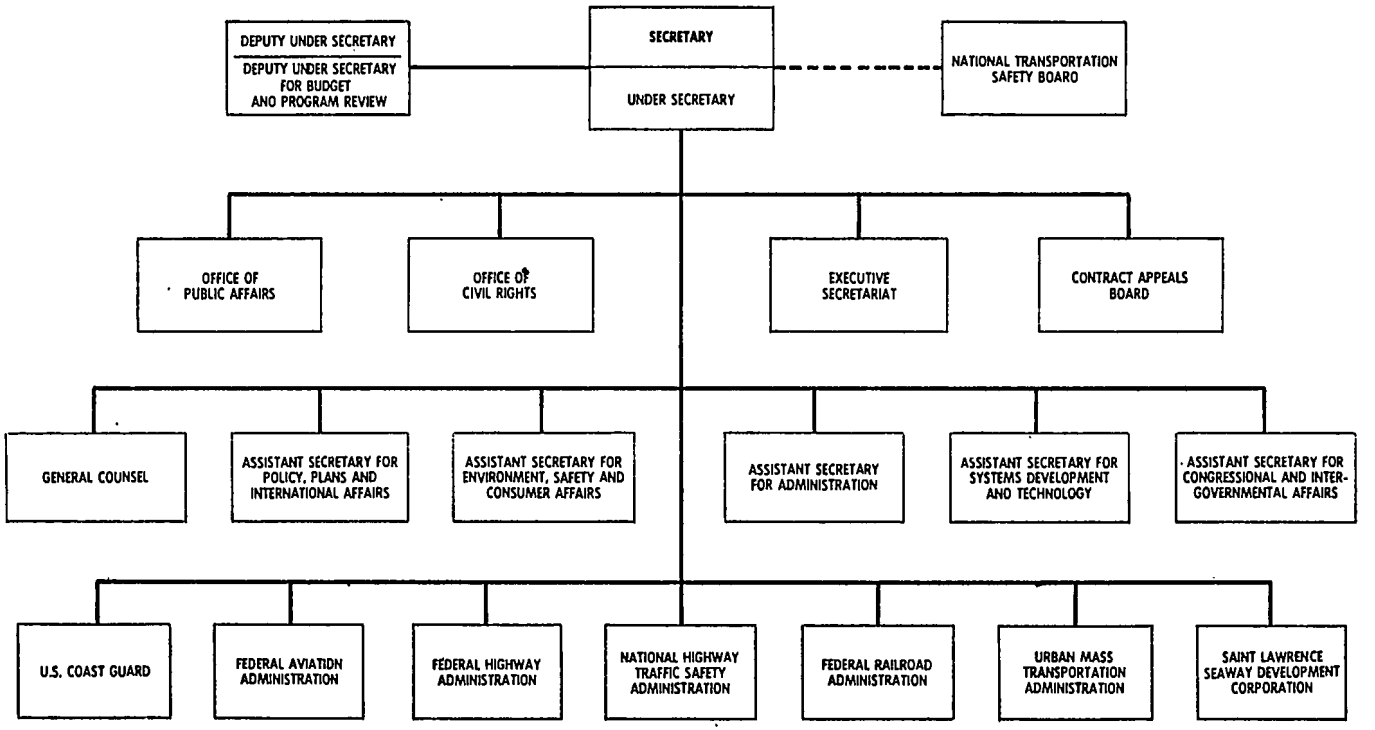
1333. FHWA receives few complaints. For example, in fiscal year 1973, it received only 19. Only two or three of these had any Title VI implications. Because there were such a small number of Title VI complaints, and because this report focuses on the FHWA civil rights office, which does not generally handle complaints, this report does not center on assessment of FHWA's complaint activities.

FHWA has updated its pamphlet, entitled "49 Questions and Answers," which gives facts about FHWA and its programs as well as information regarding the filing and processing of complaints. The revised edition entitled "68 Questions and Answers" was published in 1972 in both English and Spanish. This pamphlet is distributed to private and public organizations, colleges and universities, trade associations, Spanish-surnamed organizations and communities, State recipient organizations, Members of Congress, the Library of Congress, and FHWA regional, division, and headquarters staff.

1334. Interview with Alexander D. Gaither, Director, OCR; R. Harlan, Deputy Director, OCR; Flynn Wells, Chief, Title VI, Division, OCR; and R. Basso, Program Coordinator, OCR, FHWA, DOT, Apr. 15, 1975.

Exhibit 13

DEPARTMENT OF TRANSPORTATION



September 1974

five FHWA administrative offices,[1335] is headed by a Director[1336] who reports to the FHWA Administrator. The Director administers the overall OCR program, spending about 30 percent of his time on Title VI matters.

OCR is comprised of 4 divisions:[1337] Internal Equal Employment Opportunity, Contract Compliance, Special Programs, and Title VI. As these division names suggest, only one--Title VI--has Title VI responsibilities.[1338] As of April 1975 the total OCR professional staff numbered 19, two of whom were in the Title VI Division.[1339]

1335. The other offices include the Office of Chief Counsel and the Office of Public Affairs. See Exhibit 13, on p. 482 supra.

1336. The Director is a GS-16.

1337. These divisions are shown in Exhibit 14, on p. 484 supra.

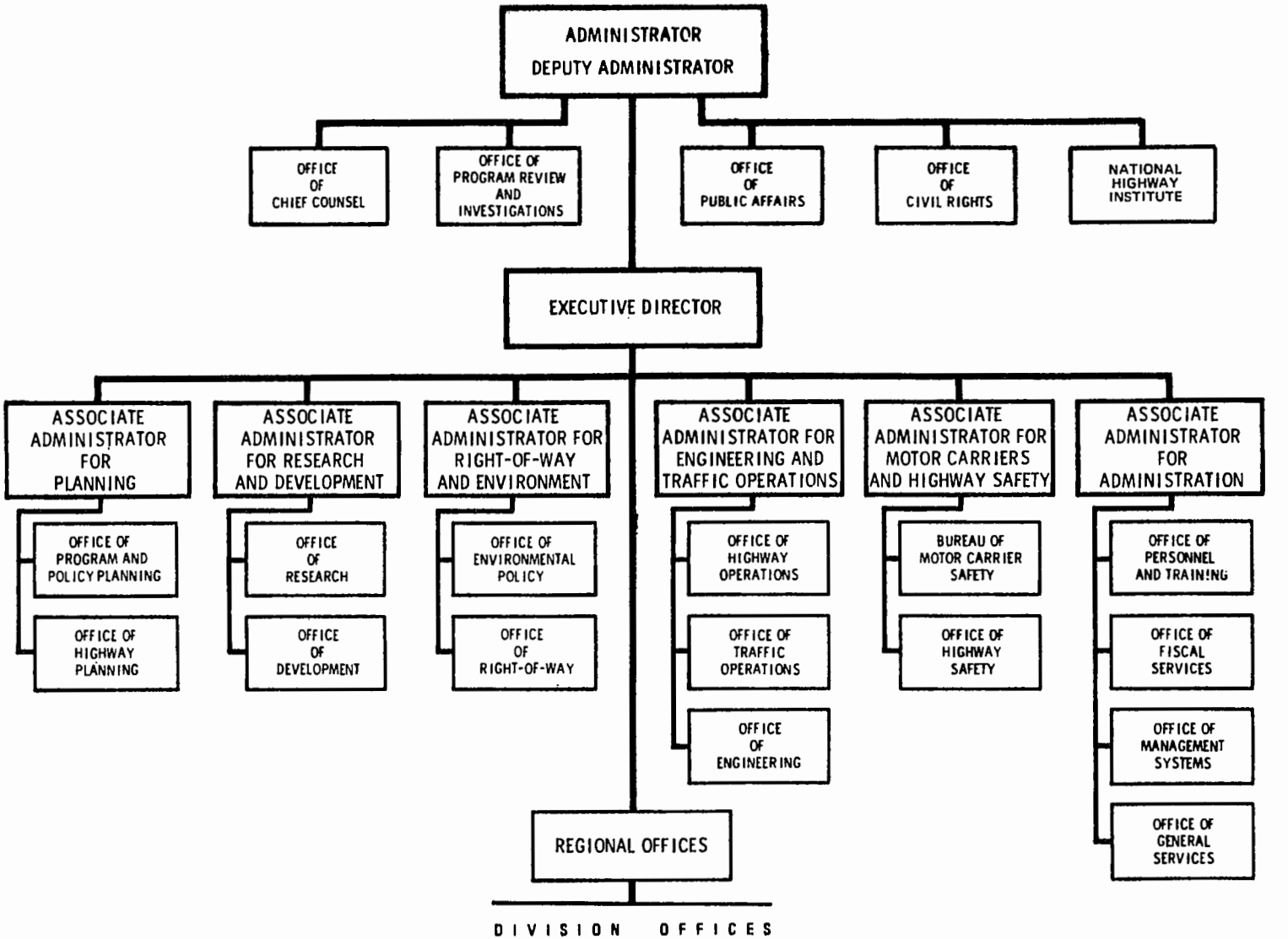
1338. The Internal Equal Employment Opportunity Division is responsible for ensuring nondiscrimination in FHWA employment. It develops and oversees implementation of FHWA's affirmative action plan, maintains statistics on the employment of minorities and women by FHWA, and establishes complaint processing procedures. The Contract Compliance Division is responsible for ensuring nondiscrimination by FHWA-assisted construction contractors. The Special Programs Division is responsible for evaluating the effectiveness of all FHWA civil rights activities. The activities of these divisions are discussed further in OCR, FHWA, DOT, Sixth Annual Report on the Status of the Civil Rights and Equal Employment Opportunity Program (December 1974).

1339. OCR, FHWA, DOT, FHWA Full-Time Civil Rights/EEO Positions as of March 25, 1975 /hereinafter referred to as FHWA Civil Rights Positions/. The Title VI Division was added to OCR in December 1973. Updated Supplement to Questions By U.S. Commission on Civil Rights, provided by Flynn Wells, Chief, Title VI Division, OCR, FHWA, DOT, Apr. 18, 1975, /hereinafter referred to as Updated Supplement/. DOT recently informed this Commission:

> As of August 18, 1975, the Office of Civil Rights was successful in filling the professional vacancy position in the Title VI Division, thus increasing the professional staff to three persons. Letter from William T. Coleman, Jr., Secretary of Transportation to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Oct. 9, 1975.

Exhibit 14

FEDERAL HIGHWAY ADMINISTRATION

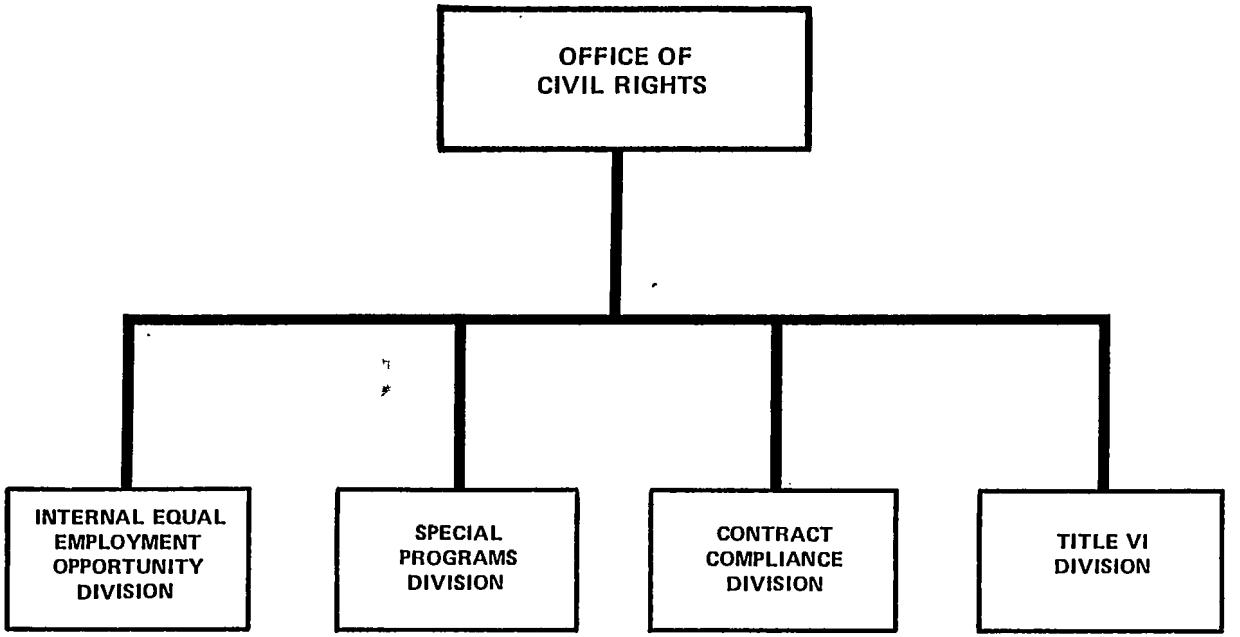


April 1975

Exhibit 15

FEDERAL HIGHWAY ADMINISTRATION

OFFICE OF CIVIL RIGHTS



April 1975

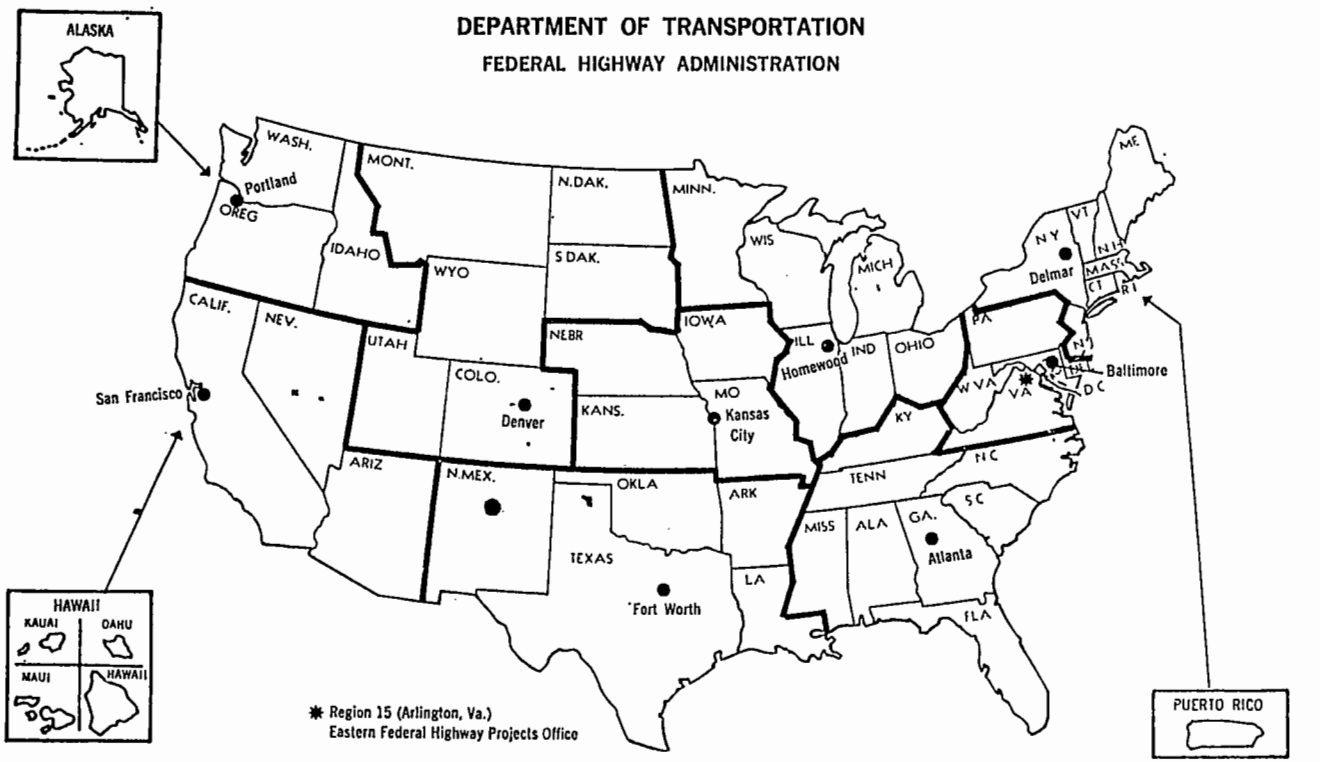
Equal opportunity staff with responsibility for implementing FHWA's civil rights program are located in all of FHWA's 10 regional offices and 13 of FHWA's 52 division offices.[1340] Program staff in all regional and division offices have responsibility for conducting civil rights compliance reviews in conjunction with their reviews of grantee performance. Regional and divisional equal opportunity staff are responsible for ensuring that those reviews are adequate by participating in the reviews and providing technical assistance to the program staff. The regional equal opportunity and program staff report to the Regional FHWA Administrator, the division equal opportunity and program staff report to the Division Engineers, who head the division offices.

The number of professional equal opportunity staff in the regional offices varies from 1 person in the Arlington, Virginia, office to 7 in the Atlanta, Georgia, office, with a total of 36 in all 10 offices. There is 1 professional equal opportunity staff member in each of the 13 FHWA division offices.[1341] Thus, a total of 49 professionals in FHWA's field offices had fulltime equal opportunity responsibilities.

1340. See map (Exhibit 16) on p. 487 for location of FHWA's regional offices. FHWA has division offices in each State and the District of Columbia. The 13 offices with equal opportunity staff were located in West Virginia, Pennsylvania, Michigan, Ohio, Arkansas, Oklahoma, New Mexico, Texas, Kansas, Missouri, Nebraska, Oregon, and Washington.

1341. FHWA Civil Rights Positions, supra note 1339.

Exhibit 16


DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
ALASKA
HAWAII
KAUAI
OAHU
MAUI
HAWAII
WASH.
Portland
OREG
MONT.
N.DAK.
MINN.
IDAHO
WYO
S DAK.
WIS
MICH
CALIF.
NEV.
UTAH
NEBR
IOWA
ILL
IND
OHIO
San Francisco
COLO.
Denver
KANS.
MO
Kansas City
Homewood
ARIZ
N.MEX.
OKLA
ARK
TENN
MISS
ALA
GA.
Atlanta
TEXAS
Fort Worth
LA
KY
W VA
VA
NC
SC
FLA
PA
NY
Delmar
ME
VT
NH
MASS
CT
RI
NJ
DEL
MD
D C
Baltimore
PUERTO RICO
✱ Region 15 (Arlington, Va.)
Eastern Federal Highway Projects Office

As of April 1975, nine regional officials spent more than 50 percent of their time on Title VI,[1342] one in each regional office except for the office in Arlington, Virginia. OCR staff stated that they could not estimate what percentage of the remaining equal opportunity staff's time was spent on Title VI.[1343]

It, thus, appears that FHWA's Title VI effort is understaffed. This view is shared by OCR staff who believe that FHWA's entire equal opportunity staff, a total of 96 positions,[1344] is too small. They note that there has been almost a 40 percent increase from 1973, when FHWA allocated nearly 70 positions for civil rights. There are, however, many civil rights problems with which OCR will not become thoroughly involved unless its staffing is increased. These include sex discrimination and review of Title VI compliance by universities receiving FHWA funds. They believe that, overall, attention to Title VI suffers because of lack of staff.[1345]

1342. Updated Supplement, supra note 1339.

1343. Gaither et al. interview, supra note 1334. DOT cautioned, however,

> The question of additional civil rights staff is currently under study internally, and no conclusions as to what increases should be recommended have been made at this time. Coleman letter, supra note 1299.

1344. Twenty-eight of these positions are for clerical staff.

1345. Gaither et al. interview, supra note 1334.

The Office of Civil Rights has offered a variety of civil rights training to FHWA civil rights staff. OCR conducted workshops in Washington, D.C., in January 1974 and 1975.[1346] There were Title VI sessions in each of these workshops. Representatives from the Departments of Justice and Housing and Urban Development and FHWA program offices gave presentations on Title VI.[1347] Civil rights staff in headquarters

---

1346. Midwinter FHWA/State Highway and Transportation Departments Civil Rights Workshops, January 19-23, 1974, and January 13-16, 1975. DOT stated:

> The workshops, including sessions on Title VI, were also held in 1973, 1972, 1971, 1970, and 1969.... The Civil Rights' staff not only received training in Title VI prior to 1973, but developed and presented training in Title VI to FHWA personnel assigned to other principal program areas. In addition, the Office of Civil Rights has developed a 1-year training program which includes 3 weeks of classroom training and 49 weeks of on-the-job training. Title VI is a major portion of this training program. As an example, 40 of the 120 hours of classroom training is devoted to Title VI. Coleman letter, supra note 1299.

1347. Other workshop participants included representatives from DOT's departmental Office of Civil Rights and State highway departments.

and field offices also participated in a number of civil rights Title VI training sessions during the past 2 years.

The Title VI Division Chief attended a 3-day conference on Civil Rights Program Management on November 6-8, 1974. This conference was sponsored by DOT's departmental Office of Civil Rights. Attendees included representatives from the departmental Office of Civil Rights and representatives from the Offices of Civil Rights in DOT's constituent agencies. During 1974-75, the Title VI Division staff attended nine equal employment opportunity seminars sponsored by the departmental Office of Civil Rights. Participants included representatives from the Women's Bureau of the Department of Labor, Department of Justice, the Spanish Speaking Program of the Civil Service Commission, Housing and Urban Development, the National Council on Indian Opportunity, and this Commission.

DOT also informed this Commission:

> In addition to the above listed training, each FHWA supervisor is required to take supervisor/management training which includes equal employment training. Civil Rights' staff and other program office staff instruct in various courses including equal opportunity training. Most of the Civil Rights' staff and all of the designated Equal Employment Opportunity /EEO/ Counselors have received specific training for EEO Counselors. Federal aid field personnel have received training in equal opportunity from region and headquarters Civil Rights' personnel. All supervisors, GS-13 and above, are presently receiving training in Equal Employment Opportunity Awareness. A total of 26 seminars will have been conducted prior to the end of /fiscal year/ 76. 1348

1348. Coleman letter, supra note 1299.

It is commendable that FHWA has such a program for equal employment opportunity training. However, it is not within the scope of this report to evaluate this training as it does not specifically relate to Title VI.

III. Compliance Reviews

A. Statewide Reviews

From fiscal year 1971 through fiscal year 1973, FHWA's principal strategy for ensuring compliance with Title VI was to conduct postaward

statewide compliance reviews.[1349] By fiscal year 1974 such reviews had been completed in all 50 States, the District of Columbia, and Puerto Rico. Aspects of these reviews appeared superficial. For example, they included a brief examination of the State highway department's appraisal of the values of property it planned to acquire. When FHWA

1349. These reviews are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--A Reassessment 398-400 (1973) /hereinafter referred to as Reassessment report/. DOT described these reviews:

> The areas in Title VI are reviewed to make sure the States and local municipalities have an approved equal opportunity affirmative action policy statement, that the clauses of appendix A of Standard DOT Title VI assurances are in appraisal contracts, that the clauses of appendix B of Standard DOT Title VI assurances are in deeds effecting a transfer of real property. Other areas of review at the State and municipality level are: If the State has received any specific civil rights complaints, if so, what action or procedure has the State established to resolve the complaint or what action was necessary to resolve the matter; States' policies and procedures to ensure employment of individuals to perform right-of-way functions and the number of minorities presently employed by the agency, do they have a qualified minority appraiser on the staff or the list and what are they doing about hiring more; and are appraisal standards and practices uniformly applied. Coleman letter, supra note 1299.

found that "standard appraisal methodolgy"[1350] had been used for assessing the value of property[1351] owned by minorities and nonminorities and that property owners believed the appraisals to have been equitable, FHWA concluded that appraisals were nondiscriminatory.[1352] In defense of its procedures, DOT stated:

> The appraisal methodology--the appraisal procedures--contains protection for all owners. Where the standard professional appraisal procedures are followed, discrimination does not occur.
>
> It is the objective of the FHWA surveillance of the program to see that these procedures are properly followed. The FHWA appraisal staff is presently

---

1350. DOT stated:

> On November 19, 1941, Congress first provided that highway funds might be used to reimburse a State for real property acquired for highway purposes. On January 13, 1942, the first appraisal instruction was issued. For more than 30 years, we have promulgated instructions and worked with State highway departments in developing appraisal procedures and standards that provide fair and equal treatment to all property owners. Basic elements of appraisal methodologies are those used by the U.S. Justice Department in acquiring property for Federal purposes. The ultimate result of the appraisal process is the value of the property if bought and sold in the open market. The value is not to be affected by ownership, race, creed, color of skin, sex, or sentimental attachments. Id.

1351. DOT commented:

> Since January 7, 1971, the fair market value term has been replaced by just compensation. The FHWA appraisal practices are governed by 42 U.S.C. 4651. Congress intended that the appraisal methodology provide just compensation to all property owners. Id.

1352. See FHWA, DOT, Title VI Review, Nevada Department of Highways, Aug. 14, 1972. The same deficiency was also found in reviews of the highway departments in Michigan, Arizona, and Hawaii.

> reviewing and evaluating Title VI and appraisal review policies and procedures developed by FHWA region and division offices, State highway department of transportation and local municipalities. 1353

FHWA also stated: "The FHWA's review of appraisal methodology includes a determination that standard practices and conclusions of value are predicated on a nondiscriminatory basis."[1354] However, FHWA did not provide this Commission with any evidence as to how it has determined that the standard appraisal methodology was nondiscriminatory. Federal agencies have found instances in which standard practices would result in lower

---

1353. Coleman letter, supra note 1299. DOT stated:

> Our reviews and inspections will continue with a goal to assure that all property owners are treated fair and equal. We assuredly will not single out one segment of society for which the appraisal methodology and process will provide fair and equitable treatment with the implication that discrimination will be allowed against other segments.
>
> In connection with our inspection, we review the reports that our field people make concerning their contacts with minority displacees.
>
> In addition to evaluation of appraisals, FHWA reviews all aspects of the right-of-way function to assure compliance with Title VI provisions. Id.

1354. October 1975 Coleman letter, supra note 1339.

appraisal of property owned by minorities or in minority neighborhoods.[1355]

Similarly, FHWA often concluded that replacement housing was available for relocatees on a nondiscriminatory basis, without having made a thorough study of that housing.[1356] For example, in a review of the

---

1355. See memorandum from Charles E. Allen, General Counsel, to Richard Platt, Jr., Director, Office of Housing and Urban Affairs, Property Appraisal Forms, Feb. 7, 1974. Because discriminatory appraisals have been a problem, the VA requires that its appraisers certify that estimates of property value have not been influenced by race, religion, or national origin of persons residing on the property or in the neighborhood. This requirement is discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing 232 (December 1974).

1356. In July 1975, DOT reported:

> The FHWA Relocation staff recently completed an evaluation of the relocation program in each of the nine regions. This evaluation included a review of the relocation program in 18 States. Civil Rights matters were included in each review and interviews were conducted with minority relocatees to ascertain if they had experienced any discrimination in relocating and whether or not replacement housing was available on a nondiscriminatory basis. The review did not indicate any instances where housing was not available to all persons. Coleman letter, supra note 1299.

It would appear, however, that FHWA's emphasis is not on investigation of the housing available for relocatees, but rather upon whether any relocatee was dissatisfied with the procedures followed. DOT also stated:

> Our regional offices provide division offices with instructions and guidance including the use of review form to assure all facets of civil rights are covered. If a property owner for any reason, including a feeling of discrimination does not wish to accept the State's offer of a fair market value, he has the right and privilege of having the value established by a State court....
>
> If additional information is furnished us concerning specific cases reviewed for this report, we will review the material submitted and make an appropriate response. Id.

Michigan State Department of Highways, FHWA concluded that adequate nondiscriminatory replacement housing was available because of its observation that "For several years Michigan has had a strong civil rights act relative to open housing" and because it was not aware of any case in which a relocatee was denied housing due to race, color, or national origin.[1357] FHWA's conclusion was not based on an investigation of housing available for relocatees. It is essential that such investigation include the following:[1358]

1357. FHWA, DOT, Title VI Review, Michigan Department of State Highways, November 1971. FHWA reached similar conclusions, also apparently without adequate information, in its reviews of Nevada and Arizona.

1358. DOT stated:

> The tone and approach of this...report seem to to assume prima facie discrimination against minorities in the acquisition of rights-of-way for highways. We believe that to the ultimate extent across the nation, State right-of-way procedures provide for the protection of and equal treatment of all property owners without regard to their name, sex, race, creed, or color of skin. Coleman letter, supra note 1299.

This Commission notes that an investigation of the extent of nondiscrimination in housing available for relocatees must be made because throughout the Nation housing discrimination continues to be a problem. See The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing, supra note 1354, at ch. 1.

(1) Testing[1359] of new and existing rental and sale housing at all income levels by appropriately trained personnel.

(2) Consultation with local community groups actively engaged in bringing about fair housing in the proposed site area.

(3) A public hearing held by FHWA at which the residents of the affected area may testify as to their experience in obtaining housing on a nondiscriminatory basis.

(4) A review of State and local fair housing activities, including not only the passage of a comprehensive, enforceable fair housing law, but also the existence of a strong fair housing agency and the elimination of any exclusionary zoning.[1360]

1359. Testing is a method of determining whether discriminatory practices exist in the sale or rental of housing by comparing experiences of minority and nonminority "homeseekers." Although some local governments have antitesting ordinances, the Civil Rights Division of the Department of Justice has taken action aimed to get several of these repealed. At the request of the Department of Justice, the City of Madison, Wisconsin, repealed its antitesting ordinance and the City of Milwaukee began action for the repeal of a similar ordinance. In addition, the Department of Justice participated in a private suit which was successful in invalidating the antitesting ordinance of Upper Arlington, Ohio. Telephone interview with Michael Barrett, Civil Rights Division, U.S. Department of Justice, Apr. 29, 1975. See also Department of Justice Press Release "Justice Department Posts New Records in Enforcement of Civil Rights Laws," Jan. 14, 1974.

1360. Exclusionary zoning ordinances may limit the construction of multi-dwelling buildings, specify a minimum acreage for residential housing, or limit occupancy in private dwellings to persons related by blood or marriage. They often discriminate against such groups as racial and ethnic minorities and single women with children. The Department of Justice has brought suit against Blackjack, Missouri, and Parma, Ohio, charging that these municipalities have used such ordinances to exclude racially integrated housing developments. As of April 1975, there had been no trial in the Parma case which was in district court, pending an appeal of the dismissal of a private suit. In Blackjack, the district court ruled against the United States, which was overturned on appeal. U.S. v. City of Blackjack, 508 F.2d 1179 (8th Cir. 1974).

(5) A review of local banking practices to ensure that local banks make mortgage loans to minorities and women as freely and on the same terms as to nonminority males.[1361]

Moreover, State and local officials should be notified of all investigations, before they take place, to enlist their support and cooperation for ensuring fair housing throughout the community. In developing a model for a fair housing investigation, FHWA would need to consult with the Department of Housing and Urban Development.

Despite the inadequacy of these reviews, OCR apparently did not inform regional staff that their reviews should be improved. In fact, at least one regional office claimed that it got no feedback on the reviews it forwarded to OCR.[1362]

B. Subject Area Compliance Reviews

Beginning in late 1973 FHWA civil rights compliance reviews were to be conducted by FHWA program staff in conjunction with field reviews of grantee performance in such areas as planning, research, design, construction, maintenance, and education training, instead of conducting one civil rights review in each State. Separate reviews were to be conducted in each program area. FHWA instructions for the civil rights components of these reviews were published in 1973 and 1974.[1363]

1361. Ideally, FHWA should obtain information on local banking procedures from the Federal financial regulatory agencies, but through calendar year 1974 these agencies had not adequately monitored banks and savings and loan associations. See The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing, supra note 1354, at ch. 2.

1362. Interview with Cortez Hope, Acting Civil Rights Director, FHWA, DOT, San Francisco Regional Office, in San Francisco, Cal., Mar. 21, 1973. DOT stated:

> The pressing workload with insufficient resource staff necessitated priority work assignments. This precluded prompt review and comments on original Title VI compliance reviews. Coleman letter, supra note 1299.

1363. FHWA, DOT, Civil Rights--Equal Opportunity Manual, Transmittal 7, Sept. 7, 1973 [hereinafter referred to as Transmittal 7], and Transmittal 9, June 10, 1974 [hereinafter referred to as Transmittal 9].

These instructions are essentially a checklist of items, indicating some of the areas to be covered by the FHWA investigator. For example, the investigator is instructed in evaluating civil rights compliance by universities engaged in FHWA-assisted projects, to obtain information about: (a) the factors used by the State in selecting universities for research projects, (b) the selection procedures of principal investigators and staff, and (c) the selection procedures for contractors.[1364] There is no guidance on how the information should be evaluated.[1365] FHWA proposes to remedy this deficiency.[1366]

1364. Id. at B-1.

1365. For example, the FHWA investigator is not told that if there is an inadequate number of minorities and/or women on the project staff, the university must affirmatively recruit minorities and women. Similarly, the investigator is not told that if a university's procedures for selecting staff for an FHWA project result in a disproportionate rejection of minorities or women, those procedures may not be used unless (a) they have been scientifically demonstrated to be job-related, and (b) no other, less discriminatory selection procedures are available. For a further discussion of nondiscrimination in selection procedures see Law Enforcement Assistance Administration ch. 5 supra and U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 5 (July 1975). DOT noted, "Presently, we are in the process of revising Transmittal 7." Coleman letter, supra note 1299. See Transmittal 7, note supra 1364.

1366. In October 1975, the Secretary of Transportation stated:

> FHWA has prepared a draft copy of proposed procedures for Title VI and related civil rights requirements for implementation and reviews. We are attaching a copy of this draft for easy reference. It is anticipated that this draft will be finalized, printed in the Federal Register during November 1975, and made a part of the FHWA Program Manual. This updated directive of FHWA Title VI Interim Guidelines includes noted comments expressed in the initial draft copy of the Commission's report on Title VI enforcement.
>
> Specific instructions noted in the mentioned draft copy deal with evaluating recipient program areas to to determine whether there is any disparity in treatment of minorities versus nonminorities.
>
> In essence, there is guidance as to how review information should be evaluated. October 1975 Coleman letter, supra note 1339.

The instructions are not sufficiently detailed to ensure that the new reviews would be less superficial than the earlier statewide reviews.[1367] For the most part, the instructions are for reviews of the employment and minority business enterprise practices of the State and its contractors and grantees. There is a section on the impact on minorities of the location of the highway. The reviewer is asked to determine the extent to which the highway location, for example, will (a) disrupt, serve, or adversely affect the continuity of the community, (b) sever the minority community from schools, churches, recreation, shopping, and employment, (c) perpetuate existing segregation patterns, and (d) produce adverse traffic volumes in the minority community.[1368] There are no instructions for gathering the

---

1367. One criticism of the earlier reviews is that although they were used to determine if standard property appraisal methodology was employed in appraising properties State highway departments planned to acquire, the reviews were not used to ascertain if the standard methodology was discriminatory. (See p. 495 supra). Concerning appraisals, the new review instructions merely instruct the reviewer to determine if appraisal standards are uniformly applied when property is to be acquired from both minorities and nonminorities. Transmittal 9, supra note 1364.

Another criticism of earlier reviews was that FHWA did not make a thorough examination of whether housing to which relocatees might wish to move was available on a nondiscriminatory basis. (See p. 491 supra). The new instructions direct the investigator to determine if replacement housing is available on a nondiscriminatory basis, but do not include standards for making that determination.

In October 1975, Secretary Coleman wrote to this Commission: "The Commission's comments have been noted with corrective actions incorporated in the attached proposed procedures." October 1975 Coleman letter, supra note 1339.

1368. Transmittal 7, supra note 1364, at C-1 to C-5.

statistical data necessary for making these determinations for the proposed route or alternative locations.

Another significant deficiency of these instructions is their absence of consideration of women despite the fact that Section 162(a) of the Federal Aid Highway Act of 1973[1369] prohibits sex discrimination in FHWA-funded programs. Although Title VI is the foremost authority for these instructions, Section 162(a) is to be enforced through agency provisions and rules similar to those established under Title VI of the Civil Rights Act of 1964,[1370] and, thus, it is totally incongruous that no mention of sex discrimination is contained in these instructions. For example, in Section A, which addresses areas of Title VI concern with regard to planning, this query appears: "To what extent does the State employ minority staff personnel in the program area under review?" While this question could easily and appropriately have been expanded to include women, this was not done.[1371]

1369. 23 U.S.C. § 324 (Supp. III, 1973). Section 162(a) is discussed on p. 468 supra. This Commission notes, however, that while Transmittal 7 repeats the Section 162(a) prohibition against sex discrimination, this is the only mention of sex discrimination in the transmittal.

1370. Id.

1371. DOT stated, "The statement referred to was intended to include women. We will, however, clearly state women in the revision of Transmittal 7." Coleman letter, supra note 1299. Transmittal 7 is discussed in note 1364 supra.

According to OCR statistics, as of April 1975 only 31 reviews had been conducted under the new system, more than 18 months after it became effective.[1372] Some regions, including Baltimore, Maryland; Fort Worth, Texas; Denver, Colorado; San Francisco, California; and Portland, Oregon; appeared to have conducted no reviews.[1373]

1372. In justification of this DOT stated:

> Transmittal 7 /note 1364 supra/ was issued on September 7, 1973. Paragraph 9b(2) stated that the States' Title VI plan was to be developed and put into effect before or by June 1, 1974. During this 8-month interim period FHWA civil rights and program staff were actively providing technical guidance and assistance to the States in preparation of the Title VI implementing plan. Not all State plans were acceptable by June 1, 1974, and were returned to the State for additional information. The Washington Headquarters Office of Civil Rights staff conducted Title VI workshops in each FHWA region to motivate the thrust of positive action in accomplishing the Title VI guideline requirements. The priority of FHWA Civil Rights staff activities was devoted to obtaining an acceptable Title VI plan from the States and having the plan put into effect by the States. Coleman letter, supra note 1299.

1373. Data supplied by Flynn Wells, Chief, Title VI Division, OCR, FHWA, DOT, Apr. 15, 1975, "Title VI Reviews Received and Completed." These data were supposed to be up-to-date as of early April 1975. It does not appear that these statistics were reliable, however. This Commission was given copies of at least four reviews not reflected in these statistics. Two of these reviews had been conducted in Illinois; one in Ohio, and one in Wisconsin. Three of these were completed in the first half of 1974; the fourth was completed in January 1975. They were not submitted to OCR until April 1975. Memorandum from H. L. Anderson, Regional Administrator, FHWA, DOT, Homewood, Illinois, Regional Office, to Alexander D. Gaither, Director, OCR, FHWA, DOT, Apr. 4, 1975.

Under FHWA's new system of compliance reviews, as with OCR's statewide reviews, findings were sometimes cursory.[1374] A review of consultant contracts, conducted by the Homewood, Illinois, Regional Office was especially shallow. It provided merely one- or two-sentence responses to the items listed in OCR's compliance review instructions. For example, OCR instructions direct the reviewer to determine if there are any requirements set by State highway departments for their consultants which may be discriminatory on the basis of race, color, or national origin.[1375] In response, the reviewer simply stated that

---

1374. Recommendations in FHWA compliance reviews are discussed on pp. 512-17 infra.

1375. Transmittal 7, supra note 1364, at D-1.

there were no such requirements.[1376] There was no indication as to the basis of the reviewer's statement, but it did not appear that a thorough review of all requirements had been made to ensure that none was discriminatory.[1377] Indeed, in response to FHWA's instruction to determine how consultant firms are selected, the reviewer merely wrote, "The State prequalifies consultants."[1378]

1376. Transmittal 7, supra note 1364 at D-1. Memorandum from J.W. Miller, Division Engineer, Springfield, Illinois, Division Office, FHWA, DOT, to G.D. Love, Regional Administrator, Homewood, Illinois, Regional Office, FHWA, DOT, Illinois--Administration of Consultant Contracts, Mar. 5, 1974.

1377. For example, bonding requirements and the size of contracts being awarded to consulting firms may disproportionately bar minority consultants because of their initially small financial capacity. By continuing to award sizable contracts and impose stiff bonding requirements, the State may prevent smaller minority firms from ever achieving the financial capability to bid competitively.

1378. Miller memorandum, supra note 1376. Prequalification is a procedure for making an advance determination of a contractor's eligibility. When work becomes available, the State can assign it to a prequalified contractor without the delays which would ensue if eligibility had not already been determined. Prequalification requirements might include meeting standards of past performance and having available certain equipment, financial resources, and technical capabilities. See FHWA, DOT, Review of Competition Obtained in Bidding, Illinois Department of Transportation, May 1974.

The reviewer did not describe the State's prequalification requirements. A description of prequalification requirements is especially important, since such requirements can be discriminatory.[1379] This review was not forwarded to OCR for more than a year after it was conducted,[1380] and it, thus, appears that, as of April 1975, OCR had not informed the reviewer of the inadequacy of his report.

Another review, of the Iowa State Highway Commission, was somewhat more thorough in its assessment of requirements for minority consultant firms. It notes that consultants must have on their staffs an engineer registered in Iowa, and speculates that if the registration of engineers is or has been discriminatory, this requirement might be an obstacle to minority consulting firms.[1381] The reviewer did not ascertain whether registration was discriminatory.[1382]

1379. See Reassessment report, supra note 1349.

1380. Anderson memorandum, supra note 1373.

1381. Memorandum from John B. Kemp, Regional Highway Administrator, FHWA, DOT, Kansas City Regional Office to Alexander D. Gaither, Office of Civil Rights, FHWA, DOT, Title VI Design Compliance Report, Apr. 10, 1975.

1382. For example, the reviewer could have examined the number of minorities registered as engineers in Iowa. If few minorities are registered as engineers, the reviewer should also have ascertained whether the work of all consulting contracts actually required the services of an engineer.

IV. Reporting Systems

A. State Plans

The 52[1383] State agencies receiving FHWA funds are required to develop and implement a plan for meeting their Title VI responsibilities.[1384] Among the specific actions to be included in the plan[1385] are that the State agency will:

--Investigate Title VI complaints.

--Conduct periodic Title VI reviews.

1383. There is one agency in each State as well as in the District of Columbia and Puerto Rico.

1384. DOT notes that:

> Appendix A in the FHWA Transmittal 7 [supra note 1364] provides guidelines for conducting Title VI compliance reviews. Paragraph 9b(c) requires the States to establish implementing guidelines to effectively monitor the State program areas to assure affirmative compliance with Title VI. Paragraph 9b(b) requires the States to prepare a written summation of its Title VI program activities at least on an annual basis. This, in our opinion, established both standards for the content and frequency of State Title VI reviews. The standards established by the States are incorporated in its Title VI implementing plans are reviewed for content prior to being approved on the FHWA division and regional level.
>
> Appendix A of Transmittal 7...provides guidelines for conducting Title VI compliance reviews of the State program areas. The questions are designed to compare and evaluate discrimination, if it exists, in accordance with the requirements of Title VI of the Civil Rights Act of 1964. Coleman letter, supra note 1299.

DOT added that, "We will make this requirement, however, more clearly understood in the revision of Transmittal 7," and projected that this would be accomplished by September 1, 1975. Id.

1385. This is a distinct requirement from the State Highway Action Plans discussed on p. 476 supra.

--Collect racial and ethnic data on beneficiaries of FHWA programs.

--Require Title VI compliance reports from subgrantees.

--Develop minority enterprise programs.

--Inform beneficiaries regarding the protections of Title VI.

--Take affirmative action to overcome past discrimination.

--Establish guidelines for the implementation of the program.

--Establish a civil rights unit to monitor activities under the plan.

--Prepare an annual summary of Title VI activities.

The plans were required to be in effect as of June 1, 1974, but as of April 1975 only 42 of the plans were approved[1386] by FHWA. Eleven plans remained unapproved.[1387] OCR states that FHWA is prepared to take

---

1386. As of April 1975, this Commission had not evaluated any of the approved plans. The plans are maintained in FHWA regional offices. The requirement of State plans was instituted after this Commission conducted interviews in FHWA regional offices.

1387. Approved plans had not been received from Rhode Island, West Virginia, Alabama, Ohio, Montana, Utah, North Dakota, South Dakota, Wyoming, and the District of Columbia. OCR officials did not know what number of the States without approved plans had failed to submit plans and what number had submitted inadequate plans. Gaither et al. interview, supra note 1334. Apparently, no plan had been received from Illinois, either. See note 1390 infra.

stringent action against those States which have not completed these plans,[1388] but as of April 1975, more than 10 months after the plans were due, action has been initiated against only one recalcitrant State. The Atlanta Regional Administrator has written to the State of Alabama, which has never submitted a plan, indicating that unless an acceptable plan is forthcoming, all FHWA assistance to the State will be terminated.[1389] As of mid July 1975, over 13 months after the plans were due, six States had still not complied. Sometime during July, five of these States submitted plans which FHWA found to be acceptable.[1370] By September 17, 1975, all plans were approved by FHWA.

1388. Gaither et al. interview, supra note 1334.

1389. Updated Supplement, supra note 1339.

1390. In mid July 1975 DOT stated:

> FHWA has established a July 1, 1975, deadline date for the remaining six States to have approved Title VI implementing plans or justify to FHWA why the State(s) should not be found in noncompliance with Title VI requirements. These States are as follows: Alabama, District of Columbia, Illinois, North Dakota, Utah, and Wyoming. Coleman letter, supra note 1299.

In October, DOT stated:

> As of July 1975, all recipients except the State of Alabama had submitted acceptable Title VI implementing plans and were approved by the FHWA. As of September 17, 1975, the State of Alabama's Title VI implementing plans were approved by the FHWA. October 1975 Coleman letter, supra note 1339.

B. Data Collection

A pilot project was undertaken in conjunction with the Virginia Department of Highways of a location study[1391] for Interstate 644 in the vicinity of Newport News-Portsmouth, Virginia.[1392] This demonstration was to examine procedures that could be used to incorporate Title VI considerations into transportation planning. It involved an extensive system for the collection of racial and ethnic data of predominantly minority communities on which I-664 would have a significant impact. The data enabled measurement of the proposed route's disruption of minority communities and the number of minorities to be displaced. As a result of the measurement, which showed that the proposed route would have disproportionately negative impact upon the minority community, the proposed route for the highway was altered.

FHWA staff indicated that they felt that future projects of this type were warranted.[1393] In conjunction with the data collection system,

---

1391. A location study is a study undertaken to determine the feasibility of (a) proposed route(s) on a highway.

1392. According to FHWA, this project was selected for the pilot study, since a location study was just commencing and also because a potential existed for significant impact on minorities to occur. A total of 105,164 persons live within the corridor of which 57,997 persons are black (approximately 49 percent) according to the 1970 census.

1393. Interview with Alexander D. Gaither, Director, OCR and Flynn Wells, Chief, Title VI Division, OCR, FHWA, DOT, Oct. 19, 1973.

community participation was solicited and obtained in the hearing process. Although the obvious merits and results of such an undertaking would certainly facilitate an evaluation of Title VI compliance of recipients, FHWA staff indicated that no subsequent projects of this type have been conducted,[1394] and as of April 1975 no system has been developed to illustrate how such procedures could be utilized or uniformly applied by the States.[1395] Thus, a comprehensive system for collecting racial and ethnic data continues to be promissory.

1394. Gaither and Wells interview, supra note 1393. In July 1975 DOT stated:

> We are not aware that any FHWA staff had indicated that no subsequent project of the I-664 type had been conducted. A similar study (the Scotlandville Bypass I-110) has been completed in Baton Rouge, Louisiana. Other such studies are proposed. Coleman letter, supra note 1299.

1395. Gaither et al. interview, supra note 1334. In July 1975, DOT stated:

> The Department of Transportation is presently having a private consulting firm study ways and means of collecting racial and ethnic data and its utilization to best be assured of compliance with Title VI of the Civil Rights Act of 1964. Coleman letter, supra note 1299.

V. Enforcement Efforts

When FHWA finds a recipient to be in noncompliance with Title VI, it attempts to secure compliance by voluntary means. If compliance cannot be achieved voluntarily, FHWA may initiate administrative proceedings for the termination of funding. Although not explicitly stated in Title VI, FHWA may alternatively refer the matter to the Civil Rights Division of the Department of Justice.[1396] FHWA has never taken either

---

1396. Title VI of the Civil Rights Act of 1964 states:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so formal, or (2) by any means authorized by law. /Emphasis added./ 42 U.S.C. § 2000d-1 (1970).

The Department of Justice's Title VI regulation defines "other means authorized by law:"

> Such other means include, but are not limited to, (1) appropriate proceedings brought by the Department of Justice to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law. 28 C.F.R. § 42.108(d) (1974).

action.[1397]

OCR reports that FHWA's recommendations are generally willingly accepted by the States,[1398] but these recommendations rarely require strong action on the part of the States. For example, FHWA has not required States to make changes in an anticipated route, as very few of its reviews have examined the impact of proposed highways on minority communities.[1399] Similarly, it does not appear that as the result of a compliance review FHWA has ever required a State to set goals and timetables for increasing the number of minority or female contractors although in several cases

---

1397. Moreover, in only one case has FHWA provided a written warning that enforcement action would be taken if compliance were not achieved. This case is discussed on p. 504 supra. DOT stated:

> Paragraph 10f of the FHWA Transmittal 7 (Civil Rights-Equal Opportunity Manual) [note 1364 supra] requires that "if satisfactory resolution is not accomplished within the allowed time period," appropriate FHWA action shall be initiated. This will be more specifically made a part of the revised Transmittal 7.

DOT has apparently not set specific time limits for the "allowed time period," however.

1398. Gaither and Wells interview, supra note 1393.

1399. Under the new system of reviews, OCR statistics show that only three such reviews have been conducted. These were in Florida, Georgia, and Missouri.

the number of minority contractors used by States appeared inadequate.[1400] Moreover, as of April 1975, FHWA did not examine the use of female-owned contracting firms. In July 1975, DOT stated:

> FHWA has taken direct and specific action to increase participation of minority and female contractors in Federal and Federal-aid contracting and subcontracting. For instance, an FHWA Order issued in November 1974, mandates an aggressive Headquarters procurement program for minority contractors and establishes a goal of four percent of contract awards for minority entrepreneurs for FY 1975. A comparable issuance placed high priority emphasis on award by States of supportive services contracts to minority consultant organizations.
>
> FHWA is presently concluding an agreement with the Office of Minority Business Enterprise, U.S. Department of Commerce, to coordinate resources for more effective utilization of minority construction contractors. A companion directive implements a specific program for minority firm involvement in Federal-aid highway construction projects. The

---

1400. See review of Iowa State Highway Commission in Kemp memorandum, supra note 1381; review of Wisconsin Division of Highways, in Kemp memorandum, supra note 1381; and review of the Illinois Department of Transportation in Miller memorandum, supra note 1376. DOT commented:

> This paragraph is misleading and is not totally accurate, While FHWA has not required specific goals and timetables for increasing the number of minority and female contractors, FHWA requires the States to maintain records that will identify contractors and subcontractors with regard to minority or nonminority classification. States are required to affirmatively encourage minority business participation in highway construction programs. State highway agencies are also required to schedule contract lettings in balanced programs providing contracts of such size and character as to assure an opportunity for all sizes of contracting organizations to compete. These requirements are referenced in paragraphs 6 and 7 of Transmittal 77 of the (FHWA) Federal-Aid Highway Program Manual. Coleman letter, supra note 1299.

> latter include goals and timetables. All documents and programs referenced provide for monitoring and evaluation. 1401

The Commission notes, however, that the examples of activity provided by DOT, while commendable, pertain primarily to Federal contracting and not to contracting done by FHWA recipients. Moreover, none of the examples provided by DOT of its contracting activity related to female entrepreneurship.

Another reason that FHWA reports that it has received little adverse reaction to its recommendations may be that FHWA rarely attempts to determine if those recommendations have been carried out. For example, in 1972 FHWA recommended that the Nevada Department of Highways (a) develop an action plan to assist minority contractors in becoming bonded and

---

1401. Id.

licensed, (b) examine its method of competitive bidding to determine in what ways minority contractors could be utilized, and (c) take action to improve communication between the State and the public, especially minority communities.[1402] OCR staff stated that there had been no followup to this review.

Similarly, as a result of a review of Arizona in 1972, FHWA recommended the State highway department take such actions as (a) monitor the civil rights compliance of its consultants and subgrantees, (b) provide information about fair housing legislation to its relocatees, and (c) invite minority groups to highway department hearings. Again, there has been no followup to ensure that these recommendations were executed.[1403]

In Iowa, one State in which there was followup, the State highway commission had taken no action to implement any of FHWA's recommendations more than 2 years after it had received them.[1404] For 2 years FHWA

1402. FHWA, DOT, Title VI Review, Nevada Department of Highways, Aug. 14, 1972.

1403. OCR, FHWA, Title VI Review, Arizona Highway Department, July 12, 1972, and Gaither et al. interview, supra note 1334.

1404. Apparently the State commission had not transmitted FHWA's recommendations to the persons within the agency who would have authority to execute them. Kemp memorandum, supra note 1381. In 1972, FHWA recommended that the Iowa State Highway Commission identify the location of minority communities in relation to the proposed project in order to assess the impact of that project on those communities; expand its public hearing procedure to notify minorities in the affected areas; establish a program to review the civil rights compliance of contractors; and locate minority consultants who can be qualified to handle work for the State.

did not take action against Iowa because it was unaware that its recommendations had not been acted upon.[1405] When FHWA again visited Iowa in 1975 and learned that Iowa's compliance status had not changed, FHWA merely repeated its earlier recommendations. FHWA did not inform the State that if substantial progress toward adopting the recommendations had not been made within a set time limit, FHWA would initiate fund termination proceedings.

1405. DOT stated:

> Due to a breakdown in communications plus reorganization within the /Iowa State Highway Commission/ in accordance with the Action Plan, the recommendations from the 1972 Title VI review were not implemented.
>
> Our OCR review and recommendations of the Iowa review contained a suggestion to establish a time frame for Iowa to implement recommendations. Coleman letter, supra note 1299.

In spite of these examples, DOT informed this Commission that:

> FHWA regional and division staffs are required to followup on all recommendations for accomplished results within a reasonable time period. This is referenced in paragraph 1 of Transmittal 7 of the Civil Rights - Equal Opportunity Manual. [supra note 1364]. Paragraph 12a also requires that prior reviews (including recommendations) to be used as a base line from which to measure State compliance and improvements with Title VI requirements. 1406

The Commission notes that paragraph 1 of Transmittal 7 makes no clear reference to followup activity. It states:

> This chapter provides FHWA's interim guidelines for (a) implementation of Title VI provisions of the Civil Rights Act of 1964, and (b) conduct of Title VI compliance reviews relative to the Federal-Aid Highway Program. 1407

Moreover, paragraph 12a refers not to the conduct of followup reviews, but rather to the use of data collected in earlier reviews as a baseline for measuring improvements.

1406. Coleman letter, supra note 1299

1407. Transmittal 7, supra note 1364.

Part B

URBAN MASS TRANSPORTATION ADMINISTRATION (UMTA)

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

UMTA was established under the Urban Mass Transportation Act of 1964:

> To authorize the Secretary of Transportation to provide...assistance for the development of comprehensive and coordinated mass transportation systems, both public and private, in metropolitan and other areas.... 1408

From July 1, 1972, through January 14, 1975, UMTA awarded 1,344 grants totaling $2.7 billion to 450 different recipients,[1409] including State and local planning agencies, State transportation agencies, and private nonprofit institutions.

UMTA funds have been used for such purposes as the planning and design of bus and rapid transit systems[1410] and for the development, testing, and demonstration of new facilities, equipment, techniques,

---

1408. 49 U.S.C. § 1601 et seq. (1970).

1409. Attachment to letter from Harold B. Williams, Director, Office of Civil Rights, UMTA, DOT, to Dreda K. Ford, Writer Editor, U.S. Commission on Civil Rights, Jan. 16, 1975.

1410. Grants for planning and design are called technical studies grants. They are often made to transportation planning agencies. From July 1, 1972, through January 14, 1974, UMTA made 334 technical study grants totaling almost $78 million to 228 different recipients. Id.

and methods.[1411] The principal use of UMTA funds has been for the construction, improvement, and acquisition of facilities and equipment.[1412]

1411. From July 1, 1972 through January 14, 1975, UMTA made 349 research development, and demonstration grants totaling almost $800 million to 81 different recipients. Id. and attachment to letter from Eugene Jackson, Jr., Chief, Division of External Programs, Office of Civil Rights, UMTA, DOT, to Joyce Long, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Jan. 28, 1975. Some of these funds are used for the development of innovations in mass transit systems. Innovations funded by UMTA include: (A) Automatic fare collection machinery and automated high speed vehicles; such equipment is being used in an automated rapid transit system in San Francisco, California. UMTA, DOT, Innovation in Public Transportation: A Directory of Research, Development and Demonstration Projects (June 30, 1974) /hereinafter referred to as Innovation in Public Transportation/. See also T. Lisco, "Mass Transportation: Cinderella in our Cities," in Public Interest 52 (Winter 1970). (B) Special traffic lanes designated for use only by buses during peak hours of congestion. Such lanes have increased operating effectiveness of buses and tripled ridership within a few months after a demonstration was carried out on Shirley Highway into Washington, D.C. (C) Parking lots on the fringes of metropolitan areas adjacent to stops for buses heading for the metropolitan areas. In Seattle, Washington, Project Bluestreak brings people from outlying areas to a parking lot, where they park their cars and proceed by bus on a reserved lane to downtown Seattle. (D) "Dial-A-Ride" systems. Such a system is being demonstrated in Haddonfield, New Jersey, where a small bus picks up people who have telephoned for a bus and takes them to their destination. Innovation in Public Transportation, supra this note.

1412. UMTA refers to its grants and loans for construction, improvement, and acquisition of facilities and equipment as capital grants and loans. From July 1, 1972 through January 14, 1975, UMTA made 400 capital grants and loans, totaling almost $2 billion, to 97 different recipients. January 1975 Williams letter, supra note 1409.

As of November 1974, UMTA has also been authorized to provide funds for the operation of transit systems.[1413] In addition, UMTA makes grants to State and local governments for training their personnel employed in managerial, technical, and professional positions in the urban mass transportation field and makes grants to public and private nonprofit institutions of higher education for conducting comprehensive research on problems of transportation in urban areas.[1414]

Although UMTA is a relatively new agency, the assistance it provides to mass transportation systems is of vital importance to the public,[1415] especially minorities and women, many of whom have low- and moderate-incomes

---

1413. National Mass Transportation Assistance Act of 1974, 49 U.S.C. § 1601b. As of March 1975, no grants had been made under this new authority. UMTA had not developed the grant mechanisms for this program. Under the new act, grants will be made to local governments serving populations of 200,000 or more and to State governments for distribution to smaller governments. Prior to the passage of the new act, UMTA provided funds to about 30 percent of the Nation's publicly-owned transportation systems, including almost all of the larger systems. UMTA anticipates that most of the remaining publicly-owned transit systems may receive UMTA assistance under the new act. Attachments 8 and 10 of letter from Harold B. Williams, Director, Office of Civil Rights, UMTA, DOT, to Cynthia N. Graae, Associate Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 21, 1975, and interview with Harold B. Williams, Director, Office of Civil Rights, UMTA, DOT, Mar. 12, 1975.

1414. From July 1, 1972, through January 14, 1975, UMTA made over 200 grants totaling almost $6 million for such training and research activities to 123 different recipients. January 1975 Williams letter, supra note 1409.

1415. Congress reported that transportation is the "lifeblood of an urbanized society" and that society's well-being "depends upon the provision of efficient, economical, and convenient transportation" in urban areas. National Mass Transportation Assistance Act of 1974, 49 U.S.C. § 1601b.

and do not own automobiles.[1416] By providing funds for transportation systems, UMTA enables cities to offer transportation so that their citizens can work,[1417] shop, and seek social services and entertainment outside their immediate neighborhoods.[1418]

B. Civil Rights Responsibilities

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the grounds of race, color, or national origin in any program or activity receiving Federal financial assistance.[1419] Title VI, thus, prohibits UMTA recipients from discriminating in the transportation services which they

---

1416. As of July 1972, nearly 80 percent of American households owned automobiles. However, only 53 percent of all families with incomes under $5,000 owned cars and only 41 percent of all families with incomes under $3,000 owned cars. Only 54 percent of all black families owned cars. Similar data are not published for Native American, Asian American, or Spanish speaking background families. They are not published by sex of head of household. U.S. Department of Commerce, Bureau of the Census, Consumer Buying Indicator, Series P-65, No. 44, "Household Ownership of Light Cars and Trucks; July 1972" (February 1973). Transportation problems of the disadvantaged are discussed in G. E. Mouchahoir, "Management of a Transportation System for the Disadvantaged" in Traffic Quarterly 291 (April 1974).

1417. In the 20 largest Standard Metropolitan Statistical Areas, the rate of black use of public transportation to travel to work is considerably higher than that of the population as a whole. Where data on the persons of Spanish speaking background were available, the Spanish speaking background group also had a higher rate of using public transportation than did the population as a whole. U.S. Bureau of the Census, Department of Commerce, Census of the Population: 1970. Detailed Characteristics, Table 190.

1418. The need for efficient and inexpensive public transportation to enable central city residents, who are often minority, to reach their places of employment has increased in recent years as many industries, once principally located in urban areas, have moved to the suburbs. See U.S. Department of Housing and Urban Development, Tomorrow's Transportation, New Systems for the Urban Future (1968); Bureau of Labor Statistics, Department of Labor, BLS Report No. 353, "Changes in Urban America" 5 (1969). Federal jobs, too, have often moved to the suburbs. U.S. Commission on Civil Rights, Federal Installations and Equal Opportunity in Housing (1970), and District of Columbia Advisory Committee to the U.S. Commission on Civil Rights, The Movement of Federal Facilities to the Suburbs (1971).

1419. 42 U.S.C. §§ 2000d, et seq. (1970).

provide, and places on UMTA responsibility for ensuring that such discrimination does not take place.

Public transportation has a history of discrimination. Southern State laws often required or abetted segregation on intrastate buses.[1420] Such statutes have been declared unconstitutional,[1421] and in 1975 such blatant discrimination is no longer a widespread problem, although on rare occasions vestiges of the segregated system are uncovered.[1422]

There appear to be two major areas of possible discrimination against minorities with regard to urban transportation. One is the difference in transportation availability between the predominantly white suburbs and the predominantly minority inner city. The other is that the

---

1420. These included, for example, laws in Georgia, Louisiana, and Arkansas. 18 Ga. Code Ann. §§ 206, 207 (1953); 45 La. Rev. Stat. Ann. § 198 (1960); and 73 Ark. Stat. Ann. §§ 1780-83 (1963).

1421. See Christian v. Jemison, 303 F.2d 52 (5th Cir. 1962); Davis v. Morrison, 252 F.2d 102 (5th Cir. 1958); and Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala. 1956), aff'd 352 U.S. 903 (1956).

1422. UMTA uncovered four cases where segregated transit facilities had been eliminated but where segregated usage continued. These were in Jackson, Mississippi (1972); Meridian, Mississippi (1972); Knoxville, Tennessee (1972); and Savannah, Georgia (1972). Letter from William J. Coleman, Jr., Secretary of Transportation, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 14, 1975.

transportation services which are available in the inner city are often alleged to be irregular and inferior.[1423] Evidence of such discrimination has been found in the past,[1424] and UMTA, in its Title VI manual has

---

1423. DOT stated:

> In addition to the two areas cited by the Commission, /the UMTA Office of Civil Rights/ considers other major areas of possible discrimination as accessibility and availability of transportation between cities and suburbs and within the inner city. Id.

1424. For example, testimony before a 1971 hearing of this Commission in Washington, D.C., showed that the public transportation system was geared to bringing people from the suburbs into the city in the morning and back out to the suburbs at night. In the morning from about 7 until 9:30, train and bus schedules ran every 10 or 15 minutes into the city, and then were scheduled only every half hour or so. The same pattern existed in the evening from 4:30 until 7 from the city back into the suburbs. No such service existed for those living in the city and working in the suburbs. Such transportation patterns affect minority employment opportunities in that minorities live predominantly in the inner city and are unable to get to the suburbs where many jobs exists. Hearing Before the United States Commission on Civil Rights, Washington, D.C., June 14-17, 1971. Likewise, testimony before a 1970 Commission hearing in St. Louis, Missouri, showed that transportation from the city, where most minorities reside, to the county, where most manufacturing plants and jobs exist, was extremely limited. Not only was transportation from the city to the county insufficient, but low-income people could not afford the kinds of transportation that were available to get them into the county daily. Hearing Before the United States Commission on Civil Rights, St. Louis, Missouri, January 14-17, 1970. See also Webber and Angel, "The Social Context for Transport Policy," Paper presented before the House Committee on Science and Astronautics at its Tenth Meeting with the Panel on Science and Technology, 91st Cong., 1st Sess., at 12 (Comm. Print 1969).

Because of poor transportation services offered to persons of lower income in the past, the Department of Housing and Urban Development and the General Services Administration have included in their regulations a requirement for examining the available public transportation in the process of locating and relocating Federal agencies. 41 C.F.R. § 101-17, Construction and Alternation of Public Buildings; General Services Administration Order PBS 7,000.11, "Availability of Low- and Moderate-Income Housing-DHUD/GSA Memorandum of Understanding of June 12, 1971;" (Published at 37 Fed. Reg. 11371, 1972); and Department of Housing and Urban Development, "New and Relocating Federal Facilities Procedures for Assuring Availability of Housing on Nondiscriminatory Basis for Low- and Moderate-Income Employees," 37 Fed. Reg. 11367 (1972). This requirement is discussed further in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Volume II, To Provide...For Fair Housing, chs. 1 and 4 (December 1974).

provided examples[1425] identifying specific discriminatory actions which are

---

1425. UMTA has also funded projects to demonstrate solutions to chronic urban problems. UMTA wrote to this Commission:

> In conjunction with the Metropolitan Washington Council of Governments, UMTA funded the "Capital Flyer Bus Service" project in the Washington (D.C.) Metropolitan area. The project was approved in 1968 and, for a period of thirty (30) months, it demonstrated approaches to two chronic urban problems, by offering suburban commuters express transit service to their jobs downtown and by providing preferentially reduced-fare direct bus service to inner city residents working or wishing to work in suburban areas. The "Capital Flyer" consisted of three two-way express bus routes in Montgomery, Prince Georges, Fairfax counties and the District of Columbia. The demonstration contracted originally with D.C. Transit, was highly successful in attracting suburbanites but met marginal success in attracting inner city residents to use the service, in spite of a large amount of advance and continuing publicity including newspaper ads, radio spot announcements, word of mouth to churches and organizations and the distribution of posters and folders throughout the metropolitan area. The demonstration has now ended but some service is still being continued by WMATA. The "Capital Flyer" demonstration was one of eighteen (18) such projects funded by UMTA.
>
> UCR does not consider these eighteen (18) demonstration projects to have been totally adequate for the inner city to suburban commuter. It does mean that prior and subsequent to 1970 UMTA was and is concerned with service levels and schedules to assure that transit mobility is available from the inner city to the suburbs, not with demonstration projects alone but on a regular basis. Coleman letter, supra note 1422.

in violation of Title VI.[1426]

Although Title VI does not prohibit sex discrimination, an amendment to the Department of Transportation's Title VI assurance includes a prohibition of sex discrimination.[1427] The intent of this amendment is to ensure that recipients comply with Title IX of the Education Amendments of 1972 and with the Federal Aid Highway Act of 1973.[1428]

1426. The Manual lists 14 categories of discriminatory actions and gives examples of possible violations in each category. For instance, the Manual notes that Title VI prohibits segregated facilities or services, including posted or de facto segregation in seating arrangements for applicants, employees, or passengers; it prohibits discrimination by providing bus service to white high schools but not to minority high schools; it prohibits the selection of project locations which have a disproportionate negative impact upon minorities, for example, routing a rapid transit line through a minority residential area so as to impede minority access to hospitals or food stores; and it prohibits modernization or improvements of rapid transit stations in predominantly white residential areas if modernized services are not provided in predominantly minority areas. Office of Civil Rights, Urban Mass Transportation Administration, Department of Transportation, Title VI Manual for Civil Rights Specialists (August 1972).

1427. Department of Transportation, Standard Assurance of Compliance with Title VI of the Civil Rights Act of 1964, (Aug. 24, 1971).

1428. UMTA recipients which are institutions of higher education are prohibited from discriminating on the basis of sex by Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681, et seq. (Supp. II, 1972). Title IX is discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity chs. 1 and 3 (January 1975). Moreover, UMTA recipients which are planning agencies receiving aid from the Federal Highway Administration of DOT are also prohibited from discriminating on the basis of sex by the Federal-Aid Highway Act of 1973. 23 U.S.C. § 324 (Supp. III, 1973). UMTA's purpose in including a prohibition of sex discrimination in UMTA's Title VI assurance is to assure compliance with these two laws. Telephone interview with Eugene Jackson, Jr., Chief, External Programs Division, UCR, UMTA, DOT, Apr. 18, 1975.

The prohibition against sex discrimination does not cover all recipient activities, but nonetheless, UMTA recipients are apparently not informed of this limitation.[1429] In September 1973, UMTA's civil rights staff were advised to include sex with race, color, and national origin in their monitoring activities.[1430] However, 18 months later, in March 1975, UMTA was in the process of revising its instructions for the conduct of compliance reviews to reflect the prohibition against sex discrimination.[1431] Further, in July 1975, these instructions had apparently not been finalized.[1432]

1429. DOT wrote to this Commission:

> The Department of Transportation Title VI Assurance does not prohibit sex discrimination. . .UMTA amended the DOT Title VI Assurance (with approval from the Office of the Secretary) to prohibit sex discrimination in its programs pursuant to Title IX /of the Education Amendments of 1972/ and the Federal Aid Highway Act of 1973. Coleman letter, supra note 1422.

This Commission notes that the assurance does not inform DOT recipients that the prohibition against sex discrimination is limited only to that sex discrimination covered by Title IX or the Federal Aid Highway Act of 1973.

1430. Memorandum from Eugene Jackson, Jr. to UMTA, Office of Civil Rights Professional Staff, "Inclusion of Sex"--Form F-32, Compliance Survey of Sponsors, Sept. 25, 1973.

1431. Attachment 6 to March 1975 Williams letter, supra note 1413.

1432. In July 1975, DOT wrote to this Commission that:

> The Title VI Manual for Civil Rights Specialists has been revised to include the ban on sex discrimination and other changes. This will be circulated for comment July 1, 1975. Form UMTA F-32 (compliance review form) is also being revised to include this ban and other changes. Coleman letter, supra note 1422.

As of March 1975 UMTA staff did not know to what extent sex discrimination may be a problem in UMTA-assisted programs.[1433] UMTA has received no complaints alleging sex discrimination in mass transportation services, but absence of complaints may stem from a variety of reasons.[1434] While it appears unlikely that personally motivated discrimination against women would affect the use of transit services by women, the Department of Housing and Urban Development has determined that transportation needs of women can differ from those

---

1433. In July 1975, UMTA wrote to this Commission:

> ...UMTA has affirmatively pursued the issue of possible sex discrimination by means of on-site compliance reviews and have identified problems in several areas such as representation on policy and advisory boards and committees and has requested changes. (Where transit board appointments are made by the recipient transit system, UMTA can require female representation pursuant to the Title VI regulations. However, where transit board members are appointed by someone other than the recipient transit system or where transit boards are composed of elected officials we cannot require representation.) Coleman letter, supra note 1422.

1434. It is possible, for example, that persons who believe that they are victims of sex discrimination in UMTA-funded programs may not file complaints with UMTA because they believe UMTA lacks jurisdiction in this area. For a further discussion of the lack of correlation between absence of complaints and absence of discrimination, see U.S. Commission on Civil Rights, To Know or Not to Know: Collection and Use of Racial and Ethnic Data 61 (1973).

of men.[1435] Thus, it appears that transit systems may operate in a way which deprives women of the full benefits of mass transportation. UMTA has not conducted a study to assess this possibility. As of March 1975, UMTA staff had not even attempted to determine what percentage of urban mass transportation users are women and what percentage are men and whether any differing transportation needs of the two groups are being met.[1436] UMTA does plan to become involved in such issues, however. UMTA expects to convene in fiscal year 1976 a conference on the issue of female discrimination and Title VI equity in transit. Based on the conference's findings and discussions, UCR expects to request funding for a comprehensive study of this matter.[1437]

1435. Coleman letter, supra note 1422. In addition, a study conducted in Brooklyn, New York, showed that, since the types of jobs held by men and women vary, the times at which transportation is needed, and even the routes for which transportation is needed, may differ for men and women. S. Bernstein, "Mass Transit and the Urban Ghetto," in Traffic Quarterly 434 (July 1973). To the extent that there are differences, transportation must take the needs of both groups into account. UMTA stated:

> We do not believe that [the] study by S. Bernstein is ... appropriate... for generalizing a conclusion about females and mass transportation, except in high density, low socio-economic communities such as Brooklyn, New York and the like. Coleman letter, supra note 1422.

1436. March 1975 Williams interview, supra note 1413.

1437. Coleman letter, supra note 1422.

Title VI prohibits employment discrimination only in a limited number of circumstances.[1438] In a forward looking action in 1966, in the absence of specific statutory authority, UMTA included a prohibition in Section 109a of its grant contracts against employment discrimination on the bases of race, color, religion, sex, or national origin in UMTA-funded programs or activities.[1439] Section 109a requires UMTA recipients to take affirmative action to ensure nondiscrimination in their employment practices on

---

1438. Title VI states:

> Nothing contained in this /title/ shall be construed to authorize action under this /title/ by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1970).

Department of Transportation Title VI regulations prohibit employment discrimination to the extent necessary to assure equality of opportunity for beneficiaries. See 49 C.F.R. 21.5(c)(1) (1974). These regulations are similar to those issued by other Federal agencies. See 45 C.F.R. § 80.3 (c)(3) (1974) (Department of Health, Education, and Welfare) and 24 C.F.R. § 1.4(c)(2) (1974) (Department of Housing and Urban Development).

1439. UMTA, DOT, External Operating Manual, Urban Mass Transportation Contract, Part II, Terms and Conditions, Section 109 (a) (1972).

One of the principal problems arising from UMTA recipients' employment practices is that few minorities and women hold positions in the upper management of transportation companies. Another serious problem is that few women hold positions as drivers or mechanics. March 1975 Williams interview, supra note 1413.

UMTA-funded projects.[1440] Generally UMTA does not require its recipients to develop written affirmative action plans for affirmative action in project-related employment,[1441] and has not issued adequate instructions as to how Section 109a must be implemented. DOT states that this is because under Section 109a UMTA can only require affirmative action on project-related employment. Moreover, DOT notes that the employment within a grantee's organization generated by UMTA grants tends to be quite modest and the employees associated with the project are typically scattered throughout such organizations.[1442] DOT noted that because UMTA will soon provide

1440. DOT stated, Section 109a, while requiring affirmative action, does not require the development of written affirmative action programs." Coleman letter, supra note 1422. UMTA civil rights staff state that, if on a compliance review employment deficiencies are noted, recipients are requested to develop affirmative action plans following guidelines of the Equal Employment Opportunity Commission. March 1975 Williams interview, supra note 1413. This ad hoc procedure is inadequate because each year over 90 percent of UMTA recipients are not reviewed and, thus, would get no instructions to develop affirmative action plans regardless of the extent of discrimination in their employment practices.

1441. Section 109(a) of UMTA's grant contract states:

> Such action shall include, but not be limited to the following: employment upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
>
> Recipients are also directed to place this requirement on their subrecipients and subcontractors. Urban Mass Transportation Contract, supra note 1439.

1442. October 1975 Coleman letter, supra note 1339. See also Coleman letter, supra note 1422. In that letter DOT stated that "project-related employment is very limited in most cases." Id.

systemwide assistance to transit companies, this situation will change.[1443] The Secretary of Transportation, William T. Coleman, Jr. wrote to this Commission on October 9, 1975:

> UMTA Administrator /Robert E./ Patricelli has indicated that his staff is reviewing actively whether UMTA ought to expand its civil rights requirements to a system-wide basis, both in the pre-award and post-award stages of the grant process, and require written affirmative action plans of all UMTA grant recipients. I am confident that the outcome of this review will be fully in accord with Federal law and policy and will advance significantly the opportunities of minorities and women within urban mass transportation. 1444

This Commission is pleased that the Department is reconsidering its position. We believe that a requirement for written affirmative action plans incorporating a utilization analysis and goals and timetables for hiring and promoting minorities and women is essential if the goal of equal employment opportunity is

---

1443. DOT stated:

> As a result of the passage of Section 5 in the National Mass Transportation Act of 1974, Section 109a will apply to systemwide employment of agencies receiving operating assistance funds. Only one transit system (New York City Transit Authority) had received such funding as of June 20, 1975. Interpretations of Section 109a are, of course, provided by UMTA Office of the Chief Counsel since it is an UMTA administrative requirement. UMTA has no other authority to examine employment practices....In view of Section 5 (November 1974) and the expanded authority we will have, UMTA is in the process of developing guidelines for compliance and comprehensive review procedures. Coleman letter, supra note 1422.

1444. October 1975 Coleman letter, supra note 1339.

to be productive.[1445]

II. Organization and Staffing

UMTA civil rights responsibilities are divided between a departmental Office of Civil Rights and the UMTA Office of Civil Rights (UCR).[1446] The departmental Office of Civil Rights is charged with establishing overall civil rights policy for DOT and monitoring the Department's performance. It is responsible for handling Title VI complaints concerning UMTA's programs; but sometimes these complaints are referred to UCR for investigation. In all other areas, its relationship to UCR is merely advisory.

1445. A requirement of the Office of Federal Contract Compliance referred to as "Revised Order No. 4" outlines the basic elements of an affirmative action plan. 41 C.F.R. §§ 60-2.1, et seq. (1974).

DOT stated, "Though Executive Order 11246, as amended, applies to public transit systems with Federal contracts of $10,000 or more, written affirmative action programs cannot be required.... The U.S. Postal Service has the OFCC assignment for local and suburban transit responsibility." Coleman letter, supra not 1422.

This Commission notes that, although this order is mandatory only for companies which hold procurement or service contracts with the Federal Government, the steps described in Revised Order No.4 are essential for any employer to ensure equal employment opportunity. Revised Order No. 4 is discussed further in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 3 (July 1975).

1446. There are 18 professionals on the staff of the departmental Office of Civil Rights, two of whom spend fulltime on Title VI. Telephone interview with James Frazier, Director, Office of Civil Rights, DOT, Mar. 24, 1975.

The Department of Transportation is comprised of the following constituent agencies: Federal Highway Administration, U.S. Coast Guard, Federal Aviation Administration, National Highway Traffic Safety Administration, and Saint Lawrence Seaway Development Corporation. Each has its own civil rights office. To distinguish the UMTA civil rights office, it is referred to as UCR, standing for "UMTA Civil Rights."

Most of UMTA's civil rights duties, including UMTA's Title VI responsibilities for conducting preaward and postaward compliance reviews, are located within UCR.[1447] This Office, which is one of eight Washington-based UMTA offices, is headed by a Director and is comprised of three divisions: Internal Programs, External Programs, and Special Programs.[1448] As of March 1975, the total professional staff in UCR numbered 16.[1449]

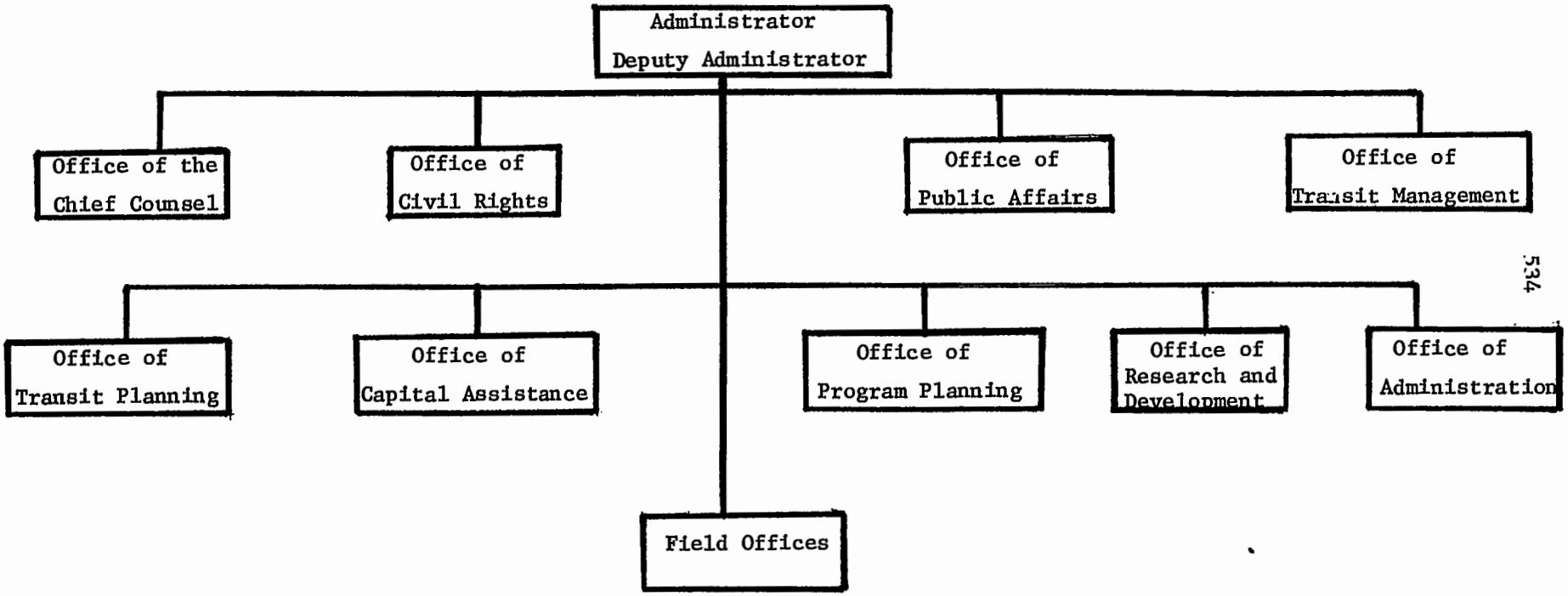
1447. See Exhibit 17 on p. 534 infra.

1448. See Exhibit 18 on p. 535 infra.

1449. March 1975 Williams interview, supra note 1413.

Exhibit 17

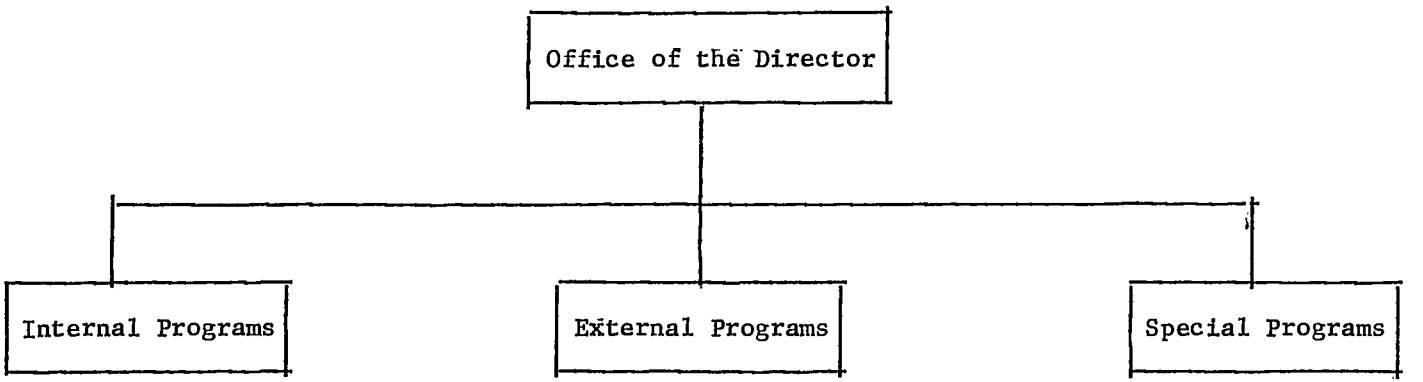
URBAN MASS TRANSPORTATION ADMINISTRATION



March 1975

Exhibit 18

URBAN MASS TRANSPORTATION ADMINISTRATION
OFFICE OF CIVIL RIGHTS



March 1975

The Director of UCR is a GS-16, the average grade of UMTA office directors, and reports directly to the UMTA Administrator. The current Director administers the overall civil rights program, spending almost 80 percent of his time on Title VI matters.[1450] This represents a large increase in time since earlier years when only 50 percent of the Director's time was spent on Title VI.[1451] There is one other professional staff member in the Director's Office, who is responsible for coordination between the three divisions.

The Internal Division, with four staff members and a Chief[1452] is composed of two teams; the equal employment opportunity team, operating under Executive Order 11478[1453] and Title VII of the Civil Rights Act of 1964,[1454] and the preaward team, which has the review of grant applications for Title VI impact[1455] as its sole assignment.

1450. March 1975 Williams interview, supra note 1413. The Director's other activities include Federal equal employment opportunity, contract compliance, and minority business enterprise.

1451. Id. In addition to oversight of UCR staff Title VI duties, the Director conducts what he terms "policy and procedure reviews," which are 2-day compliance reviews for the purpose of making known UMTA civil rights requirements to UMTA recipients. As of March 1975, such reviews had been conducted in Atlanta, Ga., Chicago, Ill., and Los Angeles and San Francisco, Cal. The Director makes recommendations orally when he is onsite, and only in the case of San Francisco was a written report prepared. Id. and, letter from Harold B. Williams, Director, Office of Civil Rights, UMTA, DOT, to Jack R. Gilstrap, General Manager, Southern California Rapid Transit District, Los Angeles, Feb. 28, 1974.

1452. The Chief of this Division is a GS-14.

1453. Exec. Order No. 11478 (1969) prohibits discrimination in Federal employment on the basis of race, ethnic origin, religion, or sex. 3 C.F.R. (1973), p. 214.

1454. The Equal Employment Opportunities Act of 1972 extended Title VII of the Civil Rights Act of 1964 to Federal Employment. 42 U.S.C. § 2000e-16. (Supp. II, 1972).

1455. The civil rights review of grant applications is discussed further on p. 549 infra.

The External Programs Division is responsible for conducting postaward reviews of compliance with Title VI, UMTA's grant contract, and Executive Order 11246.[1456] In addition to the Chief of this Division,[1457] there are five equal opportunity specialists in the Division. The Division staff spend about 50 percent of their time on Title VI.[1458]

The Special Programs Division[1459] monitors the minority business enterprise program under Executive Order 11625[1460] and evaluates UMTA applications involving relocation for compliance with civil rights requirements under Title II of the Uniform Relocation Assistance Act and Real

---

1456. Exec. Order 11246, as amended, prohibits discrimination on the basis of race, national origin, religion, or sex in the employment practices of Federal and federally assisted contractors. 3 C.F.R. (1973), p. 173. This Executive order is discussed in detail in To Eliminate Employment Discrimination, supra note 1444.

1457. The Chief of this Division is a GS-14

1458. Interview with Eugene Jackson, Chief, External Programs Division, UCR, UMTA, DOT, March 12, 1975.

1459. The Chief of this Division is a GS-15 and has 2 professional staff members.

1460. Exec. Order No. 11625 (1971) provides minority entrepreneurs an opportunity to participate in projects receiving Federal assistance.

Property Acquisition Policies Act of 1970.[1461] In 1974, an Analysis and Evaluation Branch was added to the Special Programs Division to measure and improve the effectiveness of UCR's implementation of its mandate. As of March 1975, this branch was drafting a written evaluation of UCR's activities. UCR expected that in 1975 its final report would be submitted to the Director for review and approval.[1462]

In all, UCR is able to allocate fewer than 7 person years to Title VI matters, which is insufficient to carry out an adequate Title VI program. The principal effect of the limited Title VI staff resources is that UCR is able to conduct too few onsite preaward and postaward compliance reviews.[1463]

1461. 42 U.S.C. §§ 1415, 2473, 3307, 4601, 4602, 4621-4638, 4651-4655 (Supp. II, 1972); 49 U.S.C. § 1606 (Supp. II, 1972). Department of Transportation regulations issued pursuant to the Uniform Relocation Assistance Policies Act of 1970 require that dwellings located for displaced persons be "Open to all persons regardless of race, color, religion, sex, or national origin and consistent with the requirements of Title VIII of the Civil Rights Act of 1968." 49 C.F.R. § 25.17(a)(12) (1974).

1462. March 1975 Williams interview, supra note 1413.

1463. The Chief of the External Programs Division indicated that he would need 18 professionals and 6 clerical employees in order to conduct onsite postward reviews of all recipients. He also noted that another limitation in establishing a comprehensive Title VI program has been UCR's small budget for travel. He mentioned that in order to conduct more onsite reviews, increases in travel resources would also be necessary. January 1975 Williams letter, supra note 1409.

As of June 1975, UMTA had one fulltime professional civil rights staff member in the Philadelphia regional office.[1464] There were no other UMTA civil rights personnel in the regions, but program staff in UMTA regional offices have some civil rights duties.[1465] For example, upon request, they assist the Internal Programs Division with its civil rights review of applications for technical study contracts and capital grants.[1466] The regional offices are also responsible for informing the External Programs Division of any local civil rights issues affecting transit and of civil rights disputes between minority communities and transit systems. They are supposed to clip newspaper and magazine articles relating to significant civil rights issues or problems which bear on transit, and, upon request,

---

1464. Coleman letter, supra note 1422.

1465. UMTA's regional offices are in the 10 standard Federal regions (see Exhibit 4, p. 127 supra). These offices are very small. In fiscal year 1973, 32 people were employed in UMTA's 10 regional offices, most of whom were engineers and planners. Since there were no civil rights personnel in the regions at the time of the field study, no interviews were conducted at UMTA's regional offices.

1466. These applications are received in the regions and reviewed for inclusion of all requirements. The application is then sent to UCR for indepth civil rights review. The application review process is discussed further on p. 549 infra.

attend civil rights meetings in the regions on behalf of this Division.[1467] The regional staff are also responsible for notifying the Special Programs Division of any community concerns which develop as a result of proposed or ongoing UMTA-assisted housing and relocation activities. Also upon request, regional staff are to assist the Special Programs staff in collecting pertinent data on relocation projects.[1468]

At least once a year, since 1970, the UCR Director holds a training session for UCR staff, including UMTA Washington-based legal and program staff. A two and one-half day session is planned for early April 1975, which will discuss Federal civil rights programs in general and UMTA's own program.[1469] The staff will participate in workshops geared toward improving preaward and postaward review techniques.[1470]

1467. UCR, UMTA, DOT, Handbook; Section B, "External Programs" (undated). In turn, the External Programs staff are required to notify regions of proposed compliance reviews; furnish copies of all significant correspondence to UMTA recipients; and, where possible, coordinate all visits to recipients in regions with proposed visits of regional personnel.

1468. Id. at Section C, "Special Programs."

1469. As of mid-March 1975, among the speakers scheduled were Frank C. Herringer, Administrator, Urban Mass Transportation Administration; James Frazier, Director, Office of Civil Rights, Department of Transportation; Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice; and William L. Taylor, Director, Center for National Policy Review and former Staff Director of the U.S. Commission on Civil Rights.

1470. DOT stated:

> In addition every two... years civil rights staffs of UMTA-assisted transit systems and planning agencies throughout the nation have been brought to Washington for training. Individual equal opportunity officers (new officials) from transit systems and planning agencies are trained in Washington by UCR personnel. UMTA is expected to fund a six-city demonstration project in [fiscal year] 76 designed to train transit systems' and planning agencies' equal opportunity officials in meeting Federal civil rights requirements. Coleman letter, supra note 1422.

UMTA has assigned no civil rights duties to State agencies administering UMTA funds. This is because, for the most part, until 1974, UMTA assistance had been provided directly to local agencies.[1471] However, as DOT noted, "Both the delivery system and the kind of UMTA assistance is growing and changing. UCR is changing its civil rights procedure appropriately to cover these shifts."[1472] With the passage of the National Mass Transportation Act of 1974, States have been given

---

1471. DOT stated:

> It is true that UMTA has not delegated any of its civil rights compliance responsibility to State agencies. UMTA has no legislative mandate for delegating its grant program, as is the case with [the Department of Health, Education, and Welfare, and the Federal Highway Administration]. UMTA provided funding to States (for the first time) in [fiscal year] 74 under administrative authority. In [fiscal year] 75 all fifty (50) States received UMTA funds. These funds were used internally and are not subgranted to regional, area and local transit agencies. Coleman letter, supra note 1422.

1472. Id.

the responsibility of providing UMTA funds to many local transportation authorities.[1473]

One provision of this Act states that:

> Nothing in this section shall affect or discharge any responsibility or obligation of the Secretary under...title VI of the Civil Rights Act of 1964....

While it is clear that under this section the Secretary cannot divest himself of responsibility under Title VI he is still in a position to delegate authority to act to States within policy guidelines proposed by the Secretary and subject to the Secretary's audits.

1473. DOT reported:

> In [fiscal year] 1976 some state agencies will be involved with distributing Section 5 funds to localities under 200,000 population. In some instances these state agencies will be Departments of Transportation; in others, they will be designated agencies outside the Governors' offices and in some cases the Governor. The dollar amounts of monies distributed (under $200,000) to regional, area and local offices agencies will be left up to the discretion of the Governor where he/she is the recipient under a five-year plan. Id.

For example, the State agencies involved could be assigned to conduct complaint investigations and preaward and postaward reviews of local recipients of DOT funds. This type of assignment is done for many Title VI programs, such as the health and social services programs of the Department of Health, Education, and Welfare and the employment service and unemployment insurance programs of the Manpower Administration of the Department of Labor.[1474] As of October 1975, UMTA had not developed specific methodology for assigning civil rights responsibilities to State agencies receiving UMTA funds and had no plans for such assignments.[1475]

1474. See for example, chapters 3 and 6, infra for discussions of the civil rights functions assigned to State health and welfare agencies and State employment agencies, respectively.

1475. DOT merely stated, "UMTA will develop procedures and guidelines for civil rights to cover the /fiscal year/ 75-76 shift from categorical aid under administrative authority to state and local allocation plans where appropriate." Coleman letter, supra note 1422.

UMTA also added:

> At the end of/fiscal year/ 1975 and in /fiscal year/ 1976...funds /for the/ elderly and handicapped...will be allocated to states (office of the Governor or designee) in the same manner for distribution to public and private non-profit organizations. UMTA civil rights will develop procedures and guidelines for this program. Please note that the fund distribution process varies from state to state within each state and will require extensive planning for civil rights coverage. Id.

In October 1975, the Department of Transportation added:

> The Commission appears to suggest on p. 543 that UMTA should have developed delegations to State agencies of civil rights functions prior to March 1975, and implies that UMTA ought to do so now. UMTA takes exception to this suggestion. The fact is that UMTA had virtually no dealings with State-level transportation agencies prior to making the first round of grants in June 1975 under the National Mass Transportation Assistance Act of 1974. October 1975 Coleman with, supra note 1339.

This Commission was not suggesting that DOT should have delegated civil rights functions to States prior to March 1975. This Commission is suggesting that by March 1975, several months after the National Mass Transportation Act of 1974 had been passed, UMTA should have developed procedures for assigning duties to State agencies.

III. Compliance Procedures

A. Complaint Handling

The Department of Transportation receives few Title VI complaints with regard to UMTA programs. UCR reports that UMTA has received only the following six complaints from July 1972 through March 1975[1476]: (1) In July 1972, a civil rights group alleged that the Chicago Transit Authority was not printing transit information in Spanish and that it discriminated in its employment practices. (2) In January 1973, a complainant alleged discrimination against minorities by the Tri-State Regional Planning Commission in New York, New York. (3) In March 1974, a minority-owned transit agency alleged that a UMTA grant to the City of Tucson, Arizona, would result in inferior service to the minority community and the demise of the minority-owned transit company. (4) In March 1974, it was alleged that a transportation district in San Francisco, California, discriminated in employment and delivery of transportation services. (5) In July 1974, it was alleged that minorities in Newark and Fremont, California, were excluded from the transportation planning process. (6) In January 1975, it was alleged that a planning agency in St. Louis, Missouri, discriminated against minorities in its employment practices and in the plans it developed.[1477]

1476. Attachment 3 to March 1975 Williams letter, supra note 1413.

1477. Id.

UCR reports that all but the most recent case,[1478] which is to be investigated by the departmental Office of Civil Rights, have been resolved. In four of these cases, the respondent was required to take corrective action.[1479]

UCR's handling of the complaint against the Chicago Transit Authority was so inadequate that it casts serious doubt on the value of the corrective action UCR requires. UMTA's review of the Chicago Transit Authority (CTA) indicated that CTA was probably engaged in blatant racial and ethnic employment discrimination,[1480] although the extent of the discrimination could not be fully assessed[1481][1482]

1478. This is a complaint against the planning agency in St. Louis, Id.

1479. In the case of the City of Tucson, an UMTA investigation did not reveal any Title VI violations, and UMTA, therefore, did not require any corrective action. Id.

1480. UCR's initial investigation of this complaint was conducted in conjunction with a compliance review of CTA. UMTA, DOT, Compliance Survey of Sponsors, Chicago (Illinois) Transit Authority, July 10-14, 1972.

1481. The question of sex discrimination was so superficially considered that no reliable conclusions can be drawn about CTA's employment practices regarding men and women.

1482. Among the racial and ethnic problems found were severely inadequate recruitment of minorities for CTA's graduate training programs, inadequate minority representation as officials and managers, and underutilization of persons of Spanish speaking background as CTA employees.

1483

because of the poor quality of the review. For example, the reviewer apparently failed to attempt to substantiate some of the allegations

---

1483. Overall, the review showed insensitivity to the problems of employment discrimination faced by minorities. This is exemplified by the fact that in the review report, the reviewer tended to identify lower-grade minority employees by first and last name while using the titles of "Mr." and "Mrs." to identify nonminority and higher-grade employees. The reviewer apparently permitted a representative of the employer to attend an interview the reviewer was holding with a minority group employee.

DOT responded:

> The statement that the CTA review showed insensitivity to the problems of employment discrimination faced by minorities is incorrect. Two reviewers wrote the report. One used first and last names; the other used Mr. and Mrs. and their reports were combined into one report without uniformity of courtesy titles. The statement that the reviewer permitted a representative of CTA to attend an interview with a minority-group employee is correct; however, the minority-group employee requested that the CTA representative be present. Coleman letter, supra note 1422.

This Commission notes that the review of CTA states than an interview was conducted with an official in charge of a CTA department. The review stated that this person was:

> ...dead set against allowing UMTA team to interview employees; very nervous; very distrustful; would not provide this interviewer with a private office to confidentially interview a minority employee -- insisted on sitting in on the interview. Compliance Survey of Sponsors, Chicago, supra note 1480.

of discrimination by CTA made by the employees and the minority group organization representatives,[1484] including those allegations made by the complainant.[1485]

1484. The reviewer interviewed a number of employees as well as representatives from local civil rights organizations. These included the National Association for the Advancement of Colored People, the Urban League, and Association Pro-Derechos Obreros (a Spanish speaking organization for workers' rights).

1485. There is no indication in the review that the reviewer independently attempted to substantiate allegations that (1) CTA has denied employment applications to some persons of Spanish speaking background and (2) the employment tests used discouraged Spanish speaking applicants.

DOT stated that "/the first/ allegation, made by minority organization representatives, could not be verified because specific names were not furnished." DOT also stated, regarding the second allegation, "No specifics regarding type of test, names of job applicants, when alleged discrimination occurred, etc., were furnished as requested of the community spokesman making the allegation." Coleman letter, supra note 1422.

This Commission notes that the review report makes no mention that the reviewer attempted, unsuccessfully, to obtain this information from the informants. Moreover, this Commission believes that the reviewer had an obligation to attempt to assess the truth of the allegations, independently of the informants' statements.

UCR's recommendations for corrective action were also poor. UCR recommended that transit information be printed in Spanish[1486] and that CTA formulate and implement an affirmative action plan for job categories in which minorities and women were underrepresented.[1487] UCR did not require that the plan be in writing, that it be sent to UCR for review, or that it conform to any standards. There was no requirement that CTA set goals and timetables for the hiring and promotion of minority and female employees for positions in which minorities and women were underutilized. DOT stated:

> /UCR/ did not request a written equal employment opportunity program from CTA in the follow-up letter because /the/ CTA Chairman, objected at a meeting subsequent to the compliance review indicating that UMTA did not have authority to require one. 1488

DOT did not make clear to this Commission the nature of CTA's challenge to UMTA's authority or if, in fact, UMTA did have the authority to require a plan in this case.[1489] If its authority is then

---

1486. UCR reports that this recommendation has been implemented. March 1975 Williams letter, supra note 1413.

1487. Letter from Harold B. Williams, Director of Civil Rights and Service Development, UMTA, DOT, to Michael Cafferty, Chairman of the Board, Chicago Transit Authority, Aug. 8, 1972.

1488. Coleman letter, supra note 1422.

1489. Although UMTA did not require a written affirmative action plan from the former chairman of the CTA but has received an affirmative action plan from the new CTA chairman and advised this person of CTA's failure to adopt goals and timetables.

As of March 1975, CTA had not developed a written affirmative action plan,[1490] but in July 1975 DOT wrote to this Commission:

> CTA has since developed a written affirmative action program in FY 75 in which a review revealed that it did not contain goals and timetables. This omission has been brought to their attention. 1491

B. Preaward Review Process[1492]

UCR reports that all applications for UMTA assistance are required to include a Title VI assurance[1493] and are subject to a preaward

---

1490. UCR's file on CTA notes that in early 1974 CTA established a civil rights office headed by a black male with a person of Spanish speaking background as deputy director, but there is no indication that any other action to improve CTA's employment practices was ever taken.

1491. Coleman letter, supra note 1422.

1492. DOT stated:

> ...the pre-award review process is a first attempt to review grants and contracts prior to funding in order to determine the Title VI impacts. There are no precedents for this process in service-related grant programs. Therefore, as in any pioneering research program, there is a continuing effort to modify the data collection instruments and the evaluation and analysis tools and techniques. To date, UMTA has developed Title VI research projects, funded by UMTA /and/ are supplemental and supportive of the in-house effort. Id.

1493. This is a standardized assurance which commits the recipients and its subrecipients and subcontractors to compliance with Title VI. UMTA, Department of Transportation, External Operating Manual, August 1972.

review.[1494] UMTA is the only agency in the Department of Transportation and one of only a handful of agencies of the entire Federal government, that requires any pre-award assessment of the impact of federal assistance on minority communities. UMTA regards its preaward program as "trail-blazing." DOT states that, "The Office of Civil Rights reviews all UMTA grants and contracts to determine the impact of UMTA projects on ethnic and racial minorities as well as areas with concentrations of elderly and handicapped persons."[1495] UCR requires recipients to submit a variety of data for these reviews.[1496] Depending on the nature of the project for which funds are requested, the information requested from an applicant may include a statement of the social impact of the project on minorities;[1497] a description of minority involvement in the planning process;[1498] documents showing the distribution of transportation

---

1494. Interview with Carmen Turner, Chief, Internal Programs Division, UCR, UMTA, DOT, Mar. 12, 1975.

1495. Coleman letter, supra note 1422. DOT stated:

> The review is based upon the premise that all UMTA funded projects have Title VI implications.... while the basic assumption is made that all UMTA projects have Title VI impacts, these impacts are more readily identifiable in some program areas than others. For example, the impact of a project to purchase buses is more quantifiable in terms of distribution of benefits than a project to electrify a rail system, or /a research, development, and demonstration/ project to develop a transbus.

1496. DOT stated, "UCR has developed specific Title VI requirements for capital and operating projects. Title VI requirements for planning, and RD&D are currently under development." Id.

1497. UMTA attempts to determine what the social benefits of the project are, especially for racial and ethnic minorities. UCR, UMTA, DOT, Title VI Pre-Award Review Program, (March 1975).

1498. UMTA attempts to determine if minorities are sufficiently involved in the planning process to ensure that the proposed project will be responsive to their needs. UMTA also determines if notices of public hearings are published in "newspapers oriented to minority communities." Id.

benefits to minorities;[1499] and a narrative detailing such matters as the distribution of transit equipment, frequency of transportation and ridership by route, quantity of service, and opportunities for minority entrepreneurs.[1500] Moreover, DOT stated that, "if information in an application is insufficient to make an assessment of transit benefits, we require clarifications or additional data."[1501]

1499. UCR, UMTA, DOT, Exhibit N, Final Application. DOT stated:

> Exhibit N--Distribution of Transportation Benefits--which is part of all Capital and Operating Applications contains the guidelines for preparing and submitting service information on each transit system. In summary, this exhibit includes a mini socio-economic profile of the service area, a map(s) of the applicant's jurisdiction with various demographic and planning data, the most essential operating characteristics, and an indepth discussion of the distribution of transportation benefits. It should be noted that in the discussion of transportation benefits.../this Exhibit queries the applicant about/ the philosophy or policy for distributing all equipment and facilities by route. /The Exhibit also/ asks for a list of all routes, and the number of vehicles, shelters, signs, benches, etc., assigned to each. In addition to Exhibit N, UCR reviews information submitted on the public transit system, planning, public hearings, relocation, protection of the environment, and the elderly and handicapped. Coleman letter, supra note 1422.

1500. Title VI Pre-Award Review Program, supra note 1497. Similar information is requested in conjunction with operating and technical studies grants. March 1975 Turner interview, supra note 1494.

1501. Coleman letter, supra note 1422.

Despite the vast amounts of information UCR collects for its preaward reviews, these reviews tend to be superficial.[1502]

UCR has found that, given its limited staff resources, it has not been able to make adequate use of the materials it gathers.[1503] This is because UCR has not determined how best to analyze these materials and does not even know if these materials are the ones necessary for a

---

1502. Examples of the superficiality of the reviews as given in pp. 551-558 infra. DOT stated "The /Commission on Civil Rights/ alleges that the pre-award reviews are superficial. This allegation is not substantiated with factual documentation." Coleman letter, supra note 1422. DOT also stated:

> ...there are very few evaluation parameters that can be utilized for assessing the quality of transit service. Based upon our study and experience we feel that the majority of this data and related parameters are used in the Title VI review. Again as stated earlier, the data requested of UMTA applicants is needed to assess the evaluative parameters. Id.

1503. DOT stated:

> All the data currently collected is used during the evaluation process. However, it's very difficult to determine what one means by the term "adequate." The data we require is consistent with established transportation planning practices and is needed by staff for the purpose of making both quantitative and qualitative assessments of the transit service. Id.

1504

thorough assessment of Title VI compliance by its applicants.

The superficiality of UCR's reviews may be partially due to the fact that transit systems do not maintain sufficient data to enable a comprehensive evaluation of their delivery of services to

---

1504. March 1975 Turner interview, supra note 1494. See also Handbook, supra note 1467.

Ms. Turner stated that a UCR consultant was working on an "evaluation project" to develop a prototype for measuring equitable distribution of services. She stated that UCR was struggling with the question "how do you evaluate equity of service," and that such measurements were still in the developmental stages.

UMTA has also awarded a contract to a research organization to develop methods of determining the Title VI impact of UMTA programs and to assist UCR in locating and remedying Title VI problems.

The contractor, the National Institute of Community Development, is also developing tools for the collection of racial and ethnic data, instruments for measuring the effectiveness of UCR reviews, and criteria for assessing UMTA applications. Telephone interview with Edgar Goff, Project Manager, National Institute of Community Development, Feb. 27, 1975. UCR expects to implement the final product by January 1976. Interview with Carmen Turner, Chief, Internal Programs Division, UCR, UMTA, DOT, Jan. 7, 1975.

DOT elaborated:

> The purpose of /this/ research effort is to enhance the existing review process by decreasing the time requirements for reviewing each application.... This study should provide UCR with a more uniform and streamlined set of evaluation criteria which would reduce the review time, thereby releasing the limited pre-award staff to conduct more on-site reviews. Coleman letter, supra note 1422.

minorities.[1505] The reviews are also affected because UCR lacks an adequate number of compliance investigators to make the necessary measurements. It may also be attributable to the fact that UCR has not developed a thorough model for assessing delivery of services and, thus, each reviewer must develop his or her own techniques for measurement and evaluation.[1506]

If UCR's review of the information requested of an applicant indicated possible Title VI problems, or if complaints have been filed against the applicant, UCR will conduct an outside review. Few such preaward reviews have been conducted,[1507] and those that have been initiated, leave something to be desired. DOT stated:

> UCR has established a comprehensive evaluation framework which is utilized by the Title VI reviewers to evaluate social impacts. UCR has a quality staff that evaluates the Title VI service-related applications. These transit planners have keen insights into many of the social problems relating to transportation and are quite sensitive to minority concerns. Their technical expertise has enabled UCR to permit each evaluator to make some reasonable individual assessment of projects

1505. DOT has stated:

> Most transit properties collect and maintain information on the operations of their transit system. That is, data on ridership, vehicles assigned to routes, age of vehicles, schedules, major traffic generators served, etc., is collected on a continuous basis and used to make everyday operating decisions. UCR agrees that the transit industry lacks some specific information such as sufficient vehicle maintenance data; however, such information is not generally required to conduct Title VI reviews. Finally, UCR evaluates the information requested in Exhibit N, Distribution of Transportation Benefits, /see note 1499 supra/ and finds it to be professionally sound and sufficient to make an adequate assessment of transit service. Coleman letter, supra note 1422.

DOT continued, however, that this Commission "should be cognizant of the fact that only a limited amount of data is maintained by transit properties."

1506. The types of measurements necessary for evaluating nondiscrimination in the delivery of transportation services are discussed on p. 568 infra.

1507. From July 1972 through March 1975, onsite preaward reviews have been conducted in San Diego and San Francisco, Cal.; St. Louis, Mo.; Memphis, Tenn.; Milwaukee, Wisc.; New Orleans, La.; Detroit, Mich.; and Buffalo, N.Y.

> in their respective regions. However, the Key Point to be made is that the individual reviews are conducted in response to.../UCR's/...evaluation guidelines. 1508

The scope of these reviews is generally limited to the purpose of the application. For example, if new buses are requested, UCR will review the distribution of buses,[1509] but will not necessarily look at distribution of shelter[1510] or location of offices for purchasing

---

1508. Coleman letter, supra note 1422.

1509. DOT stated:

> An evaluation of the existing and proposed distribution policies and plans includes a locational analysis of all existing and proposed equipment and facilities purchased or to be purchased with UMTA funds regardless of the scope of a specific capital grant application under review. Id.

The reviews do not cover, however, the distribution of equipment and facilities which were purchased with funds other than provided by UMTA even though discrimination in these aspects of the transit company's operations could result in discrimination in the overall services provided by the company.

1510. DOT has presented this Commission with conflicting views on the scope of UMTA preaward reviews. In July 1975, DOT stated:

> In the review of all capital grant applications for equipment and facilities, UCR evaluates the existing distributional policies and analyzes the specific locations for all shelters, benches, signs, etc., previously funded by route. In addition, we analyze and evaluate plans for distribution of the proposed new equipment and facilities by routes. This two-pronged process is used to assure equity in the distribution of transportation benefits....That is, if an applicant has previously purchased buses and shelters, and is now requesting only buses, our Title VI review would cover the initial buses and shelters, in addition to the proposed new buses. Id.

In October 1975, DOT stated:

> Moreover, UMTA has taken a very expansive view of its responsibilities in this regard, since it investigates not only the use of the specific UMTA-financed equipment but the entire range of service characteristics of the system to which the UMTA-financed equipment will be added. No other federal agency of which we are aware performs such vigorous or comprehensive reviews of differential service impacts. October 1975 Coleman letter, supra note 1339.

The carrying out of this latest policy statement would represent substantial progress.

tokens.[1511] It is this Commission's position that Title VI prohibits racial and ethnic discrimination throughout most of the operations of any transit company receiving UMTA funds. Thus, this Commission finds that UCR does not obtain sufficient information on which to base a determination of whether its recipients operate discriminatory transit systems.

UCR's review of the Niagara Frontier Transportation Authority (NFTA) in Buffalo, New York, illustrates some of the shortcomings of

---

1511. DOT stated:

> The location of offices for purchasing tokens (bus tickets) is not relevant to most Title VI reviews. This is because the majority of the transit properties have only a single ticket office. The other properties generally have most of their ticket offices or stands concentrated in the central business districts or near maximum load points. However, if a transit property had ticket offices or counters scattered throughout the service area UCR would include a locational analysis in the Title VI review procedures. Id.

This Commission believes that if a transit property has only one ticket office, UMTA has a responsibility to ensure that the office is accessible to the minority community or that the transit property has made adequate substitute arrangements for that community.

UCR's preaward reviews. DOT stated:

> The purpose of the on-site Title VI pre-award review in Buffalo was to determine the impact of the proposed project on ethnic and racial minorities, since the final capital assistance application lacked the required civil rights documentation as well as the fact that the project was stated for approval within a three-week time frame. The review focused on the transit service aspects--routing, scheduling, quality of service--and the manner in which NFTA plans to distribute the 193 new vehicles. There wasn't any need to address shelter distribution or the location of offices for purchasing tokens...simply because NFTA doesn't have federally funded shelters nor does it have offices for purchasing tokens outside the downtown area. However, if such had been the case, the review would have included these areas. 1512

The Commission has stated its view concerning UMTA's responsibility to ensure that any services provided by transit authorities through ticket offices are acessible to both the minority and nonminority communities.[1513] Concerning UMTA's responsibilities with regard to shelters, this Commission believes that if UMTA is providing money for any purpose to any transportation authority which is placing shelters in nonminority neighborhoods, but not in minority neighborhoods, then UMTA has a responsibility to ensure that the discriminatory placement is corrected, regardless of the source of funding for the shelters. Title VI of the Civil Rights Act of 1964 prohibits discrimination in any program or activity receiving Federal assistance. UMTA's interpretation should be that the programs it funds are not

---

1512. Coleman letter, supra note 1422. DOT noted; "[one of the] recommendations...of the NFTA report...suggested UCR conduct a post-award compliance review at a later date." Id.

1513. See note 1511 supra.

transportation authorities' purchases of specific items, but rather the entire public transportation systems funded.

In the review of NFTA, UCR found evidence that it tended to assign older buses to routes serving minority areas more frequently than to routes serving nonminority areas,[1514] but because of lack of data UCR believed that it could not draw firm conclusions.[1515]

1514. DOT stated:

> UCR does not utilize one evaluation parameter in deciding whether or not the transit service is discriminatory. If we did, it would be a grievous fault. The age of vehicles assigned to routes must be taken into account with the other evalative parameters--ridership by route, vehicles assigned to each route, productivity (a universal measure of transit performance), travel times, transit accessibility, accessibility to major traffic generators, distribution of equipment and facilities by route, and frequency of service on various comparable routes. Coleman letter, supra note

This Commission concurs that it is necessary to utilize such a wide variety of parameters. DOT continued, "As indicated in the NFTA report, the majority of these factors favored minority communities." Id.

1515. UCR staff found that with certain exceptions:

> ...a good deal of the older /buses are/ located on the minority routes. However, without conducting a detail (sic) survey or obtaining more specific information from NFTA that currently does not exist, it would be quite difficult to get an accurate reading of this quality of service parameter. Memorandum from James E. Davis, Equal Opportunity Specialist, UMTA, DOT, to Harold Williams, Director, Office of Civil Rights, UMTA, DOT, Title VI Preaward Review--Buffalo, N.Y. (undated).

Even with the data available, UCR sometimes did not appear to draw appropriate conclusions. For example, in the same review, UCR stated "the number of riders per vehicle-hour are generally lower on minority routes." However, the data in the review report do not appear to support this statement.[1516] Moreover, it does not appear that the measures utilized by UCR could fully indicate the extent to which buses were overcrowded. UMTA would have been able to draw more definite conclusions about the extent to which the buses were overcrowded if it had been able to look at the number of passenger hours or miles spent standing on each route.[1517]

1516. The average numbers of riders per vehicle hour on routes serving non-minority areas were 21, 26, 28, 33, and 47. The average number on routes serving minority areas were 26, 33, 36, and 41. Davis memorandum, supra note 1515.

1517. DOT stated:

> The recommendations "to look at the number of passenger hours or miles spent standing on each route" appears to have been with good intentions. However, cost of collecting such data would far outweigh the benefits derived or conclusions that could possible be drawn. A measure of productivity on a vehicle-hour or vehicle-mile basis would be more useful. A productivity measure is generally derived for the peak five or fifteen-minute period and expanded to the hour by some scientific techniques. The authenticity of such data is beyond question if collected in the proper manner. For example, a productivity (riders/vehicle-hour) of 35 for the peak hour indicates that a 53-passenger vehicle has 19 empty seats. A productivity of 72 indicates the vehicles have 19 standees for the peak hour. This assumes that 19 persons stood for an hour which is not the case the majority of the time. In conclusion, the productivity measure is universally used and is probably one of the best indicators known for measuring passenger loadings. Coleman letter, supra note 1422.

A 1974 onsite preaward review of the Bi-State Transit System in St. Louis, Missouri,[1518] was also inadequate. Among the short-term recommendations made to the Bi-State Transit System, as a result of the reviews, were "That Bi-State respond to allegations 2b through d, prior to grant approval." These allegations were as follows:

> b. Bus routes provide efficient service for White suburbanites to the center to the disadvantage of minorities residing in North St. Louis. This is accomplished by operating nine (9) rapid lines which run on the highway and bypass the Black community in North St. Louis, compared to the one (1) rapid in Central St. Louis and two rapids in South St. Louis. There is also more express and local service in Central St. Louis and South St. Louis than in North St. Louis.
>
> c. Bus routes are designed to meet the needs of inbound riders at peak hours but do not meet the needs of Blacks for outbound service (reverse commute). Presently there is only one reverse commute line, the Hazelwood Express. It is further charged that Bi-State is considering discontinuance of this service.
>
> d. Minority residents have poor access to bus service. The service is also inefficient and undependable in Black communities. [1519]

1518. DOT stated:

> The Office of Civil Rights conducted an on-site review in May, 1974, of the Bi-State Transit system and found them in non-compliance with Title VI. A report was prepared which sets forth long-term and short-term actions to bring Bi-State into compliance with Title VI. Coleman letter, supra note 1422.

1519. See UCR, UMTA, DOT, Preaward Title VI Review, Bi-State Transit System, St. Louis, Missouri (undated).

In addition to the fact that UCR appeared to be placing the responsibility for determining the truth of these allegations on Bi-State, there was no evidence in the review that UCR attempted to investigate them. 1520

1520. In the course of the review UCR substantiated a number of other allegations of disparity of service to the white and minority communities. For example, UCR confirmed that (a) Bi-State provided special services for sports and cultural events, but would not provide similar special service to employment sites which would be used predominantly by minorities and persons of low income; (b) express bus routes for white suburbanites bypassed the black community in St. Louis; and (c) bus routes were designed to meet the needs of white suburbanite riders at peak hours but did not meet the needs of blacks who commute to the suburbs. Id.

DOT stated; however:

> The analysis of the Bi-State on-site review is totally inaccurate.... In reference to the short-term actions [see p. 560 supra] Bi-State was to required to: 1. Redistribute the buses to assure equity in the quality of service provided throughout the service area. 2. Hire an affirmative action officer reporting to the General Manager on the Transit System. 3. Hire a Planner with insight and sensitivity for Minority concerns. 4. Provide UMTA with documentation which states the authority of the General Manager to carry out the necessary action to meet the Title VI requirements. These short-term actions were accomplished prior to funding in FY 1974. Coleman letter, supra note 1422. DOT also noted that "The completion of the short-term actions was a prerequisite for obtaining funds in /fiscal year/ 1974." Id.

The Commission notes that DOT neglected to mention UCR's recommendation that Bi-State respond to certain allegations.

Bi-State's reply was entirely inadequate as it did not indicate whether the allegations were true.[1521] Nonetheless, UCR did not require any further response to the allegations, and, in fiscal year 1974, UMTA awarded Bi-State the funds it requested.[1522]

In fiscal year 1975, however, UMTA appeared to have compensated for its earlier treatment of the Bi-State Transit System. DOT noted that long-term recommendations were made to the Bi-State Transit system. DOT stated that:

> In the long term, Bi-State was required to: 1. Initiate a comprehensive study of the existing system, taking into consideration the quality and quantity of service for the total riding population. Where inequitable service is found to exist, immediate steps should be taken to modify or redesign routes, schedules, and the assignment of equipment. 2. Prepare a social impact study prior to receiving any additional UMTA funds. 3. Document its operational policies and procedures as they relate to routing, scheduling, and assignment of equipment.[1523]

1521. Letter from James E. Terry, General Manager, Bi-State Transit System, St. Louis, Missouri, to Carmen Turner, Chief, Internal Programs, UCR, UMTA, DOT, May 23, 1974. The General Manager of the Bi-State Transit System merely indicated that the Bi-State planning department was being expanded and that it would (a) investigate the feasibility of extending a reverse commuter line from the inner city to the industrial complexes in the suburbs, (b) conduct a comprehensive study of the needs of the elderly and the handicapped, and (c) examine special services currently being provided by the transit system. Id.

1522. March 1975 Williams interview, supra note 1413. Meanwhile, the complainants, frustrated by their failure to obtain satisfactory corrective action, filed suit against the Department of Transportation for injunctive relief to effectuate Title VI. Urban Contractors Alliance of St. Louis v. Claude Brinegar, Secretary, United States Department of Transportation, Civ. Action No. 74-410c(3) (E.D. Mo., filed June 8, 1974). The court noted that the plaintiffs had not claimed to have exhausted administrative remedies. Thus, the court held that it lacked jurisdiction in the matter and dismissed the suit.

1523. Coleman letter, supra note 1422.

DOT also stated that Bi-State was informed "that additional funding would be withheld until the long-term actions had been accomplished," and that:

> At the time the /fiscal year/ 75 application for funding was submitted to UMTA, Bi-State had not complied with the long-term recommendations. During the period 1974 - 1975 UCR has continuously monitored the Bi-State Transit System. A second on-site Title VI review was conducted on April 2 throught 4, 1975. Based upon an analysis of Bi-State efforts to meet the long-term requirements cited in the May, 1974 report, and preliminary findings of the second on-site review, UCR non-concurred in the Bi-State application for /fiscal year/ 1975 Capital Assistance funds. It should be noted that Bi-State was not funded by UMTA in /fiscal year/ 1975. 1524

This is the first time UMTA has withheld transit funds from a major metropolitan area in response to a civil rights finding. UMTA is to be commended for this action. It is one of the few Federal agencies in the 1970's, to refuse funding because of a Title VI violation.

1524. Id. DOT also stated:

> It is UCR's policy to attempt to resolve findings of non-compliance through negotiations and conciliation prior to a formal non-concurrence and a recommendation that funds be withheld. The basic premise for this policy is that transit systems should first be afforded an opportunity to achieve compliance without sanction. Further, the civil rights constituency is the target group with the greatest potential for adverse impact resulting from service cutbacks. It is believed that this approach is both sound and reasonable since UMTA funds are provided on an annual basis. As the pre-award process develops profiles and appropriate performance measures will be completed for all UMTA recipients. The Office of Civil Rights will then have an on-going capability to assess Title VI impacts of UMTA projects. Id.

C. Postaward Review Process

1. Review Format

When an onsite compliance review has been scheduled, UCR sends a letter to the recipient requesting preliminary information, including employment data; identification of affirmative actions undertaken to comply with nondiscrimination requirements; identification of all contracts let including name of contractor, city and State, dollar amount of contract, type of work and whether contractor is a minority firm; name, title, racial or ethnic classification, and sex of each policy or advisory board member; written procedures for handling complaints of racial, sex, and other discrimination; copy of an employment application and test and claim forms; copies of recruitment advertisements; and information regarding complaints, court actions, or other legal proceedings relating to civil rights.[1525]

Onsite Title VI reviews were conducted of only 131 recipients of a total of 450 grants from fiscal year 1972 through January 15, 1975. In determining which recipients would be reviewed, UCR considered such factors as whether any complaints have been filed against the recipients, whether serious problems were uncovered in the review of preliminary information, and the size of the recipient jurisdiction's minority population.[1526]

An onsite postaward Title VI review takes from 2 to 5 days, depending on the size of the transit authority. In conducting a review, UCR staff interview local minority group and community interest organizations;[1527]

1525. UCR, UMTA, DOT, form letters, undated.

1526. Interview with Eugene Jackson, Jr., Chief, External Programs Division, UCR, UMTA, Jan. 7, 1975.

1527. For example, in the course of a review of the Fort Wayne (Indiana) Public Transportation Corporation, UCR contacted persons from The Urban League and the Neighborhood Services Organization. UMTA, DOT, Title VI Survey of Sponsors, Fort Wayne Public Transportation Corporation, Nov. 21-22, 1974.

interview at least one minority and one nonminority employed by the recipient,[1528] and ride two bus or rail lines with comparable characteristics, one in the minority community and one outside the minority community.[1529]

The reviewer's observations are recorded on a short checklist.[1530]

Almost half the items on the checklist relate to employment.[1531] More-

---

1528. In the review of the Fort Wayne Public Transportation Corporation, UCR interviewed 5 nonminority and 7 minority employees. Among those interviewed were bus operators, mechanics, a firefighter, a bookkeeper, and a purchasing agent.

1529. UCR staff are instructed to compare equipment, shelters, stops, frequency, cleanliness, and treatment afforded persons. They are also directed to assess the adequacy of bilingual services.

1530. UMTA, DOT, Title VI Survey of Sponsors, Form UMTA F-32, revised July 1973.

1531. For example, the reviewer must note if: (a) the recipient has an "effective grievance procedure" for equal opportunity, including employment matters; (b) the recipient's employees have been informed of the recipient's nondiscrimination policy; (c) administration of testing is on a nondiscriminatory basis; (d) the recipient uses minimum height requirements which could discriminate against persons on the basis of race, color, or national origin; (e) selection of trainees is made without regard to race, color, or national origin; and (f) the recipient's employment policies and procedures result in equal treatment for all persons without regard to race, color, or national origin.

DOT stated:

> /The Commission's report/ was represented to UCR to be a follow-up Title VI effort. /A/ June 5, 1975 letter from John Buggs to Secretary Coleman indicates that the draft chapter was on UMTA and FHWA Title VI enforcement activities.
>
> A. The UMTA section contained a preponderance of information on employment activity not Title VI.
>
> B. The draft report contains 28 UMTA references to Title VI and 20 to UMTA employment. The other pages contain general information on UMTA. Coleman letter, supra note 1422.

This Commission notes that if UCR's Title VI activity concentrated more on the equitable provision of transit service and less on employment matters, the Commission could have made more extensive evaluation of UCR's activity pertaining to services.

over those items relating to services are generally quite vague.[1532] It appears that UCR has not developed adequate techniques for demonstrating discrimination or absence of discrimination in the delivery of transportation services.[1533]

To assure that these services are being delivered equitably, UCR should fully assess such matters as the placement of transportation stops,[1534] the frequency of buses at particular stops,[1535] the extent to which buses are overcrowded, the extent to which buses adhere to established schedules, the accessibility from minority areas to other parts of the metropolitan area,[1536] the accessibility to schools, churches, shopping centers, and other major locations in minority areas, and the

---

1532. The reviewer must note, for example, if "equitable transit service" is provided to "all segments of the community," if the "actual use of physical facilities" is "consistent with the departmental Title VI regulations." Title VI Survey of Sponsors, Form UMTA F-32, supra note 1530.

1533. DOT stated:

> UCR is in the process of equating our pre-award review procedures with our post-award program. Post-award reviews will go into considerable depth using information and reports developed in the pre-award process. When this process is completed, delivery of services, benefits and participation will be entirely covered. Coleman letter, supra note 1422.

1534. This might include examining the geographic distance between stops on the same line and the geographic distance between lines.

1535. This might involve examining not only the number of buses which stop per hour, but also the spacing between buses when in practice the spacing is not regular. UMTA should also determine the extent to which overcrowded buses do not make scheduled stops and the extent to which buses that do stop do not have space for all the passengers at a stop.

1536. This might involve comparing the geographic distance with the distance by public transportation and measuring the number of transfers involved.

condition of buses used in minority areas.[1537]

The Commission notes that equitability does not necessarily mean the provision of equal services to minority and nonminority needs. Many factors, such as cost of providing service and citizen needs, influence the quantity and quality of transportation service which can and should be provided to a given area.[1538] The Secretary of Transportation noted:

1537. This might involve not only an examination of the age of the buses, and the presence or absence of air conditioning, which UCR frequently does, but also an examination of the extent to which heating and air conditioning function, the extent to which the windows work, the buses are clean and meet safety standards, and the incidence of bus malfunction on a given route over a several month period of time.

DOT stated:

> While we believe that the pre-award process will assist us in the post-award process in reviewing these matters, we do not believe that we will ever have adequate staff to check comparative air conditioning, brakes, heating, windows and chewing gum deposits on all buses used by all transit systems. Unless we have a Federal civil rights representative in residence at each facility on a full-time basis, these suggestions are not realistic, however well intended. We are hopeful that the number of full-time equal opportunity personnel with transit continues to increase and that these concerns can be addressed where possible. Coleman letter, supra note 1422.

1538. The Secretary stated:

> The United States Supreme Court has never held that Title VI of the Civil Rights Act of 1964 by its own terms requires that the benefits of federal programs be distributed to take into account the differential needs of various ethnic and racial groups. Rather, such a distribution has been held necessary only where the federal agency responsible for program administration specifically so requires. (Lau v. Nichols, 414 U.S. 563 (1974); see especially, the concurring opinion by Mr. Justice Stewart concurred in by the Chief Justice and Mr. Justice Blackman, 414 U.S. at 569). Responsibility for developing service-related concepts on Title VI rests, then entirely in the discretion of the federal agencies. October 1975 Coleman letter, supra note 1339.

> We would like to point out that every difference in service characteristics does not constitute a discrimination, whether it be the scheduling of buses or the location of rail ticket offices. Developing Title VI concepts with respect to public transportation is complicated and difficult. 1539

This Commission is in agreement with the Secretary's statement of the problem.

1539. Id. The Secretary also stated:

> The Commission appears to suggest...that discrimination in public transportation service is widespread and easy to identify. This is not true. On the contrary, mass transit service at or near the central city cores of many urban areas is superior to the service provided for outlying areas. The most recent report of the Urban Institute on this subject suggests that it might be extremely difficult to demonstrate in the average city that the service provided to minority communities violates federal constitutional or statutory requirements for nondiscrimination. (Kulash and Silverman, Discrimination in Mass Transit (Feb. 1974)). UMTA has long been aware, however, that residents of majority and minority communities frequently have different travel needs because of income, housing and employment characteristics. Id.

This Commission did not mean to imply at any point in this report that discrimination in public transportation service is easy to identify. Moreover, this Commission notes that the extent to which such discrimination is widespread cannot be assessed until more adequate procedures for measuring discrimination are developed.

The Secretary stated:

> Through the extensive information generated in Exhibit N of the grant application and the analytical studies being carried out under UMTA contracts, we expect to develop guidelines that can be used actively by States and local public bodies in planning and operating public transportation services. Most of the factors that the Commission suggests that we assess appear to be drawn from our own Exhibit N and are already being considered. Id.

2. UCR's Findings and Recommendations for Corrective Action

Of the 131 recipients reviewed from July 1972 to January 1975, 94 were found in noncompliance--that is, at the time of the review, UCR found violations of Title VI. Where UCR makes such findings, it is supposed to inform the recipient and make recommendations for corrective action.

In several cases, however, UCR's negative findings did not appear to be vigorously followed up with specific recommendations.[1539] For example, UCR found that the Tucson (Arizona) Transit Corporation did not provide service equitably to all segments of the minority community,[1540] but UCR did not recommend Tucson make any changes in transportation services. The only recommendation in the review report which could be construed to relate to this finding merely stated that the transit corporation should be advised of its respon-

---

1539. DOT stated:

> When UCR has made findings of noncompliance, recommendations are incorporated in the followup letter in all cases. All reviewers' findings and determinations, if approved, are incorporated in the followup letter. Coleman letter, supra note 1422.

1540. UCR, UMTA, DOT, Title VI Survey of Program Sponsors, Tuscon Transit Corporation, Dec. 28, 1971. The compliance review report did not state in what ways service was not provided equitably.

sibility in establishing policies and procedures to meet Title VI require-[1541] ments.

UCR found discriminatory testing in Tucson, Arizona,[1542] and required that the Tucson Transit Corporation provide entrance examinations in Spanish as well as English, eliminate irrelevant questions, and reduce technical terms to clearly understood language.[1543] Since UCR did not require the entrance tests to be validated,[1544] at best, its recom-

---

1541. Id. DOT stated:

> The alleged discrimination related to service provided by the Old Pueblo Transit Company, a predominantly minority firm, in a minority community. The Company ...had exclusive right to provide service in the minority community. Old Pueblo was not receiving funds directly or indirectly from UMTA. The funded recipient was the Tucson Transit Corporation which had no authority to operate in the minority community. The UMTA reviewer in going to Tucson examined the entire public transportation system in Tucson for the purpose of obtaining a complete picture of service and problems and determining relationship between the two services provided. Coleman letter, supra note 1422.

1542. Title VI Survey, Tucson Transit Company, supra note 1540.

1543. UCR did not even inform the transit body which questions were irrelevant and which terms should be rephrased.

1544. The Supreme Court has held that if a selection procedure which results in a disproportionate rejection of minorities cannot be shown to be related to job performance, that practice is prohibited. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Equal Employment Opportunity Commission's Guidelines on Employment Testing Procedures direct that where tests used for employee selection and promotion adversely affect minorities and women the test is unlawful under Title VII of the Civil Rights Act of 1964, unless the test has been validated and the employer can demonstrate that alternative, less discriminatory procedures are unavailable. Test validation consists of demonstrating, with empirical data, that is predictive of job performance. 29 C.F.R. §§ 1607.1, et seq. (1974).

mendation could effect only a partial remedy.[1545]

Similarly, the review report of the Fort Wayne Public Transportation Corporation indicated that UCR found the corporation's use of testing was not "on a nondiscriminatory basis."[1546] This finding was not elaborated upon, and nowhere in the report did UCR recommend that the Public Transportation Corporation take any action to eliminate bias in its testing procedures. Indeed, the Public Transportation Corporation's use of tests was not mentioned in UCR's recommendations.[1547]

UCR reports that it makes frequent recommendations that affirmative action be taken to rectify discriminatory employment patterns. Yet of the 131 recipients reviewed since July 1, 1972, UCR asked that affirmative action plans[1548] be developed in only 30 cases.[1549] Plans were not required

---

1545. DOT stated: "UCR's revised procedures will require (in all cases) where tests in use discriminate against applicants be validated or not used." Coleman letter, supra note 1422.

1546. Title VI Survey, Fort Wayne Transportation Corporation, supra note 1527.

1547. Id. DOT stated:

> This statement is incorrect. However, this conclusion is probably drawn from a checkmark in the wrong column on the compliance review report form. Discriminatory testing was not found in Fort Wayne, Indiana..../t/he compliance review report /has been corrected/. Coleman letter, supra note 1422.

1548. Deficiencies in UCR's affirmative action requirement are discussed on p. 543 supra.

1549. Attachment 9 to March 1975 Williams letter, supra note 1413.

in all instances in which they were necessary. For example, in Tucson, Arizona, UCR found several forms of employment discrimination, including utilization of minorities only as mechanics or operators,[1550] but UCR did not require the Tucson Transit Corporation to develop an affirmative action plan.[1551]

Similarly, in Austin, Texas, UCR found such employment problems as the total absence of minority females on the transit company's staff and determined that there was a need for recruiting minorities and women, especially in professional categories.[1552] Again, no affirmative action plan was required.[1553]

1550. Title VI Survey, Tucson, Arizona, supra note 1540.

1551. Id. and March 1975 Williams letter, supra note 1413. DOT stated: "With the added responsibility of Section 5 [see note 1443 supra], UCR will be requesting written affirmative action programs." Coleman letter, supra note 1422. Moreover, DOT noted that 35 percent of the 43 employees were minority.

1552. UCR, UMTA, DOT, Title VI Survey of Program Sponsors, Austin Transit Company, Nov. 20, 1972.

1553. Id. and Attachment 9 to March 1975 Williams letter, supra note 1413.

DOT stated:

> UCR does not request written affirmative action programs from employers with less than fifty (50) full-time employees though affirmative action may be requested. We request written affirmative action programs only when the employer has underutilization of persons in one or more job categories and the deficiency(ies) is (are) so major that a written affirmative action program is the only way to cure the deficiency(ies). It should be noted that we do not request written affirmative action program when an employer questions our authority to require one systemwide. It should also be noted that we do not, because legally we cannot, require an affirmative action program prior to a compliance review. However, once Section 5 [1554] funding "flows," UCR will be requesting more written affirmative action programs. 1555

It is this Commission's position that an affirmative action plan must contain a utilization analysis.[1556] This Commission is not recommending remedial action regardless of the outcome of the analysis, but only where an analysis reveals underutilization. It is therefore this Commission's position that affirmative action plans should be required prior to the conduct of any compliance reviews.

UCR reports that in 90 percent of the cases in which it finds noncompliance, one of the problems is the absence of an adequate complaint

---

1554. Section 5 is discussed in note 1443 supra.

1555. Coleman letter, supra note 1422.

1556. Affirmative action is discussed on p. 530 supra.

procedure.[1557] In these cases, UCR recommends that such a procedure be adopted and provides a sample procedure to assist the UMTA recipients.[1558] The sample procedure is a statement to be issued by the general manager of the transit system reminding the system's employees that discrimination on the basis of race, color, religion, sex, and national origin is prohibited and advising employees of their right to file a complaint of discrimination with the system and to have a representative present at any discussions between the employee and the complaint investigator.

1557. Although UCR generally requires its recipients to have a written grievance procedure, UCR's requirement is not in writing. Telephone interview with Eugene Jackson, Jr., Chief, External Programs Division, UCR, UMTA, DOT, Mar. 19, 1975.

1558. UCR, UMTA, DOT, Sample Complaint Policy and Procedure, Revised April 1974.

The sample procedure states that employment discrimination complaints may be filed with the transit body's equal opportunity officer,[1559] who will investigate the complaint. The complaint must be acknowledged, by letter to the employee's home; and the transit body is directed to set a time limit for the complaint investigation.[1560] The sample complaint procedure provides no other instruction as to how such complaints will be investigated. For example, there is no requirement that the complainant, or any alleged discriminatory official, or witnesses be interviewed.[1561] There is no

---

1559. Although UCR does not require transportation companies to appoint equal opportunity officers, it strongly suggests such an appointment. Among the duties which UCR recommends for the equal opportunity officer are to: (a) serve as an advisor to the employer on all civil rights matters; (b) assess the adequacy of transportation service, particularly with regard to minorities and females; (c) investigate all complaints of discrimination; (d) assist in identifying minority firms capable of performing work for the employer, and (e) assist in recruiting minorities and women for employment and training. UCR, UMTA, DOT, Suggested Role of an Equal Opportunity Officer, Undated.

1560. UCR does not recommend a time limit.

1561. The Civil Service Commission (CSC), which is responsible for ensuring that complaints of Federal employment discrimination are adequately investigated, has issued instructions for investigations of these complaints. Civil Service Commission, Investigating Complaints of Discrimination in Federal Employment (1971). These instructions are being revised. Draft Investigation Guidelines, Undated, provided by Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, Civil Service Commission, Nov. 1, 1974. Although both the guidelines and the draft revision are inadequate (see To Eliminate Employment Discrimination, supra note 1444), they illustrate the complexities of complaint investigations. These guidelines discuss, for example, the necessary training and experience for investigators; complaint filing, the scope of the investigation; interviewing witnesses and affected parties, including complainant and the alleged discriminating official, the information needed to establish patterns of discrimination; and the procedures to be followed if the complaint is withdrawn before the completion of the investigation.

indication that the equal opportunity officer has a responsibility to make a thorough statistical review of the employer's practices to determine if there is a disparity in the employment status of minorities and other employees.[1562] Indeed, UCR does not make clear that statistical evidence may be sufficient to demonstrate discrimination and that it is not necessary for a complainant to demonstrate bigotry on the part of an individual in order to show that discrimination has occurred.[1563]

Another serious deficiency of the procedure is that it does not guarantee that the investigation will be impartial. There is no stated requirement that the investigator must refrain from discussing the complaint or the investigation with the employer. The investigator is not precluded from accepting the employer's advice as how to handle the complaint.[1564] Moreover, the procedure indicated that the outcome of the complaint will be decided by the general manager,[1565] thus making the allegedly discriminatory transit authority

---

1562. Under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex, and national origin by private and State and local government employers, complainants may demonstrate a prima facie case of discrimination with statistical evidence. See, e.g., Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

1563. In July 1975, DOT stated, "These issues have been addressed in a revised complaint procedure." Coleman letter, supra note 1422.

1564. The sample procedure implies that the equal opportunity officer should treat the complaint in confidence. For example, acknowledgement of the complaint is sent to the employee's home, and the name of the employee cannot be revealed without the employee's permission. However, there is no requirement that complainant's or other employee's testimony remain confidential unless they give permission for their testimony to be released. Sample Complainant Policy and Procedure, supra note 1558.

1565. Id. In July 1975, DOT stated, "This issue is under review and consideration within UMTA." Coleman letter, supra note 1422.

responsible for rendering final decisions. This biases the complaint system against the complainants,[1566] and it appears that while the grievance procedures UCR attempts to establish may occasionally help employees to resolve minor difficulties, overall, the sample grievance procedure is so inadequate that it may serve to deny employees impartial investigations and fair decisions.

1566. The complainant may choose to refer the complaints to the Equal Employment Opportunity Commission, the Department of Transportation, or State or local human rights agencies if he or she is dissatisfied with the general manager's decision. But employees who have been discriminated against may become discouraged at this point and neglect to pursue their case further.

3. Recipients' Responses to UCR Recommendations

UCR made 94 findings of noncompliance from July 1972 through mid-January 1975. As of March 1975, UCR reported that only two of these recipients remained in noncompliance.[1567] In both cases the notices informing the recipients of the action necessary to come into compliance had been sent in early 1975[1568] and, thus, time for a response from the agency had not elapsed.

UMTA has never had occasion to initiate administrative proceedings against a recipient or to refer the case of a noncomplying recipient to the Department of Justice for civil action[1569] because, according to UCR's

---

1567. March 1975 Jackson interview, supra note 1458. One of the transportation systems was the Gulfport (Mississippi) Coast Transportation Authority (GCTA). UCR requested GCTA to (1) increase the number of minorities and females on its board of directors; (2) develop a civil rights complaint procedure; (3) take affirmative action to increase minorities and females in clerical and administrative positions; (4) provide confirmation to UCR that an additional bus will be put in the predominantly minority area of Gulfport. The other transportation system was the Southeastern Michigan Transportation Authority (SEMTA) in Detroit, Michigan. UCR requested SEMTA to (1) appoint or employ an equal opportunity officer with duties clearly delineated; (2) formulate an affirmative action plan with goals and timetables; (3) establish a grievance procedure for employees; and (4) establish continuing liaison with community organizations.

1568. March 1975 Jackson interview, supra note 1458.

1569. Like other Federal agencies, when UMTA finds a recipient in noncompliance with Title VI, and the recipient does not take corrective action as requested, UMTA may initiate administrative proceedings to terminate funds to the recipient or may refer the matter to the Department of Justice for appropriate action. For a more detailed discussion of sanctions under Title VI, see Chapter 5, infra, Law Enforcement Assistance Administration.

aggregated records, all recipients requested to take corrective action have done so and there were no long-standing cases of noncompliance.[1570] It thus might appear that UCR had an excellent record of discovering and remedying noncompliance. However, UMTA compliance review files show that UCR has insufficient evidence to demonstrate that this is the case.

UMTA recipients frequently failed to provide UCR with adequate proof that its recommendations would be adopted, and UCR did not take action to obtain that proof. For example, as a result of a review in December 1971[1571] UCR made a number of recommendations, including that the Tucson (Arizona) Transit Corporation discontinue the practice of using photographs to identify the race of applicants and provide applications, examinations, and medical forms in both English and Spanish. UCR also recommended that the transit corporation be advised of responsibilities under Title VI and the Executive order, apparently in response to UCR's finding that the transit

---

1570. March 1975 Jackson interview, supra note 1458.

1571. Title VI Survey of Sponsors, Tucson, Arizona, supra note 1540.

corporation staff had not had formal equal opportunity training.[1572]

Recommendations were transmitted to the Tucson Transit Corportation in January 1972.[1573] On May 12, 1972, the mayor of Tucson sent UMTA copies of an equal employment opportunity poster and new medical and application forms.[1574] The mayor did not forward copies of revised examinations and, apart from the poster, there was no indication that staff had been informed of their equal opportunity responsibilities.[1575] In evaluating Tucson's response, URC's only concern was that the new application forms continued to be discriminatory. UCR wrote to so

---

1572. Id.

1573. Letter from Harold B. Williams, Director, Office of Civil Rights and Service Development, to Lewis B. Murphy, Mayor, Tucson, Ariz., Jan. 24, 1972. DOT stated:

> [This] letter to Tucson asked that (1) the medical examination form and (2) the application for employment form be revised. In addition the letter asked Tucson to "apprise its employees in writing of its equal opportunity policy and establish a policy for resolution of complaints of discrimination." Tucson was advised to assign a person the responsibility for receiving and resolving complaints of discrimination. Coleman letter, supra note 1422.

1574. Letter from Lewis B. Murphy, Mayor, Tucson, Ariz., to Harold B. Williams, Director, Office of Civil Rights and Service Development, UMTA, DOT, May 12, 1972.

1575. There was no indication that any training sessions had been held, or that informational materials had been given to staff. DOT stated:

> In a letter dated May 12, 1972 the Mayor submitted a revised employment application form, physical examination form and a written complaint procedure (combined with a policy) in which persons were identified to handle complaints... This represented compliance with our recommendations. Coleman letter, supra note 1422.

inform the mayor [1576] but did not request a copy of the form and, thus,

---

1576. Letter from Harold B. Williams, Director, Office of Civil Rights and Service Department, to Lewis Murphy, Mayor, Tucson, Ariz., June 7, 1972. DOT noted:

> All of these actions took place within a period of six (6) months. UCR had been in existence only one year when the review was conducted. Understaffing was and is a critical problem in scheduling follow-up reviews. Coleman letter, supra note 1422.

Moreover, DOT also wrote to this Commission:

> We note...that the compliance reviews examined by the CRC do not reflect recent UCR activity but reflect reviews performed in 1971 and 1972, and UCR notes that the Commission on Civil Rights is reporting on some reviews carried out as much as six years ago which do not reflect changes in our review methodology, policy, program and personnel. Id.

This Commission notes that no reviews examined by Commission staff were "carried out as much as six years ago." The UMTA Office of Civil Rights was not in existence at that time. Moreover, this Commission believes that it was necessary to examine UMTA reviews from 1971 and 1972 to evaluate UCR's followup activity of these reviews.

received no further correspondence from Tucson on this issue, and made no further inquiries.[1577] Indeed, as of March 1975, the first contact between the UMTA civil rights staff and Tucson was scheduled for April 1975, almost 3 years after Tucson was informed by letter of the inadequacy of its transit system employment application.[1578]

Similarly, in the case of the Fort Wayne review, among UCR's recommendations were that the public transportation corporation: (1) appoint or employ an equal opportunity officer with responsibilities clearly delineated, and (2) recruit minorities in the official, administrative, and office clerical categories.[1579]

1577. Interview with Akira Sano, Equal Opportunity Specialist, External Programs Division, UCR, UMTA, DOT, Mar. 13, 1975.

1578. Id.

1579. Title VI Survey, Fort Wayne Transportation Corporation, supra note 1527.

In response to these recommendations, the transportation corporation only superficially described plans to take corrective measure. For example, with regard to UCR's first recommendation, it stated that an equal employment opportunity officer was appointed but did not describe the duties of the officer. The transportation corporation merely noted that she was being trained in her responsibilities. In response to the second recommendation, it promised to develop an affirmative action plan, but did not make any commitment to recruit minorities for the official, administrative, or office clerical categories.[1580] UCR did not request further action.

Moreover, even where a recipient makes a commitment to take corrective action, UCR conducts few followup reviews to ensure that this action is fully carried out. In fiscal year 1973, only 11 followup reviews were conducted. In fiscal year 1974, 10 such reviews were conducted. In fiscal year 1975, through mid-March, only 4 had been conducted.[1581] Thus, in most cases, UCR has inadequate proof that recipients it treats as being in compliance with Title VI are actually providing equal opportunity in mass transportation.

1580. Letter from Neil Shober, Operations Manager, Fort Wayne Public Transportation Corp., to Harold B. Williams, Director, UCR, UMTA, DOT, Nov. 29, 1974.

1581. Attachment 4 to March 1975 Williams letter, supra note 1413.

UCR's willingness to consider that noncomplying recipients have made adequate corrections and have come into compliance can be damaging. If UMTA erroneously regards a recipient as being in compliance, not only will the recipient be likely to continue its discriminatory practices but UMTA's determination of compliance may be used by the recipient to avert the criticism of others[1582] who might otherwise have been able to bring about change in the discriminatory practices of the recipient.

1582. For example, prior to floating a $1 billion bond issue, Chicago asked UCR to conduct a review of its transit system. The Commission notes that if UCR finds the Chicago transit system to be in compliance with UMTA's civil rights requirements, this may be useful to Chicago in its response to any minority citizens and community groups which oppose the bond because they allege discrimination in transit services.

Chapter 8

ENVIRONMENTAL PROTECTION AGENCY (EPA)

Introduction

Prior to publication of this report, the Commission provided each of the Federal agencies reviewed in the report with an opportunity to comment on the relevant draft chapter. Most Federal agencies responded by providing item-by-item reactions to specific points made by this Commission. Their comments were interspersed throughout the report, as appropriate. In contrast, EPA's letter responded not to specific statements, but to the general thrust of the Commission's review, by setting forth its own position regarding its civil rights responsibilities. Therefore, we have printed EPA's letter in its entirety, along with this Commission's evaluation of the position outlined in that letter, on the pages immediately preceding the body of this chapter.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 8, 1975

OFFICE OF THE
ADMINISTRATOR

Mr. John A. Buggs
Staff Director
U.S. Commission on Civil Rights
Washington, D.C. 20425

Dear Mr. Buggs:

Thank you for the opportunity to comment on the EPA section of your upcoming Report on the Title VI enforcement effort of the Federal government.

You are to be complimented on the honesty and meticulous detail of the EPA chapter. It is evident that the authors exercised great care and discretion in their efforts to be fair.

Notwithstanding their effort, however, we believe the chapter distorts the picture of the Agency's Title VI enforcement effort because it does not take into account the constraints of our operating programs which inhibit attainment of certain goals advocated by your reviewers.

As we read your report, we understand the authors to be assigning to this Agency responsibilities which we feel are outside our areas of authority - responsibilities more pertinent to Federal agencies providing assistance to housing and community development. We believe the report should give more recognition to the fact that EPA is essentially a pollution abatement agency and, as such, is to be distinguished from an agency principally concerned with community development. The difference is important because of the difference in proximate goals and beneficiaries. Pollution control programs mandate change. Community development programs are optional. Pollution control programs deal with what must be done to overcome existing public health and environmental hazards. Community development programs deal with what is desirable - discretionary matters that will enhance a community but need not necessarily be undertaken as a matter of national priority. This difference in thrust, we think, makes a great deal of difference in what should be expected from the two agencies and their programs when evaluating their capabilities and responsibilities under Title VI.

The principle program we fund - and the principle program reviewed in your report - is the Municipal Wastewater Treatment Works Construction Grant Program. That program accounts for over 90 percent of the Agency's budget. It was originally created in 1956 and was tailored entirely as a public health measure. Subsequently, it was amended to include environmental considerations, but it was never translated into a community development program.

Efforts were made at the outset to include the program with the sewer and water programs of the Housing and Home Finance Agency, one of the predecessor agencies of the present Department of Housing and Urban Development. Neither the original placement effort nor subsequent attempts to transfer it were successful because the goals of the two programs and agencies always have been recognized as being different.

DHUD's programs are incidental to public health and environmental considerations. With EPA, such considerations are primary. DHUD's prime beneficiaries are the communities receiving their assistance. Under the Construction Grant program, EPA's primary beneficiaries are the people of the United States (through obtaining clean waters) and the downstream communities. That is why the program became a necessity in the first place. Communities would sewer their own residents but would not vote funds to treat the sewage collected. Rather, they dumped their wastes untreated into the nearest convenient waterway, letting the downstream communities worry about their own water supplies. As a result, the nation's waterways became a public health hazard and the Federal government had to exercise its national jurisdiction to attack the problem.

In addition to the incentive of our grant program, of course, the Federal Water Pollution Control Act also has provisions for the establishment of water quality standards and for enforcement procedures with sanctions where pollutors do not act to correct polluting discharges. During operations under the Federal Water Pollution Control Act, numerous instances have occurred where our incentive grants have not been sufficient motivation for communities to provide treatment, or to provide the degree of treatment found necessary by the Federal government to abate area water pollution, and enforcement proceedings by this Agency have been required. I mention this to illustrate that despite the relatively large appropriations we have for grants, our Agency really is more of a quasi-regulatory agency than a community development one.

We think your critical standard with respect to our responsibilities under Title VI would be different if you viewed our activities more in that light and less - as your report seems to imply - as a discretionary community tool. Specifically, we think the standard you set for us on page 405 would then be modified. ("EPA thus has a major responsibility under Title VI to ensure that action is taken to reverse

[the pre-existing discriminatory practice of State and local governments of not providing minority communities with sewers].")

Perhaps we have misread your intent. If you are saying that EPA has a major responsibility to be sure that no discrimination occurs in the provision of services or benefits under its programs, then we agree. If you are saying that we have a responsibility to go beyond our project to reverse previous discriminatory practices, we hesitate. That could be true, and it could not, depending on circumstances. The Sealy, Texas, case you cited on page 449 of your report illustrates the point.

In the Sealy case the obvious health hazard caused by the overflow of septic tanks in the minority section of the city made the State Health Agency require the city to revise its plans to include the minority residents. The complaint arose under Title VI. It was redressed under the Federal Water Pollution Control Act. Frankly, had a health hazard or serious pollution problem not been shown to have existed, it is questionable whether we could have forced the City to revise its plans to provide sewerage to its minority section contemporaneously with construction of its sewage treatment works simply because original plans did not call for sewerage for the minority population. We were providing no financial assistance to that portion of the City's project and at that time had no authority to provide assistance for collection lines. Our prime responsibility then, as now, was to abate existing pollution. If failure to sewer the minority community contemporaneously with construction of the City's sewage treatment works did not add to the City's pollution, would we be justified in withholding our grant if the community did not amend its project to include contemporaneous sewer construction for the minority community? Or could we accept an agreement on the part of the City to undertake proximate sewer construction for the minority community and continue funding for the treatment works? As it turned out, of course, neither course was followed. The obvious existing public health hazard caused the State to require the City to revise its construction plans and the minority community was sewered.

The Sealy case also illustrates that point Mr. Ruckelshaus made in his appearance before your Commission in 1971. EPA has a mandate. Title VI presents a mandate. It is to be hoped that both can be carried out without conflict. When a conflict occurs, the result will have to be worked out on a case to case basis.

Under the 1972 Amendments to the Federal Water Pollution Control Act we were given authority to provide grant assistance to sewage collection line construction. This has been used sparingly because of the Ageny's view that more pollution abatement is obtained for less money through other facilities. The enclosed Water Strategy Paper may give you a better picture of how the Agency views its responsibilities under the Water Program and the goals it has set to attain them.

This leads us back to the central question. If you are suggesting that we have a responsibility over and beyond pollution control considerations to see to the sewering of minority communities - even with our new collection line authority - we believe you are asking too much. General sewering we see as a responsibility of community development programs. EPA becomes a part of the matter when we enter the picture with pollution abatement assistance. But only a part. We do not consider it as our major responsibility to see to the sewering of minority communities nationwide irrespective of pollution abatement considerations. But perhaps that is not what you meant.

With respect to our responsibilities under Title VIII of the Civil Rights Act of 1968, we note that your reviewers omitted key words from the requirements of that Act which may have led them again to distorted conclusions about our responsibilities. On page 409 of the report they describe Title VIII as requiring all Federal agencies to administer their programs affirmatively to further the purpose of fair housing. The omitted words are "programs relating to housing and urban development . . ." We think the qualifying words made a significant difference and our reading of the background of the adoption of Title VIII and its subsequent implementation by DHUD persuades us that EPA's Municipal Wastewater Treatment Works Construction Grant program is not such a program within the strictest intrepretation of the term.

Again, we think part of the confusion comes from the fact that EPA's construction grant program is often classed together generally with DHUD's sewer and water programs. These latter programs are covered by Title VIII. It seems entirely reasonable to assume that EPA's Municipal Wastewater Treatment Works Construction Grant program must be covered, too. But our reading of the background leads us to believe our relationship with those programs is more coincidental than direct. We believe it overstresses the term "related" to say that because the EPA-assisted facility connects to such projects, the EPA program thereby becomes a "housing" program with the intent of Title VIII.

As a pollution abatement agency with a special mandate of our own, we most emphatically do not believe we properly may adopt the affirmative action which you have suggested for us pursuant to Title VIII: unilateral withholding of our treatment works construction grant assistance from communities which are charged with having exclusionary zoning ordinances precluding location of low cost and medium income housing within their jurisdictions. That presents the same conflicts mentioned by Mr. Ruckelshaus with respect to Title VI affirmative action.

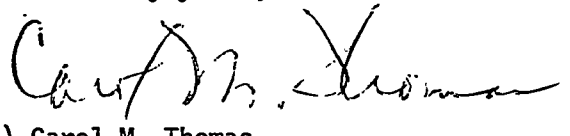
We can envision a situation where the U.S. Justice Department might request our assistance in an associated Federal effort to treat with such a problem. We undoubtedly would give careful consideration to such a request. Similarly,

we would give careful consideration to requests for cooperation on the part of DHUD. But in the absence of a Federal policy directing such suspension of assistance as a supervening program mandate, we must continue to be guided by our principle program mandate which is pollution abatement.

Overall, as we said at the outset, your report is substantially fair. Only in the two basic instances cited herein would we seriously quarrel with your conclusions. In some instances we feel we might be entitled to more credit than you have given, but that may be a personal rather than an objective judgment.

Thank you again for this opportunity to comment on your report. We regret we did not have more time to prepare more detailed comments, but what we have written covers our principal concerns with the report.

Sincerely yours,



(Mr.) Carol M. Thomas
Director
Office of Civil Rights (A-105)

U.S. COMMISSION ON CIVIL RIGHTS REPLY TO CAROL M. THOMAS'S LETTER OF JULY 8, 1975

Title VI unequivocally states that no one shall be excluded from participation in any federally assisted program because of race or ethnic origin. Title VI also clearly directs each Federal agency administering such a program to enforce that prohibition. We have found, however, that EPA provides funds to municipalities without taking adequate steps to ensure that they are in compliance with Title VI, and we have concluded that EPA has been lax in executing its Title VI mandate.

Mr. Thomas' letter attempts to justify EPA's practices by contending that there is a conflict between EPA's civil rights and pollution abatement mandates, which must be resolved on a case-by-case basis. We strongly disagree with EPA's position. The Title VI mandate is to be enforced by each Federal agency simultaneously with its mandate to administer the programs it funds. We interpret EPA's position as tantamount to saying that, in the face of environmental considerations, EPA may see fit to weaken or even abandon civil rights standards. We find nothing in EPA's mandates which would authorize the dilution of EPA's civil rights obligations in any case.

A central point of disagreement between EPA and this Commission concerns what is required of EPA to ensure Title VI compliance. Mr. Thomas' letter affirms EPA's duty to be sure that no discrimination occurs in the provision of services or benefits under EPA programs. This statement is tempered, however, by EPA'a qualification that it

hesitates to admit responsibility for ensuring that funded communities reverse previous discriminatory practices. This qualification undermines EPA's affirmation of its basic duty to ensure against nondiscrimination in its programs. It also is contrary to EPA's Title VI regulation, (40 C.F.R. § 7) which requires that EPA recipients take affirmative action to overcome the effects of past discrimination.

EPA cannot eliminate discrimination in the programs it funds unless it ensures that the effects of previous discriminatory practices are also eradicated. For example, where a municipality has failed to provide sewer services to minorities living within its boundaries, while at the same time providing services for nonminorities, discrimination will continue until minorities are also served. The fact that a decision not to provide sewers in a minority community may have been made prior to the municipality's receipt of EPA funds in no way lessens the present effects of the discrimination. If EPA funds such a jurisdiction without requiring that it take steps to eliminate the discriminatory effects, we believe that EPA would be providing those funds in violation of Title VI.

Another major point of disagreement concerns EPA's ability to invoke its Title VI enforcement authority where Title VI violations have been found. Mr. Thomas refers to the problem noted by William D. Ruckelshaus, Administrator, EPA, in his 1971 testimony before this Commission, that a conflict arises when Title VI requires fund termination because to invoke that remedy might cripple a recipient's ability to comply with environmental standards. Although under the Federal Water Pollution Control Act, EPA has authority to enforce compliance with those environmental standards, Mr. Ruckelshaus

noted that a problem arises because the enforcement process under that act is too lengthy to enable EPA to require prompt correction of critically hazardous environmental conditions. Thus such conditions might prevail if EPA's funds were withdrawn.

We believe that there may be a solution to this problem. This Commission holds that the Title VI remedy of fund termination is generally preferable to the alternative permitted under that title of referral to the Department of Justice for appropriate civil action. Nonetheless, as we have noted in Chapter 1 of this report, such a referral may sometimes be an appropriate remedy. This may well be the case where there is noncompliance with Title VI and EPA has determined that fund termination would have an immediate detrimental effect upon the health of the public. We believe, however, that it is the intent of Title VI that the remedy of fund termination be used in any cases of civil rights noncompliance in which fund termination would not create such a critical situation.

EPA also questions its authority under Title VIII of the Civil Rights Act of 1968. Title VIII requires Federal agencies to administer their programs relating to housing and urban development affirmatively to further the purposes of fair housing. Mr. Thomas's letter states that EPA's Wastewater Treatment Program is not a program relating to housing and urban development within the strictest interpretation of the term. We believe that a liberal construction of Title VIII should be applied. Moreover EPA's program for sewage treatment is essential for the development and maintenance of urban areas, and thus it is clear that even within the strictest meaning of the term "program relating to housing and urban development," it is covered by Title VIII.

EPA has become stymied by a number of obstacles to the effective execution of its civil rights responsibilities. Although we know these obstacles are serious, we believe that EPA has an obligation to determine how they can be overcome. None of them excuses EPA from discharging its civil rights duties.

In conclusion, we refer to Mr. Thomas' statement that EPA's beneficiaries are the people of the United States. EPA should keep in mind that the people of this country are not only the people who are currently benefiting from Federal programs, but also minorities who, because of discrimination, have not been able to receive Federal

benefits. As discussed more thoroughly in the ensuing chapter, unless EPA takes positive steps to insure an end to the systemic discrimination which has resulted in inadequate sewer services in many minority communities, EPA will be responsible for perpetuating that discrimination.

I. Program and Civil Rights Responsibilities

A. Wastewater Treatment Construction

The major EPA program covered by Title VI of the Civil Rights Act of 1964[1583] is the Wastewater Treatment Construction Program,[1584] which provides assistance to State and local governments for the construction of sewage treatment facilities. From the inception of this program until mid-1974, 15,200 projects had been approved and a total of $8.2 billion had been disbursed in the 10 regions.[1585] Under Title VI, EPA is

---

1583. 42 U.S.C. § 2000d, et seq. (1970). EPA Title VI regulations are published at 40 C.F.R. § 7.1, et seq. (1974).

1584. Water Pollution Prevention and Control Act of 1972, 33 U.S.C.A. § 1281, et seq. (Cum. 1975) amending 33 U.S.C. § 1281 et seq. (Supp. II, 1970). The Wastewater Treatment Construction program was designed to assist State and local governments in the construction of publicly-owned sewage treatment works. Such works include sewage treatment plants and trunk lines which may serve all or portions of individual communities, metropolitan areas, or regions. Collection lines which connect areas with the trunk line/sewage treatment plant are financed by the areas themselves or with assistance from the Department of Housing and Urban Development. EPA's programs are listed and described in EPA, Federal Assistance Programs of the Environmental Protection Agency (December 1974).

1585. EPA's regions are the 10 standard Federal regions (see map on p. 127 supra). During this time period, in the regions visited by Commission staff, the funding as of mid-1973 was as follows: Region I (Boston) funded 687 projects, granting a total of $569,061,906; Region V (Chicago) funded 2,410 projects, granting a total of $1,061,780,748; Region VI (Dallas) funded 1,832 projects, granting a total of $473,483,147; and Region X (San Francisco) funded 895 projects, granting a total of $493,731,643.

responsible for ensuring that there is no discrimination on the grounds of race, color, or national origin in any projects receiving funds under the Wastewater Treatment Construction program.

Minority communities are often not served by sewers.[1586] Their lack of sewer services has generally been part of a larger problem: Minorities have traditionally received inferior public services as a result of systemic discrimination which pervades the operations

---

1586. As of the 1970 census there were 19,511,409 housing units, both occupied and unoccupied, which were not connected to public sewers--29 percent of the total housing units in the country. The vast majority--almost 75 percent--of the unsewered homes were in rural areas. The homes of over 90 percent of all blacks living in rural areas were not connected to sewers, as compared with 80 percent of the total rural population. There are no comparable nationwide figures in the 1970 census for persons of Spanish speaking background, but looking at certain counties in Texas which have high Mexican American populations, it can be seen that lack of sewer facilities is a more severe problem for persons of Spanish speaking background than for Anglos. For example, in Hidalgo County, which is 70 percent Spanish speaking background, homes of only 63 percent of the Spanish speaking background population were connected to a public sewer as compared with 96 percent of the non-Spanish speaking background population. Similarly, in Cameron County, which is 65 percent Spanish speaking background, homes of only 75 percent of that population were connected to a public sewer as compared with homes of 96 percent of the rest of the population in the county.

Native American households, too, were infrequently connected with a public sewer. Only 104,385 (57.7 percent) of the 180,849 Native American households in the country were connected with a national average of 71 percent. No comparable data on female-headed households are available from the 1970 census.

of State and local governments.[1587] EPA, thus, has a major responsibility under Title VI to ensure that action is taken to reverse this pattern. In recognizing its duty, EPA has focused primarily on whether its recipients have provided minorities within their jurisdictions with the option[1588] of having their homes connected to a sewer line.

EPA also has a responsibility to ensure that conditions such as the lack of fair housing laws, absence of a fair housing agency, or the existence of exclusionary zoning ordinances[1589] do not contribute to the effective exclusion of minorities from EPA assistance by aiding their exlusion from a community which has applied for or receives EPA assistance. As of March 1975, EPA, however, had not

---

1587. See, e.g., Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1,286 (5th Cir. 1971); Selmont Improvement Ass'n v. Dallas County Comm'n, 339 F. Supp. 477 (S.D. Ala. 1972); Davis v. City of Sanford, Cir. No. 70-172 (N.D. Fla. 1972); and Fairfax County-side Citizens Comm. v. Fairfax County Cir. No. 336-710A (E.D. Va. 1972). See also Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970).

1588. If minorities elect not to avail themselves of this option because it is costly, EPA encourages the recipient jurisdictions to provide a more manageable payment plan, for example, to assess payments for sewer service according to salary and adjust payments over a longer period. EPA generally does not follow up to ensure that such arrangements have been made or that citizens have taken advantage of them. Telephone interview with Edgar Jenkins, Director, Compliance Division, Office of Civil Rights and Urban Affairs, EPA, Nov. 19, 1973. This issue is discussed further on p. 631, infra.

1589. Such ordinances include those which limit the construction of multi-dwelling units, specify a minimum acreage in the construction of private housing, and limit occupancy in private dwellings to persons who are related by blood or marriage. The exclusionary effects of zoning are discussed in U.S. Commission on Civil Rights, Understanding Fair Housing 4 (1973), and Equal Opportunity in Suburbia 30 (1974).

yet fully recognized this role. Several years earlier, EPA gave consideration to whether or not it could provide assistance to jurisdictions with zoning ordinances which effectively excluded low-income housing. It concluded that Title VI does not prohibit such assistance. This issue arose as a result of complaints in two regions. In Region I, complaints against the local governments of Darien, Glastonbury, and Avon, Connecticut, because of their exclusionary zoning ordinances were brought to EPA's attention by the Connecticut Commission on Human Rights and Opportunities. EPA's Regional Counsel ruled that construction grant awards to such communities[1590] would

---

1590. In 1973, one of the cities, Avon, Connecticut, filed an application with EPA for a grant of $2,212,800. EPA reported that if the grant application was otherwise satisfactory in view of the Regional Counsel's opinion that Title VI was no bar, there would be no reason not to make the requested grant offer. EPA response to April 1973 Commission on Civil Rights questionnaire, contained in a letter from William D. Ruckelshaus, Administrator, EPA, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, June 8, 1973 [hereinafter cited as EPA response]. In April 1974 EPA awarded $2.2 million to Avon and $3.3 million to Glastonbury. Interview with Edgar Jenkins, Director, and Richard Risk, Title VI Program Officer, and Frances Adkins, Compliance Specialist, Compliance Division, Office of Civil Rights and Urban Affairs Office, EPA, Sept. 5, 1974.

not violate Title VI.[1591] Although the Regional Counsel's arguments were weak,[1592] EPA's Washington Office of General Counsel has not

---

1591. Memorandum from Thomas B. Bracken, Regional Counsel, Boston Regional Office, to Richard Risk, Assistant Director, Office of Equal Opportunity, EPA, Feb. 1, 1972.

1592. As a basis for this argument that exclusionary zoning does not fall within the purview of Title VI, the Regional Counsel stated, for example, that in a recent case the court held that no Title VI issues were raised by an exclusionary zoning ordinance. Southern Alameda Spanish Speaking Organization v. City of Union City, Ca., 314 F. Supp. 967 (N.D. Cal. 1970), aff'd 424 F.2d 291 (9th Cir. 1970). The Regional Counsel does not make clear that the plaintiffs in this case were attempting to sponsor a federally-assisted housing project which had been thwarted by a citywide referendum concerning a zoning ordinance, and that the reason for the court's holding was that there was no allegation of discrimination in a federally-assisted project. The court found that:

> There is no issue here concerning racial discrimination against plaintiff under program or activity receiving Federal assistance. The only program or activity involved is the proposed housing project of the plaintiffs themselves. At 972.

Thus, the inapplicability of Title VI to this case has little bearing on the question whether or not water and sewer funds should be provided to a jurisdiction where it is clear that minorities would be excluded from the benefits of those municipal services by virtue of their exclusion from the community. For a further discussion of exclusionary zoning as it relates to Title VI, see letter from Peter W. Gross, Assistant General Counsel, U.S. Commission on Civil Rights, to Richard Risk, Chief, Title VI Compliance Branch, EPA, Mar. 14, 1972.

issued a legal opinion on this matter. EPA officials consider it is closed in light of the Regional Counsel's opinion.[1593]

EPA justified its position in part by the fact that there was no national policy barring Federal assistance to communities that ban low-income housing.[1594] EPA noted that such a policy might appropriately be promulgated by the Department of Housing and Urban Development (HUD) because of its lead role in the Federal fair housing effort under Title VIII of the Civil Rights Act of 1968.[1595]

1593. Telephone interview with Edgar Jenkins, Director, Compliance Division, Office of Civil Rights and Urban Affairs, EPA, Nov. 29, 1973.

1594. In fact, President Nixon's 1971 fair housing message (Statement by the President on Federal Policies Relative to Equal Housing Opportunity, June 11, 1971) was interpreted as indicating that the Nixon administration would not interfere with any local zoning laws which had the effect of excluding racial or ethnic minorities for economic reasons. Congressional Quarterly Weekly Report 2362 (Nov. 13, 1971).

1595. EPA response, supra note 1590.

EPA civil rights staff members met with HUD officials responsible for implementation of Title VIII to discuss exclusionary zoning. EPA furnished HUD copies of its statutes and regulations and explained the operations of its wastewater treatment works construction grant program in an effort to obtain advice on how to deal with these cases. However, EPA reported that it has not received an opinion from HUD on how to proceed in this area.[1596]

EPA's view of its own role in this issue has been excessively restrictive. The question of whether or not financial assistance should be granted to areas with exclusionary zoning policies can be decided within the framework of Title VI of the Civil Rights Act of 1964, even if Title VIII guidelines have not been forthcoming from HUD. EPA's responsibilities under Title VI are qualitatively equal to HUD's, and, thus, there is little

---

1596. Jenkins and Risk interview, supra note 1590. HUD apparently has neither issued a policy nor proposed legislation to limit exclusionary zoning. The basis of such legislation is discussed in Hearing Before the U.S. Commission on Civil Rights, Washington, D.C., Exhibit 34, Commission staff paper, "Congressional Power to Prohibit Exclusion of Low and Moderate Income Housing" 892 (1971).

reason for EPA to defer to HUD in this matter. Further, Title VIII of the Civil Rights Act of 1968 requires EPA, as all Federal agencies, to administer its programs relating to housing and urban development affirmatively to further the purpose of fair housing. In an effort to implement Title VIII, EPA could appropriately issue guidelines which bar exclusionary zoning. Where EPA allows recipients to use its programs to perpetuate racial isolation, it is not fulfilling its fair housing role.

B. Training Programs and Research and Demonstration Grants

The Air Pollution Manpower Training Program, Radiation Training Program, Solid Waste Training Program, and Water Pollution Control and Water Quality Training Program [1597] have civil rights implications. These EPA manpower programs provide financial assistance for training in technical areas such as engineering, environmental law, and urban planning. Minorities and women have traditionally been excluded from these fields. While EPA acknowledges Title VI responsibility in

---

1597. In fiscal year 1973, EPA provided almost $9 million for training in order to assist public and nonprofit private agencies and institutions to develop career-oriented personnel qualified to work in environmental protection areas such as air and water pollution control. The Air Pollution Manpower Training Program, which received $1,700,000, had 280 enrollees. The Radiation Training Program, which received $130,000, had 96. The Solid Waste Training Program, which received $826,000, had 47. The Water Pollution Control and Water Quality Training Program, which received $6,043,000, had 1,252.

its training programs, it has not taken steps to ensure that the recipients of its assistance are eliminating this practice. It has not collected data on the race, ethnic origin, or sex of enrollees in its manpower training programs.[1598] In fact, some EPA officials were under the erroneous impression that compiling such data was illegal.[1599]

1598. EPA response, supra note 1590 and Jenkins and Risk interview, supra note 1594. EPA has taken no further action because as of March 1975, most of these training programs were being transferred to the Department of Labor. Interview with Gary Katz, Special Assistant to the Director, Grants Administration Division, and Richard Risk, Title VI Program Officer, Grants Administration Division, Office of Administration, EPA, Mar. 14, 1975.

1599. EPA response, supra note 1590. The officials in question were EPA regional civil rights staff, under whose jurisdiction responsibility for such data collection would fall. Washington staff planned to request that regional officials collect this information in fiscal year 1974. Id. However, as of September 1974, the Washington office had not required such data collection. In fact, it had not even informed the regional officials that such data collection was legal. Jenkins and Risk interview, supra note 1590.

Indeed, EPA's regulation implementing Title VI of the Civil Rights Act of 1964 specifically provides that recipients of EPA assistance shall collect racial and ethnic data:

> (b) Compliance reports, Each recipient or applicant shall keep such records and submit to the responsible agency official or his designee timely, complete, and accurate compliance reports at such times, in such form, and containing such information, as the responsible Agency official or his designee may determine to be necessary or useful to enable the Agency to ascertain whether the recipient or applicant has complied or is complying with this part. Recipients and applicants shall have available for Agency officials on request racial/ethnic and national origin data showing the extent to which minorities are or will be beneficiaries of the assistance. [Emphasis added.] 40 C.F.R. §7.7(b) (1974).

While it is true that in some instances State or local law may prohibit racial or ethnic data collection, nonetheless, Federal regulations promulgated to enforce Title VI supersede State or local law. See U.S. Commission on Civil Rights, To Know or Not To Know: Collection And Use of Racial and Ethnic Data 74-84 (1973).

EPA also provides funds to institutions of higher education for research and demonstration grants.[1600] These grants are also subject to Title VI, and some institutions of higher education receiving EPA funds are also required to comply with Title IX of the Education Amendments of 1972[1601] which prohibits sex discrimination by educational institutions. Nevertheless, the Title VI and Title IX implications of these grants have not been considered by EPA officials, and no efforts were made to use program staff in any region for monitoring these projects to ensure equal opportunity for minorities and women. The Region VI Civil Rights Director did express concern that predominantly minority institutions may be short-changed in receiving such assistance[1602] but had no professional staff

---

1600. In fiscal year 1973, EPA provided $53,431,000 for research and demonstration grants. In the area of research, Air Pollution had 138 grants totalling $5,537,000; Radiation--8 grants, $285,000; Solid Waste--12 grants, $464,000; Pesticides--22 grants, $904,000; Water Pollution Control--193 grants, $1,171,000. Demonstration grants had a total of 150 grants: Air Pollution Survey and Demonstration--4 grants, $846,000: Solid Waste Demonstration--64 grants, $26,857,000; Water Pollution Control--76 grants, $857,000; and Multi- Programs--6 grants, $456,000. Telephone interview with Richard Risk, Title VI Program Officer, EPA, Nov. 29, 1973.

1601. 20 U.S.C. § 1681, et seq. (Supp. II, 1972). The 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. However, discrimination in admissions is prohibited only at institutions of vocational education, professional education, graduate higher education, and at public institutions of undergraduate education.

1602. Demonstration grants are awarded for demonstrating new and improved methods in such areas as pollution control and assessment of the extent of environmental problems. The less affluent universities may not have developed reputations in this area or have the basic equipment necessary to engage in such research. Jenkins and Risk interview, supra note 1590. On October 19, 1971, EPA held a meeting of minority universities and colleges to assist them in applying for EPA funds.

and, thus, could not review these grants.[1603]

The Department of Health, Education, and Welfare (HEW) is responsible for monitoring compliance with Title VI by institutions of higher education.[1604] Nonetheless, EPA does not have an agreement with HEW which would reduce overlap in the compliance activities of these two agencies. The possibility of delegating compliance responsibility to HEW was considered early in EPA's history, but EPA took no action until March 1975. In December 1974 the Department of Justice wrote a letter to EPA requesting that EPA sign an agreement with HEW delegating Title VI compliance responsibility to HEW[1605] and in March 1975 EPA determined that such a delegation would probably be made.[1606]

1603. Interview with Carlos J. Romero, Director for Civil Rights and Urban Affairs, Dallas Regional Office, EPA, Dallas, Tex., Jan. 29, 1973.

1604. See U.S. Commission on Civil Rights The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity 195-308 (1975).

1605. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to Richard Risk, Title VI Program Officer, Grants Administration Division, EPA, Dec. 31, 1974. Many Federal agencies which provide assistance to institutions of higher education have delegated Title VI compliance responsibilities to HEW, retaining only responsibilities for Title VI enforcement. For example, colleges and universities which are recipients of Veterans Administration (VA) assistance are monitored for Title VI compliance by HEW. The VA only becomes involved in compliance activities relating to these institutions when enforcement proceedings are necessary. See 34 Fed. Reg. 1711 (1969), for VA delegation of responsibilities to HEW.

1606. Letter from Alexander J. Greene, Director, Grants Administration Division, EPA, to Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Mar. 28, 1975.

C. Sex Discrimination

The Federal Water Pollution Control Amendments of 1972[1607] provide that:

> No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program activity receiving Federal assistance under. [EPA programs].[1608]

Thus, in effect, Title VI coverage is extended to women in programs or activities receiving EPA assistance. The nondiscrimination provision of the amendments, however, is considerably broader than Title VI. Coverage under the amendments extends both to programs of insurance and guaranty, and to all employment in EPA-assisted activities whereas Title VI does not.[1609]

1607. 12 U.S.C. § 24; 15 U.S.C. § 633, 636; 31 U.S.C. § 711; 33 U.S.C. § 1251-1265, 1281-1292, 1311-1328, 1341-1345, 1361-1376 (Supp. II, 1972).

1608. 33 U.S.C. § 1251 note (Supp. III, 1973)

1609. Title VI excludes programs of insurance and guaranty from its protection. Section 605 states:

> Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Now codified as 42 U.S.C. § 2000d-4 (1970))

It also exempts most employment practices from its coverage. Section 604 states:

> Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any organization except where a primary objective of the Federal financial assistance is to provide employment. (Now codified as 42 U.S.C. § 2000d-3 (1970))

In June 1973, EPA issued a proposed regulation to implement Section 13.[1610] It was not issued in final form until September 1974.[1611] The regulation is in many places almost a verbatim recital of EPA's Title VI regulation[1612] and, thus, is sometimes inappropriate and unnecessarily restrictive.[1613] For example, as with Federal agency Title VI regulations, the only employment practices covered by the Section 13 regulation are those where a primary objective of the program receiving Federal financial assistance is to provide employment[1614] or where employment practices would tend to exclude persons from participation, deny them benefits, or subject them to discrimination under the program receiving assistance.[1615] Thus, Section 13's broad prohibition of sex discrimination in employment is not reflected in the Section 13 regulation.

EPA's rationale for this incomplete coverage was that it intended to implement Section 13 together with Title VI, making it "necessary and desirable" to

---

1610. 38 Fed. Reg. 15457 (June 12, 1973).

1611. 39 Fed. Reg. 32989 (1975).

1612. 40 C.F.R. § 7.1 et seq. (1975).

1613. EPA staff stated that they anticipated that there would be no significant changes from the proposed regulations to the finalized ones. Jenkins and Risk interview, supra note 1590.

1614. 40 C.F.R. § 12.4(c) (1975).

1615. 40 C.F.R. § 12.4(c)(2) (1975).

have the two sets of regulations as similar as possible.[1616] While simultaneous and parallel enforcement of Title VI and Section 13 may be convenient for EPA, to the extent that the underlying prohibitions differ, EPA may not be upholding the law.

Similarly, the Section 13 regulation provided that, "Where this part applies to construction employment, the applicable requirements shall be those specified in or pursuant to Part III, Executive Order 11246, as amended."[1617] This provision,[1618] identical to one in EPA's Title VI regulation, was inappropriate, since the requirements set forth by the Office of Federal Contract Compliance (OFCC) pursuant to Part III of Executive Order 11246, as amended, have not included adequate provision for eliminating sex

---

1616. 39 Fed. Reg. 32989 (1975).

1617. 40 C.F.R. § 12.4(c)(1) (1975).

1618. 40 C.F.R. § 7.4(c)(1) (1975).

discrimination in construction employment.[1619] In order for EPA to carry out the full intent of the amendments, it would, therefore, have to develop its own monitoring and reporting format with regard to contractors involved in construction projects assisted by EPA.[1620]

As of March 1975, EPA had not conducted a study to determine what types of discrimination exist against women in its programs.[1621] EPA staff anticipated that the most obvious types of discrimination would occur in EPA-funded training and research and demonstration projects.[1622]

1619. Specifically, OFCC has failed to require goals and timetables or other affirmative action to eliminate the severe underutilization of women in Federal or federally-assisted construction projects. Moreover, OFCC has not required submission of data on women employed on construction projects nor has it set guidelines for monitoring contractors' treatment of female construction workers and applicants. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 3 (1975).

1620. Commission staff comments on the proposed regulations were communicated to EPA in a letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights to Carol Thomas, Director, Office of Civil Rights and Urban Affairs, EPA, Sept. 7, 1973.

1621. Katz interview, supra note 1598.

1622. These programs are discussed in Section I B supra.

It is not known if a disproportionate number of households headed by women lack sewers, since the Bureau of Census does not tabulate such statistics and there are no other known sources of information.

D. Coverage of Employment Practices of Grantees

Because Title VI excludes coverage of employment discrimination, with some exceptions,[1623] in mid-1973 EPA drafted an equal employment opportunity regulation covering grantees of EPA assistance.[1624] The regulation would prohibit discrimination in employment on the basis of race, color, creed, national origin, or sex by all recipients of financial assistance from EPA. A proposed regulation was circulated within EPA for comments prior to publication under a Notice of Proposed Rule-Making in the Federal Register, but it was found to be inadequate, primarily because of the lack of a requirement for a written affirmative action plan.

As of March 1975, the proposed regulation was being redrafted. The purpose of the revision was to include a requirement that EPA recipients prepare written affirmative action plans modeled after the affirmative action

---

1623. These exceptions are noted on p. 597 supra.

1624. This regulation was proposed pursuant to the general rulemaking authority of the Administrator (42 U.S.C. § 1857(a) (1970); 33 U.S.C. § 1361(a) (Supp. II, 1972); and, 7 U.S.C. § 136w(a) (Supp. II, 1972)).

requirements placed on Federal nonconstruction contractors[1625] and to indicate that the affirmative action plans will be monitored by EPA staff.[1626]

EPA staff intend that the requirement will apply to all EPA recipients, regardless of size.[1627] EPA staff's goal for the final publication of the regulation was July 1, 1975.[1628]

1625. These standards are set forth in Revised Order No. 4, C.F.R. § 60-2. This order requires a utilization analysis of the employer's work force to determine if there are fewer minorities or women in each job category than would be expected by their availability for the job. If minorities or women are underutilized in any job category, the employer must take appropriate affirmative action including the development of numerical goals and timetables to remedy the underutilization.

Revised Order No. 4 outlines requirements by the Office of Federal Contract Compliance of the Department of Labor for being in compliance with Executive Order 11246. While the authority of this order itself extends only to companies that are Federal contractors or subcontractors, the order describes the steps an employer should take to ensure nondiscrimination in employment practices and affirmatively eliminate underutilization of minorities and women. Revised Order No. 4 is discussed more fully in To Eliminate Employment Discrimination, supra note 1619.

1626. Katz interview, supra note 1598. See also memorandum from Richard E. Risk, Title VI Program Officer, to Alexander J. Greene, Director, Grants Administration Division, Issues Paper on Equal Opportunity Requirements for Recipients of EPA Financial Assistance, Nov. 15, 1974. EPA staff also intend that age will be included among the prohibited bases of discrimination.

1627. Risk memorandum, supra note 1626.

1628. Grants Administration Director, EPA, Project or Acting Plan, Fiscal Year 1975.

In the meantime, in order to inform recipients of their nondiscrimination responsibilities, EPA was planning to add a paragraph to its grant regulations, which are issued pursuant to the general rulemaking authority of the Administrator.[1629] The amendment was scheduled to be published in late March 1975. It would prohibit employment discrimination on the ground of race, color, religion, sex, age, or national origin by EPA grantees and subgrantees in any EPA-assisted program or activity. It would require grantees and subgrantees to take affirmative steps to ensure nondiscrimination, but would not elaborate on what such affirmative steps might be or that plans for these steps be in writing.[1630]

II. Organization and Staffing

EPA has downgraded the structure of its Title VI enforcement effort. From November 1972 until September 1974, EPA's Title VI activities were concentrated in its Washington, D.C., Office of Civil Rights and Urban Affairs (OCRUA). The Director of this Office reported to the Administrator of EPA.[1631] The Office included four divisions: Equal Opportunity,

---

1629. This regulation will ultimately be published as 40 C.F.R. § 30.420.5 in the 1975 Code of Federal Regulations.

1630. EPA also plans to place a notice of prohibition against discrimination on the bases of race, color, religion, sex, age, and national origin in all publications concerning EPA's grants. Katz interview, supra note 1598.

1631. The Equal Opportunity Division was responsible for developing a comprehensive agencywide equal employment opportunity program for minorities and for implementing the policies and procedures prescribed in Executive Order 11478 and the Equal Employment Opportunity Act of 1972, including the development of affirmative action plans.

Women's Programs,[1632] Urban Affairs,[1633] and Compliance.

The Compliance Division was responsible for developing policies and drafting procedures under Title VI and Executive Order 11246, as amended. There was no distinct structure within the Office of Civil Rights and Urban Affairs for executing Title VI responsibilities.[1634] Of a total staff of five, there were two persons with Title VI responsibilities. The person in charge was a GS-9 compliance specialist. Both spent approximately 85 percent of their time on Title VI.[1635] The Title VI program officer reported to the Chief of the Compliance Division, a GS-15. Thus, the Title VI officer was relegated to a subordinate position in the hierarchy of the Office of Civil Rights and Urban Affairs, although this had not always been true. Prior to November 1972, the Title VI staff had been a branch within a division and before that, a separate division.

1632. The Women's Programs Division was responsible for developing comprehensive agencywide programs to provide meaningful career opportunities for women in EPA. The Division developed and assured the implementation of affirmative action programs designed to remove impediments in the working environment to equal opportunity for women.

1633. The Urban Affairs Division was responsible for developing policies and procedures for agencywide minority economic development programs. It was also responsible for coordinating the minority business opportunity approaches of the various EPA programs which impact on urban core areas. This Division also had a policymaking role in the implementation of demonstration projects applying environmental programs to inner-city areas.

1634. The remainder of these persons' time was spent on activities including Section 13 of the Federal Water Pollution Control Amendments and contract compliance. Jenkins and Risk interview, supra note 1590.

1635. Id.

In September 1974, EPA effected a reorganization of its civil rights responsibilities which distributed EPA's civil rights duties to several divisions and offices. An Office of Civil Rights was established in the Office of the Administrator, to serve in an advisory capacity to the Administrator and to evaluate the operational components of the civil rights program.[1636] The responsibilities of the former Equal Opportunity and Women's Programs Division of OCRUA were placed within EPA's personnel office.[1637] The responsibilities of the former Urban Affairs Division were placed within an office of EPA contract management.[1638] The responsibilities of the Compliance Division were given to the compliance staff within the Administration Division of the Office of Administration.[1639]

1636. The Office of Civil Rights also retains responsibility for ensuring that EPA administers its programs affirmatively to further the purposes of Title VIII of the Civil Rights Act of 1968. Memorandum from Howard W. Messer, Deputy Assistant Administrator of Administration, and Carol M. Thomas, Director, Office of Civil Rights, to all EPA employees, Report to Employees on Aging Civil Rights Programs, Jan. 20, 1975.

1637. The personnel office is in the Personnel Management Division within the Office of Administration.

1638. This is the Contracts Management Division within the Office of Administration.

1639. EPA, Order 1110.265, Sept. 20, 1974, Organization and Functions of the Office of Civil Rights; EPA, Order 1110.16A Change 1, Sept. 20, 1974, Amendment to the Organization and Function or the Office of the Assistant Administrator for Planning and Management; and memorandum from John R. Quarles, Jr., Acting Administrator, to staff of the Office of Civil Rights and Urban Affairs, EPA's Civil Rights Program, Sept. 20, 1974.

The September 1974 reorganization decreased the amount of staff time to be spent on Title VI. Following the reorganization, EPA's Title VI Program Officer was the only person in EPA's Washington office with full-time Title VI responsibilities.[1640] Moreover, the reorganization further lengthened the line of authority between the Title VI Program Officer and the EPA Administrator. The Title VI Program Officer's advice concerning Title VI policies and procedure can reach the EPA Administrator only through a long succession of supervisors and managers.[1641] The Title VI Program Officer reports to a Special Assistant to the Director of the Grants Administration Division.[1642] This Division is one of a number of divisions within the Office of Administration; the Office of Administration is headed by the Deputy Assistant Administrator for Administration and is one of a number of offices under the Assistant Administrator of Planning and Management. The Assistant Administrator is one of EPA's five Assistant Administrators. He reports to the Deputy Administrator of EPA, who in turn reports to the Administrator. The regional offices are also under the Deputy Administrator's supervision.

1640. This person assumed full responsibility of staff work involved in drafting manuals, regulations, and guidelines pertaining to Title VI.

1641. See Exhibit 20, p. 621 infra.

1642. Id.

Exhibit 19

U.S. ENVIRONMENTAL PROTECTION AGENCY

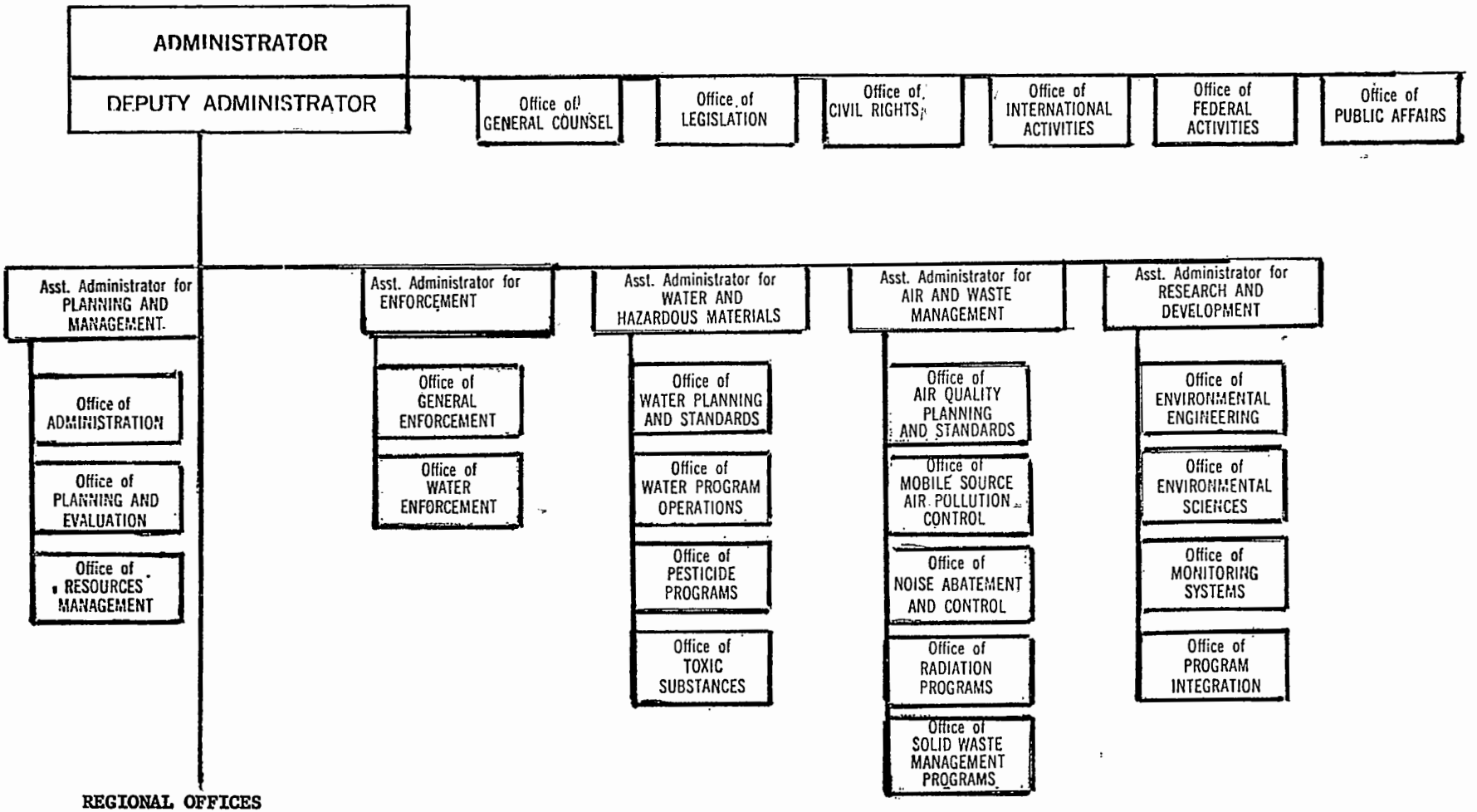
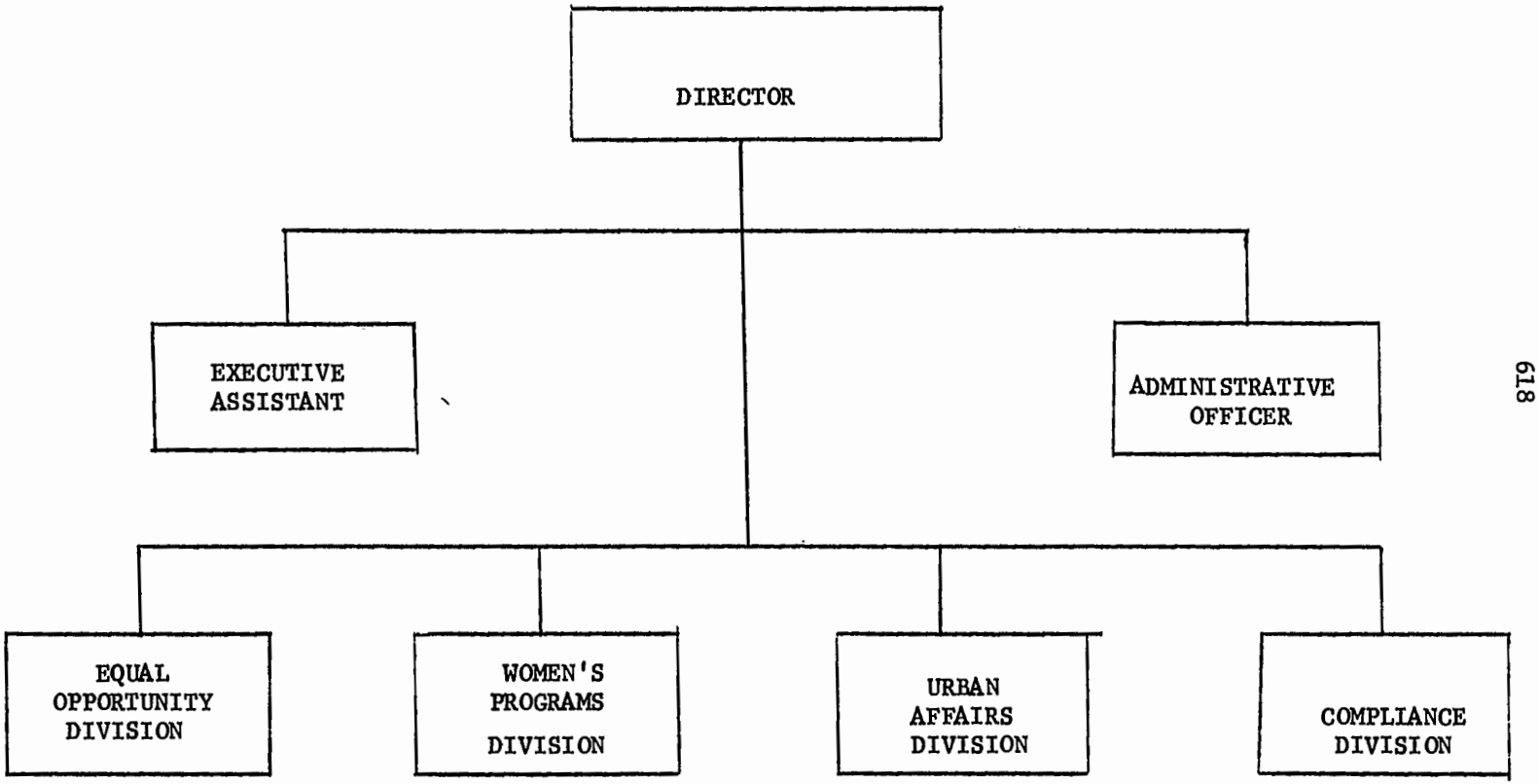


Exhibit 20

ENVIRONMENTAL PROTECTION AGENCY

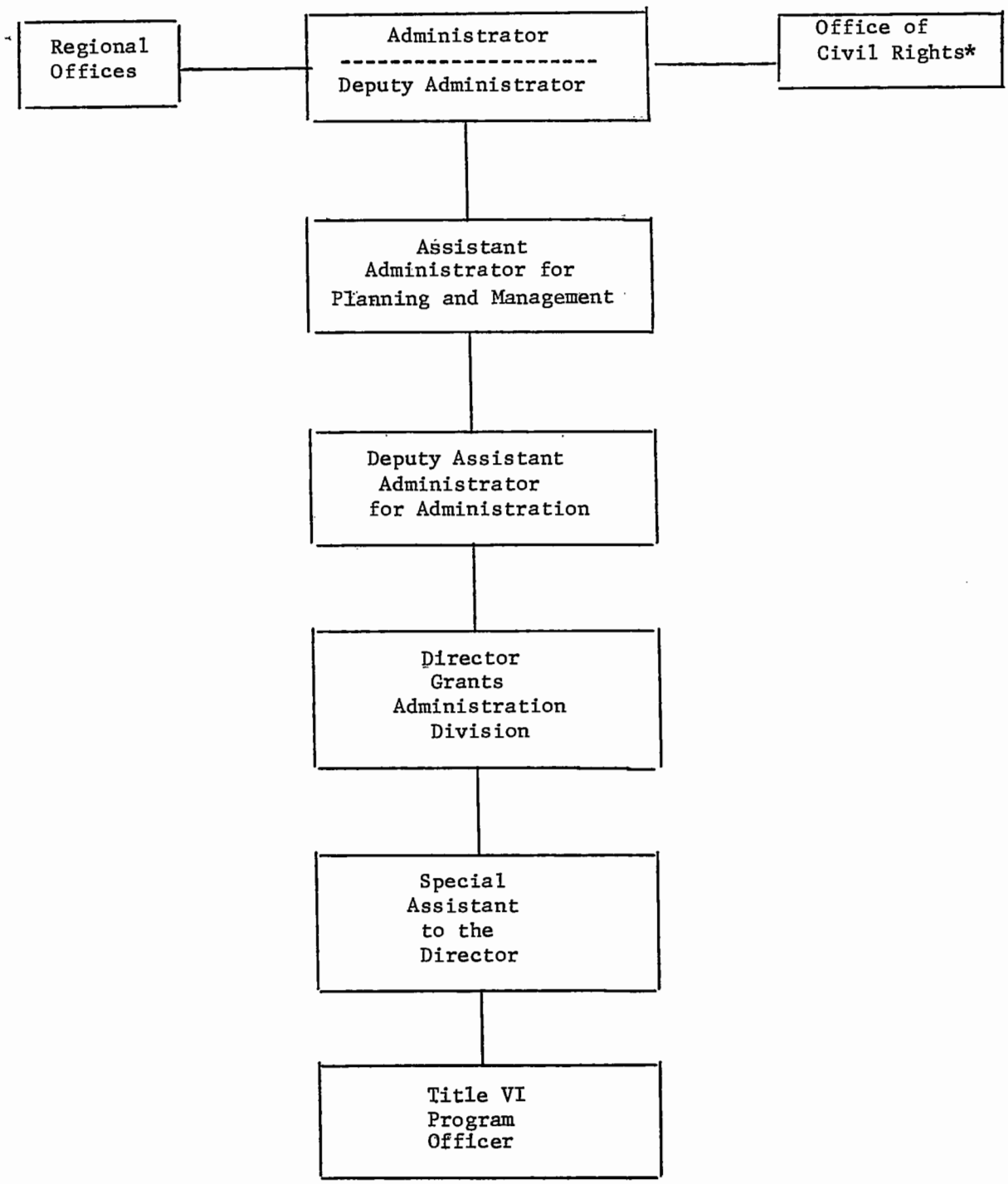
OFFICE OF CIVIL RIGHTS AND URBAN AFFAIRS



March 1975

Exhibit 21

LINE OF AUTHORITY FROM ADMINISTRATOR TO TITLE VI PROGRAM OFFICER



* This office has limited Title VI responsibilities, see text.

March 1975

Whether the Title VI Program Officer's advice concerning Title VI is transmitted to EPA staff or even to the Administrator depends almost entirely on the personal support of those above the Title VI Program Officer in EPA's chain of command. While the current Title VI Program Officer and the Special Assistant to the Director of the Grants Administration Division are pleased with EPA's current organization,[1643] this largely appears to reflect their belief that their supervisors have been receptive to their suggestions.[1644]

1643. Katz interview, supra note 1598.

1644. For example, the Division Director has evidenced an active interest in having the Title VI program officer redraft EPA's proposed employment regulation. This proposed regulation is discussed on pp. 611-12 supra.

The Division Director, the Deputy Assistant Administrator of Admistration, and the Assistant Administrator of Planning and Management made opening remarks at EPA's 1975 civil rights conference. This conference is discussed on p. 630 infra. The Deputy Administrator of EPA, in a memorandum concerning goals for regional offices, emphasized that EPA is committed to an effective civil rights program. Memorandum from John Quarles, Deputy Administrator, EPA, to EPA Regional Directors, Management by Objectives, FY 76 Operating Guidance, Feb. 22, 1975.

Each regional office at EPA has an Office of Civil Rights and Urban Affairs.[1645] The regional civil rights offices are administered by Directors for Civil Rights and Urban Affairs who report to the regional administrators, although they receive civil rights guidance from the national Office of Civil Rights and Urban Affairs.[1646] Along with their staffs,[1647] their main function is the monitoring of contract compliance.

1645. During fiscal year 1972, five offices each had only one person handling all civil rights matters. In fiscal year 1974, only Region VI (Dallas) and Region VIII (Denver) had one-person civil rights offices. Each of these offices was to receive two additional staff members in fiscal year 1974. EPA response, supra note 1590. However, EPA was not authorized to hire additional staff that year and, thus, as of September 1974, Dallas and Denver continued to have one-person offices. Jenkins and Risk interview, supra note 1590. EPA's September 1975 reorganization did not affect the civil rights structure in EPA's regional offices.

1646. Furthermore, in fiscal year 1973 only two regional offices were visited by the Title VI Program Officer, both in December 1972. These visits were made so that the Title VI Officer could familiarize himself with the functions of the regional offices.

1647. They monitored wastewater treatment plan construction programs to ensure that contractors were hiring and promoting minority employees or making good faith efforts to do so. Until November 1972 regional civil rights staff focused almost exclusively on contract compliance. Prior to that reorganization, Directors for Civil Rights and Urban Affairs were titled contract compliance specialists. At the time of the reorganization they were assigned responsibilities for Title VI, internal equal employment, and minority business.

Many regions added minority business as one of their top-priority duties and attempted to secure contracts for minorities, either from the governmental entity receiving Federal grants or from their prime contractors. At the time of Commission interviews in the regions visited by Commission staff, EPA officials reported that the minority business program was not very successful, since the civil rights staff often found out about the possibility for a contract only after it had been awarded. In Region V (Chicago), for example, only five minority subcontractors had received contracts during the past two years. Considering that in mid-1973 Region V had approximately 180 prime contractors and that each contractor had hired two or three subcontractors, this was a rather poor record. Moreover, there was no emphasis on business opportunities for women. Interview with Ronald Cornelius, Director for Civil Rights and Urban Affairs, Chicago Regional Office, EPA, in Chicago, Ill., May 15, 1973.

There is no regional counterpart to the Title VI Program Officer. Only the Atlanta Regional Office has assigned a staff person fulltime to Title VI duties.[1648]

In fiscal year 1974, 18 other staff members, all located in the regions, spent some but not more than half their time on Title VI enforcement.[1649] In fiscal year 1974 EPA staff devoted approximately 5.2 person years to Title VI enforcement. Although this was an increase from 4.0 person years since fiscal year 1972, EPA staff had expected its Title VI staff to increase to more than 7.0 person years in fiscal year 1974.

1648. The value of a full time Title VI staff member is especially apparent when looking at EPA's conciliation efforts in 1972. The Atlanta office was able to get seven cities within its jurisdiction to agree to provide sewer service to minority communities at an earlier stage than originally planned. Outside the Atlanta region, where there were no fulltime Title VI staff persons, only seven other such agreements were achieved.

1649. Fifteen additional civil rights positions were requested and all were to be allocated to the regions. None were to be fulltime Title VI positions. With the additional staff, it was expected that all regions would spend at least one-half a person year on Title VI, with Region VI allocating one person year to this function. EPA has calculated that this would result in at least 5.5 person years allocated to Title VI in the regions. EPA response, supra note 1590.

The small amount of time expended on Title VI functions[1650] reflects EPA's failure to recognize fully the importance of an adequate Title VI program. While the Title VI officer felt that Title VI was a significant issue, most of the regional staff did not. For example, the civil rights office director in Region IX (San Francisco) held the untenable position that there is little possiblity that Title VI violations will occur in an EPA-funded project.[1651] He stated that any additional staff assigned to him would be used in the contract compliance program. It is likely that the failure of this and other regions to place sufficient emphasis[1652] on Title VI will continue unless top EPA officials inform the

---

1650. The civil rights budget followed a similar pattern. For fiscal year 1973 EPA's civil rights budget was $583,000. EPA allotted approximately 10 percent (a total of $59,000) of both the headquarters and regional civil rights budgets for Title VI enforcement. For fiscal year 1974, EPA requested a headquarters civil rights budget of $748,100 with $63,000 (8 percent) for Title VI. For regional offices, the budget was estimated at $797,093 with $105,259 (13 percent) to be spent on Title VI. The increase in the percentage of the regional budget for Title VI activities was to cover the projected increase in manpower. In fiscal year 1974, EPA, allocated $109,000 to Title VI which was only 7.7 percent of its $1.4 million dollar civil rights budget. Jenkins and Risk interview, supra note 1590.

1651. Interview with Richard Kelly, Director of Civil Rights and Urban Affairs, San Francisco Regional Office, EPA in San Francisco, Cal., Mar. 20, 1973. The possibility of such violations are discussed on p. 597 supra.

1652. Id. The Washington office estimated that, as of June 1973, the San Francisco Regional Office spent only 5 percent of one person year on Title VI annually. EPA response, supra note 1590.

regional civil rights directors of the importance of their Title VI responsibilities. Until fiscal year 1974, EPA provided no Title VI training to its civil rights staff and the Washington office provided little Title VI guidance to the regional offices.[1653] In late 1973 EPA provided three days of training for its regional civil rights staff with sessions on such topics as Title VI, Executive Order 11246, and Section 13 of the Federal Water Pollution Control Amendments;[1654] and a three day conference was held in January 1975 to discuss problems which regional staff had encountered in these areas.[1655] In fiscal year 1975, after two years with no visits to the regional offices, the Title VI compliance officer and the Special Assistant to the Director made trips to all of the regional offices.[1656]

1653. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment 306 (1973).

1654. Jenkins and Risk interview, supra note 1590.

1655. Id. EPA staff stated that the small regional staffs have too much to cover. Their expertise often lies in contract compliance and, as a result, they tend to emphasize this area.

1656. Katz interview, supra note 1634.

III. Certification

Applications for EPA assistance for construction of waste treatment facilities must be made through State water quality boards.[1657] Once an agency--State, county, or municipal--has submitted an application to the State or interstate board, that application is ranked in terms of its priority with the other applications.

The criteria used to rank applicants have generally been technical. California, for example, considered the quality of the design for the facility and the plan for pollution control. Civil rights concerns have not usually been among the factors considered.[1658] Until the Federal Water Pollution Control Act Amendments of 1972 were passed, providing for Federal approval of State priority systems, EPA had no voice concerning how priorities were established by the States; and, in most regions, EPA did not provide guidance for the establishment of priorities and did not review the priorities once they were set.

1657. Variously known as water quality boards, pollution control agencies, environmental protection agencies, and environmental protection branches of State departments of natural resources, these agencies function to handle sewer service within their jurisdictions.

1658. For example, States did not generally inquire from applicants as to the extent to which the facility would service minorities or the degree to which minorities were represented on local advisory boards connected with the planning of sewage treatment facilities.

Moreover, although EPA has given consideration to the setting of specific goals and timetables for participation of minority beneficiaries in the agency's Wastewater Construction Treatment Program, it has concluded that such goals are not practical. EPA based its conclusion on the fact that it cannot select areas of a State or municipality and assign goals to them in the absence of an approved and certified application for a project.[1659]

Consequently, as of mid-1974 in most EPA regional offices neither the grants office nor the civil rights staff were reviewing the State priorities from a civil rights perspective.[1660] One exception to this pattern was found in Region VI (Dallas), however, where the Regional Director for Civil Rights and Urban Affairs stated that the EPA grants office routinely reviewed statewide priorities and that, in addition to technical considerations, one of the criteria used in evaluating the priorities has been whether minorities are being equitably served.[1661]

1659. One State, South Carolina, has taken it upon itself to require its local jurisdictions to set goals for the provision of sewer services to minority communities. It requires local jurisdictions which wish to file applications for sewer funds to have a plan showing how homes in the minority community will be sewered.

1660. Jenkins and Risk interview, supra note 1590.

1661. Romero interview, supra note 1603.

After the State board approves, or "certifies" an application, the application is forwarded to EPA, which provides funding to applicants in the order that they have been ranked by the State water quality boards. When the application is forwarded to EPA, the applicant's jurisdiction submits a preaward compliance report.[1662] In most cases, this has been the first formal involvement in the grant process of the EPA regional civil rights office. By this time, however, the local jurisdictions may have a considerable amount of work invested in the preparation of the application.[1663] EPA officials, thus, reported that they do not feel justified in disapproving a project solely on the basis of information received on the compliance report form.[1664]

Although EPA civil rights staff expected that they would become involved in the grant process at an earlier stage during fiscal year 1974,[1665] this did not occur. The national Office for Civil Rights and Urban Affairs planned to use the provisions of the new amendments as

---

1662. This form is discussed further on p. 632 infra.

1663. This may include preliminary planning and engineering efforts.

1664. EPA response, supra note 1590.

1665. Id.

authority for reviewing the equal opportunity aspects of State certification procedures;[1666] but, as of March 1975, EPA has not carried out these plans.[1667] Since the program divisions at EPA have not been instructed that civil rights concerns are of priority, it appeared that minority group interests continued to be overshadowed by technical considerations.[1668]

1666. Id.

1667. EPA staff believed that before such involvement could take place, EPA must resolve issues concerning the financing of collection lines. See p. 634 infra.

1668. For example, program staff in Region IX did not believe that there were any civil rights issues with which they should be concerned. See interview with Richard Coddington, Chief, Grants Evaluation, San Francisco Regional Office, EPA, in San Francisco, Cal., Mar. 19, 1973. Mr. Coddington was in charge of the technical side of grant programs and water quality standards. He indicated that there do not appear to be any cases where minorities are not being served.

EPA officials have, in the past, been averse to enforcing compliance with Title VI where they believe that such enforcement might be taken at the expense of environmental concerns. A former EPA Administrator testified before the Commission that violations of Title VI would require denial of assistance to a community, but that to do so "could result in the suspension of compliance with anti-pollution standards and timetables." Therefore, he stated that where conflict between environmental and civil rights concerns occurs, each case would have to be decided on its own merits. Testimony by William D. Ruckelshaus, EPA Administrator, at Hearing Before the U.S. Commission on Civil Rights, Washington, D.C., 1,005-70 (June 15, 1971).

IV. Compliance Mechanisms

A. Preapproval Reviews and Compliance Report Forms

All applicants for assistance under EPA's Wastewater Treatment Construction Program are required to submit a preaward compliance report.[1669] The form indicates the jurisdiction applying for the grant, whether the entire population of the community will be served by the project, whether the population not to be served by the proposed sewer receives sewage service, and the proportion of the population within the jurisdiction which is Native American, Asian American, black, Spanish Speaking background, white, and other. The form also asks for the number of each racial or ethnic group currently being served and the numbers of each racial or ethnic group to be served by the proposed project.[1670] This form, which covers both Title VI and Section 13 of the Water Pollution Control Amendments, took almost a year from its initial preparation until its use by EPA. Despite Section 13's coverage of sex discrimination, the form does not solicit data on female-headed households.

1669. EPA Form 4700-4 (4-74), compliance report. It is submitted to EPA after the State has cleared the proposed project.

1670. The earlier form was FWPC - T-128. It was informally referred to by EPA staff as T-128. Form T-128 could not detect if there were a sizable minority community not exceeding 10 percent of the total population, which was to remain unsewered. There was no breakdown of specific minority groups on T-128. Further, T-128 did not ask what type of sewer service residents were receiving at the time of application. Communities were, thus, able to indicate that minority areas are receiving sewer service even though they may merely be served by septic tanks. Such a response would have been misleading, since if EPA were aware of any septic tank service, it would encourage that area to be served by the proposed facility. Form 4700-4 corrects all of these deficiencies.

Most regional offices receive over 100 preaward compliance reports yearly. These must be reviewed by civil rights staff members who allot only a small percentage of their time to Title VI. As a result, these forms were being routinely accepted by the civil rights office, with no more than a perfunctory examination.

Since September 1972, regional Offices of Civil Rights and Urban Affairs have been required to submit to the national office copies of all compliance reports received from grant applicants. In some cases, the regional director of civil rights and urban affairs has submitted these reports after the grant offer was made, and in some cases, before. There is, however, no requirement that the Washington office review all forms prior to funding. Questions that the national office may have about a report are generally handled by phone with the regional office.

The analysis of these applications represents the only preaward reviews conducted before project applications are approved. If the

previous preaward compliance report[1671] reflected that more than 10 percent of the minority population did not and would not receive sewage service after the project was completed,[1672] an inquiry was usually made as to the method of financing. The jurisdiction's method of financing collection lines[1673] is a civil rights concern because it might result in excluding disproportionate numbers of poor and minority families.

There are two principal methods of financing collection lines: general obligation bonds and special assessments.[1674] General obligation bonds are bonds sold to raise money for the collection lines which are then repaid from general revenue. The cost of general obligation bonds is, thus, spread throughout the community. This is rarely used as the sole method of financing, however. Special assessments are more usual. Under a special assessment, communities raise money by assessing each user. Those who cannot pay are not connected to the sewer line.

1671. This was Form T-128. See note 1670 supra. As of the writing of this report, experience with the new form 4700-4 was too limited to permit evaluation.

1672. If a project application indicates that the jurisdiction's entire population is or will be served, the civil rights office does not routinely question the method of financing.

1673. Although the collection lines extending from the EPA-financed facilities to the individual users (e.g., homes, apartments, and industrial buildings) are financed locally or by other Federal agencies, if minorities or women are unable to afford connections to the collection lines, they will receive no benefit from EPA-financed sewage treatment plants and trunk lines extending from the plants to the user communities.

1674. There are also other types of municipal bonds, such as revenue bonds or special assessment bonds, but these are infrequently used and are not discussed here.

EPA's position has been that if local financing is derived from general obligation bonds, everyone should have the benefit of collection lines. On the other hand, if the individual assessment method is employed, EPA cannot require that the municipality provide collection lines for everyone's benefit,[1675] but it can determine whether a long-term payment plan is available so that those who cannot immediately afford the assessment can take advantage of the sewage facilities. The civil rights director in Region VI has contended that there is no "practical" reason why a jurisdiction would not want to upgrade sewage service for the entire area, but noted that there is often an unwillingness among municipal officials to be flexible in the payment schedule.[1676]

1675. EPA has authority to provide funding for collection lines and, thus, ease the burden on individual citizens; but, as a matter of policy, this has been of low priority. At the request of EPA's Administrator, in fiscal year 1975 EPA was considering a revision of this policy. Katz interview, supra note 1598.

EPA is planning to finance collection lines in Tredyffrin Township, Pennsylvania. This decision was made after it came to EPA's attention that the minority community in that township had inadequate sewer service. Id.

1676. Romero interview, supra note 1603.

An illustration of a financing problem occurred in the city of Marshall, Texas, which applied for an EPA grant to construct a sewage treatment plant. The city estimated that after completion of the project, almost 10 percent of the population would not be sewered.[1677] A disproportinate number of the unsewered population was expected to be black.[1678] When EPA expressed concern about the number of unsewered residences, and the proportion which would be minority, the city estimated that it could provide sewer service to 374 residences (about half of the unsewered population) under the existing system, by charging the residents for the cost of the sewer connection.[1679] On the strength of this response, EPA funds were provided to Marshall. EPA did not require the city to provide a racial breakdown of the residents to be served by the additions to the existing system. It did not inquire about the ability of the inhabitants to pay for the sewer connection.

It turned out that few families in the 374 residences were willing to pay the cost of the connection.[1680] As of September 1974, 328 families remained unsewered.[1681] In March 1975 EPA civil rights staff had no updated information on the number of families sewered.[1682]

1677. EPA Compliance Report, submitted by the City of Marshall, Texas, May 19, 1971.

1678. The city estimated that 59 percent of the unsewered population would be black and 41 percent would be white. Letter from C.K. Duggins, County Manager, Marshall, Texas, to C.J. Romero, Director, Equal Opportunity Division, Dallas Regional Office, EPA, May 30, 1972. The 1970 census lists Marshall as having a population of 22,937, of which 65 percent were white and 35 percent were black.

1679. In many cases, the charge for the connection was well over $100.

1680. Several months after the construction project had been approved EPA questioned the city's requirement for property owners to reimburse the city for extensions to the existing system. The city responded simply by indicating that several avenues of assistance were being explored, including the Community Action Agency and the Economic Development Administration. There was no mention as to whether these avenues were at all productive.

1681. Telephone interview with Carlos J. Romero, Director, Equal Opportunity Division, Dallas Regional Office, EPA, Sept. 6, 1974. These 46 sewer connections were made between June and October 1972.

1682. Katz interview, supra note 1598.

B. Postaward Compliance Reviews

EPA does not require its regional offices to undertake regularly-scheduled postaward onsite compliance reviews and most regional offices did not conduct them. Further, staff from the Washington office did not review the operation of any recipients.[1683] The Region IV (Atlanta) office, which conducted six onsite Title VI postaward compliance reviews,[1684] is the only one of EPA's regional offices which performed reviews in 1972. The reports of these inspections are maintained in the regional office and are not reviewed by the Washington-based staff.

Documents from three of the six Atlanta region reviews[1685] indicated that although lack of sewer service in the minority community was

---

1683. In August 1972, EPA stated that Washington staff would be going on onsite reviews. EPA response to July 1972 Commission on Civil Rights questionnaire contained in letter from William D. Ruckelshaus, Administrator, Environmental Protection Agency to Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Aug. 11, 1972. In June 1973, EPA stated that lack of funds had made this impossible. EPA response, supra note 1590.

1684. These reviews were conducted in St. Simons Island, Ga.; Social Circle, Ga.; Mt. Gilead, N.C.; Deerfield Beach, Fla.; Jefferson County, Ala.; and Ashland, Ala.

1685. Three reviews were requested from EPA as a result of this Commission's April 1973 questionnaire. The Office for Civil Rights and Urban Affairs instructed Commission staff to call the Atlanta Regional Office to expedite the forwarding of these reviews. The Atlanta Regional Office sent a memorandum to the Office of Civil Rights and Urban Affairs which was subsequently forwarded to the Commission describing their activities in these two projects. Memorandum from Matthew J. Robbins, Equal Opportunity Specialist, Civil Rights and Urban Affairs Office, Atlanta Regional Office, EPA, to Richard Risk, Title VI Program Officer, Office of Civil Rights and Urban Affairs, EPA, Jan. 11, 1974. The actual compliance reports were not sent.

frequently a problem, EPA did not require strong steps to ensure that sewer service was brought to minorities as quickly as possible. For example, in St. Simons Island,[1686] Glynn County, Georgia, 24 percent of the population not to receive services under this project was minority.[1687] St. Simons Island indicated that there was no need to sewer homes of minority residents, since they had not requested sewer services. Through EPA's compliance review, however, it determined that these minority residents desired sewage services as soon as they could be made available.

As a result, EPA only requested that the Glynn County, Georgia, Board of Commissioners adopt a resolution stating the intent to serve the minority areas that were not scheduled for sewage services under this project. EPA did not require that a plan be submitted which would demonstrate how the sewering of the minority community was to be accomplished. The resolution was approved in March 1973 and, as of September 1974, plans for financing and engineering were being drafted for the minority area in question.[1688]

1686. Onsite Title VI Inspection and Review, Glynn County, Georgia, St. Simons Island, C130340; Georgia, Project 314, conducted by Robert L. Mitchell, Equal Opportunity Specialist, Civil Rights and Urban Affairs Division, Atlanta Regional Office, Mar. 13, 1973.

1687. According to the 1970 census, the total population of St. Simons Island was 5,346; 11.4 percent of this population was minority.

1688. Jenkins and Risk interview, supra note 1590. EPA's Washington office did not follow progress in the Glynn County case from September 1974 through March 1975 and, thus, did not know the status of this case in March 1975. Katz interview, supra note 1598.

A March 28, 1972 compliance review in Mt. Gilead, North Carolina, brought out that the only areas of Mt. Gilead without sewer services were the minority areas. City officials indicated that the reason the current administration of Mt. Gilead had not provided sewer services for the minority area was the financial condition of the town at that time.

EPA asked city officials to adopt a resolution stating the intent to serve the minority area within three to five years. The city adopted this resolution and agreed to initiate an immediate survey and draw up specific plans for future sewage services to the area. EPA accepted this and committed itself to conducting a followup review in early 1974. As of September 1974, a line to part of the black community had been installed.[1689]

C. Complaints

The Office of Civil Rights and Urban Affairs in each region is responsible for investigating any Title VI complaints. For several years EPA has been developing a manual for a compliance program which would include complaint-handling guidelines. This manual was scheduled to be published in September 1973.[1690] As of September 1974 it had not been completed[1691] but was being used in draft form by the regional offices. As of March 1975, no further work had been done on the manual; rather a decision had

---

1689. Atlanta staff estimated that perhaps one-sixth of the black community was served by sewers by September 1974. Jenkins and Risk interview, supra note 1594. EPA Washington staff did not have any more up-to-date information in this case in March 1975. Katz interview, supra note 1598.

1690. EPA response, supra note 1590.

1691. EPA officials cited lack of sufficient staff as the principal reason for EPA's failure to complete the manual.

been made to write a new, longer manual. An outline of the proposed manual had been written, and EPA officials expected a first draft to be completed by May 15, 1975.[1692]

During fiscal year 1973, EPA received 16 Title VI complaints.[1693] All of these complaints alleged that minority communities[1694] were left unsewered by proposed projects. As of June 1973, EPA reported that nine complaints were "satisfactorily adjusted;" i.e., the community made changes in plans to sewer the minority community, acceptable to EPA.[1695] In two cases no discrimination was found[1696] and one case was administratively

---

1692. Katz interview, supra note 1598. One of the new areas to be covered by this manual will be the employment practices of grantees.

1693. EPA response, supra note 1590. EPA referred to these as "Title VI matter." Jenkins and Risk interview, supra note 1590. They came to EPA's attention in a variety of ways, including EPA's compliance report forms and reviews. During fiscal year 1974, eight "Title VI matters" came to EPA's attention. In Pell City, Alabama, and Stoneville, North Carolina, it was alleged that the minority communities were unsewered. At the end of fiscal year 1974, these cases were under investigation. In Youngstown, Ohio, it was alleged that the city was discriminating against contractors building a low-income housing project. That case, too, was under investigation. Conciliation was underway in Santee, South Carolina, and Tredyffrin Township, Pennsylvania, where minority communities were allegedly unsewered. EPA found that it had no jurisdiction in Tuscaloosa, Alabama, another case of an allegedly unsewered minority community. In Oil City, Louisiana, EPA closed the case although 70 percent of the black population allegedly was unsewered. Only in one case, Ontario, New York, was EPA able to assist families in obtaining sewer service. In that city, EPA aided 130 families. Environmental Protection Agency, Title VI Matters Report for fiscal year 1974.

1694. These were all from communities with large black populations.

1695. EPA response, supra note 1590. These were in Fort Smith, Ark., Brantley, Ala.; Greenville, Ala.; Bessemer City, N.C.; Cramerton, N.C.; Ashland, Ala.; Langdale, Ala.; Demerest, Ga.; and Hughes Springs, Tex.

1696. These were in Fitchburg, Mass. and Hamlin, Tex.

closed.[1697] Thus, only four cases were open. Two of these were in conciliation,[1698] and two cases were under investigation.[1699] By March 1975, all of these had been resolved.[1700]

1697. Administratively closed is a broad term used by EPA when the complainant does not pursue the complaint for any number of reasons, or when EPA has reviewed the complaint and found the jurisdiction in question not eligible for a grant because of technical problems. For example, migrant workers in Delray Beach, Fla., filed a complaint that the city refused sewer hookup to minority housing. This complaint was subsequently withdrawn when the city of Delray Beach was deemed ineligible to receive sewer service from the city of Palm Beach because it is outside the jurisdiction of Palm Beach. Therefore, Delray Beach would not be eligible to use funds alloted for sewer facilities in Palm Beach City. The minority community in question has filed a lawsuit against the city of Delray Beach and until the suit is resolved EPA has stated the case was administratively closed. Jenkins telephone interview, Nov. 29, 1973, supra note 1593. As of September 1974, the case was still closed.

1698. The two cases under conciliation at the time of the EPA response, in June 1973, Lebanon and Summer, Mo., were resolved. Lebanon had a population of 8,600 residents, of whom 390 were not receiving sewer service. After conciliation, a grant was made pending implementation of service to the 390 residents. EPA would not release any funds until this service is completed. In summer 1973, the application for a grant was subsequently withdrawn for reasons not clear to EPA's staff. Telephone interview Richard Risk, Title VI Program Officer, EPA, Oct. 17, 1973.

1699. The complaints were against Baltimore County, Md., and Fairfax County, Va.

1700. EPA, Grants Administration Division, Status of Title VI matters for August and September 1974, and Katz interview, supra note 1598.

The closing of two of these cases indicates severe inadequacies in EPA's compliance program. One of these was Baltimore County, Maryland.[1701] Baltimore County is largely white and excludes from residency many black[1702] and poor persons.[1703] The county has not taken steps to remedy the problem[1704] although EPA funds are being spent in the county.

1701. According to the 1970 census, Baltimore County had a population of 621,077, only 19,597 of whom (3.2 percent) were black. Baltimore County almost surrounds Baltimore city, which had a population of 905,754, of whom 420,210 (46.3 percent) were black.

1702. This complaint was made against Baltimore County because of its exclusionary zoning laws by the Maryland State Advisory Committee to this Commission. A report of that Committee enumerates other reasons for minority exclusion from Baltimore. They include: racism in the real estate transactions in Baltimore County, extreme lack of low-income housing, and lack of responsiveness of the county to the needs of poor and black residents. Maryland State Advisory Committee to U.S. Commission on Civil Rights, To Grant or Not to Grant (October 1974). See also Hearing Before the U.S. Commission on Civil Rights, Baltimore, Md., Aug. 17-19, 1970.

1703. In contrast, the Department of Housing and Urban Development has withdrawn funds from Baltimore County pending the development of a plan for in low- and moderate-income housing. Telephone interview with Thomas Hobbs, Assistant Area Director, Baltimore Area Office Department of Housing and Urban Development, Mar. 28, 1975.

1704. EPA's rationale for removing the Baltimore County case from the list of unresolved civil rights complaints was that no application was received from the county. Baltimore County apparently decided to withhold applications for EPA assistance. After the closing of the case the Title VI program officer visited Baltimore County to discuss the case with local officials, but no results were obtained from the visit. Jenkins and Risk interview, supra note 1590. Nonetheless, as of March 1975, EPA funds were still being spent in the county. In May 1968, EPA awarded Baltimore County approximately $2.5 million (EPA Projects Nos. 240186-010 and 240187-010). In June 1970, EPA awarded $820,600 to Baltimore County. (EPA Project No. 24-237-010.) In November 1970, EPA awarded almost $1.5 million to Baltimore County. (EPA Project No. 2402-35-010.) In at least two cases, EPA funds were still being spent, and the projects were not completed as of April 1975.

The other case is in Fairfax County, Virginia, where a minority area was not served by sewers. EPA got the county to agree to put collection lines in the minority community, but the residents could not afford to pay for the tap lines which would run from individual residences to the collection line. The county agreed to lend money to the residents to finance the tap lines, but was unable to because of technicalities in Virginia State law. Since the collection lines had been put in, even though minority residents are effectively excluded from the benefits of EPA assistance, EPA believed that its responsibility in the case was ended. As of March 1975 EPA staff did not know the final outcome of this matter.[1705]

EPA reports that it has received only one complaint since the outset of fiscal year 1974.[1706] This complaint was being investigated as of March 1975.[1707] One reason that EPA has received so few complaints may be that it had no mechanism for informing individuals in EPA-assisted areas of their right to complain to EPA concerning any inferior sewer service to minority communities. EPA had not required recipients to inform individuals in the areas to be sewered of their right to be served without discrimination on the basis of race, national origin, or sex, and that in the case of suspected civil rights violations complaints should be forwarded to EPA.

1705. Katz interview, supra note 1598.

1706. Id.

1707. Id.

D. Enforcement Proceedings

If EPA finds noncompliance by potential recipients, like other Federal agencies it may defer these funds during the pendency of administrative proceedings.[1708] For example, it appears that funding

---

1708. The sanction has been confirmed by Congress. In the 1960's the Commissioner of Education of the Department of Health, Education, and Welfare developed the practice of deferring funds to school districts which appeared not to be in compliance with the dictates of Brown v. Board of Education, 347 U.S. 483 (1954) and its progeny. As passed in 1964, Title VI contained no explicit provisions concerning deferral of funds. In 1966, however, Congress passed an amendment to Title VI which places a limit on the length of time funds could be deferred in educational programs. 42 U.S.C. § 2000d-5 (1970). Thus, it is clear that the power to defer funds is implicit in Title VI.

It has also been confirmed by the courts. Adams v. Richardson, 351 F. Supp. 636 (1972), aff'd, 480 F.2d 1159 (D.C. Cir. 1973); Board of Public Instruction of Palm Beach v. Cohen, 413 F.2d 1201 (5th Cir. 1969); Taylor v. Cohen, 405 F.2d 277 (4th Cir. 1968). Of the four regional offices visited, only Regions V and VI had ever deferred grants and then only pending more information. In Regions I and IX, T-128s were perfunctorily examined and always approved. Risk interview, supra note 1600.

was unofficially deferred to the city of Sealy, Texas.[1709] In February 1971, a Sealy resident contacted EPA's Interim Regional Coordinator to express concern over the fact that the city had not included its northeast section[1710] --a predominantly black community[1711] --in the plans for receiving service from the proposed waste treatment facility. In order to avoid losing EPA assistance, the city reapplied to both EPA and the State Water Quality Board with a revised plan which included service to the northeast section. Until a contract was awarded on this

---

1709. This is discussed in a memorandum from H.D. Smith, Project Engineer, Dallas Regional Office, EPA, May 17, 1971. See also letter from S.A. Russell, Jr., Project Engineer, Air and Water Programs Division, EPA, to E. Hulchan, Mayor, City of Sealy, Tex., Dec. 17, 1971.

1710. A February 4, 1971, tour of the northeast area of Sealy by members of the Texas Water Quality Board and the Environmental Protection Agency's Project Engineer revealed that:

> septic tank effluent was observed standing in many of the street-side ditches and adjacent to many of the residences in area....several residences...are served by privies. Some hog pens and cattle pens were observed in the area. Some drain pipes from septic tanks were observed discharging directly to street-side ditches. One shallow pond, approximately 20 feet square, was observed which may possibly have been constructed by the resident as an oxidation pond. The general conditions in the area represent a definite health hazard and the natural drainage from this area obviously contributes to stream pollution, supporting the need for sanitary sewer service to this area.

1711. According to the 1970 census, Sealy, Texas, has a total population of 2,688 residents. Of those, 480, or 18.5 percent, were black.

section, EPA indicated that it would defer all grant payments.[1712] As a result, the Texas Water Quality Board transmitted to EPA a proposal by the city of Sealy to provide sewer service to the northeast section of the city. EPA funding was provided.

If EPA finds a recipient to be in noncompliance with Title VI, it can initiate administrative proceedings for the termination of funding or it can refer the matter to the Civil Rights Division of the Department of Justice,[1713] but EPA has never taken either action.[1714] EPA officials stated

---

1712. By January 1974 construction of sewer service in the northeast section of Sealy, Texas, had been 90 percent completed. Telephone interview with S. Alcanter, Secretary, EPA, Dallas Regional Office, Jan. 4, 1974.

1713. Title VI of the Civil Rights Act of 1964 states:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so formal, or (2) by any other means authorized by law. /Emphasis added/ 42 U.S.C. § 2000d-1.

EPA's Title VI regulation defines "other means authorized by law":

> Such other means include, but are not limited to, (1) a referral of the matter to the Department of Justice with a recommendation that appropriate judicial proceedings be brought to enforce any rights of the United States under any law or assurance or contractual undertaking, and (2) any applicable proceeding under State or local law. 40 C.F.R. § 7.9(a) (1974).

1714. Katz interview, supra note 1598.

that voluntary compliance has generally been secured in cases where there has been an apparent violation of Title VI.[1715] For example, EPA reports that during calendar year 1972, fourteen cities agreed to provide sewer service to minority communities at an earlier stage than originally planned, as a result of EPA conciliation efforts.[1716] EPA estimated that 2,568 families would benefit from these agreements.[1717] This is a rather small number for all of EPA's efforts. EPA had not yet surveyed the Nation to determine the number of housing units occupied by minorities or female-headed households which did not have adequate sewer service. Undoubtedly, the number of such families thus far assisted by EPA's civil rights efforts is small in comparison to the problems which face this country's minorities and women.

1715. Jenkins and Risk interview, supra note 1590. Testimony by the EPA Administrator before this Commission provided numerous examples of successful negotiation; e.g., Sealy, Texas, where the city agreed to extend sewerage services to the predominantly black section of the city, and Boca Raton, Florida, where the community agreed to install connecting lines to serve the entire minority community. Ruckelshaus testimony, supra note 1668.

1716. The fourteen cities were Daphne, and Lockhart, Ala.; La Veta, Colo.; Albany, Covington, Glynn County, and Lowndes County, Ga.; Des Moines, Iowa; Topeka, Kan.; Red Wing, Minn.; Newton, Miss.; Mt. Gilead, N.C.; Hughes Springs and Marshall, Tex. Seven of these localities were located in Region IV where a fulltime Title VI specialist was assigned.

1717. This figure is a compilation of data provided by the regional civil rights offices to the Title VI Program Officer at the national office. Data was compiled by Richard Risk, Title VI Program Officer, and sent to this Commission in June 1973. EPA calculated that all of its civil rights efforts, including complaints and compliance reviews have resulted in assistance to only 3,629 families which had been promised sewer service but had not yet received it. As of March 1975, EPA had not compiled any revised data. Katz interview, supra note 1598.

Chapter 9

COORDINATION AND DIRECTION

DEPARTMENT OF JUSTICE (DOJ)

CIVIL RIGHTS DIVISION (CRD)

FEDERAL PROGRAMS SECTION (FPS)

In preceding chapters the activities of individual Title VI agencies have been reviewed. One agency, the Department of Justice, has sole responsibility for coordinating the efforts not only of these agencies but of all of the more than 25 Federal agencies having Title VI responsibilities. The coordination function has been assigned to the Attorney General since 1965. Currently it is exercised by the Federal Programs Section of the Department of Justice's Civil Rights Division. This chapter reviews the need for coordination and direction of Title VI enforcement, the various Executive orders which have assigned coordination responsibilities, the organization and staffing of the

Federal Programs Section, the coordination activities undertaken by the Section, and the Section's litigative activities.[1717]

1717. After a draft of this chapter was prepared, a copy of it was transmitted to the Attorney General for review and comment. See the preface to this report at p. vi supra. Upon FPS' request, comments were received by telephone and were not reduced to writing by FPS. While Commission staff were considering these comments, the Assistant Attorney General for Civil Rights wrote to the Commission that, "In our view, the report does not adequately reflect the operations of the Section." Letter from J. Stanely Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, June 27, 1975. DOJ stated it would be providing the Commission such documents as might be necessary "to ensure a proper evaluation of the Department's coordination activities under Title VI," and obsereved that, "It may be that the report's imbalance and inaccuracies are occasioned by inadequate information." Id. DOJ subsequently delivered approximately 930 pages of documents to Commission staff. Most of these had never been seen previously by Commission staff, although many of them had been requested, months earlier. This was because DOJ policy had foreclosed any disclosure of many of the documents which it ultimately supplied. These documents include, for example, DOJ's reviews of agency civil rights compliance programs, compliance reviews of Federal assistance recipients, and legal opinions. As noted, in note 1958 infra, DOJ, earlier in 1975, broke precedent with its disinclination to disclose legal opinions. The Commission commends the Department of Justice for its change in policy.

It should be noted that DOJ has accompanied some of the documents it has provided with restrictions against disclosure of the names of recipients or beneficiaries of Federal assistance. Moreover, DOJ has not provided copies of any documents constituting legal advice to agencies concerning specific litigation or administrative hearings where disclosure of such would interfere with enforcement proceedings.

I. Coordination and Direction

A. Need

Implementation of Title VI poses significant problems requiring coordination and direction. The need for coordination and direction exists because more than 25 agencies have Title VI enforcement responsibilities. Coordination and direction may be necessary to ensure joint enforcement by several agencies funding the same recipient. More importantly, absent effective coordination and direction, Title VI agencies may make inconsistent interpretations of law or develop conflicting standards for implementation of Title VI, such as data collection requirements. Since some recipients are assisted by a number of Federal agencies, it is important that these recipients not be subjected to varying and possibly conflicting information reporting requirements and compliance standards.[1718] Similarly, even where there is uniformity among the agencies, it is important that such recipients not be subjected to duplicative compliance reviews, audits, and other investigations by the different agencies.

Equally serious, however, is the situation created whenever some agencies enforce the law vigorously and others do not. An uneven

---

1718. New Title VI standards may be necessary from time to time because the concepts of equal protection which underlie Title VI are themselves always evolving through judicial proceedings. The major recent example of this is the Supreme Court's decision that failure to ensure provision of an education understandable to non-English-speaking public school children constitutes a violation of Title VI. Lau v. Nichols, 414 U.S. 563 (1974).

level of enforcement activity among the agencies encourages a nonresponsive attitude by recipients towards those who would enforce the law.[1719] This, in turn, can demoralize members of staffs who are desirous of achieving effective enforcement. In this way, inconsistency of enforcement effort undermines the Government's entire Title VI effort.

1719. The following recent statement by the head of a State planning agency administering Law Enforcement Assistance Administration (LEAA) funds is illustrative:

> ...under the LEAA, program...[w]e are oftentimes viewed as being in much more of an aggressive posture as far as civil rights...is concerned. The way we carry out the guidelines of the LEAA program is to actually go out and deal with the local agency, spell out what the guidelines are, spell out the kind of affirmative action program which he has to develop in order to certify that he has a program, help him develop the program, and get him to certify.
>
> From practical experience his response to us is that LEAA is going further than any of the other Federal agencies he deals with. He gets HEW money, and they don't make him do all these kinds of things. Remarks of Lee M. Thomas, Executive Director, Law Enforcement Assistance Program, State of South Carolina, at an LEAA Policy Development Seminar on Civil Rights Compliance, Feb. 10-11, 1975, at Rochester, Michigan. As of May 1975, a final transcript of the proceedings of the conference was being prepared by LEAA.

For a discussion of LEAA's civil rights enforcement efforts, see ch. 5 supra.

Coordination authority alone will not always suffice to avoid these problems, however. There is also a need to direct that steps be taken following unsuccessful efforts at coordination. To state the difference between coordination and direction succinctly, direction is what should follow unsuccessful efforts at coordination. Thus, for example, a coordinator can recommend a policy or standard for adoption by all Title VI agencies. Where an agency is unwilling to accept the recommendation, but the coordinator believes that the reasons advanced by an unwilling agency do not justify non-adoption of the recommendation, the coordinator should be able to direct that the recommendation be implemented. The same rule exists where an agency which is a reluctant guardian of the rights conferred by Title VI is unresponsive to suggestions that the level or quality of its compliance activity be upgraded.[1720]

B. Assignment of Responsibility

The responsibility for coordinating the Federal Government's Title VI activities has been assigned through a series of Executive orders. The duties were first vested in a Presidential Council and later in the Department of Justice.[1721]

1. Executive Order 11197

In February 1965, seven months after the passage of Title VI, Executive Order 11197 created a President's Council on Equal Opportunity, to be

---

1720. The difference between coordination authority and directional authority is discussed further on p. 659 infra.

1721. Exec. Order No. 11197, "Establishing the President's Council on Equal Opportunity," 3 C.F.R., 1964-1965 Comp., p. 278.

chaired by the Vice President and to consist of sixteen agency heads.[1722] The Council was not authorized to make policy, but to recommend policies, programs, and actions to the President.[1723] Its field of responsibility was broad, extending to the spectrum of Federal civil rights activities, including coordination of the Government's Title VI efforts.[1724]

1722. These were the Attorney General; the Secretaries of the Departments of Agriculture, Commerce, Defense, Health, Education, and Welfare, and Labor; the Chairmen of the Civil Service Commission, Commission on Civil Rights, the Equal Employment Opportunity Commission, the President's Commission on Equal Employment Opportunity, and the President's Commission on Equal Opportunity in Housing; and the heads of the Community Relations Service, Office of Economic Opportunity, Office of Education, the Federal Housing and Home Administration, and the General Services Administration.

1723. U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 333 (1971) /hereinafter cited as Enforcement Effort report/; Comment: Title VI of the Civil Rights Act of 1964--Implementation and Impact, 36 Geo. Wash. L. Rev. 824 (1968) /hereinafter cited as Comment/.

1724. The Council was plainly a coordinator and not a director of the Government's Title VI effort. See the distinction set out on p. 649 supra. As an illustration, it has been stated that the Council, in giving advice on questions such as whether a particular program was covered by Title VI, generally deferred to agency opinion. Comment, supra note 1723, at 858.

The Council "never got off and running,"[1725] however. Its ties to the President's staff were not close, and conflicts arose.[1726] Only six months after it began operations, the Council was suddenly abolished,[1727] and responsibility for coordination of Title VI was assigned to the Attorney General.

Several factors were stated as underlying the transfer.[1728] First, Title VI agencies had adopted regulations[1729] and embarked on a coordinated

---

1725. Interview with Wiley Branton, former Executive Director, President's Council on Equal Opportunity, Apr. 6, 1970, cited in Enforcement Effort report, supra note 1723, at 334, n. 210.

1726. Id. at 334.

1727. This was accomplished by Executive Order 11247, 3 C.F.R., 1964-1965 Comp., p. 348, 42 U.S.C. § 2000d (1970), discussed on pp. 654-57 infra.

1728. These factors are set out in the preamble of Executive Order No. 11247, supra note 1727.

1729. These regulations are discussed on p. 702 infra.

enforcement program.[1730] Second, the issues thereafter arising in connection with coordination of agency Title VI activities would be predominantly legal in character and in many cases would be related to judicial enforcement. And third, the Attorney General is the chief law officer of the Government and is charged with enforcing the laws of the United States. The statement that the agencies had "embarked on a coordinated enforcement program" was an overstatement. While the Council had worked on a set of guidelines for Title VI agency enforcement action and on a series of coordination plans for delegation to HEW by agencies with responsibilities in areas in which HEW was the predominantly involved agency,[1731] these guide-

---

1730. See Enforcement Effort report, supra note 1723, at 239-40, n. 415. For further discussion of the transfer, see Comment, supra note 1723, at 859, n. 133; William L. Taylor, Executive Implementation of Federal Civil Rights Laws, An Issues Paper for the Leadership Conference on Civil Rights 8 (1968).

1731. Comment, supra note 1723, at 858-59.

lines had not been issued and the coordination plans had not been signed by the participating agencies at the time of the Council's abolition.[1732]

Moreover, the statement that coordination issues would be predominantly legal in character was fallacious. While it is true that determinations regarding the scope of Title VI and the development of such matters as uniform compliance standards involve legal considerations, the ultimate success of the Government's efforts to enforce Title VI depends on the willingness of agencies to take effective implementing action. This willingness is reflected by such factors as the number of compliance reviews conducted, the quality of those reviews, and the speed and frequency of enforcement action. Agency performance in these areas has generally been deficient. Those were the problems in 1965, and those are the problems now.[1733]

1732. The coordination plans are discussed further on pp. 690-698 infra.

1733. It should also be noted that to the degree that the second and third reasons suggested that Title VI would be primarily enforced judicially rather than administratively, the reasons must be regarded as contrary to the intent of the Congress, which considered administrative action to be the primary means of enforcement. The history of Title VI in the Executive branch, however, has been in part a history of circumscription of the use of administrative means to enforce Title VI. This is evidenced by the Attorney General's Guidelines for Title VI Enforcement and by the joint action of the Attorney General and the Secretary of Health, Education, and Welfare in 1969, when they made litigation the principal Title VI enforcement tool in public schools. See the Enforcement Effort report, supra note 1723, at 237-38. The Attorney General's Guidelines appear at 28 C.F.R. § 50.3 (1974). They are criticized in Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report, 41 Notre Dame Law. 906, 922-24 (1966).

2. Executive Order 11247[1734]

Executive Order 11247 conferred on the Attorney General a responsibility and a power which had belonged to the President's Council on Equal Opportunity.[1735] The responsibility was to assist Federal departments and agencies to coordinate their programs and activities and adopt consistent and uniform policies, practices, and procedures for the enforcement of Title VI.[1736] The power was that of promulgating such rules and regulations as the Attorney General might deem necessary to carry out the responsibility assigned by the Executive order.[1737] The order also directed all departments and agencies to cooperate with the Attorney General and to provide any requested reports

---

1734. Exec. Order No. 11247, "Providing For the Coordination by the Attorney General of Enforcement of Title VI of the Civil Rights Act of 1964," Sept. 24, 1965, 3 C.F.R., 1964-1965 Comp., p. 348, 42 U.S.C. § 2000d (1970).

1735. Evaluations of the Department of Justice's performance under this Executive order are contained in the Enforcement Effort report, supra note 1723, at 239-50 (1971); U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: One Year Later 115-23 (November 1971) /hereinafter cited as One Year Later/; and The Federal Civil Rights Enforcement Effort--A Reassessment 231-39 (January 1973) /hereinafter cited as Reassessment report/.

1736. Exec. Order No. 11247, supra note 1734 at Sec. 1.

1737. Id.

and information.[1738]

Executive Order 11247 did not include a number of necessary provisions. An elementary one, a version of which was contained in Executive Order 11197, would have required Title VI agencies to designate a fulltime official of a uniformly high rank to direct agency Title VI efforts and to serve as liaison with the Department of Justice.[1739]

1738. Id. at Sec. 2. This directive was also carried over from Executive Order No. 11197, supra note 1721.

1739. Executive Order No. 11197, supra note 1721, Section 8, provided:

> Each Federal department and agency shall designate an officer, of a rank not lower than Deputy Assistant Secretary or the equivalent, to oversee and coordinate the activities of such department or agency related to the purpose of this order, and to serve as liaison with the Council.

More serious was the failure to provide certain dates for the accomplishment by the Department of Justice of specific coordination activities, such as the development of a statement of the minimum requirements of an agency Title VI enforcement program.[1740] Most important, however, was that because the power given the Attorney General was only that of assisting the agencies to coordinate and to adopt uniform and consistent policies, the Attorney General did not construe the order as providing authority to direct the agencies to take specific compliance and enforcement actions.[1741] The implementation of the Executive order by the Department of Justice was thus necessarily limited. The Attorney General is only one member of the Cabinet, which is a collegial body. As one among equals, the potential for successes in improvement of Title VI enforcement remained a function of the Attorney General's personal relationships with individual Cabinet members and of his or her own powers

---

1740. Other coordination objectives might have included the development of such matters as standards for the conduct of agency preapproval and post-award compliance reviews and complaint investigations; design of requirements for recipient self-analysis of existing discrimination, the present effects of past discrimination, and any adverse impact against minorities which would inhere in or result from funding a planned program or activity; implementation of uniform recipient data collection and reporting requirements; and determination of the compliance role to be played by State agencies.

1741. See e.g., letter from K. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, to Harold E. Fleming, Leadership Conference on Civil Rights, June 1, 1972.

of persuasion. As long as this relationship prevailed, there could be personal successes but no guarantee of institutional successes.[1742]

3. Executive Order 11764[1743]

In early 1974, President Nixon signed Executive Order 11764, which superseded Executive Order 11247. The new order recites that the agencies which extend Federal financial assistance have primary responsibility for effectuating Title VI, and clarifies and broadens the role of the Attorney General.[1744] It directs that the Attorney General

---

1742. The unambiguous support of the President is necessary to ensure the effective functioning of a chief institutional authority. One means of extending such support would have been provision of stronger authority in the Executive order itself. Another would have been provision of adequate staff to ensure effective implementation of the Executive order by the Attorney General. A third means of expressing unambiguous support would have been the personal intervention of the President when Title VI coordination problems arose. Such steps were not taken under Executive Order No. 11247, supra note 1734.

1743. Exec. Order No. 11764, "Nondiscrimination in Federally Assisted Programs," Jan. 21, 1974, 39 Fed. Reg. 2575 (Jan. 1974), 42 U.S.C.A. 2000d-1 (Cum. 1975). Drafts of the order were initiated by staff of the Federal Programs Section of the Civil Rights Division of the Department of Justice. The Federal Programs Section, formerly called the Title VI Section, is the locus of responsibility for execution of the Attorney General's Title VI coordination function. It is discussed further infra, this chapter.

1744. The order states that "/a/lthough the Attorney General is presently responsible for coordinating enforcement of Title VI, it is appropriate to clarify and broaden the role of the Attorney General with respect to Title VI enforcement." Exec. Order No. 11764, supra note 1743 (preamble).

"shall coordinate" agency enforcement of Title VI.[1745] Under Executive Order 11247, the Attorney General was directed only to "assist" agencies "to coordinate." The new Executive order thus appears to give the Attorney General a more direct role in dealing with Title VI agencies. The order also provides that the Attorney General "shall prescribe" standards and procedures for implementation of Title VI.[1746] These standards and procedures are to apply to investigations, compliance reviews, and steps to obtain voluntary compliance and to enforce Title VI requirements, and agencies are to act "in accord with" them.[1747] These provisions represent significant improvements over Executive Order 11247. The power to issue minimum requirements for investigations and compliance reviews and for enforcing Title VI has great potential for ensuring a uniformly high quality Title VI effort and for developing and improving methods for detecting, measuring, and remedying discrimination and inequity in provision of services.

The order also preserves the power in Executive Order 11247 for the Attorney General to issue necessary rules and regulations for carrying out his or her functions and adds to it a power to issue "orders."[1748] Finally, the

---

1745. Id. at Sec. 1.

1746. Id.

1747. Id. at Sec. 2(b) and (c).

1748. Id. at Sec. 1.

order preserves a provision in Executive Order 11247 that the agencies "shall cooperate with the Attorney General in the performance of his functions under this order"[1749] and delegates to the Attorney General the President's authority to approve Title VI agency regulations.[1750]

The Executive order gives the Attorney General substantial powers to implement and execute Title VI, if the Attorney General chooses to use them. Arguing from the language of the order, it seems clear that the word "orders" refers to specific, not general orders. Title VI itself contains the phrase "rules, regulations, and orders of general applicability."[1751] It appears that the difference in wording in Executive Order 11764 is, therefore, purposeful and different in meaning. From a comparison of the old and the new Executive orders, it is evident that the new order confers unprecedented management authority on the Attorney General in the area of Title VI coordination.

1749. Id. at Sec. 2(a)

1750. Id. at Sec. 3

1751. 42 U.S.C. § 2000d-1 (1970). The phrase refers to Title VI regulations to be adopted by the agencies concerned.

Nevertheless, two matters[1752] brought to this Commission's attention in July 1975[1753] have posed tests of the extent of the Attorney General's authority to manage Title VI enforcement.[1754] Both involve the refusal of a Federal agency to comply with the requests of the Department. The first matter concerned a DOJ request that USDA[1755] refer to DOJ for suit the noncompliance with Title VI of a certain State Extension Service (SES).[1756] According to a February 1975 letter from the Assistant Attorney General, both a 1973 audit by USDA and investigation by the Civil Rights Division had found legally actionable discrimination in the SES' employment and services. DOJ took the position that the SES was also in violation of its affirmative action plan, approved by USDA in 1973. DOJ stated that further efforts at achieving voluntary compliance were likely to be unavailing, and requested that USDA refer the matter to it "in the most expeditious manner possible consistent with [USDA] regulations."[1757] USDA replied that its Title VI

1752. In another example one agency civil rights official who was invited by the Department of Justice to consider entering into an agreement delegating to HEW his agency's enforcement responsibilities in the areas of elementary, secondary, and higher education believes that DOJ cannot order that the delegation be made. Telephone interview with Richard Risk, Title VI Program Officer, Grants Administration Division, Environmental Protection Agency, Mar. 3, 1975.

1753. These matters were brought to the attention of this Commission through the documents provided by DOJ in July 1975. These documents are discussed at note 1717 supra.

1754. USDA is discussed in Chapter 2, supra.

1755. The Attorney General's authority under Executive Order 11764 is discussed on pp. 657-663 supra.

1756. Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to John Knebel, General Counsel, Department of Agriculture, Feb. 21, 1975. DOJ requested that the name of the SES not be revealed because such disclosure could interfere with ongoing enforcement activity.

1757. Id.

regulation requires that attempts at negotiating voluntary compliance be made before the initiation of any enforcement proceeding and that it could "find no way that we can agree...to the appropriateness of a referral under Title VI at the present time...."[1758] USDA stated that the four findings which DOJ had made regarding services discrimination were "of limited scope in view of the Extension Service's broad areas of assistance...and /that/ corrective action may be appropriate in other areas although not presently actionable in the view of your staff due to lack of evidence...." USDA noted that these two factors made negotiation more appropriate than litigation at the present time.[1759]

1758. Letter from John A. Knebel, General Counsel, Department of Agriculture, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, Mar. 4, 1975. USDA had no objection to the initiation of a suit under Title VII involving employment practices (for which Department referral is not necessary).

1759. Id. At the same time, it should be noted that USDA acknowledged in its letter to DOJ that it had been advised by a draft memorandum of November 12, 1974, of the results, both as to employment and services, of a USDA-assisted analysis by DOJ of the additional information secured. Yet there was no indication in USDA's letter, almost four months later, that it had taken any steps in the interim period towards negotiating compliance regarding the services discrimination issues.

It is plain from the correspondence that USDA felt no obligation to regard DOJ's letter as an order. As of June 1975, however, DOJ had not challenged USDA's interpretation. Indeed, it had not even responded to USDA's letter.

The second matter pertinent to directional authority arises from FPS' amicus involvement in a case involving a State agency and private institutional child care facilities in Alabama. As a result of the experience FPS acquired in this case, it developed questionnaires for the review of HEW-funded child care and mental health programs administered under the auspices of State agencies. FPS then tried to persuade HEW's Office for Civil Rights either to participate with FPS in State agency reviews or to delegate to FPS authority to require of recipients such information as is deemed necessary for the implementation of Title VI.[1760]

HEW was not responsive to FPS' requests. The Director of OCR wrote to FPS in January 1975 that "a delegation of our Title VI authority to your office is not necessary" in order to develop realistic and uniform criteria for evaluating Title VI compliance in State agency child-care programs.[1761] OCR's reasoning was based upon the fact that

---

1760. These reviews were not intended to study compliance with Title VI, however, as much as "...to assist in formulating a thorough, uniform and simple system of data collection, a guide to future investigations, and realistic uniform criteria for evaluating compliance with Title VI...." Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, DOJ, to Barbara Walker, Director, Health and Social Services Division, Office for Civil Rights, HEW, Nov. 8, 1974. Although Mr. Dempsey was writing with particular reference only to child care programs, other documents provided by FPS suggest that its intentions with respect to mental health programs were the same or similar.

1761. Letter from Peter E. Holmes, Director, Office for Civil Rights, HEW, to Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, DOJ, Jan. 23, 1975.

it had, as of January 1975, scheduled indepth reviews in the regional Health and Social Services Branch offices in a number of areas, including child care and mental health programs. Moreover, as of January 1975, HEW's regional branches were in the process of completing draft guidelines "in the nature of compliance standards"[1762] for submission to the Health and Social Services Division of OCR. HEW proposed to submit these drafts to FPS for review and comment, and stated it would speak with an OCR director of a region in which FPS had been interested concerning the collection of child care data "along the lines developed in" FPS' proposed questionnaires.[1763] Again FPS did not challenge HEW on its position.

The Attorney General's order could have foreclosed most if not all of the room for argument over interpretation of the Executive order by responding promptly to agencies challenging the powers to direct. DOJ should have issued a legal opinion, making clear the scope of the Attorney General's authority under the order. No such order has been issued, however. If this is because the Attorney General has a contrary view to that held by this Commission concerning DOJ's powers under Executive order, the Attorney General should long ago have recommended a new Executive order.

To appreciate the deficiencies of the execution of Executive Order 11764, it is instructive to review the institutional arrangements created under Executive Order 11246[1764] in an analogous area, nondiscrimination

---

1762. Id.

1763. Id.

1764. Exec. Order No. 11246, "Equal Employment Opportunity," 3 C.F.R., 1974-1975 Comp., p. 169-177.

in employment by Federal contractors. Overall responsibility for contract compliance is vested in the Department of Labor, which has created an Office of Federal Contract Compliance (OFCC)[1765] and assigned to 17 other agencies the duty of reviewing and monitoring Federal contractors for compliance with employment nondiscrimination requirements.[1766] To ensure a consistently high level of enforcement activity by all agencies to which it has delegated responsibility, OFCC can oust an agency from jurisdiction over a particular contractor and assume responsibility for compliance by that contractor. OFCC can also conduct its own investigations and compliance reviews of contractors, and can itself impose sanctions on noncomplying contractors. Finally, OFCC can order any of the agencies to take specific actions and report to OFCC regarding the action taken within a given time.[1767] These four powers would seem essential to the effective oversight of a widely diverse

---

1765. The activities of OFCC are reviewed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination ch. 3 (July 1975).

1766. These agencies are: Department of Agriculture; Atomic Energy Commission; Department of Commerce; Department of Defense; Department of Justice; Environmental Protection Agency; General Services Administration; Department of Health, Education, and Welfare; Department of Housing and Urban Development; Department of the Interior; National Aeronautics and Space Administration; Postal Service; Small Business Administration; Tennessee Valley Authority; Department of Transportation; Department of the Treasury; Veterans Administration.

1767. The relevant OFCC regulations are found at 41 C.F.R. § 60-1.20, et seq. (1974).

program such as Title VI enforcement by Executive Order 11764.[1768]

1768. It should be noted that, with the advent of general and special revenue sharing, coordination and direction among Federal civil rights enforcement agencies in ending discrimination in provision of services may assume a new importance. Because revenue sharing programs are not specifically mentioned by Executive Order 11764, the Title VI authority of the Attorney General with respect to them may be subject to some doubt. Although it appears that this omission of the Executive order has caused no problems with respect to manpower and community development special revenue sharing, the situation is otherwise with respect to general revenue sharing. The Office of Revenue Sharing (ORS) of the Department of the Treasury, which administers general revenue sharing, contends that it is not a Title VI agency. The Department of Justice has not reached a formal conclusion on the question. This is unfortunate. Because the approximately $6 billion in general revenue sharing funds which are distributed annually by ORS among all States and practically every local government in the country can be used in the same programs and activities in which other Federal assistance funds are used, there is every need for effective coordination among present Title VI agencies and ORS. Moreover, ORS, arguing it is not a Title VI agency, has claimed that the monitoring and compliance actions it can take are more limited than those available to Title VI agencies. This goes directly to the problem of uneven levels of compliance activity, discussed on pp. 646-47 supra. For more discussion of this point, see Section III, A infra. For a review of the civil rights enforcement effort of ORS, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance /hereinafter cited as To Provide Fiscal Assistance/.

II. Organization and Staffing

For a period of time, the Attorney General's Title VI coordinational effort was unsatisfactory. Three problems have affected that effort. The first of these was a lack of continuity in leadership.[1769] The second was that the Title VI function has been downgraded in importance since 1965.[1770] The third

---

1769. During the nine years in which Executive Order 11247 was in effect, seven persons were successively assigned the duty of overseeing the Department's efforts. The shortest tenure among these was several months. The longest was under three years.

1770. When a Title VI unit was first created, in 1965, it was headed by an independent Special Assistant to the Attorney General, who reported directly to the Attorney General. For administrative purposes, however, the unit was placed under the Civil Rights Division (CRD). This arrangement led to the complete, formal integration of the unit into the CRD. The independence and direct relationship of the Title VI unit head to the Attorney General were ended. The nadir of the gradual downgrading of the Title VI responsibility was reached in late 1969, when the only person assigned to Title VI on a full-time basis was four or five rungs down the ladder from the Attorney General. This person reported to the Deputy Director of the Office of Coordination and Special Appeals, who reported to that Office's Director, who reported to a Deputy Assistant Attorney General, who reported to the Assistant Attorney General, who reported to the Deputy Attorney General or to the Attorney General. Moreover, the rank of the lead Title VI official has varied during this period. One appointee, previously a GS-15, was made a GS-17 when he became Special Assistant to the Attorney General in 1967. Another, in June 1970, was promoted to GS-15 upon his appointment. Enforcement Effort report, supra note 1723, at 241-42.

problem, which stems from the fact that CRD's professional staff consists primarily of lawyers, is that the CRD has been "geared for and oriented toward a litigation approach to problems."[1771]

1771. Until 1974 the only nonlawyer professional employees involved in Title VI have been research analysts, whom DOJ calls "[legal] paraprofessionals." They have served primarily to aid in litigation Because of DOJ's orientation, litigation has often been used as a substitute for administrative enforcement of Title VI rather than as a support for such action. See Enforcement Effort report, supra note 1723, at 242-43, 247-50, 351. In that report, the Commission observed that "If the /Title VI/ unit is to perform effective Title VI coordination, it cannot become involved in protracted litigation even if the issues involved in the cases relate to Title VI." Id. at 249 (emphasis supplied). Where primary emphasis is placed on litigation, the coordination function can suffer. Dilution of the coordination function because of involvement in litigation was observed in 1972, for example. Reassessment report, supra note 1735, at 236.

Although the Department has taken steps to correct these problems, its staffing remains inadequate. As of April 1975, the Title VI function resides in the Federal Programs Section.[1772] The Section Chief, a GS-15, reports to a Deputy Assistant Attorney General for Civil Rights, who is responsible for review of the

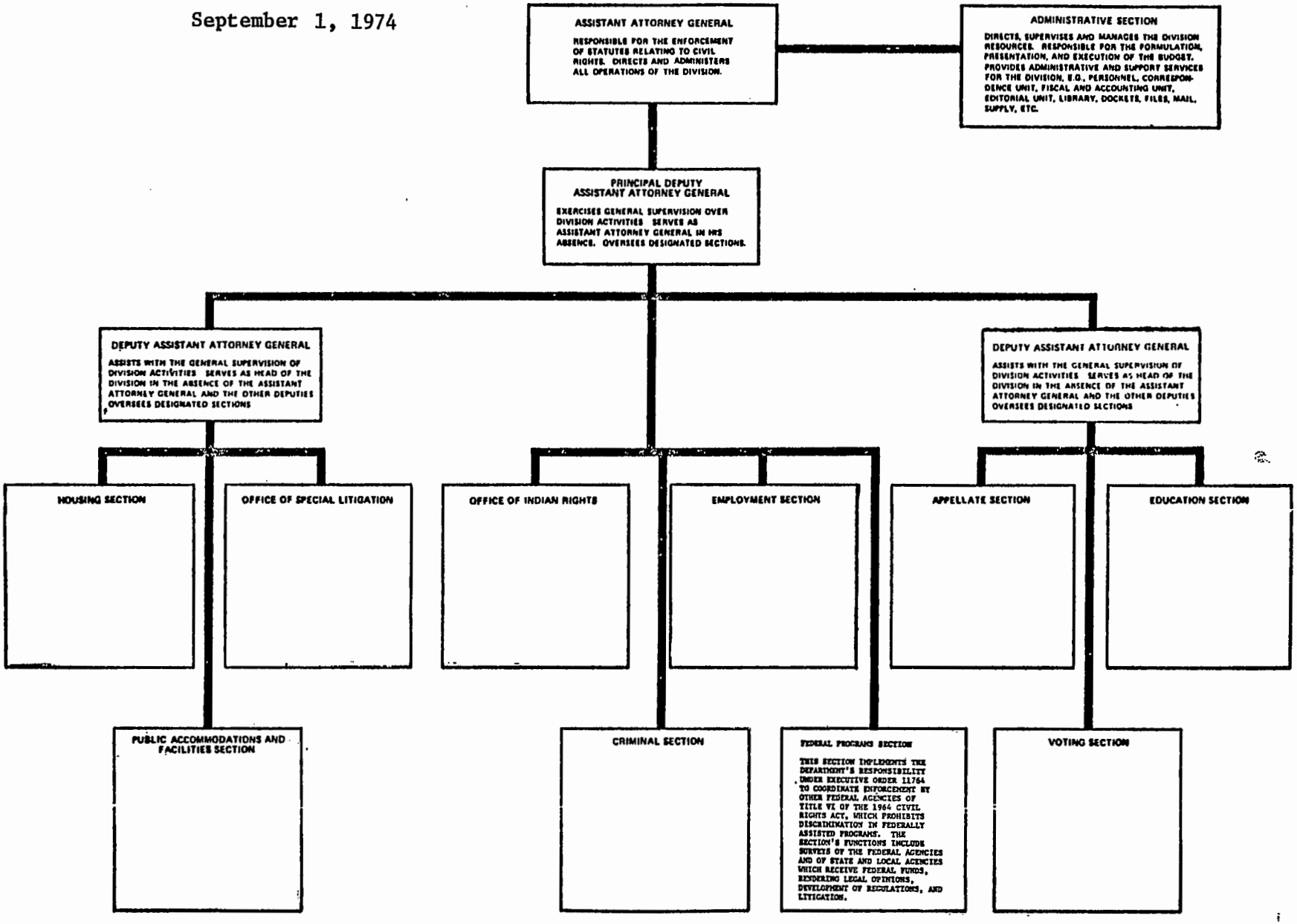
---

1772. Sections are the primary organizational units of the Civil Rights Division. See Exhibit 22, p. 672 infra. Before becoming a Section, the Title VI function was located in one of three units created by splitting up a Coordination and Special Appeals Section.

Exhibit 22

September 1, 1974

CIVIL RIGHTS DIVISION



work of the Section.[1773] The Deputy Assistant Attorney General reports to the Assistant Attorney General for Civil Rights, who is in charge of the Civil Rights Division. The Assistant Attorney General reports to the Deputy Attorney General or directly to the Attorney General, as appropriate under particular circumstances.

The Section head has two Deputy Chiefs, to whom has been delegated substantial responsibility for day-to-day management of the Section's activities. The Section has a professional staff consisting of attorneys, specialists in coordination,[1774] and research

---

1773. The Deputy Assistant Attorney General is senior to two other Deputy Assistants within the CRD, and serves in the absence of the Assistant Attorney General for Civil Rights. He has no regular contact with Title VI agency civil rights officials. Rather, his contacts are generally at a higher level than the lead fulltime civil rights official. Moreover, most of his agency contacts are on an ad hoc basis.

1774. The coordinators are Equal Opportunity Specialists, as are most of the Commission staff who have prepared the Enforcement Effort series of reports. The FPS calls its Specialists "Federal Program Coordinators."

analysts. Each deputy chief is responsible for the work of approximately 15 people, including some members of each of the above three categories.[1775]

1775. Before the spring of 1971 the staff assigned to the Title VI function at DOJ had never numbered more than 10, including attorneys and research assistants, and this figure was reduced in effect by the involvement of the staff in non-Title VI duties. In fact, between 1969 and June of 1970, only one person was assigned to Title VI on a fulltime basis. In the second half of 1970, this figure was increased to four. In March 1971 the then-Assistant Attorney General for Civil Rights acknowledged publicly that the Title VI coordination function "has not been fully carried out due to the lack of resources committed to it" and requested an increase from 10 to 18 Title VI staff. See Statement of David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, in Hearings on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1972 Before a Subcomm. of the House Comm. on Appropriations, 92nd Cong., 1st Sess., pt. 1, at 1145 (1971) [hereinafter cited as Appropriations Hearings and identified by fiscal year]. This increase was made, and a further increase, from 18 to 21, was approved for fiscal year 1973. See 1974 Appropriations Hearings 620. In June 1973 the Title VI Section had 13 authorized attorney positions, five research analysts, and, presumably, three clerical staff members. No further staff increase was requested for fiscal year 1974. DOJ response to an April 1973 Commission questionnaire, contained in letter of June 8, 1973 from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights [hereinafter cited as DOJ response]. At the beginning of fiscal year 1975, however, when the first coordinators came on board, the staff increased again.

As of April 1975, the Federal Programs Section had 14 attorneys, 10 coordinators, 4 research analysts, and 4 secretaries,[1776] a total of 32. Further increases for fiscal year 1976, to 37 personnel and a Section budget of approximately $755,000, have been approved by the Department.[1777] Thus, although the Civil Rights Division sought a significant staff increase for the Section, in fiscal year 1976, only five new positions will be added. The Department approved a request to the Office of Management and Budget (OMB) for an increase of 13 positions.[1778] This request was denied by OMB and the Department which then arranged for the transfer of 5 new positions.

1776. Letter from Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to Ellerbe P. Cole, Equal Opportunity Specialist, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 3, 1975. One of the research analysts has been serving as a coordinator. Telephone interview with Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, June 24, 1975. Thus, FPS' coordinator staff in practical effect consists of 11 persons.

1777. Telephone interview with Mildred Fowble, Budget Analyst, Civil Rights Division, DOJ, May 15, 1975. As the Section's staff has grown, so have its budget requests. For fiscal year 1972, for example, DOJ requested $204,000 for salaries and expenses. For fiscal year 1974, the figure was $307,000. 1972 Appropriations Hearings 1117; 1974 Appropriations Hearings 617.

1778. In making plans for fiscal year 1976, the Civil Rights Division requested 21 new positions for the Section.

The two deputy chiefs of the FPS have between them responsibility for more than 25 Title VI-related agencies.[1779] Each, as a supervisory general attorney, is responsible for all matters, including coordination and litigation, relating to the agencies for which he or she is responsible. The coordinators have direct and immediate responsibility for execution of DOJ's coordination function.[1780] A lead coordinator has been designated; he reports directly to the Deputy Chiefs or to the Section Chief, as appropriate.

1779. For example, one is responsible for such agencies as the Departments of Agriculture, Health, Education, and Welfare, the Interior, State, and Transportation; the other is responsible for, among others, the Departments of Commerce, Defense, Housing and Urban Development, and Labor.

1780. Before fiscal year 1975, at least one FPS attorney was assigned to each Title VI agency, and all were responsible for both coordination and litigation. With the advent of the coordinators, the first nonlawyer professionals assigned to the FPS, this has changed.

Attorneys continue to be involved in coordination. This is certainly necessary wherever legal questions, such as the applicability of Title VI to particular grant statutes, are involved. Research analysts continue to aid in litigation, and may be involved in coordination on an ad hoc basis. A clear division exists, however, where coordinators are concerned. They will not be used as research analysts in aid of litigation.[1781] nation function is the responsibility of the 10 coordinators and clearly 10 is an insufficient number to handle the Section's responsibilities with regard to the more than 25 Title VI agencies. To illustrate, monitoring of some large agencies such as HEW and DOL, each should require the full-time efforts of several persons if it is to be carried out effectively.

The training received by coordinators has generally been given on the job. They were initially provided copies of Title VI and the uniform regulations, copies of this Commission's reports which relate to Title VI enforcement, copies of proposed uniform standards drafted by the Section for Title VI implementation, and a standard questionnaire to be used for devising more comprehensive, program-specific questionnaires.[1782] In the fall of 1974, presentations relating to Title VI were made to the

---

1781. Interview with Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Feb. 6, 1975.

1782. Attachment to April 1975 Dempsey letter, supra note 1776 Coordinators were also invited to review a compendium of Title VI cases and DOJ opinion letters, and were instructed to familiarize themselves with information submitted by the agencies pursuant to FPS requests of December 1973 and March 1974 and with Section files relating to their assignments. Id. The requests to the agencies for information are discussed further infra note 1949 and pp. 725-726.

coordinators as a group by personnel of the Office of Management and Budget and this Commission.[1783] In addition, coordinator teams assigned to review the Title VI enforcement program of specific agencies, such as the Departments of Agriculture, Labor, and Transportation, have met with lead civil rights and program operations personnel, received formal orientation and training from agency Title VI staff, and have attended civil rights and program workshops conducted by the agencies for their own civil rights personnel and for program recipients.[1784]

Contemporaneously with this training, DOJ wrote to the affected departments and agencies, reminding them of the existence of Executive Order 11764 and notifying them of the creation of a new coordination unit and its mission. Agency heads were requested to assign a high-level person to coordinate with DOJ personnel. In September 1974, the Attorney General wrote such letters personally to several agency heads, including the Secretaries of Agriculture, Health, Education, and Welfare, and Labor. In addition, letters to several agencies notified them of DOJ's desire to review their programs.[1785]

1783. Attachment to April 1975 Dempsey letter, supra note 1776.

1784. Id.

1785. Copies of this correspondence were included in the Attachment to the April 1975 Dempsey letter, supra note 1776.

1786

III. Coordination Activities

In past years most of the activities of the FPS appear to have been undertaken on an ad hoc basis rather than pursuant to a programmatic approach to the execution of its responsibility.[1787]

The activities of the Section can be grouped in five categories: identification of the agencies with programs covered by Title VI; preparation and oversight of assignments of responsibility among Title VI agencies; definition of the elements of an adequate agency compliance program; review of compliance agency activities to ensure their adequacy; and provision of services and technical assistance to Title VI agencies.

A. Determination of Title VI Universe

In January 1972 this Commission raised a number of questions with DOJ concerning the possibility that some agencies were covered by Title VI, but had not acknowledged that fact. First, the Commission noted that four agencies which had been identified by DOJ as having Title VI responsibilities had not even proposed Title VI

1786. Litigation is not discussed in this section, but on pp. 742-752 infra.

1787. This may have been owing to the organization and staffing of the Section, the lack of authority provided under Executive orders, and the existence of the litigation function in tandem with the coordination function.

regulations,[1788] the first step in adopting a compliance program. These were the Appalachian Regional Commission (ARC), Environmental Protection Agency (EPA), Equal Employment Opportunity Commission (EEOC), and the Federal Home Loan Bank Board (FHLBB).[1789] As early as October 1971, DOJ advised this Commission that the EPA and FHLBB were working on draft regulations. DOJ also reported that, although it had not been advised of draft regulations of the ARC or EEOC, it was "pursuing the matter with respect to each agency."[1790]

In 1972, the EPA and FHLBB adopted Title VI regulations which were published in July 1973, when the final uniform Title VI amendments were published.[1791] In June 1973, DOJ reported that in March 1973 it had sent a proposed draft Title VI regulation to ARC.[1792] As of February 1975, ARC had not adopted Title VI regulations, however, contending that it is not purely a Federal agency and that it lacks the power to promulgate regulations. Although DOJ sent a proposed draft regulation to ARC in March 1973, ARC's files indicate that no response was sent to DOJ by ARC and that, as of February 1975, there had been no further written communication from DOJ on the subject.[1793]

1788. Letter from John A. Buggs, Staff Director-Designate, U.S. Commission on Civil Rights, to David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, Jan. 12, 1972 (attachment, at 7).

1789. Id.

1790. Attachment to letter from David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, to Rev. Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Oct. 7, 1971.

1791. EPA's Title VI regulation was published at 38 Fed. Reg. 17968 (1973). It now appears at 40 C.F.R. §§ 7.1 et seq. (1974). FHLBB's Title VI regulation was published at 38 Fed. Reg. 17929. It now appears at 12 C.F.R. §§ 529.1, et seq. (1975). The uniform Title VI regulation amendments are discussed on pp. 702-707 infra.

1792. DOJ response, supra note 1775, at 141.

1793. Telephone interview with Alan Woodford, Attorney, Office of the General Counsel, Appalachian Regional Commission, Feb. 27, 1975.

The EEOC, as of February 1975, more than five years after the question of the applicability of Title VI to EEOC's grants to State agencies was raised,[1794] was in the process of preparing a final draft of a Title VI regulation.[1795] As of April 1975, the lead EEOC attorney with responsibility for developing the regulation knew of no contact from DOJ regarding it over the past two and one half to three years.[1796]

Second, in January 1972, this Commission noted that there were a number of Federal agencies which appeared to have Title VI responsibilities but had not issued Title VI regulations resembling those of most other Title VI agencies. Accordingly, this Commission suggested to DOJ that "there is a need for consideration of the applicability of Title VI" to the Smithsonian Institution, five regional action planning commissions,[1797] the Federal Power Commission (FPC), the Library of Congress,

---

1794. See the Enforcement Effort report, supra note 1723, at 182.

1795. Interview with Michael E. Shaheen, Jr., Deputy Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Jan. 21, 1975.

1796. Telephone interview with Anthony DeMarco, Attorney (Civil Rights), Legal Counsel Division, Office of the General Counsel, Equal Employment Opportunity Commission, Apr. 22, 1975. Sometime before July 1973, EEOC sent a draft regulation to DOJ for approval, which was denied for nonconformity with the then-proposed uniform Title VI regulation amendments. Mr. DeMarco has since reworked the draft, tailoring the uniform regulations to fit the EEOC's structure. The revised draft was being circulated within EEOC in April 1975. Id.

1797. The regional commissions are authorized by law to engage in technical assistance projects, to make grants supplementing those made by other, wholly Federal agencies, and to make administrative expense grants to substate planning and development organizations. See 42 U.S.C. §3181 et seq., as amended by P.L. 93-423, approved Sept. 27, 1974 (88 Stat. 1158).

and the Water Resources Council (WRC).[1798] In June 1973, almost 18 months later, DOJ reported that the Smithsonian had contacted the Department's Title VI Section regarding the applicability of Title VI to some of its activities and that the matter was then under review.[1799] DOJ reported that the Section had not previously had contact with any of the other commissions or agencies. It indicated that it did not expect to consider the relation of Title VI to the regional commissions, as, under the proposed fiscal year 1974 budget submitted by the President to the Congress, no appropriations had been requested for them, and their functions were to be assumed by the Department of Housing and Urban Development.[1800] DOJ stated, however, that "/a/s resources permit," the Section would review the applicability of Title VI to the FPC, Library of Congress, and WRC.[1801]

1798. Buggs letter, supra note 1788. The regional planning commissions named in that letter were the Coastal Plains Regional Commission, the Four Corners Regional Commission, the New England Regional Commission, the Ozarks Regional Commission, and the Upper Great Lakes Regional Commission. They have been established to develop long-range, comprehensive economic development programs, to coordinate Federal and State economic development activities, and to promote increased private investment in economic development regions designated by the Secretary of Commerce. See 42 U.S.C.A. §§ 3181 et seq. (Cum. 1975), amending 42 U.S.C. §§ 3181 et seq. (1970).

1799. DOJ response, supra note 1775, at 141.

1800. Id. at 141-42.

1801. Id. at 142.

The Federal Power Commission has for some years prohibited discrimination in access to and use of recreational facilities established by FPC-licensed hydroelectric projects.[1802] It has not, however, published Title VI regulations paralleling the uniform regulations of Title VI agencies. Not until the spring of 1975 did FPS contact FPC to discuss the question,[1803] which, as of late April 1975, was still an open one. In March 1975, three years after this Commission raised the question of Title VI coverage of the Library of Congress, FPS contacted the Library for the first time to follow up on the matter, which, as of April 1975, was unresolved.[1804]

The Water Resources Council provides Federal financial assistance to States for comprehensive water and related land resources planning.[1805] Since 1970, WRC has required participating States to include in their grant applications an assurance that "the planning will be conducted in compliance with" Title VI.[1806] Until 1974 WRC's regulation provided

---

1802. 18 C.F.R. §§ 8.1, et seq. (1975), entitled "Part 8 - Recreational Opportunities and Development at Licensed Projects." For a discussion of FPC's civil rights enforcement program and actions, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. I, To Regulate in the Public Interest ch. 2 (November 1974).

1803. Telephone interview with Ed Minor, Assistant to the General Counsel, Federal Power Commission, Apr. 22, 1975.

1804. Telephone interview with John J. Kominski, General Counsel, Library of Congress, Apr. 22, 1975. Mr. Kominski believes that the General Services Administration has promulgated procurement regulations which, although not legally binding on the Library, would cover as a matter of policy the only area of the Library's operations which might involve discrimination of the sort prohibited by Title VI. Id.

1805. In 1974, WRC was authorized $5 million for grants for State, regional, and interstate water resources planning. Telephone interview with Theodore Farfaglia, General Counsel, Water Resources Council, May 9, 1975.

1806. 18 C.F.R. § 703.5(n) (1974).

no elaboration on the meaning of this phrase, except by way of restating the prohibition of discrimination contained in Title VI.[1807] WRC's regulation, thus, could not be considered equivalent to the Title VI regulations issued by other Federal agencies and was clearly inadequate to provide the type of notice required by Title VI.

Discussions with WRC regarding an improved regulation were initiated by FPS as early as the end of 1973.[1808] By June 1974, WRC was itself committed to the formulation of a new regulation.[1809] The only outstanding question was whether WRC's regulation would be uniform with other agencies' Title VI regulations. FPS pressed for uniformity, and WRC assented.[1810] Its final regulation was published in November 1974.[1811]

1807. See 18 C.F.R. § 703.12 (1974).

1808. Farfaglia interview, supra note 1805.

1809. Id.

1810. Id. WRC would have preferred a more streamlined regulation. WRC was concerned that adoption of a full-blown uniform regulation might give the impression that WRC is an action-oriented, line agency of the Government, just like HEW, HUD, and other major Title VI agencies. In fact, it is a planning and coordination body, composed of the heads of seven agencies which themselves make grants related to water resources. Id. In addition, WRC feared that promulgation of an extensive regulation might give the false impression that substantial noncompliance problems existed in water resources planning. Id.

1811. 39 Fed Reg. 41521 (1974).

In response to a Commission inquiry in the spring of 1973, DOJ reported that in March 1973 it had sent draft proposed regulations to ACTION and the American Revolution Bicentennial Commission (ARBC).[1812] ACTION published its final regulation in July 1974.[1813] ARBC, which was established in 1966,[1814] was abolished without ever having adopted a Title VI regulation.[1815] Its successor organization, the American Revolution Bicentennial Administration (ARBA),[1816] adopted a final Title VI regulation in August 1974.[1817]

1812. DOJ response, supra note 1775 at 141.

1813. 39 Fed. Reg. 27322 (1974). The regulation now appears at 45 C.F.R. § 1203.1 et seq. (1974).

1814. Established in July 1966 to prepare an overall program for commemorating the bicentennial of the American Revolution, ARBC was abolished in December 1973 with the creation of the American Revolution Bicentennial Administration. Office of the Federal Register, National Archives and Records Service, General Services Administration, United States Government Manual 1974-75 at 644.

1815. ARBC did publish a proposed regulation in 1973. See 38 Fed. Reg. 15637 (1973).

1816. See note 1814 supra. The Bicentennial Commission of every State, Territory, the District of Columbia, and Puerto Rico is entitled to receive grants from ARBA.

1817. 39 Fed. Reg. 28279 (1974). This regulation was a revised version of ARBC's proposed regulation. See note 1815 supra. In addition, in May 1975, ARBA published a proposed supplemental regulation, which would ban discrimination based on race, color, national origin, sex, and age to the extent that such discrimination is not prohibited to ARBA's recipients by its Title VI regulation. 40 Fed. Reg. 19835 (1975).

Another important question relates to the Corporation for Public Broadcasting (CPB). In 1967 the Congress authorized the creation of the Corporation "to facilitate the development of educational radio and television broadcasting and to afford maximum protection to such broadcasting for extraneous interference or control.[1818] To aid in ensuring CPB's independence, Congress provided that CPB "will not be" a Federal "agency or establishment,"[1819] and that its directors "shall not...be deemed" Federal employees.[1820] For fiscal year 1975, Congress authorized an appropriation of $60 million for CPB.[1821] CPB

1818. 47 U.S.C. § 396(a)(6) (1970).

1819. 47 U.S.C. § 396(b) (1970).

1820. 47 U.S.C. § 396(d)(2) (1970). Congress also made clear its intention that nothing in the act which created CPB should be deemed to authorize any Federal agency or employee to exercise any direction or control over the Corporation or any of its subgrantees or contractors. 47 U.S.C. § 398 (1970). At the same time, Congress directed CPB to report to it annually on its operations, and made CPB subject to audit by the General Accounting Office for any fiscal year in which Federal funds are made available to CPB. 47 U.S.C. §§ 396(i) and (1) (1970).

1821. 47 U.S.C.A. § 396(k)(1) (Cum. 1975), amending 47 U.S.C. § 396(k)(1) (Supp. III, 1973). In 1974, CPB received $47.75 million in Federal taxpayers' funds. Corporation for Public Broadcasting, Annual Report 1974 at 21.

is authorized to disburse its funds through a wide variety of grants and contracts with individuals, State and Federal agencies, and noncommercial educational broadcast stations.[1822]

CPB is, thus, a federally-authorized, private, nonprofit corporation, heavily impressed with a public interest and disbursing Federal funds. Whether it is an agency with Title VI responsibilities is an important question, because nothing would appear to prohibit the erosion of Title VI coverage through the diversion of additional Federal funds to similar largely or wholly autonomous, private, nonprofit corporations. It was not until March 1975, however, more than seven years after CPB was chartered, that the Assistant Attorney General for Civil Rights formally communicated his view to CPB that Title VI applies to Corporation grants[1823] and that CPB has an obligation to effect a compliance-monitoring program.[1824] Significantly, this

---

1822. For a listing of the spending powers of the Corporation see 47 U.S.C. § 396(g)(2) (1970).

1823. In 1974, CPB granted some $8 million to the Public Broadcasting Service (PBS) alone. Annual Report, supra note 1821 at 26. PBS distributes much of the programming appearing on noncommercial television.

1824. Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to Thomas Gherardi, General Counsel, Corporation for Public Broadcasting, Mar. 26, 1975. As of April 1975, the General Counsel of the CPB was preparing a response to Assistant Attorney General Pottinger's letter which would argue that the Corporation is exempt from the coverage of Title VI. Telephone interview with W. Clinton Powell, Director, Minority Affairs, Corporation for Public Broadcasting, Apr. 21, 1975.

It should be noted that CPB had earlier recognized some civil rights responsibilities. In 1973, CPB adopted a policy of suspension of funding for any of its recipients determined by a court or another agency of competent jurisdiction to be in noncompliance with civil rights laws, including Title VI. Corporation for Public Broadcasting, "Equal Opportunity and CPB Assistance" (undated mimeograph).

communication stated that:

> The Civil Rights Division is of the opinion that Title VI coverage extends to all programs and activities receiving federal financial assistance regardless of the vehicle used to distribute that assistance.[1825]

In late May 1975, FPS wrote to the Community Service Administration, formerly the Office of Economic Opportunity, regarding Title VI coverage of the Legal Service Corporation (LSC), which was created by the Congress in 1974. The opinion provided by FPS[1826] does not appear to have been a matter of FPS initiative; rather, it was in response to an LSC request that FPS review two alternative sets of regulations proposed to be issued by LSC to ensure nondiscrimination in programs it funds. FPS concluded that Title VI's prohibition of discrimination does indeed apply to LSC and that LSC is obligated to ensure that the provisions of Title VI's prohibition are carried out. At the same time, however, because of LSC's status, as created

---

1825. Id. (Emphasis supplied.) DOJ suggested that CPB may wish to delegate Title VI responsibility to HEW, which makes grants for educational television. Id. Delegation agreements are discussed on pp. 690-698 infra.

1826. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to Steve Harris, General Attorney, Transition Staff, Community Services Administration (Legal Services), May 27, 1975.

by Congress,[1827] FPS concluded that Title VI provides no authority for LSC to issue Title VI regulations and stated that it was not aware of any other statutory basis for the promulgation of regulations. FPS suggested that LSC could implement its Title VI responsibilities by incorporating language designed to achieve that end into its grant agreements and contracts with recipients, and that such language could be keyed to corporate bylaws setting out procedures for Title VI enforcement.

A final point regarding FPS determinations of the coverage of Title VI relates to general revenue sharing (GRS), under which the Department of the Treasury distributes approximately $6 billion in Federal funds annually to all States and more than 37,000 county, city, and other local governments.[1828] A prohibition of discrimination which closely parallels Title VI applies to GRS funds.[1829] The GRS legislation specifically provides that enforcement is to be as under Title VI or by referral to the Attorney General for suit. Because there are few spending restrictions

---

1827. Congress provided that, except for purposes not here relevant, LSC "...shall not be considered a department, agency, or instrumentality of the Federal Government." 42 U.S.C.A. §2996d(e)(1) (Cum. 1975). The status of the Corporation for Public Broadcasting is similar. See discussion on pp. 683-685 infra.

1828. For a review of civil rights enforcement under GRS see To Provide Fiscal Assistance, supra note 1768.

1829. See 31 U.S.C.§ 1242(a) (Supp. III, 1973). The principal differences are that under GRS sex discrimination is prohibited and the limitation of employment discrimination coverage under Title VI does not apply.

on GRS funds,[1830] it is spent in programs which other Federal agencies also support.[1831]

President Nixon, who urged the enactment of GRS, declared expressly his intent that GRS funds be subject to the same protections as are afforded under Title VI.[1832] He did not, nor did the Congress, make clear that GRS is in every respect subject to Title VI. The Office of Revenue Sharing (ORS), which administers GRS, has determined that it is not a Title VI agency[1833] because it believes that GRS is a form of Federal financial assistance different from assistance provided by Title VI agencies. As of June 1975, although FPS and ORS had interchanged views on the question whether ORS is a Title VI agency,[1834] FPS had reached no formal conclusion. This omission has important ramifications. ORS, in the

---

1830. GRS funds may be spent in such areas as education, health, transportation, recreation, social services for the poor or aging, environmental action, and public safety, including fire protection, police, the courts, and prisons. For all of the rules governing GRS spending, see To Provide Fiscal Assistance, supra note 1768, at 2-5.

1831. Such agencies might include, for example, the Departments of Health, Education, and Welfare, Transportation, the Interior, the Environmental Protection Agency, and the Law Enforcement Assistance Administration of the Department of Justice.

1832. Office of the Federal Register, National Archives and Records Service, General Services Administration, Public Papers of the Presidents, Richard Nixon, 1971, Annual Message to the Congress on the State of the Union, Jan. 22, 1971, 50, 54 (1972).

1833. See To Provide Fiscal Assistance, supra note 1768, at 88, note 222.

1834. June 1975 Dempsey interview, supra note 1776. See also interview with Michael E. Shaheen, Jr., Deputy Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Jan. 23, 1975; interview with Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Feb. 11, 1975, and Feb. 6, 1975, Dempsey interview, supra note 1781.

absence of final DOJ opinion, has decided that it has no authority to conduct preaward compliance reviews;[1835] indeed, it was not until early 1974, more than a year after GRS was enacted, that any indication appeared that ORS was considering performing postaward compliance reviews.[1836]

Moreover, until a 1974 Federal district court decision held otherwise,[1837] ORS insisted that it had no authority to defer the payment of funds to recipients pending resolution of matters of noncompliance.[1838] Thus, the dangers of inconsistent civil rights standards and their effect on overall enforcement[1839] appear to exist. Most importantly, unless GRS is a Title VI program, there is no coordinator with authority to address these dangers.[1840]

1835. To Provide Fiscal Assistance, supra note 1768 at 61-62.

1836. Id. at 65.

1837. Robinson v. Shultz, Civ. Action No. 74-248 (D.D.C., Apr. 4, 1974).

1838. See To Provide Fiscal Assistance, supra note 1768, at 86-93.

1839. See pp. 704-707 infra.

1840. In this regard, it seems fair to surmise that the question of GRS and Title VI might have been raised by FPS and resolved in the course of formulation of Executive Order No. 11764, supra note 1743.

Although some progress appears to have been made in the area of determining the application of Title VI to Federal organizations, FPS has no set plan or mechanism for ensuring that the question of Title VI coverage is taken up with every new agency created by the Congress.[1841]

1841. Feb. 11, 1975, Dempsey interview, supra note 1834 Thus, although the Section has developed regulations for a number of new agencies, as of February 1975 the question of the application of Title VI to the Federal Energy Administration had not even been raised, much less resolved.

Ensuring that appropriate agencies adopt Title VI regulations is only the first among FPS' responsibilities. DOJ must ensure that these agencies staff and organize their own offices for Title VI compliance activities and formulate compliance monitoring enforcement plans. The need for such DOJ oversight is illustrated by the National Endowment for the Arts, which 22 months after its Title VI regulation was promulgated, was only in the process of devising a system for conducting compliance reviews. Letter from Robert Wade, General Counsel, National Endowment for the Arts, to Jeffrey M. Miller, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, May 23, 1975. Although the Endowment provides financial assistance to more than 100 symphony orchestras, no compliance reviews of any of these have been conducted. Id. and attachment thereto.

B. Delegation

Prior to the demise of the President's Council on Equal Opportunity in 1965,[1842] drafting was undertaken on plans for coordination of Title VI enforcement in the areas of elementary and secondary education, higher education, and medical facilities, in which HEW is the agency most extensively involved.[1843] In the spring of 1966, the statements of coordinated enforcement procedures were made final and a number of agencies delegated responsibilities in these areas to HEW.[1844]

1842. See p. 651 supra.

1843. A rationale for the coordination agreements is that:

> Since some agencies have no real compliance staffs, the alternative to investigation by HEW would often be no investigation at all....The delegations prevent costly and unnecessary duplication of work by agencies, and excessive harrassment of recipients. Comment, supra note 1723, at 871.

1844. The plans are: "Coordinated Enforcement Procedures for Medical Facilities Under Title VI of the Civil Rights Act of 1964" (February 1966); "Coordinated Enforcement Procedures for Elementary and Secondary Schools and School Systems Under Title VI of the Civil Rights Act of 1964" (May 1966); and "Coordinated Enforcement Procedures for Institutions of Higher Education Under Title VI of the Civil Rights Act of 1964" (February 1966). A "Letter Transmitting Assignment of Responsibilities for Specified Title VI Actions With Respect to [the area involved]" was prepared for each of the three plans. After agency heads signed these, they were published in the Federal Register. The form letters state that the plans were "developed by the interested governmental agencies and approved by the Department of Justice...."

All of the authority delegated appears to have passed to HEW. Agencies delegating in the area of medical facilities were the Departments of Agriculture (USDA), Commerce (DOC), and Housing and Urban Development (HUD), the Atomic Energy Commission (AEC), General Services Administration (GSA), National Science Foundation (NSF), the Small Business and Veterans Administrations (SBA; VA), and the Offices of Economic Opportunity and of Emergency Preparedness (OEO; OEP). The Department of Defense (DOD) joined all of these in delegating to HEW in the area of elementary and secondary education. All of these, with the exception of SBA, signed higher education delegation agreements. Other signatories to higher education delegation agreements are the Departments of the Interior (USDI) and of State, the Agency for International Development (AID), Federal Aviation Administration (FAA), National Aeronautics and Space Administration (NASA), and the Tennessee Valley Authority (TVA). VA signed two of its three agreements in 1969. All of the others date from 1966. Copies of the plans, the form assignments of responsibility, and a listing, "Delegations of Authority to HEW Under the Coordination Plans," were provided in the Attachment to the April 1975 Dempsey letter, supra note 1776.

Each of the documents underlying the agreements contains a "Statement of Need" and a "Coordination Plan." The Statement of Need recites that Title VI enforcement requires: (a) preparation and distribution of a single compliance report form; (b) receipt of compliance reports from recipients, their review and evaluation; (c) requests for maintenance of records and data; (d) periodic compliance reviews; (e) complaint investigations; (f) attempts at securing voluntary compliance; and (g) ultimate enforcement by litigation, administrative hearings, or referral to State or local agencies. The statement provides that there must be coordination at each of these steps because recipients often deal with more than one Federal agency, that a recipient should have to submit only one compliance report to the Federal Government, and that periodic compliance reviews of a recipient and complaint investigations and settlement should be conducted by one agency on behalf of all. Moreover, it provides that there should be advance consultation on enforcement action among all agencies concerned, and where hearings are held, they should be held jointly.

The three Coordination Plans are also similar. Agencies are to provide HEW a list of all recipient facilities, schools and school systems, and institutions of higher education, and state which ones have and which have not filed standard form statements of assurance of compliance with Title VI. HEW is to mail out standard compliance report forms to recipients, on behalf of all agencies concerned. HEW has full responsibility for investigating

allegations of noncompliance, determining whether there appears to be compliance, attempting to secure voluntary compliance, and conducting periodic compliance reviews. Agencies are to designate professional staff to aid HEW on a request basis in accomplishing any of these activities. HEW is to publish a periodic "Interagency Status Report," based on agency and other source information inputs, showing recipients believed to be in noncompliance.[1845] Upon receipt of the interagency report, agencies may, if they wish, advise HEW of their desire to join in investigating and informally resolving a matter. All agencies are to be notified of resolution, and copies of agreements are to be available upon request. Agencies may make informal requests for current information on a recipient's compliance status at any time, and may recommend to HEW priorities for recipients to be investigated and for other implementation activities.

Where HEW cannot secure voluntary compliance, all agencies concerned may make their own decisions regarding formal enforcement action. By the same token, delegating agencies may not undertake independent compliance actions short of the informal compliance stage without HEW's concurrence.

1845. Since 1966 HEW has published more than 300 periodic Interagency Status Reports. A recent report, selected at random, lists 56 schools or school districts or systems in 12 States, including one each in Michigan and New York, 10 in South Carolina, and 15 in Texas. Only two institutions of higher education are listed, one each in South Carolina and Tennessee. Among health facilities, one is listed in Indiana and four in Mississippi. Department of Health, Education, and Welfare, Status of Title VI Compliance, Interagency Report, Cumulative List No. 317 (undated, but showing information recorded through Jan. 30, 1975).

Finally, participating agencies may be assessed a reasonable pro rata share of the costs of data maintenance and other implementation activities, based on the amount of assistance each agency extends in the area covered by each agreement.

By 1974 there existed a number of agencies established since the promulgation of the coordination plans and delegation agreements which had not become parties to the agreements. Therefore, at the end of December 1974, FPS wrote to ACTION, the Environmental Protection Agency (EPA), and the National Endowment for the Arts and the Humanities, suggesting they consider entering into delegation agreements with HEW in the area of education.[1846] FPS has also pursued the possibility of delegation by the Department of Defense and the Veterans Administration to HEW of authority regarding several health and hospital care programs.[1847]

1846. Letters from Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to Bart J. Crivella, Acting Director, Office of Minority Affairs, ACTION; Richard Risk, Title VI Program Officer, Compliance Staff, Grants Administration Division, Environmental Protection Agency; and Joseph R. Schurman, Associate General Counsel, National Endowment for the Arts and Humanities, Dec. 31, 1974.

1847. See letters from Robert N. Dempsey to Martin Hoffman, General Counsel, Department of Defense, Jan. 20, 1975; John J. Corcoran, General Counsel, Veterans Administration, Jan. 20, 1975; and Richard Foley, Deputy Director, Health and Social Services Division, Office for Civil Rights, Department of Health, Education, and Welfare, Jan. 31, 1975.

It does not appear, however, that FPS has assessed the success of the delegation agreements or the need for changes in them.[1848] As a result of the December 1974 letters from FPS to ACTION, the EPA, and the National Endowment for the Arts and Humanities,[1849] HEW requested that FPS evaluate the delegation agreements.[1850] As of June 1975, DOJ reported that "the matter is now under a comprehensive review."[1851] At that point the review was in a preliminary stage. FPS intends to gather copies of all of the delegation agreements and will send out a questionnaire to the agencies concerned.[1852]

After nine years of operations under the agreements, such a review seems entirely warranted. There appear to be serious problems concerning the coordination plans. First, HEW, the agency to which authority is delegated, has not maintained an adequate enforcement program.[1853] Second, the

---

1848. That FPS has not in recent years been especially concerned about the delegation agreements is evidenced by the fact that the most recent entry on an FPS file listing of signatory agencies is dated January 1969. Of this list, FPS has stated:

> ...we have attempted no updating....Since the areas of Title VI delegation you refer to concern programs of education, health, and social services, you may wish to obtain a current list from HEW. April 1975 Dempsey letter, supra note 1776.

1849. Supra note 1869.

1850. June 1975 Dempsey interview, supra note 1776.

1851. Id.

1852. Id. That it appears FPS does not even have file copies of the executed delegation agreements reinforces the point of note 1843 supra.

1853. This is especially true in the area of higher education. See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity ch. 3 (January 1975) /hereinafter cited as To Ensure Equal Educational Opportunity/. All reviews of educational institutions conducted by HEW's Higher Education Division (HED) uncover areas of Title VI noncompliance, and HED's followup reviews generally find continued violations; yet only two institutions have been terminated since the formation of the Higher Education Division. Id. at 255.

agreements do not function as they were intended to. For example, one contemplation of the original coordination plans was that when agencies found one of their recipients listed on HEW's periodic status report, they would have the opportunity to advise HEW if they wished "to join in the investigation and in the informal compliance proceedings."[1854] Today, however, the "trigger" which results in listing a recipient on the Interagency Status Report is the posting by HEW to a recipient of a notice of intention to initiate formal enforcement proceedings. It may be, then, that any opportunity for joining in an investigation will have passed and that attempts at voluntary compliance also will have already been made. Thus, participation by delegating agencies in the Title VI process may be effectively limited to the formal hearing stage.[1855]

Third, HEW appears to operate its compliance program without adequate regard for the agreements. An assessment made seven years ago concluded:

1854. This phrase appears in all three plans.

1855. An official of the National Science Foundation states that, in fact, NSF does not learn of possible noncomplying Federal aid recipients until after HEW has itself determined to proceed against a recipient. NSF is then invited by HEW to join in a termination hearing if it wishes. Telephone interview with Arthur Kusinski, Assistant to the General Counsel, Office of the General Counsel, National Science Foundation, Apr. 21, 1975.

> HEW gears neither its priorities nor its methods of investigation to the delegations, but considers them in conjunction with its own investigation and enforcement procedure. HEW chooses which facilities to investigate, determines whether particular recipients are out of compliance, seeks to obtain voluntary compliance, and when it concludes that voluntary compliance is unobtainable, ascertains what funds other departments and agencies are giving to the recipient. It then notifies the other agencies involved. [1856]

The same appears to be true today. Thus, for example, it has been suggested that HEW, in reviewing a system of higher education, may be interested primarily in faculty and student body desegregation, and not research programs. An official of one Title VI agency used just this example in stating that "HEW has never been able to get into our programs," and that this was a matter of the two agencies just not having the same interests.[1857] Dissatisfaction with HEW operations under the agreement has caused one agency, the Department of Agriculture, to investigate some of its higher education recipients despite the delegation agreement,[1858] and, as of early 1975, to actively consider seeking rescission of the agreement.[1859]

1856. Comment, supra note 1723, at 870.

1857. Telephone interview with Richard Peer, Director, Compliance and Enforcement Division, Office of Equal Opportunity, Department of Agriculture, Jan. 7, 1975. See also, Kusinski interview, supra note 1855.

1858. Peer interview, supra note 1880. These recipients are the Cooperative State Research Services, which are often located off-campus. Id.

1859. Id.

An official of the Small Business Administration (SBA) stated that HEW does not appear to review SBA's programs, because, as a practical matter for HEW, "everything we have is too small for it to touch."[1860] Accordingly, SBA conducts some reviews on its own, despite the delegation.[1861]

1860. Telephone interview with J. Arnold Feldman, Chief, Compliance Division, Office of Equal Employment Opportunity and Compliance, Small Business Administration, Jan. 7, 1974.

1861. Id. Before it makes such a review, it contacts HEW and asks whether HEW has plans to do such a review. "The answer is universally 'No'," reports SBA. Id.

An important area of inquiry, because of budgeting considerations, is the provision for reimbursement for HEW's costs in implementing the agreements.[1862] Civil rights officials in the delegating agencies appear generally unaware whether HEW is using this provision to defray costs.[1863] Several indicated, however, that were HEW to make a request they would recommend that it be denied, as no services have been rendered under the agreements.[1864]

1862. Although it does not appear that HEW was taking advantage of this provision, HEW attributes a major share of the problems in its enforcement program to a lack of staff. To Ensure Equal Educational Opportunity, supra note 1849, ch. 1 (January 1975).

1863. One lead official was unaware of the coordination plans' reimbursement provision altogether. Peer interview, supra note 1880. Another agency official, who knew of no HEW requests for reimbursement, suggested that this may be a matter of business between the administrative offices of HEW and his agency. Kusinski interview, supra note 1855.

1864. Feldman interview, supra note 1860; Peer interview, supra note 1857.

C. Setting Standards

1. Attorney General Guidelines

As coordinator of the Federal Government's Title VI enforcement effort, FPS has a responsibility to define the elements of a compliance program and set standards to be observed by Title VI agencies. This is necessary to ensure an adequate effort and to avoid the dangers of inconsistent or conflicting standards of enforcement activity.

A prime matter for which FPS might have provided is development of a basic internal structure and staffing design for agency compliance programs. FPS also could have set standards with regard to procedures for conducting complaint investigations, pre- and postaward compliance reviews, and data collection and analysis. In addition, there is a need for deadlines or time schedules for the accomplishment of specific agency actions such as completion of a compliance review, a complaint investigation, and efforts to secure voluntary compliance, as well as for determining whether to proceed to enforce Title VI administratively or by referral to DOJ.

There are other concerns, which relate to recipients' responsibilities. These include uniform standards for State agencies, where they have an assigned or delegated role to play in enforcement,[1865] and the development

---

1865. State agencies may conduct complaint investigations, desk audits of subgrantees, or field compliance reviews. A question related to the role of State agency recipients involves compliance and enforcement responsibilities of State and local civil rights agencies. A pertinent point which must be addressed is whether the Federal Government or the State/local governments should bear the expense of such enforcement. The FPS has not considered either of these matters. Feb. 11, 1975, Dempsey interview, supra note 1834.

of standards to be used by recipients in conducting a self-analysis of their compliance status.[1866]

The promulgation of compliance and enforcement standards would be a great aid to FPS in monitoring Title VI agency performance. Shortly after the January 1974 signing of Executive Order 11764, which expressly mandates the Attorney General to develop such standards,[1867] the Section developed a

---

1866. Self-analysis can be used to make such determinations as: (a) the extent to which benefits of a recipient-operated activity are reaching minorities and if not, how the effective exclusion of minorities is accomplished, as for example through the process of announcement of the existence of the activity or the process of selecting participants; (b) the extent to which the activity is operated on a segregated basis; and (c) the extent to which the activity has an adverse impact upon minorities as individuals or as a group in the community.

Such analyses are appropriate prior to the award of a grant to ensure that the prospective recipient is aware of any deficiencies and to enable the recipient to set goals and timetables to remedy them, prior to funding. Updates of the analysis should be conducted periodically following the award of the grant. Where a preaward self-analysis has not been conducted, such an analysis should be conducted as soon as possible after receipt of the grant. For a further discussion of analyses to ensure compliance with Title VI, see U.S. Commission on Civil Rights, To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs 15-22 (1973).

1867. Executive Order 11764 is discussed on pp. 657-663 supra.

draft set standards.[1868] Nevertheless, as of July 1975, 18 months after the Executive order was signed, no standards had been issued.

That the Attorney General did not promulgate standards promptly after the Executive order was signed is the most serious failure in the period covered by this report. Such an action by DOJ would have underscored the additional authority conveyed to it by the President: Authority not exercised can become moribund. It may well be that, in the perception of most agencies, the order has changed nothing. The longer the order remains unused, the greater the likelihood it will not prove effective when it is used. Moreover, the failure to promulgate standards may in time come to be regarded by some, certainly in the private civil rights community, as constituting a dereliction of duty by the Attorney General under the Executive order, thereby diminishing confidence in the ability of DOJ to do its job. The absence of definitive standards has meant that DOJ has had to continue to evaluate most Title VI matters on an ad hoc basis.

1868. An early draft of the standards was shared with this Commission, and staff of the FPS and the Commission discussed their merits. In early 1975 FPS declined to share its final draft, however. Jan. 21, 1975, Shaheen interview, supra note 1795; April 1975 Dempsey letter, supra note 1776. Thus, no assessment of the standards as proposed by FPS can be made in this report.

2. Regulations

Title VI specifically directed each agency under its coverage to effectuate Title VI's prohibition of discrimination by issuing rules, regulations, or orders of general applicability.[1869] Six months after Title VI became law, regulations for more than twenty agencies were published.[1870] In July 1967 an interagency committee began to formulate uniform amendments for adoption by the agencies[1871] and in July 1973, some six years after the need for them was first

---

1869. 42 U.S.C. § 2000d-1 (1970).

1870. 29 Fed. Reg. 16273-16309, 19275-19304 (1964), and 30 Fed. Reg. 298-329 (1965).

1871. Enforcement Effort report, supra note 1723, at 182. See also the Reassessment report, supra note 1735, at 71.

recognized, the uniform amendments, approved by the Attorney General, were issued,[1872] The most important sections of the uniform regulations

---

1872. 38 Fed. Reg. 17920-17997 (1973). Uniform amendments were published for the 21 departments and agencies which then had initial Title VI regulations in effect. These were: the Departments of Agriculture; Commerce; Defense; Health, Education, and Welfare; Housing and Urban Development; the Interior; Labor; Justice; State; and Transportation; and the Agency for International Development, Atomic Energy Commission, Civil Aeronautics Board, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Office of Economic Opportunity (OEO), Office of Emergency Preparedness (OEP), Small Business Administration, Tennessee Valley Authority, and the Veterans Administration. Of these, the Departments of Commerce and of Housing and Urban Development, OEO, and OEP completely reissued their Title VI regulations.

On January 4, 1975, the President signed into law the Headstart, Economic Opportunity, and Community Partnership Act of 1974, which established within the Executive branch an independent agency known as the Community Services Administration (CSA). The CSA is in all respects and for all purposes the successor authority to the Office of Economic Opportunity. 40 Fed. Reg. 3213 (1975). Until superseded, rescinded, or changed, OEO's Title VI regulations continue in effect, and all references therein to the OEO are to be deemed to refer to the GSA.

The proposed amendments, like the original regulations, had to be submitted to the President for approval. See 42 U.S.C. § 2000d-1 (1970). In January 1974, however, President Nixon delegated authority to approve Title VI regulations to the Attorney General. Executive Order No. 11764, supra note 1743, at Sec. 3.

For the views of this Commission and two private groups on the uniform amendments as they were proposed in December 1971, see letters from Harold C. Fleming, Chairman, Task Force on Federal Program Coordination, Leadership Conference on Civil Rights, to David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, Jan. 4, 1972; letter from Richard T. Seymour, Staff Attorney, Washington Research Project, to Mr. Norman, Feb. 4, 1972; and letter and attachment from John A. Buggs, Staff Director-designate, U.S. Commission on Civil Rights, to Mr. Norman, Jan. 12, 1972.

are those prohibiting discrimination in the selection of sites for facilities of federally-assisted programs, requiring affirmative action to overcome the effects of past discrimination, and providing that discriminatory employment practices are prohibited by Title VI to the extent that such practices tend to cause discrimination in the services provided to beneficiaries. These are valuable additions to the body of Title VI requirements.

Nevertheless, the Title VI regulations could be strengthened in several ways. First, the explanation given for the meaning of the prohibition of discrimination is quite broad, despite the inclusion of a number of forbidden acts or practices.[1873] As a result of such broad statements, many agency program and civil rights officials have voiced a lack of confidence as to what constitutes noncompliance in terms of their own programs. Certainly, a similar degree of confusion may exist in the minds of recipients. To reduce this uncertainty, the regulations, when

---

1873. Title VI regulations typically provide that recipients may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin, deny any service or other benefit provided under the program or activity, provide any service or other benefit which is different or is provided in different form from that provided to others, subject to segregated or separate treatment in any facility in, or in any matter or process related to receipt of services or benefits, restrict in any way the enjoyment of any advantage or privilege enjoyed by others receiving services or benefits, treat any individual differently from others in determining whether he or she satisfies any admission, enrollment, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided services or other benefits, or deny an opportunity to participate in a program or activity as an employee. See, e.g., the Title VI regulation of the Department of Health, Education, and Welfare, 45 C.F.R. § 80.3(b) (1974), and of the Department of Housing and Urban Development, 24 C.F.R. §§ 1.4(b) (1974).

originally published, could have required each agency, within a set span of time after publication, to develop and publish standards or guidelines, supplemental to the regulations, describing what constitutes noncompliance. The Title VI regulations could have specified that these standards should include an enumeration of specific factors to be considered in determining whether a recipient or subgrantee is in compliance. In addition, the regulations could have required the development of a well-defined methodology for evaluating these factors. To ensure specificity and as much uniformity as possible, the regulations could have required that the standards and evaluative techniques be developed in consultation with the Attorney General, and be subject to his or her review.

Second, the regulations could have aided the agencies in effecting a satisfactory compliance program by addressing in detail matters involving racial and ethnic data collection[1874] and the conduct of compliance reviews[1875] and complaint investigations. The regulations could also have required that comprehensive complaint investigation procedures[1876] be issued by the agencies, under DOJ's oversight.

1874. The present uniform language to the effect that recipients should in general have available racial and ethnic data regarding program participation by minorities is inadequate in two respects: It may be construed as merely hortatory, not mandatory, and it lacks required detail.

1875. Instead of the general provision that responsible agency officials shall "from time to time" review the practices of recipients, the regulations could have provided that the agency must establish in writing a formal compliance review mechanism which would periodically subject a percentage of recipients to civil rights compliance scrutiny, including preapproval reviews.

1876. The regulations could have specified that these procedures must set forth reasonable deadlines for agency completion of the investigation, assessment, negotiation, and resolution phases.

Third, several comments are appropriate concerning the current provisions for recipients to remedy the effects of past discrimination and to correct the effects of practices which limit participation by persons of a particular race, color, or national origin. The position generally embraced by the Title VI regulations is that action to correct the current effects of past discrimination is mandatory.[1877] In some cases, however, action to correct racial or ethnic imbalances in participation, where such imbalances are not the product of past discrimination, is optional.[1878] Moreover, most of the regulations fail to provide instruction regarding the kinds of

---

1877. A succinct statement of this is as follows:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
>
> Even in the absence of such prior discrimination, a recipient in administering a program shall take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

See the regulation of the Department of Labor, 29 C.F.R. § 31.3(b)(6) (1974).

1878. For example, regulations of the Department of the Interior (USDI) and the Veterans Administration (VA) stated, instead, "Even in the absence of such discrimination, a recipient...may...take affirmative action...." See the regulation of USDI, 43 C.F.R. § 17.7(b)(4) (1974), and of VA, 38 C.F.R. § 18.3(b)(6) (1974).

remedial action recipients might take.[1879]

Fourth, the regulations could have provided that all agencies were to issue guidelines on a number of points, such as the provision of more information on Title VI by organizations engaged in the delivery of services to ultimate beneficiaries.[1880] Also, provision should have been made for minority representation on planning and advisory bodies which have roles related to the administration of Title VI funds.[1881]

1879. For an example of an exception, see the regulation of the Department of Labor, 29 C.F.R. § 31.3(b)(7) (1974). One of DOL's such instructions is:

> In some situations even though past discriminatory practices have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient...to provide information as to the availability of the program or activity, and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subjected to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served. 29 C.F.R. § 31.3(b)(7)(i).

1880. The regulations could have required, for example, that all descriptive program materials designed for the public explain the meaning of Title VI as well as the procedures for filing complaints. The regulations could also set out a basis for determining in what regions or metropolitan areas all such materials would have to be published in languages other than English.

1881. In this regard, see the requirement of the Economic Development Administration of the Department of Commerce, 13 C.F.R. §§ 311.60 et seq. (1975).

3. Other Directives

Despite the absence of standards or detailed regulations, DOJ has begun to deal on a system-wide basis with one issue, the provision of adequate assistance to non-English speaking minorities. This matter was the subject of a court decision predicated on the requirements of Title VI. In January 1974, in Lau v. Nichols,[1882] the Supreme Court affirmed lower court findings that the San Francisco public school system had failed to take steps to ensure that students of Chinese national origin, for whom English was not the primary language, could secure a meaningful education. The students thus did not enjoy equal access to the benefits of federally-assisted education; the Court held this to constitute a violation of Title VI.[1883]

In June 1974 the FPS wrote to 26 Federal agencies concerning Lau and indicated that the case has broad impact for all assistance programs and activities funded by the Federal Government, in that where language barriers hinder equal access and participation for all, a responsibility to remove or remedy such hindrances may

---

1882. 414 U.S. 563 (1974).

1883. The Supreme Court found it unnecessary to reach the question whether the system's failure also constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. Thus, the case does not control non-federally-funded programs of State and local governments. One lower court, however, has decided a similar case on both Title VI and equal protection grounds. See Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), aff'd 499 F.2d 1147 (10th Cir. 1974).

exist.[1884] FPS further stated that Lau "imposes a responsibility on Federal agencies to review"[1885] their programs to determine if language barriers operate to deny equal participation.[1886] It added that "/W/e would appreciate having" agency views on the relevance of Lau to agency programs, any measures the agencies may have taken prior to Lau to ensure language barriers do not adversely affect participation, and any measures the agencies intended to take in the future.[1887]

The letter represents a worthwhile coordination activity. Achievement of a uniform agency view and implementing action would serve to institutionalize a legal principle derived from Title VI. The letter might have served this purpose better, however, in a number of ways. Although FPS did state unequivocally its view that Lau commands a review of agency programs, it did not suggest either an approach to such a review or a specific date by which replies should be received. It did not suggest that agencies should proceed to

---

1884. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 26 Federal agencies, June 13, 1974. It should be noted that, from materials supplied by DOJ (as an Attachment to the April 1975 Dempsey letter, supra note 1776), it does not appear that the Lau letter was sent to the Office of Revenue Sharing; yet the rationale would seem to apply equally to general revenue sharing as to traditional Title VI programs.

1885. Id. at 2.

1886. Id.

1887. Id. FPS encouraged the adoption of Lau-based guidelines. It stressed that Lau indicates that courts will give great weight to an agency's construction of Title VI, as reflected in its consistent administrative practice, and it suggested that "published guidelines may be one appropriate response where additional measures may be indicated." Id.

identify groups to which Lau might be relevant, nor did it indicate data sources for locating concentrations of such group members geographically.[1888] In addition, the letter failed to direct a review of existing bilingual or non-English printed program materials, such as statements describing programs and explaining program eligibility and forms required to be executed by applicants, to determine whether such materials do or could aid in ensuring equal access and in what circumstances employment of bilingual program staff would be necessary. These omissions indicate an FPS inclination not to raise and resolve the Lau issue with all agencies as a single, coordinated, and systematic activity. Indeed, FPS has stated it intends to take up the Lau issue with each agency in the course of its scheduled agency reviews.[1889] Using this approach, it may take several years for FPS staff to ascertain whether there has been implementation of Lau in all affected agencies.

Not only was FPS' action deficient in some respects, it was belated. FPS did not have to wait for a court test before taking a position on this issue. HEW, more than three and a half years before Lau was decided,

---

1888. By determining locations and then programs administered in those places, agencies might be able quickly to highlight prime areas of attention.

1889. June 1975 Dempsey interview, supra note 1776. These reviews are discussed on pp. 725-735 infra.

had issued a memorandum on the subject to all public school districts having more than five percent national origin minority group children.[1890]

Other than DOJ's Lau letter, there have been few communications of views to all Title VI agencies.[1891] The only other communication known to this Commission related to a speech delivered in November 1974 by the Assistant Attorney General for Civil Rights.[1892] The speech made a number of salient points related to the development of standards, such as: the affirmative, active role Congress intended Title VI agencies to play; the need for ensuring not merely that minorities are protected from harmful acts, but that they benefit on an equal basis from the expenditure of Federal tax dollars; the need for preaward and postaward compliance reviews; and the need for institutionalizing and routinizing recipient self-analysis and self-correction.[1893] More than six months

---

1890. Memorandum from J. Stanley Pottinger, Director, Office for Civil Rights, Department of Health, Education, and Welfare, 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. Thus, the basis for an analogy from educational to all other Title VI programs was available some years ago.

1891. There have been several requests by DOJ for information from all of the Title VI agencies. These are discussed on p. 717 and in note 1904 infra.

1892. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, Speech, "Managing Title VI Programs," presented before Department of Transportation Regional Civil Rights Officials, Shady Grove, Maryland, Nov. 8, 1974.

1893. Id. (Department of Justice release).

later, in June 1975, the speech was circulated to all Title VI agencies.[1894]

A second matter regarding which there should have been communication flows from the enactment, in 1973, of a provision which in essence makes the handicapped a protected class under Title VI.[1895] In enacting this prohibition of discrimination against the handicapped in federally assisted programs, Congress made clear its intent that, in this area, HEW would be an FPS counterpart: HEW is to coordinate enforcement of the new law. This responsibility is lodged with HEW's Office for Civil Rights (OCR), which is responsible, among other things, for enforcing Title VI in all HEW programs and for implementing the delegation agreements between HEW and some 15 other agencies.

The passage of this new law regarding the handicapped should have raised questions with FPS concerning such matters as: the possibility that HEW and other Title VI agencies would have to redefine their priorities in a way which might adversely affect execution of their Title VI functions; whether there would be a need for coordination to avoid duplicative onsite reviews which might arise from having one agency investigate matters arising under the new law shortly before or after another agency conducted a Title VI review of the same recipient; whether it would be more desirable, generally or in particular agencies, to expand

---

1894. June 1975 Dempsey interview, supra note 1776. In a February 1975 Commission staff interview, when asked whether Assistant Attorney General Pottinger's speech had been shared with the agencies, FPS acknowledged that it had not and stated that such distribution was "not a bad idea." Feb. 11, 1975, Dempsey interview, supra note 1834.

1895. Rehabilitation Act of 1973 (codified in scattered sections of 29 U.S.C.)

existing Title VI staff and assign them the additional duty of monitoring compliance with the new law, or to have a different office structure and staff for each of the two functions.[1896] FPS should have been in consultation with all agencies, to learn how they intended to implement the new prohibition. As of February 1975, however, FPS had not been moved to ascertain even from HEW how that agency would ensure that its new responsibilities would mesh with its Title VI program.[1897]

D. Monitoring

It is important that FPS review agency Title VI enforcement programs for several reasons. First, monitoring permits FPS personnel to become familiar with actual enforcement procedures and their relationship to agency programs. Second, a personal basis may be laid for increased cooperation and consequent enhancement of the coordination function. Third, monitoring is necessary to ensure a uniformly high level of Title VI enforcement.

1. Budget Programming

For monitoring to be effective, FPS needs to know the precise extent of Title VI agencies' responsibilities and their actual operations under

---

1896. Where there were separate staffs within the same agency, there still might be an interest in ensuring that combined or joint reviews of recipients are conducted by the two staffs from that agency.

1897. Feb. 11, 1975, Dempsey interview, supra note 1834.

Title VI. With this information, FPS could determine what it believes the agencies should be doing and could calculate the budget and staff resources necessary for the agencies to meet their responsibilities. Having derived estimates of the work output that should result from given staff and dollar inputs, FPS could establish a yardstick for determining whether an agency's performance measures up to reasonable expectations. Moreover, FPS would be able on a highly informed basis to comment to the Office of Management and Budget (OMB)[1898] on agencies' annual budget requests for Title VI enforcement. Thus, where an agency requested additional funding and positions, but its past performance indicated it has not effectively used its existing staff, FPS might give the agency concerned its commitment to support the increase or some part thereof, but only upon condition that certain results[1899] be

---

1898. OMB is responsible for the preparation of the budget of the United States, submitted annually to the Congress by the President. OMB's civil rights responsibilities and activities as well as the budget process, are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VII (in preparation).

1899. Ideally, results would be measured in terms of increases in the number of minority persons enabled to participate in federally assisted programs by the ending of discriminatory bars to their access, or the number of victims of discrimination among actual program participants for whom the discrimination were ended. Such data were generally not obtainable as of 1975. Accordingly, results are more often measured in terms of such things as the numbers of compliance reviews conducted, the grant dollar totals covered by such reviews, the length of time required for reviews and for resolving noncompliance, and the number of instances of resolved and unresolved noncompliance matters.

achieved. Conversely, where an agency failed to request an increase which FPS felt was needed in order to meet growing responsibilities, FPS could either take the matter up with the officials who have responsibility for the administration or Title VI or suggest that OMB recommend additional funds for agencies in order that they may carry out their Title VI duties.

More than four years ago an internal DOJ memorandum suggested that among activities the Title VI Section could undertake were:

> Supporting the agency's request to the Office of Management and Budget (OMB) for funds for Title VI activity.
>
> Making an annual survey if all the granting agencies' budget requests for Title VI enforcement for the coming year and conferring with the Office of Management and Budget about the Title VI budget requirements of all agencies. 1900

Moreover, at least two models or vehicles for budget programming have been available to DOJ for several years.* The first of these is used by the Office of Federal Contract Compliance (OFCC) 1901 in its relations with

---

1900. Memorandum from Thomas R. Ewald, Director, Office for Title VI, to Jerris Leonard, Assistant Attorney General, Civil Rights Division, DOJ, Short Range Program for Enforcement of Title VI of the Civil Rights Act of 1964, Oct. 23, 1970, at 6-7.

1901. For a review of the activities of the Office of Federal Contract Compliance, see To Eliminate Employment Discrimination, supra note 1765 ch. 2.

Federal contract compliance agencies. Through a Program Guidance Memorandum, OFCC outlines particular industries needing contract compliance attention, the number of compliance reviews which should be conducted, and the budgets and staff levels necessary for carrying out these objectives. OFCC makes recommendations to OMB regarding the number of compliance reviews to be conducted in each fiscal year, and on staffing and budget levels for the agencies. These recommendations are based on OFCC's analysis of three reports required to be filed regularly with OFCC.[1902] Although the system is not free of deficiencies,[1903] it appears to be a reasonably adaptable model for use by DOJ.

1902. The first of these reports, submitted quarterly, is the Agency Planning Report Form, on which the agencies provide estimates of costs for carrying out their programs, the number of reviews planned, the total number of blacks and persons of Spanish speaking background at the contractor establishments reviewed, and the aggregate of the numerical employment goals set by these contractors. A second form, the Agency Quarterly Operations Report, shows the number of compliance reviews scheduled and conducted. The third form, a Monthly Progress Report, indicates the agency staff level and monthly costs, the number of compliance reviews conducted, the number of affirmative action plans reviewed, and the number of show cause notices issued. This report is also designed to show the total employment, minority employment, and goals of all contractors reviewed. See To Eliminate Employment Discrimination, supra note 1765, at 285.

1903. The most important deficiencies are a failure by OFCC to ascertain the total number of contractor facilities under the jurisdiction of each agency and a failure to require agencies to report on past performance of contractors reviewed. DOJ might avoid the problems which have occurred as a result of these deficiencies by requiring all Title VI agencies to provide annual estimates for the total number of facilities and recipients for which they are responsible and by requiring summary reports from the agencies on each recipient they review. These deficiencies are more fully discussed in the Commission's review of OFCC. See note 1765 supra.

One reporting requirement which has been in existence for several years,[1904] and which FPS could have used as an element of a budget programming system similar to OFCC's, is a civil rights information submission made by all agencies through FPS itself to the Office of Management and Budget. OMB, under its Circular No. A-11,[1905] receives annual inputs of compliance program data and narrative information regarding all agencies in the field of civil rights, including Title

---

1904. Before 1970, a quarterly reporting system was used by the Title VI office to gather data on such matters as the number of complaints received and investigated by Title VI agencies, the number of compliance reviews undertaken, and the number and nature of actions taken on noncompliance actions. Because no narrative report was required, no agency interpretation of the statistics was available to DOJ; the reports were, thus, of limited value, and the system was discontinued in late 1969. Enforcement Effort report, supra note 1730, at 244-45. This system has not been revived. Feb. 6, 1975, Dempsey interview, supra note 1781.

1905. Office of Management and Budget, Circular No. A-11, "Preparation and Submission of Budget Estimates." The circular governs all aspects of the preparation and submission of budgets to OMB by Federal departments and agencies. Consisting of approximately 200 pages of instructions and forms, it is revised and reissued annually.

VI enforcement.[1906] The circular requires, in certain areas of Federal civil rights activities, that only a designated lead agency report to it. These leads agencies are responsible for collecting, checking the accuracy of, and aggregating the necessary data from the individual agencies. The Department of Justice is the lead agency for reporting

---

1906. This information is supplemental to budget estimates and is not required to be submitted until some time after the budget estimates themselves, which, except for very large programs, do not generally provide detailed information on civil rights requirements. The civil rights information is used in part in preparation of a "Special Analysis of Federal Civil Rights Activities," which appears annually in OMB's Special Analysis of the Budget, one of the standard budget documents published by the Federal Government. It is also used by OMB in examining agency civil rights budget estimates.

The narrative statement, prepared for each program administered by an agency, contains such things as: a concise description of the program; the clientele served; the delivery mechanism (including State and local governments); agency comments on the reliability of its data; program indicators, e.g., complaints processed, compliance reviews conducted, instances of noncompliance disclosed and actions taken against non-compliers; and achievement indicators, e.g., change in composition of beneficiary class, outreach facilities in areas of discrimination. OMB Circular No. A-11 supra note 1905, § 53.3. Two schedules required in addition to the narrative report show such data as obligations, outlays, fulltime permanent positions, Federal person years, number of beneficiaries served (by race or ethnic origin and by sex), and other workload indicators (these are the "program indicators" suggested for inclusion in the narrative report and set out supra, this note). These schedules are prepared separately by fund category (e.g., civil rights protection), program type (e.g., enforcement and investigation), and activity type (e.g., compliance review and monitoring).

on the enforcement of Title VI.[1907] The Federal Programs Section performs this function for the Department.

Circular No. A-11 is, thus, an existing mechanism, familiar to the agencies for providing annually civil rights enforcement information to a central agency. The circular could constitute a basis for a budget programming system. FPS has either not recognized or not accepted the opportunity which the circular presents, but has largely limited its role to exactly that prescribed by the circular. It has collected the A-11 reports from the agencies, summarized them, and sent them to OMB, as the circular requires. It has not, however, done such things as give OMB written

---

1907. Other lead agencies and their responsibilities are: the Civil Service Commission--Federal service equal employment opportunity; the Department of Commerce--minority business enterprise; the Small Business Administration--"8A" assistance (Federal contract set-asides for minority contractors); Department of the Treasury--minority bank deposits; and Department of Labor--Federal contract compliance. OMB Circular No. A-11, Revised June 1974, § 53.2.

analyses of the information gathered,[1908] comment systematically to OMB on agency budget requests,[1909] or provide the agencies with regular feedback regarding deficiencies in their submissions.[1910]

1908. Telephone interview with James B. Robinson, Budget Examiner, Civil Rights Unit, Community and Veterans Affairs Division, Office of Management and Budget, Jan. 16, 1975. Jan. 23, 1975, Shaheen interview, supra note 1834.

1909. Id.

1910. Telephone interview with James B. Robinson, Budget Examiner, Civil Rights Unit, Community and Veterans Affairs Division, Office of Management and Budget, Feb. 7, 1975. FPS has noted that deficiencies include the following: (1) missing information on dollar allocation; (2) insufficient detail in the narrative portion of the report; and (3) imprecise or simply unavailable beneficiary data. Jan. 23, 1973, Shaheen interview, supra note 1857.

In 1974 FPS took steps that could serve as a basis for adoption of the concept of budgetary programming as component of the coordination function. In March of that year FPS sent an information request to 25 Title VI agency officials.[1911] This letter noted that the then new Executive order issued six weeks previously "redefines the role of the Attorney General" under Title VI, and that FPS had been assigned responsibility for "developing certain information to assist in designing a new Title VI coordination system."[1912] The letter, which contained much more extensive requirements than A-11, sought information regarding agency budgetary resources, personnel allocations, and program accomplishments and projections. FPS asked for citations to all written materials relating to civil rights[1913] and requested, for the data sought, a breakout by agency organizational subdivision if an agency's total fiscal year 1973 assistance was $40 million or greater.[1914] Information was sought both for agency headquarters and field level offices. Agencies were asked to fill out several schedules, designed to show:

1911. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 25 Title VI agency officials, Mar. 8, 1974.

1912. Id. The letter also noted that "In addition, the Attorney General, as Chairman of the Domestic Council Committee on Civil Rights, requires certain data regarding the basic structure of present agency Title VI efforts." For a discussion of this committee, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VII (in preparation).

1913. Id. These included rules and regulations, guidelines (including those applying to internal equal employment opportunity), and current compliance manuals used in reviewing recipients.

1914. If less than $40 million, agency-basis treatment sufficed.

(1) inputs,[1915] (2) performance indicators,[1916] and (3) results.[1917]

Orientation of this request to these three areas was a significant step forward for FPS, as it could lay the groundwork for programming Title VI needs and activities on a uniform basis among all of the agencies concerned. Unfortunately, it appears that FPS did not follow this data collection with a timely and comprehensive analysis. Although a review of the data for four or five agencies was made in 1974,[1918] it was not until late March 1975, a year after the request was made, that a comprehensive analysis of all of the data was begun. As of June 1975, a report of the analysis had not been submitted to the Chief of the Section.[1919]

In November 1974, when agency A-11 civil rights submissions were to be prepared in connection with budget estimates for fiscal year

---

1915. Inputs included such things as the number of agency programs covered by Title VI, number of recipients involved, total number of grants made and their dollar value, and the Title VI enforcement budget and staff and the estimated number of years of fulltime Title VI experience represented by the staff.

1916. Performance indicators included such things as the number of complaints received, resolved, and pending, number of pre- and postaward compliance reviews performed and dollar amount of grants covered by the reviews, the average length of time for review, and the number of onsite investigations and their average duration.

1917. The results obtained included such information as the number of recipients in compliance and number in potential noncompliance, administrative proceedings initiated and dollar amount covered thereby, and the number of grants terminated and their dollar value.

1918. These reviews related to agencies whose operations the Section was reviewing.

1919. June 1975 Dempsey interview, supra note 1776.

1976, existing requirements were strengthened. For example, performance indicators, such as numbers of compliance reviews and resolutions of noncompliance, were stressed.[1920] In addition, a breakdown by agency subdivision was requested.[1921] The potential of this new enterprise, however, may have been diminished by the short lead time--2 weeks--which which FPS gave the agencies for responding.[1922] As it was, a number of agencies requested extensions of time, and there were deficiencies in the reports.[1923] Again, FPS provided OMB no analysis of the data.[1924]

In sum, until 1974 FPS had not adopted the budget programming concept, which could serve as a yardstick for the monitoring function.

1920. Interview with Mary A. Planty, Deputy Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Jan. 23, 1975; February 1975 Robinson interview supra note 1910.

1921. This had been done in the March 1974 letter request. See pp. 721-23, supra.

1922. DOJ's letter requesting the A-11 reports was sent out on November 27, 1974. Responses were due by December 11. Jan. 23, 1975, Shaheen interview, supra note 1834.

1923. Id.; Jan. 23, 1975, Planty interview, supra note 1920; and see note 1910 supra.

1924. February 1975 Robinson interview, supra note 1910.

As of July 1975, FPS has not announced whether it would adopt a budget programming approach[1925] as an aid to execution of its coordination responsibilities. In June 1975, however, FPS did send to 30 agencies a letter which evidenced an intent to adapt the requirements of OMB Circular No. A-11 both to facilitate preparation of agency reports concerning Title VI enforcement activities and for purposes of coordination efforts under Executive Order 11764.[1926] FPS noted that although the circular requires Title VI data only from agencies with budgets in excess of $100,000, the Section was requesting all agencies to submit reports, even where Title VI enforcement responsibility had been delegated to another agency. FPS' letter also stated that, "Administrators of block grant and special revenue sharing programs should...report their nondiscrimination enforcement activities."[1927]

1925. Budget programming is discussed supra pp. 713-723.

1926. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 30 Federal agencies, June 9, 1975.

1927. Although there was no express mention in the letter of general revenue sharing (GRS), a copy of the letter appears to have been sent to the Office of Revenue Sharing (ORS), which administers GRS. Commission staff had previously understood that ORS was similarly asked for an A-11 submission in 1974.

2. Agency Reviews

An effective program of FPS reviews of the compliance activities of the Title VI agencies requires several elements. FPS staff should measure the time required by agencies to accomplish investigations and compliance reviews and to negotiate voluntary compliance where noncompliance is found. Of equal importance, FPS should assess the quality of investigations, compliance reviews, and voluntary compliance agreements between agencies and recipients. Agency use of enforcement actions should also be analyzed, as should agency followup, to ensure recipient implementation of negotiated resolutions. In addition, the scope of FPS reviews should extend far enough to ensure examination of all delegated or otherwise assigned authority. Thus, where State agency recipients, for example, have enforcement responsibilities, FPS should, as a part of a Title VI review of a Federal agency, examine that agency's monitoring and oversight of those responsibilities.

A second major factor in a successful monitoring system is the provision by FPS of adequate feedback to the agencies. In key areas such as education, health, and law enforcement, there need to be repeated, regular evaluations, with periodic FPS recommendations and followup. For the other large Title VI programs, at least an annual meeting between the Chief of the

FPS and the Title VI director of the agency concerned, to review agency performance, is important. No pattern of such regular action is discernible in past FPS monitoring activities.

The Section's principal coordination activity in early 1975 consisted of agency reviews.[1928] Indeed, FPS expects that agency reviews will continue to be the principal activity of the coordinators.[1929]

DOJ has long recognized a responsibility to conduct reviews of Title VI agency compliance programs.[1930] Indeed, between 1971 and 1973, FPS performed several such reviews.[1931] For example, one staff

---

1928. See letter from Lawrence H. Silberman, Acting Attorney General, to John W. Barnum, Acting Secretary, Department of Transportation, Feb. 5, 1975.

1929. Interview with Mary A. Planty, Deputy Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Jan. 21, 1975.

1930. As early as 1966 Office of the Special Assistant to the Attorney General for Title VI established a framework for assisting and evaluating agency compliance and termination efforts. Enforcement Effort report, supra note 1723, at 243 & n. 439. In July, 1975, DOJ provided this Commission with a number of its reviews of Title VI compliance programs. The transmission of these reviews is discussed in note 1717 supra. For the most part, DOJ permitted this Commission to disclose the name of the Federal agency reviewed when discussing these reviews. However, DOJ also provided this Commission with copies of interim reports by FPS staff of visits to five Federal regions in connection with an agency review in progress. Because the review was not completed, FPS requested that the Commission not reveal the name of the agency concerned. The reports were prepared in 1975 at the request of the agency under review. Among the reviews' findings, which varied from region to region and even from office within regions, were lack of leadership, vague procedures for complaint resolution, and conflict between State merit systems and affirmative action requirements. The interim reports had been transmitted to the agency with the caution that they point up particular problems in the regions reviewed, and did not necessarily reflect systemic problems, which would be identified in FPS' final report of the review.

1931. Reassessment report, supra note 1735, at 69; DOJ response, supra note 1775, at 137.

attorney reviewed the compliance operation of the Economic Development Administration (EDA) of the Department of Commerce. Similar reviews were made of the Law Enforcement Assistance Administration of the Department of Justice, of the Health and Social Services Division of HEW's Office for Civil Rights, of HUD's Title VI program including area and regional offices, and of the Department of Labor's (DOL's) implementation of Title VI with regard to State employment services.[1932] Among the programs analyzed by FPS since 1974 have been selected State Cooperative Extension Service programs funded by the Department of Agriculture and the Employment Service of the Department of Labor.[1933]

1932. In past years, DOJ has believed that to share these reviews would be inconsistent with its role as attorney/advisor to agencies. See the Reassessment report, supra note 1735, at 69-70 & n. 6; DOJ response, supra note 1775, at 140. In early July 1975, after this Commission stated, in a draft of this report, its own belief that such a restriction was unwarranted, DOJ reversed its position and provided copies of several of these reviews.

1933. In January 1975 DOJ and ORS staff conducted several joint compliance reviews in California. Another area of FPS involvement relates to the LEAA. Perhaps in part because LEAA is itself a unit of DOJ, there has been frequent exchange between FPS and LEAA regarding Title VI enforcement. In August 1973 a prohibition of sex discrimination was added to LEAA's civil rights law by the Congress. Where discrimination in services is concerned, it is quite likely FPS will be involved with sex discrimination issues under GRS, discussed supra. In addition, questions relating to sex discrimination in the extension of credit may end up in FPS. Jan. 23, 1975, Planty interview, supra note 1920. Thus, FPS may increasingly be dealing with sex discrimination, which is not expressly prohibited by Title VI.

a. Economic Development Administration (EDA)

In August 1972 FPS completed a report of a review of the Economic Development Administration (EDA) of the Department of Commerce.[1934] FPS found that EDA's Title VI compliance system had many strong points. It concluded that EDA's weakest area was its postaward compliance reviews. FPS recommended that: (1) EDA's civil rights staff be increased; (2) its preaward compliance review system be modified to ensure preaward identification and elimination of overt racial discrimination such as segregated rest rooms and cafeterias; (3) EDA develop systematic postaward compliance tools, such as a mechanism for monitoring postaward employment statistics; (4) EDA consider, in appropriate cases, referring noncompliance matters to DOJ; (5) the Offices of the Chief Counsel and of Equal Opportunity of EDA develop a memorandum of understanding regarding their respective roles in effecting compliance with Title VI; (6) EDA make greater use of DOJ as Title VI coordinator; (7) EDA work with the Equal Employment Opportunity Coordinating Council (EEOCC)[1935]

1934. DOJ, "Economic Development Administration's Title VI Compliance System: A Review" (1972). The review was based on interviews with EDA program and civil rights personnel in Washington, Atlanta, and Austin. The Southeast and Southwest regions were reviewed because of the substantial minority populations and significant number of ESA projects within those two regions. Moreover, probably because the primary objective of EDA assistance is to provide employment, the report dealt primarily with aspects of EDA's Title VI compliance system pertaining to equal employment opportunity.

The documents provided by FPS did not reveal the date the review was undertaken, its duration, or the number of staff assigned to it. Commission staff had earlier understood the review was the work of one of FPS' attorney staff.

1935. For a discussion of the EEOCC, see To Eliminate Employment Discrimination, supra note 1765, ch. 6.

in developing ways to maximize EDA's use of the equal employment opportunity resources of other Federal agencies; (8) EDA meet with the Office of Federal Contract Compliance (OFCC) to discuss the "interlacing" of EDA's equal employment opportunity obligations under Executive Order 11246 and under Title VI with respect to construction employment; and (9) while EDA had developed a good system for evaluating services discrimination under EDA-assisted water and sewer projects, it should investigate the development of a comparable system for evaluating other kinds of EDA-assisted projects.

b. Law Enforcement Assistance Administration (LEAA)

During the week of May 8, 1972, FPS[1936] staff conducted a civil rights survey of LEAA's Office of Civil Rights Compliance (OCRC).[1937] FPS'[1938] principal findings were that: (1) the inadequate size of OCRC's staff--10 professionals and paraprofessionals in fiscal year 1972--impaired LEAA's civil rights compliance program;[1939] (2) the disposition of LEAA complaint investigations suggested a need to establish procedural and substantive

---

1936. At that time FPS was still referred to as the Title VI Section.

1937. The survey of OCRC's operations included interviews with personnel in OCRC, the Office of Audit, and the Office of Inspection and Review of LEAA, as well as a review of all OCRC complaint files, selected State and audit files of the Office of Audit, and other pertinent documents of LEAA.

1938. DOJ, "The Civil Rights Compliance Program of the Law Enforcement Assistance Administration" (September 1972).

1939. FPS' specific subfindings were that: (1) LEAA placed undue reliance on assurances of civil rights compliance; (2) LEAA had not issued procedural and substantive civil rights guidelines; (3) LEAA had resolved relatively few of the civil rights complaints filed with it; and (4) LEAA's civil rights compliance review program was limited.

standards for complaint resolution;[1940] and (3) the LEAA civil rights technical assistance programs appeared to require additional review.[1941]

FPS did not provide documents suggesting the degree to which its recommendations had been implemented by LEAA.[1942]

FPS also provided a sample of the findings from four reviews of LEAA recipients conducted by FPS.[1943] All recipients in the sample were police departments. The findings and recommendations in all four appear exclusively to involve employment.[1944] A document related to one of the reviews noted

---

1940. FPS found that of those complaint files which OCRC had closed for lack of jurisdiction, it was at least an open question whether OCRC's view of its jurisdiction, with respect to some of the matters, was correct. FPS also found OCRC apparently relucant to take affirmative action to obtain compliance where widely accepted institutional procedures in the criminal justice system contravened Federal civil rights law. FPS found, for example, that "...thus far OCRC has taken a more conciliatory approach than has the Supreme Court in dealing with racial discrimination resulting from the use of [unvalidated] tests for employment selection...." To illustrate this, FPS found that, rather than requiring suspension of the use of tests pending validation, OCRC was urging law enforcement agencies to discard the use of test results as a "single eliminator" and use test scores in combination with oral interview scores to produce a total score on which to assess applicants' capabilities.

1941. Principal among these was a $390,000 grant to the Marquette University Law School. See the Reassessment report, supra note 1735, at 102.

1942. The Commission's more recent assessment of LEAA's program is in chapter 5 supra.

1943. These reviews were conducted pursuant to FPS' responsibilities under Title VI and LEAA's Equal Employment Opportunity Regulations. The reviews appear to have been conducted in 1973-74.

1944. Areas covered by the reviews appear generally to have included minority recruitment, entry level testing, employment of women, minimum height requirements, promotions, and assignments.

that FPS had attempted processing raw data provided by the recipient concerning services but had encountered difficulty. The document suggested that the services aspect of the review would be addressed at a later time.[1945]

c. Department of Health, Education, and Welfare (HEW)

In 1972 FPS also conducted a comprehensive review of HEW's Title VI compliance program in the area of health and social services.[1946] Among the aspects of HEW's program which were evaluated were the role of State agencies administering HEW funds in HEW's compliance program, HEW's instructions to State agencies, and HEW's reviews of those agencies. Included in FPS' findings was that State agencies were generally "not adequately apprised in an orderly and coherent fashion of exactly what HEW expected of them in terms of Title VI compliance activity."[1947] The

---

1945. The document provided FPS was a proposed letter to the recipient. FPS did not state whether the letter was sent, nor did it provide any indication whether or how the services aspect was resolved.

1946. DOJ, "Title VI and the Department of Health, Education, and Welfare: The State Agency Compliance System in Health and Social Services" (1972).

1947. Id. HEW has still not provided State agencies with a single comprehensive instruction concerning their responsibilities although as of July 1975 guidelines for State agencies are in draft form. See ch. 3 supra, Department of Health, Education, and Welfare. FPS also provided this Commission with an internal HEW memorandum concerning the FPS review. Memorandum from Bill van den Toorn, Office of the Secretary, HEW, to J. Stanley Pottinger, Office for Civil Rights, HEW, Mar. 7, 1973. HEW appears to have concluded that the principal FPS findings made in 1972 were valid, despite their being based on FPS analysis of two HEW State agency reviews conducted in 1968. HEW also concluded that FPS' findings were applicable beyond the two States covered in the report.

review also showed that State agencies failed to establish regular procedures for conducting compliance reviews of subgrantees and failed to notify subgrantees of Title VI requirments.

d. Department of Agriculture (USDA)

FPS provided analyses by FPS staff of audits of 18 State Cooperative Extension Services conducted by USDA's Office of the Inspector General. These summaries were each approximately 10 pages in length and discussed both employment and services under the covered programs. These analyses were shared with USDA by FPS. From dates on the documents, it appears they were prepared between July and November 1974. In some instances, FPS staff concluded that firm conclusions regarding noncompliance could not be drawn because of lack of data in the audit reports themselves. In others, especially in States which formerly operated dual Extension Service programs, FPS staff found that vestiges of these dual programs were apparent, and that continuing problems of postmerger discrimination, particularly in employment, were also evident.[1948] FPS staff also found blatant discrimination in employment practices and in service distribution practices in States which had never operated dual programs.

1948. USDA is discussed in ch. 2 supra.

e. Department of Labor (DOL)

In the fall of 1974, FPS, then staffed with coordinators,[1949] began a review of the Employment Service (ES) of DOL. Five Federal regions have been visited.[1950] In early February 1975 an interim report of the DOJ team was sent to DOL, which found the report "a great help...in...efforts to identify specific problem areas and to institute corrective action."[1951] Two other interim reports, covering all of the regions visited, have also been prepared, and DOL has been taking action regarding them without waiting for FPS' final report and recommendations, which were expected to be completed in July 1975.[1952] In addition,

1949. In late 1973, shortly before Executive Order No. 11764, supra note 1750, was issued, FPS requested an extensive amount of information from Title VI agencies. The information it sought would be useful to FPS' coordination function in general and in selecting agencies for particular review. The request, presented as a "routine survey...based on the Attorney General's coordinating role as defined by Executive Order 11247," sought information on all instances of probable noncompliance, including the length of time each matter had been pending and projected plans, with timetables, for remedying noncompliance. Letter from Robert Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to 25 Title VI agency officials, Dec. 4, 1973. Detailed information was also requested for all Title VI noncompliance matters resolved since July 1, 1972, and for all pending civil rights litigation and administrative actions in which each agency was involved. Finally, FPS requested agency assessment of a report of this Commission which had been published in January 1973, and a copy or a description of any agency program of priority goals and timetables. Id. This information appears to have been solicited in order to provide a base of knowledge on which coordinators might build.

1950. In September 1974, the FPS team assigned to the review received training and instruction in the headquarters office of DOL's Manpower Administration (MA). In November, the team, consisting of six coordinators and two attorneys, visited Region IV (Atlanta). After a team review of the Regional Office itself, as two subteams, they examined State office operations in the Georgia and South Carolina State Employment Security Agencies and visited a local office in each State. In December, a slightly smaller team visited Region V (Chicago), examining operations in Illinois and Indiana. Attachment to April 1975 Dempsey letter, supra note 1776. In the spring of 1975, Regions I (Boston), VII (Dallas), and IX (San Francisco) were visited.

1951. Letter from Ben Burdetsky, Deputy Assistant Secretary for Manpower, Department of Labor, to K. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, Feb. 20, 1975.

1952. June 1975 Dempsey telephone interview, supra note 1776.

FPS was, in February 1975, planning a review of the Department of Transportation.[1953]

Reviews of the nature described above of all principal agencies could lead to a more effective enforcement of Title VI. However, if such reviews are to have a maximum impact, they should always be followed with deadlines for complying recommendations for improving the agencies' enforcement programs. Further, involvement in agency reviews must not detract from the full development of the budgetary analysis component of the coordination function, which can provide a basis for onsite reviews of other agencies. Also, FPS must ensure that its agency reviews reflect a truly systemic approach[1954] to detection and remedy of agency compliance operation deficiencies.[1955]

1953. Feb. 11, 1975, Dempsey interview, supra note 1834.

1954. FPS believes that its reviews reflect such an approach. June 1975 Dempsey telephone interview, supra note 1776.

1955. A DOJ review of an agency compliance program may be regarded in part as a test of whether the program is effective in detecting recipient noncompliance. Where DOJ can discover no noncompliance, there may be no need for further review. Conversely, where DOJ discovers actual noncompliance, it has a responsibility to determine why the agency was unaware of or had not ensured correction of the noncompliance. The danger of this approach, however, is that FPS may find the coordination function becoming the prisoner of DOJ's natural litigative instinct. The detection of noncompliance and the interest in factfinding which it entails may become a litigative end in itself rather than a means to systemic application of the coordination responsibility.

There are some indications that DOJ, under the 1974 Executive order, will take additional steps to ensure implementation. First, it is expected that the DOJ cover letter forwarding final reports to the agencies and signed by the Attorney General, will request a specific indication, within 30 days after receipt of the report, of agency actions intended to be taken in response to the report.[1956] It also appears that FPS will utilize an "affirmative action plan" approach, which may include timetables, for implementation of recommended changes.[1957] This would be a commendable advance in FPS' operations.

1956. Jan. 21, 1975, Shaheen interview, supra note 1795.

1957. This is suggested by a job description statement provided by FPS in Attachment to April 1975 Dempsey letter, supra note 1776.

E. Service Activities

Both because it has a coordinative role and because it is a part of the Department of Justice, the Federal Government's lawyer, FPS is necessarily involved in providing services to the agencies. These include providing legal opinions on the application of Title VI and assisting agencies in preparing for administrative termination hearings. Thus, for example, between July 1972 and June 1973 the Section consulted with HEW on its racial and ethnic data collection capabilities[1958] and provided opinion letters to HUD on HUD's tenant selection guidelines for low-rent public housing, durational residency requirements for public housing applicant eligibility, and on lot size zoning in connection with HUD's Housing Project Selection Criteria.[1959] The Section also consulted with agencies on complaint investigations and compliance reviews,[1960] and participated with DOL staff in the modification of DOL policy regarding the use of special aptitude test batteries by State employment agencies.[1961] Other service activities included drafting civil rights guidelines and making

---

1958. DOJ response, supra note 1775, at 137.

1959. Id. The Housing Project Selection Criteria are discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. II, To Provide...For Fair Housing 93 (December 1974) [hereinafter cited as To Provide...For Fair Housing].

1960. Id. at 137-38. Two of these agencies were DOL and HUD.

1961. Id. at 138.

recommendations to LEAA regarding its civil rights compliance program;[1962] submitting a draft Title VI affirmative action plan to the Federal Highway Administration;[1963] corresponding with the Department of the Treasury regarding discrimination in lending by depositories of Federal funds;[1964] aiding the Veterans Administration in preparing for a Title VI administrative termination hearing against a private university in South Carolina;[1965] and consulting with the Federal financial regulatory agencies[1966] regarding regulation of discriminatory lending practices by financial institutions.[1967]

Perhaps the most recent notable service activity has been an FPS response[1968] to a request for a legal opinion[1969] from the Veterans

---

1962. DOJ response, supra note 1775, at 138.

1963. Id. at 139.

1964. Id.

1965. Id.

1966. These agencies include the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Federal Home Loan Bank Board. For a discussion of their civil rights responsibilities and activities, see To Provide... For Fair Housing, supra note 1959 at 134-218 (December 1974).

1967. DOJ response, supra note 1775, at 139.

1968. See letter from Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, to John J. Corcoran, General Counsel, Veterans Administration, Jan. 20, 1975.

1969. In April 1975, DOJ provided this Commission a copy of its opinion on VA medical programs, referenced in note 1776, supra. It should be noted however, that in the past DOJ has declined to make available to the Commission copies of its legal opinions, believing that to do so would be inconsistent with its function as attorney/advisor to Title VI agencies. While invocation of this relationship may be appropriate where litigation is concerned, its applicability to legal opinions is less clear, certainly where opinions are addressed to questions of the scope of Title VI.

Administration, which inquired regarding the applicability of Title VI to certain VA medical programs. The opinion, which was comprehensive in VA's view,[1970] concluded that a number of VA programs which provided funds for Veterans and dependents to receive health services from non-Federal medical facilities were Title VI programs, and the facilities were thus subject to the provisions of Title VI.

A significant service activity, undertaken on agency request, is FPS field reviews, undertaken either singly or jointly with the agency concerned, of recipients' compliance status. In fiscal year 1973, for example, FPS staff participated with HUD personnel in a compliance review of an urban renewal project.[1971] Earlier, staff attorneys also participated in reviews of DOL, DOT, and LEAA recipients.[1972] These reviews appear to have had a favorable impact. For example, in February 1974 officials of the Dallas, Texas, police department notified DOJ of a number of actions being taken as a result of a joint FPS-LEAA review.[1973]

1970. Telephone interview with Douglas Bartow, Attorney, Office of the General Counsel, Veterans Administration, Apr. 25, 1975.

1971. DOJ response, supra note 1775, at 137.

1972. Reassessment report, supra note 1735, at 70. FPS reports that similar reviews were undertaken in fiscal year 1974. Jan. 21, 1975, Shaheen interview, supra note 1795.

1973. The police department began hiring minorities on a one-for-one basis, engaged in extensive selection standard validation work, eliminated a requirement that police officers be males, and increased its employment of women. In addition, the department was considering replacing its 5'6" minimum height requirement with a validated physical performance test and launched a recruitment program intended to increase minority enrollment in a police cadet program to 50 percent. Memorandum, "Weekly Report," from Thomas R. Hunt, Executive Officer, Civil Rights Division, Department of Justice, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, February 15, 1974, at 4-5 /hereinafter cited as Weekly Report, with date and page numbers/. Similar corrective action was later reported by the Phoenix, Arizona, police department. Weekly Report, Apr. 5, 1974, at 5.

These service activities are in many instances necessary and quite valuable.

Among the documents provided by DOJ to the Commission on Civil Rights were 24 additional legal opinions relating to Title VI and other matters. All but two of these were written before 1973, the earliest in August 1964, barely a month after Title VI was enacted. 1974

1974. One of the two opinions written since 1973 was sent by the Deputy Assistant Attorney General responsible for oversight of FPS to the General Counsel of HUD. Letter from K. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, DOJ, to David O. Maxwell, General Counsel, HUD, Jan. 4, 1973. The letter concerned requirements that applicants for public housing be resilent within a jurisdiction for a certain length of time. Appellate courts in the First and Second Circuits had in 1971 and 1970 declared such requirements unconstitutional and HUD had responded, so FPS understood, by issuing a circular indicating that such requirements were illegal in those two circuits. FPS suggested that these residency requirements might have a racial impact and could deny inner-city minorities access to public housing in predominantly white suburban communities. FPS, therefore, suggested that such requirements might be also illegal under Title VI and Title VIII.

The other of these two opinions was discussed on pp. 737-738 supra.

In addition to legal opinions, DOJ has provided other technical assistance and suggestions to agencies at times without any prior agency request for assistance.[1975] A recent example of such aid is that in June 1975 DOJ sent to the Department of Labor (DOL) a proposal for an analysis of State Employment Security Agencies' (SESA's) employment practices.[1976] The impetus for the proposal was that DOL has received complaints that State merit system standards preclude effective implementation of affirmative action requirements promulgated by DOL regarding employment in SESA's. The proposal was aimed at determining the extent of the problem so that DOL would have a basis for action. As of October 1974, this proposal had been accepted for testing by DOL and was in the pilot project stage.

1975. This is true also of some of the legal opinions, e.g., the letter regarding durational residency requirements, discussed on p. supra.

1976. Memorandum from Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, to James P. Turner, Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, Proposed Analysis of State Employment Security Agencies Employment Practices, June 18, 1975.

In May 1972 DOJ prepared and submitted to the Veterans Administration (VA) a set of draft Title VI guidelines to be sent to proprietary schools receiving assistance under VA educational and training assistance programs. DOJ also submitted a draft notification to veterans attending such schools informing the veterans of the schools' Title VI obligations.[1977]

In November 1974, the Civil Rights Division sent to HEW's Office for Civil Rights (OCR) for consideration proposed guidelines[1978] clarifying the responsibilities of federally assisted welfare agencies in providing services to non-English speaking persons.[1979] DOJ noted that, OCR's "... experience...may indicate the propriety of broader guidelines to encompass all Federal assistance health and social service programs administered by HEW."[1980] HEW expressed the hope that the welfare agency guidelines could be cleared for publication by HEW by early 1974.[1981] As of July HEW had not published such guidelines.[1982]

1977. Letter from Robert N. Dempsey, Deputy Chief, Title VI Section, Civil Rights Division, Department of Justice, to William W. Parker, Director, Contract Compliance Service, Veterans Administration, May 11, 1972, with attachments. Because some of the schools involved might be recipients of assistance from HEW as well as from the VA, DOJ suggested that the VA might wish to coordinate with HEW in the issuance of appropriate Title VI guidelines for the proprietary schools. Id.

1978. Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to Peter Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare, Nov. 1, 1974, with attachment.

1979. In this regard, see discussion of Sanchez v. Norton, infra note 2018, and of Lau v. Nichols, pp. 708-711 supra.

1980. November 1974 Pottinger letter, supra note 1978.

1981. Id.

IV. Litigation

A persistent problem in the FPS in the past has been the involvement in litigation has tended to dilute the section's implementation of the coordination function.[1983] The current chief, however, regards

---

1983. See pp. 651-52 supra and Enforcement Effort report, supra note 1723, at 350-51. In that report, it was recommended that DOJ concentrate its Title VI activities on assuring effective administrative enforcement of Title VI by the agencies concerned rather than on litigation. Id. at 360. See also One Year Later, supra note 1735, at 121-22 (1971).

In 1970, the then Chief of the Title VI office believed that litigation was the most important part of the office's work. Enforcement Effort report, supra note 1723, at 247. In 1969, the head of the Title VI office estimated that 40 percent of staff time was devoted to preparing for and conducting trials. Id. at 247-48. In 1975, the Chief of the FPS could not make such an estimate, but did state his belief that a reasonable balance existed between litigation and coordination. Feb. 6, 1975, Dempsey interview, supra note 1781.

In the past, several reasons have been given for Section involvement in litigation: (1) that suits serve as a coordination device; (2) that staff attorneys both desire and need litigation experience in order to work effectively with Title VI agency personnel; and (3) that suits filed by DOJ or pending against any agency can often lead to agency acceptance of a legal position previously taken by DOJ. Enforcement Effort report, supra note 1723, at 248. For all of DOJ's reasoning, see Id. at 248-49.

coordination and litigation as "interdependent, not independent".[1984] To illustrate, where defense of agency termination decisions involves tests of the scope of Title VI or other, related legal questions,[1985] the objective of a coordinated and uniform view of Title VI is furthered.[1986]

1984. Feb. 6, 1975, Dempsey interview, supra note 1781.

1985. An example of such a case is Bob Jones University v. Roudebush. The Veterans Administration, after an administrative hearing in 1972, terminated Bob Jones University (BJU) as an approved school for the use of educational benefits administered by the VA, because BJU, on religious grounds, refused to admit blacks as students. The case tests the position of VA and DOJ that, although veterans benefits are paid directly to eligible veterans and their dependents, such assistance is, nonetheless, covered by Title VI. BJU sought judicial review of the termination order and lost at the district court level. Bob Jones University v. Roudebush, D.S.C., Order of July 25, 1974. The U.S. Court of Appeals for the Fourth Circuit subsequently affirmed the district court's decision. Telephone interview with Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, June 10, 1975.

1986. Success in defending a position on the scope of Title VI may, for example, induce some agencies to establish the same position and may encourage others, which may have adopted the position but paid it lip service, to be more aggressive in pressing the position on recipients.

FPS may be involved in litigation in several ways. First, agencies may refer for enforcement cases in which recipient compliance cannot be secured voluntarily. Second, DOJ may be defending an agency's administrative decision to terminate funding. Third, DOJ may handle suits brought by private plaintiffs, naming agency officials as defendants. Fourth, FPS may serve as an amicus curiae, or friend of the court, representing neither party to a suit but aiding the court in resolving the matter.[1987]

Suits in the third class of cases, which has for some time been the largest of the three,[1988] can be useful in ensuring the adequacy of agency compliance programs. DOJ can analyze the merits of the private complaint and, where it agrees that agency corrective action is appropriate, can persuade the agency to take action, in return for which it can then seek to obtain the private plaintiffs'

1987. An example of FPS' amicus participation is Player v. Alabama Department of Pensions and Security, discussed in note 1994 infra.

1988. In 1970, the Director of the Title VI Office of DOJ observed that, excluding HEW referrals of public school suits, DOJ had filed only seven suits to enforce Title VI on referral from the agencies in the first five years after Executive Order 11247 was issued. Three of those seven cases were referred only after agency officials were named defendants in private suits. Moreover, although in October 1970 DOJ had five of those seven suits still pending, there were no fewer than 16 suits by private plaintiffs pending against Title VI agency officials. Ewald memorandum, Oct. 23, 1970, supra note 1900, at 10-12.

As of April 1975, of the Section's ten active cases, none was solely of the first type. The only active case of the second kind was Bob Jones University v. Roudebush, discussed supra note 1985. Eight were of the third type, as they either originally or presently involve Federal officials as defendants. Five of these eight suits appear to allege inaction or ineffective action in Title VI compliance and enforcement. These are discussed infra this section. A tenth case, involving general revenue sharing, is discussed in Section V infra.

consent to the dismissal of the agency officials as defendants.

Thereafter, DOJ in some cases intervenes in the litigation as a plaintiff[1990] and proceeds against the remaining State or local government defendants.[1991]

1989. A recent example of this is among the FPS' ten active cases. In Sanchez v. Norton, Civil No. 15,732 (D.Conn., June 24, 1974), private plaintiffs alleged that HEW had violated their rights under Title VI and the Fifth amendment of the Consitution by failing to act on their administrative complaint and by failing to take affirmative steps required by Title VI and HEW regulations to ensure the protection of their rights to nondiscriminatory provision of benefits and services by the Connecticut Welfare Department. HEW investigated the CWD, found noncompliance, and entered into an agreement with CWD under which CWD would employ 20 additional Spanish speaking workers and implement a reporting system which would permit HEW to monitor CWD's compliance with Title VI. Based on these arrangements and representations regarding them, the plaintiffs, fifteen months after the action was filed, agreed to the dismissal of the Federal defendants. Sanchez v. Norton, No. 15,732 (D. Conn., June 24 1974).

1990. Such intervention is permissible, under Title IX of the Civil Rights Act of 1964, in suits arising under the 14th amendment which are certified to the court by the Attorney General to be of general public importance. 42 U.S.C. § 2000h-2 (Supp. II, 1972). In 1972, the statute was amended to add sex discrimination to race, color, national origin, and religion as the classes of cases in which the Attorney General may intervene.

1991. Examples of such cases among FPS' active caseload include Strain v. Philpott, 331 F. Supp. 836 (M.D. Ala. 1971); Wade v. Mississippi Cooperative Extension Service, 372 F. Supp. 126 (M.D. Miss. 1974), appeal docketed No. 74-2065, 5th Cir. Apr. 16, 1974; Poole v. Williams, Civil No. 72-H-150 (S.D. Tex., filed Feb. 4, 1972); and Bazemore v. Friday, Civil No. 2879 (E.D. N.C., Nov. 27, 1971).

Six agencies are represented in FPS' current caseload.[1992] Four of the suits involve the same agency, USDA, and the same program, the State Cooperative Extension Services.[1993] HEW assistance to the Alabama Department of Pensions and Security for the care of dependent and neglected children is involved in one suit.[1994] HEW was originally

---

1992. One of these, the Office of Revenue Sharing, is discussed on pp. 753-55. infra.

1993. These cases are: Bazemore v. Friday, supra note 1991 (North Carolina CES); Poole v. Williams, supra note 1988 (Texas CES); Strain v. Philpott, supra note 1991 (Alabama CES); and Wade v. Mississippi CES, supra note 1991. Strain was decided in 1971, but is still active because DOJ aids USDA in ensuring implementation by Alabama of a plan for remedying discrimination in employment and services. As of April 1975, Wade was being appealed to the Fifth Circuit by the defendants, a lower court having found discrimination in employment and in the CES' sanction of segregated homemakers and 4-H clubs. See 372 F. Supp. 126 (N.D. Miss. 1974). As of April 1975, neither Bazemore nor Poole had been tried.

1994. Player v. Alabama Department of Pensions and Security, Civil No. 3835-N (M.D. Ala., Dec. 11, 1973). The complaint in Player alleged that the Alabama DPS and six of the State's 15 private residential childcare facilities have denied services to black children which they make available to whites. In December 1972, the United States was ordered to participate in the case as amicus curiae (friend of the Court) and with the rights of a party. DOJ has argued that the facts of the case present causes of action under Title VI and under fair housing and general revenue sharing laws. As of April 1975, the case was awaiting adjudication by the district court. Attachment to April 1975 Dempsey letter, supra note 1776.

a defendant in another case involving the Connecticut Welfare Department.[1995] Other suits involve the Environmental Protection Agency (EPA),[1996] the Law Enforcement Assistance Administration (LEAA),[1997] and the Veterans Administration (VA).[1998]

Several observations may be made regarding this caseload. First, FPS litigation appears to be largely limited to suits initially involving federal officials as defendants. It would be far better if the FPS caseload

---

1995. This was Sanchez v. Norton, discussed in note 1989 supra.

1996. Norwood v. EPA, Civ. Action No. 73-1491, E.D. Pa. The suit was brought by a white EPA construction project bidder who failed to comply with bid specifications when he did not submit a "Philadelphia Plan" with his bid. EPA refused to fund the project should Norwood be awarded the contract by an EPA recipient and his bid was rejected. The suit alleges arbitrary and capricious action by EPA and intentional racial discrimination by two black EPA employees who reviewed and rejected Norwood's bid. As of April 1975, a trial date had not been set. Attachment to April 1975 Dempsey letter, supra note 1776.

1997. In Afro-American Patrolman's League v. Inman and LEAA, Civil No. 18227 (N.D. Ga., filed Apr. 25, 1973), plaintiffs alleged racial discrimination and denial of constitutional rights in the employment practices of the Atlanta Police Department and sought an injunction against the disbursement of funds by LEAA to the police department. As of April 1975, the parties were attempting to negotiate the suit. April 1975 Dempsey letter, supra note 1776.

1998. This is Bob Jones University v. Roudebush, discussed in note 1985. supra.

consisted primarily of court actions growing out of an aggressive program for enforcement by Title VI agencies.

The need for FPS involvement in some of the cases which have taken up time must be questioned. For example, FPS should, when the evidence justifies such action, order agencies to terminate recipients which do not take adequate action to comply with Title VI instead of defending them in court.[1999]

1999. In the instance of the Department of Agriculture, which accounts for 4 of the 10 suits in FPS' active caseload, it is clear that the Federal Programs Section has not taken effective action, such as refusing to defend USDA in suits by private plaintiffs, to force USDA to meet its responsibilities. The situation has prompted private plaintiffs to take legal action on their own behalf.

For the most part, it is apparent that where agencies are not referring noncompliance matters for suit by DOJ, it is not because they are taking effective administrative action on them, but because they are doing nothing about them. For example, in recent years there have been few fund terminations. See To Provide...For Fair Housing, supra note 1959, To Ensure Equal Educational Opportunity, supra note 1853; and other chapters in this volume.

Second, some FPS cases, especially ones involving the Cooperative Extension Services (CES), which are of statewide import, are "career-long" cases, pending for some years.[2000] Certainly, before the hiring of coordinators by FPS, these cases--with court deadlines for discovery, filing of briefs, and fixed dates for depositions, hearings, pretrial conferences and trials--must have had an adverse effect on the nonlitigative, coordination activities.[2001]

2000. A Deputy Chief used this word to describe the cases. He felt it would be desirable to lessen FPS' involvement in them. Jan. 23, 1975, Shaheen interview, supra note 1853. Examples of such cases are: (1) Wade v. Mississippi CES, filed by private plaintiffs in April 1970, in which DOJ intervened in late October 1971: decided in February 1974, the case was on appeal in April 1975; and (2) Bazemore v. Friday, filed by private plaintiffs in November 1971, intervened in by DOJ in April 1972, and not even tried as of April 1975, 3 years later. The final pretrial ference in this case was, as of April 1975, scheduled for May 30, and any trial is expected to require 6 to 8 weeks.

2001. For example, the research involved in Bazemore, supra note 1991, took at least six and maybe as many as nine person years to complete. Interview view with Mary Planty, Deputy Chief, FPS, Civil Rights Division, DOJ, Dec. 2, 1974.

DOJ has never filed suit to enforce Title VI except upon agency referrals, despite the fact that as early as 1970 the then Title VI office head believed that such suits could be brought.[2002] The present Chief of the FPS, however, while acknowledging that the Section has never filed a nonreferral suit and that both he and other Section personnel have considered the question whether such suits would be permissible.[2003]

2002. See Ewald memorandum, supra note 1900, at 4-9. Mr. Ewald reasoned from a Supreme Court decision, In Re Debs, 158 U.S. 564 (1895), which indicated judicial recognition of a power in the Federal Government to sue to protect a Federal interest, even though no statute authorized suit in a particular case. From Debs it can be argued that the Government has a Federal interest in ensuring that recipients of Federal financial assistance do not deny persons the benefit of that assistance on the ground of race, color, or national origin. The Ewald memorandum also recognized that occasion for such a suit would arise whenever Title VI enforcement were stymied by agency inaction.

In a non-Title VI action in which another Section of the CRD intervened in 1974, a Federal district court judge permitted DOJ to participate in the suit as a plaintiff. According to DOJ the court held that the United States has nonstatutory authority to sue to remedy widespread and severe constitutional deprivations, and that DOJ has a "valid interest in the vindication of the constitutional rights of citizens such as those" involved in the litigation. The suit is Alexander v. Hall (D.S.C.), in which the plaintiffs challenge the constitutionality of South Carolina's mental health commitment statutes and the adequacy of treatment in the South Carolina State Hospital. See Memorandum, "Weekly Report," from Thomas R. Hunt, Executive Officer, Civil Rights Division, Department of Justice, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, July 26, 1974, at 6.

2003. Feb. 11, 1975, Dempsey interview, supra note 1834.

Another question of importance is the right of successful private plaintiffs to recover attorney's fees in Title VI litigation.[2004] With the principal exception of employment discrimination suits, civil rights complaints often proceed only by way of injunction and do not seek monetary relief, such as back pay or damages. Thus, there is no money recovered from which plaintiffs can pay their attorney's fees.[2005] As a result, potential plaintiffs may be discouraged from seeking an attorney's assistance,[2006] and attorneys may be reluctant to undertake litigation where there is little hope of recompense. The availability of attorney's fees to successful plaintiffs would remove some of these hindrances to full implementation of the policy expressed in Title VI. In 1972, the Congress provided for attorney's fees in Title VI suits involving elementary and secondary education.[2007]

2004. The burden of litigation to effectuate Title VI is borne by minority group members. Such plaintiffs will often include "the least well to do, the least well educated, and most vulnerable to economic and other pressures." See the remarks of Senator Hubert H. Humphrey, 110 Cong. Rec. 6541 (1964).

2005. For a valuable discussion, see P. Nussbaum, "Attorney's Fees in Public Interest Litigation," 48 N.Y.U.L. Rev. 301 (1973).

2006. It should be noted that the costs of litigation, which do not include attorney's fees, can in themselves be discouraging. Fifteen years ago, this Commission estimated the cost of litigating a school desegregation case, from a district court through a court of appeals and to the Supreme Court once, to be between $15,000 and $18,000. Letter from Gordon M. Tiffany, Director, U.S. Commission on Civil Rights, to Senator Jacob K. Javits, Jan. 29, 1960, reprinted at 106 Cong. Rec. 3663-64 (1960).

2007. Section 718, Title VII, Emergency School Aid Act, 20 U.S.C. § 1617 (Supp. II, 1972).

The Supreme Court has held that, under section 718, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." Northcross v. Memphis Bd. of Education, 412 U.S. 427, 428 (1973).

While this action should aid in ensuring the desegregation of public education, it is important to note that Congress has not provided for attorney's fees to successful plaintiffs in suits involving such entities as hospitals, public libraries, parks and other recreational facilities, transit systems, and programs administered by departments of public welfare. Enforcement of Title VI in these areas seems, nonetheless, as important an objective as in public schools.

The Federal Programs Section, through its intervention in private plaintiff suits, is in contact with attorneys who litigate Title VI cases in these areas, and so is in a good position to assess the need for expansion of the current limited provision for attorney's fees.[2008] Nonetheless, as of February 1975, FPS had not considered the issue.[2009]

2008. A Presidential recommendation to the Congress could follow such an assessment. Moreover, while such a recommendation might seem inconsistent with Title VI's original emphasis on administrative enforcement and with the Section's prime mission of improving administrative enforcement, the agency failures documented elsewhere in this report appear to warrant reconsideration of the role private litigation should play in all areas of Title VI enforcement.

In recent years, Federal courts have been increasingly willing to award attorney's fees in various non-Title VI cases, where they believed that plaintiffs, by enforcing important statutory rights on behalf of others as well as themselves, were serving as "private attorneys general." This was done even though, as in every area but education under Title VI, no express statutory authorization for the awards existed. A May 1975 Supreme Court decision appears to end this trend. Alyeska Pipeline Service Co. v. Wilderness Society, ___ U.S. ___, 95 S. Ct. 1612 (1975). Accordingly, it is unlikely in the extreme that any court will provide attorney's fees in a Title VI case involving an area other than education, absent further congressional action.

2009. Feb. 11, 1975, Dempsey interview, supra note 1834.

The FPS litigative responsibility involving general revenue sharing[2010] is threefold: (1) Where the Office of Revenue Sharing is unable to resolve recipient noncompliance by negotiation, it must either initiate administrative termination proceedings or refer the matter to DOJ for suit.[2011] (2) The Attorney General has independent power to initiate

---

2010. Although the Commission believes that general revenue sharing is a Title VI program, FPS has not yet determined whether it believes that GRS is covered by Title VI. Therefore, activities pertaining to general revenue sharing are included in this section on non-Title VI activities.

2011. GRS is discussed on pp. 685-688, supra. Discrimination on the ground of race, color, national origin, or sex in any program or activity, funded in whole or in part with GRS funds, is prohibited.

Other responsibilities which appear to have devolved upon FPS in 1973 and 1974 are pattern and practice suit powers under manpower and community development special revenue sharing. Jan. 23, 1975, Planty interview, supra note 1920. In addition, Ms. Planty believed that the new programs and assistance provided under the Emergency Jobs and Unemployment Assistance Act of 1974 (Pub. L. 93-567, 93d Cong., 2d Sess., Dec. 31, 1974) would fall under the manpower revenue sharing pattern and practice power. Id.

suit without a referral where there is reason to believe a pattern or practice of discrimination exists under GRS.[2012] (3) The Attorney General, in order to exercise the power of independent pattern and practice suit, has an implied power to conduct compliance reviews of recipients.[2013] In 1974, all three of these powers were exercised. The Office of Revenue Sharing (ORS) referred a letter alleging discrimination to DOJ, which thereupon amended a court complaint, filed

---

2012. 31 U.S.C. § 1242(c) (Supp. III, 1973).

2013. These three activities are discussed in To Provide Fiscal Assistance, supra note 1768. There do not appear to have been any such activities before 1974. GRS was enacted in October 1972. In 1972 and early 1973 the Section aided the Office of Revenue Sharing (ORS) in formulating its civil rights regulations. DOJ response, supra note 1775. More recently, in 1975, FPS, in response to a request from ORS, commented on proposed regulations of ORS, relating principally to deferral of funding. See letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, Mar. 5, 1975.

in August 1973 against the Chicago Police Department, to include a charge of violation of the GRS legislation. Moreover, in December 1974 FPS filed the first suit brought by it directly under general revenue sharing.[2014] This suit arose from matters discovered during compliance reviews conducted of 20 revenue sharing recipients by FPS staff in the spring of 1974.[2015]

2014. United States v. City of Tallahassee, Fla., Civ. Action No. TCA 74-209, (N.D. Fla., filed 1974). Suit was filed under both GRS and Title VII, charging a pattern and practice of discrimination against blacks in hiring and promotion throughout municipal employment. A consent decree was entered on Apr. 11, 1975. See DOJ news release, Apr. 11, 1975.

The decree requires among other things extensive conformity of the city's employment practices with the Equal Employment Opportunity Commission's (EEOC's) Guidelines on Employee Selection Procedures (29 C.F.R. § 1607.1, et seq. (1974) and establishes, as a long-term goal for the city, the employment throughout the municipal work force of a proportion of blacks in each job classification approximating their proportion in the city civilian labor force. United States v. City of Tallahassee, supra, Consent Decree, entered Apr. 11, 1975.

2015. Jan. 21. 1975, Shaheen interview, supra note 1795.

FINDINGS AND CONCLUSIONS

General

Title VI of the Civil Rights Act of 1964 directs Federal agencies to enforce compliance with that title's prohibition against racial or ethnic discrimination in federally assisted programs, and under a variety of other laws and regulations many agencies are also obliged to eliminate sex discrimination in their programs. The responsibility for ensuring that federally assisted programs do not engage in unlawful discrimination rests with those Federal officials who operate the programs. In addition, most Federal agencies employ civil rights staff to monitor recipient compliance with the law. This Commission has found that Federal Title VI responsibilities have not been effectively discharged.

I. There is a lack of Government-wide leadership for the enforcement of these requirements. There is a lack of direction as to what constitutes discrimination and how it should be eliminated. As a result, neither Federal officials nor the recipients of their programs have fully understood the nature of their duties.

II. Each individual office has been left to set its own priorities. During the past few years, dedicated staff in a number of Federal agencies have tried hard to establish viable equal opportunity programs, but for the most part these efforts have floundered. Agencies have engaged in many ineffective tasks, ranging from providing technical assistance for the establishment of pro forma employee grievance procedures to drafting weak

guidelines for affirmative action plans. Frequently, however, these agencies have neglected their principal duty under Title VI which is to ensure nondiscrimination in the services offered by the programs they fund. They must focus upon more than simply their recipients' employment practices as important as that subject is. Moreover, in the area of employment agencies often create their own standards and ignore the legal principles established by Federal agencies with primary responsibility for equal employment opportunity.

III. In the aggregate these compliance programs have held out false promises for the many minorities and women who have been frustrated in their attempts to participate in the benefits of federally-assisted programs.

A. Federal agencies have not supported the effective utilization of Title VI staff and have not been fully responsive to the recommendations of Title VI staff for enforcement action.

B. The Title VI offices of Federal agencies have not made full use of State resources available to them for ensuring compliance with these requirements.

C. Federal agencies do not collect or require their recipients to collect sufficient, appropriate data necessary to measure the distribution of benefits of federally assisted programs to minorities or, where applicable, to women.

D. Most agencies receive few Title VI complaints, often because the public is not aware of the protections of Title VI or of the right to file a compliant when those protections have been violated, and the little complaint processing which is required has too frequently been slow and incomplete.

E. Federal agencies conduct far too few preaward and postaward reviews, and those which are conducted tend to be superficial because Federal agencies have not developed adequate tools for measuring nondiscrimination.

F. Where Title VI violations are uncovered, they often are not adequately remedied for reasons such as the failure of Federal agencies to promptly notify the recipient of its findings, Federal agency acceptance of the recipients' excuses and rationalizations defending the violations, protracted and unproductive negotiations, and reluctance to use sanctions.

FINDINGS AND CONCLUSIONS

Department of Agriculture (USDA)
Extension Service (ES)

1. The Extension Service, which is one of several constituent agencies of the Department of Agriculture, serves as the education arm of the Department.

2. There are a number of prohibitions against discrimination by recipients of Extension Service funds.

   a. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race or ethnic origin in federally assisted programs, including those operated by the Extension Service.

   b. A 1968 USDA regulation prohibiting employment discrimination on the basis of race, national origin, religion, or sex in State extension programs requires States to adopt an equal employment opportunity program, including a statement of policy endorsing the prohibition, a procedure to enforce the policy, and a system for handling complaints.

   c. This Commission believes that Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally-funded education programs, applies to all State extension programs. Although it has been more than three years since the passage of Title IX, USDA has not yet determined for itself the extent to which it applies to USDA programs and has not consulted with the Department of Health, Education, and Welfare, the Federal agency with primary Title IX responsibility.

3. Inadequate staffing and poor organizational structure have hampered USDA's Title VI program.

   a. Title VI enforcement responsibilities at USDA are distributed among a

ber of officials and organizational units, including the Assistant Secretary for Administration, the Office of Equal Opportunity (OEO), the Office of Audit, the Office of General Counsel, and the Civil Rights Compliance Staff of the Extension Service. There is inadequate coordination among these units.

b. As of May 1975, OEO had been without a permanent director for more than a year.

c. Although USDA does not know the number of work years all of its units devote to Title VI, some staff are overworked and unable to complete all the work necessary for a full Title VI compliance program.

4. Under the Secretary's Memorandum No. 1662, Supplement No. 1, each USDA constituent agency is required to collect racial and ethnic data to measure progress in achieving equal opportunity.

a. The biggest deficiency of USDA's data requirement is that it does not call for the collection of data on the basis of sex.

b. Compliance reviews conducted by OEO frequently indicate that the data maintained by USDA recipients are inaccurate.

c. USDA has published reports on the number of minorities participating in the programs it funds, but the most recent report is from 1973 and, therefore, out of date and contains insufficient data for an evaluation of the participation figures.

5. In fiscal years 1974 and 1975 combined, USDA received only three complaints regarding the Extension Service. No action was taken on one of the complaints, which was lodged against a county extension service in North Carolina, due to litigation involving the North Carolina Cooperative Extension Service. Although an investigation of a second complaint was supportive of the complainant's allegation of racial discrimination in 4-H

programs, the Extension Service has not recommended a resolution of the matter.

6. As a result of a lawsuit, Strain v. Philpott (331 F. Supp. 836 (M.D. Ala. 1971)), in which the Federal court found discrimination in the Alabama State extension program, USDA developed a model affirmative action plan to ensure equal employment opportunity for minorities and women in State extension programs and to ensure equal opportunity for minorities in services provided by the State extension programs.

a. The model plan does not require a work force analysis to determine if there are fewer women or minorities employed in each job category than would be expected by their availability for the job, the setting of numerical goals and timetables to remedy any underutilization, or the validation of employee selection criteria to ensure their job-relatedness.

b. USDA's model plan does not cover sex discrimination in the area of services.

c. The most serious limitation of the model plan with respect to services is that, where data reveal segregation or underrepresentation, the plan does not require a comprehensive analysis to identify barriers to participation, nor does it require numerical goals and timetables to increase minority participation.

d. A review of several approved plans revealed many inadequacies.

7. In 1965, USDA audits of Extension Service programs showed that civil rights violations were blatant and widespread, and audits in 1967 and in 1973-74 produced similar findings.

a. The 1973-74 audits were conducted with the understanding of

OEO staff that, if they demonstrated noncompliance with Title VI, sanctions would be promptly initiated.

b. Among the failings of the 1973-74 audits were that they did not (1) cross-tabulate all data by race, ethnic origin, and sex, (2) consider all major minority groups in each State, and (3) fully assess the quality of services provided to minorities and nonminorities.

c. USDA determined that about one-third of the States audited were in substantial noncompliance with the law and that all other States needed to take some corrective action.

8. If USDA finds noncompliance with Title VI, and its recipients do not eliminate that noncompliance voluntarily, USDA can defer funding, terminate funding, or refer the matter to the Department of Justice for civil action.

a. USDA has never deferred funding to a State extension program; and, in the absence of a private suit, it has never made a referral to the Department of Justice.

b. Instead, USDA has repeatedly provided noncomplying recipients with new procedures for achieving compliance, thus extending the time during which the illegal practice is continued.

c. The end result of the failure of USDA to impose sanctions within a reasonable time after finding recipients to be in noncompliance is that, although noncompliance has been documented in State extension programs for over 10 years, enforcement had been left to private citizens filing lawsuits against State programs. USDA continues to provide funds for the operation of discriminatory programs with the complicity of the Secretary and other high-level USDA officials.

FINDINGS AND CONCLUSIONS

Department of Health, Education, and Welfare (HEW)
Health and Social Services

1. The major health and social services programs funded by HEW are Medicare, which provides medical insurance for older persons; Medicaid, which provides medical treatment for the poor; and various categorical health and welfare programs, including Aid to Families with Dependent Children, Vocational Rehabilitation, and Maternal and Child Health Services.

2. The prohibition in Title VI of the Civil Rights Act of 1964 against racial and ethnic discrimination in federally-assisted programs extends to approximately 10,000 hospitals and nursing homes and 250 State health and welfare agencies which are recipients of HEW funds.

3. HEW guidelines to assist its recipients in complying with Title VI are inadequate.

   a. HEW's guidelines for hospitals and nursing homes, issued in November 1969, concern nondiscrimination in admissions, services, room assignments, and staff privileges, but do not address the issue of the relocation of inner-city hospitals to the suburbs, a problem which can significantly reduce the health care services for the often disproportionately minority inner city.

   b. Although HEW relies heavily on State health and welfare agencies, which administer Medicaid and many HEW categorical grant programs, to monitor equal opportunity in the delivery of health and social services, HEW has not established adequate guidelines for them to carry out this function.

c. No HEW guidelines instruct HEW recipients on what constitutes acceptable affirmative action, including the setting of goals and timetables, for the correction of Title VI deficiencies.

d. HEW has not established guidelines to ensure that recipients take into account the needs of non-English speaking clientele, guidelines which would, for example, set criteria for determining when it is necessary to provide bilingual services and what types of services should be provided.

e. HEW has not issued guidelines concerning minority participation on advisory committees to HEW-funded programs.

4. There is no prohibition comparable to Title VI against discrimination based on sex in health and social services programs. Although women are beneficiaries of a large number of HEW programs, HEW does not know the extent to which such a prohibition is necessary, as it has not conducted a comprehensive study of sex discrimination in these HEW-funded programs.

5. Responsibility for ensuring Title VI compliance in HEW health and social services programs lies with the Health and Social Services Division of the Office for Civil Rights (OCR) and Health and Social Services Branches of HEW's 10 regional offices. As of June 30, 1974, HEW allotted 81 fulltime professional positions to Title VI compliance activities in the area of health and social services.

6. In fiscal year 1974, HEW received about 300 compliants against State agencies, hospitals, nursing homes, and other HEW recipients.

a. Investigations conducted in four regions tended to be reasonably thorough, frequently uncovering discrimination and often resulting in correction of the alleged violation.

b. In June 1975, HEW proposed to abandon the guarantee that individual complaints will be investigated and to concentrate on identification and correction of systemic discrimination, a radical change from current procedures. These proposed procedures could have a serious negative impact.

7. HEW has periodically collected comprehensive data from hospitals and nursing homes on the race and ethnic origin of patients, staff, and population served, but has not collected comparable racial and ethnic data from State agencies on a nationwide scale.

8. From 1968 through 1974, a principal OCR compliance activity in the area of health and social services was an evaluation of the structure and procedures of 250 State agency nondiscrimination programs, covering such matters as dissemination of Title VI information, training of State agency staff, and compliance reviews conducted by State agencies of local health and welfare facilities.

a. These State agency reviews generally did not attempt to determine whether HEW-funded health and social service programs were being operated without racial or ethnic discrimination.

b. In recent years, HEW conducted compliance reviews of only a small percentage of hospitals, nursing homes, and other health-related facilities, essentially relying on State agencies to fulfill this responsibility. However, State agencies often failed to conduct compliance reviews of these institutions.

c. In 1974, HEW conducted 10 field reviews for the purpose of determining if HEW-funded services reached minorities on an equitable basis. The reviews were designed to serve as a prototype of indepth compliance reviews to replace HEW State agency reviews and its limited reviews of hospitals and nursing homes.

9. In the course of its State agency reviews, HEW discovered numerous instances in which recipients failed to execute Title VI properly including: State agency staff's having a fundamental lack of understanding of Title VI; State agencies providing funds to local offices which maintained segregated facilities; and hospitals and nursing homes operating with discriminatory admissions policies.

a. Where HEW discovered Title VI violations, it generally made recommendations to the recipient for correcting them. HEW, however, sometimes informed the recipient that it was in compliance, without adequate proof that its recommendations had been adopted.

b. HEW's follow up to ensure that recipients honored their commitments to institute corrections has often been inadequate.

10. Where discrimination and noncompliance with Title VI is discovered by HEW which cannot be resolved voluntarily, HEW may initiate administrative action against the recipient by suspension, termination, or refusal to grant or continue Federal financial assistance, or it may refer the matter to the Department of Justice for corrective action.

a. When confronted with recipients who are unwilling to correct Title VI violations in their programs, HEW sometimes spent months or even years in negotiations for compliance.

b. These negotiations have not always been successful, allowing a number of violations to continue.

c. HEW has failed to use its full powers to require prompt correction. As of January 1975, (1) there were no outstanding orders terminating HEW assistance to recipients of health and social service programs; (2) HEW funds were deferred to only one recipient, and this deferral had occurred only after the recipient had voluntarily withdrawn from HEW's program; and (3) HEW had referred no cases of discrimination to the Department of Justice for civil action.

d. As a result, HEW continues to provide Federal funds to facilities which are in violation of Title VI, even though it has known about the discriminatory practices of these recipients for several years.

FINDINGS AND CONCLUSIONS

Department of the Interior (USDI)

1. The Department of the Interior operates several assistance programs including: grants to State agencies for the acquisition and development of outdoor recreational facilities; loans to irrigation districts for planning, constructing, and improving irrigation and water distribution systems; grants for the preservation of national historic sites; and funds for youth work camps.

2. Racial and ethnic discrimination is prohibited in these programs by Title VI of the Civil Rights Act of 1964, and USDI is responsible for ensuring compliance with that prohibition.

   a. Before fiscal year 1974, USDI's Title VI program concentrated only on nondiscrimination in outdoor recreation programs.

   b. During fiscal year 1974, USDI greatly expanded its focus to determine the civil rights implications of a number of other programs and to study the possible ways in which discrimination might occur in these programs. However, USDI's administration of these programs still does not fully ensure that the interest of minorities and women are taken into account, as USDI has not developed guidelines requiring civil rights considerations to be incorporated into many programs where minority needs are often ignored or overlooked.

3. Title VI does not prohibit discrimination based on sex, and so in March 1973 USDI promulgated a regulation prohibiting discrimination on the basis of sex in its federally-assisted programs.

   a. USDI's investigation of compliance with this prohibition has focused primarily on advisory boards and employment in outdoor recreation systems.

b. USDI has not concerned itself with sex segregation in sports events held in the park systems it funds or with use of facilities by groups which restrict their membership to only one sex.

4. USDI requires affirmative action plans concerning recipients' employment, but its guidelines for the content of these plans are inadequate. In addition, USDI does not generally review the recipients' plans except in the course of compliance reviews or complaint investigations, and, even then, it does not approve or disapprove them.

5. During the course of the investigation of this report, it was especially evident that the Title VI staff of USDI's Office for Equal Opportunity (OEO) are dedicated and have tried hard to establish a model Title VI office, but have inadequate status for ensuring that Title VI is fully executed and are too few to carry out all of their Title VI objectives.

6. As required by the Office of Management and Budget in Circular A-102, all applicants for Federal assistance are required to sign a promise to comply with Title VI.

a. Circular A-102 does not require the applicant to promise nondiscrimination on the basis of sex, although sex discrimination is prohibited by USDI regulations.

b. Although the applicant is required to promise to refrain from employment discrimination in the case of nonconstruction grants, the assurance does not cover all areas of employment discrimination which USDI believes are prohibited by Title VI.

7. USDI has recognized the responsibility for performing preaward reviews in order to determine the Title VI compliance status of an applicant prior to the award of Federal financial assistance.

a. USDI designates for preaward reviews, which are essentially desk audits, all applicants applying for Federal financial assistance of $500,000 or more, applicants who have not complied with its civil rights recommendations, and applicants who have previously discriminated against persons on the grounds of race, color, sex, or national origin.

b. A proposed draft of procedures for USDI's compliance program would have required applicants for USDI assistance to submit a report of how minorities would be affected by any land acquisition process involved in the grant; a report of how minorities would be informed that programs were operated in a nondiscriminatory fashion; racial, ethnic, and sex data on the members of any advisory committees; and information on action taken to involve minority citizens in all phases of the program; but these requirements were not included in the final procedures.

8. USDI requires that applicants and recipients collect and maintain data showing the extent to which members of minority groups and women participate in federally assisted programs.

a. USDI requires that data be collected only on a visual basis and requires that park visitors be identified as "minority" or "nonminority" but not as American Indian, black, Spanish speaking background, Asian American, or other.

b. USDI procedures provide no details for data collection and no safeguards as to their accuracy.

9. USDI procedures provide for accepting, processing, and resolving complaints by the State or USDI regional program staff; and, thus, few Title VI complaints have been received by OEO.

a. Although where USDI is dissatisfied with complaint handling it can assume jurisdiction over the complaint, USDI has not always used this authority when necessary.

b. Generally, USDI has accepted resolutions reached by the parties involved without making an investigation to determine if the complaint reflected a larger pattern of discrimination.

10. In 1973 USDI requested that State park brochures include illustrations of minority participation to encourage nondiscriminatory use of all facilities, but USDI did not conduct a followup investigation to determine if States adhered to their promises to comply with this request. In addition, USDI has not required the use of illustrations of sexual integration of activities which have traditionally been all male or all female.

11. In 1974 USDI conducted 113 postaward onsite compliance reviews to determine what Title VI problems occur in USDI-funded programs and how best to marshall USDI resources to ensure Title VI compliance.

a. As a result of these reviews, USDI made recommendations for the improvement of most State programs, for example: to establish a system for collecting and reporting racial and ethnic data on beneficiaries; to increase employment opportunities for minorities; to involve minority communities in the planning process; and to ensure that State park systems' brochures and booklets illustrate nondiscriminatory participation in recreational activities.

b. USDI reports that States have generally agreed to adopt its recommendations, and it has not terminated funds to any recipient.

c. Until recently, however, USDI conducted few followup reviews to ensure that its recommendations were carried out and rarely required progress reports of a State's implementation of its recommendations.

FINDINGS AND CONCLUSIONS

Department of Justice (DOJ)
Law Enforcement Assistance Administration (LEAA)

1. The Law Enforcement Assistance Administration provides assistance to State and local governments to reduce crime and juvenile delinquency and to improve criminal justice. Both Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968 as amended [hereinafter referred to as the Crime Control Act] prohibit discrimination on the grounds of race, color, and national origin in services provided by those programs.

   a. The Crime Control Act also prohibits sex discrimination in services provided by LEAA-funded programs.

   b. In addition, the Crime Control Act prohibits all employment discrimination based on sex, race, and ethnic origin in LEAA-funded programs.

2. LEAA has a number of regulations and guidelines detailing how nondiscrimination is to be implemented in LEAA-funded programs, but the sum total of these regulations, as implemented, is inadequate.

   a. LEAA has not issued regulations for court systems receiving LEAA assistance. LEAA civil rights staff doubt that LEAA has adequate authority to issue such regulations, but have not requested a definitive opinion from LEAA's General Counsel or DOJ's Civil Rights Division.

b. Although more than a year and a half has elapsed since the passage of the Crime Control Act, LEAA has not issued implementing regulations, leaving recipients with no guidance as to how to comply with the act's prohibition against sex discrimination, nor has LEAA acknowledged the full scope of the act's prohibition against employment discrimination.

c. LEAA has provided no guidelines concerning assistance for beneficiaries who do not speak English.

d. One LEAA guideline states that failure to appoint "otherwise qualified" minorities or women to advisory boards would constitute a Title VI violation, but LEAA staff have no plans to monitor this guideline.

e. An LEAA guideline prohibits recipients from using height as a criterion for selecting or assigning employees where such a criterion tends to discriminate against women or minorities, unless the recipient can demonstrate that the criterion is job related; but LEAA has instituted no regular monitoring of compliance with this guideline.

f. LEAA's equal employment opportunity guidelines, which require certain LEAA recipients to establish equal employment opportunity programs (EEOPs), are the core of its equal opportunity activities.

(1) To supplement its own requirements, LEAA has included the Equal Employment Opportunity Commission (EEOC) guidelines in its Equal Employment Opportunity Program Manual, but LEAA has not formally notified its recipients that compliance with EEOC guidelines and standards set forth in EEOC decisions is mandatory and LEAA does not require that the EEOPs include goals and timetables to remedy past discrimination.

(2) LEAA does not generally review the EEOPs.

3. LEAA, the Equal Employment Opportunity Commission, and the Office of Revenue Sharing have overlapping responsibility for equal employment opportunity in State and local government law enforcement programs; and, thus, there is a need for coordination among them. But LEAA has not agreed with the other two agencies upon a uniform standard of compliance and information sharing has been inadequate.

4. The Office of Civil Rights Compliance (OCRC), responsible for ensuring civil rights compliance by LEAA recipients, has a fulltime professional staff of 16, an increase of 8 persons since mid-1972, but not all OCRC staff members work on Title VI and the staff size is still inadequate in comparison to LEAA's civil rights responsibilities.

5. Each State Planning Agency (SPA), the principal LEAA recipient at the State level, must sign an assurance to LEAA that it will undertake civil rights compliance activities.

a. Training of SPA staffs has been insufficient.

b. LEAA has not adequately monitored SPA activities.

c. LEAA has not required SPAs to review for approval all subgrantees' Equal Employment Opportunity Plans, and undertake complaint investigations, conduct compliance reviews of subgrantees, or collect and review data on subgrantee activities, although as of July 1975, it had plans to do so.

6. In June 1972, LEAA directed almost 8,000 police agencies to complete a questionnaire on their employment practices; but, as of March 1974, barely more than half had complied, and LEAA had not taken any action against nonrespondents.

a. OCRC never fully reviewed the completed questionnaires.

b. LEAA discontinued this questionnaire and intends, instead, to rely upon EEOC data, but the EEOC's employment categories are of limited use in analyzing police department employment.

c. In order to monitor community-based correctional facilities, LEAA drafted a questionnaire which originally was to be distributed by mid-1972, but as of February 1975 it had not been finalized. In draft form it failed to cover services provided by contractors or subcontractors, racial and ethnic patterns in sentencing, disciplinary actions and special privileges, or parole procedures.

7. In October 1973, LEAA commenced a program of onsite preaward compliance reviews, but this program does not cover block grants--general purpose grants to SPAs--which comprise the vast bulk of LEAA grants.

8. Although LEAA has thousands of recipients, OCRC conducted only 18 post-award compliance reviews from the time of its creation in 1968 through January 1975 and at least 14 of these were completed before July 1973, while only one was completed since May 1974.

a. OCRC's compliance reviews emphasize minority employment, frequently to the exclusion of services and female employment.

b. LEAA did not sufficiently analyze the information it collected and it did not gather all the information it needed.

c. Despite the apparent frequency, diversity, and severity of civil rights problems uncovered in the reviews, LEAA made no findings of noncompliance, and its recommendations were not sufficiently forceful.

d. After LEAA has worked hard to obtain a recipient's commitment to achieve civil rights compliance, it often conducts inadequate follow-up to ensure that the required actions are properly taken.

9. Like all Title VI agencies, LEAA has a number of tools at its disposal when it finds noncompliance by its recipients or potential recipients, including fund deferral, fund termination, and referral to the Civil Rights Division of the Department of Justice.

a. LEAA has not deferred funding of any block grants and, although OCRC states that LEAA has deferred funds in some instances, it does not maintain data on the number of deferrals.

b. LEAA has never terminated funding because it has a strong preference for judicial rather than administrative remedies for Title VI violations, but this bias ignores the potential effectiveness of the fund termination remedy, and it is not supported by the language of Title VI which makes clear a preference for administrative remedies.

c. LEAA has referred only four cases to the Civil Rights Division.

d. LEAA continues to fund jurisdictions in which there is prima facie evidence of civil rights violations, diminishing its credibility as a civil rights enforcement agency.

FINDINGS AND CONCLUSIONS

Department of Labor (DOL)
Manpower Administration (MA)

1. One of the principal functions of the Manpower Administration is to provide financial and technical assistance to State employment security agencies, which operate State employment service (ES) and unemployment insurance (UI) offices.

2. The Title VI prohibition against racial and ethnic discrimination extends to the operations of the State employment service and unemployment insurance offices, and in addition there are other civil rights laws, regulations, and directives affecting these offices. But the Manpower Administration has failed to provide its staff, recipients, and beneficiaries with sufficient guidance and leadership for executing a comprehensive nondiscrimination program.

   a. The Secretary of Labor has allowed to expire a 1966 order which prohibited sex discrimination in programs operated by the Manpower Administration.

   b. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin in State employment service operations; and, although the Manpower Administration instructs its staff to work toward compliance with this title, it has not incorporated into its own regulations the comprehensive standards for

equal employment opportunity set by the guidelines and decisions of the Equal Employment Opportunity Commission.

c. The Compliance Officers Handbook, the Manpower Administration's principal document outlining its civil rights requirements, fails to provide adequate guidance with regard to ensuring against discrimination on the basis of sex or native language.

3. In December 1973, Congress passed the Comprehensive Employment and Training Act (CETA) to provide funding for training and work incentive programs for the unemployed and underemployed.

a. Evidence of civil rights noncompliance in earlier manpower training programs--such as failure to hire sufficient numbers of minority staff, failure to display equal opportunity posters, lack of equal opportunity grievance procedures, and racially segregated work crews--indicates the need for strong action to ensure nondiscrimination in CETA programs.

b. CETA prohibits discrimination on the grounds of race, creed, color, handicap, national origin, sex, age, and political affiliation or beliefs, but CETA regulations do not make clear what constitutes discrimination in CETA-funded programs and as of February 1975 DOL had not begun active monitoring of the civil rights provision.

4. Responsibility for setting policy for and overseeing the Manpower Administration's Title VI program lies with the Division of Equal Employment Opportunity (DEEO), and responsibility for implementing the

Title VI program lies with equal employment opportunity representatives (EEORs) in Manpower Administration regional offices.

a. Both the DEEO and the EEORs have insufficient authority to execute their responsibilities.

b. The DEEO has not adequately monitored regional office staff compliance activities.

5. The Department of Labor has instituted the Manpower Operating Data System, one of the more comprehensive systems for collecting nationwide data on a Federal program.

a. The system provides data on the labor force and on unemployment and enables DOL to determine the number of persons using the State employment services.

b. This system has rarely been used to measure the civil rights compliance status of local offices, because (1) equal employment opportunity staff do not review Manpower Operating Data System reports on a regular basis, and (2) program staff who study the data are not trained to use the data for civil rights purposes.

6. The Manpower Administration has attempted to have the State employment security systems absorb some of the responsibility for ensuring recipient Title VI compliance, requiring each State to appoint a Minority Group Representative (MGR) to coordinate Title VI compliance in the local ES and UI offices.

a. The Manpower Administration has not made clear the duties of the MGRs. Thus, in some States MGRs were virtually nonfunctioning,

while in others, MGRs investigated complaints, conducted compliance reviews, and provided training and technical assistance to local ES offices.

b. The effectiveness of the MGRs also depends upon the amount of time they spend on equal opportunity duties, the size of their staffs, and the extent of their coordination with the Manpower Administration.

c. Some MGRs have assumed responsibilities for ensuring nondiscrimination on the basis of sex, but the Manpower Administration has not instructed MGRs that these responsibilities must be assumed.

7. The MA requires its regional equal employment opportunity representatives to conduct an onsite compliance review of at least one local ES office in each State in each region.

a. This number is far too low, especially considering the great number of ES offices in more populous States.

b. Reviews of State UI offices are generally only conducted in conjunction with State ES offices; and, since there are usually many more UI offices than ES offices, it appears that most UI offices will never be reviewed.

8. One of the most critical shortcomings of the equal employment opportunity programs of State employment security systems has been their underutilization of minorities and women as employees, especially in managerial and executive positions; but the Manpower Administration's

feeble efforts to improve this deficiency have been fruitless, as the Manpower Administration has not instructed State employment security systems how to set goals properly for improving employment patterns.

9. Serious violations of the civil rights of black and Spanish speaking farmworkers have been found in the Rural Manpower Services, units of the State employment security systems which concentrate on agricultural employment.

a. Among these violations were that minority farmworkers were (1) denied the same counseling and training that the State employment service provided for nonminorities; (2) arbitrarily restricted to low-paying field work; and (3) assigned to racially segregated housing.

b. Although a court ordered DOL to stop participating in federally funded State programs that discriminate against migrant farm workers, DOL has not gathered sufficient evidence to ensure that the violations have been corrected.

10. MA has failed to take the steps necessary to ensure the timely correction of all civil rights violations. Thus, violations such as failure to credit minority job applicants with all relevant experience, entry of extraneous information such as "Afro hair" on application cards, making discriminatory job referrals, and use of discriminatory selection criteria were often repeated year after year, even in the same offices.

a. MA has often failed to provide prompt formal notification to ES offices when violations have been found.

b. Recommendations have been poor, failing to require affirmative action where necessary.

c. State employment service offices provide flimsy excuses for continuing illegal actions, and these excuses are often not challenged by regional offices, thus allowing violations to continue.

d. There is little followup activity to ensure that corrections are made. Indeed, in some cases, the State ES failed to acknowledge MA's recommendations, but MA was unware of this.

e. When followup reviews revealed uncorrected deficiencies, MA engaged in prolonged negotiations and offered technical assistance but made no move to cut off funds, thus permitting noncompliance to continue indefinitely.

FINDINGS AND CONCLUSIONS

Department of Transportation (DOT)
Federal Highway Administration (FHWA)

1. The Federal Highway Administration provides assistance to States for building and maintaining interstate highways; other roads, including urban streets, and related structures, such as bridges, bikeways, pedestrian walkways, parking facilities, and rest areas.

2. Although minorities are not the principal highway users, highway construction has taken a heavy toll from inner-city minority neighborhoods, and there are a number of requirements pertaining to FHWA's program which relate to the rights of minorities to be free from such discrimination in FHWA-funded programs.

   a. Title VI applies to FHWA-assisted programs.

   b. Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, DOT regulations require that dwellings for displaced persons be open to all persons regardless of race, color, religion, sex, or national origin.

   c. Section 136(b) of the Federal-Aid Highway Act of 1970 requires that the Secretary of Transportation develop guidelines to assure full consideration of possible adverse economic, social, and environmental effects in the development of federally-aided highway systems.

3. Although these requirements give FHWA responsibility to ensure that federally-aided highways do not increase or accelerate the racial-

ethnic polarization of urban areas, the Department of Transportation has continually denied that it has such responsibilities.

a. FHWA staff have stated, for example, that FHWA's mandate does not permit FHWA to impose civil rights requirements upon communities which may experience enlarged commercial opportunities because of better roads.

b. The main emphasis of FHWA's civil rights programs has been on issues such as minority employment in highway construction projects and satisfactory relocation of minority displacees.

4. Section 162(a) of the Federal Aid Highway Act of 1973 prohibits discrimination on the basis of sex in FHWA-assisted programs, effectively extending Title VI to cover sex discrimination in these programs, but FHWA has issued no regulations stating what actions recipients must take to implement Section 162(a).

5. FHWA civil rights responsibilities are divided between a small departmental Office of Civil Rights, the FHWA Office of Civil Rights (OCR), and civil rights specialists in FHWA field offices.

a. Only two persons in OCR have fulltime Title VI responsibilities, and only nine officials in the field spend more than 50 percent of their time on Title VI although FHWA has staff in 62 field offices.

b. There are many civil rights problems with which OCR reports that it will not become thoroughly involved unless its staffing is increased, including sex discrimination and review of Title VI compliance by universities receiving FHWA funds.

6. FHWA's compliance reviews have been poor.

a. By fiscal year 1974, FHWA's field staff had completed statewide compliance reviews of all 50 States, the District of Columbia, and Puerto Rico, but aspects of these reviews were superficial.

(1) In assessing whether the State's appraisals of property to be acquired for highway construction were nondiscriminatory, FHWA was satisfied if a standardized method was used, failing to determine if this method was equitable.

(2) FHWA satisfied itself that replacement housing was available on a nondiscriminatory basis, merely by the existence of a State law prohibiting housing discrimination, failing to investigate whether the housing in question was open to both minorities and nonminorities.

b. Beginning in late 1973, FHWA civil rights compliance reviews were to be conducted by FHWA program staff in conjunction with field reviews of grantee performance in such areas as planning, research, design, construction, maintenance, and education and training, instead of conducting one civil rights review in each State. Few of these reviews have been conducted, and FHWA instructions are not sufficiently detailed to ensure that the new reviews would be less superficial than the earlier statewide reviews.

(1) There are no instructions for gathering statistical data for determining the extent a proposed highway route will disrupt or adversely affect the continuity of the minority

community; sever the minority community from schools, churches, recreation, shopping, and employment; perpetuate existing segregation patterns; or produce adverse traffic volumes in the minority community.

(2) There are no instructions for investigating the extent to which there is equal opportunity for women in the recipient's services or employment.

7. State agencies receiving FHWA funds are required to develop and implement a plan for carrying out Title VI responsibilities.

a. Although the State agencies are asked to conduct periodic compliance reviews, no standards are set for the content or frequency of these reviews.

b. Although State agencies must investigate complaints, FHWA offers no methodology for impartial complaint investigation.

c. The State plans were to be in effect by June 1, 1974, and as of April 1975 only 42 had been approved; yet FHWA had informed only one State without an approved plan that funds would be terminated unless an acceptable plan is forthcoming.

8. FHWA has instituted no comprehensive system for collecting racial and ethnic data although a pilot data collection project was influential in altering a proposed route after it demonstrated that a proposed interstate route would have a disproportionate negative impact on the minority community.

9. FHWA has never used sanctions against a noncomplying recipient

because FHWA reports that its recommendations are willingly accepted by the States.

a. FHWA recommendations have not fully tested the willingness of States to comply with civil rights requirements. This is because FHWA's recommendations rarely require strong action on the part of States, such as making changes in a proposed route.

b. FHWA cannot be certain that its recommendations have been adopted, as it rarely conducts follow-up reviews or requires recipients to submit followup reports.

FINDINGS AND CONCLUSIONS

Department of Transportation
Urban Mass Transportation Administration

1. The Urban Mass Transportation Administration (UMTA) provides funds to State and local planning agencies, State transportation agencies, private nonprofit institutions for the development of mass transportation systems, including the planning, demonstration, construction, improvement, and acquisition of facilities and equipment.

2. There is evidence that transportation services in the predominantly minority inner city have been infrequent, irregular, and inferior to transportation services in the predominantly white suburbs, and UMTA's Title VI manual makes clear that Title VI prohibits such discrimination.

   a. Section 109(a) of UMTA's grant contract prohibits employment discrimination by UMTA recipients and requires affirmative action to ensure nondiscrimination on the basis of race, color, religion, sex, or national origin in their employment practices, but UMTA has not issued any instructions as to how Section 109(a) must be implemented.

   b. UMTA has amended its Title VI assurance to include a prohibition against sex discrimination, but has done little to ensure that its recipients adhere to this prohibition.

3. UMTA Title VI responsibilities are divided between a small departmental Office of Civil Rights and the UMTA Office of Civil Rights. UMTA

has not delegated to State agencies administering UMTA funds duties such as conducting complaint investigations and preaward and postaward reviews of local recipients.

4. From July 1972 through March 1975 DOT received only six complaints with regard to UMTA programs, and UMTA required corrective action in four of these cases, but UMTA's handling of one complaint reviewed by Commission staff was inadequate, casting serious doubt on the value of the corrective action UMTA requires.

   a. Although the review indicated that a transit company was probably engaged in blatant racial and ethnic employment discrimination, the extent of discrimination could not be fully assessed because the review gave no indication that all allegations of discrimination had been investigated.

   b. While UMTA recommended that the transit agency formulate and implement an affirmative action plan, it did not require that the plan be in writing, or that it contain goals and timetables, and, moreover, it does not appear that the plan was developed.

5. UMTA's preaward program is superficial.

   a. UCR reports that all applications for UMTA assistance are required to include a Title VI assurance and are subject to a preaward review. UCR requires recipients to submit a variety of data for these reviews.

Title VI implications, and it will ask the applicant to provide further information to enable its civil rights staff to conduct a desk review.

b. UMTA's review of this information is cursory, limited largely to making certain that it has been submitted with no obvious deficiencies. UMTA, however, has contracted with a research organization to improve the preaward process.

c. UMTA rarely conducts onsite preaward reviews.

6. From July 1972 to January 1975, UMTA conducted onsite compliance reviews of 131 recipients, more than a quarter of its total recipients.

a. Onsite postaward reviews, which take from 2 to 5 days, generally concentrate on the recipient's employment practices.

b. UMTA has not developed adequate techniques for measuring discrimination or absence of discrimination in the delivery of transportation services.

c. Transit systems do not maintain sufficient data to enable a comprehensive evaluation of their delivery of services.

7. When UMTA finds noncompliance, which it found in 94 of its 131 reviews, its recommendations are inadequate.

a. In several cases UMTA's findings did not appear to be vigorously followed up with specific recommendations. For example, (1) where it found discriminatory entrance tests, it did not require that they be validated or eliminated; and (2) where affirmative action was necessary, UMTA did not always

require it.

b. In 90 percent of all cases of noncompliance, UMTA recommends adoption of a recipient complaint procedure. This procedure is grossly inadequate because it (1) provides no instruction as to how such complaints will be investigated, (2) does not make clear that statistical evidence may be sufficient to demonstrate discrimination and that it is not necessary for a complaint to allege bigotry on the part of an individual in order to show discrimination, and (3) does not guarantee that the investigation and resolution will be impartial.

8. UMTA has never initiated administrative proceedings against a recipient because it states that all recipients requested to take corrective action have done so, but UMTA's compliance review files show that it has insufficient evidence to demonstrate that this is the case.

a. UMTA recipients frequently failed to provide the UMTA civil rights staff with adequate proof that UMTA recommendations would be adopted, and the civil rights staff have often not taken adequate action to obtain that proof.

b. Even where recipients have made commitments to take corrective action, UMTA has conducted few followup reviews to ensure that such commitments are fully carried out.

FINDINGS AND CONCLUSIONS

Environmental Protection Agency (EPA)

1. EPA provides assistance to State and local governments for the construction of sewage treatment facilities under the Wastewater Treatment Construction Program.

2. Title VI extends to projects receiving funds under that program, but EPA's acknowledgment of its responsibilities under Title VI is inadequate, with the result that EPA continues to provide funds to jurisdictions which exclude minorities from residency, or do not provide all minority areas with sewer service.

   a. Minority communities have traditionally received inferior public services due to the systemic discrimination which pervades the operations of State and local governments and, thus, they have often lacked sewers. Although EPA has a major responsibility under Title VI to ensure that action is taken to reverse this pattern, EPA has taken a narrow view of its Title VI duties.

   b. EPA has denied responsibility under Title VI to ensure that conditions such as lack of fair housing laws, absence of a fair housing agency, or the existence of exclusionary zoning ordinances do not contribute to the effective exclusion of minorities from receiving EPA assistance.

   c. Sewer collection lines are generally financed by assessing each user so that those who cannot pay the assessment are not

connected to the sewer. This sometimes results in the disproportionate exclusion of minority and poor families from sewer connections. Yet EPA believes that it cannot require that the collection lines benefit those who cannot pay, contending that it can only ensure that long term payment plans are available to assist those who cannot immediately afford the assessment.

3. EPA also provides funds to institutions of higher education for research and demonstration grants which are subject to Title VI and to Title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions.

a. EPA has made no efforts to monitor EPA-funded institutions to ensure equal opportunity for minorities and women.

b. As of March 1975, EPA had not delegated to the Department of Health, Education, and Welfare (HEW) any responsibilities for ensuring compliance by these institutions, although HEW has principal responsibility for monitoring Title VI compliance by institutions of higher education, and many other agencies made such delegations years ago.

4. Section 13 of the Federal Water Pollution Control Amendments of 1972 effectively extends Title VI coverage to include a prohibition of sex discrimination in EPA-assisted programs or activities.

a. Unlike Title VI, coverage under these amendments extends both to programs of insurance and guaranty and to all employment in EPA-assisted activities, but EPA's regulation implementing

Section 13 does not reflect this broad coverage.

b. EPA has not conducted any studies to determine what types of sex discrimination exist in its programs.

5. EPA's organizational structure reveals that EPA has failed to recognize fully the importance of an adequate Title VI program.

a. As a result of a September 1974 reorganization, EPA left only one person in Washington, D.C., the Title VI Program Officer, with major Title VI responsibilities.

b. In only one region is there a staff member who has fulltime Title VI responsibilities, and in addition, in fiscal year 1974, 18 regional staff members spent less than half their time on Title VI.

6. EPA has not used its application process adequately to ensure that applicants provide sewer service to their jurisdiction on a nondiscriminatory basis.

a. Applications for EPA assistance for construction of waste treatment facilities must be made through State water quality boards, but civil rights concerns have not usually been among the factors considered by the States in evaluating the applications and EPA has not made a State by State assessment, from a civil rights perspective, of the procedures for evaluating applications.

b. All applicants for assistance under EPA's Wastewater Treatment Construction Program are required to submit a preaward compliance report to EPA, but most regional offices give the reports only a perfunctory examination, and analysis of these reports represents the only preaward reviews conducted of EPA-funded projects.

7. EPA does not require its regional offices to undertake regularly scheduled postaward onsite compliance reviews, and most regional offices do not conduct them.

8. EPA's Title VI complaint processing procedures reveal inadequacies in EPA's compliance program.

a. Regional staff are responsible for investigating complaints and, for guidance in the assignment, have relied on an outdated draft manual. EPA plans to replace this with a new, longer manual.

b. EPA does not require recipients to inform potential customers (1) of their right to be served without discrimination on the basis of race, national origin, or sex; or (2) where to file complaints of suspected civil rights violations.

9. If EPA finds noncompliance, it may defer funds, terminate them, or refer the matter to the Civil Rights Division of the Department of Justice for civil action.

a. EPA reports that voluntary compliance has generally been secured where there has been an apparent violation of Title VI.

b. The total number of housing units which have received sewer services as a result of EPA's efforts to secure voluntary compliance appears to be small but even so they cannot be adequately evaluated, since EPA has not yet surveyed the Nation to determine the number of housing units occupied by minorities, single women, or female-headed families which were not adequately serviced.

c. EPA has unofficially deferred funds at least once, but it has never terminated funding or referred a case to the Department of Justice.

FINDINGS AND CONCLUSIONS

Department of Justice (DOJ)
Civil Rights Division (CRD)
Federal Programs Section (FPS)

1. Because of the large number of Federal agencies with Title VI responsibilities, coordination and direction by a central authority are necessary to ensure that:

   a. Title VI agencies do not make inconsistent interpretations of law or impose conflicting requirements on their recipients.

   b. Recipients are not subjected to duplicative reviews, audits, and other investigations by different Title VI agencies,

   c. Title VI is enforced with equal vigor by all Title VI agencies.

2. Executive Order 11764, issued in early 1974, directs the Attorney General to coordinate agency enforcement of Title VI and to prescribe "standards and procedures for implementation of Title VI."

   a. Executive Order 11764, is a significant improvement over Executive Order 11247, which it supersedes. The previous Executive order directed the Attorney General to "assist" Title VI agencies "to coordinate." In contrast, Executive Order 11764 gives the Department of Justice broad powers to oversee the Government's Title VI effort.

b. Although two Federal agencies have effectively challenged the Attorney General's authority under the new order, the Department of Justice has not issued any legal interpretation of its authority in this area.

c. Executive Order 11764 clearly directs the Attorney General to develop and promulgate Title VI standards, and draft standards have been prepared; but as of July 1975 the Attorney General had failed to issue them leaving all other Federal agencies with inadequate direction.

3. Within the Department of Justice, responsibility for the implementation of the coordination function rests with the Civil Rights Division's Federal Programs Section, which has a staff of more than 30 professionals, including attorneys, coordination specialists, and research analysts.

4. An important element of the Federal Programs Section's coordination responsibility is the identification of agencies having programs covered by Title VI to ensure adoption by those agencies of Title VI regulations.

a. A significant accomplishment has been FPS' determination that grants made by a non-Federal entity which is responsible for disbursing Federal funds are covered by Title VI and that the entity disbursing the funds has an obligation to effect a Title VI monitoring program.

b. FPS has not taken adequate action to ensure that Federal agencies with Title VI responsibilities acknowledge those responsibilities and issue Title VI regulations; and, thus, (1) there has been no formal determination as to applicability of Title VI to some agencies which would appear to have Title VI responsibilities, and (2) some agencies with clear Title VI responsibilities have yet to issue appropriate regulations.

c. As of February 1975, FPS had not formally determined whether general revenue sharing is subject to Title VI. Thus, although the general revenue sharing legislation relies upon Title VI for the enforcement of nondiscrimination, the Office of Revenue Sharing of the Department of the Treasury, which administers the legislation, does not believe it is a Title VI agency and does not use the Title VI compliance techniques necessary for a viable compliance program.

5. A principal coordination tool has been agreements between approximately 15 agencies and the Department of Health, Education, and Welfare (HEW) delegating to HEW responsibilities with regard to educational institutions and health care facilities which are recipients

of funds from those agencies.

a. The agreements do not appear to have functioned as intended because (1) HEW has not itself maintained an adequate Title VI program with respect to its own recipients; and (2) HEW appears to operate its compliance program without sufficient regard to the agreements.

b. Even though the delegations were signed soon after the passage of Title VI, as of July 1975 an FPS review to assess the effectiveness of the delegations was only in a preliminary stage.

6. Executive Order 11764 gives the Attorney General the responsibility for approving Federal agency Title VI regulations. These regulations, largely uniform for all Federal agencies which have issued them, lack adequate time frames for action and also contain deficient provisions relating to such matters as racial and ethnic data, complaints investigations, and compliance reviews.

7. FPS has been slow to effectuate a structure for broad scale monitoring and assessing agency performance under Title VI.

a. Although the concept of budget programming--which can be used to measure and evaluate Title VI resources, activities, and results--has been known to FPS at least since 1970, FPS had not adopted it. When FPS, in 1974, gathered data with potential utility for budget programming, it was not thoroughly analyzed in a timely manner.

b. Although a principal and worthwhile activity of FPS has been to conduct indept reviews of selected Federal agency Title VI programs, there is danger that the conduct of extensive reviews may detract from the Section's ability to maintain necessary ongoing contact with all Title VI agencies.

8. FPS may become involved in litigation because (1) agencies may refer to DOJ for enforcement cases in which recipient compliance cannot be secured voluntarily; (2) DOJ may be defending against a recipient's appeal from an agency's administrative decision to terminate funding; (3) DOJ may handle suits brought by private plaintiffs which name agency officials as defendants; or (4) DOJ may participate in a private suit as amicus curiae, a friend of the court.

a. In past years excessive FPS involvement in litigation has tended to dilute implementation of coordination responsibilities, but it is anticipated that the employment of nonlawyer coordinators may effectively counteract this problem.

b. The fact that many of the cases among FPS' active caseload were originally filed against Federal agency officials for failure to remedy discrimination in Title VI programs reflects both ineffectiveness by the Federal Government's Title VI enforcement effort, and dereliction by FPS of its obligation to ensure that Federal agencies take enforcement action.

c. As early as 1970 FPS was of the opinion that DOJ had the power to circumvent agency recalcitrance by filing suit to enforce

Title VI absent an agency referral, but FPS has never filed such a suit.

d. Several of the Section's lawsuits have spanned several years and require significant allocations of the Section's staff and time, reducing the resources the Section can devote to coordination and direction.

RECOMMENDATIONS

We believe that it is of great importance that the President take the following steps to establish a strong program for ensuring equal opportunity for minorities and women in federally-funded programs.

I. The President should issue an Executive order which states that no person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. The President should direct that each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity (1) shall be responsible for enforcing that prohibition simultaneously with its enforcement of Title VI of the Civil Rights Act of 1964, and (2) shall issue, within 180 days, regulations approved by the President implementing the Executive order.

II. The President should issue an Executive order transferring to the Executive Office of the President the responsibility for providing Title VI coordination and direction, which is currently vested in the Attorney General under Executive Order 11764. The President should also assign to the Executive Office parallel responsibility for coordinating and directing Federal agency enforcement of the prohibition against sex discrimination.

The Commission has considered the following three options for locating the coordination and directive function within the Executive Office of the President:

(1) Office of Civil Rights

The director of this office would be given cabinet rank and would be provided with a staff which would have the capability of monitoring and evaluating the manner in which all departments and agencies with Title VI responsibilities discharged these responsibilities. Additional responsibility in the field of civil rights could also be assigned to this office. The director of the office would prepare and forward to the President proposed Presidential directives to departments and agencies designed to strengthen and expedite the implementation of Title VI whenever the evidence developed by his staff pointed to the need for intervention on the part of the President.

(2) Domestic Council

A special office would be set up in the Domestic Council. The office would function in a manner comparable to the office provided for in option number one except that proposals for Presidential directives would be transmitted to the President through the staff director and Vice Chairman of the Council.

(3) Office of Management and Budget

The Director of the Office of Management and Budget would be charged with the same responsibility as proposed in option number one for a director of an office for civil rights. The Office of Management and Budget would, in the light of oversight reviews of Federal agencies, recommend to the President the issuance of Presidential directives designed to bring about an effective implementation of Title VI. The performance of oversight functions on behalf of the President is a recognized institutional role of the Office of Management and Budget. The addition of Title VI responsibilities would serve notice of a Presidential decision to use all of the powers at the President's disposal to translate the rhetoric of Title VI into action.

The Commission favors option number three, namely, placing the responsibility for the Government-wide coordination and direction of Title VI and the proposed Executive order prohibiting sex discrimination in the Office of Management and Budget.

III. The Executive order transferring the coordination and direction function to the Office of Management and Budget should direct OMB to issue within 180 days of the date of the amended order, proposed standards for the implementation of Title VI and the Executive order prohibiting sex discrimination.

A. This Commission believes that, at a minimum, those standards should include the following:

1. The standards should make clear the steps Federal agencies must take in order to inform recipients through regulations how to operate their programs and activities in a nondiscriminatory fashion.

a. The standards should provide guidance to grant-making agencies to enable each agency to issue specific regulations detailing what constitutes nondiscrimination on the basis of sex, race, and national origin in the programs of its recipients.

b. The standards should address the needs of non-English speaking beneficiaries of federally-funded programs, setting criteria for determining what types of services must be provided in languages other than English and when it is necessary to provide them, and indicating the ways in which the funding agencies must assist recipients to develop bilingual services.

c. There should be standards for participation of minority groups and women on planning and advisory committees. The standards should require, for example, that (1) in areas where there is a significant minority population, planning and advisory bodies should reflect that

population; and (2) recipients must evaluate criteria for selecting advisory board members to ensure that the criteria are nondiscriminatory.

d. The standards should address the issue of site selection of recipients' offices and facilities to ensure that they are equally accessible to all racial and ethnic groups.

e. The standards should include provision for any grant-making agency which does not already do so to require recipients to inform customers and potential customers of their rights to be served without discrimination on the basis of race, national origin, or sex and that any complaints of suspected violations should be forwarded to State agencies administering Federal programs but that complainants have a right to appeal the State agencies' decisions to the grant-making agency.

2. The standards should provide guidance for upgrading the offices with responsibilities for securing nondiscrimination in federally-assisted programs.

a. Federal agencies should be instructed to ensure that the chief official with such responsibilities has sufficient status to execute them effectively. The chief official should have a grade level at least equivalent to top program administrators and should report directly to the office of the agency director.

b. The standards should require grant-making agencies to hold State agencies administering federally-funded programs accountable for securing subgrantees' compliance with civil rights requirements. State agencies should be required to submit annually a plan for (1) approval and monitoring of subgrantees' equal opportunity plans, (2) investigation of complaints of discrimination in services provided by subgrantees, (3) collection and review of data on subgrantees' activities, (4) compliance review of subgrantees' activities, and (5) establishment of procedures for withholding funds from subgrantees in the event of their noncompliance. In addition, the grant-making agency should set standards for State agency compliance activities and establish a schedule for monitoring these activities by setting regular reporting requirements for the State agencies and making periodic onsite visits to State agency offices.

3. The standards should set forth the basic components of the grant-making agencies' compliance programs.

a. Each agency should develop annual reporting systems for all recipients, requiring recipients to submit data, cross-tabulated by race, ethnic origin, and sex on such variables as (1) the number of program participants, (2) the size of the

population to whom the program is directed, and (3) where appropriate, the number of applicants. The agency should provide procedures to recipients to assure that the data submitted are accurate and up to date.

b. Each agency should develop a procedure for targeting recipients for review. The following information should be taken into account when targeting recipients for onsite review: the degree of discrimination, as revealed by the data each recipient must submit on the annual report form; the incidence of complaints against the institution; and the existence of problems which raise novel issues of law. In the case of reviews conducted by Federal agencies, the agencies should also consider the recommendations of the State agencies.

c. Each agency should develop techniques for measuring the quality of services extended to minorities and women, including such factors as the types of services, their amounts and frequency, and the extent to which program participation is integrated on the basis of race, ethnic origin, and sex.

d. Based on these techniques, each Federal agency should require its recipients to undertake the data collection necessary for such measurements, and incorporate the analysis of those data into an equal opportunity plan. The plan would also describe the steps the recipient will take to deal with each problem identified in the analysis, including where appropriate (1) numerical goals for increasing and upgrading the quantity and quality of minority and female participation and (2) definite timetables for implementing

the plan. This plan must be maintained in the recipient's file and forwarded to the granting agency upon request.

e. Upon targeting a recipient for review, the grant-making agency should require that recipient to submit its equal opportunity plan along with supporting data. The grant-making agency should be required to make a determination, within 30 days of receipt of this information, whether the recipient should be reviewed onsite. The agency should also be required to notify the recipient immediately of the scheduled onsite review.

f. In order to provide recipients with prompt notification concerning investigative findings, the granting agencies should be required, within 60 days of the receipt of the equal opportunity plan and supporting data, or within 90 days of receipt of that information if the recipient is to be reviewed onsite, to notify the recipient of its preliminary determination whether the recipient reviewed is in compliance with all applicable civil rights requirements. The recipient should be provided with a 30-day period to offer any additional information.

g. The grant-making agency should be required to make a final determination of the recipient's compliance status within 30 days of that notice or, if the recipient provides additional information, within 30 days of the grant-making agency's receipt of that information.

h. The grant-making agency should require that all complaints be resolved within 180 days of their receipt. Every complainant should be informed of the right to request and receive a notice from the grant-making agency, 180 days after the filing of a complaint, indicating that it considers the complainant to have exhausted Federal administrative remedies. In the event that an investigation is undertaken: (1) Within 60 days after obtaining all information necessary for the investigation, the investigating agency should be required to inform the complainant and recipient of the preliminary results of its investigation, providing both parties with 30 days in which to offer any additional information. (2) A final determination should be issued within 30 days of receipt of additional information, or within 30 days of the preliminary finding if no additional information is forthcoming from either party.

i. When a grant-making agency issues a notice of determination of noncompliance, the notice should be required to include the findings of fact in support of the determination and the specific timetables for implementing and completing such actions in order to comply with all applicable statutes. Except in unusual circumstances, no timetable for complete compliance should be allowed to exceed two years.

j. Within 60 days of receipt of notification of a determination of noncompliance, the recipient should be required to submit a report on its implementation of the actions required to be taken

pursuant to the determination of noncompliance.

k. The grant-making agency should establish a system of reporting in order to follow up all voluntary agreements to achieve compliance: (1) Such reports should be required semi-annually for the first two years and thereafter, annually. (2) The grant-making agency should set a goal for onsite reviews of 20 percent of these agreements.

l. Sixty days after the recipient has received notification of noncompliance but has failed to provide a report on its implementation of the required activities or 30 days after the recipient has provided an inadequate report, the grant-making agency should be required to commence enforcement proceedings. This standard should immediately be applied to all outstanding cases of noncompliance.

m. The standards should emphasize the Title VI preference for administrative rather than judicial enforcement. In cases in which a Federal grant-making agency is sued for failure to implement requirements for nondiscrimination in a federally-assisted program, the Attorney General should determine if the plaintiff has a justifiable cause of action. If so, the Office of Management and Budget should direct the agency to initiate administrative sanctions against the recipient within 60 days.

B. The Executive order transferring Title VI coordination and direction should make clear that general revenue sharing programs provided for under the State and Local Fiscal Assistance Act of 1972 and any subsequent renewal of that program, as well as all special revenue sharing programs such as provided for by the Comprehensive Employment and Training Act, are covered by it. Agencies administering those programs should abide by the standards set by the Office of Management and Budget to implement that order.

C. The Executive order transferring Title VI coordination and direction should enumerate the duties and authority of the Office of Management and Budget under the order. These should include the following:

1. The Office of Management and Budget shall ensure that all Federal agencies comply with Title VI of the Civil Rights Act of 1964 and the Executive order prohibiting sex discrimination in federally-assisted programs.

2. The Office of Management and Budget shall make certain that all Federal grant-making agencies issue regulations implementing those requirements. These regulations must meet the approval of the Office of Mangement and Budget.

3. The Office of Management and Budget shall regularly review the compliance activities of all grant-making agencies and shall develop an appropriate reporting system to assist it in this review.

4. The Office of Management and Budget shall work toward eliminating duplication of Federal grant-making agencies' efforts. The Office of Management and Budget should ensure that no more than one Federal agency is responsible for such functions as data analysis, complaint investigation, compliance reviews, and negotiations with regard to any one recipient.

a. The Office of Management and Budget shall conduct a review of the status and effectiveness of the interagency agreements delegating certain compliance responsibilities to the Department of Health,

Education, and Welfare (HEW). The Office of Management and Budget (1) shall make the findings available to the public and (2) ensure that any necessary revisions in the agreements and changes in HEW's program are made expeditiously.

b. The Office of Management and Budget shall oversee the drafting and implementation of other agreements among grant-making agencies. For example, the Office of Management and Budget should ensure that the Secretary of the Treasury delegates compliance responsibilities to Federal agencies with duties which overlap those of the Office of Revenue Sharing.

c. The Office of Management and Budget shall ensure that Federal agencies reduce the level of their resources allocated to eliminating employment discrimination, but only after taking steps to ensure that any discrimination Federal agencies encounter among recipients is addressed effectively by the Equal Employment Opportunity Commission (EEOC). As the Commission recently recommended in its report, The Federal Civil Rights Enforcement Effort--1974, Volume V, To Eliminate Employment Discrimination, equal employment opportunity enforcement responsibilities should be consolidated with the creation of a National Employment Rights Board.

(1) Until that recommendation is adopted, the Office of Management and Budget should ensure that each grant-making agency signs an agreement with the Equal Employment Opportunity Commission providing that:

-- The grant-making agency will inform recipients that they must conform to the standards set forth in EEOC guidelines and decisions.

-- The grant-making agency will inform recipients that they must develop and implement affirmative action plans conforming to

the specifications set forth in Revised Order No. 4 of the Office of Federal Contract Compliance.

-- Any complaints received by the granting agency alleging discrimination in its recipients' employment practices will be referred to EEOC.

-- EEOC will establish a special unit to ensure prompt investigations of these complaints, review recipients' affirmative action plans, and conduct compliance reviews of recipients' employment practices.

-- Where EEOC finds noncompliance by recipients which cannot be voluntarily corrected, EEOC's finding will be accepted by the grant-making agency, which will then proceed with sanctions against the recipient.

5. The Executive order should state unequivocally that (1) the Office of Management and Budget may order an agency to take any action the Office of Management and Budget believes necessary for effective Title VI enforcement and (2) if the agency does not comply with that order within 30 days, the Office of Management and Budget shall notify the President of the agency's failure to act.

IV. The President should direct the staff of the Domestic Council to conduct an evaluation, to be completed within 18 months of the issuance of the proposed Executive order, of Federal agency execution of responsibilities to ensure nondiscrimination on the basis of race, national origin, and sex in federally assisted programs, paying special attention to the Office of Management and Budget's execution of the functions of coordination and direction. If the evaluation finds that progress continues to be slow, the President should consider requesting that Congress enact legislation to abolish individual agency Title VI duties and to vest all duties for ensuring nondiscrimination in federally assisted programs within a single agency.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1975 632-835/16

CIVIL RIGHTS ACT OF 1964

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Sections 2000d–d4

§2000d 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.

§2000d–1 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. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§2000d–2 Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

§2000d–3 Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

§2000d–4 Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Sections 2000d5–d6 Omitted

U. S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

POSTAGE AND FEES PAID
U. S. COMMISSION ON CIVIL RIGHTS