

LEADERSHIP CONFERENCE EDUCATION FUND

CIVIL RIGHTS MONITOR

disk #1

vol. 2, no. 4

JUNE/JULY 1987

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FAIR HOUSING LEGISLATION ADVANCES

In testimony before House and Senate Subcommittees this Spring, many witnesses testified to the need for strengthening the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968), which prohibits discrimination in the rental, sale, marketing, and financing of the Nation's housing. The Fair Housing Amendments Act (S558/HR1158) introduced in the 100th Congress by Senators Edward M. Kennedy (D-MA) and Arlen Specter (R-PA) and Representatives Don Edwards (D-CA) and Hamilton Fish, Jr. (R-NY), would strengthen the enforcement provisions of the Fair Housing Act and expand the protected classes to include disabled persons and families with children. The bill was introduced in response to widespread evidence that families and disabled persons who encounter discrimination in the housing market do not have an effective remedy. While the Department of Housing and Urban Development has primary responsibility for the enforcement of the Fair Housing Act HUD "is significantly hampered in its power to require compliance with Title VIII because if it finds discrimination, it can only use informal persuasion to bring about compliance" (U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974 Volume II To Provide ... For Fair Housing (December 1974)).

Enforcement through the courts by private individuals is a long and costly process. The Department of Justice is limited to "pattern and practice" cases, or cases raising an issue of general public importance and thus does not bring suit on behalf of individual families. During the period from November 1, 1983 through January 31, 1987, DOJ filed a total of 53 lawsuits, fewer than 18 per year. The amendments would strengthen HUD's enforcement mechanism by providing a simple and inexpensive administrative remedy: HUD would represent a complainant with a valid case before an Administrative Law Judge who would be able to award equitable and declaratory relief as well as compensatory and punitive damages to a prevailing complainant.

The Hearings

The Senate Subcommittee on the Constitution held six days of hearings followed by six days of hearings in the House Subcommittee on Civil and Constitutional Rights. Witnesses in both the House and Senate provided evidence of continuing and pervasive housing discrimination. Mr. Arthur L. Blackwell, Jr. provided gripping testimony about his experience with housing discrimination:

On January 30, 1983, I tried to purchase a house in an all-white block of a predominantly white area in Richmond, Virginia... The seller, who was friendly and appeared eager to sell her home rejected 3 contracts, and on February 2, wrote a letter indicating she was selling her home to a white couple at a lower price than the price I had offered [\$7,000 lower than Mr. Blackwell's highest offer]... When I asked my agent if race was an issue, she said that some racial comments had been made.

...I filed a complaint against the realtor, seller and agent... [and] was referred to Housing Opportunities Made Equal (the local private fair housing organization in the Richmond Metropolitan area).

The information received from H.O.M.E. was discouraging. I learned that there are many cases of discrimination in housing, that they are not easily resolved and most of the complainants do not ultimately move into the house that they originally wanted. I remember leaving the office feeling terribly distressed and angry knowing that a group of whites had so easily prevented me from purchasing a home. This was not 1920 or 1950; but 1983, a time when there were laws to prevent this type of injustice from occurring.

What I have experienced is not an isolated incident. It occurs frequently, often without the victims knowing that they have been mistreated. You, the members of this committee cannot change the way people think or treat minority classes; but you can take steps to insure that it is not easy to unlawfully discriminate against them. I urge you to prevent this type of behavior from recurring, to support the public and private organizations which fight discriminatory practices in housing, and to severely punish the offenders.

The MONITOR summarizes below the hearing testimony on discrimination against families with children and the disabled, and on the Administrative Law Judge enforcement provisions.

Discrimination Against Families with Children

The latest national studies of this issue, prepared for HUD in 1980, found that 25.5 percent of all rental units in the U.S. did not allow children, and another 50 percent had policies which restricted the ability of families with children to rent the units. Such restrictions included limits on the number of children who could occupy a unit, limits on the number of units in an apartment complex where families with children could reside, lower limits on the age of children occupants, and prohibitions on children of the opposite sex sharing the same bedroom (See testimony of James B. Morales, Staff Attorney for the National Center for Youth Law, Before the House Subcommittee on Civil and Constitutional Rights, May 6, 1987).

Since 1980, studies of state and local practices have confirmed the HUD findings:

- o A survey of a sample of apartment complexes in Sacramento, California in 1983, a year after the State prohibited adults-only rental housing, found that 40 percent of the units "engaged in differential and discriminatory treatment toward families with children. The most common form of discrimination was the restriction of families with children to certain units or sections of an apartment complex. Other reported practices included misrepresentation of the availability of the unit, discouragement of families with children from applying, and limitations on the number of children per apartment" (See Morales testimony).

- o A survey of 96 landlords (11,000 rental units) in Des Moines, Iowa revealed that 48 percent of the landlords did not rent to families with children.

- o The Connecticut Commission on Human Rights and Opportunities recently concluded after holding hearings on housing discrimination throughout the state that while the state has a nondiscrimination law "families with children are overtly and illegally discriminated against" (See Morales testimony).

- o In Irving, Texas, a suburb of Dallas, only 13 of the 40 apartment complexes built since 1983 accept families with children.

- o In Atlanta, Georgia, 25 percent of large apartment complexes do not rent to families with children.

James Morales testified that restrictions on the age of tenants disproportionately result in discrimination against minorities:

Adults-only housing policies disproportionately and adversely affect racial and ethnic minority families in at least two ways: 1) Black, Hispanic and other minority households are significantly more likely than white families to have children; therefore, age-restrictions have the potential of denying housing to a larger proportion of the minority households than of the white households. 2) Adults-only housing tends to be concentrated in newer developments that are in predominantly white areas; therefore, the existence of no-children policies forces minority households with children into non-white areas and thus reinforces racially-segregated patterns of housing.

A 1985 survey of state and local fair housing agencies that handle complaints of housing discrimination documented the severity of the problem, with nearly 90 percent of the respondents citing family discrimination as severe and 59 percent as very severe.

Opponents of the inclusion of familial status as a protected status include the Reagan Administration and the National Apartment Association (a trade association of owners, developers, managers, and industry suppliers of multifamily rental units and condominiums). Wm. Bradford Reynolds, Assistant Attorney General for Civil Rights, in testimony before the House Subcommittee on Civil and Constitutional Rights, testified: "No other federal civil rights

statute prohibits discrimination based on familial status. Its inclusion in the Fair Housing Act would dramatically extend the reach of the federal government." He continued, "housing discrimination based on familial status is not so wholly arbitrary that it should drain federal resources from the enforcement effort against more egregious forms of housing discrimination, such as those based on race, color, national origin, sex, religion, and handicap." As noted above, supporters of extending protection to familial status argue that it can be used as a disguise for sex and race discrimination.

The National Apartment Association in testimony provided to the House Subcommittee, asserted that this is a problem best addressed locally as the "problem differs nationally because the markets differ so radically nationwide."

Local governments can better identify their housing needs and design a customized solution based on the demands of the market. There is no reason to outlaw an all adult facility when there is an adequate supply of housing for families. There is no need for federal legislation to address a problem that can better be handled locally.

The bill provides an exemption for retirement communities and for dwellings intended and operated for senior citizens.

Discrimination Against Disabled Persons

The bill would make it unlawful to refuse to rent or sell to a physically or mentally disabled person solely because of that person's disability, and to refuse to allow reasonable modification of the premises by the disabled tenant. Marca Bristo, President of Access Living, a Center for Independent Living testified on the extent of discrimination against disabled persons in the housing market. Examples from her testimony follow:

A deaf woman was not allowed to complete an application for an apartment because the rental agents assumed she was not competent.

A young man with mild mental retardation, living in the District of Columbia, was told no rental units were available after he was observed getting assistance in reading his application. His previous rental history was impeccable and his income was more than sufficient. The units were re-advertised the following weekend.

A family with a child who was severely disabled by an accident was forced to leave their rent-controlled apartment when some minor modifications to the bathroom were disallowed. The increased rents they paid for their new setting exacerbated the already serious financial problems which they faced in meeting their daughter's care costs.

Edwards Roberts, co-founder of the World Institute on Disability, and the first severely disabled person to be named Director of the California State Department of Rehabilitation, testified about his personal experiences with discrimination:

As recently as 1984, a landlord told me "OH, MY GOD....I COULDN'T HAVE AN

IRON LUNG LIVING HERE... CAN YOU IMAGINE WHAT THE NEIGHBORS WOULD SAY." "On another occasion I was told that "WE DON'T HAVE INVALIDS LIVING IN THIS NEIGHBORHOOD." Several landlords have explained "YOU CAN'T LIVE HERE. POLIO IS CONTAGIOUS - MY FAMILY CAN CATCH IT." It didn't matter that I was a public official or even a MacArthur Fellow. What mattered was that I was disabled.

Assistant Attorney General Reynolds testified that while the Administration supports the inclusion of disabled persons as a protected class, language should be added to the bill "requiring that renters agree in advance to restore the premises to their original condition prior to any modification, reasonable wear and tear excepted." The Assistant Attorney General also argued that the definition of handicap should exclude "any current impairment that consists of alcoholism or drug abuse, or any other impairment that would be a direct threat to the property or the safety of others."

The National Association of Realtors in testimony before the House Subcommittee stated that "[a] preferable definition of 'handicapped' would be one that clearly specifies that 'handicapped' means an impairment of a person's ability to see, hear, walk unaided, or live unattended." Second, the National Association endorses the Justice Department's recommendation that 'handicapped' not include drug or alcohol abuse, or other impairments that could present a threat to the safety or property of others."

Mr. Roberts testified that it was imperative "that the definition of handicap remain consistent with the definition currently in place under Section 504 of the Rehabilitation Act to insure that all people with disabilities are adequately protected." He further stated:

The opponents of this legislation appear to be arguing that there are acceptable and unacceptable types of disabled people. They seem to suggest that this Committee would be willing to differentiate among those members of a minority to whom protections would be extended. If what was in question was protections for a lighter skinned person over a darker skinned person, I believe that there would be no deliberation by this Committee. Certainly it is this kind of arbitrary and capricious decision-making which prompted Congress to pass the Fair Housing Act originally. We urge you not to construct a bill that makes choices about which disabilities are more acceptable, which merit protection. Bigotry and fear bring us here today to argue that ALL Americans should be covered by this Act.

Further, proponents of the bill argue that language excluding "any current impairment that consists of alcoholism or drug abuse, or any other impairment that would be a direct threat to the property or the safety of others is not necessary because landlords will retain the right to refuse to rent to individuals with a history of poor tenancy. Landlords will be able to screen disabled applicants just as they screen other applicants as to, for example, employment history, credit rating, previous history of tenancy.

Administrative Law Judge Enforcement Provision

The Fair Housing Act of 1987 would strengthen HUD's enforcement mechanism by providing an administrative remedy that proponents say is simple and inexpensive. If HUD determines that a complaint of housing discrimination is

valid and is unable to resolve the complaint through conciliation, the agency will file a charge on behalf of the complainant with an Administrative Law Judge. The complainant has the right to intervene in the proceeding and the decision of the Administrative Law Judge may be appealed to the federal court of appeals for the circuit in which the discriminatory practice is alleged to have occurred. If discrimination is found by the Administrative Law Judge, equitable and declaratory relief (including orders requiring the respondent to sell or rent the house to the complainant) as well as compensatory and punitive damages may be awarded. Similar types of administrative enforcement procedures are used by 28 other federal agencies and departments. The bill also provides for an application to a federal court for an order to hold a house or apartment off the market while the case is being decided.

Proponents argue that this enforcement mechanism will provide a more efficient, less costly means of addressing housing discrimination. Victims of housing discrimination will be more likely to file complaints with HUD, and respondents will be more likely to conciliate complaints if HUD is provided with the ALJ procedure. HUD estimates that two million instances of housing discrimination occur each year, yet fewer than 5,000 complaints are filed each year with HUD and only a comparative handful are successfully conciliated by the Department. Martin Sloane, Executive Director of the National Committee Against Discrimination in Housing, in testimony before the Senate Subcommittee on the Constitution, stated that the administrative law judge procedure would:

...constitute a dramatic improvement over the toothless conciliation process to which HUD is now limited. By affording a realistic opportunity for redress to housing discrimination victims, it would provide a strong incentive for them to file complaints. By providing the realistic promise of speedy and expeditious enforcement, it would provide a strong incentive for complainants and respondents to conciliate well before the hearing process even begins. We estimate that the new administrative enforcement procedure under S.558 will result in a many fold increase in the number of complaints and, equally important, an even greater increase in the number of successful conciliations.

The Administration opposes the ALJ procedure. Assistant Attorney General Reynolds in testimony before the House Subcommittee stated:

While we fully support the goal of providing victims of discrimination with speedy, inexpensive and effective redress, we remain convinced that channelling complaints through the administrative bureaucracy envisioned in HR1158 will not serve any of these goals. Because it contemplates sending large numbers of complaints through formal administrative adjudication, including review by a court of appeals, the administrative procedure will not provide speedy or effective relief for individuals who have been denied housing.

Testimony by Victor W. Palmer, Chair, National Conference of Administrative Law Judges, and Judge Isaac D. Benkin, President, Federal Administrative Law Judges Conference, took issue with Mr. Reynolds' assertion that the ALJ process would not afford speedy, inexpensive and effective redress. Judge Benkin testified:

When we look at programs analogous to the one that would exist under the

Fair Housing Amendments Act of 1987, we find that disputes resolution through the medium of hearings conducted by administrative law judges under the Administrative Procedure Act are relatively prompt, flexible, and inexpensive. This is particularly true when these proceedings are compared with trials in civil actions in the United States District Courts.

Similarly, Mr. Palmer stated "that a trained administrative law judge would easily and expeditiously resolve [discrimination cases]. The latest available published data on ALJ hearings show relatively swift adjudication of discrimination claims."

Mr. Reynolds said that a survey of government agencies employing administrative law judges or their equivalent revealed the following average times for the processing of complaints: the National Labor Relations Board (1986) 25.6 months; the Social Security Administration 14 months; the Federal Labor Relations Authority 15.5 months and the Department of Labor 13.3 months in black lung cases, excluding judicial review. In contrast, Mr. Reynolds stated that the average processing time for all civil rights cases in federal court, excluding employment cases, is 11 months.

Messrs. Benkin and Palmer countered in their testimony that the Reynolds' survey was very selective, including only two types of cases which involve complex laws and facts, heard by only four agencies. They shared data on ALJ hearings that demonstrate relatively swift adjudication of discrimination claims. For example, during 1976-78, HUD averaged 9.1 months from the date a complaint alleging discrimination by a recipient of HUD funds was referred to an ALJ for hearing, to the date the ALJ issued a decision and order. Further, they contended that Mr. Reynolds' figures for ALJs included the time the case was before the agency prior to a filing with the ALJ.

They further asserted that Mr. Reynolds' figure of 11 months for adjudication of civil rights cases in federal court was misleading as it included weak cases dismissed by way of summary judgment. The only fair comparison, they asserted, is between cases in federal court that are subject to trial on the merits, and the length of time administrative cases are actually before the ALJ.

Citing data from the Administrative Office of the United States Courts, Statistical Division (1986), their testimony established that "[t]wenty months was the median time from filing to termination for employment civil rights cases in litigation, and 19 months was the median for all other civil rights cases going to trial. Of litigated civil rights cases, ten percent of the employment cases were in the federal courts for more than 45 months--nearly four years--before they were resolved, and ten percent of all other civil rights cases were in the federal courts for more than 43 months." Further, as of June 30, 1985, 2,273 civil rights cases had been pending in federal district courts three or more years.

Status of the Bill

The bill was reported out of the Senate Subcommittee on the Constitution on June 23, 1987. Full committee markup is expected in July, and similar action in the House is also scheduled in July.

HOUSE COMMITTEE CITES HHS FOR LAX CIVIL RIGHTS ENFORCEMENT

In a report issued on April 15, 1987 the House Committee on Government Operations found serious problems with the Office for Civil Rights' enforcement procedures. The Committee suggests that HHS's failure to enforce the Hill-Burton Act may have resulted in the death of a three-year-old child (see page 10). The report (Investigation of the Office for Civil Rights in the Department of Health and Human Services) is based on investigatory hearings held last August by the Human Resources and Intergovernmental Relations Subcommittee, and a review of OCR case files, internal memoranda, correspondence, and other data.

A number of the problems uncovered through the investigation were reported in the October 1986 and the January 1987 CIVIL RIGHTS MONITORS. Below, we report excerpts from the findings of the committee with examples from OCR case files.

OCR has responsibility under several statutes for ensuring nondiscrimination in federally assisted programs. They include Title VI of the Civil Rights Act of 1964 (race), Section 504 of the Rehabilitation Act of 1973 (disability), and the Age Discrimination Act of 1975. OCR is also responsible for compliance with the Hill-Burton Act which requires health care providers receiving federal funds to make their services "available and accessible" to their communities.

The House Committee's Findings

"OCR HAS UNNECESSARILY DELAYED CASE PROCESSING, ALLOWING DISCRIMINATION TO CONTINUE WITHOUT FEDERAL INTERVENTION"

Between July 22, 1981 and January 3, 1986, 61 cases were referred to OCR headquarters by HHS regional offices. As of March 18, 1986, the cases ranged in age up to 2,762 days and in some cases had languished in headquarters for as long as 1,700 days... Much of the delay was due to administrative sloppiness, with OCR staff reporting that case files were lost, or had sat on the Director's desk for many weeks without action. The Office of the General Counsel (OGC), where cases were apparently sent for legal analysis, also caused long delays.

A serious example of headquarters delay is found in OCR's handling of a complaint involving the State of Michigan's Department of Mental Health. On October 1, 1980, a Section 504 complaint was filed with OCR against that agency, alleging the State's failure to provide services to mentally handicapped persons. The complaint was later amended to include discrimination on the basis of race. As of March 18, 1986, this case was five years and 169 days old, yet still unresolved and in headquarters, where it had been for nearly three years.

"OCR's VOLUNTARY COMPLIANCE AGREEMENTS IN DISCRIMINATION CASES ARE INSUFFICIENT TO ACHIEVE COMPLIANCE WITH FEDERAL CIVIL RIGHTS LAWS AND DO NOT SECURE ADEQUATE REMEDIES FOR INJURED PARTIES. IN ADDITION, THEY ARE NOT MONITORED TO ASSURE THAT RECIPIENTS ADHERE TO THE REQUIREMENTS OF THE AGREEMENT"

OCR's Investigative Procedures Manual requires that all proposed non compliance letters of findings (LOF's) must be forwarded to headquarters in draft form for review and approval before being sent to a recipient that has been found in violation of the law. Because of the inordinate case delays in headquarters, regional office staff attempt to circumvent the headquarters logjam by negotiating voluntary compliance agreements in cases where serious violations have occurred. These agreements, in many cases, did not determine (1) that steps would be taken to overcome the effects of the discrimination, (2) that the discrimination had ceased, and (3) that steps had been taken to prevent the recurrence of the discriminatory behavior.

A Title VI complaint gives a[n]... illustration of an inadequate settlement by OCR. The complaint alleged that a staff physician at Roosevelt Memorial Hospital in Culbertson, Montana, had refused emergency treatment to Native Americans because of their race and had, among other abuses, let a Native American child die by denying him services. The hospital refused to cooperate with OCR and denied access to their records for nearly a year. The case was three years old in March of 1986, before the problem of denial of access to information was resolved or the investigation was completed.

After the investigation, the regional manager directed the staff to draft a voluntary compliance agreement -- rather than a letter of findings citing a violation of Title VI -- even though information in the case file demonstrates that (1) the hospital had refused to provide requested information to OCR for a year, and (2) there was gross negligence and stereotyping of indigent Native Americans that had resulted in serious injuries to that population.

Such a voluntary compliance agreement [with the Roosevelt Memorial Hospital], in lieu of a letter of findings indicating a violation or an enforcement action to gain access to recipient data, is unsatisfactory in all cases. In this case, beneficiaries were subjected to life-threatening discriminatory treatment. In cases such as the Roosevelt Memorial Hospital complaint, where Native Americans or other protected populations are being refused critical emergency care, OCR's investigation and findings have minimal value when OCR's apparent proclivity is to spare the recipient embarrassment. It raises questions about whether the agreement can be enforced in a court of law.

This practice also has the effect of muddying the compliance status of the recipient and therefore its eligibility to receive HHS funds. As soon as OCR's investigation reveals a violation and until adequate correction of the violation is obtained via a compliance agreement, the recipient is technically ineligible to receive HHS funds. When OCR makes such a finding but does not formally declare it, the recipient retains eligibility. Then, when the compliance agreement is not monitored, the recipient may continue to engage in the discriminatory practice while receiving HHS funds.

"OCR ROUTINELY FAILS TO FORMALLY CHARGE RECIPIENTS WHO HAVE VIOLATED FEDERAL CIVIL RIGHTS LAWS. OCR ALSO FAILS TO BRING TO FORMAL ADMINISTRATIVE OR JUDICIAL ENFORCEMENT, CASES IN WHICH OCR HAS BEEN UNABLE TO NEGOTIATE A SETTLEMENT AGREEMENT"

The subcommittee found that, for both complaints from citizens and agency initiated compliance reviews, the number of noncompliance letters of findings (LOF's) issued to recipients found in violation of law had dropped from 85 in 1981 to three in 1985. OCR's explanation [that it has been achieving more voluntary compliance] left the subcommittee unable to determine what violations were corrected and how they were corrected through negotiations, for in cases that were settled with voluntary agreements, there was no OCR statement of what the violations were.

OCR by law cannot negotiate a correction that has not been formally identified in a letter of findings and transmitted to the recipient. Therefore these voluntary agreements have no legal standing.

The issuance of a letter of findings should be a routine event following every investigation. The LOF should lay out the issues discovered and illuminated by the investigation. If no violations are found in the investigation, none are presented in the LOF; if violations are found, the LOF should describe them and the recipient is then formally charged with a violation of Federal civil rights law. The LOF with violations should be followed by attempts by OCR to secure voluntary corrective action.

"OCR FAILS TO ENFORCE THE COMMUNITY SERVICE ASSURANCE REQUIREMENT FOR HOSPITALS BUILT WITH FEDERAL FUNDS PROVIDED UNDER THE HILL-BURTON ACT FOR PUBLIC MEDICAL FACILITY CONSTRUCTION AND MODERNIZATION"

The Hill-Burton Act provides that any person residing in the service area of the hospital may not be denied emergency medical services. In her testimony before the subcommittee on August 6, 1986, Sylvia Drew Ivie, a former Director of OCR, criticized OCR's present leadership for failing to enforce the community service assurance in Hill-Burton hospitals. The Office for Civil Rights has failed to inform Hill-Burton hospitals and other medical facilities of the community assurance requirements. No technical assistance has been offered, no guide or manual has been written and distributed and no policy interpretations have been developed and circulated for facilities to use in adhering to the community service assurance requirements. The Committee concluded that the egregious violations that have occurred in these hospitals are therefore not surprising.

For example, in August 1984, a three-year-old girl with spinal meningitis was denied emergency care by the Richmond Memorial Hospital in South Carolina because her family had neither money nor insurance. The child was sent to another hospital 125 miles away where she subsequently died, most likely because of the delay in treatment, according to the physicians who finally treated her.

Another case involved an uninsured man with severe burns on 45 percent of his body as a result of an automobile accident in December 1984. He was denied treatment for lack of insurance by the Vanderbilt University Medical Center Hospital in Tennessee. After the man was transferred to an Army hospital 1,000 miles away, it was necessary to amputate his leg.

Committee Recommendations

The Committee makes 14 recommendations to address the serious enforcement problems at HHS. They include recommendations that (1) OCR establish a tracking system for cases in headquarters and in the regional offices to eliminate the excessive delays in processing complaints, (2) that OCR develop guidelines to ensure that all compliance agreements achieve compliance with Federal civil rights laws and secure adequate relief for injured parties, and (3) that OCR take a more aggressive posture regarding enforcement of the community service assurance requirements for hospitals built with the assistance of funds authorized under the Hill-Burton Act.

Interested readers may obtain a copy of the report from the House Committee on Government Operations, 2157 Rayburn Bldg, Washington, D.C. 20515. After reviewing the report, readers should feel free to share their comments with the Chair of the Committee, Rep. Jack Brooks (D-TX) or Chair of the Subcommittee, Rep. Ted Weiss (D-NY).

DEPARTMENT OF EDUCATION FAILS TO ENFORCE DESEGREGATION OF HIGHER EDUCATION

The Office for Civil Rights (OCR) in the Department of Education has been accused of foot dragging, defiance and deception in enforcement of the Nation's civil rights laws. In hearings before the House Subcommittee on Human Resources and Intergovernmental Relations, witnesses testified about OCR's failure to require states to eliminate their dual segregated systems of higher education, and about lax enforcement of Title IX (sex discrimination). The Office is in such disarray that employees have admitted to backdating of documents to conceal failure to meet court ordered timeframes for handling discrimination complaints.

Background

OCR has responsibility for enforcement of federal statutes that prohibit discrimination in all education programs and activities that receive federal funds: Title VI of the Civil Rights Act of 1964 (race), Title IX of the Education Amendments of 1972 (sex), Section 504 of the Rehabilitation Act of 1973 (handicap), and the Age Discrimination Act of 1975.

OCR investigates charges of discrimination when individuals or groups file complaints with the Department. OCR also initiates compliance reviews based upon information gained from surveys OCR conducts. Since 1966 OCR has collected public school enrollment data by race, and more recently by sex, disability and English language proficiency.

In 1970 the NAACP Legal Defense Fund filed suit against the Department of Health, Education and Welfare (now the Department of Education) to compel the Department to enforce Title VI in the southern and border states and require desegregation of public schools on all levels, Adams v. Richardson. In 1974, a similar case was filed, WEAL v. Weinberger to compel enforcement of Title IX beginning with promulgation of regulations.

The Adams Case

The District Court held in 1973 that "continuation of HEW financial assistance to segregated systems of higher education in the ten States violate[d] the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964." In the decade following the filing of the Adams case most of the de jure public school districts in the South were desegregated. However, the higher education component of Adams "has been a series of disappointments and evasions..." (See testimony of Julius L. Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund). Elliott C. Lichtman, counsel for the plaintiffs in the Adams case testified that the reasons the suit was brought in 1970 unfortunately still characterize OCR's enforcement efforts today. OCR continues to refuse "to decide compliance issues or ha[s] delayed those decisions for protracted periods of time..." and has refused "to commence enforcement proceedings against state systems of higher education despite the clearest evidence of Title VI noncompliance by the states." This persists despite numerous judicial decrees requiring OCR to enforce Title VI in the higher education area and establishing specific timeframes and procedures for the enforcement of Title VI, as well as OCR's own findings that the states have not eliminated the vestiges of segregation after three cycles of plans from the states committing themselves to desegregation of the systems.

The latest data from the states clearly document that they have not met their obligations to desegregate their higher education institutions. OCR, however, continues to drag its feet and rather than finding the states in noncompliance and initiating enforcement proceedings, has begun another review process. OCR prepared "summaries" of the states' efforts to desegregate their dual systems and disseminated them for public comment. Comments were due to OCR by June 8, 1987 and a letter of April 22, 1987 from Alicia Coro, Acting Assistant Secretary for Civil Rights to staff of the CIVIL RIGHTS MONITOR states: "After the comment period, which ends June 8, OCR will determine whether a State is in compliance with Title VI of the Civil Rights Act of 1964 and advise each State what further action is required." Gloria Wilkinson, Special Assistant to the Acting Assistant Secretary, in a telephone interview with MONITOR staff indicated that the office is in the process of reviewing the comments from the states and a few citizens, and should have completed this process by mid-August at which time the Office will issue a statement indicating whether the states are in compliance.

Elliott Lichtman in testimony before the Subcommittee reasoned that this was yet another delaying tactic:

OCR.. refuses to make this evaluation of whether the states have carried out their goals and commitments under their ... plans... More than one year has now passed since OCR received the fall of 1985 student and faculty data central to this decision. After holding these data and the on-site institutional reports over all of this time, OCR has now decided not to decide. Instead, it has issued "factual summaries" to the states and to the public calling for comments within 60 days, without deciding whether the states have met their plan commitments and whether the states are in compliance with Title VI. These 1987 summaries are primarily drawn from information supplied by the states themselves. What reason can there be for this unprecedented 60-day comment period except to give OCR a mechanism for

further delay? Moreover, in addition to giving OCR a mechanism for additional delay, the "comment" device will provide each of the states with a wholly unnecessary opportunity to submit self-serving protestations which will attempt to rationalize their continuing failure to carry out their commitments. After three cycles of plans over 13 years--each time entailing formulation, submission and negotiation of the plan, a period for implementation and massive failure to achieve desegregation--it is time for OCR to bite the bullet: find the states out of compliance and commence formal enforcement proceedings against them.

The State of Georgia

Mr. Lichtman's testimony provided an evaluation of one state, Georgia. This evaluation clearly documents that Georgia has defaulted on its commitment to eliminate its dual system of higher education and is representative of the lack of progress made by the other states. Excerpts from Mr. Lichtman's testimony follow:

Georgia pledged in 1978 to enhance its traditionally black institutions (TBIs) by improving their physical facilities, academic programs and services offered to students and faculty. In 1984 OCR informed Georgia, as it had on several occasions, that it had 'found significant and recurring problems regarding the efforts to enhance the traditionally black institutions'... [T]he state promised to seek up to \$15 million in special construction funding for the three traditionally black schools between 1979 and 1984, and identified specific projects to be completed. As of 1985 only about half the promised funds had materialized. Four buildings were scheduled for renovation: one has received minor improvements but funds are considered unavailable for the complete renovation university officials say is needed; one is funded but still under design; and two have been declared not in need of renovation. Eight new buildings were to be constructed; two are funded and under construction; two were funded in 1985; and four are not even reported to be funded, let alone built...

Throughout the period of Georgia's plan, blacks have entered college at only half the rate of whites or worse although parity was the goal. The disparities have grown worse, in recent years, with the black rate sinking to only 38% of the white rate in the most recent year reported, 1985-86. While blacks have become an increasing percentage of high school graduates in Georgia, they have declined as a proportion of overall undergraduate enrollment.

Despite the magnitude of this inequity the state has done little to alter it. Only a few statewide measures were undertaken; one was a brochure to be distributed among blacks whose development was delayed so long that it was late even for the 1985-86 recruiting... Advertisements run pursuant to the plans made no reference or special appeal to black students.

Georgia committed itself to increase black enrollment at the TWIs substantially. The number and percentage of black students at these institutions has increased since 1978, with particular progress in the last two years. However, the state has still achieved only about 75 percent of its goals.

None of Georgia's traditionally white four-year institutions has ever achieved its goals for either black faculty or black administrators at any level, and for the most part they have not even come close.

Although blacks constitute over 25 percent of Georgia's population, during most years of the state's plan only two of 15 members of the Board of Regents were black. That number was increased, but only recently, and only to three.

OCR is seeking dismissal of the Adams case, arguing in part that plaintiffs do not have standing to challenge defendants' abdication of their civil rights enforcement responsibility. Standing is the legal requirement that a plaintiff suing must show that (s)he has sustained or is in immediate danger of sustaining a direct injury or harm to an interest of the plaintiff as an individual, not just as a citizen, one shared by the public at large.

Backdating of Documents

Timeframes established pursuant to court order require OCR, among other things, to acknowledge in writing to a complainant receipt of a complete complaint within 15 days, and to send a letter of findings within another 90 days indicating whether a violation has occurred. OCR then has 90 additional days to attempt to secure voluntary compliance and an additional 30 days before it must begin formal enforcement proceedings against the discriminating institution.

OCR is required to issue findings from compliance reviews within 90 days of commencing the review. It has 180 days from the beginning of the review to attempt voluntary compliance when violations are found, and an additional 30 days before being required to initiate formal enforcement proceedings. In limited circumstances, the court order allows for tolling (interruption of the case processing) of complaints and compliance reviews.

OCR has consistently had difficulty in meeting these timeframes, and recently it has been documented by the Department of Education's Inspector General and by the office itself that acknowledgments and letters of finding have been backdated to cover up missed deadlines in a majority of OCR's 10 regions. The tolling provisions have also been misused, and OCR personnel have attempted to get complainants to drop their cases when the time frames were not met.

The Inspector General's report on interviews with employees provided the following examples (see testimony of Marcia Greenberger, Managing Attorney, National Women's Law Center).

One legal technician said she was told on occasion by the former director of the Elementary and Secondary Education Division or by a branch chief to backdate LOFs. Backdating was common knowledge and had been prevalent in OCR for two or three years, she said.

A former branch chief and an equal opportunity specialist said they signed and dated -- correctly -- the LOF in a particular case only to be ordered later by the same division director to change the date to reflect compliance with Adams.

One attorney said that 50 percent of the acknowledgments and LOFs she saw were backdated.

In addition to backdating OCR attempted to cover up its failure to meet the deadlines by urging complainants to drop complaints when the deadlines were not met. "[O]ne OCR employee told the Inspector General representative that where a proposed adverse finding was under review in a 1985 case, the then [OCR] Director of Boston's Elementary and Secondary Education directed her 'to contact the complainant and attempt to persuade the complainant to withdraw the complaint so that the June 30, 1985 deadline would not be missed'" (see Lichtman testimony).

Abuse of the tolling provision [the court order allows for interruption of case processing in limited circumstances] was documented in five regions. A review of 54 files in Region IX revealed that ten cases had been tolled twice, and five had been tolled on three occasions. Moreover, twenty-one files contained no explanations for the tolling or any indication of supervisory approval. Abuse of this provision is clearly documented by one case which was tolled twice because a witness was on vacation in August 1984 and July 1985. Because of a one month vacation by the witness in 1984 and 1985, the case was tolled for 10 months in 1984 and another 10 months in 1985. Many of the cases were tolled because of vacations, but the tolling extended well beyond the vacations.

OCR's Response

Alicia Coro, Acting Assistant Secretary for Civil Rights, testified that "OCR has investigated and effectively dealt with the discovery of certain case processing irregularities in 6 of OCR's 10 regional offices." Ms. Coro further asserted that she discovered the backdating during a visit to the Boston Regional Office in July 1986, and that since that time she has implemented a number of policy -- as well as personnel -- changes to ensure that nothing like this ever happens again. To demonstrate the effectiveness of the new policy, she offered statistics showing that the number of cases in a tolled status declined from 258 cases in February 1986 to 74 cases in February 1987.

Marcia Greenberger as a witness stated:

All of these corrective actions are well and good, but we question whether OCR has done enough to inform itself of the root of the problem and its true magnitude. Certainly with respect to Regions II through X, a thorough review has yet to be done, even on the narrow question of backdating. The samples of case files that OCR examined were extremely limited, based on an unsupported assumption about which cases would be more likely to contain backdated acknowledgments and LOFs. Moreover, no employees other than the regional directors were allowed to comment as part of the investigation.

Perhaps more to the point, OCR has not yet come to grips with how this problem fits the profile of its generally deficient approach to civil rights enforcement. Backdating and improper tolling have arisen in a context of headquarters hostility to the very civil rights statutes it is charged with enforcing.

Subcommittee staff indicate that a Committee Report with findings and

recommendations should be ready for release in September 1987. The Committee has referred the information on backdating to the Department of Justice for possible action.

**SUPREME COURT ORDERS JAPANESE AMERICAN REDRESS CASE TRANSFERRED
TO THE FEDERAL CIRCUIT**

In Hohri v. U.S., ___ U.S. ___ (June 1, 1987), the Supreme Court declined to rule on the merits of the case which sought monetary damages for Japanese Americans interned during World War II, and instead remanded the case to the U.S. Court of Appeals for the District of Columbia Circuit for transfer to the Federal Circuit holding that the D.C. Court of Appeals lacked jurisdiction to decide the case. This confirms the position of the Department of Justice which asserted in its brief that the issue before the Court (Federal Government taking of private property without just compensation) was the exclusive province of a special court called the U.S. Court of Appeals for the Federal Circuit.

The suit against the U.S. government was brought on March 16, 1983 by Japanese Americans who had been interned in U.S. military-controlled camps during World War II, seeking monetary damages and a declaratory judgment on twenty-two claims based upon a variety of constitutional violations, and other grounds (See January 1987 CIVIL RIGHTS MONITOR for further discussion).

The plaintiff in the case, Mr. Hohri, called the ruling "scandalous" and said the Court had "ducked the issue." A bill to provide redress to Japanese Americans interned during World War II is currently before the Congress. The bill, Japanese Americans Redress Bill (S.1009/H.R.442), would establish an educational and humanitarian trust fund to educate the American people about the dangers of racial intolerance and would provide individual compensation of \$20,000 to be paid to each surviving internee, in recognition of individual losses and damages. The bill has 75 cosponsors in the Senate, and 141 in the House.

1870 CIVIL RIGHTS STATUTE APPLIES TO ARABS AND JEWS

The Supreme Court on May 18, 1987 ruled unanimously in two cases that an 1870 civil rights law (42 U.S.C. sec. 1981) prohibiting racial discrimination in the making of private and public contracts applies to discrimination based upon one's ancestry or ethnicity as well as to discrimination based upon race. The Court reasoned:

Based on the history of sec. 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended sec. 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.

A claim of racial discrimination was made under sec. 1981 by an Arab American in the first case (Saint Francis College v. Majid Ghaidan Al-Khazraji ___ U.S. ___, 55 LW 4626 (May 18, 1987)); and by Jewish Americans in the second

case, (Shaare Tefila Congregation v. John William Cobb, ___ U.S. ___, 55 LW 4629 (May 18, 1987)). The Saint Francis case was brought by an American citizen, born in Iraq, who alleged that he was denied tenure at St. Francis College because of his Arabian ancestry. He filed suit pursuant to Title VII of the Civil Rights Act of 1964 and the 1870 law. The District Court ruled the Title VII claim was not timely, and that sec. 1981 did not "reach claims of discrimination based on Arabian Ancestry." The Court of Appeals reversed and remanded the case for consideration on the merits of the case. The Supreme Court affirmed.

The Shaare Tefila case was brought by members of the synagogue after the building was sprayed with red and black paint and with large anti-Semitic slogans, phrases and symbols. The District Court dismissed the case and the Court of Appeals affirmed. The Supreme Court reversed the decision and remanded it for further proceedings.

The unanimous Supreme Court decision was based on the Justices' reasoning "that all those who might be deemed Caucasians today" were not thought to be of the same race when sec. 1981 became law in the 19th Century:

Encyclopedias of the 19th century... described race in terms of ethnic groups... Encyclopedia Americana in 1858, for example, referred to various races such as Finns,... gypsies,... Basques,... and Hebrews.

Further, an examination of the legislative history of sec. 1981 showed that the congressional debates were "replete with references to the Scandinavian races,... as well as the Chinese,... Latin,... Spanish,... and Anglo-Saxon races.

Richard Seymour, Director, Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law, stated that the Court's decision is an important one because sec. 1981 allows for compensatory and punitive damages not available under Title VII of the Civil Rights Act of 1964, and covers smaller employers while Title VII exempts employers with fewer than 15 employees. Further, the 1870 statute reaches nonemployees such as partners in law or accounting firms or individuals competing for partnership from outside the firm. Mr. Seymour indicated that he did not expect a substantial increase in national origin discrimination cases as the dimensions of the problem are so different from racial discrimination, and he suggested that expansion of coverage to ethnic groups may increase the public's support for civil rights laws.

FOR YOUR INFORMATION

The National Women's Law Center has released a report, Dependent Care Tax Provisions in the States: An Opportunity for Reform, which reviews the current status of dependent care tax provisions in the twenty-nine states that currently have such provisions. The report includes an analysis of the impact of federal tax-reform on these provisions, and makes several recommendations for improvements in state provisions. Copies of the report are available from the Center for \$5.00, NWLC, 1616 P Street, NW, Washington, D.C. 20036.

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The CIVIL RIGHTS MONITOR is published by the Leadership Conference Education Fund, Inc., an independent research organization which supports educational activities relevant to civil rights. The MONITOR is written by Karen McGill Arrington. William L. Taylor, Vice President of the LC Education Fund serves as Senior Editor. Editorial assistance is also provided by Arnold Aronson, President of the Fund. Items presented in the MONITOR are not to be construed as necessarily reflecting the views of the LC Education Fund. Legislative updates are for educational purposes and are not meant to suggest endorsement or opposition of any legislation. Subscriptions are available for \$30.00 a year (October - September). COMMENTS ABOUT THE MONITOR OR ANY ARTICLE CONTAINED IN THE MONITOR ARE MOST APPRECIATED.