U.S. Department of Justice
Civil Rights Division

CIVIL RIGHTS FORUM

Volume 13, No. 1 **Winter-Spring 1999**

Civil Rights Division issues Policy Guidance Document on Title VI enforcement in block grant-type programs

Acting Assistant Attorney General Bill Lann Lee has issued a Policy Guidance Document, entitled "Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs," which responds to agency requests for clarification as to what State block grant recipients permissibly can do to aid Federal authorities in carrying out their Title VI enforcement responsibilities. In a 1996 report concerning Title VI enforcement, the U.S. Commission on Civil Rights suggested that such clarification and guidance was badly needed. While the Policy Guidance Document focuses on Title VI, the principles set forth are also applicable to Title IX and Section 504, as well as various other grant-related nondiscrimination statutes.

The Policy Guidance Document makes clear that while Title VI enforcement is the responsibility of the Federal granting agencies, those Federal agencies may involve State block grant recipients in conducting complaint investigations as well as pre-award and post-award compliance reviews of their subrecipients. While the responsibility for determining compliance or noncompliance with Title VI remains a Federal responsibility that cannot be delegated to recipients, agencies are free to use all the resources at their disposal in seeking creative ways to gather necessary information to make compliance decisions.

While the Policy Guidance Document sets forth in some detail what can be delegated and how it should be done, it allows Federal agencies maximum flexibility to involve their State block grant recipients in Title VI compliance activities, if the states are willing and adequately trained to do so.

For example, a Federal agency may allow a State to investigate and make recommended dispositions of Title VI complaints. However, because determining compliance with Title VI is ultimately a Federal and not a State responsibility, the Federal agency must retain the right to initiate formal enforcement action as well as the right to review a participating State's investigative findings and proposed resolutions.

Similarly, a Federal agency must ensure that recipients and subrecipients maintain sufficient data to allow the Federal agency to determine if Title VI has been violated. However, a Federal agency may delegate to a willing State the responsibility for ensuring that its subrecipients are collecting sufficient data.

The Civil Rights Division encourages agencies to enter into partnerships with their block grant recipients. In this

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way, the resources devoted to compliance may be increased, and those parties closest to potential problems will have the opportunity to resolve them. The Division also suggests that Federal agencies explore other avenues, such as working with State human rights agencies to develop agreements that would allow those State human rights agencies to process Title VI complaints.

The Civil Rights Division hopes that its Policy Guidance Document will create opportunities to leverage the resources devoted to Title VI enforcement. If done with care, the degree of trust and cooperation between Federal grant agencies and State and local recipients can markedly increase, which ultimately will lead to furthering the purpose of Title VI.

The full text of the Policy Guidance Document can be found on the Department of Justice Website at: *http://www.usdoj.gov/crt/grants_statutes/*.

HHS guidance addresses recipients' responsibility to provide services to individuals with Limited English Proficiency

The Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS) has issued guidance for its staff that addresses how recipients of HHS funds should provide services and information in languages other than English to individuals with Limited English Proficiency (LEP).

The guidance provides that recipients may be required to provide language assistance to LEP individuals to ensure that they are effectively informed about, and can effectively participate in, and benefit from, HHS's federally assisted programs, consistent with the requirements of Title VI of the Civil Rights Act of 1964.

The guidance suggests that, in order to determine the language assistance needs of LEP persons, a recipient should assess the points of contact in a program where language assistance is likely to be needed, the non-English languages that most likely will be encountered, and where and how the resources necessary to meet the recipient's responsibility can be obtained.

The guidance emphasizes that recipient health care and social service providers have flexibility in choosing the language assistance options they will employ. For example, small providers and/or providers who serve only one or two language groups may be able to meet their responsibilities by choosing fewer or different options than larger providers and/or providers who serve many language groups.

The guidance stresses the necessity for a recipient to achieve "effective communication" at no cost or additional burden to the LEP beneficiary. In other words, the LEP client should be given information about, and be able to understand, the services that can be provided by the recipient to address the client's situation, and must be able to communicate his or her situation to the recipient service provider.

A recipient can employ a number of options, or combinations of options, to provide language assistance. For example, a recipient may hire bilingual staff or staff interpreters; use volunteer staff interpreters, volunteer community interpreters, or contractor interpreter services; use a telephone interpreter service, such as the AT&T Language Line; or develop a notification and outreach plan for LEP beneficiaries.

Determining which interpreter option(s) best meets the needs of the recipient and its LEP beneficiaries depends upon a number of factors, including the size of the recipient and the LEP population it serves, the setting in which interpreter services are needed, and the proficiency and availability of staff members and/or volunteers to provide interpreter services during a program's hours of operation.

The guidance states that although required interpreter "competency" does not necessarily mean formal certification, competency does mean proficiency both in English and the other language, as well as orientation or training (including the ethics of interpreting), and a fundamental knowledge in both languages of any specialized terms and concepts.

The various options for providing interpreter services to LEP persons have differing weaknesses and strengths, depending on the situation. For example, hiring bilingual staff for certain critical positions involving patient or client contact would facilitate participation by LEP persons. However, this option by itself may be insufficient where there are several LEP language groups to be served.

In determining compliance, OCR will assess the appropriateness of the options chosen, which will vary, depending on the circumstances. For example, a small health care clinic that accepts patients by appointment only and serves a small but significant LEPpopulation may be able to meet its responsibility to its LEP clients by making arrangements for interpreter services on an as-needed basis, and appropriately publicizing the availability of such arrangements. On the other hand, the emergency room in a large hospital located in an area with a larger and more diverse LEPpopulation may require

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bilingual volunteers and contractors as well. OCR's primary concern will be whether the options chosen allow LEP persons equal access and opportunity to participate in the recipient's health and social service programs.

The HHS/OCR guidance expands upon the requirements of the Department of Justice's governmentwide Title VI coordination regulation, issued in 1976, which addresses the provision of language assistance to LEP persons. 28 C.F.R. §42.405(d). The HHS/OCR guidance can be found on OCR's web site at http://www:hhs.gov/progorg/ocr/lepfinal.htm. ❖

Work Group issues draft guidance to implement new race and ethnic data standards

The Office of Management and Budget (OMB) has released for comment draft guidance that addresses, among other things, how agencies can implement the Federal government's decision to permit individuals to select one or more races when responding to requests for data on race and ethnicity. The report, entitled "Provisional Guidance on the Implementation of the 1997 Standards for Federal Data on Race and Ethnicity," was prepared by the Tabulation Working Group of the Interagency Committee for the Review of Standards for Data on Race and Ethnicity, and was issued on February 17, 1999.

In October 1997, OMB issued revisions to the "Standards for the Classification of Federal Data on Race and Ethnicity," which the Federal government uses to collect data (formerly known as Directive 15). The revised Standards changed the racial and ethnic categories and, for the first time, allowed individuals to indicate that they were of more than one race.

As reported in the Summer 1998 issue of the Civil Rights Forum, individuals now can select from among one or more racial categories (American Indian or Alaska Native, Asian, Native Hawaiian or Other Pacific Islander, Black or African American, or White) and can choose between "Hispanic or Latino" or "Not Hispanic or Latino." Alternatively, a combined format may be used in which "Hispanic or Latino" is listed along with the racial categories.

In developing the Provisional Guidance, the Interagency Committee recognized that tabulation guidance must meet the needs of at least two groups within the Federal government. One group is composed of Federal officials charged with carrying out constitutional and legislative mandates, such as redistricting legislatures, enforcing civil rights laws, and monitoring progress in antidiscrimination programs. The second group consists of Federal statistical agencies producing and analyzing data that are used to monitor economic and social conditions and trends. The Interagency Committee seeks comments to ensure that the needs of these groups are met.

Whatever the final outcome, the Interagency Committee recognizes that "it is important that Federal agencies with the same or closely related responsibilities adopt the same tabulation method." Therefore, various civil rights enforcement offices should review the draft guidance to make sure that the tabulation methods under consideration meet their needs.

The full text of the draft guidance may be found on the White House website at: *http://www.whitehouse.gov/WH/EOP/OMB/html/ misc-doc.html.* ❖

Appellate courts further refine sex harassment liability

When a public school student wants to lodge a complaint about sexual harassment, does she have to go straight to the top of the school district?

On January 20, 1999, the Second Circuit issued its ruling in Bruneau v. South Kortright Central School Dist., No. 97-7495 (2nd Cir. 1999). In Bruneau, a sixth grade student alleged that she and other girls in her class were subjected to verbal and physical harassment by their male classmates. The student further alleged that her sixth-grade classroom teacher, an assistant superintendent of the school, and other school officials were aware of the boys'behavior and failed to take action to stop it.

The district court reasoned that since students are not agents of the school district, Title IX liability in a peer harassment case generally cannot be based upon constructive notice. Accordingly, the court instructed the jury that the school could be held liable only if certain employees in a position of supervisory disciplinary authority over the plaintiff and her sixth-grade classmates -- namely, the classroom teacher, the full time guidance counselor, and the assistant school superintendent -- had actual knowledge of the conduct and failed to take action.

Based on the evidence at trial, the jury returned a verdict in favor of the school district. While the case was pending on appeal, the Supreme Court issued

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its opinion in Gebser v. Lago Vista Indep. School Dist., 118 S. Ct. 1998, which held that a recipient of Federal financial assistance may be held liable for damages under Title IX only if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference.

On appeal, the Second Circuit upheld the jury's verdict in Bruneau. The Second Circuit ruled that, in light of the Supreme Court's intervening decision in Gebser, the district court had correctly instructed the jury that the school district could be held liable only if its officials had actual notice of the harassment. The Second Circuit also rejected the student's argument that the list of individuals whose receipt of notice of harassment would constitute notice to the district was not sufficiently inclusive.

The Department of Justice had filed an amicus brief in Bruneau, before the Supreme Court issued its decision in Gebser. In that brief, the United States supported the district court's ruling that recipients of Federal financial assistance can be held liable under Title IX if they have notice of sexual harassment of students by other students and fail to take prompt appropriate action to remedy the harassment. This is the same position the United States urged in its amicus brief in the Supreme Court in Davis v. Monroe County School Bd., No. 97-843.

In its brief in Bruneau, the United States also argued that the district court had erred in instructing the jury that the school board could only be held liable if its officials had actual notice of the harassment. This position was subsequently rejected by the Supreme Court in Gebser.

Finally, the United States argued that the district court had erred in instructing the jury that the school district could be deemed to have notice of the harassment only if teachers with disciplinary authority over the harassing students knew of it. The United States argued that the group of employees whose knowledge of harassment may be imputed to the school district should include not only high level agents, and those with immediate disciplinary authority over the harassing students, but also those who are charged generally with the task of maintaining order, guiding the activities, and overseeing the well-being and safety of the students.

Also prior to the Supreme Court's decision in Gebser, the Eleventh Circuit ruled, in Floyd v. Waiters, No. 94-8667 (11th Cir. 1998), that a school district is not liable for sexual harassment under Title IX, absent evidence that either the superintendent or members of the school board had knowledge of the misconduct and failed to act. Unlike Bruneau, this case did not involve peer sex harassment. In Floyd, two female students filed an action alleging Title IX violations arising out of an incident in which a security guard assaulted and raped one of the students.

Despite evidence that the school board's security supervisor and its director of operations had received complaints and heard rumors of the guard's harassment of other female students and took little or no action in response, the court of appeals affirmed summary judgment for the school board. The Eleventh Circuit reasoned that the Title IX contract established at the time a school district accepts Federal funds incorporates the State law as to which school official is responsible for Title IX enforcement and, in this instance, it was the superintendent. The court determined that there was insufficient notice to the school district at the time of receipt of Federal funds that enforcement responsibilities would extend beyond the superintendent to lower level employees.

The Supreme Court vacated the Eleventh Circuit's decision in Floyd v. Waiters, and remanded the case for reconsideration in light of its decision in Gebser. On remand, the Eleventh Circuit invited the parties to file supplemental briefs on the impact of Gebser. The Department of Justice filed an amicus brief supporting the plaintiffs, arguing that the Eleventh Circuit's earlier decision was inconsistent with Gebser, and that there is sufficient evidence to withstand summary judgment that school board officials with the requisite authority knew of prior sexual misconduct by the employee with another student and responded to that knowledge with deliberate indifference.

No matter what point in the chain of a school district's authority notice of sexual harassment is imputed, one thing is abundantly clear: the Justice Department takes the position that schools that are given the responsibility for educating students are also responsible for ensuring that the learning environment they create for them is not rendered unlawfully hostile by sexual harassment in violation of Title IX. School officials should be held accountable for their own toleration or implicit condonation of a hostile environment.

Editor's Note: The Supreme Court's decision in Davis v. Monroe County School Bd., mentioned in the above article, occurred on May 24, 1999, as this issue of the Civil Rights Forum was going to press. This significant decision will be coved in depth in the next issue. ✦

Something to share? The *Forum* is looking for agency "happenings" and news of interest to otheragencies and the civil rights community. Contact us at: (202) 307-2222 (voice); (202) 307-2678 (TDD), or write to:

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Thomas Perez appointed civil rights director at Department of Health and Human Services

Thomas E. Perez is HHS's new Director of the Office for Civil Rights. (HHS photo.)

Secretary Donna Shalala appointed Thomas E. Perez, formerly a Deputy Assistant Attorney General in the Department of Justice's Civil Rights Division, as Director of the Department of Health and Human Services' Office for Civil Rights (OCR) on February 16, 1999.

Mr. Perez has devoted his entire career to civil rights. From 1989-1999, he worked for the Department of Justice's Civil Rights Division as a trial attorney and as Deputy Section Chief in the Criminal Section. Before becoming a Deputy Assistant Attorney General in 1998, he was detailed to Senator Edward M. Kennedy's office for three years, where he served as principal adviser on civil rights, criminal justice, and certain constitutional issues.

In his new position, Mr. Perez oversees OCR's headquarters operations and ten regional civil rights offices. OCR's activities include uncovering medical redlining and other forms of discrimination that impair access to health care for minorities, ensuring access to health care for individuals with disabilities, and addressing the needs of individuals with limited English proficiency.

Mr. Perez is a graduate of Brown University, Harvard Law School, and the John F. Kennedy School of Government. He served as a law clerk to U.S. District Court Judge Zita L. Weinshienk in the District of Colorado. A first generation Dominican-American, Mr. Perez is married to Ann Marie Staudenmaier, an attorney for the Washington Legal Clinic for the Homeless. They have two daughters. ❖

So ordered . . . Court cases of note

Two court decisions address NCAA's responsibilities under Federal financial assistance statutes

Supreme Court finds NCAA dues insufficient to generate Title IX coverage for NCAA, which may be covered under alternative theories

In a unanimous but narrow ruling on a matter of substantial importance for coverage under Title IX of the Education Amendments Act of 1972 and related statutes, the Supreme Court reversed a Third Circuit case, Smith v. National Collegiate Athletic Association, 139 F.3rd 180 (3rd Cir. 1998), which would have extended Title IX coverage to the National Collegiate Athletic Association (NCAA) by virtue of its receipt of dues from member colleges and universities.

The Supreme Court found that there was no allegation that NCAA members' dues were paid with Federal money earmarked for paying the dues. Relying on that part of the decision in Grove City College v. Bell, 465 U.S. 555, 563 70 (1984), that was not overruled by the Civil Rights Restoration Act, and Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), the Court stated: "Title IX coverage is not triggered when an entity merely benefits from federal funding.... Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not."

The Supreme Court reiterated the distinction, which was sanctioned in Paralyzed Veterans of America, between (1) recipients that receive Federal financial assistance either directly or through an intermediary and, accordingly, are covered by the statute (in that case, Section 504), and (2) entities that only benefit economically from Federal assistance and, therefore, are not covered. The Court concluded that "at most, the Association's receipt of dues demonstrates that it indirectly benefits from federal financial assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage."

However, the narrowness of the Supreme Court's holding is emphasized by the Court's remanding the case to the lower courts for consideration of two alternative grounds for affirmance urged by Ms. Smith and by the United States in its amicus brief: (1) that the NCAA receives Federal financial assistance directly or indirectly from the Department of Health and Human Services (HHS) through the National Youth Sports Program; or, (2) that when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless of whether it is itself a recipient. National Collegiate Athletic Association v. Smith, 98-84 (February 23, 1999)(NCAA v. Smith).

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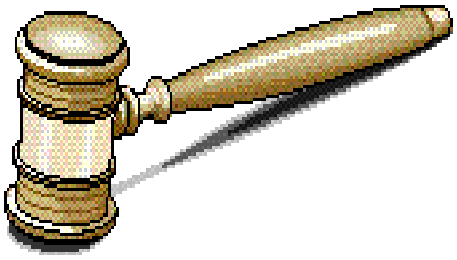
District court finds coverage of NCAA under Title VI and strikes down standardized testing requirements for athletic eligibility and scholarships

The very points that the United States made in its amicus brief in NCAA v. Smith were embraced several weeks later by a U.S. District Court. The Eastern District of Pennsylvania was faced with a Title VI complaint alleging that a requirement (called Proposition 16 or NCAA Bylaw 14.3), which requires that students have a minimum score on one of two standardized tests to participate in intercollegiate athletics or to receive athletic scholarships in their freshman year, had a discriminatory impact on the basis of race.

The district court held that the NCAA is an indirect recipient of Federal funds and, thus, is covered by Title VI because it exercises effective control and operation of the National Youth Sports Program. The court then also stated that the NCAAwas covered by Title VI, irrespective of its receipt of Federal funds, by virtue of the authority federally assisted schools had ceded to it. The court stated:

Whether characterized as a "delegation" or an "assignment" of "controlling authority," "regulation," or "supervision," Plaintiffs have established on this record . . . . that the member colleges and universities have granted to the NCAA the authority to promulgate rules affecting intercollegiate athletics that the members are obligated to abide by and enforce. Under these facts, the NCAA comes sufficiently within the scope of Title VI irrespective of its receipt of federal funds.

The court concluded that the NCAA as well as each member school was subject to Title VI under either the "indirect recipient" or the "controlling authority" theory.



The court then found that Proposition 16 had an unjustified adverse impact on African Americans in violation of Title VI and ordered that athletic scholarships and/or student eligibility for intercollegiate sporting activity during the freshman year of student-athletes no longer be subject to Proposition 16. Cureton v. National Collegiate Athletic Association, 97-131 (E.D. Pa., March 8, 1999).

Department of Justice files amicus brief supporting challenge to public school financing policy

On February 16, 1999, in conjunction with the Department of Education, the Department of Justice filed an amicus brief in Powell v. Ridge, No. 98-2096 (3d Cir.). This case involves a challenge to the scheme for financing public education in Pennsylvania. Plaintiffs, Philadelphia school children, the Mayor of Philadelphia, the Philadelphia School District, and others, sued under Title VI and 42 U.S.C. §1983, alleging that the current school funding system has a disparate impact on predominantly minority school districts, and that its design is attributable, at least in part, to purposeful racial discrimination. They alleged that this system violates Title VI's implementing regulations, which prohibit recipients of Federal funds from using "criteria or methods of administration" that have a discriminatory effect.

The district court agreed with defendants' challenge to standing of the City and school district plaintiffs to sue under Title VI, as well as the standing of several individual plaintiffs who were suing in their official capacities. See Powell v. Ridge, No 98-1223, 1998 WL 804727 (E.D. Pa., Nov. 19, 1998). The court stated that these defendants are political subdivisions (or administrators representing these subdivisions in their official capacities) and, consequently, are not "persons" who can bring a private action under Title VI. The court concluded they were public entities and not entitled to sue the State under Title VI as private individuals could.

The court then determined that the State defendants' Eleventh Amendment immunity does not apply because plaintiffs were seeking prospective relief. However, the court declared that the plaintiffs' allegation that more money was needed to educate primarily poor and minority students did not state a claim of disparate impact under Title VI.

Plaintiffs appealed this case to the Third Circuit. In its amicus brief to the appellate court, the Department of Justice argued that plaintiffs could enforce the Title VI discriminatory effects regulations through 42 U.S.C. §1983, as well as through an implied private right of action. The Department of Justice also argued that plaintiffs' allegation does state a valid Title VI claim, because plaintiffs had alleged expressly that the system had a disparate impact on minorities, and also had alleged sufficient facts for a factfinder to infer that the defendants had engaged in purposeful discrimination.

The Department of Justice's brief also discussed briefly two potential theories of disparate impact liability that plaintiffs might rely on in the trial court: (1) that components of the Commonwealth's funding formula could be challenged for their disparate impact, even if the formula as a whole gave more State revenues to predominantly minority districts, following

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Connecticut v. Teal, 457 U.S. 440, 455-56 (1982); and, (2) that plaintiffs' allegations that the State system for funding education, taken as a whole, has a disparate impact on predominantly minority school districts may state a claim under the disparate impact regulations. The brief also noted that once plaintiffs had made their prima facie case, defendants would be entitled to proffer legitimate justifications for the disparities.

Department of Justice files amicus briefs in two Fourth Circuit cases addressing race as a factor in school admissions

The Fourth Circuit Court of Appeals heard oral argument on January 27, 1999, in Tuttle v. Arlington County School Board, No. 98-1604, in which the Department of Justice entered as amicus curiae. This Virginia case arose from a challenge to the use of race, family income, and the students' first language in the selection of students entering a special kindergarten. The school board defended its use of race on the ground that it had a compelling interest in promoting a diverse student body. The district court rejected the school board's position and held that the use of race could never be justified except when its purpose was to remedy prior discrimination.

The Department of Justice argued in its amicus brief that the educational and social benefits of diversity may be a compelling interest in the context of elementary and secondary education, and that the district court erred in reaching a contrary conclusion without first hearing evidence on the question. The Department of Justice urged a remand to the district court to consider evidence on the benefits of diversity in elementary and secondary education. The amicus brief also argued that the district court could not enjoin the use of language or family income as criteria for student assignment without finding that those factors were pretexts for impermissible racial or ethnic discrimination.

On January 19, 1999, the Department of Justice filed an amicus brief in a second case, Eisenberg v. Montgomery County Public Schools, No. 98 2503, supporting the Maryland county's efforts to avoid the racial isolation in its public schools.

In this case, the plaintiffs claimed under the equal protection clause of the Fourteenth Amendment that the school district discriminated against them when it refused to reassign their son to a "magnet program" because he was white. The district court refused to enter a preliminary injunction ordering the school district to allow plaintiffs' son to transfer out of his neighborhood school -- a school that had been losing significant numbers of white students in recent years. The court found that the harm to the white student from refusing to transfer him was outweighed by the negative effect on the schools of becoming racially isolated.

The district court found on the merits that the school district had a compelling interest in refusing to allow transfers that would result in racially isolated schools. The Department of Justice's amicus brief likewise argued that school districts have a compelling interest in guarding against resegregation, and that the district court properly denied the preliminary injunction pending a trial on the merits that would consider the strength of the school district's interest and whether the policy as implemented is narrowly tailored.

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Attorney General.

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