
Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations?

Volume IV: An Evaluation of the Departments of Education, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commission

**U.S. Commission on Civil Rights
September 2004**

U.S. Commission on Civil Rights

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

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume IV: An Evaluation of the Departments of Education, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commission*, pursuant to Public Law 103-419. This final volume of the series evaluates the extent to which these agencies have responded to Commission recommendations made during the past decade and if civil rights enforcement has improved or changed as a result.

Volume I of this series named the critical elements in civil rights enforcement, such as accountability, on which previous Commission recommendations were based. As in volumes II and III, the Commission finds mixed implementation success. For example, the Department of Housing and Urban Development abided by most Commission advice, but the Equal Employment Opportunity Commission continued previously found approaches or chose other alternatives.

An array of problems continues to hinder relief to victims of discrimination. Select illustrations from earlier volumes include inadequate civil rights resources for most Department of Transportation operating administrations and the Department of the Interior's cursory pre-award reviews. This report finds, for example, that the Health and Human Services' Office for Civil Rights has yet to revise and update its case resolution manual.

Throughout the life of this four-year study, the Commission has identified model programs. Earlier volumes established, for example, that the Department of Labor's job-training program's data collection and analysis system was a model recipient compliance evaluation system and the Environmental Protection Agency created a Title VI task force to implement previous Commission recommendations. In this report, the Commission commends the Department of Education's Office for Civil Rights models for technical assistance and outreach on important issues such as special education.

Overall, agencies generally focus on process and not mission-oriented factors to measure progress. Federal civil rights enforcement, to evaluate effectiveness, must also formally assess agency progress toward discrimination reduction, the government's overarching goal.

For the Commissioners,

Mary Frances Berry
Chairperson

Acknowledgements

The Office of Civil Rights Evaluation, under the direction of Terri A. Dickerson, director, prepared this report. Sock-Foon C. MacDougall, social scientist, served as team leader, and along with Margaret Butler, civil rights analyst, and Wanda Johnson,* civil rights analyst, researched and wrote the report. Monique Dennis-Elmore,* civil rights analyst, conducted research, summarized prior Commission findings and recommendations pertaining to an agency, and drafted one of the interrogatories. Teresa Brooks, secretary, also contributed to the completion of the report. The following interns contributed to the report as well: Sarah Whitfield, St. John's College, and Anny Vu, University of California, Los Angeles.

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Executive Summary

The Civil Rights Act of 1964, born of long, painful years of struggle for equality, is one of the most comprehensive pieces of civil rights legislation that Congress enacted since post-War Reconstruction.¹ Title VI of the Civil Rights Act prohibits discrimination in federal programs based on race, color, or national origin while Title VII bans unlawful employment discrimination practices. Title VIII, better known as the Fair Housing Act (FHA) (amended in 1988), banned discrimination in most housing transactions. These statutes mandate equal access to employment, housing, transportation, and education and established a foundation on which further progress could be made.

The statutes' mandates, however, can only be realized if federal civil rights agencies conduct vigorous enforcement. The Commission emphasizes each agency head's leadership role to support Offices of Civil Rights. The Commission's reports over the last decade identified a set of civil rights elements that if carefully followed promotes enforcement. These are priority of civil rights, resources (funding and staffing), effective planning, policy guidance prepared and issued, technical assistance, education and outreach, effective compliant processing process, quality compliance review, staff training, and initiatives that maximize effectiveness.² These elements frame the Commission's four-volume study on civil rights enforcement.

During this four-volume study, the Commission revisited 11 federal agencies to determine whether or not they have responded to recommendations offered in previous reports and if civil rights enforcement improved as a result. Throughout the volumes, the Commission has identified good and inadequate civil rights practices that affect federal agencies' ability to carry out their enforcement responsibilities. This final volume evaluates the extent to which the Departments of Education, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commission have implemented the Commission's recommendations. These agencies oversee federally conducted and federally assisted programs that have consequences for the nation's social welfare. Affected people rely on forceful enforcement of the civil rights statutes for which these agencies have responsibility to afford equal access to education and quality health care, protection from employment discrimination, and safe and decent housing. It is the federal agencies' responsibility to ensure that they and their grant recipients administer programs and services without discrimination and provide equal access to all beneficiaries and participants.

Department of Education

The U.S. Department of Education's (DOEd) elementary and secondary programs annually serve nearly 15,000 school districts and more than 53 million students nationwide. DOEd's postsecondary program coverage also extends to more than 4,000 colleges and universities. The agency's Office for

¹ Wade Henderson, "Remarks on the 40th Anniversary of the Civil Rights Act," speech, June 24, 2004.

² See U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume I: A Blueprint for Civil Rights Enforcement*, September 2002, which summararily discusses these elements.

Civil Rights (OCR) is one of the largest civil rights enforcement units in the federal government. Between 1992 and 2000 the Commission reviewed OCR numerous times and issued 224 recommendations. In this report, the Commission continues to find strengths and weaknesses in OCR's enforcement practices. On paper, OCR's organizational structure remains exemplary; but two of its top positions are vacant. It also continues to effectively conduct Title VI outreach and education as well as provide technical assistance. However, the office still does not track civil rights activity expenditures; there is an absence of manuals explaining procedures for Title VI compliance and review processes; and on-site reviews are still based on priority issues because of limited resources. Furthermore, OCR does not apply social or behavioral science methods to evaluating its progress, relying instead on measures that assess administrative processes and not mission accomplishment. Some OCR practices offer models from which other agencies might benefit. Since 2000 OCR has consistently exceeded its performance targets for complaint resolution rates and durations; for example, within 180 days of receipt; over the past seven years OCR has allocated an average of \$446,000 for training; and OCR has an active and effective public outreach and education program.

Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission's (EEOC) mission promotes equality of opportunity in the workplace and enforces federal laws prohibiting employment discrimination. The EEOC enforces six key civil rights statutes to accomplish this. Between 1992 and 2000, the Commission assessed EEOC's performance in implementing and enforcing Title VII and offered 199 recommendations for improvement. EEOC implemented few of the Commission's recommendations, preferring to continue with existing approaches to address problems previously identified, or use alternative approaches. In regard to the staff training, EEOC offered many nationwide training programs for attorneys and field staff, such as negotiation and resolution skills and trial skills, but most took place between fiscal years 1999 and 2002. Further, despite the Commission's previous recommendation, EEOC still has not issued an updated compliance manual since 1998. Neither has it developed timetables to review existing guidance to determine relevance and usefulness. This study also discovers that EEOC adopted a Five-Point Plan, which is the current framework for accomplishing its mission. The plan's objectives focus on prevention, proficient resolution, promotion, and expansion of mediation, strategic enforcement and litigation, and promotion of EEOC as a model workplace. The agency's newly implemented strategic plan for fiscal years 2004–2009 incorporates and executes the Five-Point Plan and contains performance indicators. EEOC should ensure that performance indicators also assess the eradication of discrimination. The Commission commends EEOC for its extensive outreach, education, and technical assistance activities that reach underserved groups through forums, public events, and regular and ethnic media. Unfortunately, EEOC programs suffer from inadequate funding and staffing; it has not received a significant funding increase since 1998, and key positions remain vacant.

Department of Health and Human Services

The U.S. Department of Health and Human Services is the principal agency for ensuring health services for all Americans and protecting individuals and groups from discriminatory practices. The agency provides approximately 60,000 grants per year, and supports more than 300 programs, aspects of which apply to everyone. The Office for Civil Rights (OCR) enforces 18 federal statutes to prevent and eliminate unlawful discrimination in access to health care. Between 1992 and 2000, the Commission offered more than 200 recommendations to OCR pertaining to civil rights enforcement in health care. This study finds that OCR implemented some of the Commission's recommendations.

For example, OCR streamlined its organizational structure, establishing multifunctional units and consolidating tasks; developed budget plans and resource accountability standards; established an electronic reporting system to track civil rights expenditures and better identify resource needs; and improved legal training, technical assistance, and outreach to operating divisions, grant recipients, communities, and advocacy groups. However, OCR did not follow some Commission advice. For example, OCR has not improved compliance reviews since the 1996 and 1999 reviews. OCR only conducts pre-award reviews on new Medicare applicants and Medicare recipients with a change of ownership or name. Further, OCR conducted few post-award reviews, including desk-audit and on-site visits, relative to its number of recipients. In addition, OCR does not require applicants or recipients to collect or submit demographic data on beneficiaries. Furthermore, if OCR made better use of operating divisions, it could improve complaint processing and enforcement.

Department of Housing and Urban Development

The U.S. Department Housing and Urban Development's (HUD) mission is to increase homeownership, support community development, and increase access to affordable housing free from discrimination. The Office of Fair Housing and Equal Opportunity (FHEO) enforces eight federal civil rights laws. Between 1992 and 1996, the Commission issued three reports examining HUD's FHA and Title VI enforcement record and offered 66 recommendations. HUD implemented many of these recommendations, thus addressing Commission concerns. The FHEO assistant secretary now has the authority to issue cause or no cause determinations with general counsel concurrence. However, about 30 percent of HUD's open case inventory and 44.7 percent of FHAP's were aged more than 100 days at the beginning of FY 2003. Aged cases for both HUD and FHAP averaged 400 and 317 days, respectively. Furthermore, the secretary-initiated complaint is a seriously underutilized enforcement strategy. Secretary-initiated complaints combat broad-based discrimination and regular use enhances enforcement. Moreover, HUD does not consistently evaluate education and outreach initiatives to determine success and collect feedback for improvement. HUD also has developed measurable performance indicators, many focusing on assessing process results. It needs to adopt evaluation methods that measure mission attainment not just administrative process. HUD's Civil Rights Limited Monitoring Review Protocol (CRLMR) and Risk Analysis Data Management System (RADMS) are worthy of emulation. The CRLMR promotes civil rights enforcement as an agency-wide mission; FHEO enforces civil rights compliance while the evaluation units in program offices conduct civil rights monitoring. RADMS predicts recipient civil rights risk (discriminatory) potential and helps FHEO identify recipients for on-site reviews. Unfortunately, HUD funding and staffing continue to be problematic, and overall, while much is improved complaint processing is not.

More generally, after more than three years of research and study, the Commission finds common threads running through the four-volume series. Implementation of Commission recommendations varied among the agencies for a variety of reasons, including changed priorities; problems that continue to hinder civil rights enforcement, for example, inadequate resources and staffing, outdated and unclear guidance at some of the agencies; performance indicators that measure quantity but do not assess agency success in eradicating discrimination; and infrequent evaluation of initiatives directed to targeted groups. The Commission urges careful consideration of findings and recommendations presented in the four-volume series; correction of identified problems; use of more complex tools, such as testing and public surveys, to establish bases against which progress toward discrimination elimination can be measured; and formal evaluation of agency initiatives. The Commission also found several model civil rights programs that other federal agencies may wish to examine.

The Commission concludes that its function of monitoring federal civil rights law enforcement, researching and preparing reports, and making findings and recommendations is still very much needed. The struggle for equality for all regardless of race, national origin, gender, age, religion, disability, or familial status is, as Representative John Lewis put it, “the struggle of a lifetime [and] . . . our work is far from done.”³

³ Congressman John Lewis, “‘Equal Justice’ Only an Illusion,” <<http://www.house.gov/johnlewis/pr040126.html>> (last accessed July 15, 2004); “Congressman John Lewis Lead Sponsor on the Fairness Act: The Civil Rights Act of 2004,” <<http://www.house.gov/johnlewis/pr040126.html>> (last accessed July 15, 2004).

Chapter 1: Introduction

Historically, and to this day, people of color, those with disabilities, and other marginalized Americans have looked to the federal government to redress wrongs committed against them while seeking equal access to quality education, health care, and housing, and fair treatment in employment.

Whether the government has appropriately responded to the public's trust is the source of countless studies, including the U.S. Commission on Civil Rights' own. Even so, federal agencies have been mandated to enforce civil rights laws passed to protect individuals denied equal protection on account of their race, color, religion, sex, age, national origin, disability, and familial status. With the force of civil rights laws, the federal government has scored significant victories since the 1960s.

Over the past 10 years, as a part of its fact-finding mission, the Commission published 16 reports that evaluated 11 federal agencies and offered more than 1,100 recommendations for improving their civil rights operations. In the last two years, the Commission revisited these agencies and issued a series of reports determining whether or not the agencies implemented the recommendations. This serves two purposes. First, it measures the agencies' efforts and success at addressing civil rights concerns. Second, it enables the Commission to measure its own effectiveness at fulfilling its monitoring and evaluation role.

This study is the fourth and final volume in this series. In 2002, the Commission issued *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume I: A Blueprint for Civil Rights Enforcement*, which cataloged and disclosed elements for effective civil rights enforcement, including priorities, resources (funding and staffing), planning, policy guidance, and compliance reviews. In 2002 and 2003, the Commission issued *Volume II: An Evaluation of the Departments of Justice, Labor, and Transportation* and *Volume III: An Evaluation of the Departments of Agriculture and the Interior, the Environmental Protection Agency, and the Small Business Administration*, respectively. Volumes II and III evaluated the named departments' performance with respect to the foregoing elements to determine how effectively they implemented past recommendations.

Definitions of Terms

"External matters" in this report pertain to enforcement of Title VI of the Civil Rights Act of 1964,¹ Title VIII of the Civil Rights Act of 1968,² as amended, and Title IX of the Education Amendments of 1972.³ Title VI prohibits discrimination in federally funded programs based on race, color, or national origin, and protects against a broad range of discrimination, including denial of services; differences in the quality, quantity, or manner of services; different standards for participation; and discrimination in an activity conducted in a facility built with federal funds. Congress authorized government agencies to enforce Title VI to prevent recipients from using federal funds to support discrimination. The U.S. Department of Justice (DOJ) is responsible for coordinating federal Title VI

¹ Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-(7) (2004)).

² Pub. L. No. 88-352, tit. VI, 78 Stat. 241, tit. VIII (codified as amended at scattered sections of 42 U.S.C. (2004)).

³ Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2004)).

enforcement.⁴ Title VIII of the Civil Rights Act of 1968 (Fair Housing Act (FHA)), as amended, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability).⁵ DOJ also coordinates with the Department of Housing and Urban Development (HUD) in FHA enforcement.⁶ Title IX bans sex discrimination in schools in academics or athletics. The Departments of Education (DOEd), Health and Human Services (HHS), and HUD have Title VI responsibilities. In addition, HUD is the key agency for enforcing Title VIII and DOEd plays an important role in Title IX enforcement.

“Internal matters” pertain to employment discrimination. Title VII of the Civil Rights Act of 1964 prohibits discriminatory practices of public and private sector employers based on color, race, sex, religion, or national origin.⁷ The Equal Employment Opportunity Commission (EEOC) is the lead agency enforcing Title VII.

Have the Departments of Education, Health and Human Services, Housing and Urban Development, and the Equal Employment Opportunity Commission responded to Commission recommendation and, if so, how effectively? These are the questions this study addresses. The study examines the agencies’ external and internal civil rights enforcement.

Department of Education

The mission of DOEd is to ensure equal access to education and promote educational excellence throughout the United States. Since the Commission’s previous reviews, two key positions in the Office for Civil Rights (OCR) have become vacant: assistant secretary for civil rights and the deputy assistant secretary for policy. OCR remains proactive in providing technical assistance and outreach on priority issues. However, enforcement practices show weakness, for example, in the absence of manuals explaining Title VI compliance and review processes, the limited use of pre-award reviews, and a case resolution manual that does not delineate procedures for whether, when, and to what degree it would review performance of those to whom it gave federal funds. The DOEd Secretary must make filling the two vacancies a priority and OCR should expeditiously rectify enforcement weaknesses.

Equal Employment Opportunity Commission

The mission of EEOC is to promote equality of opportunity in the workplace and enforce federal laws prohibiting employment discrimination. Now all of its commissioner positions and the general counsel position are finally filled. There is also a new strategic plan for FY 2004–2009 centering on three strategic objectives: justice and opportunity, inclusive workplace, and organizational excel-

⁴ Executive Order 12250 delegates responsibility to the U.S. Department of Justice to provide leadership and coordinate the Title VI implementation, compliance, and enforcement responsibilities of the federal agencies. Executive Order 12,250 §§ 1-101, 1-201, 3 C.F.R. § 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1988).

⁵ U.S. Department of Housing and Urban Development, “Fair Housing Laws and Presidential Executive Orders,” <<http://www.hud.gov/offices/ftheo/FHLaws/index.cfm>> (last accessed Mar. 12, 2004) (hereafter cited as HUD, “Fair Housing Laws and Presidential Executive Orders”).

⁶ U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, September 1994, pp. 189, 191.

⁷ Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (1964)).

lence. EEOC is active in education and outreach, engages ethnic media for this purpose, and has an information system to track such activities. The Office of Field Program's annual review of a sample of case files for accuracy in case categorization fully met its target goal for this measure, which was 90 percent, in FY 2001 and 2002. Moreover, the number of multiple aggrieved cases⁸ grew yearly since FY 1997. However, the emphasis is on plans and their development but not execution, for example, the agency's Five-Point Plan, Strategic Enforcement and Litigation Plan, and five-year Revolving Fund business plan. Goal setting is vital as a road map, but more energy at EEOC also must be directed to reaching targets and outcome review. Most EEOC guidance and information clarifying disability-related terms were issued before 2000, clearly signifying a review is necessary. Informal guidance for the public on several topics was issued since 2000, employing the question-and-answer format. However, the legal and human resource and other related professional communities need detailed, formal guidance.

Department of Health and Human Services

The mission of HHS is to protect the health of all Americans and provide essential health services, especially for those who are least able to help themselves. Since the Commission's previous reviews, the Office for Civil Rights (OCR) has streamlined its organization and operations to bring about a more cohesive approach to enforcement. It can now track expenditures and identify areas in which resources are needed. Moreover, OCR provides ongoing civil rights training, technical assistance, education and outreach, and guidance to operating divisions and their recipients concerning civil rights laws and requirements. It needs to improve its compliance reviews. Only a select number of applicants undergo pre-award reviews before receiving funding and a very small number of post-award reviews are on-site visits. To assist OCR in its work, the Commission previously recommended expanded delegation of authority to eligible operating divisions. OCR holds firm that other departmental entities should not enforce civil rights in programs and that program administration and program enforcement should function separately. However, delegation of authority should apply more resources to enforcement, and further HHS overall mission to protect *all* Americans.

Department of Housing and Urban Development

The mission of HUD is to increase homeownership, support community development, and increase access to affordable housing free from discrimination. Since the Commission's previous review, HUD implemented many recommendations. A major source of concern is serious funding and staffing insufficiency against a backdrop of overall increase in the Title VI and FHA workload. Commitment to agencywide civil rights enforcement is evident in the use of "Civil Rights Front-End and Limited Monitoring Review Protocol" in which program offices participate in civil rights monitoring. On the other hand, historic and current underutilization of secretary-initiated complaints misses an opportunity to use a powerful strategy against broad-based discrimination. Further, nearly 15 years since FHA became operational, there are just 98 state and local agencies participating in Fair Housing Assistance Program (FHAP) to process complaints, and of that only 69 percent are HUD certi-

⁸ Multiple aggrieved cases are cases that challenge a policy that applies to a group of similarly situated individuals and cases challenging a practice that affects a group of similarly situated individuals. Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, e-mail, Apr. 29, 2004.

fied.⁹ Securing adequate funding and staffing, expanding secretary-initiated complaints, and increasing FHAP agencies are critical priorities.

Scope

This review covers the Departments of Education, Health and Human Services, Housing and Urban Development, and Equal Employment Opportunity Commission.

The study focuses on recommendations made in the following Commission reports:

- Equal Educational Opportunity and Nondiscrimination for Girls in Advanced Mathematics, Science, and Technology Education: Federal Enforcement of Title IX (2000).
- Equal Educational Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices (1999).
- Equal Educational Opportunity and Nondiscrimination for Student with Disabilities: Federal Enforcement of Section 504 (1997).
- Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and *Lau v. Nichols* (1997).
- Equal Educational Opportunity Project Series: Volume I (1996).
- The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality—Volume I: The Role of Government and Private Health Care Programs and Initiatives (1999).
- The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality—Volume II: The Role of Federal Civil Rights Enforcement Efforts (1999).
- The Fair Housing Amendments Act of 1988: The Enforcement Report (1994).
- Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System (1992).
- Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts (2000).
- Helping Employers Comply with the ADA: An Assessment of How the U.S. Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act (1998).
- Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs (1996).
- Civil Rights Issues Facing Asian Americans in the 1990s (1992).

⁹ The Fair Housing Assistance Program (FHAP) provides funds that supplement the fair housing enforcement activities of HUD-certified state and local agencies. FHAP funds training, case processing, education and outreach, improving agency data and information systems, as well as capacity-building for newly HUD-certified agencies for up to two years. HUD also reimburses these state and local agencies for investigating individual fair housing complaints. The Office of Fair Housing and Equal Opportunity (FHEO) administers FHAP. See U.S. Department of Housing and Urban Development's Response to the U.S. Commission on Civil Rights Interrogatory for Volume IV of the Ten-Year Review of Civil Rights Enforcement, Office of Fair Housing and Equal Opportunity, Dec. 5, 2003, p. 3.

The study analyzes the following elements relevant to civil rights enforcement at each department:

- Priority of civil rights.
- Resources (funding and staffing) provided to carry out the work.
- Effective planning.
- Policy guidance prepared and issued.
- Technical assistance.
- Education and outreach.
- Effective complaint processing process.
- Quality compliance reviews.
- Staff training.
- Initiatives that maximize effectiveness in accomplishing civil rights enforcement. (Such initiatives include oversight and quality assurance of civil rights program, effective coordination, and community involvement.)

Methodology

In assessing whether the departments or their components have responded to the Commission's previous recommendations made in the above named reports, the Commission conducted fact-findings that included interrogatories posing questions which focused on 224 recommendations made to the Department of Education; 199 to the Equal Employment Opportunity Commission; 234 to the Department of Health and Human Services; and 66 to the Department of Housing and Urban Development.

In addition to analyzing interrogatory responses, the Commission reviewed relevant policy, planning, and budget documents, annual reports, and Civil Rights Implementation Plans; interviewed civil rights staff; and reviewed other appropriate reports. Owing to the Commission's lack of resources, the work was performed exclusively in Washington, D.C.; thus the Commission could not examine field offices firsthand.

Conclusion

At the conclusion of three years of research and analysis, the Commission establishes that most agencies generally track funding inputs and output indicators that measure processes, such as complaints resolved and reviews conducted. The Commission recognizes the opportunity for agencies to employ complex output indicators that assess mission accomplishment such as eradication of discrimination. Federal agencies would do well to consider more complex tools such as testing, experimentation, analysis of behavioral data, or public surveys to establish bases against which its progress toward mission accomplishment can be measured.¹⁰

¹⁰ Social or behavioral science methods include laboratory experiments, field experiments, analysis of observational data and natural experiments, and survey and administrative records reports. *Measuring Racial Discrimination*, a report of the National Research Council of the National Academies, established these research methods as relevant to measuring discrimination. See the National Research Council of the National Academies, *Measuring Racial Discrimination*, 2004.

The Commission's studies also identified several model programs. The Department of Labor's data collection and analysis system for its job-training program, for example, is an excellent model of a recipient compliance evaluation system that facilitated Title VI enforcement. DOJ's Disabilities Rights Section's technical assistance program and the use of mediation for the enforcement of the Americans with Disabilities Act serve as models for other components in DOJ.¹¹ HUD's Risk Analysis Data Management System, which predicts recipient civil rights risk or discriminatory potential, helps the Office of Fair Housing and Equal Opportunity (FHEO) identify persons for on-site reviews. Overall, DOEd continues to serve as a model for other agencies in carrying out its enforcement responsibilities.

The record on agency implementation of previous Commission recommendation is varied. The Environmental Protection Agency, shortly after receiving the Commission's 1996 recommendations, created an internal Title VI Task Force to, among other duties, evaluate and implement them.¹² Volume IV concludes that HUD implemented many of the Commission's recommendations. EEOC implemented few recommendations, asserting it was better served by existing practices and other approaches. DOEd indicates that some recommendations were not addressed because the specific issues were no longer priorities within OCR. HHS implemented some of the recommendations.

A central Commission role is monitoring federal civil rights activities to ensure equal treatment regardless of race, color, religion, sex, age, disability, or national origin, or in the administration of justice in all areas of life. The Commission's monitoring highlights deficiencies in federal civil rights enforcement as practiced, while its corrective recommendations and widespread dissemination of best practices strengthen civil rights enforcement. The Commission urges the administration, Congress, and federal civil rights enforcement agencies to join its endeavor.

¹¹ U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Government Agencies Responded to Civil Rights Recommendations? Volume II: An Evaluation of the Departments of Justice, Labor, and Transportation*, September 2002, p. x.

¹² U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Government Agencies Responded to Civil Rights Recommendations? Volume III: An Evaluation of the Departments of Agriculture and the Interior, the Environmental Protection Agency, and the Small Business Administration*, September 2003, p. xii.

Chapter 2: Department of Education

Congress first created a federal education function in 1867 to collect information that would help the states establish effective school systems. Over the ensuing 130 years, the agency's name and location within the Executive Branch have changed. The Department of Education (DOEd) was created in 1980. Its mission is to ensure equal access to education and to promote educational excellence throughout the nation.¹ Today, the department's elementary and secondary programs annually serve nearly 15,000 school districts and more than 53 million students attending over 92,000 public schools and 27,000 private schools.²

The Department of Education contains 10 program offices and nine staff offices. The 10 program offices are (1) the Institute of Education Sciences; (2) the Office of Elementary and Secondary Education; (3) the Office of English Language Acquisition, Language Enhancement and Academic Achievement for Limited English Proficient Students; (4) the Office of Federal Student Aid; (5) the Office of Innovation and Improvement; (6) the Office of Postsecondary Education; (7) the Office of Safe and Drug-Free Schools; (8) the Office of Special Education and Rehabilitation Services; (9) the Office of Vocational and Adult Education; and (10) the Office for Civil Rights.³

Acronyms are used throughout this chapter. Table 2.1 lists those referenced frequently.

TABLE 2.1
Acronyms in Chapter 2

Civil Rights Implementation Plan	CRIP
English Language Learner	ELL
Individuals with Disabilities Education Act	IDEA
National Center for Education Statistics	NCES
Office for Civil Rights	OCR
Office of Management and Budget	OMB
Office of Special Education and Rehabilitative Services	OSERS
Profile, Assessment, and Resolution	PAR
U.S. Department of Education	DOEd
U.S. Department of Justice	DOJ

¹ U.S. Department of Education, Office for Civil Rights, "Annual Report to Congress Fiscal Years 2001 and 2002," July 2003, p. 2 (hereafter cited as DOEd/OCR, "2001 and 2002 Annual Report").

² U.S. Department of Education, Office for Civil Rights, "Office for Civil Rights Fiscal Year 2000 Annual Report to Congress," p. 3.

³ U.S. Department of Education, "Ed Staff Organization," <<http://www.ed.gov/about/offices/list/index.html?scr=h>> (last accessed May 18, 2004).

Previous Commission Reviews of DOEd

Between 1992 and 2000, the U.S. Commission on Civil Rights released seven reports that made 224 recommendations to the Department of Education concerning its adherence to civil rights enforcement.⁴ The Commission found strengths and weaknesses in OCR's enforcement practices. It commended DOEd/OCR for having a model organizational structure whereby the assistant secretary reports directly to the Secretary; aggressively using administrative and other options to necessitate Title VI compliance; actively and effectively conducting Title VI education and outreach and technical assistance; and possessing a superior data collection and analysis system. The Commission took issue with the absence of manuals for explaining procedures for Title VI compliance and review processes; the inaccessibility of DOEd/OCR's database to the public; OCR's limited use of pre-award reviews; and the continuous decline in the number of initiated compliance reviews. This study examines whether DOEd has implemented recommendations made in the earlier reports, and focuses on OCR, DOEd's enforcement unit.

Mission and Responsibilities—OCR

DOEd's Office for Civil Rights (OCR) is one of the largest civil rights enforcement units in the federal government.⁵ To ensure equality in and equal access to education programs, OCR enforces civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance. OCR is responsible for enforcing the following statutes:

- Title VI of the Civil Rights Act of 1964.⁶
- Title IX of the Education Amendments of 1972.⁷
- Section 504 of the Rehabilitation Act of 1973.⁸
- The Age Discrimination Act of 1975.⁹
- Title II of the Americans with Disabilities Act of 1990.¹⁰

⁴ U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, February 1992 (hereafter cited as USCCR, *Asian Americans in the 1990s*); U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996 (hereafter cited as USCCR, *Federal Title VI Enforcement*); U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series, Volume I*, December 1996 (hereafter cited as USCCR, *Equal Educational Opportunity, Volume I*); U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504, Vol. II*, September 1997 (hereafter cited as USCCR, *Federal Enforcement of Section 504*); U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols, Vol. III*, November 1997 (hereafter cited as USCCR, *Federal Enforcement of Title VI and Lau v. Nichols*); U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices, Vol. IV*, September 1999 (hereafter cited as USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*); U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Girls in Advanced Mathematics, Science, and Technology Education: Federal Enforcement of Title IX, Vol. V*, July 2000 (hereafter cited as USCCR, *Federal Enforcement of Title IX*).

⁵ U.S. Department of Education, "U.S. Paige Issues Statement on Resignation of Assistant Secretary for Civil Rights Gerald Reynolds," Oct. 31, 2002, p. 1.

⁶ Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-(7) (2004)).

⁷ Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2004)).

⁸ Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2004)).

⁹ Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2004)).

- The Boy Scouts of America Equal Access Act.¹¹

As the enforcement arm of DOEd, OCR investigates discrimination complaints, conducts compliance reviews, monitors corrective action plans, and provides technical assistance on civil rights issues. Twelve enforcement offices within OCR are responsible for preventing, identifying, ending, and remedying discrimination against the nation's students. The administrative offices in Washington, D.C., provide additional administrative support, coordination services, policy development, and overall leadership.¹²

Priority of Civil Rights

In its 1996 report, the Commission commended DOEd for its exemplary organizational structure and recommended that OCR retain that structure within headquarters and regional offices. The Commission also recommended that OCR continue its coordination with the Office of the General Counsel to ensure that OCR was familiar with the legal policy positions of the program offices.¹³

Although OCR's organizational structure has changed since 1996, the assistant secretary for civil rights continues to report directly to both the Secretary and the deputy secretary.¹⁴ OCR has a deputy assistant secretary for enforcement and a deputy assistant secretary for policy who report to the assistant secretary for civil rights. However, two of the top three positions within OCR are vacant. The assistant secretary for civil rights resigned October 31, 2003. The deputy assistant secretary for policy position became vacant in November 2003; no one is acting in the position. The special assistant to the assistant secretary for civil rights is "delegated the authority to perform the functions of the assistant secretary for civil rights" until Congress confirms a successor.

Two senior enforcement directors have authority over four enforcement divisions. Each enforcement division consists of three regional offices (see figure 2.1). The Program Legal Group, which consists of three teams, supports OCR by preparing or helping enforcement divisions prepare motions, briefs, pleadings, and other legal documents on case-related matters; developing policies, legal standards, guidelines, and regulations pertaining to civil rights compliance; developing investigative guidance manuals, technical assistance, and training materials for staff engaged in compliance and technical assistance activities; and identifying areas in which the development of legal standards and policies is needed.¹⁵

Among this section's key points is:

- Two of the top three positions—the assistant secretary for civil rights and the deputy assistant secretary for policy—are vacant.

¹⁰ Pub. L. No. 101-336, tit. II and III, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.) (2004).

¹¹ Pub. L. No. 107-110, tit. IX, § 901, 115 Stat. 1425 (codified at 20 U.S.C. § 7905 (2004)); U.S. Department of Education's Response to the U.S. Commission on Civil Rights' Interrogatory for Volume IV of the Ten-Year Review of Civil Rights Enforcement, Office for Civil Rights, Nov. 14, 2003, p. 1 (hereafter cited as DOEd Interrogatory).

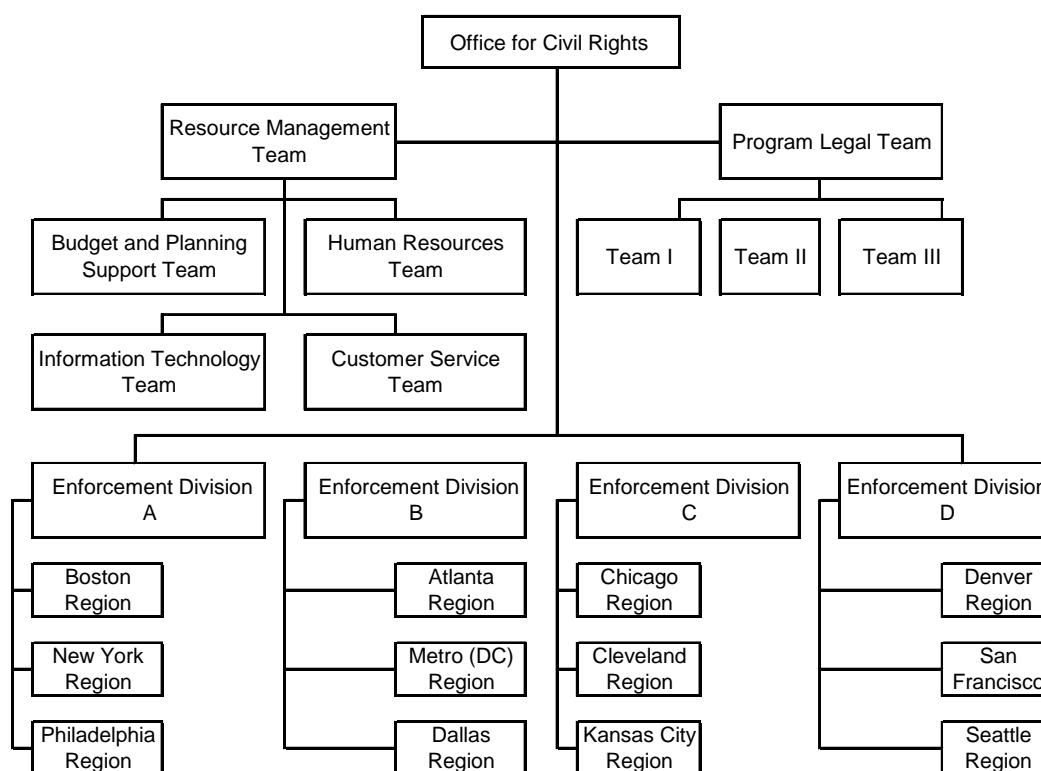
¹² U.S. Department of Education, "About OCR," <<http://www.ed.gov/about/offices/list/ocr/aboutocr.html?exp=0>> (last accessed May 12, 2004).

¹³ USCCR, *Federal Title VI Enforcement*, p. 210.

¹⁴ DOEd Interrogatory, p. 3.

¹⁵ U.S. Department of Education, "OCR Organizational Chart and Functional Statements," Oct. 28, 1999, pp. 9–11.

FIGURE 2.1
DOEd/OCR Organizational Structure, 2004



Source: U.S. Department of Education, "OCR Organizational Chart and Functional Statements," Oct. 28, 1999, p. 2.

Resources—Funding and Staffing

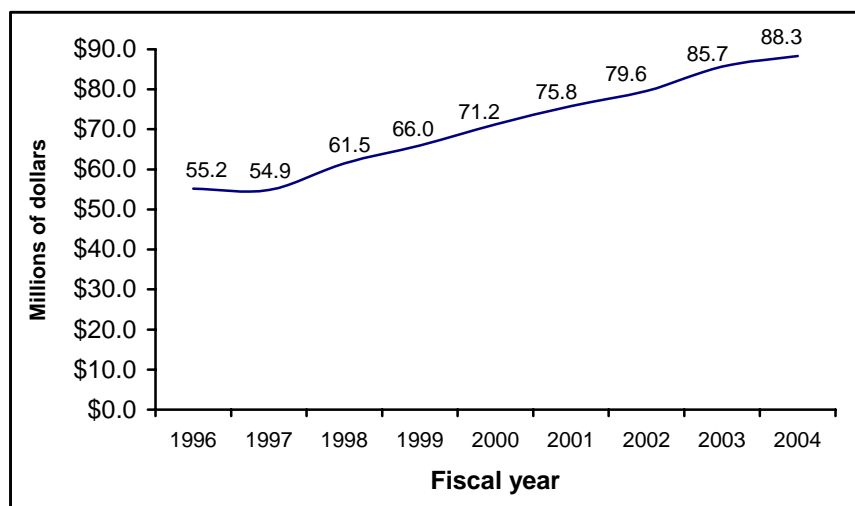
In its 1996 report, the Commission found that OCR's workload, in particular the number of complaints it received, had increased steadily over time, but its budget and staff resources had fallen. As a result, the Commission recommended that OCR assess itself quarterly to ensure that resource reductions do not hamper its ability to enforce civil rights statutes.¹⁶

OCR's budget has steadily increased over the past seven years (see figure 2.2). However, salaries and expenses, including pay raises, cost of living adjustments, and increases in retirement and health benefits, but not the hiring of additional staff, have absorbed increases in funding. Personnel-related matters consume more than 70 percent of OCR's budget. Expenses related to DOEd/OCR's rent, telecommunications, and local area network computer system have also exhausted OCR's budget increases.¹⁷

¹⁶ USCCR, *Federal Title VI Enforcement*, p. 211.

¹⁷ DOEd Interrogatory, p. 2.

FIGURE 2.2
DOEd/OCR Budget, 1996–2004



Source: U.S. Department of Education, Office for Civil Rights, "Annual Report to Congress Fiscal Years 2001 and 2002," July 2003, p. 2.

After OCR's budget decreased nearly 1 percent between FY 1996 and 1997, it grew continuously between FY 1998 and 2002. The greatest increase, 12 percent, occurred between FY 1997 and 1998. After FY 1998, the budget increased annually, but by successively smaller percentages. Between FY 2003 and 2004, OCR's budget increased only 3 percent (see figure 2.2). Congress, not the Department of Education, authorizes OCR's budget and staffing levels, and officials believe Congress is providing sufficient resources (funding and staffing) to enable OCR to investigate discrimination complaints in a timely manner, conduct compliance reviews, and provide technical assistance.¹⁸

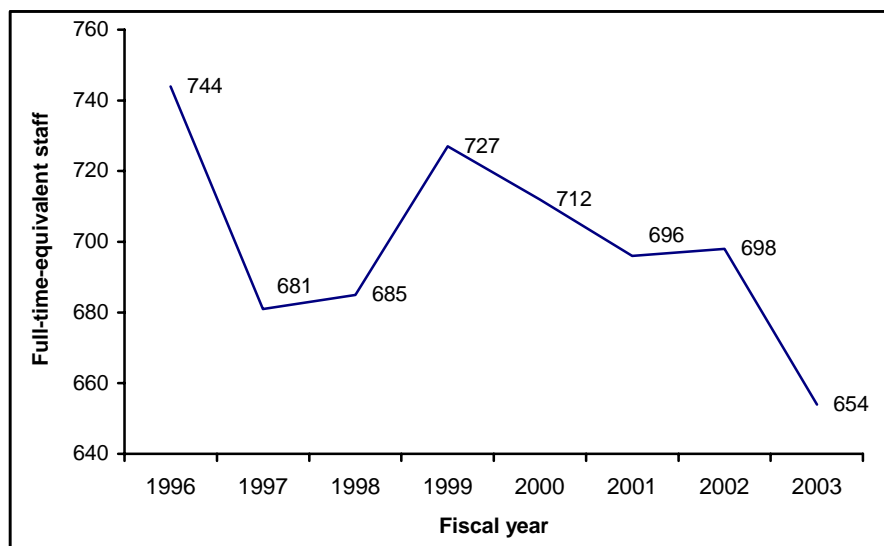
Within the past seven years, OCR's staffing level has decreased 6.2 percent. The largest change occurred between FY 1996 and 1997, when OCR's full-time-equivalent (FTE) staff level fell by 63, an 8.5 percent reduction. Between FY 1998 and 1999, the number of FTEs increased from 685 to 727. After increasing 6.1 percent, FTEs decreased again, roughly 2 percent, between FY 1999 and 2000 and FY 2000 and 2001. Although the number of FTEs decreased 6 percent between FY 2002 and 2003 (see figure 2.3), OCR does not believe that decreased staffing has hindered its ability to fulfill its responsibilities.

In 1996, OCR did not track staff resources by issue area and program activity. The Commission recommended that in addition to tracking its resources, OCR expand its information management system to include resources expended to support other important civil rights activities, such as pre- and post-award reviews and data collection and analysis.¹⁹

¹⁸ Ibid., pp. 1–2.

¹⁹ USCCR, *Federal Title VI Enforcement*, p. 210.

FIGURE 2.3
DOEd/OCR Staffing, 1996–2003



Source: U.S. Department of Education, Office for Civil Rights, "Annual Report to Congress Fiscal Years 2001 and 2002," July 2003, p. 2.

OCR uses Oracle Financials, the department's automated accounting system to track expenditures.²⁰ While the system tracks resources expended, such as travel and computer technology, it still cannot segregate expenditures for its different civil rights activities. In the past, OCR has always used the same tracking system as the department. None of DOEd's past systems has ever tracked expenditures separately for different civil rights activities.

Among this section's key points are:

- OCR's budget has continuously increased since FY 1996.
- Between FY 2002 and 2003, the number of FTEs decreased 6 percent.
- OCR still does not track expenditures for its different civil rights activities.

Planning

In past studies, the Commission found that DOEd used its strategic plan, which outlined an overall management philosophy for OCR, as a foundation for OCR's civil rights policies and actions. A separate office—the Planning, Analysis, and Systems Service—maintained an information system and was responsible for DOEd's operational planning. In addition, OCR's component offices each submitted enforcement plans that described specific strategies, goals, and objectives and assign resources to specific tasks. The Commission recommended that OCR continue to use its information system and the Planning, Analysis, and Systems Service to develop annual civil rights enforcement plans. The plans should be based on analyses of available resources, legal requirements, and pro-

²⁰ DOEd Interrogatory, p. 2.

jected workload; contain timetables for achieving specific goals and objectives; and measure accomplishments against plans from the preceding years.²¹

The Commission now finds that the Planning, Analysis, and Systems Service no longer exist. The four enforcement divisions develop annual enforcement plans for approval of the assistant secretary, based on the national objectives and guidance from the deputy assistant secretary for enforcement and the two enforcement directors.²²

In past studies, the Commission also found that DOEd's Civil Rights Implementation Plan (CRIP) did not conform to the Department of Justice (DOJ) guidelines and that DOEd regarded the plan as a reporting instrument. The document plan did not provide information adequate for DOJ to assess enforcement or for the public to understand it. As a result, the Commission recommended that DOEd incorporate the CRIP preparation into its management and strategic planning processes. The Commission also recommended that OCR submit its component enforcement plans to DOJ as part of its CRIP.²³

OCR continues to prepare and submit an annual CRIP to DOJ. According to OCR, the plan is prepared according to DOJ guidance. Receiving no feedback from DOJ, OCR assumes its plans conform to guidelines.²⁴ Effective FY 2003, DOJ changed its CRIP reporting guidelines. The revised schedules and reporting format capture summaries of an agency's civil rights activities in an improved manner.²⁵ For example, in the new format, long narratives are no longer required. DOJ solicits more quantitative data.

OCR does not submit its annual civil rights enforcement plans to DOJ as part of its CRIP because the information in the enforcement documents are irrelevant to DOEd's CRIP. Thus, DOEd argues, sending the plans to DOJ would serve no purpose.²⁶

Among this section's key points is:

- The Planning, Analysis, and Systems Service no longer exists. The four enforcement divisions develop annual enforcement plans for approval of the assistant secretary, based on the national objectives and guidance from the deputy assistant secretary for enforcement and the two enforcement directors.

Policy Guidance

In its 1996 report, the Commission found that DOEd's Title VI regulations had not been updated to reflect changes necessitated after the Civil Rights Restoration Act of 1987 passed. In addition, the regulations did not reflect the full scope of DOEd's fund termination authority. The Commission recommended that DOEd revise its Title VI regulations to include a clarified definition of "covered pro-

²¹ USCCR, *Federal Title VI Enforcement*, pp. 216–17.

²² DOEd Interrogatory, p. 4.

²³ USCCR, *Federal Title VI Enforcement*, p. 217.

²⁴ DOEd Interrogatory, pp. 2–4.

²⁵ Ralph F. Boyd, Jr., letter to Federal Funding Agency Civil Rights Directors, "FY 2003 Information and Reporting Requirements for Agencies that Administer Federally Assisted Programs Subject to Executive Order 12250," Dec. 13, 2002, p. 2.

²⁶ DOEd Interrogatory, p. 4.

grams or activities.” The Commission also recommended that DOEd make explicit its authority to terminate funding for a recipient’s programs if discrimination is present in the operation of those programs and elsewhere in the recipient institution.²⁷

In accordance with the court’s decision in *Cureton v. NCAA*, the regulations governing Titles VI and IX, Section 504, and the Age Discrimination Act have been amended to reflect the clear definitions that the 1987 Civil Rights Restoration Act created.²⁸ Each regulation provides a conforming definition of “program or activity” or “program.” A brief discussion of coverage and fund termination is in the preamble.²⁹ DOEd was the first federal agency to amend its regulations to conform to the Civil Rights Restoration Act.

The Commission’s 1996 study also revealed that since 1980 DOEd had not revised the appendix to its Title VI regulations to list the department’s Title VI programs. The Commission recommended that DOEd publish a complete, updated list of its federally funded programs annually in the *Federal Register*. Alternatively, DOEd could revise its regulations to make reference to a readily available source of information, such as the *Catalog of Federal Domestic Assistance* published by the Office Management and Budget (OMB) and the General Services Administration.³⁰

DOEd now publishes “Guide to U.S. Department of Education Programs and Resources,” which is available on its Web site.³¹ This publication lists and describes each program detailing the purposes, the eligibility requirements, and the intended beneficiaries.

DOEd had not issued Title VI guidelines for each of its federally assisted programs. The Commission recommended that OCR review the programs and determine whether adequate Title VI guidance existed. Where guidance did not exist, OCR should take steps to develop and disseminate the needed guidance.³²

As program offices bring forth guidance problems, OCR will consider those issues and respond to each on a case-by-case basis. OCR indicated that this is a more effective way to ensure that programs are implemented consistent with Title VI requirements.³³

In 1996, the Commission found that DOEd had recently issued a complaint resolution manual outlining complaint investigation procedures. OCR had not, however, produced manuals for explaining procedures for other Title VI compliance and review processes. As a result, the Commission recommended that OCR develop a comprehensive procedures manual.³⁴

OCR’s prevailing document is its case resolution and investigative manual, which replaces the old case resolution manual. Aside from outlining complaint investigation procedures, it offers a small

²⁷ USCCR, *Federal Title VI Enforcement*, pp. 211–12.

²⁸ 198 F.3d 107 (3d Cir. 1999); Conforming Amendments to the Regulations Governing Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Sex, and Age Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. 68,050 (2000) (to be codified at 34 C.F.R. pts. 100, 104, 106, and 110); DOEd Interrogatory, p. 12.

²⁹ DOEd Interrogatory, p. 12.

³⁰ USCCR, *Federal Title VI Enforcement*, p. 212.

³¹ See <<http://web99.ed.gov/GTEP/Program2.nsf>> (last accessed May 12, 2004).

³² USCCR, *Federal Title VI Enforcement*, p. 212.

³³ DOEd Interrogatory, p. 13.

³⁴ USCCR, *Federal Title VI Enforcement*, p. 213.

section that instructs staff to use the same investigative procedures for compliance reviews and for complaint resolution.³⁵ The manual does not delineate procedures for pre-award³⁶ or post-award reviews, nor does it contain separate sections for conducting compliance reviews for different types of DOEd programs; for example, the procedures for conducting a compliance review of a school district are very different from the procedures for conducting a compliance review of a college or university.

In 1992, the Commission reviewed the admissions discrimination controversies at three universities: Brown University, the University of California at Berkeley, and Harvard University. Brown officials later admitted that “Asian American students have been treated unfairly in the admissions process,” and remedial measures were implemented shortly thereafter. A Special Committee of Berkeley’s Academic Senate pinpointed several factors that may have been responsible for a precipitous decline in Asian American admissions in the fall of 1984, including a decision to cease guaranteeing admission to economically disadvantaged applicants who did not qualify for affirmative action. In 1988, OCR conducted a compliance review and found that the lower admit rate for Asian American applicants in comparison with white applicants could be entirely explained by admission preferences that Harvard gave to athletes and children of alumni (legacies). OCR determined that legacy preferences are not per se illegal. However, the Commission recommended that OCR issue policy guidance clarifying requirements that a university must meet under Title VI to justify a legacy preference or other admissions policies that have a disparate impact by race, color, or national origin.³⁷

OCR has not issued any such guidance and also has not received complaints on this issue. According to OCR, if complaints are filed in this area, Titles VI and IX and their implementing regulations, case law, and existing policy would address the legal requirements.³⁸

OCR’s strategic plan required it to become a partner with local beneficiaries, advocacy groups, and other entities. Because no formal guidance from OCR headquarters existed on the partnership process, each region developed its own pilot program. The Kansas City Enforcement Office formalized its partnership process review, entitled Profile, Assessment, and Resolution (PAR), and issued documents that explained clearly PAR’s application to high-priority issue areas.³⁹ The Commission recommended that OCR finalize and disseminate the PAR review self-assessment survey to all its regional offices. In 1999, the Commission found that although the PAR reviews were successful, Kansas City was still the only OCR enforcement office using them.⁴⁰

After the completion of the pilot program in Kansas City, OCR discontinued PAR reviews because of competing priorities, which include minorities in special education, English language learners in special education, and accessibility reviews. The last PAR review was done in 1999, and at this time OCR has no plans to restart the reviews.⁴¹

³⁵ U.S. Department of Education, Office for Civil Rights, “Case Resolution and Investigative Manual,” June 2004, p. 19.

³⁶ OCR only performs pre-award reviews mandated by law under the Magnet Schools Assistance Program.

³⁷ USCCR, *Asian Americans in the 1990s*, pp. 195–97.

³⁸ DOEd Interrogatory, p. 13.

³⁹ USCCR, *Equal Educational Opportunity, Volume I*, pp. 251–52.

⁴⁰ USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*, p. 125.

⁴¹ DOEd Interrogatory, p. 14.

In 1996, the Commission found that Section 504 regulations⁴² were subdivided into topic areas and that this specificity helped funding recipients, beneficiaries, employees, and other individuals understand their rights and responsibilities under the federal regulations. OCR staff and officials, however, noted that the general public has little understanding of Title VI in comparison with Section 504.⁴³ As a result, the Commission recommended that OCR issue new Title VI regulations⁴⁴ modeled on the subdivision in the Title IX⁴⁵ and Section 504 regulations.⁴⁶

The Title VI regulations were the first of the nondiscrimination regulations that the former Department of Health, Education, and Welfare (HEW) published in 1964. HEW and DOEd used Title VI regulations as the model for regulations promulgated to implement later nondiscrimination statutes. Therefore, according to DOEd, the regulatory restructuring the Commission suggested is unnecessary.⁴⁷

In 1996, the Commission found that although OCR's draft guidance on fairness in testing was detailed, it applied only to testing under Titles VI and IX. At that time, the Commission recommended that OCR issue finalized investigative guidance on fairness in testing. The Commission also recommended that OCR modify the draft to include a discussion of the legal standards and investigative guidance on testing under Section 504 and Title II of the Americans with Disabilities Act.⁴⁸

In December 2000, OCR issued "The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy Makers." OCR developed this document as a resource guide for its external customers and not as an investigative guide for OCR employees. Employees rely on the statute, the regulations, and case law when investigating testing issues. Often, documents developed or published during previous administrations are archived when a new administration comes into the agency. Archived documents become available to the public through OCR's Web site and under the Freedom of Information Act (FOIA). The testing document was archived in 2001.⁴⁹

Previously, the Commission found that OCR staff had easy access to policies, resource materials, education and technical assistance documents, and other information through a single computerized database. The public, however, did not have access to this database. As a result, the Commission recommended that OCR take advantage of its database of information and make its policies, investigative guidance, and other education and technical assistance materials available to the public through an electronic bulletin board service or through the Internet.⁵⁰

OCR's Web site is now accessible to the public.⁵¹ The site provides the public access to OCR's current education and technical assistance materials and some policy and investigative guidance documents. Although the list of documents is not inclusive, the public may request other documents.

⁴² 34 C.F.R. pt. 104 (2004).

⁴³ USCCR, *Equal Educational Opportunity, Volume I*, pp. 254–55.

⁴⁴ 34 C.F.R. pt. 100 (2004).

⁴⁵ 34 C.F.R. pt. 106 (2004).

⁴⁶ USCCR, *Equal Educational Opportunity, Volume I*, p. 255.

⁴⁷ DOEd Interrogatory, pp. 14–15.

⁴⁸ USCCR, *Equal Educational Opportunity, Volume I*, p. 258.

⁴⁹ DOEd Interrogatory, p. 15.

⁵⁰ USCCR, *Equal Educational Opportunity, Volume I*, p. 259.

⁵¹ See <<http://www.ed.gov/about/offices/list/ocr/publications.html>> (last accessed Apr. 19, 2004).

OCR undertook enforcement and compliance activities that were affected at times by state statutes and policies already in place. The Commission recommended that OCR regional offices be informed of state civil rights policies and compliance programs for all states within their regions. The Commission also recommended that OCR take appropriate steps to inform school districts and state officials of their obligations under federal law and to ensure that school districts are in compliance with Title VI and *Lau v. Nichols*, which requires that English be taught to students who are limited English proficient in order for them to participate meaningfully in education programs.⁵²

OCR indicates that its enforcement offices work closely with state officials on all federal civil rights matters involving educational institutions. In many jurisdictions, state civil rights laws have greater, as opposed to fewer, requirements than federal regulations. Rather than focusing on areas in which state laws or regulations do not match federal requirements, OCR devotes itself to informing states about the federal requirements. For example, OCR worked with six State Departments of Education that supervised districts with small numbers of English language learner (ELL) students; those districts had not provided services that comply with the requirements of Title VI and *Lau* guidelines. According to OCR, this state-level effort ensures “low-incidence” districts meet their obligations to comply with federal law. Other ways in which OCR informs school districts and state officials of their obligations include (1) mailing information to administrators at the state level to inform them about their obligations; (2) delivering joint presentations with states on Title VI and *Lau*, which are directed to state- and district-level administrators; (3) providing information on its Web site for all customers; and (4) conducting statewide reviews that provide important information to district officials.⁵³

The Commission found that despite the landmark *Brown v. Board of Education* decision,⁵⁴ most schools in the United States still used ability grouping to organize students within classrooms.⁵⁵ After the *Brown* decision prohibited racial segregation in education, local education officials simultaneously complied with the judicial mandate to allow students of different races to attend the same schools while they relied on ability grouping and tracking to achieve de facto segregation within schools. The Commission recommended that OCR investigate and monitor vigorously how schools implemented ability grouping to ensure compliance with civil rights laws. In addition, the Commission recommended that OCR strengthen and improve its technical assistance, outreach, and education programs to provide clear and detailed guidance to state and local education agencies, school administrators, district Title VI compliance officers, teachers, counselors, professional support staff, and parents on how to ensure equal access to educational opportunities or compliance with Title VI.⁵⁶

⁵² USCCR, *Federal Enforcement of Title VI and Lau v. Nichols*, pp. 231–32. In *Lau v. Nichols*, the landmark case in bilingual education, the parent of a Chinese student sued the San Francisco School Board. The case questioned whether non-English-speaking children received a meaningful opportunity to participate when instructed in a language they cannot understand. The Supreme Court ruled in favor of *Lau*, suggesting equal treatment does not ensure equal opportunity. 414 U.S. 563 (1974).

⁵³ DOEd Interrogatory, p. 18.

⁵⁴ 347 U.S. 483 (1954). On May 17, 1954, the United States Supreme Court announced its decision that “separate educational facilities are inherently unequal.” The decision effectively denied the legal basis for segregation in Kansas and 20 other states with segregated classrooms.

⁵⁵ USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*, pp. 118–19. Historically, school officials used ability grouping to separate students based on racial rather than academic considerations.

⁵⁶ USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*, pp. 119–20.

The Commission identified five key principles and recommended that OCR implement them in providing guidance on education planning.⁵⁷

OCR still considers the overrepresentation of minorities in lower track courses a problem,⁵⁸ and has proactively initiated compliance activities on the misidentification of minorities and students with limited English proficiency for special education. Because education planning is a state and local responsibility, providing guidance on the subject falls outside OCR's purview. OCR does, however, provide guidance if problems arise in a particular case resolution where appropriate planning measures are necessary to achieve compliance with federal requirements.⁵⁹

Although OCR gave high priority to ability grouping practices, it had not issued a single, coherent, and cohesive policy guidance document or investigative manual to assist legal and investigative staff working on Title VI ability grouping compliance reviews and complaint investigations. In addition, OCR had not issued guidance or other materials to schools seeking to ensure that their ability grouping practices complied with Title VI. Based on this finding, the Commission recommended that OCR update, finalize, and formally issue the draft documents, such as "Investigative Plan: Ability Grouping Compliance Review," on ability grouping practices and develop an investigative manual similar to the draft manual on the underrepresentation of female and minority students in upper-level math and science classes.⁶⁰

OCR still has not issued "Investigative Plan: Ability Grouping Compliance Review" in final form because, it says, guidance in this area can be found in Title VI regulations, case law, and existing policy.⁶¹

Neither the Title VI regulations nor any OCR policy or technical assistance document defined "ability grouping." The Commission recommended that OCR define the term in a Title VI ability grouping policy or technical assistance document.⁶²

OCR's "Elementary and Secondary School Survey," currently on OCR's Web site, defines ability grouping "as the pedagogical practice of separating students into different classrooms within a grade based on their estimated achievement or ability levels."⁶³ OCR's pamphlet, "Student Assignment in Elementary and Secondary Schools and Title VI," also provides a definition.⁶⁴

⁵⁷ The five key principles are (1) providing parental notification and encouraging parental participation; (2) using neutral and nondiscriminatory screening and diagnostic procedures; (3) structuring education programs to serve a diverse student population by grouping students to reflect differential ability in various subjects and re-evaluating and reassigning students periodically to reflect changes in ability; (4) evaluating and allocating teachers, facilities, and other resources among education programs; and (5) taking steps to eliminate all institutional barriers promoting equal access to all subjects and activities, and counseling each student to maximize his or her potential opportunities.

⁵⁸ DOEd Interrogatory, p. 4.

⁵⁹ *Ibid.*, p. 19.

⁶⁰ USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*, p. 121.

⁶¹ DOEd Interrogatory, p. 19.

⁶² USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*, p. 121.

⁶³ DOEd Interrogatory, p. 19. This document can be accessed at <<http://205.207.175.80/ocrpublic/wdsdef98.thml#ability>> (last accessed May 12, 2004).

⁶⁴ DOEd Interrogatory, p. 19. This pamphlet can be accessed at <<http://www.ed.gov/about/offices/list/ocr/docs/tviassgn.html>> (last accessed Apr. 23, 2004).

Although Section 504 statutory language used the term “individual with a disability,” OCR retained references to “handicapped persons” throughout the corresponding regulations.⁶⁵ The Commission recommended that if DOEd/OCR reviews Section 504 regulations, the phrase “qualified handicapped persons” be modified to conform to the current language of the statute.⁶⁶

OCR has not yet undertaken this task and is focusing its resources on other competing priorities. According to OCR, incorporating the new statutory language would require more than technical amendments to the existing regulations and the appendix. Except when directly quoting the Section 504 regulations, OCR does use language consistent with the statute.⁶⁷

OCR had not produced policy specifically addressing students with disabilities who also have non-disability-related needs, such as giftedness and limited proficiency in English. Under Section 504, a recipient that operates a public elementary or secondary education program must provide a “free appropriate public education” (FAPE) to each qualified disabled person who is in the recipient’s jurisdiction regardless of the nature or severity of the person’s disability.⁶⁸ The Commission recommended that OCR clarify the effect of Section 504 requirements on the nondisability-related needs of students who have disabilities and address the obligation to provide a free appropriate public education under Section 504 as it applies to students who have disabilities and who are also limited English proficient or gifted.⁶⁹

The Section 504 regulations explicitly express that a recipient’s obligation to provide a free appropriate public education extends to each qualified person with a disability in the recipient’s jurisdiction, regardless of the nature or severity of the person’s disability.⁷⁰ OCR indicated that it declined to follow the Commission’s recommendation because the obligation applies fully to students with disabilities who are gifted and students with disabilities who also have limited English proficiency.⁷¹ In addition, OCR states that it has consistently required FAPE to gifted and limited English proficient students with disabilities.⁷² One of its current areas for compliance reviews is English language learners in special education.

During its previous reviews, the Commission found that Section 504 regulations do not explicitly address whether schools are legally obligated to provide students with transition services as they move from high school to postsecondary education or the work world. The regulations do, however, mention such related issues as program accessibility in the context of entering postsecondary education programs. The Commission recommended that OCR create policy guidance on the right to transition services under Section 504 to prevent inconsistent decisions in the court system and to improve OCR’s compliance and enforcement efforts related to transition services.⁷³

⁶⁵ 34 C.F.R. § 104.3(j) (2004).

⁶⁶ USCCR, *Federal Enforcement of Section 504*, p. 374.

⁶⁷ DOEd Interrogatory, p. 20.

⁶⁸ USCCR, *Federal Enforcement of Section 504*, p. 386.

⁶⁹ *Ibid.*

⁷⁰ 34 C.F.R. § 104.4 (2004); DOEd Interrogatory, p. 22.

⁷¹ DOEd Interrogatory, p. 22.

⁷² U.S. Department of Education, Office for Civil Rights, Comments on USCCR Draft 10-Year Review, p. 3.

⁷³ USCCR, *Federal Enforcement of Section 504*, p. 406.

OCR has issued several pamphlets on postsecondary education of students with disabilities.⁷⁴ “Postsecondary Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities” is a question-and-answer document that helps inform individuals of their rights and responsibilities as they transfer from secondary to postsecondary education as well as the responsibilities that postsecondary schools have for students.⁷⁵ To ensure that students with disabilities participate effectively in the classroom, the pamphlet, “Auxiliary Aids and Services for Postsecondary Students with Disabilities,” offers information about a postsecondary school’s responsibility to provide auxiliary aids and services in a timely manner.

In 2000, although OCR considered girls’ access to advanced mathematics and science education a high priority, it had not developed any major new policies relating to girls in math and science since adopting its strategic plan. In addition, in August 1994 OCR released its draft investigative manual, “Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools.” The Commission recommended that OCR develop policy guidance that established clear criteria for ensuring equal educational opportunities for girls in advanced math, science, and technology. The Commission also recommended that OCR formally issue its investigative manual on the underrepresentation of female and minority students in upper-level math and science education.⁷⁶

OCR still has not finalized the draft investigative manual, “Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools.” In addition, OCR discontinued the document, “What Schools Can Do to Improve Math and Science Achievement by Minority and Female Students.” According to OCR, Title IX, its implementing regulations, current case law, and existing policy contain appropriate guidance on ensuring equal educational opportunities for girls in advanced math, science, and technology.⁷⁷

In 2000, the Commission also found in OCR’s draft guidance that it selected schools and districts for compliance reviews that had compliance problems and were more likely to operate their upper-level math and science programs in a manner that discriminated against females and minorities. The Commission recommended that OCR charge its Survey and Statistical Support Branch with obtaining and analyzing the data that would help identify potential compliance problems.⁷⁸

Although the Survey and Statistical Support Branch no longer exists, the Program Legal Group’s Team I carries out the data collection function. Team I collects data at the elementary and secondary levels on participation of females and minorities in advanced placement math and science programs. OCR’s enforcement offices have rapid access to unedited data on key issues and to final edited school district data within six months after the close of the school year.⁷⁹

Among this section’s key points are:

- OCR released its new case resolution and investigative manual in June 2004.

⁷⁴ DOEd Interrogatory, p. 23.

⁷⁵ U.S. Department of Education, Office for Civil Rights, “Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities,” July 2002, pp. 1–9. The pamphlet can be accessed at <<http://www.ed.gov/about/offices/list/ocr/transition.html>> (last accessed May 12, 2004).

⁷⁶ USCCR, *Federal Enforcement of Title IX*, p. 132.

⁷⁷ DOEd Interrogatory, pp. 23–24.

⁷⁸ USCCR, *Federal Enforcement of Title IX*, p. 133.

⁷⁹ DOEd Interrogatory, p. 24.

- OCR has discontinued conducting Profile, Assessment, and Resolution reviews.
- In December 2000, OCR issued “The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy Makers,” but has since archived this resource guide.
- OCR’s Web site is now accessible to the public.
- OCR did not finalize the draft investigative manual, “Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools,” because Title IX contains appropriate guidance.
- The Survey and Statistical Support Branch no longer exists and the Program Legal Group’s Team I now carries out the data collection function.

Technical Assistance

In 1996, the Commission commended OCR for providing technical assistance both actively and proactively, but during later studies the Commission found that regional enforcement offices reduced the amount of technical assistance that was not part of compliance reviews.⁸⁰ One of OCR’s primary technical assistance activities was the development and dissemination of “promising programs and practices” documents in high-priority areas.⁸¹ The Commission recommended that OCR issue promising practices in all its priority issue areas as formal technical assistance documents and update, expand, and distribute them more widely.⁸²

OCR continues to provide technical assistance to its customers upon request, although to the extent that there are adequate resources and no conflicting priorities. OCR offers proactive technical assistance with both case-related issues and with matters identified in the department’s strategic plan. For example, OCR works with school districts to help them develop good evaluation plans to ensure that language acquisition programs are research based and that ELL students are meeting performance standards; and provides outreach and technical assistance that focuses on encouraging ELL parents to actively participate in their children’s education.⁸³

OCR no longer uses the term “promising practices,” but enforcement offices distribute guidance and information on educational issues. OCR refers callers and e-mail inquiries to its Web site, which contains information about civil rights issues as well as links to important DOEd educational sites. Publications and presentations can be downloaded from the Web site. Topics include, but are not limited to, “Frequently Asked Questions About Section 504 and the Education of Children with Disabilities”; “Harassment and the First Amendment”; and the “Transition From High School to College for Students with Disabilities” pamphlet.⁸⁴

⁸⁰ USCCR, *Federal Title VI Enforcement*, p. 215; USCCR, *Equal Educational Opportunity, Volume I*, p. 261.

⁸¹ “Promising programs and practices” documents describe educationally valid models that have been implemented in school districts across the country and promote equal educational opportunity in the issue areas. OCR’s headquarters office assembles the teams of issue-area experts who prepare these documents for the regional enforcement offices to use as guides in developing remedial plans for school districts that are not in compliance with civil rights statutes. See USCCR, *Equal Educational Opportunity, Volume I*, p. 261.

⁸² USCCR, *Federal Enforcement of Title IX*, p. 135.

⁸³ DOEd Interrogatory, p. 5.

⁸⁴ *Ibid.*

The Commission found that before the May 1996 reorganization, OCR had formed the *Lau* Working Group, composed of headquarters and regional staff considered subject-matter experts, and created informational materials for regional compliance specialists and state and local school district personnel. This working group provided outreach, education, and technical assistance on an informal, “whenever time allowed” basis to school districts to improve their understanding of their legal responsibilities to students with limited English proficiency. Furthermore, under the May 1996 reorganization, all *Lau* Working Group functions were assigned unofficially to the program legal teams within headquarters, despite the importance of technical assistance activities. The Commission also found that OCR had failed to issue its “promising practices” document as a formal technical assistance manual and that no reports based on the meetings of its *Lau* Working Group had been issued. The working group had produced an abundance of technical assistance materials, such as the *Lau* glossary, newsletters covering new or noteworthy compliance issues, and legal and policy information. There was no cohesive means of presenting the information in these various documents. The Commission recommended that OCR (1) ensure that its staff assigned to technical assistance activities were performing these functions officially and not informally, “whenever time allowed”; (2) issue reports following *Lau* Working Group meetings; and (3) issue “promising practices” documents as formal technical assistance manuals to a wide audience, including school districts, educators, parents, and students.⁸⁵

The *Lau* Network replaced the *Lau* Working Group, composed of headquarters and regional staff. OCR has established other networks on different programmatic issues. The purpose of these networks is to build knowledge and expertise in an area; coordinate and enhance OCR’s ability to identify and obtain strong remedies; help OCR refine its case resolution approaches; and develop ways to monitor resolution agreements more effectively. Because networks are not formal organizational structures, they have no official authority or duties, nor do they conduct technical assistance. Some staff, however, have ongoing technical assistance responsibilities in their official positions. The networks coordinate with one another across subject areas. According to OCR, in FY 2003, the *Lau* Network members coordinated with representatives of the Minorities in Special Education Network to develop investigative and technical assistance tools to ensuring consistency in an OCR initiative, “Misclassification of ELL in Special Education.”⁸⁶

The networks do not issue reports on their meetings because their primary purpose is internal information sharing. Staff who work on the networks often help develop technical assistance materials, which are then cleared for dissemination to the public.

OCR offers technical assistance to school districts with diverse student populations that address how to involve parents and community officials in school policies and programs. OCR has offered the following types of technical assistance addressing this issue:

- Enforcement offices have talked with recipient staff about effective means for serving English language learners and their parents and communities in a presentation titled “*Lau* and ELL Guide and Ensuring Equal Educational Opportunities for English Language Learners.”
- OCR provided technical assistance to parent groups, advocacy groups, and school districts on parents’ and students’ rights, and districts’ obligations in the areas of Titles VI and IX, Section 504, and Title II of the Americans with Disabilities Act.

⁸⁵ USCCR, *Federal Enforcement of Title VI and Lau v. Nichols*, pp. 197–98, 230–31.

⁸⁶ DOEd Interrogatory, p. 6.

- OCR made presentations to parents of ELL students in districts that have diverse populations on parents' and students' rights and responsibilities.
- Enforcement offices initiated a technical assistance effort to help school districts encountering an influx of African American and Hispanic students devise effective means to address student-to-student racial harassment.
- OCR provided information in English and other languages about its role in civil rights and how parents can ensure their ELL child's inclusion in an education program.⁸⁷

Although the following guidance and information documents were all produced in 1996, they were never updated or issued formally: "Promising Programs and Practices for Recruiting and Retaining Minority and Other Disadvantaged Students at Postsecondary Institutions," "Promising Programs and Practices: Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs," "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," and "Promising Practices and Programs to Prevent or Resolve Sexual or Racial Harassment." These guidance and information documents are available to OCR staff for internal use, but because of competing priorities, OCR has decided not to issue these documents as formal technical assistance manuals.⁸⁸ OCR's current priority issues include (1) minorities in special education, with an emphasis on reading; (2) limited English proficient students in special education; (3) limited- English-proficient parental involvement; (4) the transition of students with disabilities from secondary to postsecondary education; and (5) physical accessibility at postsecondary institutions.⁸⁹

The Commission found that in 1996, OCR released a promising practices document titled "Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Program." In addition, OCR created a technical assistance brochure, "What Schools Can Do to Improve Math and Science Achievement by Minority and Female Students," to help schools comply with civil rights requirements and promote equal educational opportunity for girls and minorities in advanced math and science. The Commission recommended that OCR update and expand these documents and distribute them widely to elementary and secondary schools and not wait until it schedules technical assistance presentations to distribute them.⁹⁰

Although OCR did not update "Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs," it is available to OCR staff for internal use.⁹¹ OCR has no plans to update this document because of competing priorities. "What Schools Can Do to Improve Math and Science Achievement by Minority and Female Students" has been discontinued and is no longer posted on DOEd's Web site.

Among this section's key points are:

- OCR continues to provide technical assistance to its customers upon request.

⁸⁷ Ibid., p. 7.

⁸⁸ Ibid.

⁸⁹ Stephen Cramolini, special assistant, Office of the Deputy Assistant Secretary for Enforcement, U.S. Department of Education, e-mail, Mar. 8, 2004.

⁹⁰ USCCR, *Federal Enforcement of Title IX*, p. 135.

⁹¹ DOEd Interrogatory, p. 8.

- Aside from the *Lau* Network OCR established other networks on different programmatic issues, such as minorities and students with disabilities in special education.
- The networks do not issue reports because their primary purpose is internal information sharing.

Education and Outreach

The Commission commended OCR for active and effective public outreach and education on Title VI.⁹² However, in Volumes II, III, IV, and V of its Equal Educational Opportunity Series, the Commission recommended that OCR (1) provide additional outreach and education to help state and local education agencies develop “grow their own” teacher programs; (2) develop additional outreach and education materials that discuss the “least restrictive environment”; (3) conduct more education activities on the re-evaluation requirements under the Individuals with Disabilities Education Act (IDEA);⁹³ and (4) use letters of findings as a means to disseminate to state and local school district officials the basis for the civil rights obligations Congress created in Title IX.⁹⁴

OCR uses a variety of formats to initiate education and outreach, including its Web site. According to OCR, funding recipients often attend conferences where staff regularly make presentations, which in turn leads to further opportunities for education and outreach. For example, within the past year OCR made numerous presentations throughout the country to state officials, recipients at the secondary school level, community colleges and traditional postsecondary institutions, parent advocacy organizations, independent living centers, and parent and students on how students with disabilities transit from high school to college. In addition, OCR conducted Titles VI and IX conferences in which large numbers of recipients have shared successful practices and strategies. For example, OCR provided a forum for colleges to inform one another on best practices for educating students with psychiatric disabilities. Each enforcement office has procedures for responding promptly to OCR customer inquiries whether through phone, mail, or e-mail.⁹⁵

OCR conducts more outreach, education, and technical assistance activities to encourage state and local education agencies to develop teacher programs that provide bilingual/ESL training to staff when an investigation shows compliance problems. When OCR discovers compliance problems, it may suggest corrective action that involves teacher education. For example, OCR held discussions concerning remedial actions to increase the number of trained bilingual/ESL staff where staff shortages have resulted in a denial of services. The topic of teacher competency has been part of the overall program at regional conferences on ELL students. Under appropriate circumstances, OCR has encouraged states with bilingual instructor shortages to use various state programs that encourage temporary assignments for qualified non-U.S. teachers. OCR has also helped states create an ESL endorsement to encourage local colleges to offer more ESL and tuition reimbursement programs for ESL endorsements.⁹⁶

⁹² USCCR, *Federal Title VI Enforcement*, p. 215.

⁹³ Pub L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1485 (2004)).

⁹⁴ USCCR, *Federal Enforcement of Title VI and Lau v. Nichols*, p. 228; USCCR, *Federal Enforcement of Title VI in Ability Grouping Practices*, p. 126; USCCR, *Federal Enforcement of Section 504*, pp. 382–83, 388; USCCR, *Federal Enforcement of Title IX*, p. 135.

⁹⁵ DOEd Interrogatory, p. 9.

⁹⁶ *Ibid.*, pp. 9–10.

To assist in providing compliance standards for the least restrictive environment requirement, in 1998 OCR updated its pamphlet, “Student Placement in Elementary and Secondary Schools and Section 504 and Title II of the Americans with Disabilities Act,” which is available on OCR’s Web site.⁹⁷ The pamphlet lists elements, such as evaluation and placement procedures, educational setting, and re-evaluations that must be considered when assigning students with disabilities to the least restrictive educational setting appropriate to their needs.⁹⁸

In conducting technical assistance for Section 504, OCR covers re-evaluation requirements. The Section 504 regulations provide that periodic re-evaluations of students with disabilities must be conducted, and that a re-evaluation conducted in accordance with the Education of the Handicapped Act (now IDEA) is one way to meet this requirement.⁹⁹ OCR has no enforcement responsibilities for the IDEA, but staff rely on the IDEA and its implementing regulations, as well as letters of policy clarification, when providing guidance on the re-evaluation process.

As a general rule, OCR does not use its resolution letters, including letters of findings, for disseminating information about the basis for the civil rights obligations Congress created in Title IX. OCR’s resolution letters are intended to clearly explain OCR’s jurisdictional authority to investigate Title IX complaints and the legal analysis it applies. To advise state and local school districts about Title IX and to provide clear and precise explanations of the civil rights laws, regulations, and policies on which OCR bases its compliance and enforcement activities, OCR relies on policy documents such as “Dear Colleague” letters and informational pamphlets and brochures.¹⁰⁰ OCR uses “Dear Colleague” letters to communicate information simultaneously to a large number of similar recipients, such as college and university presidents or elementary and secondary school superintendents.

Among this section’s key points are:

- Each enforcement office has procedures for responding to OCR customer inquiries whether by phone, mail, or e-mail.
- OCR uses “Dear Colleague” letters to communicate information to a large number of similar recipients.

Compliance Reviews

In past studies, the Commission found that DOEd’s pre-award review system was extremely limited. Because pre-award reviews were conducted for only one of DOEd’s federally assisted programs, recipients received funding without OCR ensuring, beforehand, that they were in compliance with Title VI. As a result, the Commission recommended that DOEd use the information required of applicants for DOEd funding to conduct pre-award desk-audit reviews of applicants before granting assistance.¹⁰¹

⁹⁷ See <<http://www.ed.gov/about/offices/list/ocr/docs/placpub.html>> (last accessed Apr. 19, 2004).

⁹⁸ U.S. Department of Education, Office for Civil Rights, “Student Placement in Elementary and Secondary Schools and Section 504 and Title II of the Americans with Disabilities Act,” <<http://www.ed.gov/about/offices/list/ocr/docs/placpub.html>> (last accessed May 12, 2004).

⁹⁹ 34 C.F.R. § 104.35(d) (2004); DOEd Interrogatory, p. 11.

¹⁰⁰ DOEd Interrogatory, p. 11.

¹⁰¹ USCCR, *Federal Title VI Enforcement*, p. 213.

OCR generally does not conduct pre-award reviews and continues to only conduct them for the Magnet Schools Assistance Program. OCR has determined that pre-award reviews are not effective compliance tools.¹⁰²

DOEd did not have a system in place to conduct post-award desk-audit reviews as an alternative to on-site compliance reviews. The Commission recommended that OCR implement a system of post-award desk-audit reviews of recipients, including local school districts and colleges and universities. The post-award desk-audit reviews should be used to uncover obvious violations of Title VI and to select recipients for on-site compliance reviews.¹⁰³

OCR still does not have a system to conduct post-award desk-audit reviews, but does do post-award compliance reviews. According to OCR, there are no plans to start conducting post-award desk-audit reviews.¹⁰⁴

In 1996, the number of compliance reviews OCR performed had barely increased over the years, implying that most DOEd recipients could expect never to be reviewed. As a result, recipients were not compelled to comply voluntarily with Title VI in anticipation of an OCR review. The Commission recommended that although OCR should continue to conduct on-site compliance reviews based on priority issues, it also should conduct comprehensive reviews that assessed a recipient's entire operations, not only compliance on priority issues.¹⁰⁵ The Commission also recommended that OCR expand its selection process for compliance reviews to include more input from parents and students.¹⁰⁶

OCR initiated fewer compliance reviews between FY 1998 and 2002 due to an increased monitoring workload.¹⁰⁷ According to OCR, between FY 1994 and 1998 it resolved 681 compliance reviews, compared with 362 in the previous five fiscal years between 1989 and 1993.¹⁰⁸ This large number of resolved reviews created an enormous monitoring workload for OCR staff. With complaints rising, OCR needed to cut back on compliance reviews.¹⁰⁹ The number of initiated compliance reviews is again rising. OCR initiated 74 compliance reviews in FY 2003, compared with 11 in 2002 (see table 2.2).

¹⁰² DOEd Interrogatory, p. 25.

¹⁰³ USCCR, *Federal Title VI Enforcement*, p. 214.

¹⁰⁴ DOEd Interrogatory, p. 26.

¹⁰⁵ USCCR, *Federal Title VI Enforcement*, p. 214.

¹⁰⁶ USCCR, *Equal Educational Opportunity, Volume I*, p. 260.

¹⁰⁷ DOEd Interrogatory, p. 26.

¹⁰⁸ DOEd/OCR, "2001 and 2002 Annual Report"; DOEd Interrogatory, p. 27.

¹⁰⁹ DOEd Interrogatory, p. 27.

TABLE 2.2
DOEd/OCR Compliance Reviews, 1998–2003

Fiscal year	Initiated	Resolved
1998	102	100
1999	76	93
2000	47	71
2001	21	43
2002	11	18
2003	74	

Source: U.S. Department of Education, Office for Civil Rights, “Annual Report to Congress Fiscal Years 2001 and 2002,” July 2003, p. 2; DOEd Interrogatory, p. 27.

OCR’s on-site reviews are still based on priority issues because its resources are not infinite and it must choose its issues based on how many compliance reviews staff can conduct. OCR believes that concentrating available resources on high-priority issues optimizes productivity.¹¹⁰

OCR enforcement offices typically do not solicit input from parents or students when selecting sites for compliance reviews because they likely lack the necessary policy, procedural, and services perspective to determine whether a site is suitable for review. Occasionally, OCR has contacted membership organizations directly affected, for example, parent groups. As reviews are being conducted, OCR enforcement offices will talk with parents and students either in interviews or focus group settings.¹¹¹

In the early 1990s, the Commission found that many Asian American immigrant children, particularly those with limited English proficiency, were deprived of equal access to educational opportunity. Available information suggested that American immigrant children were leaving public schools with serious deficiencies, particularly in the areas of reading and writing, and that some subgroups had high dropout rates.¹¹² The Commission recommended that OCR step up its enforcement of Title VI’s *Lau* requirements for instruction for students with limited English proficiency. In particular, OCR should carry out more compliance reviews on adherence to the *Lau* guidelines.

OCR indicates that its enforcement offices have conducted hundreds of Title VI/*Lau* reviews throughout the country since the Commission’s 1992 report. These reviews have been conducted on schools of every size and at all enrollment levels. Because of the close cooperation between OCR and state officials, OCR’s activity in the *Lau* area is visible to states and their school districts. Throughout 2003, although OCR conducted *Lau* technical assistance activities, it continued to receive complaints regarding *Lau* activities. OCR continues to investigate these complaints.¹¹³

One of the key objectives of the No Child Left Behind Act and the DOEd strategic plan is to ensure that English language learner students meet rigorous standards.¹¹⁴ OCR has been monitoring the im-

¹¹⁰ *Ibid.*, p. 33.

¹¹¹ *Ibid.*, p. 28.

¹¹² USCCR, *Asian Americans in the 1990s*, pp. 194–95.

¹¹³ DOEd Interrogatory, p. 27.

¹¹⁴ DOEd/OCR, “2001 and 2002 Annual Report,” p. 10. On January 8, 2002, the President signed into law the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301–6777 (2004)). The act contains provisions to ensure that all children will have access to a high-quality education regardless of race, ethnicity, sex, disability, or socioeconomic status. This landmark legislation embodies four key principles: strong accountability for re-

plementation of resolution agreements from more than 200 school districts to ensure that they (1) have a means for effective program evaluation; (2) are evaluating their English language acquisition programs and the performance of ELL students and former ELL students; and (3) are making changes as needed to meet their education goals for these students.¹¹⁵ According to OCR, one of its high-priority national issues for compliance reviews is the placement of ELL students in special education.¹¹⁶

In 2000, the Commission found that OCR conducted only a handful of compliance reviews and complaint investigations based on Title IX and girls' access to and participation in advanced math and science education. The Commission also found that OCR had not specifically addressed within-class and between-class pupil placement methods to ensure nondiscrimination in math and science in its Title IX regulations. The Commission recommended that OCR increase the number of Title IX compliance reviews focusing on girls' access to advanced math and science. In addition, it recommended that OCR examine within-class and between-class student placement practices to determine if they are having an adverse effect on girls' participation rates in upper-level math and science classes.¹¹⁷

The Commission now finds that due to competing priorities, OCR is not conducting compliance reviews on girls' access to and participation in advanced math and science education. In addition, OCR did not conduct any within-class and between-class student placement practices reviews in the recent past. OCR does not plan to perform any such reviews in the near future. OCR provides technical assistance, makes presentations, responds to inquiries, and investigates complaints to ensure against gender bias. In addition, OCR provides guidance to recipients and students through Title IX, its regulations, case law, and existing policy.¹¹⁸

Among this section's key points are:

- Because OCR believes that pre-award reviews are not effective compliance tools, it conducts reviews only for the Magnet Schools Assistance Program.
- OCR continues to conduct only post-award compliance reviews and there are no plans to start conducting post-award desk-audit reviews.
- Between FY 2002 and 2003, the number of initiated compliance reviews increased 573 percent.
- OCR's on-site reviews are still based on priority issues because of finite resources.
- OCR no longer conducts compliance reviews on girls' access to and participation in advanced math and science education.

Deficiencies, Remedies, and Sanctions

In the past, the Commission commended DOEd for the degree to which it used administrative and other options available to compel compliance with Title VI. The Commission indicated that DOEd stood out as the only agency that made more than infrequent use of its fund termination authority. It

sults; greater flexibility for states, school districts, and schools in the use of federal funds; more choice for parents; and an emphasis on teaching methods that have been demonstrated to work.

¹¹⁵ DOEd/OCR, "2001 and 2002 Annual Report," p. 10.

¹¹⁶ DOEd Interrogatory, p. 27.

¹¹⁷ USSCR, *Federal Enforcement of Title IX*, pp. 134, 146.

¹¹⁸ DOEd Interrogatory, p. 29.

recommended that other federal agencies emulate DOEd and make effective use of all the enforcement options available to them.¹¹⁹

OCR has been able to secure compliance through voluntary agreements with recipients where compliance concerns have been found. OCR issues a formal letter of violation if a recipient refuses to enter into a voluntary agreement. If the recipient still refuses to remedy the violation, OCR either files a “Notice of Opportunity for Hearing” to initiate fund termination proceedings, or refers the violation to DOJ for judicial enforcement. Between 1996 and 2003, although OCR did not defer or terminate federal financial assistance, it initiated fund termination hearings under Section 504 against two recipients. OCR also referred two cases to DOJ for judicial enforcement.¹²⁰

Among this section’s key points is:

- Between 1996 and 2003, OCR initiated fund termination hearings against two recipients.

Staff Training

OCR had not developed a comprehensive staff training strategy or plan to ensure that all staff were afforded regular and thorough training on civil rights statutes, regulations, guidelines, policies, and enforcement procedures. As a result, the Commission recommended that OCR prepare a comprehensive staff training plan; and provide new staff with formal training on all the civil rights statutes DOEd enforces, on DOEd’s federally assisted programs, and on DOEd’s regulations, policies, guidelines, and enforcement procedures. The Commission also recommended that DOEd base its staff training plan on an assessment of the training needs of all staff and allocate specific budgetary resources to staff training.¹²¹

Each OCR enforcement office has at one time or another developed a comprehensive training program based on staff input and aligned with specific training needs in each office. When providing training, OCR uses a variety of sources and methods, such as classroom instruction, mock investigations, audio and videotapes, professional trainers, in-house experts, and study groups.¹²²

According to OCR, DOEd encourages its staff to develop individual training plans and offers courses on management and skills training. OCR encourages its enforcement staff to attend conferences and meetings relevant to their work. Recent training topics included interviewing skills, negotiation skills, telephone skills, accessibility of facilities, individualized instruction, evidence, sexual harassment, and First Amendment requirements.¹²³

By jointly conducting case processing activities, the chief attorney and/or chief program officer provides new staff with basic or intermediate case processing techniques. New staff also receive hands-

¹¹⁹ USCCR, *Federal Title VI Enforcement*, pp. 214, 216.

¹²⁰ DOEd Interrogatory, p. 32. The two cases referred to DOJ for judicial enforcement were (1) under Section 504, Davis Joint Unified School District and (2) under Title VI, Denver Public Schools.

¹²¹ USCCR, *Federal Title VI Enforcement*, p. 216.

¹²² DOEd Interrogatory, p. 33.

¹²³ *Ibid.*

on work on cases assigned to their case processing teams. Training covers all civil rights statutes and regulations that OCR enforces, and is updated as needed.¹²⁴

OCR provides refresher training to its staff. Current staff are invited to participate in new staff training. There are also mentoring programs for less experienced staff. For each fiscal year, enforcement offices identify training opportunities for staff and develop a training schedule. Internal training provided to staff includes forums or seminars on frequently raised legal issues. OCR provides refresher legal training during monthly attorney meetings. OCR staff sometimes attend civil rights seminars that outside groups such as the Departments of Justice and Agriculture and state and local bar associations offer, and conferences that publishers provide. OCR also invites outside speakers to host staff training on emerging civil rights issues and investigative techniques. Staff may also utilize the Regional Training Centers' training and career development resources.¹²⁵

OCR has consistently allocated hundreds of thousands of dollars for training. Between FY 1997 and 1999, OCR's training budget increased 512 percent. In 2000, the OCR training budget decreased 7 percent, from \$612,000 to \$570,000. Funding allocated for training also decreased in 2001 and 2002. For 2003, OCR's training budget increased by \$22,000 or 5.1 percent (see table 2.3).

TABLE 2.3
DOEd/OCR Training Budget, 1997–2003

Fiscal year	Amount
1997	\$100,000
1998	\$456,000
1999	\$612,000
2000	\$570,000
2001	\$502,000
2002	\$431,000
2003	\$453,000

Source: DOEd Interrogatory, p. 34.

OCR communicates emerging civil rights issues to its staff using a variety of methods. The Assistant Secretary's Lecture Series uses teleconferencing or video conferencing to present enforcement offices with speakers on current issues.¹²⁶ At monthly general staff meetings OCR discusses important developments, and most enforcement offices conduct regular meetings for attorneys and investigators, as well as internal forums with experts from within OCR and outside organizations. Informal brown bag lunches and roundtable discussions are also held to keep staff up to date. DOEd provides issue forums on its intranet for all staff as participants or leaders. Networks, composed of headquarters and regional staff who are subject-matter experts, are available for discussions on such topics as Title IX and athletics, disabilities, racial harassment, desegregation, testing, and *Lau* and minorities in special education.

The Commission recommended that OCR incorporate hands-on training techniques and mock investigations into its staff training, which would assist in developing skills and ensure that OCR's poli-

¹²⁴ Ibid.

¹²⁵ Ibid., pp. 33–35.

¹²⁶ Ibid., p. 35.

cies are effectively applied. The Commission recommended that OCR work with the program offices to share resources and materials and to identify contractors to provide the training.¹²⁷

OCR now incorporates hands-on training techniques and mock investigations into its staff training. During 2003, OCR held a three-day seminar on interviewing techniques, which included mock interviews and role playing. The Department of Justice's advocacy-training program for attorneys also provides hands-on training techniques. To keep staff abreast of emerging issues, issue networks conduct monthly teleconferences. For example, the *Lau* Network has arranged for education experts to offer training on enhancing educational opportunities for limited English proficient students. The Disability Network, composed of representatives from OCR headquarters and enforcement offices throughout the country, conducts monthly teleconferences on Section 504 and Title II of the Americans with Disabilities Act enforcement. The Disability Network periodically hosts guest speakers from the field as well as representatives from other offices within DOEd, including the Office of Special Education Programs and the Office of Elementary and Secondary Education.¹²⁸

Among this section's key points is:

- OCR has consistently allocated hundreds of thousands of dollars for training, although the training budget decreased between FY 1999 and 2002.

Oversight and Quality Assurance

In 1996, the Commission found that oversight of continuing state programs was one of the weakest areas of DOEd's Title VI compliance and enforcement program. The Commission recommended that OCR require each state to submit methods of administration and annual Title VI self-assessments. In addition, the Commission recommended that OCR provide states with program-specific guidance on the necessary elements of acceptable methods of administration and technical assistance to help them come into compliance. The Commission also recommended that OCR conduct periodic comprehensive on-site reviews of each state's Title VI compliance program to uncover any problems not revealed in the Title VI self-assessments.¹²⁹

DOEd still administers the guidelines HEW issued in 1979. These guidelines, which are still in effect, require states to submit their vocational education methods of administration.¹³⁰

The Commission commended DOEd for its data collection and analysis system and indicated that it was superior to that of other federal agencies. At that time, OCR had a headquarters office—the Planning, Analysis, and Systems Service—assigned to maintain and analyze civil rights data. The Commission recommended that DOEd continue to place appropriate emphasis on data collection and analysis as integral parts of civil rights compliance and enforcement.¹³¹

The Planning, Analysis, and Systems Service no longer exist. Currently, the Program Legal Group, within the Office for Civil Rights, collects and maintains civil rights data and provides analyses to OCR's enforcement offices. In the future, DOEd's Performance Based Data Management Initiative

¹²⁷ USCCR, *Equal Educational Opportunity, Volume I*, p. 263.

¹²⁸ DOEd Interrogatory, pp. 35–36.

¹²⁹ USCCR, *Federal Title VI Enforcement*, pp. 215–16.

¹³⁰ DOEd Interrogatory, p. 36.

¹³¹ USCCR, *Federal Title VI Enforcement*, p. 216.

will collect and maintain OCR data. DOEd continues to collect and analyze data on the treatment of participants by race, color, and national origin. In addition to the aforementioned data, OCR and DOEd's Institute of Education Sciences and National Center for Education Statistics (NCES) collect a wide variety of other data.¹³²

In 1992, the Commission found that the admit rates of Asian American students to elite colleges and universities fell at a time when the number of Asian American applicants to these colleges and universities was increasing rapidly. Charges that colleges and universities were placing ceilings on the numbers of Asian American students admitted, and that Asian American applicants were discriminated against in the admissions process relative to white applicants were made with increasing frequency. As a result, the Commission recommended that OCR require colleges and universities covered under Title VI to regularly provide OCR with data on the racial and ethnic breakdown and qualifications of applicants and admitted students. The Commission recommended that OCR use these data in deciding whether to initiate Title VI compliance reviews of these institutions.¹³³

The Commission now finds that OCR coordinates with NCES to require that data be collected on students enrolled in postsecondary institutions, but institutions are not required to collect data on applicants to these institutions.¹³⁴ NCES makes its Integrated Postsecondary Education Data System available to the public through its Web site.¹³⁵

DOEd data were displayed by students' race or ethnicity in crucial areas, such as demographic characteristics, enrollment of students in particular educational settings, measures of achievement, and indicators of attainment. But the presentation of these data was generally limited to reporting on students who were white, black, or Hispanic. Data were lacking in these crucial areas for Asian Americans, Native Americans, and other national origin groups. The Commission recommended that documents of all DOEd entities that contain data include information on national origin groups, such as Asian Americans and Native Americans.¹³⁶

DOEd/OCR has undertaken the task of providing adequate data on the demographic characteristics, educational experiences, measures of educational achievement, and indicators of attainment for Asian Americans, Native Americans, and students of other national origins. OCR collects these data at the elementary and secondary levels and coordinates with NCES to collect such data at the postsecondary level.¹³⁷

Among this section's key points are:

- DOEd continues to collect and analyze data on the treatment of participants by race, color, and national origin.
- OCR coordinates with NCES to require that data be collected on students enrolled in postsecondary institutions.

¹³² DOEd Interrogatory, p. 30.

¹³³ USCCR, *Asian Americans in the 1990s*, pp. 195, 197.

¹³⁴ DOEd Interrogatory, p. 31.

¹³⁵ See <<http://www.ed.gov/nces/ipeds>> (last accessed Apr. 21, 2004).

¹³⁶ USCCR, *Equal Educational Opportunity, Volume I*, p. 249.

¹³⁷ DOEd Interrogatory, p. 31.

Coordination

Aside from its memorandum of understanding (MOU) with the Office of Special Education and Rehabilitative Services (OSERS), OCR had little formal communication with the other program offices within DOEd. Although the Commission commended OCR for the MOU with OSERS, it recommended that whenever appropriate OCR continue its interaction with DOEd's program offices, such as the Office of Bilingual Education and Minority Languages Affairs, the Office of Elementary and Secondary Education, and the Office of Educational Research and Improvement.¹³⁸

Although OCR continues its interaction with DOEd's program offices, it has not identified the need for any additional memoranda of understanding with other program offices.¹³⁹

Except for the Disability Coordinating Council, no similar coordinating council existed for other civil rights statutes that OCR enforced, such as Titles VI and IX.¹⁴⁰ As a result, the Commission recommended that DOEd and OCR, along with DOJ, establish interagency coordinating councils for the other civil rights statutes.

DOJ established the Interagency Working Group on Limited-English Proficiency in December 2001. Members of the working group represent more than 35 federal agencies. The working group's mission is to build awareness of the need and methods to ensure that limited English proficient persons have meaningful access to important federal and federally assisted programs. OCR serves on the steering committee of the working group.¹⁴¹

Among this section's key points is:

- OCR serves on the steering committee of the Interagency Working Group on Limited-English Proficiency.

Output Evaluation

OCR's outcomes measurement is process oriented; that is, it does not apply social or behavioral science methods, or public surveys to evaluate its success in eradicating discrimination.¹⁴² Furthermore, OCR has neither planned nor implemented means to distinguish its activities' individual effect on the organization's efficiency and effectiveness or the overall goal of eradicating discrimination.¹⁴³ OCR expresses as its goal to ensure equal access to education and promote educational excellence throughout the nation through the vigorous enforcement of civil rights. To meet that goal, OCR has developed the following two objectives: (1) to eliminate discriminatory educational practices within schools, and (2) to obtain results through efficient management of civil rights compliance activities.

¹³⁸ USCCR, *Equal Educational Opportunity, Volume I*, p. 248.

¹³⁹ DOEd Interrogatory, p. 37.

¹⁴⁰ USCCR, *Equal Educational Opportunity, Volume I*, p. 250.

¹⁴¹ DOEd Interrogatory, p. 37.

¹⁴² Social or behavioral science methods include laboratory experiments, field experiments, analysis of observational data and natural experiments, and survey and administrative records reports.

¹⁴³ DOEd Interrogatory, p. 38.

Under these two objectives, OCR has developed performance evaluation factors in response to the requirements of the Government Performance and Results Act (GPRA).¹⁴⁴

To evaluate its goal to eliminate discrimination in schools, OCR measures the percentage of technical assistance it provides to recipients and the percentage of technical assistance it provides to parents. For FY 2003, OCR established a performance target that 50 percent of its technical assistance materials would help recipients identify and fulfill federal civil rights obligations. OCR's actual performance exceeded its target. OCR also set a performance target that 20 percent of its materials would assist parents in understanding recipients' federal civil rights obligations. Again, OCR exceeded its target (see table 2.4).

OCR also sets goals for obtaining results through efficient management of civil rights compliance activities. OCR measures the percentage of complaints resolved within 180 days of receipt. In each year between FY 2001 and 2003, OCR exceeded its performance target of resolving 80 percent of its complaints within 180 days (see table 2.4). According to OCR, in FY 2003, 91 percent of complaints were resolved within 180 days of receipt. Although OCR has continuously exceeded its performance targets since 2001, the performance target for FY 2004 remains at 80 percent.

OCR uses the above performance indicators in its strategic self-evaluation and also in the annual budget request to OMB.¹⁴⁵ OMB and Congress measure OCR's effectiveness by reviewing its ability to meet these indicators.¹⁴⁶

TABLE 2.4
DOEd/OCR Performance Indicators, FY 2000–2004

Performance indicators	Actual performance	Performance targets
Percentage of OCR materials that assist recipients in identifying and addressing federal civil rights obligations		
2003	76	50
2004	–	50
Percentage of OCR materials that assist parents in understanding recipients' federal civil rights obligations		
2003	40	20
2004	–	20
Percentage of complaints resolved within 180 days of receipt		
2000	78	80
2001	84	80
2002	89	80
2003	91	80
2004	–	80

Source: DOEd Interrogatory, pp. 39–41.

¹⁴⁴ Pub. L. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 31 U.S.C. and 39 U.S.C. (2004)).

¹⁴⁵ DOEd Interrogatory, p. 38.

¹⁴⁶ *Ibid.*, p. 41.

Among this section's key points is:

- OCR has continuously exceeded its performance target in terms of the percentage of complaints it resolves within 180 days of receipt.

Conclusion

Between 1992 and 2000, the Commission reviewed OCR numerous times and issued recommendations that could potentially enhance its enforcement efforts. During those reviews, the Commission applauded OCR for its model organizational structure; its aggressive use of administrative and other options to necessitate Title VI compliance; its ability to actively and effectively conduct Title VI education and outreach and technical assistance; and its superior data collection and analysis system. Today, the assistant secretary continues to report to the secretary and the deputy secretary, but OCR's top three positions are vacant; one has been vacant since December 2002. OCR continues to use administrative and other options available to compel Title VI compliance. Between 1996 and 2003, OCR did not defer or terminate federal financial assistance, but it did initiate fund termination hearings against two recipients. OCR also referred two cases to DOJ for judicial enforcement. OCR continues to provide technical assistance and education and outreach on the following priority issues: (1) minorities in special education; (2) limited English proficient students in special education; (3) limited English proficient parental involvement; and (4) the transition of students with disabilities from secondary to postsecondary education.

During its reviews, the Commission also found weaknesses in OCR's enforcement practices. The Commission noted the absence of manuals for explaining procedures for Title VI compliance and review processes; the inaccessibility of DOEd/OCR's database to the public; OCR's limited use of pre-award reviews; and the decline in the number of initiated compliance reviews. OCR updated its case resolution manual in 2001, but the manual does not delineate procedures for pre-award or post-award reviews, nor does it contain separate sections for conducting compliance reviews for different types of DOEd programs. OCR's Web site is now accessible to the public and provides current education and technical assistance materials and some policy and investigative guidance documents. OCR continues to conduct only pre-award reviews for the Magnet Schools Assistance Program and has determined that pre-award reviews are ineffective compliance tools. Between FY 1998 and 2002, the number of initiated compliance reviews declined from 102 to 11. More recently, however, the number of reviews has sharply increased. Between FY 2002 and 2003, initiated compliance reviews jumped 573 percent. OCR relies on process-oriented evaluation factors of its success toward reaching goals instead of applying social or behavioral science methods.

Chapter 3: Equal Employment Opportunity Commission

President Lyndon B. Johnson signed the Civil Rights Act of 1964,¹ which among other things, created the Equal Employment Opportunity Commission (EEOC). The agency began operating on July 2, 1965. According to the EEOC founding statute, as amended in 1972, the United States President, with the consent of the Senate, appoints EEOC's five commissioners for five-year, staggered terms and the general counsel for a four-year term.²

Acronyms are used throughout this chapter. Table 3.1 lists those referenced frequently.

TABLE 3.1
Acronyms in Chapter 3

Age Discrimination in Employment Act	ADEA
Alternative Dispute Resolution	ADR
Americans with Disabilities Act of 1990	ADA
Annual Performance Plan	APP
Comprehensive Enforcement Plan	CEP
Fair Employment Practices Agencies	FEPA
Government Performance and Results Act	GPRA
National Academy of Public Administration	NAPA
Office of Legal Counsel	OLC
Priority Charge Handling Procedures	PCHP
Research and Analytic Services	RAS
Revolving Fund	RF
Technical Assistance Program Seminars	TAPS
U.S. Equal Employment Opportunity Commission	EEOC

Previous Commission Reviews of EEOC

Since 1992, the U.S. Commission on Civil Rights has released four reports examining EEOC's enforcement of federal equal employment laws and made 199 recommendations. A 1992 report contained 11 recommendations on ways in which EEOC could improve how it handled fair employment problems.³ A 1993 report made eight recommendations on how the agency could better eradicate employment discrimination in the federal sector.⁴ A 1998 report outlined EEOC's specific failings in its implementation and enforcement of the Americans with Disabilities Act (ADA) and offered 68

¹ Pub. L. No. 88-352, tit. VII, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 200e-200e-17(a) (2004)).

² 42 U.S.C. § 2000e-4 (2004); U.S. Equal Employment Commission, Order 110.002, 5/97, p. I-1.

³ U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, February 1992 (hereafter cited as USCCR, *Asian Americans in the 1990s*).

⁴ U.S. Commission on Civil Rights, *Equal Employment Rights for Federal Employees*, August 1993. This chapter does not focus on the federal sector.

recommendations to improve ADA enforcement.⁵ In 2000, the Commission focused on EEOC's overall enforcement and offered 112 recommendations.⁶ This study examines whether EEOC has implemented recommendations made in the earlier reports except that issued in 1993 as this chapter's focus is on the private sector.

Mission and Responsibilities

The EEOC's mission is to promote equality of opportunity in the workplace and enforce federal laws prohibiting employment discrimination. The agency enforces and interprets federal employment discrimination laws protecting workers from employment discrimination, and adjudicates employment discrimination claims filed against agencies. In regard to the administrative charge process, EEOC's functions are intake, categorization, and investigation. EEOC also provides funding and support to state and local Fair Employment Practices Agencies (FEPAs) and Tribal Employment Rights Organizations (TEROs).⁷ Further, EEOC conducts many outreach programs such as a small-business initiative to encourage equal employment practices in the private sector.⁸ Through the Office of the General Counsel (OGC), EEOC files lawsuits seeking relief for victims of discrimination and submits *amicus curiae* briefs to support agency positions. EEOC's mediation-based alternative dispute resolution (ADR) program serves to encourage the early resolution of employment disputes, functioning as an alternative to the charge investigative process. EEOC enforces the following key civil rights statutes to achieve its mission:

- Title VII of the Civil Rights Act of 1964,⁹ as amended, which prohibits employment discrimination based on race, color, sex, religion, or national origin.
- The Age Discrimination in Employment Act (ADEA) of 1967,¹⁰ as amended, which prohibits employment discrimination against individuals 40 years of age or older.
- The Equal Pay Act of 1963,¹¹ which prohibits compensation discrimination based on gender for substantially similar work under similar conditions.
- Title I and Title V of the Americans with Disabilities Act of 1990,¹² which prohibit employment discrimination on the basis of disability in the private sector and state and local government.

⁵ U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA: An Assessment of How the U.S. Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act*, September 1998, pp. iii–iv (hereafter cited as USCCR, *Helping Employers Comply with the ADA*).

⁶ U.S. Commission on Civil Rights, *Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts*, September 2000, p. viii (hereafter cited as USCCR, *Overcoming the Past*).

⁷ U.S. Equal Employment Opportunity Commission, "Strategic Plan for Fiscal Years 2004–2009," effective October 1, 2003, <http://www.eeoc.gov/abouteeoc/plan/strategic_plan_04to09.html> (last accessed Mar. 8, 2004) (hereafter cited as EEOC, FY 2004–2009 Strategic Plan); Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, e-mail (EEOC Comments on U.S. Commission on Civil Rights 10-Year Review Chapter 3: Equal Employment Opportunity Commission), May 17, 2004, pp. 1–2 (hereafter cited as Brenner May 17 e-mail).

⁸ U.S. Equal Employment Opportunity Commission, "EEOC Enforcement Activities," 2002, <<http://www.eeoc.gov/enforce.html>> (last accessed Sept. 17, 2003).

⁹ Pub. L. No. 88-352, tit. VII, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 200e–200e-17(a) (2004)).

¹⁰ Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2004)).

¹¹ Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. §§ 201–206 (2004)).

- Sections 501 and 505 of the Rehabilitation Act of 1973,¹³ as amended, which prohibit employment discrimination against federal workers with disabilities.
- The Civil Rights Act of 1991,¹⁴ which provides monetary damages in cases of intentional discrimination and clarifies provisions regarding disparate impact actions.¹⁵

Priority of Civil Rights

EEOC reorganized in 1997 as part of a continuing effort to reinvent and enhance effectiveness.¹⁶ The reorganization reflected agency reforms implemented in 1995 and 1996 to improve management, and operational policies and procedures. At that time, EEOC had 11 offices at headquarters and 50 field offices nationwide. OGC, the Office of Legal Counsel (OLC), and the Office of Field Programs (OFP) were the offices most involved in enforcement of ADA, Title VII, ADEA, and the Equal Pay Act. Directors for those components reported to and continue to report to the chair today.¹⁷

Today, EEOC has not undergone major organizational restructuring apart from a new office that the agency established in Puerto Rico.¹⁸ A 2003 National Academy of Public Administration (NAPA) study, however, urged major changes.¹⁹ NAPA's three recommendations are that EEOC (1) create a national call center and systems for electronic charge filing; (2) streamline the field office structure and reduce the number of full-service locations; and (3) reorganize the headquarters office.²⁰ In November 2003, EEOC began the process of establishing a national contact center to provide general information about EEOC, the laws it enforces, and other agencies. The agency envisions a launch of the national contact center at the beginning of the third quarter of FY 2005.²¹ EEOC is reviewing NAPA's other recommendations.²²

Even though there has been no major restructuring, other key changes occurred at the agency. The chair, on assumption of office in August 2001, announced a Five-Point Plan under which the agency

¹² Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42, 47, 49 U.S.C. (2004)).

¹³ Pub. L. No. 93-112, tit. V, 87 Stat. 393 (codified as amended at 29 U.S.C. §§ 793-794 (2004)).

¹⁴ Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (2004)).

¹⁵ U.S. Equal Employment Opportunity Commission, "U.S. Equal Employment Opportunity Commission: An Overview," November 1998, <<http://www.eeoc.gov/facts/overview.html>> (last accessed Apr. 26, 2004) (hereafter cited as EEOC, "An Overview").

¹⁶ This was not a major organization and involved only certain headquarters support and management offices. See Brenner May 17 e-mail, p. 3.

¹⁷ USCCR, *Overcoming the Past*, p. 59.

¹⁸ Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, e-mail, Feb. 6, 2004.

¹⁹ The study came about because EEOC asked the National Academy of Public Administration for assistance in developing the restructuring plan and the human capital plan that the President's Management Agenda and related Office of Management and Budget and Office of Personnel Management directives required. See National Academy of Public Administration, *Equal Employment Opportunity Commission: Organizing for the Future*, February 2003, p. 2, <http://www.napawash.org/pubs/eeoc_report_new.htm> (last accessed Jan. 16, 2004) (hereafter cited as NAPA, *Organizing for the Future*).

²⁰ NAPA, *Organizing for the Future*, p. 3.

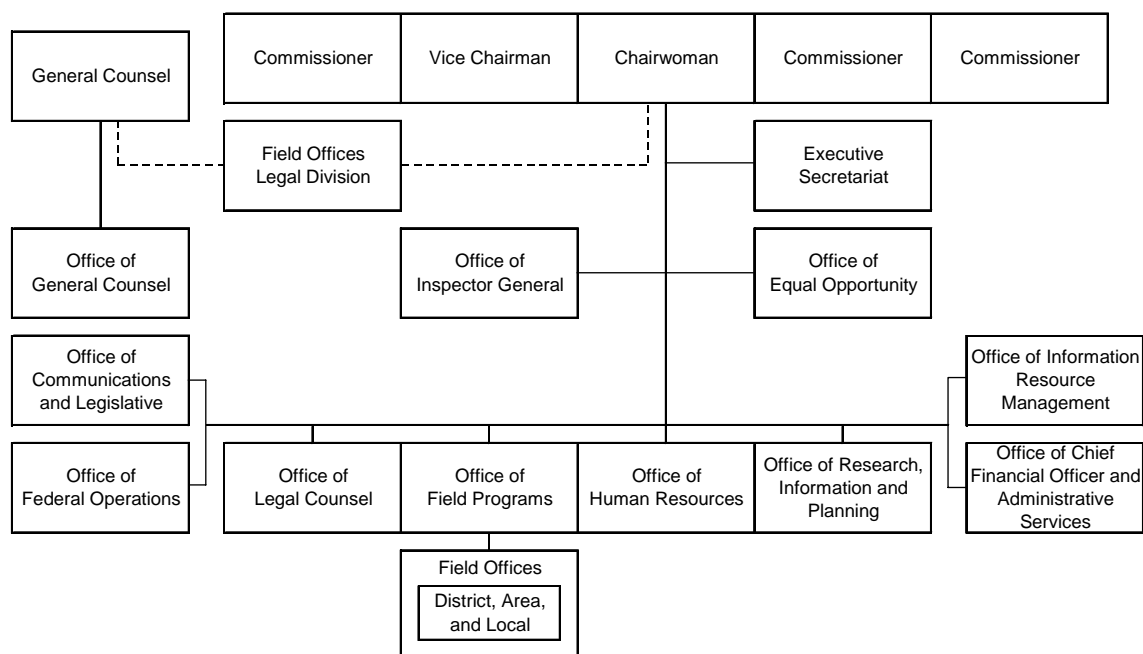
²¹ Brenner May 17 e-mail, p. 3; "EEOC Approves Initial Restructure Plan Establishing Call-In Center for Two-Year Pilot," *Daily Labor Report*, Nov. 7, 2003, p. A-2.

²² "With EEOC Finally at Full Strength, Mediation, Call Center Are Focus for 2004," *Daily Labor Report*, Jan. 12, 2004, p. C-1.

now operates.²³ EEOC also adopted a new strategic plan for FY 2004–2009, operational in October 1, 2003.²⁴ Too, the agency launched a comprehensive effort to combat backlash discrimination after the September 11, 2001, terrorist attacks. EEOC, along with the Departments of Justice and Labor, issued a public statement focused on preventing and redressing harassment incidents and workplace discrimination and violence, including any acts directed toward individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian, or Sikh. EEOC also released a fact sheet to the public on discrimination based on religion, ethnicity, or country of origin and created a special section on the agency Web site devoted to post-terrorism-related employment problems. The agency also set up a new code (named post-9-11 related) in its database to track charges alleging employment discrimination related to the events of September 11, 2001. Within a year of the attacks, 654 such charges were filed under Title VII. Of the 449 post-9-11 related charges that were closed, 95 had legitimate claims that were successfully resolved.²⁵

EEOC's organizational setup is presented in figure 3.1.

FIGURE 3.1
EEOC Organizational Structure, 2004



Source: U.S. Equal Employment Opportunity Commission, Organizational Chart, May 3, 2001, <http://www.eeoc.gov/abouteeoc/plan/2002/budget/appendix_b-4.html> (last accessed Feb. 5, 2004).

²³ U.S. Equal Employment Opportunity Commission's Response to the U.S. Commission on Civil Rights Interrogatory for Volume IV of the Ten-Year Review of Civil Rights Enforcement, Nov. 25, 2003, p. 1 (hereafter cited as EEOC Interrogatory). The Five-Point Plan is discussed in greater detail in the Planning section of this chapter.

²⁴ The strategic plan is discussed in greater detail in the Planning section of this chapter.

²⁵ EEOC Interrogatory, p. 5.

Among this section's key points are:

- EEOC's organizational structure has remained basically the same since the Commission's 2000 review. The NAPA report recommended major changes to the agency's organizational structure.
- EEOC is beginning to implement one key change, setting up a national contact center to provide general information on EEOC, the laws it enforces, and other agencies. It is considering other NAPA recommendations. The agency envisions a launch of the national contact center in the beginning of the third quarter of FY 2005.
- EEOC's chair introduced the Five-Point Plan, and the agency developed a strategic plan for FY 2004–2009.

Resources—Funding and Staffing

EEOC, the Commission stated in 1998, struggled to accomplish its mission because it had insufficient funding and staff.²⁶ While it acknowledged that EEOC developed and implemented new procedures and policies to improve its enforcement activities within the constraints of limited resources, the Commission nevertheless recommended in 2000 that EEOC conduct two internal evaluations. The first was an assessment of EEOC spending priorities, including identifying major program areas to which funding could be focused or reallocated. The Commission urged that this study include accountability factors for program areas to ensure appropriate use of resources. The Commission recommended increased or reallocated funding for mediation, technical assistance, state and local fair employment agencies, staff training, trends research and analysis, and headquarters oversight of field offices. The Commission said EEOC should evaluate its overall budgetary and staffing needs, and strategic and national enforcement plans, as well as develop a plan on how to use additional funding, if received.²⁷

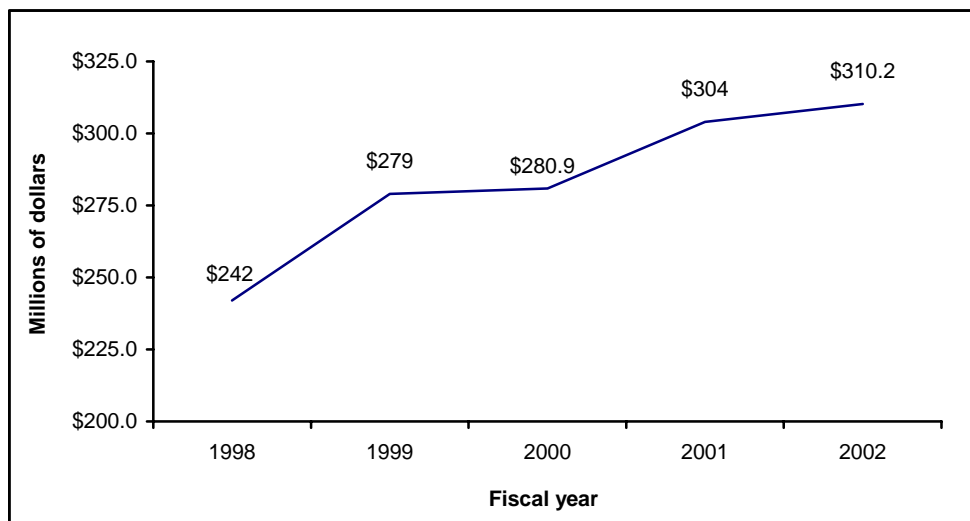
In the past five years, EEOC did not always receive the funds it requested. For example, EEOC requested budgets for FY 2000, 2001, and 2003 are \$312 million, \$322 million, and \$320.4 million, respectively. The corresponding appropriated budgets are \$280.9 million, \$304 million, and \$310.2 million, respectively.²⁸ EEOC's congressionally appropriated budget for FY 1998–2002 shows yearly increase (see figure 3.2).

²⁶ USCCR, *Helping Employers Comply with the ADA*, p. 247.

²⁷ USCCR, *Overcoming the Past*, pp. 263–64.

²⁸ U.S. Equal Employment Opportunity Commission budget requests for FY 2000 (p. 85), FY 2001 (p. 19), and FY 2003 (p. 15).

FIGURE 3.2
EEOC Budget, 1998–2002



Source: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003, p. 12.

The agency claims it continually seeks ways to maximize existing resources. In this effort, it provides funds annually for:

- The ADR program.
- Enforcement efforts on charges filed by the public, as well as systemic, commissioner, and directed charges, including on-site investigations, as appropriate.
- Research and analysis of data on ongoing investigations, from EEO-1 forms and other sources.
- Programmatic and operational staff training.
- Outreach and technical assistance to the public, employers, and other stakeholder organizations.
- Oversight of field offices to ensure quality technical assistance and performance.
- FEPA and TERO partners.²⁹

EEOC says it already conducts a full range of analyses and evaluations during annual budget preparation and throughout the fiscal year. Therefore, EEOC has no additional plans to assess its budget nor does it regard doing so productive.³⁰

Despite the 1997 reorganization, the Commission said in 2000 that numerous obstacles remained that prevented EEOC from accomplishing its mission, including a high rate of management turnover. The Commission recommended that EEOC fill high-level managerial positions, particularly district director and regional attorney positions, to ensure that management in field offices remained stable. The

²⁹ EEOC Interrogatory, p. 6.

³⁰ Ibid., p. 7; Brenner May 17 e-mail, p. 5.

agency also needed to undertake long-term strategic planning to foster organizational stability through changes in administration.³¹

EEOC claims that the few leadership changes that occurred since 2000 involved smooth transition periods.³² It states that headquarters and field vacancies in key positions are usually filled quickly. When this is not feasible, the agency details individuals, either from the management ranks within the affected office or other EEOC offices, to those positions. Field staff also have been detailed to critical vacancies at headquarters and vice versa.³³ To address staffing shortages in the field offices, Chair Dominguez took drastic measures and “reassigned [in December 2003] five ‘high producing’ district directors to assume additional responsibilities—in effect, running two offices on a temporary basis. Chair Dominguez said that she made the changes for sound budget and management planning reasons, adding ““an extremely tight budget situation prevented [EEOC] from filling vacancies, some of which had existed for more than three years.”³⁴

In addition, during its 2004 fact-finding, the Commission discovers that with regard to presidential appointees, it was only at the beginning of FY 2004 that EEOC had a full complement of commissioners for the first time in seven years. The Senate only confirmed the general counsel in July 2003. The general counsel’s position had lain vacant since the Bush administration took office and was discharged for several years on an acting basis.³⁵ EEOC is now operating with no presidential-appointee vacancies.

The Commission’s analysis of staffing between FY 1998 and 2002 shows that EEOC did not receive the staffing it requested to discharge its responsibilities (see table 3.2). The percentage difference between actual and requested full-time equivalent staff (FTEs) was greatest in FY 2001, at 13.0 percent, followed by 2002, at 9.8 percent. As to actual FTEs, with the exception of a 10.0 percent increase in FY 2000 (2,593 to 2,852), yearly increase was small. Finally, many EEOC employees will be eligible for retirement in the next several years.³⁶

³¹ USCCR, *Overcoming the Past*, pp. 269–70.

³² EEOC claims the smooth transitions resulted in record levels of performance. For example, at the end of FY 2003, 70.8 percent of EEOC’s charge inventory was under 180 days old; the total number of pending charges was under 30,000; nearly 8,000 charges were resolved through mediation; and, in the administrative process alone, almost \$240 million in monetary relief was obtained for individuals who had experienced discrimination. *See* EEOC Interrogatory, p. 2.

³³ EEOC Interrogatory, p. 2.

³⁴ “EEOC to Focus on Call Center, More Mediation in 2004,” *Daily Labor Report*, Jan. 12, 2004, p. C-1.

³⁵ *Ibid.* One long-time commissioner’s term is due to expire in July. *See* *ibid.*

³⁶ EEOC, FY 2004–2009 Strategic Plan.

TABLE 3.2
Requested and Actual Full-Time-Equivalent Staff at EEOC, 1998–2002

Fiscal year	Requested FTEs	Actual FTEs	Percent difference between requested and actual FTEs*
1998	2,680	2,544	-5.3%
1999	2,748	2,593	-6.0%
2000	2,946	2,852	-3.3%
2001	3,055	2,704	-13.0%
2002	3,055	2,783	-9.8%

*Derived from the original data.

Source: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003, p. 13.

Among this section's key points are:

- Over the past five years, EEOC did not always receive requested funds.
- Between FY 1998 and 2002, EEOC did not receive the staffing it requested to accomplish its mission.
- All five commissioner positions are filled for the first time in seven years; the Senate only confirmed the general counsel in July 2003.
- EEOC details employees to critical headquarters and field vacancies that cannot be quickly filled.

Planning

The Commission's 2000 report stated that EEOC developed the Comprehensive Enforcement Program (CEP)³⁷ to link the strategies of the National Enforcement Plan³⁸ and Local Enforcement Plans³⁹ with the Priority Charge Handling Procedures (PCHP),⁴⁰ the agency's primary workload management tool.⁴¹ The CEP was designed to emphasize collaboration among EEOC outreach, in-

³⁷ On assumption of office in 1998, the then-chair determined that a strategic comprehensive approach was needed to help EEOC reach the next plateau in employment discrimination enforcement. The challenge was to implement a process where nonmeritorious charges could be separated from the rest of the charges and dealt with swiftly. Although the policy pieces were in place, an operational plan that brought the staff together without adding layers of work had to be developed. Thus, the Comprehensive Enforcement Program (CEP) came into existence. The major focus of the CEP is to strengthen the relationships between the legal and administrative enforcement functions. See USCCR, *Overcoming the Past*, p. 76. The Comprehensive Enforcement Program was previously known as the Comprehensive Enforcement Plan. See Brenner May 17 e-mail, p. 6.

³⁸ The National Enforcement Plan identifies priority issues and sets forth a plan for administrative enforcement and litigation of Title VII, ADEA, ADA, and the Equal Pay Act. It calls for EEOC to eliminate discrimination through education, outreach, and technical assistance at the national and local levels, the voluntary resolution of disputes, and where the latter fails, the use of strong and fair enforcement. See USCCR, *Overcoming the Past*, p. 75.

³⁹ The National Enforcement Plan requires that each district director and regional attorney develop a Local Enforcement Plan and submit it to the EEOC commissioners, general counsel, and director of OFP for review. Although Local Enforcement Plans are linked to National Enforcement Plans, each district identifies its own enforcement priorities and target population. Outreach, education, technical assistance and training, enforcement activities, and litigation are also included in Local Enforcement Plans. See USCCR, *Overcoming the Past*, pp. 75–76.

⁴⁰ The Priority Charge Handling Procedures were initiated in 1995. Details are provided in later sections of this chapter.

⁴¹ USCCR, *Overcoming the Past*, p. 272.

vestigatory, and legal staff to improve public service; increase outreach, education, and technical assistance to employers; resolve charges quickly and more effectively; and enforce the law when employers fail to take corrective action voluntarily.⁴² However, the Commission said in 2000 that the CEP did not discuss in any detail how its key elements could be instituted. The Commission thus recommended that OFP closely monitor CEP implementation and that field office management be given the opportunity to meet collaboratively with the chair and the OFP director to discuss methods to meet CEP requirements, such as attorney-investigator interaction, enhancement of the intake function, and performance measurement.⁴³

EEOC indicates that the key elements of the CEP have been incorporated as practical and ongoing steps into enforcement and litigation procedures. They are clarified during annual conferences of district directors, regional attorneys, and program analysts; regional cluster meetings of district directors; task forces; special workgroups; and, within field offices, through regularly scheduled meetings between enforcement and litigation offices. In addition, OFP monitors CEP implementation through biannual technical assistance visits to district offices and through evaluating the performance of district directors.⁴⁴

More importantly, the Five-Point Plan is now the overarching framework for accomplishing the agency's mission and undergirds the strategic plan's strategic objectives. Adopted in FY 2002, this broad plan promotes strategic alliances within EEOC and with outside organizations.⁴⁵ It builds on what EEOC has done and provides the framework for the agency's mission.⁴⁶ The five points are as follows:

- *Proactive prevention* focuses on education and outreach to employers and employees to help them identify and solve problems before they escalate.
- *Proficient resolution* seeks to provide fair, prompt, and cost-effective enforcement and legal services.
- *Promotion and expansion of mediation or alternative dispute resolution* addresses ongoing enhancement of a comprehensive agencywide alternative dispute resolution (ADR) program, as well as work to increase the number of private employers who agree to mediate.
- *Strategic enforcement and litigation* seeks to strategically use EEOC resources and to better integrate policy, investigative, litigation, and outreach functions.
- *EEOC as a model workplace* implements the President's Management Agenda so that employees may accomplish the agency's goals effectively and efficiently in an environment conducive to good employment practices.⁴⁷

The EEOC chair appointed a workgroup in FY 2002 to implement one of its points, strategic enforcement and litigation. The workgroup is charged to develop a strategic enforcement and litigation plan to better integrate policy development with investigative and litigation functions, and to help

⁴² EEOC, "An Overview."

⁴³ USCCR, *Overcoming the Past*, p. 272.

⁴⁴ EEOC Interrogatory, p. 31.

⁴⁵ *Ibid.*, p. 4.

⁴⁶ U.S. Equal Employment Commission, *About EEOC*, "Strategic Plan for Fiscal Years 2004–2009," <<http://www.eeoc.gov>> (last accessed Jan. 20, 2004).

⁴⁷ EEOC Interrogatory, p. 1.

EEOC make strategic decisions about emerging workplace trends and issues that merit attention. The workgroup's work is ongoing and members are now reviewing appropriate materials as they develop a plan.⁴⁸

The FY 2004–2009 strategic plan contains three objectives to advance the agency's mission:

- *Justice and opportunity* focuses EEOC's resources on serving the public through seeking justice for individuals who experience employment discrimination, and removing discriminatory barriers. This objective incorporates and implements three points of the Five-Point Plan: proficient resolution, promoting and expanding mediation/ADR, and strategic enforcement and litigation.
- *Inclusive workplace* strengthens America's workplace through preventing discrimination and promoting employment policies and practices that foster an inclusive work culture. This objective incorporates and implements one point of the Five-Point Plan, proactive prevention.
- *Organizational excellence* directs EEOC to establish an organizational infrastructure that will set and implement the highest quality standards for equal opportunity, customer service, internal efficiency, and fiscal responsibility. This objective seeks to implement the fifth point, making EEOC a model workplace.⁴⁹

In addition to these objectives, the strategic plan also incorporates initiatives such as the President's Management Agenda and the President's New Freedom Initiative.⁵⁰ Several outcomes with deadlines, as well as means/strategies are associated with each strategic objective. One example of a process outcome for the strategic objective "justice and opportunity" is "by 2009, ensure that at least 70 percent of private sector charges will be resolved within 180 days."⁵¹ One example of a corresponding strategy is "to collaborate with stakeholders, academia, and the public to ensure open communication and feedback; to identify trends and strategies for improving private sector and federal sector processes; and to have a meaningful impact on addressing discriminatory employment policies and procedures."⁵² The Annual Performance Plans (APPs) contain performance indicators for measuring progress in meeting targets set in the strategic plan.⁵³

For the above process outcome, "by 2009, ensure that at least 70 percent of private sector charges will be resolved within 180 days," the targets for FY 2001, 2002, and 2003 were 60 percent while the results were higher, 64 percent, 65.6 percent, and 68.9 percent, respectively.⁵⁴ The strategic plan in-

⁴⁸ Ibid., p. 12.

⁴⁹ Ibid., pp. 1–2.

⁵⁰ President Bush announced the New Freedom Initiative in February 2001 to promote the full integration of people with disabilities into all aspects of American life. The goals of this comprehensive plan include expanding educational and employment opportunities; increasing access to assistive technologies and public accommodations; and providing accessible transportation and housing options for individuals with disabilities. The initiative builds on the progress that ADA made in protecting the civil rights of approximately 54 million Americans with disabilities. EEOC has taken a lead role in implementing the employment goals of the initiative. See U.S. Equal Employment Opportunity Commission, "New Freedom Initiative," Oct. 8, 2003, <<http://www.eeoc.gov/initiatives/nfi/index.html>> (last accessed Jan. 28, 2004).

⁵¹ EEOC, FY 2004–2009 Strategic Plan. As a result of the amendment to the strategic plan, which was included in the FY 2005 performance budget, the measure went from 70 to 75 percent. See Brenner May 17 e-mail, p. 4.

⁵² EEOC, FY 2004–2009 Strategic Plan.

⁵³ Ibid.

⁵⁴ U.S. Equal Employment Opportunity Commission, "FY 2005 Performance Budget," February 2004, <<http://eeoc.gov/abouteeoc/plan/2005budget.html>> (last accessed Mar. 8, 2004).

dicates that the agency has scheduled five program evaluations, with three relating to performance measures in the strategic plan, namely, (1) private sector mediation programs, (2) administrative processing of private sector charges, and (3) federal sector mediation programs. The remaining two scheduled evaluations are to determine (4) the effect of EEOC's high-impact litigation and (5) the effect of EEOC's federal sector evaluation and assistance. EEOC is establishing procedures for conducting program evaluations and preparing for the assessment of private sector mediation programs during FY 2005.⁵⁵

Among this section's key points are:

- The EEOC chair appointed a workgroup in FY 2002 to develop a strategic enforcement and litigation plan that would better integrate policy development with investigative and litigation functions.
- The workgroup's work is ongoing and members are now reviewing appropriate materials as they develop a strategic enforcement and litigation plan.
- The FY 2004–2009 strategic plan incorporates and implements the Five-Point Plan.

Policy Guidance

The Commission's present review finds that EEOC develops and implements two kinds of policies: operational policies that govern the agency's administrative objectives, and legal policies that include regulatory and subregulatory guidance. Subregulatory guidance is policy guidance that is not issued for notice and comment and that does not appear in the *Federal Code of Regulations*.⁵⁶ The Office of Legal Counsel (OLC) develops legal policy, drawing on diverse sources, including recommendations from commissioners and staff, employers, employees and their representative organizations, and civil rights and labor organizations; case law and analysis of problems that would benefit from policy development; and input from other government agencies. EEOC is not required to follow public notice and comment procedures before clearing subregulatory guidance, although it obtains significant public involvement, such as discussions with stakeholders and letters from the public. All subregulatory guidance is reviewed and circulated internally according to strictly defined procedures before EEOC approval.⁵⁷ The Executive Secretariat circulates draft subregulatory guidance to appropriate offices for comment. It is then forwarded to OLC for further review, and then to the commissioners for a vote.⁵⁸ The EEOC commissioners are the final authority for approving all the agency's legal policy.⁵⁹

In 2000, the Commission noted that EEOC had named retaliation as a priority and updated its original guidance in the compliance manual. The Commission encouraged EEOC to continue to update policy guidance on retaliation, including examples of types of retaliation that employers practiced. Such guidance should rely on recent court cases and instruct investigators on how to determine whether retaliation occurred. The Commission also noted that since 1998, EEOC issued only two

⁵⁵ EEOC, FY 2004–2009 Strategic Plan; Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, e-mail, Mar. 10, 2004; Brenner May 17 e-mail, p. 4.

⁵⁶ Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, e-mail, Mar. 8, 2004.

⁵⁷ EEOC Interrogatory, pp. 3–4.

⁵⁸ Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, telephone interview, Mar. 26, 2004.

⁵⁹ EEOC Interrogatory, p. 4.

sections of its new compliance manual and said that the agency should complete and issue a full new manual.⁶⁰

Today, EEOC states that it has not issued an updated compliance manual. Since 1998, it has been updating volume 2 of the compliance manual; new and updated sections become a part of the new compliance manual. The agency has published on its Web site a detailed compliance manual section on retaliation that reflects its present enforcement position. This section provides guidance on investigating retaliation cases and gives numerous examples of actions that constitute unlawful retaliation under the statutes EEOC enforces. EEOC staff are also drafting sections addressing religious, racial and color, and age discrimination. Compliance manual sections are available to staff on the agency's intranet. EEOC-approved sections are posted to the agency's public Web site.⁶¹

In 2000, EEOC did not follow established intervals for reviewing, developing, and issuing subregulatory policy guidance. The Commission recommended that EEOC develop a timetable for reviewing existing guidance to determine relevance and usefulness.⁶²

EEOC still does not have a formal timetable to review existing guidance to determine relevance and usefulness. The agency asserts that all its attorneys routinely keep abreast of developing case law, statutory amendments, and pertinent legal treatises and law review notes and articles. These attorneys regularly interact with employees, employers, and organizations representing the myriad parties having an interest in equal employment opportunity. EEOC contends that all these individuals and groups can readily convey suggestions for policy revisions to OLC or other EEOC offices.⁶³

The Commission stated in 1998 that ADA's broad framework for ensuring equal employment opportunity and nondiscrimination for employed people with disabilities invariably left too much discretion to apply different definitions to key ADA-related terms. The Commission recommended that EEOC issue policy guidance to clarify its position on such key terms, including "health insurance and disability-based insurance," "major life activity," "qualified individual," "reasonable accommodation and undue hardship," and "job-related and business necessity."⁶⁴

EEOC has issued guidance on such terms and other ADA-related guidance and offers 14 examples of such documents in its interrogatory response to the Commission.⁶⁵ All but three, however, were issued between FY 1993 and 2000. A more recent EEOC effort is formally commenting on other federal agencies' proposed regulations addressing related definitional issues. For example, EEOC commented on the Office of Personnel Management's "Interim Rule With Request for Comments: Federal Long Term Care Insurance Regulation."⁶⁶

⁶⁰ USCCR, *Overcoming the Past*, p. 272.

⁶¹ EEOC Interrogatory, pp. 13–17; For a list of the revised Compliance Manual Sections, see EEOC Interrogatory, p. 13.

⁶² USCCR, *Overcoming the Past*, pp. 270–71.

⁶³ EEOC Interrogatory, p. 14.

⁶⁴ USCCR, *Overcoming the Past*, pp. 249–60.

⁶⁵ See EEOC Interrogatory, pp. 15–17. EEOC rescinded several sentences of the Interpretive Guidance on Title I of the Americans with Disabilities Act, found in the Appendix to 29 C.F.R. § 1630.2(h) and (j), that addressed mitigating measures used by persons with impairments. The Supreme Court held that the determination of whether an individual has an impairment that substantially limits a major life activity under the ADA must be made by considering any mitigating measures that the individual uses to eliminate or reduce the effects of an impairment. See Interpretive Guidance on Title I of the Americans with Disabilities Act, 65 Fed. Reg. 36,327 (2000) (to be codified as 29 C.F.R. pt. 1630).

⁶⁶ 68 Fed. Reg. 5,530 (Feb. 4, 2003); EEOC Interrogatory, p. 14.

EEOC now says that since 2000, it has issued significant informal guidance on the job application process, telework as a reasonable accommodation, and the ADA Primer for Small Businesses, for example, employing a user-friendly question-and-answer format. The agency considers its approach most appropriate to meet the public's informational needs about ADA rights and responsibilities. While this works well for the general public, the legal and human resource communities and other federal agencies require detailed, formal guidance to do their work, not informal, simplified guidance.⁶⁷

EEOC actively litigated race cases, but the Commission said in 2000 that it provided little guidance on race discrimination under Title VII. None of EEOC's policies directly referred to and offered guidance on race discrimination, specifically racial harassment. The Commission stressed that racial harassment was one of the most rooted concepts in discrimination law and recommended that EEOC issue guidance on how to prevent racial harassment. The guidance should include recent court cases' rationales for arriving at a determination of racial discrimination and provide clear examples of racially discriminatory behavior.⁶⁸

EEOC indicates that its draft compliance manual section on race and color discrimination in employment will include information about racial harassment, including prohibited practices and useful examples with citations to court cases. This section will be released before September 30, 2004.⁶⁹

In its assessment of EEOC's ADA enforcement, the Commission's 1998 report found that many of the activities and issues EEOC addressed required the advice of subject-matter experts in the social sciences or medicine. EEOC's Research and Analytic Services (RAS) unit in OLC had on staff subject-matter experts, including social scientists, economists, and psychologists. Unfortunately, OLC and its ADA Policy Division had little contact with RAS. Therefore, the Commission recommended that OGC staff make use of in-house subject-matter experts during policy guidance development and consider hiring an in-house medical expert to help staff during ADA investigations.⁷⁰

EEOC states that OLC confers with RAS on technically complex subjects, such as economic impact analyses, statistical/systemic analyses, industrial and organizational psychology, and social sciences generally. For example, OLC staff consulted RAS when drafting the compliance manual section on discrimination in compensation. OLC also has sought RAS assistance with investigations and has encouraged field offices to do the same.⁷¹

Among this section's key points are:

- Unlike regulatory guidance, EEOC is not required to follow public notice and comment procedures when clearing subregulatory guidance.⁷² However, there is public involvement, such as discussions with stakeholders.

⁶⁷ Brenner May 17 e-mail, p. 7.

⁶⁸ USCCR, *Overcoming the Past*, pp. 87, 271.

⁶⁹ EEOC Interrogatory, pp. 17–18.

⁷⁰ USCCR, *Helping Employers Comply with the ADA*, p. 251.

⁷¹ EEOC Interrogatory, pp. 18–19. A recent OLC compliance manual section to field staff states: "For assistance and technical support in conducting relevant analysis and estimating monetary relief in systemic cases, contact your liaison in the Office of General Counsel, Litigation Management Services at (202) 663-4719 and/or Research and Analytic Services at (202) 663-4749. You may also contact the Office of Research, Information and Planning, Research and Technical Information Branch, at (202) 663-4959 for assistance and technical support." *Ibid.*, p. 19.

⁷² 5 U.S.C. § 553 (2004).

- EEOC issued definitions for several key ADA-related terms, but almost all guidance was issued before 2000. In a recent communication with the Commission, EEOC says that it has issued informal guidance on various topics using a user-friendly question-and-answer format. This does not negate the need to develop detailed formal guidance to help professionals who work in the ADA area.
- EEOC has not issued an updated compliance manual.
- EEOC does not follow a formal timetable for reviewing existing guidance to determine currency. The agency keeps abreast of developing case law, statutory amendments, and pertinent legal treatises and law review notes and articles in the course of ongoing work.
- EEOC makes appropriate use of RAS' subject-matter specialists.

Technical Assistance

Technical Assistance Program Seminars (TAPS) were tailored to areas of public interest and featured such topical areas as sexual harassment, ADA, ADR, and government sessions on employment law. The Commission recommended in 2000 that EEOC continue to market and develop TAPS to meet audience needs and interest; however, TAPS should be comprehensive in its coverage of employment discrimination laws and include issues identified in the National Enforcement Plan and the Local Enforcement Plan.⁷³

Each district office now annually submits a proposed location and spending plan for its fee-based TAPS. The Revolving Fund (RF) Division reviews and approves the proposed plans to ensure that locations are geographically dispersed and are in areas that can attract enough attendees to cover seminar costs. Each district office also submits an annual outreach plan and budget request, which describes planned activities for the coming year. The national outreach coordinator reviews these plans to determine if they (1) ensure outreach to underserved groups in different geographic communities; employer groups, including small businesses; underserved national origin groups; the legal community, including the plaintiff's bar; and the federal sector; and (2) include efforts to promote ADR in the employer community; partnership with industry groups and employer associations; and partnership with state and local agencies and federal agencies such as DOJ.⁷⁴ The RF division coordinates the marketing of TAPS. District offices conduct supplemental marketing of their respective TAPS.⁷⁵

EEOC headquarters, the Commission said in 2000, expended Revolving Fund monies as Congress intended.⁷⁶ When Congress established the RF, it stipulated that EEOC should charge fees to offset the costs of education, technical assistance, and training provided with the fund. It further required that the fees be uniformly imposed upon the persons and entities receiving it; and that they be reasonably related to and not in excess of the cost of providing it.⁷⁷ Thus, headquarters set fees for TAPS; and reviewed and approved proposals for customer-specific training so that there was cost uniformity nationwide. The agency also hired a consultant to target technical assistance, consulted

⁷³ USCCR, *Overcoming the Past*, p. 292.

⁷⁴ EEOC Interrogatory, pp. 19–20.

⁷⁵ Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, telephone interview, Mar. 26, 2004; Brenner May 17 e-mail, p. 8.

⁷⁶ USCCR, *Overcoming the Past*, p. 291.

⁷⁷ 42 U.S.C. § 2000e-4(k) (2004); USCCR, *Overcoming the Past*, p. 226.

stakeholders, and required district offices to consult their stakeholders as well. The Commission advised EEOC to make certain that procedures for managing the fund enhanced the agency's technical assistance and outreach programs.⁷⁸

The RF division and the national outreach coordinator work closely together to provide direction, consistency, and coordination in tracking and managing both no-cost education and outreach and fee-based RF activities, and to ensure that the two programs complement each other. There is no evidence that the RF division established procedures for fund management and monitoring management to ensure compliance with congressional intent.⁷⁹ EEOC indicates that the RF division is able to retrieve information on cost expenditures and revenues from EEOC's financial system. The agency has asked the RF division to prepare and implement a five-year business plan outlining RF's goals, objectives, product lines, and marketing and fee structure.⁸⁰

EEOC headquarters systematically evaluated TAPS and customer-specific training in 2000. Evaluations assessed how well the content met employers' needs, but did not focus on whether employers changed their behavior or company policies after the training. Therefore, the Commission recommended that EEOC strengthen the evaluation program to include a determination of whether TAPS participants were less likely to have employee complaints filed against them, more likely to change employment policies, and reported increased diversity on EEO-1 forms.⁸¹

EEOC attendees at TAPS complete a nonmandatory evaluation form that assesses the overall seminar, individual sessions, instructors, handouts, and audiovisuals. Trainers ask attendees to identify the sessions that were most useful, state whether the training will enable them to perform their jobs more effectively, and indicate whether the training will bring about changes in the organization's practices/policies, or enable the organization to prevent or resolve discrimination claims more effectively. However, such evaluation does not measure actual behavioral change; that is, if fewer TAPS participants have employee complaints filed against them and whether more of them change employment policies; and does not assess TAPS attendees' EEO-1 forms to determine if diversity improved.⁸²

Among this section's key points are:

- EEOC attendees at TAPS complete a nonmandatory evaluation form that assesses the seminar. However, such evaluation does not measure actual behavioral change; that is, if fewer TAPS participants have employee complaints filed against them and whether more of them change employment policies

⁷⁸ USCCR, *Overcoming the Past*, p. 291.

⁷⁹ In a recent communication, EEOC states that "since 2002, the Revolving Fund has employed a business manager who is responsible for ensuring appropriate fiscal management of Revolving Fund monies, following sound accounting practice and congressional intent." *See* Brenner May 17, p. 8. EEOC did not provide any detail on how the business manager accomplishes this other than "following sound accounting practice and congressional intent." EEOC also did not discuss how management is monitored to ensure compliance with congressional intent. *See* *ibid*.

⁸⁰ EEOC Interrogatory, p. 21. In a recent communication, EEOC claims that the Commission, statement (reproduced here), "The agency has asked the RF division to prepare and implement a five-year business plan outlining RF's goals, objectives, product lines, and marketing and fee structure," is incorrect. This statement is taken from p. 21 of the EEOC interrogatory, which was returned to the Commission toward the end of November 2004. EEOC goes on to say that "the business plan is complete and was implemented in FY 2003." *See* Brenner May 17 e-mail, p. 8.

⁸¹ USCCR, *Overcoming the Past*, p. 292.

⁸² EEOC Interrogatory, p. 22.

- The RF division reviews and approves each district office's annual proposed location and spending plan for its fee-based training, which includes TAPS and customer-specific training courses. The national outreach coordinator reviews the district office's annual outreach plan and budget request.

Education and Outreach

EEOC's efforts to reach underserved groups and areas began in the mid-1990s. According to the Commission in 2000, district offices employed different means to reach Hispanic, Asian, and Native American communities. Outreach emphasized contacting ethnic media, hiring bilingual investigators and program analysts, and working with community groups. The Commission encouraged innovative approaches and urged district offices to avoid limiting outreach to everyday routine activities. District offices, it said, should develop and implement a comprehensive outreach program to design and execute outreach projects that were not part of daily enforcement activities.⁸³

Among EEOC's current approaches to reach underserved minority communities are community forums and town hall meetings. Just before a meeting, EEOC arranges local press announcements of the event and press interviews with staff. Trainers offer day sessions aimed at employers and evening sessions geared toward employees and the public. EEOC also utilizes "expanded presence activities," which offer off-site individual counseling and charge-taking in partnership with local community groups, such as the Urban League and the Spanish American Committee, and service organizations, such as the State Workforce Centers. These organizations provide space and office equipment. As before, staff advertise their presence through the media and local community organizations. In FY 2003, the Office of Communications and Legislative Affairs and OFP devised another approach to build and strengthen relationships with ethnic and foreign-language media representing traditionally underserved communities. For example, the New York District Office sponsored a forum for New York's independent press, drawing journalists representing such diverse publications and media outlets as the Caribbean Voice, Asian World Journal, Chinese Overseas Television Network, Muslims Weekly, Dominican Times, *La Hoy*, India Tribune, China Press, and Korea Central Journal. At this forum, EEOC explained its work and mission and sought input on how it could better serve ethnic communities in New York City.⁸⁴

In FY 2002, field and headquarters offices offered 4,136 educational, training, and outreach events that reached 360,836 persons; 1,532 oral presentations; 654 training sessions, including RF events; 251 stakeholder input meetings; and 250 expanded presence activities providing individual counseling and assistance to underserved constituents. Furthermore, field and headquarters offices distributed material on EEO laws and represented EEOC at 650 other public events, reaching 122,744 people. Field and headquarters offices also made 508 media presentations (including radio and TV interviews, talk shows, and press conferences) that provided substantive EEO information to thousands of stakeholders as well as individuals in other protected classes.⁸⁵

⁸³ USCCR, *Overcoming the Past*, pp. 293, 296. The "expanded presence" policy has been in place for at least 20 years. See Brenner May 17 e-mail, p. 8.

⁸⁴ EEOC Interrogatory, pp. 26–27.

⁸⁵ *Ibid.*, p. 23. EEOC says that overview of EEO laws and procedures composes 50 percent of all events. Charge processing procedures is second, at 20 percent of all events. EEOC's mediation program and Title VII are the third and fourth most frequent topics, respectively. Other sought-after topics were national origin discrimination, including English-only

The Commission's 1992 study on civil rights issues facing Asian Americans revealed that many, particularly the immigrant generation, faced unlawful discrimination in the workplace due to limited English proficiency, accent, or desire to speak native languages on the job. Thus, the Commission recommended that federal agencies increase outreach efforts to educate employers about the rights of language-minority workers.⁸⁶ Further, the Commission reported in 2000 that while EEOC has prepared fact sheets, brochures, and booklets, only the fact sheets were available in non-English languages. A general brochure about filing a charge of job discrimination was available in Braille, large print, audiotape, and electronic file. As such, the Commission said EEOC should produce fact sheets, brochures, and booklets in languages other than English and in Braille, large print, audio, and electronic file formats.⁸⁷

OLC engages in extensive outreach with respect to the agency's efforts to educate not just employers and language minorities, but also people of color and those with disabilities on their rights. Its attorneys regularly give ADA training throughout the country at conferences and presentations for employees, employers, human resource professionals, government representatives, disability advocates, individuals with disabilities, chambers of commerce, and ethnic advocacy organizations. Since FY 2002, EEOC has presented approximately 50 free ADA workshops across the country targeted to small-business audiences to promote the hiring of people with disabilities. The agency has also issued pamphlets and other publications. It offers sign language interpreters, a TTY telephone system for people with hearing impairments, and documents in electronic format, Braille, large print, and audiotape.⁸⁸

In addition, EEOC continues to establish and maintain collaborative partnerships with employer and advocacy groups. Among the employer groups are chambers of commerce, including minority chambers; the Society of Human Resource Managers; Equal Employment Advisory Council; and national Industry Liaison Groups. Advocacy groups with which it works include the National Association for the Advancement of Colored People (NAACP), the League of United Latin American Citizens (LULAC), Mexican American Legal Defense and Educational Fund (MALDEF), the American-Arab Anti-Discrimination Committee, the Organization of Chinese Americans, and the Rainbow/PUSH Coalition.

EEOC also partners with federal, state, and local government agencies to reach employers and the public. For example, it has offered joint programs with DOJ's Office of Special Counsel for Immigration Related Concerns and its Community Relations Service and the Department of Labor's Wage and Hour Division and its Office of Federal Contract Compliance Programs. Several EEOC offices have created partnerships with Mexican consulates in their jurisdictions to reach the immigrant and limited-English-speaking populations. In addition, many district offices join with the FEPAs in their jurisdictions to educate employers and the public.⁸⁹

In regard to persons with limited English proficiency, EEOC assists through outreach programs and during the entire administrative charge filing and investigative process. Indeed, EEOC provides bi-

rules; ADA, including reasonable accommodation; harassment (both sexual and nonsexual); discrimination based on religions followed by gender, race and age discrimination, retaliation, and federal sector case processing procedures. *Ibid.*

⁸⁶ USCCR, *Asian Americans in the 1990s*, p. 198.

⁸⁷ USCCR, *Overcoming the Past*, pp. 297–98.

⁸⁸ EEOC Interrogatory, pp. 23–24.

⁸⁹ *Ibid.*, p. 24.

lingual staff for translation services. Since the signing of Executive Order 13166 in 2000,⁹⁰ EEOC has adopted an agencywide plan to assist persons with limited English proficiency. Each district office trained staff on the executive order's requirements, named a district coordinator, and developed a districtwide Language Assistance Plan to provide services within its geographic boundaries.⁹¹ Since 1992, the agency has provided outreach materials, brochures, and pamphlets in languages other than English, including Spanish, Arabic, Chinese, Korean, Vietnamese, Russian, Haitian-Creole, French, Urdu, Punjabi, Hindi, and Farsi.⁹² Field offices can obtain hard copies of publications or they may access the document via the internal Web site. EEOC distributes these documents at outreach, education, and technical assistance events. Of note, field offices have developed materials in additional languages to meet the specific needs of local communities in their jurisdictions.⁹³

In 2000, the Commission reported that each district office had only recently assigned a program analyst solely responsible for conducting outreach, although other staff still volunteered a modest amount of time. The Commission recommended that outreach staff explore ways in which other EEOC personnel could help conduct outreach. District offices, it said, should share innovative ideas and strategies for outreach at forums the headquarters office sponsored.⁹⁴

EEOC asserts that the district office program analyst is the manager/coordinator for outreach and technical assistance programs within the district's jurisdiction. Other field staff who conduct outreach are the district directors; managers and staff of both the enforcement and legal units, including the regional attorney and trial attorneys; area and local office directors; ADR coordinators and mediators; administrative judges; and investigators. EEOC headquarters conducts a monthly conference call with all program analysts/outreach coordinators, during which time ideas and strategies are discussed. In August 2001, all program analysts/outreach coordinators attended a weeklong training conference that included panel discussions on best practices and strategies for outreach. District offices also submit quarterly reports of significant outreach events, which are compiled into a national report that is shared with all offices and posted on the EEOC intranet. District offices submit copies of locally developed materials to the national outreach coordinator, who shares them with all offices. In FY 2003, the annual EEOC/FEPA conference recognized several offices for their best practices in outreach programs conducted in partnership with their local FEPAs. The agencywide newsletter, "EEOC Mission," also highlights strategies and best practices.⁹⁵

EEOC's Small and Mid-Sized Business Initiative was designed to increase business owners' access to information about antidiscrimination laws and to promote voluntary compliance. Still, in 2000, small-business owners' presentations at EEOC meetings revealed a need for information about the agency and the statutes it enforced. Furthermore, small-business participation in mediation was lack-

⁹⁰ Executive Order 13,166, "Improving Access to Services for Persons with Limited English Proficiency," 65 Fed. Reg. 50,121 (2000). Also on August 16, 2000, the Department of Justice issued Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency: Policy Guidance, 65 Fed. Reg. 50,123 (2000).

⁹¹ EEOC Interrogatory, pp. 24–25. EEOC points out that when DOJ requested that agencies review and revise their plans in 2002, district offices reviewed Language Assistance Plans using the most recent census data and updated them as necessary. *Ibid.*

⁹² For a list of EEOC publications with the languages in which they are available, see U.S. Equal Employment Opportunity Commission, "Publications Request Form," <<http://www.eeoc.gov/publications.html>> (last accessed Feb. 18, 2004).

⁹³ EEOC Interrogatory, p. 25.

⁹⁴ USCCR, *Asian Americans in the 1990s*, p. 294.

⁹⁵ EEOC Interrogatory, pp. 25–26.

ing, suggesting a need for outreach to explain the ADR program. The Commission recommended that to ensure the promotion of mediation within the small-business community, EEOC should use the nationwide Small Business Development Centers and the Small Business Administration district offices to disseminate information to business owners.⁹⁶

All of EEOC's education and outreach programs provide information about employment discrimination. Examples of such programs include a speakers bureau, training and technical assistance, a small-business initiative, and mediation. Other sources of information on employment discrimination are EEOC publications, its recently revamped Web site, its small business Web page, and OLC guidance letters. Recent communication from EEOC states that the agency has implemented the Freedom to Compete Initiative.⁹⁷

The Commission's 2000 report indicated that some populations were reluctant to participate in mediation, likely due to language and cultural barriers.⁹⁸ The Commission therefore recommended that EEOC initiate supplementary mediation outreach efforts to reach such underserved populations. EEOC should contact appropriate organizations and advocacy groups for input and involvement. Finally, the Commission said district office ADA coordinators and outreach program analysts should collaborate to identify communities within their jurisdiction that participate in mediation at a lower rate than others.

EEOC identifies underserved communities in a number of ways. ADR coordinators contact program analysts in district offices and also affiliate with national and local mediation groups, the bar, advocacy groups, employer organizations, and community resources. Many of these groups have actively promoted EEOC's mediation program and invited the agency to participate in regular local membership meetings and national conferences. For example, the Rainbow/PUSH Coalition invited EEOC to conduct a workshop on its mediation program at the coalition's national convention in January 2004 in New York City. Such groups have participated in local outreach and training events that EEOC sponsored.⁹⁹

Among this section's key points are:

- EEOC reaches underserved minority groups and areas through community forums and town hall meetings, expanded presence activities with local community-based groups away from the district offices, and engagement with ethnic media.
- OLC engages in extensive outreach, including educating employers, the public, and persons with disabilities or limited English proficiency about each other's rights; EEOC continues its collaborative partnerships with employer groups, advocacy groups, and federal, state and local government agencies; and publishes documents in multiple languages.
- The program analyst in each district office is the manager/coordinator for outreach and technical assistance programs within the district's jurisdiction. ADR coordinators collaborate with program analysts, and also affiliate with national and local mediation groups, the bar,

⁹⁶ USCCR, *Overcoming the Past*, pp. 294–95.

⁹⁷ See EEOC Interrogatory, pp. 27–31, for a detailed discussion of the education and outreach programs. Freedom to Compete Initiative activities include public announcements; and outreach activities to build partnerships and strategic alliances with groups and organizations that traditionally do not engage with the agency. See Brenner May 17 e-mail, p. 9.

⁹⁸ USCCR, *Overcoming the Past*, p. 279.

⁹⁹ EEOC Interrogatory, p. 31.

advocacy groups, and employer organizations in order to identify communities that ADR underserved.

- Education and outreach programs that provide information about the employment discrimination laws that EEOC enforces and the EEOC charge/complaint process include fee-based training and technical assistance programs, a small-business Web page, OLC guidance letters, and mediation.

Enforcement Activities

The Priority Charge Handling Procedures (PCHP) were initiated in 1995.¹⁰⁰ PCHP has the goal of reducing charge backlog that had burdened EEOC for over a decade and improving the quality of investigations through prioritization and early screening of charges. PCHP rescinded EEOC's full investigation policy which required investigation of every charge. With PCHP, immediately following intake, charges are prioritized into "A," "B," or "C" categories. "A" charges are those that fall within the National Enforcement Plan or the Local Enforcement Plan, as well as where further investigation will probably result in a cause finding. "B" charges are those that initially appear to have some merit, but which require additional evidence to determine whether continued investigation is likely to result in a cause finding. "C" charges are those that are dismissed on the grounds that there is sufficient information to conclude that further investigation will not likely result in a cause finding. The Commission said in 2000 that PCHP encouraged district offices latitude to develop procedures for processing charges. This invariably resulted in variation among district offices in charge intake, communication methods with charging parties, and charge categorization reviews. Availability of resources and existing caseload also determined the strategies district offices used to process charges. The Commission recognized that district offices should have latitude in charge handling procedures; however, EEOC should develop and disseminate guidance and establish criteria and standards that all district offices must follow. In addition, the headquarters office must provide guidance and monitor performance to ensure consistency in charge handling across the nation. EEOC should also establish the means by which district offices share proven ideas and resources electronically, such as an electronic newsletter or chat room.¹⁰¹

EEOC has not developed and disseminated guidance or established criteria and standards that all district offices must follow in charge handling. The agency says it has processes to ensure consistency, but allows flexibility to enable development of best practices. Foremost, PCHP sets forth the procedures for case categorization. Next, staff attend regular investigator training that addresses the criteria for case categorization. Then, during intake, intake staff assess potential charges and counsel potential charging parties to help them make informed decisions about filing charges. Furthermore, during technical assistance site visits, OFP routinely reviews the accuracy and appropriateness of the cases categorized, as well as open and closed charge files. EEOC points out that one of its GPRA measures is the accuracy of charge prioritization. It claims that since this measure was adopted, the agency has consistently met its goal of at least 90 percent of the charges being appropriately categorized. OFP shares best practices identified during such visits with field offices in meetings and annual conferences, through internal agency memoranda, and postings on the internal Web site.¹⁰²

¹⁰⁰ USCCR, *Overcoming the Past*, pp. 102, 114.

¹⁰¹ *Ibid.*, pp. 273–74.

¹⁰² EEOC Interrogatory, pp. 18, 32.

CEP required district offices to develop pilot programs to implement strategies for improving charge intake. The Commission said in 2000 that CEP's proposed strategies included extending office hours, providing rotational units rather than dedicated intake units,¹⁰³ combining intake with other investigative functions, and elevating the importance of the intake function. The Commission recommended that district offices implement some of these procedures to make the charge filing process more accessible and less burdensome. It also recommended that EEOC continually assess the intake function.¹⁰⁴

EEOC has run pilot programs aimed at enhancing charge intake or charge processing. The agency later adopted those programs and commensurately revised standard operating procedures. There is evidence of two successful pilot programs: mobile charge intake units in remote areas and "one-stop shopping" collaborations with other federal agencies. OFP assesses the use and success of pilot programs in routine technical assistance field office visits, while evaluating office performance, and in the appraisal of the district directors. EEOC asserts that this is a formal evaluation. In regard to extending office hours and providing rotational units, in a recent communication with the Commission, EEOC states that staff work outside normal working hours. In many field offices, field staff are available to the public in the weekends and evenings during expanded presence events. Many district offices, including Atlanta, Cleveland, and San Antonio, assign staff on rotating basis to conduct intake.¹⁰⁵

One-fifth of the charges citing ADA involved "miscellaneous" disabilities, such as "mental retardation," allergies, and speech impairments, each less than 3 percent of all ADA charges. The Commission further reported in 1998 that "other" disabilities, not specifically identified in the EEOC charge data system, accounted for 23 percent of all ADA charges. Thus, the Commission advised EEOC to consider revising its disability categories, to expand some and collapse some of the less frequently noted. EEOC, it added, should work with the disability communities to determine the types of disabilities to track.¹⁰⁶

EEOC now indicates that through the Integrated Mission System (charge tracking system) it collects data for 43 distinct disabilities. Staff add new disabilities to the system as they are identified through charge activity and advocacy group input. For example, EEOC added post-traumatic stress disorder as a basis because of its significant presence in the general population. EEOC also now engages with the disability community, and cited its field legal units' ongoing relationship with offices of the National Association of Protection and Advocacy System as one example.¹⁰⁷

Among this section's key points are:

- EEOC has not developed and disseminated guidance or established criteria and standards that all district offices must follow in charge handling. The agency ensures consistency in charge handling in other ways, including use of PCHP, staff training, and OFP review during on-site technical visits; however, EEOC allows flexibility to enable development of best practices.
- Successful pilot programs to enhance charge intake or charge processing have been implemented, and standard operating procedures have been appropriately revised.

¹⁰³ In rotational units, investigators staffed the intake unit on a daily or weekly basis as opposed to dedicated units, which only have staff who have been assigned to them. See USCCR, *Overcoming the Past*, pp. 275–76.

¹⁰⁴ USCCR, *Overcoming the Past*, pp. 275–76.

¹⁰⁵ EEOC Interrogatory, p. 33; Brenner May 17 e-mail, p. 10.

¹⁰⁶ USCCR, *Helping Employers Comply with the ADA*, p. 267.

¹⁰⁷ EEOC Interrogatory, pp. 33–34.

- To ensure currency, EEOC adds new disability codes to its Integrated Mission System as they are identified through charge activity and input from advocacy groups.

Complaint Processing

This section focuses on complaint processing in the private sector. Between 20 and 50 percent of formal inquiries became complaint charges in various district offices, the Commission reported in 2000. Further, a 1998 Commission study found that close to half of all ADA cases resulted in no cause outcomes.¹⁰⁸ To improve intake procedures so that customers benefit, the Commission recommended in 2000 that EEOC implement internal requirements. First, district offices should monitor charge inquiries to determine why they were not becoming charges. Second, staff should survey charging parties after intake sessions to receive feedback on experience with EEOC. Third, enforcement supervisors in district offices should regularly evaluate intake sessions firsthand to provide constructive feedback to staff on how to improve intake.¹⁰⁹ In addition, the Commission's 1998 report stated that EEOC needed to conduct an internal audit to examine why charge processing time did not decrease with the institution of PCHP.¹¹⁰

EEOC points out that more thorough counseling of potential charging parties at intake results in fewer "C" charges being filed. Addressing charge monitoring, the agency explains that initial charge categorization at intake may involve consultation with supervisors and/or supervisory review. In some instances, charge categorization also undergoes upper management review in collaboration with legal and/or enforcement staff. OFP annually reviews a sample of case files for categorization accuracy. In FY 2001 and 2002, a review of charge files found the accuracy of district office categorization at 91.1 percent and 90 percent, respectively, thus meeting or exceeding the GPRA goal, which is set at 90 percent. In light of this, EEOC indicates it does not need the services of an outside contractor to review case files and ensure investigations are handled properly.¹¹¹

Customer service satisfaction of the intake phase is measured in different ways. According to EEOC, charging parties have direct contact with field office supervisory staff and OFP headquarters staff and therefore have the opportunity to express satisfaction or dissatisfaction. Since field office supervisors frequently participate in the intake process, they have firsthand knowledge of the process. Field office managers regularly assess the overall quality of intake services. OFP staff evaluate intake operations as a part of standard technical assistance visits. In addition, both new and advanced skills training for investigators include design and development of interviewing techniques. Moreover, district offices gather feedback from stakeholders and members of the public during respective meetings.¹¹² There is no evidence that staff now survey charging parties after intake sessions to receive feedback on their experience with EEOC. In a recent communication with the Commission EEOC states: "Surveys used to be distributed by field offices to potential charging parties and responses were collected by EEOC's Office of Research Information. However, response rates were so low as to not provide a statistically valid sample."¹¹³

¹⁰⁸ USCCR, *Helping Employers Comply with the ADA*, p. 266.

¹⁰⁹ USCCR, *Overcoming the Past*, p. 275.

¹¹⁰ USCCR, *Helping Employers Comply with the ADA*, p. 267.

¹¹¹ EEOC Interrogatory, pp. 34–36.

¹¹² *Ibid.*, pp. 34–35.

¹¹³ Brenner May 17 e-mail, p. 11.

Among this section's key points are:

- EEOC indicates that thorough counseling of potential charging parties at intake in accordance with the PCHP results in fewer "C" charges being filed.
- Initial charge categorization at intake may include supervisory review and consultation. On occasions, upper management legal or enforcement staff collaborate to review charge categorization. OFP's FY 2001 and 2002 annual review of a sample of case files for accuracy in categorization met or exceeded the GPRA target established for this indicator, which was 90 percent.
- Customer service satisfaction during the intake phase is ascertained in different ways. Charging parties have direct contact with field office supervisory staff and OFP headquarters staff and can express their satisfaction or dissatisfaction; field office managers regularly assess the overall quality of intake services; and district offices gather feedback from their network of stakeholders.
- There is no evidence that staff now survey charging parties after intake sessions to receive feedback on their experience with EEOC.

Investigations

In 2000, the Commission recommended that OFP and OLC work together to ensure that the investigative procedure guidelines kept current with changes in law that might affect charge processing. It said a task force should be created to determine if existing procedures were appropriate to the types of charges in the agency's inventory; there were frequently occurring issues not addressed by the procedures; more useful examples of investigative scenarios could set the context for investigators; and there were more efficient methods for conducting investigations given advances in technology and research methods.¹¹⁴

EEOC did not establish a task force, but assigned headquarters staff in OFP and OLC to coordinate all procedural amendments to EEOC regulations, compliance manual sections, and other guidance. Thus, OLC drafts all regulatory changes and OFP reviews and comments on them, while OFP drafts compliance manual procedures and OLC reviews them for legal sufficiency. Moreover, an EEOC order establishes a formal interoffice review and comment process that most procedural guidance goes through before issuance.¹¹⁵

Relative to the number of charges filed, the Commission's 2000 report stated that the number of on-site visits was small, and such visits were increasingly targeted to "A" cases. As previously mentioned, "A" charges are those charges that fall within the National or Local Enforcement Plan and those where further investigation will probably result in a cause finding. The Commission said the agency should continue to emphasize "A" cases, but it should also increase on-site investigations for "B" charges that merited site visits. However, the Commission cautioned that resources dedicated for

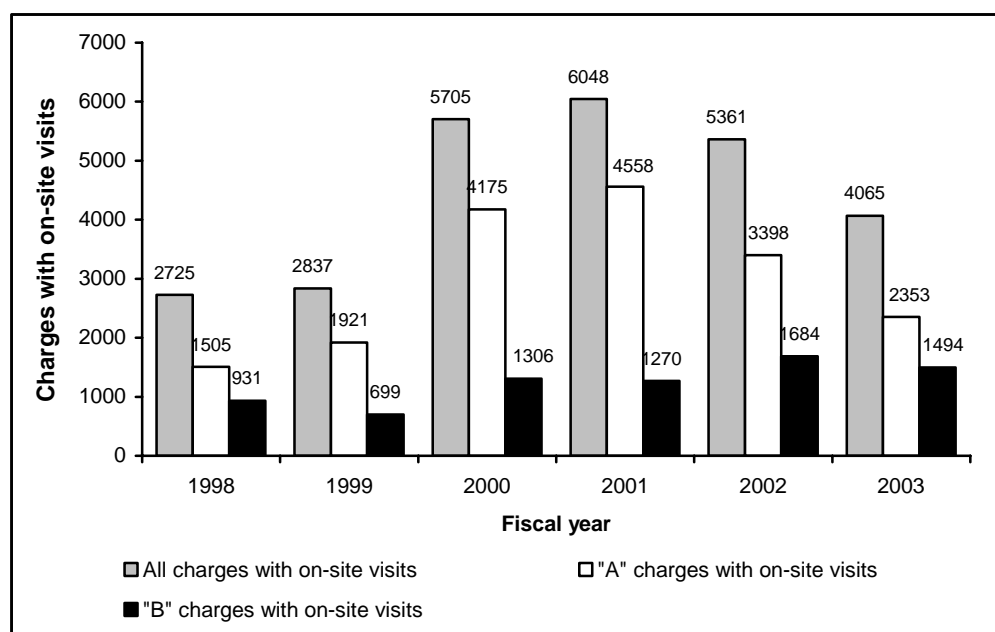
¹¹⁴ USCCR, *Overcoming the Past*, p. 280.

¹¹⁵ EEOC Interrogatory, pp. 36–37. EEOC now says: "OFP drafts Volume I of the Compliance Manual, OLC drafts Volume II." See Brenner May 17 e-mail, p. 11.

on-site visits must be used judiciously. Thus, EEOC staff should take full advantage of on-site visits to also conduct outreach and maximize the power of limited resources.¹¹⁶

EEOC now offers data for FY 1998 to 2003 to show that on-site visits have increased. The Commission's examination shows that the number of "A" charge on-site visits grew from 1,505 in FY 1998, peaked at 4,558 in 2001, and thereafter decreased steadily to 2,353 in FY 2003. These decreases in the number of "A" charges with on-site visits, however, have not fallen below the pre-2000 numbers (see figure 3.3). The trend in the number of "B" charge site visits between FY 1998 and 2003 showed year-to-year fluctuation, although an overall upward trend, hinting that EEOC may be emphasizing site visits for "B" charges. Finally, there is no evidence that EEOC staff take full advantage of on-site visits to also conduct outreach and maximize the power of limited resources.¹¹⁷

FIGURE 3.3
A Comparison of EEOC "A" and "B" Charges with On-Site Visits, 1998–2003



Note: FY 2003 data are preliminary.

Source: EEOC Interrogatory, pp. 37–38.

Among this section's key points are:

- OFP and OLC headquarters staff work together to ensure that guidelines for investigative procedures reflect changes in the law.
- Trend data on "B" charge site visits hint that EEOC may be emphasizing on-site visits in these cases. Between FY 1998 and 2003, "B" charge site visits showed year-to-year fluctuation, but the overall trend is upward.

¹¹⁶ USCCR, *Overcoming the Past*, pp. 280–81.

¹¹⁷ EEOC now states: "[S]taff have conducted outreach in conjunction with on-site investigation in appropriate circumstances. In most situations though, this is not practicable." See Brenner May 17 e-mail, p. 11.

- There is no evidence that EEOC staff take full advantage of on-site visits to also conduct outreach and maximize the power of limited resources. In a recent communication with the Commission, EEOC says that this is not practicable in most situations.

Mediation

Although EEOC prepared a Mediation Deskbook in 1999 outlining procedures, the Commission said in 2000 that the document did not establish formal guidelines for mediation units in district offices. As a result, programs' approaches to mediation tended to differ. While there should be some latitude to foster creativity in district mediation programs, the Commission recommended that EEOC prepare standard criteria for program monitoring and evaluation. These standards should be applied to every district office and include accountability standards for maintaining a consistent, fair, and impartial program. The Mediation Deskbook should be updated regularly.¹¹⁸

In April 2002, the mediation program was expanded so that "A" cases, including those at the conciliation stage, could qualify. As a result, EEOC revised and reissued relevant portions of the Mediation Deskbook.¹¹⁹ Since 1999, the agency has also published and disseminated other operational guidance to address new problems and assisted the field offices in developing and managing their expanding ADR program. There is no evidence that EEOC prepared standard criteria for program monitoring and evaluation, which should be applied to every district office and include accountability standards for maintaining a consistent, fair, and impartial program.¹²⁰ Instead, EEOC states that the Media Deskbook and the new guidance form the framework for program operation and evaluation. Recently, EEOC developed an ADR resource manual and offered it in print and CD-ROM format. This manual has been distributed to field offices and contains outreach materials, slide shows, and examples of successful field office practices and techniques to promote the ADR program and to demonstrate the benefits of mediation to parties.¹²¹

According to EEOC procedures, all "B" charges are supposed to be given the option of mediation. The Commission said in 2000 that this was unlikely to happen in light of resource limitations and the fact that "B" charge cases made up the majority of EEOC's inventory. Thus, the Commission recommended that EEOC develop criteria for determining which "B" charges were suited for mediation.¹²²

All "B" charges are now eligible for mediation, except those that raise class, systemic, or Equal Pay Act claims. Only "C" charges are ineligible for mediation. When allocating funds for mediation programs in district offices, EEOC now considers the projected pool of charges eligible for mediation, the number of mediation staff available in each office, and the overall level of funding provided for

¹¹⁸ USCCR, *Overcoming the Past*, p. 278.

¹¹⁹ EEOC Interrogatory, p. 40.

¹²⁰ EEOC now states that it has commissioned "three studies, using appropriate standard criteria and social science methodology . . . to evaluate its mediation program: (1) *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, September 2000; (2) *The EEOC Mediation Program: Mediators' Perspective on the Parties, Processes, and Outcomes*, August 2001; and (3) *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, December 2003, all by Dr. E. Patrick McDermott, Primary Researcher, et al., Franklin P. Purdue School of Business, Center for Conflict Resolution, Salisbury State University." These studies and their summaries are available on EEOC's Web site at <<http://www.eeoc.gov/mediate/mcd-intro.html>>. See Brenner May 17 e-mail, p. 12. EEOC did not include this information in its interrogatory response.

¹²¹ EEOC Interrogatory, p. 32.

¹²² USCCR, *Overcoming the Past*, p. 278.

the mediation contract program. All district offices receive some funding so that they can continue their contract mediation program. EEOC does make adjustments during the year to meet the needs of specific offices.¹²³

The number of mediations conducted reached a new plateau following FY 1999. Rising from 7,397 in FY 1999, the number of mediations conducted reached a height of 11,595 in FY 2003 (see table 3.3). The trend in the number of mediations resolved is similar, attaining a height of 7,990 in FY 2003 from 4,833 in FY 1999. The percentage of mediations resolved ranged between 64.8 in FY 2000 to 68.9 FY 2003.¹²⁴

TABLE 3.3
EEOC Mediations Conducted and Resolved, 1999–2003

Fiscal year	Number conducted	Number resolved	Percent conducted resolved*
1999	7,397	4,833	65.3%
2000	11,478	7,438	64.8%
2001	10,588	6,987	65.9%
2002	11,457	7,858	68.5%
2003	11,595	7,990	68.9%

*Calculated from EEOC data on number of mediations conducted and resolved.

Source: EEOC Interrogatory, p. 41.

EEOC's mediation program was generally successful and considered an integral tool for eliminating unfair employment practices. The Commission's 2000 report noted, however, that mediation may not always get to the root of the alleged employment discrimination. The Commission stated that mediation should be used where appropriate and settlement agreements should anticipate that the same problem might recur. Thus, in settlements reached through mediation, mediation staff should recommend provisions for change in employer practices or policies that might have discriminatory effects.¹²⁵

Agency officials now state that the ADR program offers charging and respondent parties opportunity to reach mutually satisfactory resolutions. This opportunity is offered in cases where mediation took place soon after charge filing when investigation was incipient. In these instances, resolutions are not required to include statements specifying employers change a practice or policy, or prevent a recurrence of an allegedly discriminatory practice. EEOC states that it has no control over the inclusion of provisions that relate to employment practices or policies since parties tailor agreements to case circumstance. On the other hand, when mediation is used at the conciliation stage, following a finding of discrimination, an EEOC employee joins the conflicting parties to represent EEOC and the public interest. In such a situation, the settlement agreement may appropriately include changes in the respondent's practices or policies. Finally, since EEOC mediation agreements are confidential, the

¹²³ EEOC Interrogatory, p. 8.

¹²⁴ EEOC's interrogatory response included data for FY 1998 through FY 2002. In a recent communication, EEOC states: "The timeframe is incorrect. Only pilot programs were in place in FY 1998." The recent communication included data for FY 2003 and revised figures for the number of mediations resolved for FY 2001 and 2002. See Brenner May 17 e-mail, p. 13.

¹²⁵ USCCR, *Overcoming the Past*, p. 278.

agency does not conduct a compliance review regarding implementation of the terms of mediation agreements except in the event of a breach.¹²⁶

Among this section's key points are:

- Since the publication of the Mediation Deskbook in 1999, EEOC has prepared additional guidance to address new issues. There is no evidence, however, that EEOC prepared standard criteria for program monitoring and evaluation that should be applied to every district office.
- Some "A" cases are now eligible for mediation; EEOC amended the Mediation Deskbook to reflect this guidance. All "B" charges are eligible for mediation, except those that involve class, systemic, or Equal Pay Act claims. Only "C" charges are ineligible for mediation.
- In general, settlement agreements between mediating charging and respondent parties are not required to include provisions that result in a change in an employer's practices or policies, or that prevent a recurrence of an allegedly discriminatory practice.

Special Charges

The Commission's 2000 report supported EEOC's emphasis on class and systemic charges. EEOC commissioners, it said, should review reports derived from EEO-1 data that identify discriminatory trends to determine if systemic investigation should be initiated.¹²⁷ District office and legal staff too needed to use EEO-1 data regularly for the same purpose. Further, intake staff should decide when individual charges should be broadened if evidence suggested more victims.¹²⁸

EEOC staff say the agency uses EEO-1 data in the development of class, systemic, or commissioner charges, but offered no supporting evidence. A commissioner charge is a charge that is initiated based on information from a commissioner, an EEOC staff member, or any outside source on potential violation of statutes. It is usually used in situations where discrimination victims are unaware of their rights or of the occurrence of discriminatory practice.¹²⁹ According to the agency, the internally developed EEO-1 desktop software allows investigators and attorneys to review readily an employer's EEO-1 reports and to compare that employer's EEO profile with others in the same industry and geographic area.¹³⁰ EEO-1 reports also contain workforce statistics by gender, race, and ethnicity for nine occupational categories. They include Standard Industrial Classification (SIC) designations, thus enabling the desktop user to compare an employer's utilization of women and minorities with that of similar SIC-code employers located in a common recruiting or commuting area.¹³¹

¹²⁶ EEOC Interrogatory, p. 40.

¹²⁷ EEOC will be revising the EEO-1 form. See "Commission Poised to Delay EEO-1 Changes Until 2005; Final Format Expected in Spring," *Daily Labor Report*, December 2003, p. A-1. As of May 2004, a final EEO-1 form had not been released.

¹²⁸ USCCR, *Overcoming the Past*, p. 282.

¹²⁹ *Ibid.*, pp. 160–61.

¹³⁰ All employers with 100 or more employees, 50 or more if they are federal contractors, must file an EEO-1 report each year. See EEOC Interrogatory, p. 43.

¹³¹ EEOC Interrogatory, p. 43.

Despite the importance of commissioner charges and directed investigations, the Commission's 2000 report showed that they made up a minuscule percentage of EEOC's charge inventory.¹³² Between FY 1993 and 1999, the agency annually filed between 19 and 48 commissioner charges. Besides, directed investigations issued under the Equal Pay Act and ADEA decreased from 304 in FY 1993 to 66 in FY 1999. The Commission advised EEOC to re-emphasize the importance of commissioner charges and direct investigations, and encourage field offices to add these charges to their charge inventories. District offices, it added, should set a goal for commissioner-initiated charges to be conducted based on staff size and charge inventory.¹³³

The Commission finds that EEOC has not increased commissioner charges over the past six years. Agency data show that four commissioner charges were filed in FY 2002 and one in FY 2003. EEOC says the vast majority of its class and systemic cases do not stem from commissioner charges, but the public, including individual charges expanded or amended during investigation to include class issues. EEOC indicates that a commissioner charge is just one of several ways to initiate class and systemic cases, and that the agency's commitment to pursue this type of case is evident in an examination of its litigation docket as a whole. Over the past six years, EEOC says there has been a substantial and continuing increase in the number of class and systemic cases.¹³⁴ The number of multiple aggrieved cases on the litigation docket and the percentage of total cases in litigation are shown in table 3.4. Commission analysis shows that with the exception of FY 2000, the number of multiple aggrieved cases grew each year, most notably in 1998 and 1999. Except for FY 1999, the percentage of multiple aggrieved cases to all litigation grew slightly every year (see table 3.4).

TABLE 3.4
EEOC Multiple Aggrieved Cases on the Litigation Docket as
a Percent of Cases in Litigation, 1997–2003

Fiscal year	Number of multiple aggrieved cases on docket	Percent of multiple aggrieved cases cases to total
1997	112	30%
1998	151	33%
1999	187	32%
2000	180	39%
2001	210	40%
2002	215	42%
2003	220	41%

Source: EEOC Interrogatory, p. 9.

¹³² The Commission's 2000 report found that agency enforcement staff could initiate a charge based on information from an EEOC commissioner, any EEOC staff, or an outside source on potential violations of statutes. Such commissioner chargers or directed investigations were usually used in situations where victims were unaware of their rights or of the occurrences of discriminatory practice. The term commissioner charge referred specifically to Title VII claims, while directed investigation applied to ADEA and Equal Pay Act claims. See USCCR, *Overcoming the Past*, pp. 160–61.

¹³³ USCCR, *Overcoming the Past*, p. 282.

¹³⁴ EEOC Interrogatory, pp. 9–10. Multiple aggrieved cases are cases that challenge a policy that applies to a group of similarly situated individuals and cases challenging a practice that affects a group of similarly situated individuals. Brett Brenner, attorney advisor, U.S. Equal Employment Opportunity Commission, e-mail, Apr. 29, 2004.

Finally, district offices are not required to initiate a certain number of commissioner charges in their performance goals based on the number of staff and charge inventory. They are, however, expected to develop class and systemic cases for resolution in either the administrative process or in litigation.¹³⁵

Among this section's key points are:

- EEOC says staff use EEO-1 data in the development of class, systemic, or commissioner charges. The EEO-1 desktop software allows investigators and attorneys to review and compare employers' EEO profiles with others in the same industry and geographic area.
- The vast majority of EEOC's class and systemic cases do not stem from commissioner charges, but result from charges that members of the public filed.

Charge Resolutions

The use of PCHP stopped the substantive use of letters conveying the decision that investigation did not find a violation (letter of determination).¹³⁶ Instead, as the Commission noted in 2000, EEOC implemented a short standardized determination letter stating that the investigation failed to disclose a violation. The Commission recommended that EEOC inform the charging party of how it reached the determination and that staff conduct predetermination interviews with charging parties giving them the opportunity to provide any additional information before having their case dismissed.¹³⁷

There is no evidence that EEOC staff conduct predetermination interviews. EEOC also did not institute an explanatory letter but now informs charging parties that it has arrived at a no cause determination through an in-person interview, telephone or conference call, a written statement, and referrals to a private attorney.¹³⁸

Among this section's key points are:

- There is no evidence that EEOC staff conduct predetermination interviews.
- EEOC did not institute an explanatory letter informing the charging party of how it reached a no cause determination.

Charge Processing Time

EEOC guidelines, the Commission said in 2000, indicated that the investigation of a charge should generally be completed within 120 days of the time the charge was initially categorized. However, tight resources caused EEOC to amend this goal. Data from EEOC's Charge Data System showed that the average processing time for a charge was 325 days, but had declined since the implementa-

¹³⁵ EEOC Interrogatory, p. 43.

¹³⁶ A no cause letter of determination is issued when EEOC has not found sufficient evidence to support a finding of discrimination.

¹³⁷ USCCR, *Overcoming the Past*, p. 283.

¹³⁸ See EEOC Interrogatory, pp. 44–45, for details on these options. EEOC now states that “the essence of both [Commission] recommendations has been EEOC practice for many years, . . . although it may not conform to the precise means the Commission has in mind.” See Brenner May 17 e-mail, p. 14.

tion of PCHP. The Commission recommended that EEOC re-establish the 120-day goal for processing charges.¹³⁹

EEOC replies that its guidelines do not and never have mandated that charges be completed within 120 days. The agency reports that in FY 2002, the average processing time was 171 days.¹⁴⁰

Among this section's key points is:

- In FY 2002, the average charge processing time was 171 days.

Litigation

In FY 1997, EEOC reaped substantial benefits totaling \$307.3 million through the administrative process (inclusive of the mediation program) and litigation (on cases mainly involving Title VII and ADEA). The Commission urged EEOC to continue to pursue benefits of this magnitude on behalf of charging parties.¹⁴¹

Analysis of EEOC data shows that between FY 1998 and 2002 monetary benefits collected from the administrative process and litigation fluctuated. Total monetary benefits rose to a sizable \$308.9 million in FY 1999, from \$264.7 million in FY 1998, decreased to \$295.5 million and \$299.0 million in FY 2000 and FY 2001, respectively, and then reached a height of \$310.5 million in FY 2002 (see table 3.5). Thus, for two of the five years, FY 1999 and 2002, the total benefits collected exceeded that collected in FY 1997.

TABLE 3.5
EEOC Monetary Awards Collected from Administrative Process and Litigation,
1998–2002 (in millions)

Fiscal year	Administrative process benefits	Litigation benefits	Total benefits	Administrative process as percent of total
1998	\$169.2	\$95.5	\$264.7	63.9%
1999	\$210.5	\$98.4	\$308.9	68.1%
2000	\$245.7	\$49.8	\$295.5	83.1%
2001	\$247.8	\$51.2	\$299.0	82.9%
2002	\$257.7	\$52.8	\$310.5	83.0%

Source: EEOC Interrogatory, p. 46.

The Commission's analysis further discovers that EEOC obtained a larger proportion of monetary benefits through the administrative process than litigation; administrative process benefits as a percentage of all benefits ranged from 63.9 percent in FY 1998 to 83.1 percent in FY 2000 (see table 3.5).

¹³⁹ USCCR, *Overcoming the Past*, p. 283.

¹⁴⁰ EEOC Interrogatory, p. 45.

¹⁴¹ USCCR, *Overcoming the Past*, p. 285.

Among this section's key points are:

- Total monetary benefits collected during the review period ranged from \$264.7 million in FY 1998 to \$310.5 million in FY 2002, although the trend showed fluctuation.
- EEOC obtained a larger proportion of monetary benefits through the administrative process than litigation, from 63.9 percent in FY 1998 to a high of 83.1 percent in FY 2000.

Staff Training

The Commission said in 2000 that EEOC should more appropriately train legal, investigative, outreach, and mediation staff. For example, intake staff should receive training on interaction and communication skills since aspects of the jobs included explaining to charging parties their rights and merits of charges without discouraging filing. EEOC should also provide periodic training and refresher courses to enforcement staff on charge categorization criteria. Moreover, all EEOC staff could benefit from refresher courses and update training.¹⁴²

During the past five years, OGC offered several nationwide training programs on a host of appropriate topics to its different staff. Training programs included two OGC conferences for regional attorneys, supervisory trial attorneys, and selected senior trial attorneys; two OGC nationwide programs on class cases; a headquarters-developed negotiation and resolution program delivered in field offices to all investigators and attorneys; two nationwide OGC trial skills programs; and training activities for field staff.¹⁴³ However, most training programs EEOC cited in its interrogatory responses were held between FY 1999 and 2002; exceptions were a telephonic conference in FY 2003 and effective negotiation and resolution training for some field legal and enforcement staff.¹⁴⁴

Among this section's key points are:

- Between FY 1999 and 2003, EEOC offered training for headquarters and field attorneys as well as field staff performing outreach and technical assistance.
- Most training took place between FY 1999 and 2002.

Oversight and Quality Assurance

Corporate culture that reflected practices biased against minorities and women made it difficult for these groups to advance professionally. The Commission also stated in 2000 that the restructuring of the American economy led to conditions that intensified the glass ceiling (that is, women were not being promoted to high organizational levels), such as elimination of supervisory and low-level management positions. The Commission supported midlevel hiring and opportunities for managerial training to enhance diversity in supervisory and managerial positions. Moreover, EEOC should include diversity issues in pertinent investigations and through commissioner charges.¹⁴⁵

¹⁴² *Ibid.*, pp. 264, 274–76.

¹⁴³ See EEOC Interrogatory, pp. 46–48, for training details.

¹⁴⁴ Most field legal and enforcement staff received the effective negotiation and resolution training in FY 2002. See Brenner May 17 e-mail, p. 16.

¹⁴⁵ USCCR, *Overcoming the Past*, p. 267.

EEOC now relies on EEO-1 forms to collect data from private sector companies on the participation rates of minorities and women in upper management positions. The agency also sometimes uses these data to make strategic choices about charge development, or when it has reason to believe that a company has a discriminatory policy or practice, usually because of a charge already filed.¹⁴⁶ EEOC has drawn on EEO-1 data to prepare special reports, including the recent *Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector* (2004) and *Diversity in Law Firms* (2003).¹⁴⁷

The Commission is interested in EEOC's ability to demonstrate linkage between inputs, such as funding, and outcomes, such as prejudice reduction. The agency claims that it is showing gradual progress in presenting to Congress annual performance budgets that link funding with different performance indicators. In the past few years, EEOC's adoption of new finance, personnel, and program performance systems enhanced its ability to provide better funding and outcome information. According to officials, an important achievement during FY 2003 that helped EEOC create these linkages was the adoption of a new strategic plan for FY 2004–2009. As discussed earlier, the strategic plan contains outcome measures addressing the agency's three strategic objectives: justice and opportunity, inclusive workplaces, and organizational excellence; as well as a program evaluation schedule.¹⁴⁸

Among this section's key points are:

- EEOC has drawn on EEO-1 data to prepare special reports, such as *Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector* (2004) and *Diversity in Law Firms* (2003).
- EEOC is improving its ability to present annual performance budgets that link funding with performance indicator categories. EEOC's adoption of new finance, personnel, and program performance systems recently enhanced its ability to provide better funding and outcome information.

Coordination

The National Enforcement Plan encouraged collaboration between field offices and Fair Employment Practices Agencies (FEPAs) in investigations and recommended that district offices solicit FEPA comments in developing Local Enforcement Plans.¹⁴⁹ Unfortunately, in 1998, there was little coordination between FEPAs and EEOC field offices in investigations. Moreover, the existing training offered annually at EEOC headquarters to FEPA directors was inadequate to meet the training needs of all FEPA staff. Therefore, the Commission recommended in 1998 that consistent with the National Enforcement Plan, EEOC should improve coordination between FEPAs and EEOC field offices in investigative activities and meet the training needs of all FEPA staff.¹⁵⁰

¹⁴⁶ EEOC Interrogatory, p. 33.

¹⁴⁷ See U.S. Equal Employment Opportunity Commission, "Special Reports," <<http://www.eeoc.gov/stats/reports/index.html>> (last accessed Mar. 31, 2004).

¹⁴⁸ EEOC Interrogatory, p. 11.

¹⁴⁹ EEOC contracts certified state and local employment agencies (FEPAs) to resolve charges under the statutes that EEOC enforces. See USCCR, *Helping Employers Comply with the ADA*, p. 48.

¹⁵⁰ USCCR, *Helping Employers Comply with the ADA*, p. 246.

EEOC headquarters staff conduct an annual training conference for FEPA partners that centers on legal issues affecting their workloads and updates on emerging national problems. The FY 2003 EEOC/FEPA national conference, “A Partnership to Achieve a Fair and Inclusive Workplace,” included discussions on EEOC/FEPA joint litigations, strategies for EEOC/FEPA joint outreach and enforcement, and best practices.¹⁵¹ EEOC also says many district offices partner with FEPAs within their jurisdiction to provide training and outreach activities and collaborate with them on investigative efforts.¹⁵²

EEOC posted documents, regulations, and procedures on the Internet leading the Commission’s 2000 report to conclude that many people may not be able to retrieve the information because of lack of ready access to personal computers. At the same time, information was usually given when a charge was filed. As a result, the public may not necessarily know much about the complaint filing process, leading to misinformation or a lack of information about EEOC’s requirements, policies, and procedures. The Commission’s 2000 report recommended that district offices compile organization and advocacy group referral lists so that when a charging party approached EEOC with a complaint outside the agency’s jurisdiction or with which it could not assist, charging parties would be expeditiously referred to the correct organization.¹⁵³

Field offices routinely screen potential charges for jurisdictional coverage during the intake process and appropriately refer the potential charging parties to external organizations and agencies. For example, if a potential charging party wants to file a sexual harassment charge against an employer with fewer than 15 employees, the office will counsel him or her about filing with the appropriate FEPAs and the varying time limits among FEPAs for filing charges. Field offices develop and maintain their own lists of resources, organizations, and advocacy groups based on geographical proximity and jurisdictional requirements. They identify these entities during ongoing outreach activities and form partnerships with them to jointly serve mutual stakeholders.¹⁵⁴

Among this section’s key points are:

- Headquarters staff offer an annual training conference for FEPA partners on legal issues and updates on emerging national problems. Many district offices partner with FEPAs within their jurisdiction to provide training.
- Field offices develop and maintain their own lists of resources, organizations, and advocacy groups, and appropriately refer potential charging parties to external organizations and agencies.

Conclusion

EEOC implemented few of the Commission’s previous recommendations. In some instances, the agency claimed that existing procedures suffice; for example, the agency did not evaluate its overall budgetary and staffing needs as the Commission recommended, arguing that it already annually conducts a full range of analysis in preparing its budget requests. In other instances, it opted for a differ-

¹⁵¹ EEOC/FEPA National Training Conference, Agenda, “A Partnership to Achieve a Fair and Inclusive Workplace,” May 13–May 15, 2003. EEOC provided the FY 2003, FY 2002, and FY 2001 national conference agendas.

¹⁵² EEOC Interrogatory, p. 49.

¹⁵³ USCCR, *Overcoming the Past*, p. 274.

¹⁵⁴ EEOC Interrogatory, p. 50.

ent approach; for example, instead of creating a central technical assistance office at headquarters as the Commission recommended, it established a national outreach coordinator at OFP and an RF director at headquarters.

The agency's existing organizational setup has not changed since the Commission's 2000 review. A recent NAPA study, however, proposed a major overhaul.

The recently issued EEOC strategic plan for FY 2004–2009 centers on the three strategic objectives: justice and opportunity, inclusive workplace, and organizational excellence. Several outcomes with deadlines, as well as means/strategies, are associated with each strategic objective. The APP contains performance indicators for measuring progress in meeting targets set in the strategic plan. The strategic plan has scheduled program evaluations for mediation programs and administrative processing of private sector charges. During FY 2004, EEOC is establishing procedures for conducting program evaluations and preparing for assessment of private sector mediation programs during FY 2005. The agency's output measures are mostly oriented to gauging results of process and not to determining the extent to which discrimination has been eradicated in employment. Both types of outcomes are essential to determining progress.¹⁵⁵

For the first time in seven years EEOC has no commissioner vacancies, and the position of general counsel is finally filled. Between FY 1998 and 2002, EEOC never received requested staffing and did not always receive requested budget.

EEOC has issued guidance and information clarifying such terms as "health insurance and disability-based insurance," "major life activity," and "qualified individual." However, little guidance has been issued since 2000. Moreover, the agency has not developed and disseminated guidance or established criteria and standards that all district offices must follow in charge handling. The agency permits flexibility to encourage development of best practices. It indicates that processes are in place to ensure uniform standards are upheld. Further, EEOC has not issued an updated compliance manual. EEOC has a substantial amount of regularly updated guidance information on its internal Web site that is accessible to all EEOC staff at any time.

EEOC has implemented extensive education and outreach efforts, reaching underserved groups and areas through community forums and town hall meetings, expanded presence activities with local community-based groups away from the district offices, and engagement with ethnic media. In FY 2002, field and headquarters offices offered thousands of educational, training, and outreach events that reached more than 300,000 people. Field and headquarters offices also made 508 media presentations (including radio and TV interviews, talk shows, and press conferences) that provided substantive EEO information to thousands of stakeholders. Finally, EEOC offered a number of nationwide training programs for attorneys and field staff; however, few sessions have taken place since FY 2002.

¹⁵⁵ EEOC argues: "Many of our measures in the Strategic Plan, which are not mentioned, get close to assessing the outcome of our work on employers and society. These are new measures and we are only beginning to develop approaches and expect to build data bases." See Brenner May 17 e-mail, p. 4.

Chapter 4: Department of Health and Human Services

The U.S. Department of Health and Human Services (HHS) originated as the Department of Health, Education, and Welfare (HEW) under President Dwight Eisenhower in 1953. In 1979, under the Department of Education Organization Act, Education became a separate department and HEW became HHS in 1980.¹ HHS is the principal federal agency with responsibility for protecting the health of all Americans and providing essential health and human services, especially for those who are least able to help themselves. HHS provides services through federally funded grants and programs. As the largest federal grant-distribution agency, it provides some 60,000 grants a year and supports more than 300 programs that cover a broad spectrum of health-related activities. Eleven operating divisions administer the programs and grants.² In FY 2003, HHS had a budget of \$502 billion and employed 65,500 persons.³

Acronyms used throughout this chapter. Table 4.1 lists those referenced frequently.

TABLE 4.1
Acronyms in Chapter 4

Annual Implementation Plan	AIP
Annual Operating Plan	AOP
Limited English Proficiency/Proficient	LEP
Office for Civil Rights	OCR
Office of the General Counsel	OGC
U.S. Department of Health and Human Services	HHS

Previous Commission Reviews of HHS

In the 1990s, the U.S. Commission on Civil Rights released four reports that discussed HHS' health care issues and policies, research programs, and civil rights enforcement: *Civil Rights Issues Facing Asian Americans in the 1990s* (1992); *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (1996); and *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality—Vol. I: The Role of Government and Private*

¹ U.S. Department of Health and Human Services, "Historical Highlights," <<http://www.hhs.gov/about/hhshist.html>> (last accessed Mar. 19, 2004).

² The 11 operating divisions are the Administration for Children and Families, the Administration on Aging, the Agency for Healthcare Research and Quality, the Agency for Toxic Substances and Disease Registry, the Centers for Disease Control and Prevention, the Centers for Medicare and Medicaid Services, the Food and Drug Administration, Health Resources and Services Administration, the Indian Health Service, the National Institutes of Health, and the Substance Abuse and Mental Health Services Administration. See U.S. Department of Health and Human Services, "Organizational Chart," <<http://www.os.dhhs.gov/about/orgchart.html>> (last accessed Apr. 22, 2003); "Agencies in HHS," <<http://www.hhs.gov/about/index.html>> (last accessed May 21, 2003); "HHS What We Do, HHS Operating Divisions," <<http://www.hhs.gov/news/press/2002pres/profile.html>> (last accessed Feb. 24, 2004) (hereafter cited as HHS, "What We Do").

³ HHS, "What We Do."

Health Care Programs and Initiatives (1999) and *Vol. II: The Role of Federal Civil Rights Enforcement Efforts* (1999). Volume I of the health care report examined racial, ethnic, and gender disparities in health status, research, services, programs, and health care financing, and the role of the department and state and local agencies in providing health care services to minorities and women, while Volume II assessed civil rights enforcement at the department.⁴ The Commission made 234 recommendations to HHS, its Office for Civil Rights (OCR), and other components, including eight operating divisions.⁵ This study examines whether HHS has implemented recommendations made in the earlier reports, and focuses on OCR, HHS' enforcement unit.

Mission and Responsibilities—OCR

OCR's mission is to prevent and eliminate discrimination and to enhance access to HHS-funded programs.⁶ OCR enforces 18 federal civil rights statutes that collectively prohibit discrimination on the basis of race, color, national origin, age, disability, gender, or religion;⁷ and strives to make civil rights integral to HHS.⁸ Among the key major statutes, regulations, and executive orders OCR carries out are:

- Title VI of the Civil Rights Act of 1964.⁹
- The community service requirements of Titles VI and XVI of the Public Health Service Act, also known as the Hill-Burton Act.¹⁰

⁴ U.S. Commission on Civil Right (USCCR), *Civil Rights Issues Facing Asian Americans in the 1990s*, February 1992 (hereafter cited as USCCR, *Asian Americans in the 1990s*); USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996 (hereafter cited as USCCR, *Federal Title VI Enforcement*); USCCR, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality—Vol. I: The Role of Government and Private Health Care Programs and Initiatives*, September 1999 (hereafter cited as USCCR, *The Health Care Challenge, Vol. I*); and USCCR, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality—Vol. II: The Role of Federal Civil Rights Enforcement Efforts*, September 1999 (hereafter cited as USCCR, *The Health Care Challenge, Vol. II*).

⁵ The Commission's four reports were comprehensive reviews of every aspect of HHS and health care affecting minorities and women, including enforcement of Title VI and other statutes, health care, research, programs and initiatives, health-related policy guidance, and state and community involvement in health care delivery. The 234 recommendations are a culmination of recommendations made in all four of the reports.

⁶ HHS Interrogatory, p. 1; U.S. Department of Health and Human Services, Office for Civil Rights, "OCR's Mission and Vision," July 2003, <<http://www.os.dhhs.gov/ocr/mission.html>> (last accessed Apr. 22, 2004) (hereafter cited as HHS, "OCR's Mission").

⁷ U.S. Department of Health and Human Services' Response to the U.S. Commission on Civil Rights' Interrogatory for Volume IV of the Ten-Year Review of Civil Rights Enforcement, Office for Civil Rights, Oct. 15, 2003, pp. 1–2 (hereafter cited as HHS Interrogatory). See also USCCR, *The Health Care Challenge, Vol. II*, p. 17.

⁸ HHS Interrogatory, p. 1; HHS, "OCR's Mission."

⁹ Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-(7) (2004)); OCR is responsible for enforcing the civil rights provisions of federal statutes pertaining to federally assisted and federally conducted programs.

¹⁰ In 1946, Congress passed the Hospital Survey and Construction Act, also known as the Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946) (codified as amended at 42 U.S.C. §§ 291–291o-1) (2004)). A later act, known as the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (codified as amended at 42 U.S.C. §§ 300k–300n-5 (2004)), added Title XVI to the Public Health Service Act. This effectively amended the Hill-Burton program to encompass Titles VI and XVI of the Public Health Service Act. With this law, Congress sought to address a nationwide lack of adequate health care facilities, with a special focus on rural areas. The original act established federal grants for the construction of hospitals and other health care facilities. See USCCR, *The Health Care Challenge, Vol. II*, p. 53.

- Provisions of the Omnibus Budget Reconciliation Act of 1981 relating to nondiscrimination in block grant programs.¹¹
- Section 504¹² and Section 508¹³ of the Rehabilitation Act (covering federally conducted programs) of 1973.
- Title IX of the Education Amendments of 1972 as it applies to medical schools and teaching hospitals.¹⁴
- The Age Discrimination Act of 1975¹⁵ (OCR now coordinates governmentwide compliance with the act).¹⁶
- Title II of the Americans with Disabilities Act of 1990,¹⁷ Section 1808(c) of the Small Business Job Protection Act of 1996,¹⁸ and the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996.¹⁹
- Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” and Executive Order 13217, “Community-Based Alternatives for Individuals with Disabilities.”

OCR also partners with customers, providers, and other HHS components to ensure equality in the delivery of services to HHS beneficiaries.²⁰ Furthermore, it reviews HHS policies and practices to ensure that they do not have potential discriminatory effects on women, minorities, individuals with disabilities, and others protected by federal civil rights laws.²¹

Priority of Civil Rights

Organizationally, OCR is in the Office of the Secretary, and the director reports to the Secretary through the deputy secretary. The director is the special assistant for civil rights and principal advisor

¹¹ The statute requires nondiscrimination on the basis of race, color, national origin, disability, age, sex, and/or religion in health care and block grant programs. Pub. L. No. 97-35, 95 Stat. 357 (codified as amended in scattered sections of 5, 7, 10, 12, 15, 19, 20, 22, 23, 24, 25, 29, 31, 33, 35, 36, 38, 42, 45, 46, 47, 49, 50 U.S.C. (2004); Pub. L. No. 97-35, 95 Stat. 463 (codified as amended at 20 U.S.C. §§ 7301–7373 (2004)). *See also* USCCR, *The Health Care Challenge, Vol. II*, p. 17.

¹² 29 U.S.C. § 794 (2004).

¹³ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508 (codified as amended at 29 U.S.C. § 794d (2004)).

¹⁴ 20 U.S.C. § 1681 (2004).

¹⁵ Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2004)).

¹⁶ HHS Interrogatory, p. 2.

¹⁷ 42 U.S.C. §§ 12101–12213 (2004).

¹⁸ Pub. L. No. 104-188, § 1808 (codified at 42 U.S.C. §§ 671(a) and 674) (2004)).

¹⁹ Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. (2004)). The Privacy Rule establishes, for the first time, a set of national standards for the protection of health information. It provides patients with access to their medical records and more control over how their personal health information is used and disclosed. It provides a uniform, federal privacy protections for consumers. The final rule covers health plans, health care clearinghouses, and providers who conduct financial and administrative transactions. Most health insurers, pharmacies, doctors and other health care providers are required to comply with the federal standards beginning in April 2003. This review focuses on OCR’s civil rights activities excluding implementation of the Privacy Rule. *See* HHS Interrogatory, p. 2.

²⁰ HHS Interrogatory, p. 1.

²¹ USCCR, *The Health Care Challenge, Vol. II*, p. 18.

to the Secretary on civil rights matters. The director meets twice weekly with the Secretary and executive staff, and may confer with the former on civil rights initiatives and projects at anytime.²²

OCR's headquarters structure has been reorganized once between 1996 and 2000. In 1996, OCR headquarters included the Office of Management Planning and Evaluation, as well as the Office of Program Operations and the 10 regional offices that reported to it.²³ Headquarters staff provided policy guidance and operational direction to OCR's regional offices while regional staff conducted complaint investigations and pre-award and post-award reviews. Overall, the Commission found the organizational structure adequate for Title VI enforcement.²⁴ However, it recommended that OCR (1) develop regulations for Title VI enforcement; (2) hire its own attorneys to provide immediate legal guidance and assistance; and (3) establish a policy and planning unit to provide overall guidance to the regional and operating staff to enforce Title VI.²⁵ By 1999, OCR headquarters had reorganized into five components, each with specialized functions and numerous divisions or units, including these key components (see figure 4.1):

- The Policy and Special Projects Staff, which developed and interpreted civil rights policy and guidance and monitored civil rights issues; reviewed and interpreted regulations, policies, and legislative proposals for civil rights sufficiency; developed publications to provide outreach and technical assistance; and maintained a compendium of OCR's Title VI documents.
- The Office of Management Planning and Evaluation, which served as the principal advisor in management policy, budget formulation, and automated data processing systems in OCR headquarters and regional offices. The office had three divisions, including the Quality Assurance and Internal Control Division, which developed and conducted quality assurance activities.
- The Office of Program Operations, which managed OCR's compliance activities, including complaint investigations, voluntary compliance, and outreach activities. It was the principal advisor to the director on enforcement, and supervised OCR's 10 regional offices.

In each region an Office of the Regional Manager developed an enforcement and voluntary compliance program to carry out civil rights enforcement. The regional offices received and investigated discrimination complaints; conducted compliance reviews; coordinated voluntary compliance activities; and provided technical assistance and outreach to funding recipients, beneficiaries, and organizations. At the time, approximately three-quarters of OCR staff were in the regions.²⁶

²² HHS Interrogatory, p. 4.

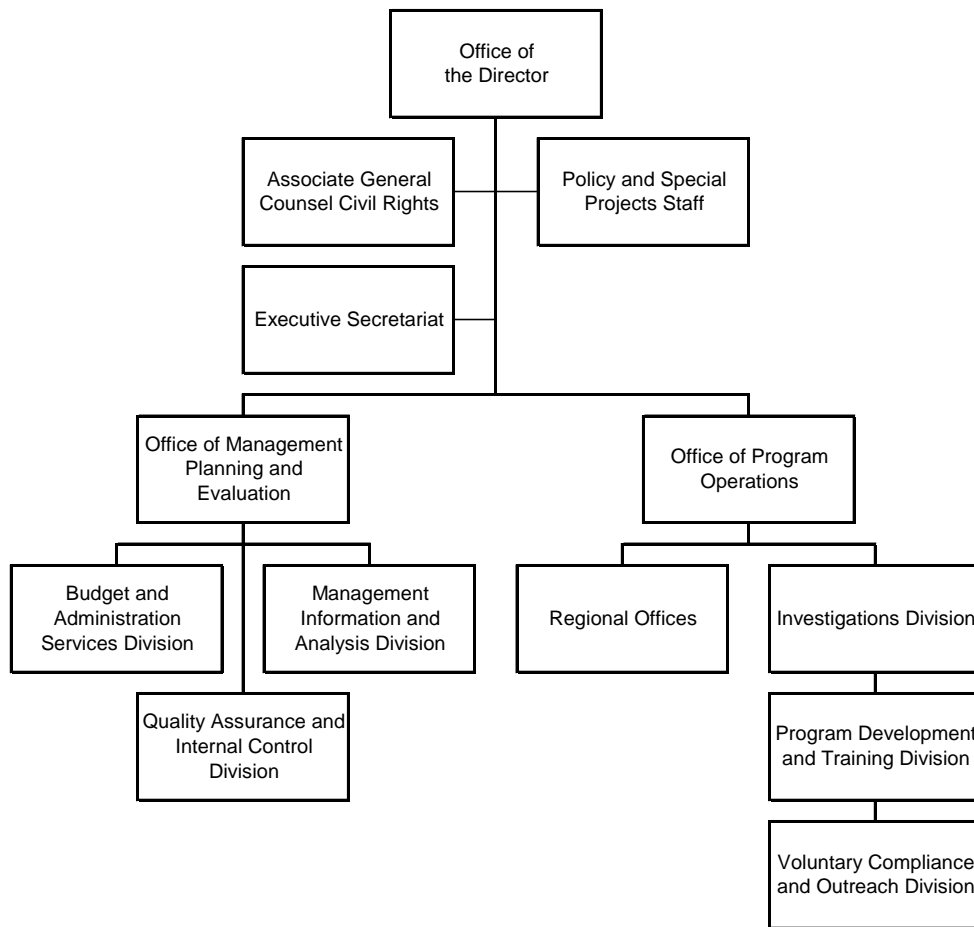
²³ The 10 regional offices are in Boston, MA, New York, NY, Philadelphia, PA, Atlanta, GA, Chicago, IL, Dallas, TX, Kansas City, MO, Denver, CO, San Francisco, CA, and Seattle, WA. The location of the regional offices remains the same.

²⁴ USCCR, *Federal Title VI Enforcement*, pp. 219–20.

²⁵ *Ibid.*, p. 238.

²⁶ USCCR, *The Health Care Challenge, Vol. II*, pp. 19–20.

FIGURE 4.1
HHS/OCR Organizational Structure, 1998



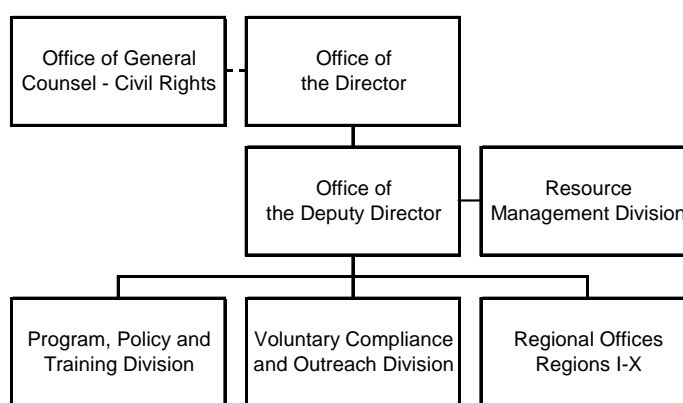
Source: U.S. Department of Health and Human Services, OCR Organization Chart as reprinted in U.S. Commission on Civil Rights, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality—Vol. II: The Role of Federal Civil Rights Enforcement Efforts*, September 1999, p. 20.

Many of the deficiencies in enforcement were caused by the large, complicated structure. For example, communication between headquarters and regional offices was “slow, inadequate, and unresponsive” and headquarters staff lacked sufficient knowledge about enforcement to assist investigators. The Commission recommended headquarters become more involved with daily regional functions and provide extra oversight and guidance. Moreover, it said that OCR headquarters should hire experienced enforcement staff. Further, despite its 1996 recommendation, OCR did not have its own legal staff in 1999. Instead, OGC provided guidance and interpretation of legal matters on enforcement to OCR. This was accomplished through OGC’s Civil Rights Division, which had attorneys assigned to OCR. OGC supervised the attorneys, but their salaries came from the OCR budget. The Commission also found attorney responsibilities and authority unclear. It recommended that the Secretary define attorney responsibilities to advance OCR’s mission and give supervisory authority to the OCR director. All in all, the Commission found the 1999 OCR organizational structure too large and complex. Many functions were not implemented and there was little indication that resources were used effectively. Moreover, few policy guidance documents were issued between the Commis-

sion's 1996 and 1999 reviews, outdated documents and directives abounded, and few publications had been produced. The Commission recommended that OCR streamline its headquarters organization and operations and establish a policy and planning unit.²⁷

OCR realigned headquarters operations in November 2000, establishing multifunctional units and consolidating functions.²⁸ It hired five nonsupervisory senior policy analysts experienced in enforcing Title VI, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. OCR also consolidated 20 management positions, reducing the number to its present level, six (see figure 4.2).²⁹

FIGURE 4.2
HHS/OCR Organizational Structure, 2003



Source: HHS Interrogatory, "2003 Organizational Chart," p. 3.

The OCR director is still responsible for overall leadership and operations in civil rights enforcement. The deputy director, on the other hand, coordinates daily headquarters operations, namely, overseeing program operations, policy development, and administrative, budget and human resources activities. In addition to OCR's 10 regional offices, three units now report to the deputy director: the Program, Policy and Training Division; the Voluntary Compliance and Outreach Division; and the Resource Management Division.³⁰

- The Program, Policy and Training Division develops civil rights–related policy and provides overall guidance to headquarters and regional staff on civil rights problems. It develops policy statements on legal issues and orders affecting minorities, women, and people with dis-

²⁷ Ibid., pp. 284–87.

²⁸ "Office for Civil Rights; Statement of Organization Functions and Delegations of Authority," 65 FR 19379 (Apr. 11, 2000). The *Federal Register* notice describes the changes in OCR's structure and functions. OCR realigned the Office of Management Planning's functions into the new Resource Management Division; incorporated the Office of Program Operations' functions into the new Program, Policy and Training Division; and reorganized the Voluntary Compliance and Outreach Division, which was part of the Office of Program Operations, into a separate unit.

²⁹ HHS Interrogatory, p. 3.

³⁰ Ibid., pp. 4–5.

abilities. The division also plans and coordinates OCR's civil rights program initiatives; assesses results of OCR's compliance activities; conducts policy and HHS program-related research; advises OCR staff on case development and quality; assists in developing negotiation and enforcement strategies; identifies training needs and designs training programs for OCR staff; develops civil rights surveys; and reviews operating divisions' regulations, policies and other activities before departmental clearance.

- The Voluntary Compliance and Outreach Division conducts pre-award reviews; provides guidance and assistance to OCR field offices to ensure uniform implementation of pre-award policies and procedures; maintains civil rights assurance forms; and provides technical assistance and other services to operating divisions, recipients, national advocacy groups, beneficiaries, and other federal departments.
- The Resource Management Division implements OCR's administrative, financial, information resource management, data collection and personnel functions.³¹

OCR also reorganized the regional structure. The 10 regional managers now report to the deputy director. The regional offices have a deputy regional manager to oversee operations, and an attorney from OGC's regional staff. In addition to the regional offices, there are two satellite (field) offices. The field offices provide technical assistance and education to recipients in their area, and conduct complaint investigations and compliance reviews. This regional structure provides (1) a direct line to OCR management; (2) managerial oversight of regional operations; and (3) direct assistance in areas where there are a large number of recipients and diversity in beneficiaries.³²

OGC's Civil Rights Division still advises and assists OCR in interpreting and applying nondiscrimination laws and regulations. Attorney responsibilities, however, are clear: (1) preparing cases for administrative enforcement proceedings and referring cases to DOJ for enforcement; (2) assisting DOJ in litigating court cases involving civil rights issues and health and human services programs; (3) reviewing or assisting in developing civil rights and privacy regulations, policy interpretations, and guidelines; (4) issuing legal opinions at OCR's request; and (5) providing legal guidance in applying the Privacy Act, the Freedom of Information Act, and other statutes and regulations with which OCR must comply. OGC still supervises the 19 attorneys. OCR maintains that the relationship between OGC and OCR is adequate for enforcement.³³

Among this section's key points are:

- OCR reduced and consolidated management positions.
- OCR streamlined headquarters and regional organizational structures.
- OCR reorganized its regional structure and created field offices to improve enforcement in some areas.
- OCR hired staff at headquarters with enforcement experience.

³¹ Ibid., pp. 5–7.

³² Ibid., pp. 3, 6–7.

³³ Ibid., p. 6.

Resources—Funding and Staffing

In the Commission's 1996 and 1999 reviews, OCR's Title VI resources decreased while civil rights responsibilities increased.³⁴ However, in 1999 OCR did not provide justification to increase its enforcement budget or a detailed plan for how additional resources would be expended.³⁵ The Commission recommended that OCR show justification for more resources, how additional resources would be expended, and how OCR's enforcement would improve with more resources.³⁶

OCR now prepares a detailed budget plan that outlines the resource allocation for civil rights enforcement. The budget plan includes an analysis of current workload, projected workload and staff time for specific types of compliance activities, and issues anticipated during the budget year.³⁷ It indicates where additional resources are needed and how they would be used to improve enforcement. The Commission also recommended that HHS establish a reporting system that monitors and tracks resources and expenditures for each type of civil rights enforcement activity, including investigations, compliance reviews, technical assistance, and outreach.³⁸ The Commission further proposed that OCR develop a "codification system" to approximate the time and resources devoted to each civil rights law that it enforced. Such a system would justify OCR's budget and staffing requests.³⁹

OCR now reports resources (funding and staffing) by OCR component and activity, but not by statute.⁴⁰ OCR implemented in November 2002 the Program Information Management System to upgrade and integrate its information and management capabilities. The new system serves as an electronic repository for technology that monitors and tracks expenditures by the type of activity. OCR states that in its final phase, the system will improve OCR's ability to identify resources associated with specific compliance activities, including multiple authorities and issues.⁴¹

OCR maintains comprehensive information on its resources, staffing, and enforcement activities from FY 1998 to FY 2003. Table 4.2 shows resources for components and activities, and staff assignments before and after the 2000 realignment. Some components were eliminated or their functions consolidated into new or other units or divisions after the realignment.

The resources for FY 2000 through FY 2003 reflect expenditures and resource allocations for OCR's current organizational structure. Table 4.2 shows OCR's funding and staffing by component and activity from FY 2000 has increased overall, and that resources for compliance reviews increased.

³⁴ USCCR, *Federal Title VI Enforcement*, p. 240. The 1996 review reported HHS' civil rights resources from 1981 to 1993. OCR's budget only increased from \$19.8 million in 1981 to \$22.2 million in 1993. After correcting for inflation, OCR's budget fell by 26 percent between 1981 and 1993. In addition, OCR staff declined from 524 to 309 during the period. *Federal Title VI Enforcement*, p. 222. USCCR, *The Health Care Challenge, Vol. II*, p. 42. In the 1999 review, factoring in inflation, OCR reported that its FY 1999 budget of \$20.6 million was approximately 65 percent of the 1981 budget of \$19.8 million.

³⁵ USCCR, *The Health Care Challenge, Vol. II*, p. 42.

³⁶ *Ibid.*, p. 292.

³⁷ HHS Interrogatory, pp. 9–10; HHS Interrogatory Document Request, Item 6.

³⁸ USCCR, *Federal Title VI Enforcement*, p. 240; USCCR, *The Health Care Challenge, Vol. II*, p. 293.

³⁹ USCCR, *Federal Title VI Enforcement*, p. 240.

⁴⁰ HHS Interrogatory Document Request, Oct. 15, 2003, Items 2, 4.

⁴¹ HHS Interrogatory, pp. 8–9.

TABLE 4.2
HHS/OCR Funding and Staffing by Component and Activity, 1998–2003
 (Staff and Funding—FY 1998–2002 Actual FTE and \$ (in 000s)—FY 2003 Preliminary Estimates Only)

FTE and \$ by Activity/Office	FY 1998		FY 1999		FY 2000		FY 2001		FY 2002		FY 2003	
	FTE	\$	FTE	\$	FTE	\$	FTE	\$	FTE	\$	FTE	\$
By Activity												
1 Compliance activities	179	\$16,261	174	\$17,060	179	\$18,744	186	\$22,926	209	\$26,674	207	\$27,899
Legal services	19	\$1,726	19	\$1,863	19	\$1,990	18	\$2,219	20	\$2,553	20	\$2,696
Program management	18	\$1,635	17	\$1,667	17	\$1,780	19	\$2,342	16	\$2,042	18	\$2,426
TOTAL	216	\$19,622	210	\$20,590	215	\$22,514	223	\$27,487	246	\$31,396	245	\$33,021
By Specific Compliance Activity (see note 2)												
2 Complaint processing	74	\$6,772	79	\$7,746	74	\$7,749	83	\$9,172	90	\$10,688	100	\$13,477
Preventative compliance reviews and monitoring	81	\$7,358	76	\$7,452	60	\$6,283	53	\$5,857	48	\$5,700	37	\$4,986
Public, education, outreach and voluntary compliance	24	\$2,180	19	\$1,863	45	\$4,712	45	\$4,973	59	\$7,007	37	\$4,986
Privacy of health information	n/a	n/a	n/a	n/a	n/a	\$18,744	5	\$2,924	12	\$3,406	33	\$4,450
TOTAL	179	\$16,261	174	\$17,060	179		186	\$22,926	209	\$26,801	207	\$27,899
By Office (see note 3)												
Office of the Director and Deputy Director	14	\$1,272	14	\$1,373	9	\$942	11	\$1,356	15	\$1,914	16	\$2,156
Office of the General Counsel	9	\$818	8	\$784	8	\$838	8	\$986	9	\$1,149	10	\$1,348
Office of Management Planning and Evaluation (pre-FY 2001 realignment)	16	\$1,453	15	\$1,471	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
3 Office of Program Operations (pre-FY 2001 realignment)	23	\$2,089	23	\$2,255	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Program, Policy and Training Division (post-FY 2001 realignment)	n/a	n/a	n/a	n/a	21	\$2,199	19	\$2,342	20	\$2,553	19	\$2,561
Resource Management Division (post-FY 2001 realignment)	n/a	n/a	n/a	n/a	14	\$1,466	14	\$1,726	12	\$1,532	10	\$1,348
Voluntary Compliance and Outreach Division (post-FY 2001 realignment)	n/a	n/a	n/a	n/a	7	\$733	8	\$986	7	\$893	7	\$943
Regional Offices	154	\$13,990	150	\$14,707	156	\$16,336	163	\$20,091	183	\$23,356	183	\$24,665
FTE & \$ Actual (\$ in 000s including Trust Funds)	216	\$19,622	210	\$20,590	215	\$22,514	223	\$27,487	246	\$31,396	245	\$33,021
FTE & \$ Authorized (\$ in 000s including Trust Funds)	242	\$19,659	232	\$20,618	225	\$22,533	259	\$27,983	269	\$31,430	267	\$33,038

1. FY 2000 authorized includes a net of \$445,000 in funds transferred to OCR under the Secretary's 1 percent transfer authority (to cover costs associated with implementation of the Supreme Court's June 1999 decision in the *Olmstead* case (most integrated setting for persons with disability)).

2. Civil Rights FTE and \$ allocated on pro-rata basis consistent with Budget Authority by Activity and Detail of Full-Time Equivalent Employment (FTE) in Justification of Estimates for Appropriations Committees.

3. OCR realigned headquarters operations effective November 27, 2000. Because the realignment was published during April 2000 (during FY 2000), staff allocation by office in FY 2000 was made comparable to FY 2001.

4. n/a -The table shows OCR's components before and after realignment.

Sources: U.S. Department of Health and Human Services, "HHS Office for Civil Rights Funding and Staffing by Component and Activity FY 1998–FY 2003"; U.S. Commission on Civil Rights Interrogatory Document Request Items 2, 3, and 5.

OCR's FY 2004 budget is \$33.9 million, 64.6 percent higher than in FY 1999,⁴² and supports 56 more FTEs. OCR states that its resources are sufficient to support both the new Privacy Rule responsibility and civil rights compliance without necessitating a shift in resources.⁴³

Among this section's key points are:

- OCR now prepares and submits a detailed budget plan that includes an analysis of current workload, projected workload, staff time for compliance activities, and issues anticipated during the budget year.
- OCR now reports resources by component and activity.
- OCR's new electronic record-keeping system monitors and tracks expenditures by the type of activity. It is a repository for technology, program, financial, and resource planning.

Planning

OCR prepares numerous planning documents, many dating back to 1996 and 1999.⁴⁴ Some plans are statutorily mandated, such as the Department of Justice's annual Civil Rights Implementation Plan, while others are solely for internal use.⁴⁵ For example, headquarters and regional staff prepare annual operating plans (AOPs), which combine goals in the strategic plan with other initiatives. In 1999, the plans generally overlapped in content, and the Commission recommended that OCR develop one, comprehensive civil rights enforcement plan.⁴⁶

OCR still does not have one, comprehensive civil rights enforcement plan. OCR continues to prepare all the earlier plans. Since 1999, OCR has produced two new plans, one to eliminate language barriers and the other to assist regions in their budgetary preparation process. OCR maintains that the earlier and new plans have a specific purpose or meet reporting requirements.⁴⁷

One of OCR's statutorily mandated documents is the annual Civil Rights Implementation Plan (CRIP). DOJ requires all Title VI agencies to forecast and report on enforcement activities annually. Internally, OCR considers the CRIP its Annual Implementation Plan (AIP). The AIPs that the Commission examined in 1996 and 1999 summarized OCR's Title VI work. The agency did not consider the AIP a planning document, as DOJ intended.⁴⁸ As a result, OCR did not identify specific objec-

⁴² See HHS/OCR, "Civil Rights Funding and Staffing by Component and Activity, 1998–2003"; U.S. Department of Health and Human Services, Office for Civil Rights, 2004 Budget Data.

⁴³ HHS Interrogatory, p. 8. In FY 2003, OCR employed 244 FTEs.

⁴⁴ In its response to the Commission's document request, OCR submitted six types of plans, including examples of a strategic plan, annual operating plans, annual performance plans, annual implementation plans, the language assistance plan, and the financial operating plan. See HHS Interrogatory Document Items 7–10.

⁴⁵ For example, a strategic plan is required by law. The Annual Performance Plan is in accordance with the Government Performance and Results Act (GPRA) Pub. L. 103-62, 107 Stat. 285 (codified at 5 U.S.C. § 306, 31 U.S.C. §§ 1115–1119 (1994)). Most agencies the Commission reviewed have responsibilities to ensure nondiscrimination in federally assisted programs as required under Title VI of the Civil Rights Act of 1964. See Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-(7) (2004)).

⁴⁶ USCCR, *Federal Title VI Enforcement*, p. 249; USCCR, *The Health Care Challenge, Vol. II*, pp. 31, 39, 289.

⁴⁷ HHS Interrogatory, p. 10. See *ibid.*, pp. 10–12, for a detailed description of each plan.

⁴⁸ USCCR, *The Health Care Challenge, Vol. II*, pp. 39–40. In 1996, the Commission reviewed FY 1989 to 1993 CRIPs and in 1999, reviewed FY 1996 to 1998 CRIPs. The studies found the same problems with all the CRIPs reviewed, even though the Commission made recommendations for improvement in the 1996 report.

tives or resources necessary to accomplish them, or OCR provide information sufficient to evaluate Title VI enforcement.⁴⁹

OCR has not revised its AIPs since 1999.⁵⁰ It contends that AIPs serve as evaluation measures to the extent that they provide information about OCR's enforcement activities.⁵¹

Among this section's key points are:

- OCR prepares numerous planning documents, some of which are statutorily mandated, while others are solely for internal use. Since 1999, OCR has produced two new plans.
- OCR has not revised its annual Civil Rights Implementation Plan since 1999.
- OCR still does not have one, comprehensive civil rights enforcement plan.

Policy Guidance

In 1999, the Commission stated, "OCR's failure to develop and use regulations and policies to implement civil rights laws has had a devastating effect on the agency's ability to conduct thorough, comprehensive enforcement to ensure equal access to quality health care." Therefore, the Commission recommended that OCR assign staff to develop policy guidance or statements that address civil rights compliance, amendments to civil rights statutes, and revisions in civil rights regulations or policies.⁵²

Since then, OCR has issued one new regulation and eight new guidance documents.⁵³ OCR disseminates the policy documents throughout the department and to recipients by posting to HHS' Web site, by e-mail and mail, and during technical assistance meetings.⁵⁴

⁴⁹ USCCR, *Federal Title VI Enforcement*, p. 249; USCCR, *The Health Care Challenge, Vol. II*, pp. 39, 289.

⁵⁰ HHS Interrogatory, p. 15. OCR submitted FY 1998–2002 AIPs. See HHS Interrogatory Document Request, Item 10.

⁵¹ HHS Interrogatory, p. 15.

⁵² USCCR, *The Health Care Challenge, Vol. II*, pp. 298–99.

⁵³ HHS Interrogatory, pp. 16–18; HHS Document Request Item 13. The regulation is the Health Insurance Portability and Accountability Act Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182 (2002) (codified at 45 C.F.R. pts. 160 and 164), which ensures a national floor of privacy protections for patient medical records and other health-related information. The eight guidance documents include (1) *Civil Rights Laws and Welfare Reform—An Overview and Technical Assistance for Caseworkers on Civil Rights Laws and Welfare Reform* (Aug. 27, 1999), which explains how federal civil rights laws apply to certain aspects of welfare reform and is designed to assist officials involved in welfare reform programs in identifying potential civil rights issues and avoiding discrimination; (2) *Olmstead Letters to State Medicaid Directors* (Jan. 14 and July 25, 2000), which was issued jointly with the Centers for Medicare and Medicaid Services. It provides information on the Supreme Court decision, *Olmstead v. L.C.* 527 U.S. 581 (1999), and its impact on the administration of Medicaid programs. The decision provides a legal framework for efforts to enable individuals with disabilities to live in the most integrated setting appropriate to their needs, and requires initiatives to develop more opportunities for these persons to have access to cost-effective community-based, rather than institutionalized, services; (3) *Title VI of the Civil Rights Act of 1964: Policy Guidance on the Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (Aug. 30, 2000), which assists recipients of HHS federal financial assistance in fulfilling their responsibilities to provide meaningful access to LEP individuals. A revised guidance was issued in August 2003; (4) *Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program, Temporary Assistance for Needy Families (TANF) and Food Stamp Benefits* (Sept. 21, 2000), which clarifies when information on these matters may or may not be requested; (5) *Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance for Needy Families)* (Jan. 19, 2001), which clarifies the obligations that Title II of the ADA and Section 504

OCR also reviews other HHS components' proposed civil rights regulations and policy initiatives. The Office of the Secretary establishes clearance timelines according to the subject's sensitivity. Appropriate components review policy proposals within the timelines.⁵⁵

Title VI Regulations

OCR reported in 1996 that its Title VI regulations had not been revised since 1980. In addition, HHS had not published any Title VI guidelines for its federally assisted programs, as DOJ required. The Commission recommended that HHS develop and issue Title VI guidelines regularly.⁵⁶ In August 2003, OCR amended Title VI regulations.⁵⁷

Case Resolution Manual

In 1996, an investigative procedures manual guided OCR's operations. The manual contained procedures for Title VI complaint investigations, compliance reviews, and pre-award reviews; however, it did not include comprehensive Title VI enforcement instructions. The Commission recommended that OCR provide a manual with "step-by-step" instructions for implementing Title VI, from the application stage through compliance reviews.⁵⁸ By 1999, OCR had replaced the investigative procedures manual with the case resolution manual. Some of the same deficiencies were in the new manual. For example, the manual was too brief and cursory to serve as a procedural guide for compliance reviews and complaint investigations. The Commission concluded that the case resolution manual was not sufficiently comprehensive as an enforcement guide. OCR responded at that time that it intended to improve the manual and that it had a goal of enhanced usability, particularly for investigative staff.⁵⁹

impose on state and local government TANF agencies and on recipients of federal financial assistance from HHS involved in TANF activities; (6) *Access to HHS-Funded Services for Immigrant Survivors of Domestic Violence* (Jan. 21, 2000), which is a fact sheet that provides guidance to health and social service agencies and community-based organizations about specific requirements affecting access to HHS federally funded programs for battered immigrants and their children; (7) *MEPA (Multi-Ethnic Placement Act/Section 1808 Internal Evaluation Instrument* (July 10, 2003), which is designed to assist states and other entities involved in adoption and foster care and their compliance with the Multi-Ethnic Placement Act of 1994 and Section 1808 of the Small Business Administration Job Protection Act of 1996, which also is useful in compliance with Title VI in this area; and (8) *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (Aug. 8, 2003) is a revised guidance to the 2000 LEP guidance. This guidance clarifies existing legal requirements for LEP persons and factors recipients should consider in fulfilling their responsibilities to LEP persons.

⁵⁴ HHS Interrogatory, p. 16.

⁵⁵ *Ibid.*, p. 4.

⁵⁶ USCCR, *Federal Title VI Enforcement*, pp. 240–41.

⁵⁷ See *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 68 Fed. Reg. 47,311 (2003). Also in August 2003, HHS proposed to amend regulations implementing Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975 to conform with certain statutory amendments made by the Civil Rights Restoration Act of 1987. The principal proposed conforming change was to amend the regulations to add definitions of "program or activity" or "program" that correspond to the statutory definitions enacted under the Civil Rights Restoration Act of 1987. See Office for Civil Rights, *Amending the Regulations Governing Nondiscrimination on the Basis of Race, Color, National Origin, Handicap, Sex, and Age to Conform to the Civil Rights Restoration Act of 1987*, 65 Fed. Reg. 64,194 (2000) (to be codified at 45 C.F.R. pts. 80, 84, 86, 90, and 91).

⁵⁸ USCCR, *Federal Title VI Enforcement*, p. 242.

⁵⁹ USCCR, *The Health Challenge, Vol. II*, pp. 156–57, 168–70.

The Commission recommended that OCR revise the case resolution manual and model it after the Department of Justice's guidance.⁶⁰ It said that the manual should instruct investigative staff not only on what type of data it should collect, but also on the importance of data collection and use. The manual also needed to provide clearer instructions to recipients for implementing policy in an effective and nondiscriminatory manner.⁶¹ OCR has not revised the case resolution manual and continues to use it.⁶²

LEP Guidance

In 1998, OCR issued an LEP guidance memorandum to its investigative staff, which addressed language assistance related to national origin. Overall, the guidance was informative, but lacking in characterizing the diversity of languages represented in the service population or the need to identify skilled interpreters.⁶³ The guidance also did not have clear standards for what constitutes a violation of Title VI and failed to provide meaningful access within the health and human services systems. The Commission noted the absence of a concise denotation of "equal access to health care," and concluded that without the definition, HHS could not enforce LEP patients' civil rights.⁶⁴ The Commission recommended that OCR develop LEP policy guidance that included (1) a definition of "equal access to health care"; (2) standards for interpreter certification; and (3) specific monitoring objectives.⁶⁵ The Commission also recommended that OCR clarify terms such as "reasonable steps" and give specific examples as to what recipients could do to assist LEP persons. The Commission recommended that OCR issue the guidance as Title VI regulations. The Commission praised OCR, despite its shortcomings, for having produced LEP guidance and commended the document to other agencies to do the same.⁶⁶

In August 2000, President William J. Clinton issued Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."⁶⁷ The executive order requires all Title VI agencies to develop LEP guidance for recipients with strategies to improve LEP persons' access to

⁶⁰ In September 1998, DOJ's Coordination and Review Section released to civil rights enforcement agencies a detailed and comprehensive procedural guidance, in response to the requests from the agencies to prepare guidance on investigative techniques. It included sections on applicable legal theories, a description of the evidence required to complete investigations, methods for analyzing evidence, and detailed sections on preparing letters of finding and investigative reports. USCCR, *The Health Care Challenge*, Vol. II, p. 326.

⁶¹ USCCR, *The Health Care Challenge*, Vol. II, p. 328.

⁶² HHS Interrogatory, p. 19; HHS Interrogatory Document Request Item 15.

⁶³ USCCR, *The Health Care Challenge*, Vol. II, p. 93. In Executive Order 13166, reprinted at 65 Fed. Reg. 50,119 (2000), federal grant agencies are directed to issue guidance to their respective recipients of federal financial assistance on ensuring meaningful access to their programs and activities by persons with limited English proficiency (LEP). Executive Order 13166 further requires that agency guidance be consistent with the compliance standards set out in Department of Justice Policy Guidance issued contemporaneous with the executive order and published at 65 Fed. Reg. 50,123 (2000).

⁶⁴ USCCR, *The Health Care Challenge*, Vol. II, pp. 298–99.

⁶⁵ *Ibid.*, p. 310. The Commission noted that it failed to include a discussion on how OCR would monitor recipients' implementation of remedial plans or resolution agreements developed in settlement negotiations with OCR.

⁶⁶ USCCR, *The Health Care Challenge*, Vol. II, pp. 93, 309, 311.

⁶⁷ Executive Order 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000). The purpose of the executive order is to improve access and eliminate language as a barrier to federally assisted and federally conducted programs and activities. Under the order, all federal agencies are required to prepare an LEP (or language access plan) and those agencies under Title VI are to prepare guidance to their recipients on improving access to their programs for LEP persons. For additional information on the executive order and its implementation by federal agencies, see U.S. Commission on Civil Rights, *Eliminating Language Barriers to Federal Programs and Services*, 2004.

federally funded programs. OCR issued a revised LEP guidance in August 2003.⁶⁸ The guidance addresses some of the Commission's earlier concerns; for example, it provides suggestions and examples on how to improve language access; recommends language sources for recipients to use; and includes information about oral interpretation and written translation.⁶⁹ OCR has not issued the guidance as part of its Title VI regulations.⁷⁰

Among this section's key points are:

- Since 1999, OCR has issued two new regulations and eight new guidance documents.
- OCR has amended its Title VI regulations.
- OCR has not revised the case resolution manual.
- OCR issued a final LEP guidance in 2003 that addresses the Commission's earlier concerns.

Technical Assistance

In 1996 and 1999, OCR did not provide structured, regularly scheduled technical assistance for HHS staff or recipients. The Commission therefore recommended that OCR provide regularly scheduled technical assistance programs. Moreover, OCR should inform regional offices, operating divisions, and state and local agencies about new and developing problems and case law, and provide step-by-step instructions on compliance procedures.⁷¹ The Commission also suggested that OCR assign headquarters staff to full-time education and outreach coordinator positions to monitor and coordinate technical assistance, and education and outreach activities.⁷²

OCR now provides regularly scheduled technical assistance for regions and components throughout the department. Some activities are conducted more than once a year, while other activities run for a few weeks. Technical assistance is offered through written documents and at conferences and meetings. Headquarters senior civil rights analysts discuss with regional staff such topics as racial and ethnic health disparities, meaningful access to programs and services, racial discrimination in adoption and foster care, and the special needs of persons with disabilities and limited English proficiency. OCR also uses outside consultants to provide technical assistance and information to its staff.

⁶⁸ In August 2000, OCR issued an LEP guidance. See 65 Fed. Reg. 52,762 (2000). This original guidance was republished for additional comment on February 1, 2002, pursuant to a memorandum issued by the United States Department of Justice on October 26, 2001. See Fed. Reg. 4,968 (2002). See *Title VI of the Civil Rights Act of 1964: Policy Guidance on the Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*. See 68 Fed. Reg. 47,311 (2003). The August 2003 guidance is a revision of the August 2000 guidance with additional information required by DOJ. See *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (Aug. 8, 2003) in HHS Interrogatory Document Request, Item 13.

⁶⁹ HHS Interrogatory, pp. 19–20.

⁷⁰ Executive Order 13166 does not require the Title VI agencies to issue the guidance as final rule or as a part of the Title VI regulations.

⁷¹ USCCR, *Federal Title VI Enforcement*, p. 246.

⁷² USCCR, *The Health Care Challenge, Vol. II*, pp. 350–52. In 1999, OCR's Voluntary Compliance and Outreach Division was responsible for coordinating technical assistance, and education and outreach activities. However, it consisted of only two staff who could not account for the specific amount of time spent on these activities, which involved mostly evaluating plans and status reports from the regions. There was no liaison person at headquarters assigned to the regions, and headquarters staff admitted there was very little communication between the regions and headquarters about these matters and headquarters staff were not fully aware of the outreach activities being conducted. *Ibid.*, pp. 351–52.

However, OCR technical assistance to operating divisions and recipients concerning civil rights developments, law, and policy is provided only as needed. Finally, OCR assigns staff to coordinate activities.⁷³

Among this section's key points are:

- OCR now provides technical assistance and information on a wide range of civil rights topics to OCR staff, operating divisions, state and local agencies, and recipients.
- OCR also uses outside consultants to provide technical assistance and information to its staff.

Education and Outreach

In previous reviews, the Commission found that OCR did not regularly conduct Title VI community outreach or public education.⁷⁴ OCR did not use mechanisms such as the media to inform the public about nondiscrimination policies in health care. It therefore recommended that OCR actively and regularly inform actual and potential participants of their civil rights and how to file complaints.⁷⁵ The Commission further recommended that OCR conduct a media campaign to emphasize the importance of quality health care and nondiscrimination in health services. In addition, it recommended that OCR reach out to civil rights and community organizations to assist in education and outreach.⁷⁶

OCR used fact sheets, available in English, Spanish and some Asian languages, for education and outreach, but these had not been updated since the early 1990s. Besides, the fact sheets did not describe OCR's role and civil rights laws, or provide service information. OCR also had not prepared any other education and outreach publications. OCR attributed the paucity of outreach documents to a lack of resources. The Commission recommended that OCR assess whether benefits of allocating resources to education and outreach justified the sacrifice of resources in other areas.⁷⁷

OCR now provides education and outreach to the public and funding recipients on health care services, civil rights, and Title VI.⁷⁸ OCR has 16 fact sheets about the civil rights laws that it enforces. All have been updated since 1999 and are translated into seven languages: Spanish, Chinese, Korean, Vietnamese, Polish, Russian, and Tagalog. It disseminates health care information to community and advocacy groups, recipients and providers, and to the general public through HHS' Web site. OCR's standardized Discrimination Complaint Form can be downloaded from the Web site and filed electronically. In addition, OCR partners with other federal agencies, including DOJ and the Department of Agriculture, to coordinate education and outreach activities on related issues. It collaborates with

⁷³ HHS Interrogatory, pp. 22–25.

⁷⁴ USCCR, *Federal Title VI Enforcement*, p. 245.

⁷⁵ *Ibid.*, p. 346.

⁷⁶ USCCR, *The Health Care Challenge, Vol. II*, pp. 278–79.

⁷⁷ *Ibid.*, pp. 350–52.

⁷⁸ HHS Interrogatory, pp. 27–28. OCR reports that in FY 2003, 44 percent of the approximately 300 outreach, educational, and technical assistance activities involved Title VI issues (LEP, racial and ethnic health disparities, immigrant access, and racial discrimination in adoption and foster care). Education and outreach activities include OCR staff speaking at or participating in briefings, conferences and workshops; developing videos; making presentations; and developing materials on its Web site on different civil rights issues.

operating divisions, and universities and state agencies to pool resources to support education and outreach activities.⁷⁹

Among this section's key points are:

- OCR provides education and outreach on Title VI.
- OCR now has 16 updated fact sheets in several languages about the civil rights laws that it enforces.
- OCR uses the HHS Web site to widely disseminate health care information. The standardized Discrimination Complaint Form on HHS' Web site can be downloaded and filed electronically.
- OCR collaborates internally and externally to pool resources to support education and outreach activities.

Complaint Processing

In 1996, HHS' enforcement activities were complaint driven.⁸⁰ OCR reported that complaint processing consumed the majority of its resources and made up 60 percent of its workload. Nevertheless, the complaint backlog continued to increase. To rectify the problem, OCR instituted a "high priority" caseload program, which concentrated resources on cases most likely to result in discrimination findings.⁸¹ The Commission recommended that OCR initiate more strategies to eliminate backlog, including (1) an early resolution system in which cases could be resolved before investigation; (2) use of operating divisions for daily compliance responsibilities to increase the number of on-site reviews and investigations; and (3) use of pre-award reviews as a proactive strategy to eliminate discrimination before a complaint is filed, which would increase the number of applicants undergoing pre-award reviews.⁸²

OCR now implements an Early Complaint Resolution process, in which parties have the opportunity to resolve allegations at initial stages. If regional staff determine that this process is appropriate, and the charging parties and the covered entity are willing, staff will facilitate agreements between the parties. OCR does not sign, endorse, or formally monitor agreements between parties, but if the covered entity fails to comply, the charging party may refile the original complaint.⁸³ However, OCR did not address the Commission's other recommendations. Thus, operating divisions do not assist in complaint processing and pre-award reviews do not serve as a strategy to increase the number of applicants reviewed.

Among this section's key points are:

- OCR implements an early complaint processing procedure in which parties have the opportunity to resolve allegations at initial stages of the complaint.

⁷⁹ HHS Interrogatory, pp. 27–30.

⁸⁰ USCCR, *The Health Care Challenge, Vol. II*, p. 229. Between 1985 and 1992, OCR's complaint inventory rose from approximately 400 complaints to nearly 1,300 complaints. From FY 1986 through FY 1993, OCR received 1,589 and 2,094 complaints, respectively. Approximately one-third of the inventory involved Title VI complaints.

⁸¹ USCCR, *Federal Title VI Enforcement*, p. 245.

⁸² *Ibid.*, pp. 239, 245. In 1996, none of the operating divisions had staff assigned to Title VI enforcement. Only one, the Centers for Medicare and Medicaid, had an MOU with OCR that outlined specific responsibilities.

⁸³ HHS Interrogatory, p. 32.

- OCR has not established any other procedures or strategies to improve complaint processing.

Compliance Reviews

Pre-Award Reviews

HHS provides financial assistance to 230,000 entities; however, it only reviews new Medicare applicants and Medicare recipients that reapply for federal financial assistance because of a name or ownership change before making awards.⁸⁴ The pre-award reviews apply to Medicare institutions such as nursing homes, home health agencies, hospitals and hospices, and not to applicants who are doctors or other health professionals.⁸⁵

In its 1996 and 1999 reviews, the Commission concluded that HHS lacked a comprehensive pre-award process that included all program applicants. It recommended that OCR develop strategies that would increase the number of applicants reviewed, include on-site reviews, and develop a data collection system to collect useful information about applicant administration of programs.⁸⁶ The Commission suggested OCR institute desk-audit reviews of non-Medicare funding recipients and use software applications to perform analysis of statistical information.⁸⁷ In 1999, the Commission also recommended that qualified operating divisions perform pre-award desk-audit reviews.⁸⁸

⁸⁴ *Ibid.*, p. 35. Medicare is a national health insurance program sponsored by the government. It is divided into two parts: “Part A,” which pays benefits for hospital and skilled nursing home care, and “Part B,” which helps pay for doctor bills and outpatient services. See “Medicare: Parts A and B,” <http://www.bristolhospital.org/bh_hil/AGIN3390.htm> (last accessed May 9, 2004). In the 1960s, Medicare was the largest federal health care program. The Secretary of HEW (now HHS) devised the Medicare pre-award review to combat racial segregation and other discrimination in health care services. Medicare remains the largest HHS health care program and the nation’s largest health care insurer with 900 million claims a year. OCR states that the unique structure of the Medicare program lends itself more to a pre-award review, while the structures of other HHS-funded programs are more appropriate for post-award reviews. OCR explains that Medicare providers are direct recipients of federal financial assistance and each year thousands of new providers seek certification to participate in the program. OCR believes that, through pre-award reviews of Medicare applicants, it is reviewing the highest number of new recipients for nondiscrimination. In other HHS programs such as Medicaid, federal funding goes to a state agency rather than directly to the provider, and the state applicant pool is relatively static. State Medicaid agencies can and do change their plans for participation or submit waivers under Medicaid authority. When appropriate, OCR does review these submissions for civil rights implications. Shelley Jackson, senior civil rights analyst, Office for Civil Rights, U.S. Department of Health and Human Services, “Additional Information on the Office for Civil Rights Medicare Pre-Grant Reviews,” e-mail, Feb. 20, 2004.

⁸⁵ OCR explains that 230,000 is the number of all recipients, not the number of entities required to apply or reapply for participation in the Medicare program. OCR estimates that approximately 50,000 institutional Medicare recipients have undergone pre-award reviews. OCR further explains that other Medicare participants, including doctors and other health professionals, do not undergo pre-award reviews if they participate in the Medicare “Part B” program, which is the Medicare medical insurance program that helps pay for doctors’ services and other care. OCR states that HHS’ Title VI regulations do not include Medicare “Part B” as a federally funded assisted program. See Robinsue Frohbese, principal deputy director, Office for Civil Rights, U.S. Department of Health and Human Services, letter to Les Jin, staff director, U.S. Commission on Civil Rights, Re: Ten-Year Check-Up: Have Agencies Responded to Civil Rights Recommendations? (Chapter on U.S. Department of Health and Human Services, May 17, 2004; U.S. Department of Health and Human Services, HHS Office for Civil Rights Suggested Revisions to USCCR Draft, *Ten-Year Check-Up Report* (HHS Chapter) (hereafter cited as HHS letter and Suggested Revisions).

⁸⁶ USCCR, *Federal Title VI Enforcement*, pp. 242–43; USCCR, *The Health Care Challenge, Vol. II*, p. 330.

⁸⁷ USCCR, *The Health Care Challenge, Vol. II*, p. 331.

⁸⁸ Pre-award desk audits include review of signed assurances as part of the pre-award package. In addition, OCR pre-award reviews do not involve an on-site visit to a facility. HHS Interrogatory, p. 36. In 1999, some operating divisions had

OCR did not respond to the Commission's recommendations. In regard to pre-award reviews, OCR has not increased the pool of applicants reviewed or included on-site visits in the process. Table 4.3 shows a total of 18,531 pre-award reviews between FY 1998 and 2002, and that the number reviewed each year was lower than that in FY 1998. OCR maintains that it cannot control the number of pre-award reviews it conducts since it is based on the number of Medicare recipients that the Centers for Medicare and Medicaid refer each year.⁸⁹ OCR believes that strategies to increase the number of pre-award reviews are unnecessary since it is reaching the largest number of new applicants through its pre-award review policy.⁹⁰

TABLE 4.3
HHS/OCR Pre-Award Reviews, 1998–2002

Fiscal year	Pre-award review workload	On-site reviews	Completed pre-award reviews involving desk audits only	Reviews resulting in noncompliance
1998	4,035	0	3,028	156
1999	3,702	0	2,582	109
2000	3,426	0	2,174	140
2001	3,628	0	2,268	138
2002	3,740	0	3,740	11

Sources: HHS Interrogatory Document Request, Annual Civil Rights Implementation Plans, FY 1998–2002, Item 10; HHS Interrogatory, p. 37; Shelley Jackson, senior civil rights analyst, Office for Civil Rights, U.S. Department of Health and Human Services, e-mail, Dec. 18, 2003.

OCR has not improved data collection on applicant beneficiaries, including collecting information on beneficiaries that recipients reject. Some regions collect demographic information on the program's affected community.⁹¹

Post-Award Reviews

OCR uses post-award reviews to identify deficiencies in program administration, allegations of barriers to program participation, and recipients' need for education and technical assistance.⁹² In 1996, OCR conducted a small number of post-award reviews, including desk-audit and on-site visits, relative to the number of recipients.⁹³ OCR attributed the small number of post-award reviews to a lack of resources. In light of this, the Commission recommended that OCR use desk-audit reviews, although not exclusively, to ensure Title VI compliance.

civil rights staff performing external civil rights enforcement. In 2003, six operating divisions had MOUs with OCR. HHS Interrogatory, p. 44.

⁸⁹ In 2004, the Commission reiterates its earlier concern that the number of applicants that undergo pre-award reviews is far below the number of recipients (currently, 230,000) that receive HHS federal financial assistance. OCR believes that comparing the number of recipients with the number of applicants is inappropriate. *See* HHS Letter and Suggested Revisions. To clarify the issue, the Commission requested the total number of applicants from FY 1998 to 2002, in order to compare the number of applicants with the number of those who underwent pre-award reviews. OCR informed the Commission that the information is not available. Shelley Jackson, senior civil rights analyst, Office for Civil Rights, U.S. Department of Health and Human Services, telephone interview, May 18, 2004.

⁹⁰ HHS Interrogatory, p. 35.

⁹¹ *Ibid.*, p. 36.

⁹² *Ibid.*, p. 37.

⁹³ USCCR, *Federal Title VI Enforcement*, p. 228.

The number of post-award reviews has continuously declined, from 270 in FY 1999 to 136 in FY 2002. Data on on-site reviews suggested that OCR is not simply relying on desk-audit reviews. On-site reviews initially made up less than 20 percent of all reviews, but increased in FY 2000 to 26.7 percent, and to a height of 57.3 percent in FY 2001, then decreased to 42.6 percent in FY 2003. The trend in percentage of reviews resulting in a finding of noncompliance is erratic, with figures notably high in FY 1998 and FY 2001 (see table 4.4).

TABLE 4.4
HHS/OCR Post-Award Reviews, 1998–2002

Fiscal year	Total reviews completed	On-site reviews	Desk audits only	Percent on-site reviews	Reviews resulting in noncompliance	Percent noncompliance
1998	228	39	189	17.1%	58	25.4%
1999	270	44	226	16.3%	37	13.7%
2000	176	47	129	26.7%	23	13.1%
2001	164	94	70	57.3%	86	52.4%
2002	136	58	78	42.6%	27	19.9%

Source: Shelley Jackson, senior civil rights analyst, Office for Civil Rights, U.S. Department of Health and Human Services, e-mail, Mar. 1, 2004.

Limited-Scope Reviews and Full-Scope Reviews

Full-scope reviews generally cover all protected classifications under a statute. Limited-scope reviews, implemented in FY 1993, focus on one problem that is usually applicable to a single statute.⁹⁴ With limited-scope reviews, OCR planned to increase the number of post-award reviews, rationalizing that more reviews could be quickly conducted with fewer resources. Limited-scope reviews usually do not require on-site visits and omit important classifications;⁹⁵ however, some have resulted in investigations of other issues and generated additional cases.⁹⁶

In 1999, the majority of OCR's post-award reviews were limited-scope desk audits.⁹⁷ For example, in FY 1997, OCR conducted 253 limited-scope but only 33 full-scope reviews, all of which were desk audits. The Commission concluded that OCR overrelied on limited-scope reviews in the post-award process. It recommended that OCR employ an approach that addressed a broad range of issues, covered at least one statute thoroughly, and included on-site visits. The Commission also recommended that OCR set goals for a minimum number of full-scope reviews conducted each year.⁹⁸

OCR acknowledges that a post-award review usually requires a thorough investigation of more than one issue and on-site visits. OCR indicates that it now conducts limited- and full-scope reviews.⁹⁹

⁹⁴ In recent years, the limited-scope review has focused on limited English proficiency, which addresses national origin discrimination but not race and color, the other two protected classifications under Title VI. The Commission concluded that OCR's "reliance" on limited-scope reviews, and its haphazard selection of sites for on-site reviews, was a weakness in its overall enforcement programs. USCCR, *The Health Care Challenge, Vol. II*, pp. 163, 167.

⁹⁵ USCCR, *The Health Care Challenge, Vol. II*, pp. 163, 167, 333.

⁹⁶ Shelley Jackson, senior civil rights analyst, Office for Civil Rights, U.S. Department of Health and Human Services, telephone interview, Dec. 19, 2003.

⁹⁷ USCCR, *The Health Care Challenge, Vol. II*, p. 163.

⁹⁸ *Ibid.*, p. 333.

⁹⁹ HHS Interrogatory, p. 35.

Table 4.5 shows the number of limited-scope and full-scope reviews conducted between FY 1998 and 2002. The data show that since FY 2000, the number of full-scope reviews has increased sizably.

Finally, OCR does not set goals for the number of full-scope reviews it will conduct each year. However, it uses criteria, such as the number of complaints, to determine when it will conduct a limited- or full-scope review.¹⁰⁰

TABLE 4.5
HHS/OCR Limited-Scope Reviews and Full-Scope Reviews, 1998–2002

Fiscal year	Limited-scope reviews	Full-scope reviews	Investigations	Total
1998	194	62	134	390
1999	239	98	114	451
2000	149	225	77	451
2001	61	295	54	410
2002	48	285	53	386

Note: Investigations reflect those limited-scope reviews that resulted in new cases or different issues that had to be investigated. The total number of full- and limited-scope reviews reflect “initiated” post-award reviews that were not necessarily completed, and the “carried in” cases (usually referred to as the backlog). Thus, the total number of full- and limited-scope reviews is higher than the post-award reviews reported in table 4.4. Shelley Jackson, senior civil rights analyst, Office for Civil Rights, U.S. Department of Health and Human Services, telephone interview, Dec. 19, 2003.

Source: HHS Interrogatory, p. 34.

Among this section’s key points are:

- OCR did not implement the Commission’s recommendations on pre-award reviews.
- OCR is employing on-site and desk-audit post-award compliance reviews.
- OCR does not have annual goals for the number of full-scope reviews to be conducted. It has criteria for determining when it will conduct a limited- or full-scope review.
- Limited-scope reviews usually do not require on-site visits and omit important classifications; although some have resulted in investigations of other issues and generated additional cases.

Staff Training

In 1996 and 1999, OCR did not provide regularly scheduled, comprehensive civil rights training for its staff on such issues as investigative techniques. Instead, it only offered on-the-job training for new staff and annual seminars on civil rights developments.¹⁰¹ The Commission recommended that OCR inform civil rights staff throughout the department about enforcement and compliance procedures, and Title VI programs and policies, case law, and regulations.¹⁰²

¹⁰⁰ Ibid.

¹⁰¹ USCCR, *Federal Title VI Enforcement*, p. 247; USCCR, *The Health Care Challenge, Vol. II*, pp. 294–95.

¹⁰² USCCR, *The Health Care Challenge, Vol. II*, pp. 294–95.

OCR now has a formal civil rights training program for departmental staff that covers requirements and provisions of civil rights laws and regulations, and investigative techniques and procedures.¹⁰³ The program is also designed to help operating division staff as they plan and implement programs.¹⁰⁴ In addition, OCR's headquarters and regional staff train HHS administrators, program and grants management staff, and EEO counselors. OCR uses an evaluation form to assess the effectiveness of training and to design future training efforts.¹⁰⁵

Among this section's key points are:

- OCR has a formal, ongoing program for training HHS staff on civil rights laws and regulations and investigative techniques and procedures. This program also helps operating division staff as they plan and implement programs.
- OCR uses an evaluation form to evaluate the effectiveness of the training and to design future training efforts.

Coordination

In 1999, a departmental Office of Minority Health and Office of Women's Health, and some operating divisions developed and implemented initiatives to improve health care and eliminate disparities in programs and services for minorities and women.¹⁰⁶ Little coordination, however, existed between OCR and these components.¹⁰⁷ The Commission concluded that the minority and women initiatives could affect OCR's work, and it recommended more interaction between OCR and components.¹⁰⁸ The Commission further recommended that OCR coordinate departmentwide efforts to implement the minority and women's initiatives. It also recommended that OCR form an interoffice working group to examine the relationship between civil rights enforcement and the minority and women's initiatives.¹⁰⁹

OCR now coordinates activities with HHS components on initiatives that affect the health care of minorities and women. All departmental initiatives that affect minorities, women, and other protected groups are integrated into civil rights enforcement through outreach and other activities. For example, OCR reviewed the Office of Women's Health fact sheet on battered female immigrants' eligibility for HHS programs, as well as a FY 2002 department report to the President that discusses the role of women as caregivers to family members with disabilities. It also coordinates activities with other components, such as the Office of Disability, established in 2002, to address different services for

¹⁰³ HHS Interrogatory, pp. 39–40.

¹⁰⁴ Since 1999, OCR's Centers for Medicare and Medicaid Services (CMS) training program is provided to all CMS employees and is required of designated staff at all levels. Since 1999, 2,895 CMS staff, including 1,886 CMS headquarters staff and 1,099 CMS regional staff have received OCR's training. HHS Interrogatory, pp. 39–40.

¹⁰⁵ HHS Interrogatory, p. 43. The quantitative score 1–5 with 5 the highest score provides feedback that allows OCR to analyze and document the quality of the training. To date, an average of the quantitative scores reveals a high rating for the training, with scores ranging between 4 to 5. *Ibid.*, pp. 43–44.

¹⁰⁶ See USCCR, *The Health Care Challenge, Vol. I*, pp. 118–34.

¹⁰⁷ *Ibid.*, p. 212.

¹⁰⁸ *Ibid.*, p. 134.

¹⁰⁹ *Ibid.*, pp. 215–16.

disabled and elderly persons. In addition, OCR works closely with operating divisions on a variety of minority and women initiatives.¹¹⁰

Among this section's key points are:

- OCR coordinates activities with the Office of Minority Health and the Office of Women's Health on women and minority health issues and with the Office of Disability on services for people with disabilities and the elderly.
- OCR also collaborates with operating divisions on a variety of minority and women initiatives.

Oversight and Quality Assurance

Although there was a Quality Assurance and Internal Control Division in 1999, the Commission found that there had been no systematic, formal quality assurance reviews since 1993.¹¹¹ The Commission recommended that OCR conduct annual oversight reviews, quality assurance reviews, and other monitoring activities to evaluate civil rights performance.

Quality assurance reviews are now a routine part of OCR's enforcement program. OCR senior staff now assess the quality of case analysis and provide consultations and training for regional staff.¹¹² The quality assurance process includes an assessment of performance indicators, including investigators' (1) delineation of the parties in a case; (2) analysis of allegations; (3) accuracy of statutory or regulatory basis and citations; (4) articulation of the elements in a case; (5) assessment of evidence collection and presentation; and (6) questions raised during the investigation.¹¹³

Among this section's key points are:

- OCR senior staff now conduct quality assurance reviews of regional staff performance when problems surface and provide consultations and training for them.
- OCR has developed indicators to measure investigator effectiveness, but no numerical measures to assess enforcement performance or results.

Data Collection and Analysis

In the 1990s, OCR collected a paucity of racial and ethnic information. Most states and federal health agencies only made minimal efforts to collect health-related data on Asian Americans.¹¹⁴ Apart from fulfilling Hill-Burton Act requirements, OCR did not request racial and ethnic data from recipients until

¹¹⁰ HHS Interrogatory, pp. 46–51. The coordination activities range from technical assistance, to participation on working groups, to joint presentations at outside meetings and associations on particular issues. For examples of the coordination activities, see HHS Interrogatory, pp. 45–48.

¹¹¹ USCCR, *The Health Care Challenge, Vol. II*, p. 284.

¹¹² HHS Interrogatory, pp. 51–52. OCR has integrated technical assistance into its quality assurance program. The focus of the program is on assisting investigators to reach effective conclusions based on facts and evidence in a case.

¹¹³ HHS Interrogatory, p. 53.

¹¹⁴ USCCR, *Asian Americans in the 1990s*, p. 202.

compliance reviews.¹¹⁵ The Commission recommended that OCR commence collecting demographic data routinely to determine minority communities' access to quality health care.¹¹⁶ The Commission recommended that HHS collect and report public health data separately for Asian American and other subgroups.¹¹⁷ It suggested formal regulations that specify data elements, including:

- The manner in which programs provide services.
- The race, color, or national origin of the population eligible to be served.
- Data on covered employment, including the use of bilingual employees to work with beneficiaries who do not speak English.
- The location of existing or proposed facilities and information on whether the location will have the effect of denying access to any person on the basis of prohibited discrimination.
- The race, color, and national origin of the members of any planning or advisory body that is an integral part of the program.
- Requirements and procedures designed to guard against adverse impact on persons based on race, color, or national origin when relocation is involved.¹¹⁸

Today, OCR still does not conduct broad-based surveys or data collection, except to fulfill Hill-Burton Act requirements. OCR continues to collect racial and ethnic data from recipients only during compliance reviews and complaint investigations.¹¹⁹ For example, it will collect such data when compliance work involves or requires comparisons among Asian American and Pacific Islander and/or Hispanic subgroups;¹²⁰ or to develop evidence and analyze case elements. Similarly, it will collect health care and human services data during compliance reviews.¹²¹

Among this section's key points are:

- OCR does not conduct broad-based surveys or data collection.
- OCR continues to collect race and ethnic and health care and human services data during compliance reviews.

¹¹⁵ Popular name for Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040 (1946) (codified as amended at scattered sections of 42 U.S.C.A. and various sections of 26 U.S.C., 33 U.S.C., 46 U.S.C., and 49 U.S.C. (2004)). In 1996, OCR's limited data collection and analysis efforts were restricted to the Community Services Assurance Report, by which OCR collected data under the Hill-Burton Act. This report requested recipients for information relevant to compliance with Title VI. It requested recipients to estimate the proportion of their program area composed of minorities. It did not require recipients to provide this information by race and ethnicity. Regional offices were provided with census data to determine whether each minority group is represented among the recipient's patients in proportion to their representation in the relevant locality. However, the report did not ask recipients to report on services provided by race or ethnicity and cannot reveal whether members of different racial and ethnic groups are treated disparately. USCCR, *Federal Title VI Enforcement*, p. 248.

¹¹⁶ USCCR, *Federal Title VI Enforcement*, pp. 247–48.

¹¹⁷ USCCR, *Asian Americans in the 1990s*, p. 203.

¹¹⁸ USCCR, *The Health Care Challenge, Vol. II*, p. 324.

¹¹⁹ HHS Interrogatory, p. 56.

¹²⁰ OCR reports that HHS includes health data for groups such as Asian Americans in its health populations surveys. The collection of these data is funded by the operating divisions. HHS' National Center for Health Statistics also has a leadership role in data collection. HHS Interrogatory, p. 55.

¹²¹ HHS Interrogatory, p. 56.

Community Involvement

OCR consulted beneficiaries, providers, advocacy organizations, and other customers when it developed its strategic plan. The Commission recommended, however, that OCR regularly solicit suggestions and comments from affected communities and recipients, particularly with respect to its Title VI enforcement.¹²²

OCR now has ongoing communication and relationships with civil rights organizations, advocacy and health industry groups, beneficiaries, providers, and other stakeholders to ensure their active participation in its programs.¹²³ It consults with community organizations and advocacy groups when developing guidance and planning documents. For example, stakeholders and advocacy groups served as consultants in the development of OCR's LEP guidance, offering insight and views on LEP problems.¹²⁴

Among this section's key points are:

- OCR has an ongoing relationship with various community organizations.
- OCR consults stakeholders when developing guidance and planning documents.

Delegation

In 1996 and 1999, OCR reported that its enforcement resources were inadequate to carry out its mission. The Commission recommended that it should formally delegate some enforcement responsibilities to eligible operating divisions.¹²⁵ It said that the Secretary should issue a directive supporting delegation of authority.¹²⁶ However, the Commission noted that delegation should not take place without OCR leadership, guidance, instruction, monitoring, and oversight. The Commission recommended that OCR develop procedures for training and guidance, and oversight mechanisms to monitor the operating divisions' enforcement. It also recommended that operating divisions have civil rights offices with staff experienced in enforcement.¹²⁷

The Secretary has not issued a directive stating that OCR share enforcement responsibilities with operating divisions, nor does OCR support such a directive. OCR believes that its organizational separation from the operating divisions allows promotion of civil rights compliance without potential conflicts or inconsistency. It is convinced that diffuse delegation would duplicate enforcement ef-

¹²² USCCR, *Federal Title VI Enforcement*, p. 246; USCCR, *The Health Care Challenge, Vol. II*, p. 350.

¹²³ Organizations include the Association of Retired Persons, the National Immigration Law Center, the National Council of La Raza, and disability and welfare advocates. HHS Interrogatory, pp. 57–58.

¹²⁴ HHS Interrogatory, p. 61.

¹²⁵ USCCR, *The Health Care Challenge, Vol. II*, p. 293. The Commission suggested that until it received the resources needed to carry out its mission, regional staff could concentrate on-site compliance reviews, on-site complaint investigations, local education and outreach, and technical assistance. The Commission suggested that with proper guidance and oversight, the operating divisions could be delegated other enforcement duties such as pre-award and post-award reviews, data collection and analysis, and reviewing and evaluating recipient self-assessments and assurances of nondiscrimination.

¹²⁶ USCCR, *The Health Care Challenge, Vol. II*, p. 357.

¹²⁷ USCCR, *Federal Title VI Enforcement*, pp. 238–40.

forts. Moreover, it would have to use limited resources to train operating division staff to a level at which they could enforce effectively.¹²⁸

Rather than use operating divisions to assist in civil rights enforcement, OCR shifts additional responsibilities to OCR headquarters staff. To illustrate, since 1999, OCR has transferred the majority of pre-award work from five regional offices to the Voluntary Compliance and Outreach Division in headquarters. Four full-time employees from other OCR components have been assigned to the division to carry out pre-award review functions. OCR maintains that this approach frees regional staff to perform other critical civil rights functions.¹²⁹

Among this section's key points are:

- The Secretary has not issued a directive stating that OCR share enforcement responsibilities with operating divisions.
- OCR does not support such a directive, believing that separation from the operating divisions allows it to conduct civil rights compliance without potential conflicts or inconsistency.

Conclusion

The Commission examined numerous HHS components and made more than 200 recommendations during the past decade. It cited problems and deficiencies, and suggested ways for improvement. Many of OCR's problems were caused by a large, complicated organizational structure with too many offices, units, and divisions. Many of the responsibilities overlapped or were neglected. With all of its offices, there was no planning or policy development unit; it assigned staff to perform quality assurance reviews, however, the division was dysfunctional; and it employed staff at headquarters who did not understand enforcement or the regional offices' responsibilities.

The Commission recommended that OCR reorganize and it did streamline its organization and operations by consolidating and realigning offices and functions. It reduced the number of managers, offices, and units and hired staff with enforcement experience. Regional offices now report to a deputy director rather than to staff in a headquarters office. Communication and better understanding among managers, headquarters, and regions led to a more cohesive approach to enforcement.

The Commission also made recommendations to enhance enforcement and OCR responded to the concerns, including:

- *Complaint processing.* OCR needed to address its backlog and expedite complaints. OCR uses different strategies such as early resolution and full-scope and limited-scope reviews to address the backlog and expedite cases. It refined the use of limited-scope reviews and has made it a viable tool in complaint processing.
- *Resource accountability.* OCR stressed the need for resources; however, it could not justify the request or explain how it would use any additional resources. OCR improved budget reporting and accountability. It can now track expenditures and identify areas where resources are needed. It has a detailed budget plan that can show funding by compliance activity.

¹²⁸ HHS Interrogatory, p. 44.

¹²⁹ *Ibid.*, p. 7.

- *Coordination and communication with other departmental components that have civil rights responsibilities.* It provides ongoing civil rights training, technical assistance, education and outreach, and guidance to operating divisions and their recipients. The collaboration results in a better understanding of the different components' responsibilities.

However, where OCR did not address recommendations, deficiencies persist:

- OCR has not expanded the pool of recipients that undergo pre-award reviews. It has a policy, established in the 1960s, that requires pre-award reviews for new institutional Medicare applicants.
- Pre-award reviews do not include on-site visits, and the number of on-site visits for post-award reviews is lower than the number of desk audits.
- OCR has a paucity of demographic data on beneficiaries and applicants.

In 1996 and 1999, OCR maintained that its resources were inadequate to perform enforcement effectively. The Commission recommended that operating divisions assist OCR. For example, operating divisions could assist with data collection, technical assistance, and education and outreach, enabling OCR staff to increase the number of pre- and post-award reviews, particularly on-site visits and investigations.

The Commission still recommends delegation of authority to eligible operating divisions. However, the Commission notes that any delegation lacks authority without the Secretary's endorsement, and OCR's leadership, guidance, instruction, monitoring, and oversight of operating divisions' activities. There should be delineation of duties formally stated in memoranda of understanding.

HHS' responsibilities to ensure quality services and eliminate disparities in health care for minorities and women are tasks that cannot be achieved without effective civil rights enforcement. At HHS, this is an enormous responsibility that requires effective organization, administration, and coordination. Delegation of authority to eligible operating divisions, with OCR's guidance and leadership, may be a first step to making quality health care for all Americans a reality.

Chapter 5: Department of Housing and Urban Development

President Lyndon B. Johnson created the U.S. Department of Housing and Urban Development (HUD), a cabinet-level agency under the Housing and Urban Development Act of 1965,¹ as a part his war on poverty.² HUD has the mission to ensure a decent, safe, and sanitary home and a suitable living environment for every American. In its efforts to realize this mission, the agency creates opportunities for homeownership; provides housing assistance for low-income persons; works to create, rehabilitate, and maintain affordable housing; enforces the nation's fair housing laws; helps the homeless; spurs economic growth in distressed neighborhoods; and assists local communities in meeting their development needs.³ Consistent with its mission, HUD is mandated to enforce several civil rights statutes, including:

- Title VIII of Civil Rights Act of 1968 (Fair Housing Act (FHA)), as amended.⁴
- Title VI of the Civil Rights Act of 1964.⁵
- Section 504 of the Rehabilitation Act of 1973.⁶
- Section 109 of Title I of the Housing and Community Development Act of 1974.⁷
- Title II of the Americans with Disabilities Act of 1990.⁸
- The Architectural Barriers Act of 1968.⁹
- The Age Discrimination Act of 1975.¹⁰
- Title IX of the Educational Amendments of 1972.¹¹

In addition, HUD is responsible for implementing six executive orders.¹²

¹ Pub. L. No. 90-448, 82 Stat. 476 (codified as amended in scattered sections of 5, 12, 15, 18, 31, 38, 40, 42, and 49 U.S.C. (2004)).

² U.S. Department of Housing and Urban Development, "Questions and Answers About HUD," <<http://www.hud.gov:80/about/qaintro.cfm>> (last accessed Aug. 25, 2003).

³ U.S. Department of Housing and Urban Development, "Mission and History," Apr. 7, 2003, <<http://www.hud.gov/library/bookshelf18/mission.cfm>> (last accessed June 3, 2003).

⁴ Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601–3619 (2004)).

⁵ Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-(7) (2004)).

⁶ Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2004)).

⁷ Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified at 42 U.S.C. §§ 5301–5320 (2004)).

⁸ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and in scattered sections of 29 U.S.C. and 47 U.S.C. (2004)).

⁹ Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4157) (2004)).

¹⁰ Pub. L. No. 90-202, 81 Stat. 602 (codified as amended in scattered sections of 29 U.S.C. (2004)).

¹¹ Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2004)). HUD, "Fair Housing Laws and Presidential Orders."

¹² See HUD, "Fair Housing Laws and Presidential Orders."

HUD headquarters houses 19 key offices, including that of the Secretary, Fair Housing and Equal Opportunity, General Counsel, and Policy Development and Research.¹³ In addition, there are 10 regional hubs wherein numerous field offices are located.¹⁴ In FY 2003, HUD had an estimated budget of \$34.5 billion and employed the equivalent of 10,520 full-time staff.¹⁵

Acronyms are used throughout this chapter. Table 5.1 lists those referenced frequently.

TABLE 5.1
Acronyms in Chapter 5

Administrative Law Judge	ALJ
Annual Management Plan	AMP
Annual Performance Plan	APP
Civil Rights Implementation Plan	CRIP
Department of Justice	DOJ
Deputy Assistant Secretary	DAS
Office of Fair Housing and Equal Opportunity	FHEO
Fair Housing Assistance Program	FHAP
Fair Housing Initiatives Program	FHIP
Fair Housing Training Academy	FHTA
Limited English Proficiency	LEP
Office of the General Counsel	OGC
Public Housing Agency	PHA
Title VIII, as amended	FHA
U.S. Department of Housing and Urban Development	HUD

Previous Commission Reviews of HUD

Between 1992 and 1996, the U.S. Commission on Civil Rights released three reports pertaining to HUD. Two examined the agency's record in enforcing federal fair housing laws, particularly the Fair Housing Amendments Act (hereafter cited as FHA, referring to Title VIII, as amended). The third report analyzed HUD's performance in enforcing the Civil Rights Act of 1964 (Title VI) in its federally assisted programs. *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System* (1992) addressed HUD's progress in certifying state and local agency fair hous-

¹³ U.S. Department of Housing and Urban Development, "Headquarters Organizational Directory," June 2, 2003, <<http://www.hud.gov/directory/directory.cfm>> (last accessed Aug. 25, 2003).

¹⁴ U.S. Department of Housing and Urban Development, "Listing of Regional and Field Offices," <<http://hudclips.org>> (last accessed July 1, 2003). The 10 hubs are New England, New York/New Jersey, Mid-Atlantic, Southeast Caribbean, Midwest, Southwest, Great Plains, Rocky Mountains, Pacific Hawaii, and Northwest Alaska, with regional hub offices in Massachusetts, New York, Pennsylvania, Georgia, Illinois, Texas, Kansas, Colorado, California, and Washington. See U.S. Department of Housing and Urban Development, "Housing Discrimination: Fair Housing Hubs," June 30, 2002, <<http://www.hud.gov/offices/fheo/aboutfheo/fhhubs.cfm>> (last accessed June 16, 2003). Hubs came into existence in FY 1997. See U.S. Department of Housing and Urban Development's Response to the U.S. Commission on Civil Rights Interrogatory for Volume IV of the Ten-Year Review of Civil Rights Enforcement, Office of Fair Housing and Equal Opportunity, Dec. 5, 2003, p. 1 (hereafter cited as HUD Interrogatory).

¹⁵ Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 108th Cong., 1st Sess. Part 2, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 2004, p. 660.

ing laws as significantly comparable or “substantially equivalent” to FHA, and the consequences that would ensue should the laws of many agencies fail to be certified.¹⁶ In the 1992 report, the Commission concluded that progress toward certifying state and local fair housing agencies since passage of FHA was minimal and made 11 recommendations for improvement of the certification process.¹⁷ *The Fair Housing Amendments Act of 1988: The Enforcement Report* (1994) concluded that HUD failed to aggressively enforce FHA and proposed 33 recommendations. *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (1996) assessed HUD’s progress in enforcing Title VI in federally assisted programs and included 22 recommendations for improving HUD’s Title VI enforcement. This study examines whether HUD has implemented recommendations made in the earlier three reports, and focuses on the Office of Fair Housing and Equal Opportunity (FHEO) as it has major, though not exclusive, responsibility for enforcing Title VI and FHA.¹⁸

Mission and Responsibilities—FHEO

FHEO’s mission is to create equal housing opportunities by establishing policies and enforcing federal laws that prohibit discrimination in housing based on race, color, religion, sex, national origin, age, disability, and familial status.¹⁹

FHEO also manages the Fair Housing Assistance Program (FHAP) and administers the grants awarded under the Fair Housing Initiatives Program (FHIP).²⁰ FHAP provides financial assistance to supplement the enforcement activities of HUD-certified state and local agencies. FHAP funds support training, case processing, education and outreach, and improvements to agency data and information systems. HUD also reimburses these state and local agencies for investigating individual fair housing complaints.²¹ FHIP is a competitive grant program that provides federal funds to support the work of public and private entities in enforcing fair housing rights. FHIP-funded activities perform enforcement, voluntary compliance reviews, and education and outreach.²²

¹⁶ U.S. Commission on Civil Rights, *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System*, September 1992, letter of transmittal (hereafter cited as USCCR, *Federal Fair Housing System*).

FHA was signed into law on September 13, 1988, and became operational on March 12, 1989. State and local agencies previously operating in the federal housing system under Title VIII had an interim period of 40 months, ending on September 13, 1992, to revise their laws so that they are significantly comparable to FHA. During this interim period, such agencies operated under an Interim Referral Agreement. State and local agencies wishing to continue to process federal fair housing complaints must formally apply to HUD to seek certification of their fair housing laws as comparable to FHA. If HUD determines that their fair housing laws provide substantially equivalent protection as FHA, the state or local agencies are certified. See USCCR, *Federal Fair Housing System*, pp. 2, 10. HUD certification of state and local agencies’ fair housing laws or ordinances is discussed in greater detail later in the chapter.

¹⁷ USCCR, *Federal Fair Housing System*, pp. 31–34.

¹⁸ U.S. Department of Housing and Urban Development, “About FHEO,” <<http://www.hud.gov/offices/fheo/aboutfheo/aboutfheo.cfm>> (last accessed June 4, 2003) (hereafter cited as HUD, “About FHEO”).

¹⁹ FHEO activities include implementing and enforcing FHA, Title VI of the Civil Rights Act of 1964, Section 109 of the Housing and Community Development Act of 1974, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title IX of the Education Amendments Act of 1972. HUD, “About FHEO.”

²⁰ HUD, “About FHEO.”

²¹ HUD Interrogatory, p. 3; U.S. Commission on Civil Rights, *Funding Civil Rights Enforcement: 2004*, June 2003, p. 41 (hereafter cited as USCCR, *2004 Funding Report*).

²² HUD Interrogatory, p. 3.

Priority of Civil Rights

Title VI

During fact-finding for the 1996 report, the Commission uncovered two major weaknesses in FHEO's organizational structure: (1) too many layers between the assistant secretary and the units that implemented and enforced Title VI; and (2) policy development, planning, and budget functions dispersed throughout two deputy secretarial offices. At the time, FHEO had recently reorganized into three areas: Enforcement and Investigations, Policy and Initiatives, and Operations and Management (see figure 5.1). Each reported to a deputy assistant secretary (DAS), who reported to the assistant secretary.²³ Enforcement and Investigations had overall responsibility for enforcing Title VI. Within its Office of Compliance and Disability Rights, the Division of Compliance Programs performed Title VI implementation and enforcement, overseeing, monitoring, coordinating, and providing guidance to FHEO's field staff and regional offices. The Disability Rights Division dealt with disability and access rights complaints in all HUD programs. Title VI field staff reported to the field liaison staff, who in turn reported to the assistant secretary. FHEO's many tiered organizational structure insulated the assistant secretary from units enforcing Title VI, whether in the headquarters office or in the field offices. Further, policy development, planning, and budget preparation were separated. Policy and Initiatives, specifically its Office of Public Standards and Evaluation, developed policy, while Operations and Management, expressly the Office of Management and Field Coordination, prepared plans and budgets. Thus, elements crucial to Title VI enforcement were in different deputy secretarial offices, a situation that might divert attention from Title VI. On a more positive note, FHEO did not have responsibility for internal civil rights; that is, Title VII matters, thereby allowing staff to concentrate time and energy on external civil rights enforcement.²⁴

The Commission's 1996 report recommended that FHEO assess its organizational setup for civil rights enforcement, particularly Title VI, at the headquarters, hub (region), and field levels.²⁵ It encouraged FHEO to establish its independent legal office to provide legal guidance on Title VI and other external civil rights enforcement issues.²⁶ The Commission also recommended that disability rights activities and other civil rights enforcement efforts remain administratively separate. Moreover, Title VI regional and field staff should report to headquarters staff with Title VI responsibilities to ensure direct oversight and monitoring. Furthermore, Title VI policy and planning staff should be integrated with Title VI enforcement staff so that actual enforcement experience inform policy development; and to ensure that Title VI initiatives are considered during the planning process. Failing this, the Office of Compliance and Disability Rights should stay in close contact with Policy and Initiatives to ensure priority attention to Title VI policy development; and with Operations and Management to guarantee that the latter gave similar attention to Title VI planning and budget preparation.²⁷

²³ U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, September 1996, p. 344 (hereafter cited as USCCR, *Federal Title VI Enforcement*).

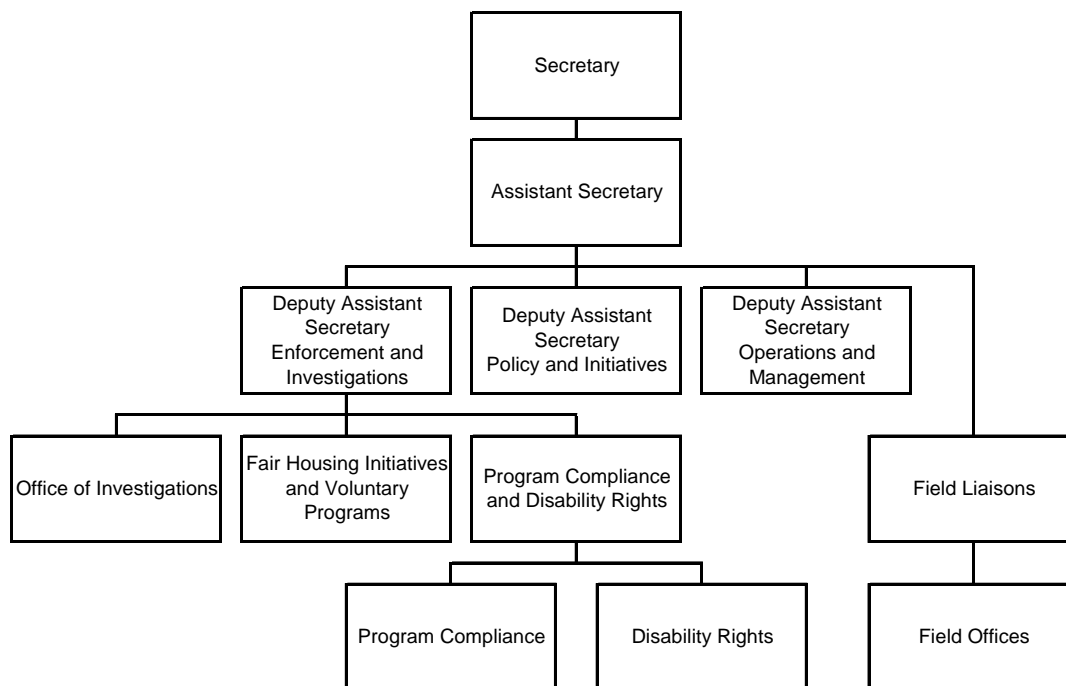
²⁴ USCCR, *Federal Title VI Enforcement*, pp. 329, 343.

²⁵ *Ibid.*, p. 343.

²⁶ USCCR, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, September 1994, p. 224 (hereafter cited as USCCR, *Fair Housing Amendments Act Report*); USCCR, *Federal Title VI Enforcement*, p. 344.

²⁷ USCCR, *Federal Title VI Enforcement*, pp. 343–44.

FIGURE 5.1
HUD/FHEO Organizational Structure, 1994



Source: Constructed from U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996, pp. 327–30; 343–45.

FHEO claims it regularly reviews its programs and their effectiveness. Since the reorganization in 1994, FHEO has submitted annual reports to Congress showing its progress toward meeting its statutory objectives. GAO assessed HUD twice, in 1994 and 1997. HUD officials stated that changes within the agency in 1994 and 1995 led to a separate Disability Rights Division and expanded FHA, Title VI, and Section 504 enforcement programs, all of which helped FHEO to better fulfill its Title VI and Title VIII missions. These changes affected headquarters and field offices. By 1995, to give visibility to disability rights throughout the agency, HUD created an Office of Disability Policy that reported to the secretary, a reporting situation that no longer exists.²⁸

FHEO's assistant secretary still reports to the HUD Secretary, and is among the agency's key principal staff.²⁹ FHEO and the Office of the General Counsel (OGC) share Title VI enforcement duties, though without operating procedures. Nonetheless, both offices work closely on Title VI matters. On FHEO's internal structure, the Commission detects a critical departure from 1994: the addition of a general deputy assistant secretary (general deputy), the sole FHEO managerial staff member reporting to the assistant secretary (see figure 5.2). Moreover, whereas previously DAS reported to the assistant secretary, he or she now reports to the general deputy, and formally does not have direct access to the assistant secretary. Two areas are now under a DAS—Enforcement and Programs, and

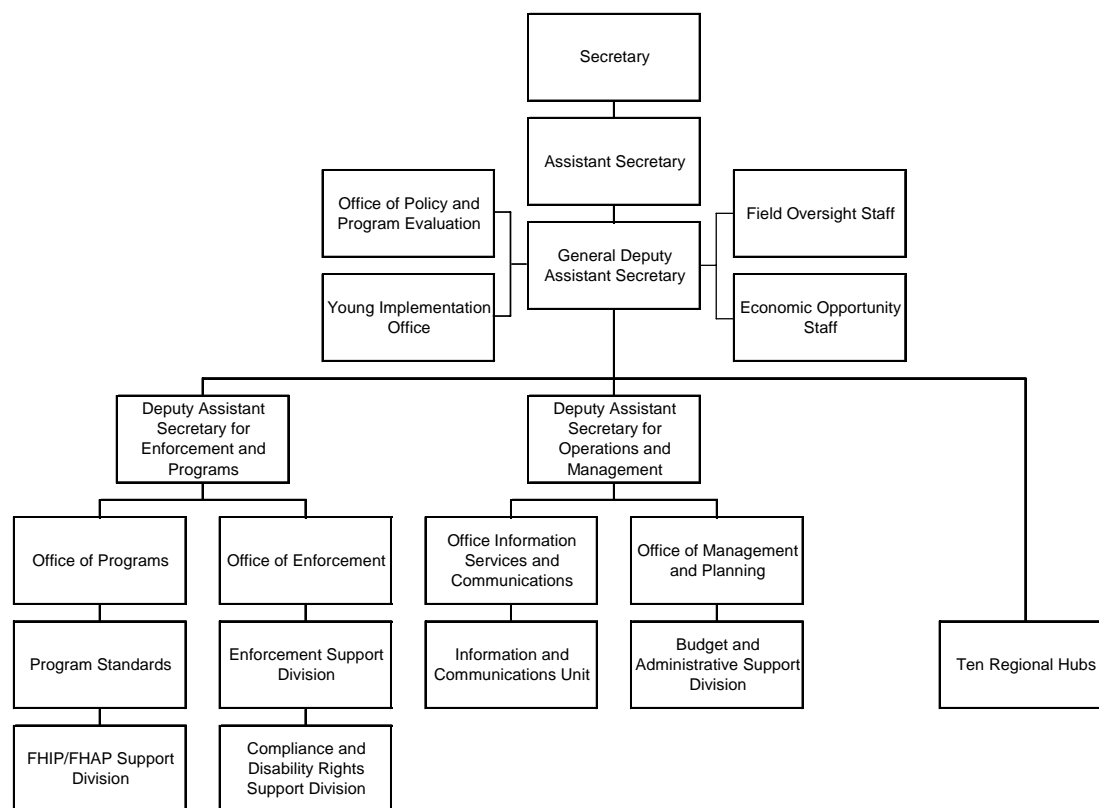
²⁸ HUD Interrogatory, p. 1.

²⁹ Ibid. U.S. Department of Housing and Urban Development, "Key Principal Staff," June 2003, <<http://hud.gov/library/bookshelf16/keyhq.cfm>> (last accessed July 2, 2003).

Operations and Management—compared with three previously (see figures 5.1 and 5.2). The DAS for Enforcement and Programs, along with field offices, and in cooperation with OGC, carries out Title VI enforcement for HUD.³⁰ With the addition of the general deputy and the change in reporting for DAS, the assistant secretary is formally further removed than previously from headquarters units directly involved with Title VI enforcement, and as this study shows, from hub and field staff as well. In a later communication with the Commission, HUD states that:

[The] DASs and Director of the office of Policy and Program Evaluation report directly to the general deputy primarily for supervis[ory] purposes, but that line of reporting reflects only part of the command structure, it does not reflect the day-to-day interaction of the various members of senior management . . . The assistant secretary has regularly scheduled meetings with the general deputy, the DASs, and the Director of the Office of Policy and Program Evaluation and attends regional meetings with them and the Hub directors.³¹

FIGURE 5.2
HUD/FHEO Organizational Structure, 2004



Source: Floyd O. May, deputy general assistant secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, through Kirk I. Perry, senior program analyst, Office of Policy and Program Evaluation, U.S. Department of Housing and Urban Development, e-mail, Nov. 20, 2003.

³⁰ HUD Interrogatory, pp. 2–3.

³¹ Carolyn Peoples, assistant secretary, Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter (attachments, May 18, 2004, p. 1 (hereafter cited as Peoples letter).

As was the case in 1996, enforcement and planning staff are separate. The Office of Operations and Planning is responsible for Title VI planning, specifically establishing annual goals for enforcement activities. HUD officials indicate that the Office of Enforcement and Programs works cooperatively on Title VI planning to make clear its resource requirements. Responsibility for policy development and enforcement is located in the same DAS area. Specifically, the Office of Enforcement develops policy and enforces Title VI, while the Office of Programs collaborates with all HUD program offices to develop program monitoring and compliance guidance.³²

Today, FHEO does not have a legal unit located in its office. Legal support for Title VI, FHA, and other external civil rights enforcement comes from OGC and the 10 regional counsel offices. Within OGC, the Fair Housing Enforcement Division is dedicated to providing FHEO with legal assistance and enforcing civil rights laws. FHEO is the only HUD program office that has this arrangement. Field oversight staff and the regional hubs now report to the general deputy (see figure 5.2). All field staff, whether Title VI or Title VIII, report to program center directors, who in turn report to the hub directors. Regional and field staff investigate Title VI and FHA complaints, and conduct Title VI monitoring reviews and compliance reviews. Disability rights activities remain separate from other civil rights enforcement activities.³³

Title VIII

In 1994, the implementation and enforcement of FHA was highly fractured. The HUD Secretary divided this responsibility among the FHEO assistant secretary, general counsel, and chief administrative law judge (ALJ). The assistant secretary delegated some fair housing functions to regional directors, who reported to regional administrators. The general counsel also delegated some fair housing functions to regional counsels, who were jointly supervised by regional administrators and the general counsel. Regional administrators reported to the deputy secretary. An assistant to the Secretary advised key principal staff on all aspects of field management and was the Secretary's point person on all regional office activities.³⁴

The FHEO assistant secretary charged to develop fair housing policy and disseminate internal guidance to staff for implementing HUD policies did not have line authority over the regional directors and regional counsels, and carried out the duties without the benefit of their field perspective and experience. Making matters worse, the assistant secretary's decisions as to reasonable cause became final only after general counsel review.³⁵ The Commission therefore recommended that HUD create an independent, deputy-secretarial administrative agency with its own administrative and legal staff for FHA implementation. All regional fair housing offices, it said, should report to the deputy secretary to ensure direct monitoring. The Commission favored a structure in which the general counsel and deputy secretary jointly supervise and evaluate regional attorneys who worked on fair housing. Finally, the Office of the Administrative Law Judge should continue to be an independent entity within HUD.³⁶

³² HUD Interrogatory, p. 4. HUD states that the agency clearance procedures are set forth in HUD handbook 000.2REV-2. See HUD Interrogatory, p. 4.

³³ HUD Interrogatory, pp. 1, 4, 5, 15; Peoples letter, p. 4.

³⁴ USCCR, *Fair Housing Amendments Act Report*, p. 68.

³⁵ *Ibid.*, pp. 68–69.

³⁶ *Ibid.*, p. 224.

HUD now states that the Office of Enforcement and the Office of Programs, under the purview of the DAS for Enforcement and Programs, are responsible for FHA enforcement and the administration of FHIP and FHAP. The Enforcement Support Division develops standards, regulations, rules, guidelines, and handbooks for FHA implementation. Moreover, the ALJ office remains a functionally independent unit within HUD.³⁷ Furthermore, the assistant secretary has the authority to make a cause or no cause decision with general counsel concurrence, thus raising the office's stature. Regulations govern the relationship between FHEO and OGC.³⁸ HUD officials point out that the Office of Enforcement and OGC collaborate closely on FHA claims for First Amendment relevance, cases where FHEO and regional counsel are unable to reach agreement, and policy development. A written memorandum of understanding (MOU) defines the working relationship between each FHEO hub director and regional counsel on complaint intake, jurisdictional determinations, investigative plan development, investigations, conciliation, determinations of reasonable cause, preparation of evidence and witnesses, and administrative trials.³⁹

Among this section's key points are:

- The FHEO assistant secretary now has the authority to make a determination of cause or no cause with general counsel concurrence, thus raising the office's stature.
- FHEO is now divided into two main DAS units: (1) Enforcement and Programs and (2) Operations and Management. As previously, enforcement and planning responsibilities remain in separate offices.
- FHEO now has a general deputy assistant secretary, the only managerial staff member to formally report to the FHEO assistant secretary. In practice, the assistant secretary has informal and scheduled formal meetings with headquarters and field staff responsible for implementing Title VI and FHA.

Resources—Funding and Staffing

The Commission's 1996 report found that FHEO did not maintain a separate budget for HUD's Title VI federally funded fair housing programs, indeed, for external civil rights as a whole. The Commission advised FHEO to develop a separate budget account for external civil rights programs. Furthermore, FHEO should implement and maintain a management information system to track resources and expenditures according to statute and specific civil rights activities. Such a system would allow the assistant secretary to readily base key enforcement decisions, such as future enforcement budget requests on actual expenditures and staff assignments, on factual workload.⁴⁰

FHEO does not maintain a separate account for Title VI or for any external civil rights activities. When HUD's "Total Estimation and Allocation Mechanism" designed to capture workload and time usage is fully implemented, FHEO will be able to track manpower used to perform enforcement activities.⁴¹ It now captures workload accomplishments and time usage of all enforcement activities.⁴²

³⁷ HUD Interrogatory, p. 3.

³⁸ *Ibid.*, p. 1. The statutory arrangement between the assistant secretary and the general counsel is described in 24 C.F.R. pts. 103 and 180. Peoples letter, p. 4.

³⁹ HUD Interrogatory, p. 2.

⁴⁰ USCCR, *Federal Title VI Enforcement*, p. 345.

⁴¹ Peoples letter, p. 5.

HUD officials indicate that the agency's funding for salaries and expenses supports Title VI and FHA workload and staffing. FHEO's budget is part of HUD's overall salaries and expenses request. The agency receives a lump sum appropriation and gives FHEO an allotment for salaries and expenses.⁴³ Congress funds FHIP and FHAP separately and, consequently, they have separate budgets.⁴⁴

As to fair housing, the Commission's 1994 report found an enormous increase in workload in FHEO due to growth in the number of complaints from the original protected groups (race, color, religion, and national origin); and complaints from the newly protected classes (disability and familial status). The Commission urged Congress and the President to ensure that HUD received adequate funds and other resources to fulfill its responsibilities.⁴⁵ Significantly, the Commission had already made the same appeal in its 1992 report. The 1992 report also advised the agency to develop a management plan to ensure adequate resources and staff for processing fair housing complaints within the congressionally mandated 100-day requirement.⁴⁶

From FY 1998 through FY 2003, the budget for salaries and expenses showed scant increase during the first four years, merely changing from \$45.5 million in FY 1998 to \$51.4 million in FY 2001. Funding rose to \$58.5 million in FY 2002, and to \$65.7 million in FY 2003 (see figure 5.3).⁴⁷ This notwithstanding, the current funding level has affected, for example, HUD's ability to perform post-award compliance reviews on a significant number of funding recipients and travel to monitor funding recipients.⁴⁸

FHAP and FHIP funding is examined for the same period. Funding for FHAP declined from \$15 million in FY 1998 to \$13 million in FY 1999; showed an upward trend between FY 1999 and 2002, rising to \$25.6 million; then remained at this level in FY 2003 (see figure 5.3). Overall, annual increases are unremarkable except for FY 2000, despite that the number of complaints filed with FHAP is growing yearly. FHAP agencies process approximately two-thirds of all fair housing complaints filed with FHAP and HUD.⁴⁹

Congress intends FHIP to supplement government enforcement and educational activity.⁵⁰ FHIP funding rose annually between FY 1998 and 2000, from \$15 million to \$24 million, stayed at the same level in FY 2001, and then decreased to \$20.3 million and \$20.1 million in the remaining two years (see figure 5.3). This is not an encouraging trend especially in light of the following research findings: (1) a 2001 George Washington University study on segregation reported that a key reason why persons who suffered discrimination do not take legal action is that they think that nothing would come out of it; and (2) fair housing complaints filed each year with the National Fair Housing Alliance, Department of Justice (DOJ), HUD, and FHAP constitute less than 1 percent of the esti-

⁴² HUD Interrogatory, p. 7.

⁴³ *Ibid.*, p. 8.

⁴⁴ In FY 2003, Congress appropriated \$20.5 million for FHIP and \$25.6 million to FHAP. *See* HUD Interrogatory, p. 7.

⁴⁵ USCCR, *Fair Housing Amendments Act Report*, p. 221.

⁴⁶ USCCR, *Federal Fair Housing System*, p. 32.

⁴⁷ USCCR, *2004 Funding Report*, p. 36.

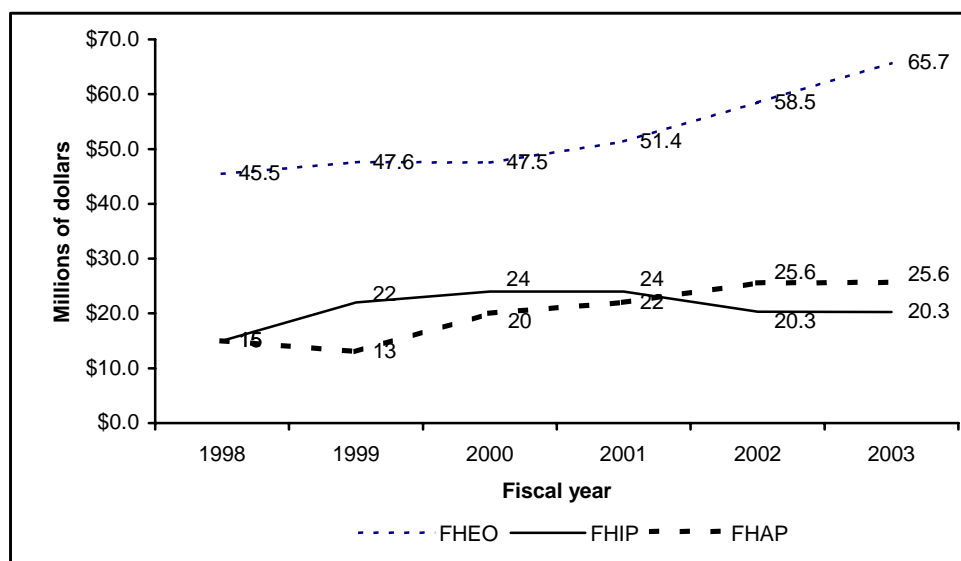
⁴⁸ HUD Interrogatory, pp. 43, 55.

⁴⁹ Complaint processing is more fully discussed in later sections of this chapter.

⁵⁰ HUD Interrogatory, p. 28.

mated illegal acts of housing discrimination that occurs yearly.⁵¹ Taken together, these findings point to an urgent need for greatly expanded FHIP and HUD education and outreach.

FIGURE 5.3
HUD/FHEO Budget, 1998–2003



Source: U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2004*, June 2003, pp. 36, 42–43.

HUD officials say FHEO had 750 full-time-equivalent staff members (FTEs) in FY 1994 and approximately 758 FTEs in FY 2003. While FY 2003 staffing levels are similar to FY 1994 levels, HUD says FHEO experienced steady staffing declines through the 1990s, reaching its lowest level of 584 in FY 2000.⁵² The Commission's own analysis of FHEO's FTE data in 2004 focuses on a different period, FY 1998 through 2003; but evidence leads to a similar conclusion, that the staffing situation is foreboding and deserves monitoring. FHEO's FTE total (headquarters and field offices combined) exhibits a slightly upward trend, showing a net gain of 167 FTEs (125 in the field offices and just 42 at headquarters).⁵³ But a caveat is necessary; there was little growth in FTEs during the first four years, and the FY 2002 and 2003 increases account for the upward trend (see figure 5.4). Furthermore, the FY 2003 FTE level of 758 exceeds that of the FY 1992 level by only 15, at which

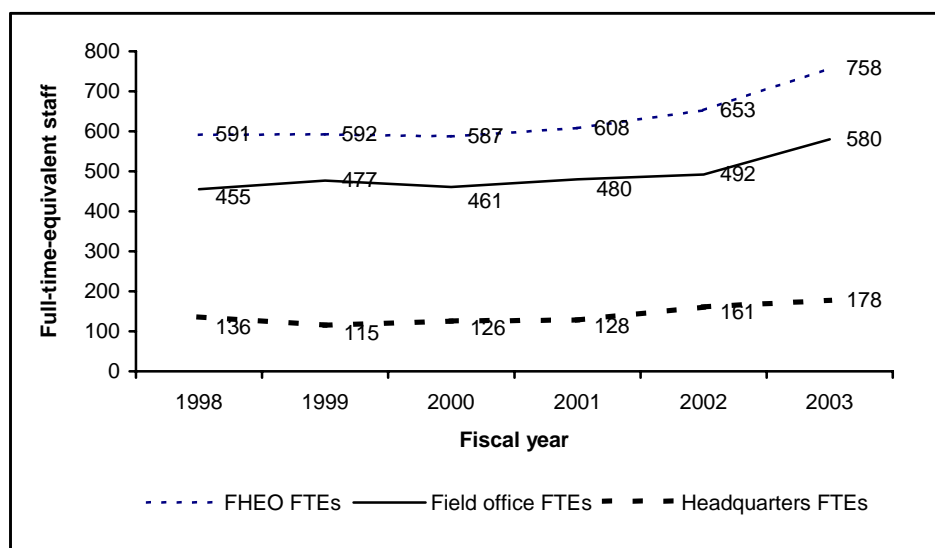
⁵¹ National Fair Housing Alliance, "Less than One Percent of Illegal Housing Discrimination Reported, According to New Report by National Fair Housing Alliance," press release, Apr. 16, 2003. A more detailed discussion is presented later. Testifying at a joint congressional hearing a National Council on Disability representative said that lack of funds and staff for FHAP and FHIP have caused shortfalls in their intended roles. See Joint Hearing Before the Subcommittee on Housing and Community Opportunity and the Subcommittee on Oversight and Investigation of the Committee on Financial Services, U.S. House of Representatives, June 25, 2002, p. 115.

⁵² HUD Interrogatory, p. 8. HUD data showed 587 for FY 2000. See U.S. Commission on Civil Rights Document Request #4. FHEO's analysis of its dismal staffing situation is confirmed by the National Council on Disability, in *Reconstructing Fair Housing*, Nov. 6, 2001, pp. 206–07.

⁵³ Data derived from U.S. Commission on Civil Rights Document Request #4.

time the Commission recommended an increase in resources for HUD. Civil rights enforcement is heavily staff-based; staff conduct interviews, prepare guidance documents, review plans, and investigate complaints. Without adequate staffing, FHEO cannot fully carry out its mission.⁵⁴ For example, the current staffing level has affected FHEO's ability to conduct an adequate number of post-award reviews to ensure that funding recipients are in compliance with Title VI.⁵⁵ Now HUD is offering cash buyouts in four offices, one of which is FHEO, in an attempt to reduce its headcount to comply with a congressionally mandated ceiling of 9,177 employees.⁵⁶ In addition, FHEO (like most HUD offices) has lost and continues to lose a large number of experienced employees to retirement. This situation clearly complicates an already serious staffing situation.⁵⁷

FIGURE 5.4
HUD/FHEO Staffing, 1998–2003



Source: U.S. Commission on Civil Rights Document Request #4.

On the Commission's 1992 recommendation that FHEO develop a management plan to ensure adequate resources and staff for processing fair housing complaints within the 100-day requirement, HUD indicates that it began a special initiative in FY 2000 to reduce the "aged case" inventory (case backlog). At the start of the initiative, the aged inventory was 85 percent; by FY 2003 it fell below 25 percent. FHEO accomplished this reduction through diverting resources and travel funds to the initiative and by providing optional training to staff to increase their understanding of investigation poli-

⁵⁴ National Council on Disability, *Reconstructing Fair Housing*, Nov. 6, 2001, p. 11.

⁵⁵ HUD Interrogatory, p. 43.

⁵⁶ Stephen Barr, "Window for HUD Buyouts in Four Offices Opens Today," *Washington Post*, May 19, 2004, p. B2.

⁵⁷ HUD Interrogatory, p. 64.

cies and processes.⁵⁸ HUD states that the initiative is ongoing, although focus now is on new cases as the aged inventory is below 25 percent.⁵⁹

Among this section's key points are:

- Yearly funding increase to FHEO's budget was scant between FY 1998 and 2001, but grew in FY 2002 and 2003. The FY 2003 FTE level of 758 exceeds that of the FY 1992 level by only 15, at which time the Commission recommended an increase in resources for HUD. The agency's buyout efforts to bring the number of employees in line with a congressionally mandated ceiling affect FHEO.
- FHEO diverted resources and travel funds to implement an initiative to reduce aged complaint cases.

Planning

The Commission evaluated HUD's Title VI Civil Rights Implementation Plans (CRIPs) for 1990 through 1994 in its 1996 report.⁶⁰ Overall, the CRIPs were not adequate as informational tools for DOJ or as management and planning tools for HUD. For example, the major objectives were generally vague and did not embody criteria for measuring accomplishments. The Commission said that the Title VI CRIP should be revised according to DOJ's "Guidelines on Agency Implementation Plans." The Commission also advised HUD to develop a "comprehensive civil rights enforcement plan" for all its civil rights responsibilities. This plan should be updated every three months and adjustable to increases and decreases in actual compliance activities and new or developing issues.⁶¹

HUD now states that the agencywide strategic plan incorporates CRIP and a comprehensive civil rights enforcement plan. The current strategic plan covers FY 2003–2008. HUD's strategic framework consists of a mission statement, six strategic goals, and corresponding strategic objectives.⁶² Three strategic goals relate to HUD's programs (programmatic goals): (1) increasing homeownership opportunities, (2) promoting decent affordable housing, and (3) strengthening communities. The remaining three strategic goals apply agencywide (cross-cutting goals): (4) ensuring equal opportunity in housing, (5) embracing high standards of ethics, management, and accountability, and (6) promoting participation of faith-based and community organizations. Several long-term strategic objectives support each strategic goal. For example, "resolve discrimination complaints in a timely manner" is a strategic objective for the cross-cutting strategic goal "ensure equal opportunity in housing."⁶³ HUD has also identified a set of long-term performance measures/indicators and intermediate measures/indicators for each strategic goal.⁶⁴ The long-term measures/indicators "reflect the projected long-term outcomes of the policies employed to achieve the [particular] goal," while the "intermedi-

⁵⁸ *Ibid.*, p. 8.

⁵⁹ Kirk I. Perry, senior program analyst, Office of Policy and Program Evaluation, U.S. Department of Housing and Urban Development, interview, Mar. 3, 2004.

⁶⁰ USCCR, *Federal Title VI Enforcement*, pp. 340–42.

⁶¹ *Ibid.*, p. 352.

⁶² U.S. Department of Housing and Urban Development, HUD Strategic Plan, FY 2003–FY 2008, March 2003, p. 3 (hereafter cited as HUD, FY 2003–2008 Strategic Plan).

⁶³ HUD, FY 2003–2008 Strategic Plan, p. 2. HUD provided a copy of the current strategic plan.

⁶⁴ For examples of long-term performance measures and intermediate measures supporting the goal, "Ensure Equal Opportunity in Housing," see HUD, FY 2003–2008 Strategic Plan, pp. 9, 11.

ate measures reflect shorter term results that HUD plans to track closely over the next year or two to determine if progress is being made to achieve the [particular] goal.”⁶⁵ An Annual Performance Plan (APP) implements the strategic plan and is developed at the end of an assessment process. Thus, at the start of each year, HUD officials review the previous year’s accomplishments and establish targets for the current year.⁶⁶ Additional considerations are the number and types of complaints, concerns of advocates and beneficiaries, results of a detailed risk analysis, and the agency’s staffing and funding situation.⁶⁷ APP has numerical criteria for measuring accomplishments.⁶⁸ For FY 2004 the APP presents the strategic goals, corresponding strategic objectives, and output measures. Each performance measure/indicator is systematically discussed under four subtitles: (a) indicator background and context, (b) data source, (c) limitations/advantages of the data, and (d) validation, verification, and improvement of measure.⁶⁹

The two strategic goals, “ensure equal opportunity in housing” and “embrace high standards of ethics, management and accountability,” and related strategic objectives and APP outcome indicators are particularly relevant to FHEO’s mission. FHEO’s Annual Management Plans (AMPs) are designed to support realization of APP, and therefore that of the strategic plan.⁷⁰ Thus, AMP contains APP indicators (described as national goals in the AMP) appropriate to FHEO’s mission and annual target for each indicator and related guidance for staff. For example, in regard to the fair housing indicator/national goal “the percentage of fair housing complaints aged over 100 days will decrease by two percentage points from FY 2003 level of the HUD inventory,”⁷¹ the FHEO annual target is 17 percent. The related guidance to staff states that each hub is responsible for ensuring that the open inventory of aged cases decreases to no more than 17 percent at the end of the fiscal year and that FHEO headquarters will monitor progress.⁷² HUD officials also state that the strategic plan, APP, and AMP attempt to project resources and budget constraints to the extent possible. They point out, however, that appropriation cycle delays and unmatched requests render resource and budget planning more difficult. Fortunately, AMPs may be modified midyear when actual resources and funding differ from those projected.⁷³ APP and AMP are the only plans that change annually.⁷⁴

⁶⁵ HUD, FY 2003–2008 Strategic Plan, n. 3, p. 9.

⁶⁶ HUD Interrogatory, p. 8.

⁶⁷ U.S. Department of Housing and Urban Development, “Annual Performance Plan, Fiscal Year 2004,” April 2003, p. v (hereafter cited as HUD, APP FY 2004).

⁶⁸ See, e.g., HUD, APP FY 2004, “Resources Supporting Strategic Goal: Ensure Equal Opportunity in Housing—Budget Authority and Staff Levels,” p. 47.

⁶⁹ HUD, APP FY 2004, “Part 2: Performance Indicator, Goal FH: Ensure Equal Opportunity in Housing,” p. 139.

⁷⁰ U.S. Department of Housing and Urban Development, “FY 2004 Management Plan: Office of Fair Housing and Equal Opportunity.” AMPs align operations with APP and set targets and activities for each part of HUD, including FHEO. See FY 2001 Information and Reporting Requirements for Agencies Covered by Executive Order 12,250 (October 1, 2000–September 30, 2001); HUD Interrogatory, p. 9.

⁷¹ This is an indicator for the strategic objective “Resolve Discrimination Complaints on a Timely Basis.” The objective itself is related to the strategic goal “Ensure Equal Opportunity in Housing.” See HUD, APP FY 2004, p. 129. Note that the discrimination indicators/national goals and targets center on fair housing. This discussion serves to demonstrate that the APP and AMP contain indicators and targets. Both also include Title VI indicators and targets.

⁷² U.S. Department of Housing and Urban Development, “FY 2004 Management Plan, Office of Fair Housing and Equal Opportunity,” p. 4.

⁷³ HUD Interrogatory, pp. 9–10.

⁷⁴ FY 2001 Information and Reporting Requirements for Agencies Covered by Executive Order 12,250, Leadership and Coordination of Non-Discrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980), *reprinted in* 42 U.S.C. § 2000d note (2004).

The performance indicators cited above measure process results. Indicators that measure mission accomplishment, that is, the extent to which HUD increases homeownership, supports community development, and increases access to affordable housing free from discrimination, are also needed. Both types are essential for determining overall progress. Social science methodology such as testing, experimentation, analysis of behavioral data, or public surveys is generally used to collect data to evaluate mission progress.⁷⁵

Among this section's key points are:

- HUD's strategic plan combines CRIP and a comprehensive civil rights enforcement plan.
- An APP operationally supports the strategic plan.
- FHEO's AMP aligns operations with APP and sets targets and provides related guidance to staff for achieving targets.

Policy Guidance

Regulations

In its 1996 report, the Commission noted that HUD last updated its Title VI regulations in 1973. The regulations did not reflect recent developments in the law and were not modified to include examples of discrimination specific to each type of HUD's federally assisted programs. Besides, the list of HUD's federally assisted programs in "Appendix A" was out of date. Accordingly, the Commission said HUD should issue revised Title VI regulations and clarify the effect of the Civil Rights Restoration Act of 1987. HUD should also provide examples of discrimination relating to each type of HUD's federally assisted programs and annually update its list of federally assisted programs.⁷⁶

HUD, in collaboration with DOJ, is now finalizing revisions to its Title VI regulations in response to the Civil Rights Restoration Act of 1987 and the Third Circuit Court of Appeals' decision in *Cureton v. National Collegiate Athletic Association*.⁷⁷ The list of HUD's federally assisted programs has been revised and is being finalized for OMB review.⁷⁸

Guidelines

Previous Commission research found that HUD did not publish Title VI guidelines for each of its federally assisted programs. Hence, the Commission said that FHEO must provide Title VI staff with step-by-step guidelines for implementing and enforcing this law for each type of HUD's federally assisted program. Guidelines were especially critical in state and locally administered programs as local agencies assume Title VI compliance responsibility. The Commission therefore recommended that guidelines pertaining to state and locally administered programs should (1) establish methods of administration for the state and local government agencies; (2) ensure that recipients conduct self-assessment of their compliance status, including remedying any deficiencies discovered; (3) include definitive standards on implementation, compliance, and enforcement for states and local agencies;

⁷⁵ Social or behavioral science methods include laboratory experiments, field experiments, analysis of observational data and natural experiments, and survey and administrative records reports.

⁷⁶ USCCR, *Federal Title VI Enforcement*, p. 346.

⁷⁷ 198 F.3d 107 (3d Cir. 1999). See HUD Interrogatory, p. 11.

⁷⁸ Peoples letter, p. 5.

(4) set forth and explain the process for collecting data from funding recipients, and (5) address requirements for public education and community outreach related to Title VI's nondiscrimination mandate.⁷⁹

HUD now indicates that Title VI guidelines, known as "Civil Rights Related Program Requirements," are included in all HUD program regulations and handbooks that agency staff and funding recipients use.⁸⁰ With respect to (1) and (2) above, HUD says that when applied to Title VI, these requirements address questions pertaining to how federally assisted programs benefit eligible persons; as well as how funding recipients ensure that their programs and services benefit all segments of the eligible population on a nondiscriminatory basis. The requirements that affect Title VI include site and neighborhood standards, public housing tenant selection and assignment plans, and affirmative fair housing marketing plans and strategies. HUD program handbooks, for example, the *Public Housing Occupancy Guidebook* and the *Occupancy Requirements of Subsidized Multifamily Housing Programs*, contain other Title VI implementation guidance.⁸¹ In regard to (3) above, HUD says assisted recipients must comply with Title VI and ensure subrecipients' compliance. HUD does not issue guidelines to federally assisted recipients since the investigation of Title VI noncompliance is its responsibility. As to (4) above, HUD further states that HUD program offices collect racial and ethnic data; for example, the Office of Public and Indian Housing uses the "Public Housing Information Center System" to record demographic data. Finally, on (5) above, HUD indicates that FHEO's local field staff conduct Title VI education and outreach activities.⁸²

Policies

The Commission's 1996 report found that FHEO issued "guidance notices" that elaborated on HUD policy on certain Title VI implementation and enforcement issues. The Commission advised HUD to regularly develop policies on Title VI implementation that enable enforcement staff and funding recipients to thoroughly understand Title VI compliance with respect to specific HUD-administered programs. Further, policy directives should address (1) Title VI implementation and enforcement, in particular on HUD's state and locally administered programs (such as block grants and home improvement in affordable housing programs); (2) discriminatory practices prohibited in certain types of HUD programs (such as steering applicants to same-race housing); and (3) developing and changing legal issues affecting Title VI compliance (such as amendments to statutes).⁸³

HUD recently issued guidance to funding recipients that provide services to persons with limited English proficiency (LEP).⁸⁴ HUD also says that in the past five years, it has developed and disseminated Title VI policies. For instance, after the Quality Housing and Work Responsibility Act of 1988 was enacted, HUD issued and revised numerous regulations, such as (1) creating a site-based waiting list within public housing;⁸⁵ (2) including civil rights protections in the preamble of the Section 8

⁷⁹ USCCR, *Federal Title VI Enforcement*, pp. 346–47.

⁸⁰ HUD Interrogatory, p. 12.

⁸¹ HUD provided copies of the two handbooks.

⁸² HUD Interrogatory, pp. 12–14. Additional examples are found in these same pages.

⁸³ USCCR, *Federal Title VI Enforcement*, p. 347.

⁸⁴ U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, "HUD Releases Limited English Proficiency Guidance," <<http://www.hud.gov/offices/fheo/index/index.cfm>> (last accessed Jan. 9, 2004).

⁸⁵ Rule to Deconcentrate Poverty and Promote Integration in Public Housing, 65 Fed. Reg. 81,214 (2000) (to be codified at 24 C.F.R. pt. 903). See HUD Interrogatory, p. 14.

Homeownership Program Rule [indicating] that Public Housing Agencies (PHAs) may not steer families to particular units or neighborhoods; . . . [that] PHAs must provide assistance to expand housing opportunities”; and (3) preventing predatory lending, specifically PHAs may review lender’s qualifications as well as the terms of the loan before sanctioning homeownership assistance in order to protect participating families from abusive lending practices. HUD may disqualify a proposed financial transaction, such as financing, refinancing or other debt, if PHAs decide that the debt is unaffordable or the lender or the terms of the loan fail to meet PHA qualifications.⁸⁶ HUD further says that FHEO staff use the DOJ-developed Complaint and Compliance Review Manual and the Legal Manual in their enforcement work.⁸⁷

FHA grants the HUD Secretary authority to review the final decisions of ALJs with respect to all findings and conclusions of law, and to issue final decisions. The HUD Secretary can affirm, modify, or nullify an ALJ’s initial decision, or send the decision back to the ALJ for further proceedings.⁸⁸ The Commission’s 1992 report showed that the Secretary used this review process to establish policies on new and controversial adjudication. The Commission advised HUD to set agency policy using a public process that involves formal posting, notice, and public comment. Moreover, HUD should reverse established policies in the same way.⁸⁹

HUD officials now explain that FHEO’s assistant secretary is responsible for interpreting FHA and publishing resulting policies in the *Federal Register*.⁹⁰ Major policies that HUD did not publish in the *Federal Register* are available on the HUD Web site’s online public library.⁹¹ The agency also has published technical guidelines for housing accessibility in the *Federal Register*.⁹² Policies that interpret FHA may also be developed through the complaint process. For example, upon FHEO’s determining that there was reasonable cause to believe that discrimination occurred, the regional counsel or OGC’s Fair Housing Enforcement Division issues a discrimination charge and prosecutes the case before HUD’s ALJ office. Policy decisions on administrative cases usually are made before a charge of discrimination is issued. This procedure is adopted because FHA administrative adjudication is a lengthy process, averaging about six months, from charge to initial decision. These decisions, too, are available to the public on HUD’s Web site.⁹³

⁸⁶ Section 8 Homeownership Program, 65 Fed. Reg. 55,134 (2000) (codified at 24 C.F.R. pts. 5,903 and 5,982). See HUD Interrogatory, pp. 14–15.

⁸⁷ HUD Interrogatory, p. 15.

⁸⁸ 42 U.S.C. § 3612(h) (2004). USCCR, *Fair Housing Amendments Act Report*, pp. 165–66.

⁸⁹ USCCR, *Fair Housing Amendments Act Report*, p. 230.

⁹⁰ HUD’s interpretation of FHA can be found in the Fair Housing Act regulations starting at 24 C.F.R. Part 100. See HUD Interrogatory, p. 15.

⁹¹ U.S. Department of Housing and Urban Development, “Library,” Dec. 10, 2003, <<http://www.hud.gov/offices/fheo/library/index.cfm>> (last accessed Dec. 23, 2003). Also on the Web site are online training and guidance on design and construction requirements of FHA. See Fair Housing Accessibility FIRST, “Training Program,” <<http://www.fairhousingfirst.org/trainingprogram.asp>> (last accessed Dec. 12, 2003); “Educational Materials,” <<http://www.fairhousingfirst.org/educationalmaterials.asp>> (last accessed Dec. 23, 2003); “Legal Materials,” <<http://www.fairhousingfirst.org/legalmaterials.asp>> (last accessed Dec. 23, 2003).

⁹² HUD has also developed a design manual to help housing developers comply with design and construction requirements specified in FHA. See HUD Interrogatory, p. 15.

⁹³ U.S. Department of Housing and Urban Development, “Fair Housing Act Cases,” Apr. 11, 2003, <<http://www.hud.gov/offices/oalj/cases/fha/index.cfm>> (last assessed Dec. 23, 2003). HUD notes that the administrative decisions are also available in Westlaw’s database FAIRHOUS for a fee. See HUD Interrogatory, p. 15.

As to the expanded jurisdiction resulting from the Fair Housing Amendments Act of 1988—adding disability and familial status—the Commission’s 1994 report found that privacy rights of persons in real estate transactions were subjected to dispute. For example, in one case, a condominium association attempted to require an owner to produce a medical statement to certify her disability before it would approve use of a flotation device in the building’s swimming pool. In another situation, an ALJ ruled as lawful questions about whether an applicant’s children were noisy. HUD, however, held that it was improper to pose questions to potential tenants or owners that indicate an illegal bias against groups that had suffered historical discrimination. Clearly, HUD needed to further develop policy positions for new disability and familial status enforcement. Thus, the Commission’s 1994 report recommended that HUD issue policy guidance detailing what inquiries were proper regarding tenant suitability and regarding the disability of a person in a real estate transaction.⁹⁴

HUD officials indicated that the agency has now issued policy guidance regarding proper inquiries related to disability, familial status, real estate transactions, and tenant suitability. These may be issued in the form of regulations or policy guidance; found in handbooks, and published in the *Federal Register*.⁹⁵ Agency officials emphasize that HUD uses policy guidance in all FHA enforcement activities, such as case investigation, analysis and prosecution, responses to general inquiries, and drafting and finalization of legal memoranda.⁹⁶

Among this section’s key points are:

- HUD, in collaboration with DOJ, is now finalizing revisions to its Title VI regulations.
- Title VI guidelines, known as “Civil Rights Related Program Requirements,” are included in all HUD program regulations and handbooks.
- In the past five years, HUD has developed and disseminated Title VI policies.

Enforcement Procedures

As reported in the Commission’s 1996 report, FHEO produced several technical guidance memoranda and manuals, as well as a handbook, outlining enforcement procedures specific to certain funding programs. HUD did not, however, update the 1976 procedures manual designed principally for Title VI enforcement. The Commission said that enforcement staff should reference the most current information in their work, thus HUD must update this manual. Moreover, HUD should continue issuing Title VI technical guidance, memoranda, manuals, and handbooks on program-specific procedures as new programs develop.⁹⁷

HUD now indicates that it has continued to issue and revise program regulations and/or handbooks for each HUD-assisted program. For example, HUD has developed the *Public Housing Occupancy Handbook* and the *Occupancy Requirements of Subsidized Multifamily Housing Programs*.⁹⁸ FHEO staff now use DOJ’s Title VI Complaint and Compliance Review Manual and the Legal Manual instead of the 1976 Title VI procedures manual for enforcement work. As such, HUD did not update

⁹⁴ USCCR, *Fair Housing Amendments Act Report*, pp. 227–28.

⁹⁵ See HUD Interrogatory, pp. 16–17, for examples. Two of the six regulations HUD referenced were issued in 1989.

⁹⁶ HUD Interrogatory, p. 17.

⁹⁷ USCCR, *Federal Title VI Enforcement*, p. 347.

⁹⁸ HUD Interrogatory, p. 18.

the 1976 Title VI manual. Furthermore, the Civil Rights Threshold Reviews, the Consolidated Annual Performance Evaluation Reports (CAPER),⁹⁹ Public Housing Agency Plans, and the Risk Analysis contain specific procedures for pre- and post-award reviews. HUD officials say these tools have helped the agency target recipients for on-site reviews and improved Title VI compliance.¹⁰⁰

On processing FHA complaints, the Commission's 1994 report found that HUD did not have a systematic approach that would ensure timely and consistent complaint management across all regional offices. Instead, a series of draft technical guidance memoranda contain the majority of the instructions for complaint processing. Hence, the Commission recommended that HUD develop and publish a fair housing complaint processing manual that included current HUD policy on the necessary evidence to support a claim of discrimination under FHA.¹⁰¹

HUD now indicates that when FHEO began FHA administrative enforcement, it was necessary to develop and issue new case processing standards. Thus, shortly after FHA became effective on March 12, 1989, between November 9, 1989, and March 17, 1992, headquarters FHEO issued 19 draft technical guidance memoranda addressing specific issues and procedures for processing FHA complaints. Where appropriate, the memoranda were incorporated into the *Title VIII Complaint Intake, Investigation, and Conciliation Handbook*, issued in September 1995. Additional chapters and revisions to the handbook were published in November 1998. FHEO headquarters uses the handbook guidance in all in-house training, FHA investigations, and intake analysis.¹⁰² A task force is planning an update to include latest case decisions. HUD also issues other documents, including a field manual, general FHA guidance materials, and several memoranda of understanding (MOUs) with other federal agencies for facilitating filing and investigation of housing discrimination complaints.¹⁰³

Among this section's key points are:

- HUD did not update its 1976 Title VI compliance and enforcement procedures manual. DOJ's Title VI Complaint and Compliance Review Manual and the Legal Manual have replaced the 1976 manual.
- HUD has specific procedures for pre-award reviews and post-award reviews established in the Civil Rights Threshold Reviews, Review of Consolidated Plan's Consolidated Annual Performance Evaluation Reports, Public Housing Agency Plans, and the Risk Analysis.
- HUD issued *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* in September 1995, and published additional chapters and revisions in 1998. HUD has issued numerous other documents, including a field manual, general FHA guidance materials, and several memoranda of understanding with other federal agencies for facilitating filing and investigation of housing discrimination complaints.

⁹⁹ CAPER's civil rights-related components focus on how the jurisdiction's Consolidated Plan programs and activities affect beneficiaries by race, ethnicity, and gender, as well as the actions taken during the program year to further fair housing. See HUD Interrogatory, p. 41.

¹⁰⁰ HUD Interrogatory, p. 18.

¹⁰¹ USCCR, *Fair Housing Amendments Act Report*, p. 222.

¹⁰² HUD Interrogatory, p. 19.

¹⁰³ See *ibid.*, pp. 18–24, for examples of handbooks, manuals, memoranda of understanding, regulations, notices, and general Title VIII case processing guidance materials.

Technical Assistance

Although FHEO provided technical assistance seminars to Title VI recipients, the Commission's 1996 report indicated that focus on Title VI was limited. The Commission advised FHEO to train recipients and HUD civil rights staff regularly. Moreover, technical assistance should include methods for achieving enforcement, and information on new and developing civil rights issues, especially changing case law, statutes, regulations, and policies affecting Title VI enforcement in HUD's grant programs.¹⁰⁴

HUD now offers Title VI technical assistance based on DOJ guidance on an as-needed basis to headquarters, hubs, and field staff. FHEO has also offered to federal funding recipients technical assistance focusing on the implications of the Civil Rights Restoration Act. Generally, FHEO staff and staff in DOJ's Coordination and Review Section offer training sessions throughout the country. Training includes on-site Title VI compliance reviews to encourage acquisition of practical experience.¹⁰⁵

On certifying state and local fair housing agencies' laws as substantially equivalent to FHA, the Commission emphasized in 1992 that without HUD's technical assistance and financial support, many local agencies would reduce or, worse, eliminate their fair housing programs. Such a situation would make it more difficult for fair housing charging parties to receive local assistance and the full protection of FHA. The Commission recommended that HUD provide technical assistance to state and local jurisdictions that were not already in the federal fair housing system. To help, HUD needed to provide sustained and timely assistance with drafting laws that would meet a substantial equivalency review, assign staff to specific agencies to handle inquiries, provide legal advice on state and local proposed fair housing laws, and testify on behalf of an agency's proposed law.¹⁰⁶ These actions would increase the number of participants in FHAP.

FHEO offers ongoing technical assistance to state and local jurisdictions whose laws are not significantly comparable to FHA. HUD hosts the FHEO National Policy Conference Forum every other year for interested agencies. For example, FHEO invited several agency representatives to its FY 2002 conference to learn about bringing fair housing laws in line with FHA and to ask questions of HUD officials.¹⁰⁷ FHEO also reviews agencies' existing fair housing laws to determine if they satisfy FHA criteria.¹⁰⁸ HUD also offers more specific or targeted assistance to agencies.¹⁰⁹ Such help may include, for example, limited technical assistance for drafting fair housing laws. OGC provides legal analysis to FHEO regarding the adequacy of state or local fair housing laws, but the assistant secretary makes the final determination as to whether a specific agency meets the criteria set forth under FHA.¹¹⁰ At this time, FHEO says it does not testify on behalf of an agency's fair housing law.¹¹¹

¹⁰⁴ USCCR, *Federal Title VI Enforcement*, pp. 350–51.

¹⁰⁵ HUD Interrogatory, p. 25.

¹⁰⁶ USCCR, *Federal Fair Housing System*, p. 33.

¹⁰⁷ HUD Interrogatory, p. 25.

¹⁰⁸ Section 810(f)(3)(A). *See* HUD Interrogatory, p. 25.

¹⁰⁹ In particular, *see* the regulations at 24 C.F.R. § 115.205 (2004). *See* HUD Interrogatory, p. 23.

¹¹⁰ 24 C.F.R. § 115, subpart B.

¹¹¹ HUD Interrogatory, p. 26. The certification process is discussed in detail later in this chapter.

Among this section's key points are:

- Title VI technical assistance based on DOJ guidance is offered on an as-needed basis to headquarters, hubs, and field staff. Training includes on-site Title VI compliance reviews to impart practical experience.
- FHEO offers ongoing technical assistance to provide information on certification and substantial equivalency to state and local jurisdictions whose laws are not significantly comparable to FHA.

Education and Outreach

In 1996, the Commission noted that FHEO had performed little Title VI community outreach and public education, having only prepared a Title VI “fact sheet” for dissemination to the public, and developed a Title VI education program for one public housing authority recipient. The Commission said that HUD should anticipate recipients’ outreach requirements and regularly solicit comments from (1) affected communities and funding recipients on FHEO’s Title VI enforcement efforts; (2) funding recipients on potential Title VI violations and HUD’s compliance expectations; and (3) affected communities and civil rights groups on protecting Title VI rights. HUD also must be forceful in public education, informing potential and actual participants, beneficiaries, and affected communities about their Title VI rights, including procedures for filing complaints. Furthermore, the 1996 report stated FHEO must ensure that funding recipients educate the public about their programs. HUD also should consider modeling its Title VI education and outreach efforts on that of the Fair Housing Initiatives Program (FHIP), which funded community and fair housing agencies’ varied education and outreach activities.¹¹²

HUD now states that field office staff are primarily responsible for Title VI education and outreach activities, using a combination of printed and electronic media. Each hub and field office conducts its own education and outreach, and activities are targeted to the needs of its community.¹¹³

One of HUD’s compliance expectations is that potential Title VI violations will be brought to its attention. FHEO receives referrals from recipients, particularly from public housing authorities, of potential discrimination complaints.¹¹⁴ HUD communicates compliance expectations to funding recipients in a number of ways to ensure awareness of Title VI rights and responsibilities. For example, FHEO headquarters office issues “Notices and Directives” to funding recipients, and to hub directors, program branches, and program centers in the regions. It also responds to recipients’ regular requests for clarification. Further, funding recipients receive periodic training sessions on Title VI compliance expectations. Other opportunities to provide education and outreach occur during compliance reviews and complaint investigations, and when FHEO staff provide feedback to recipients after reviewing their plans and other documents.¹¹⁵

¹¹² USCCR, *Federal Title VI Enforcement*, p. 350.

¹¹³ HUD Interrogatory, p. 27.

¹¹⁴ *Ibid.*, p. 29. FHEO now states that this is incorrect. It says: “FHEO receives discrimination complaints from beneficiaries, in particular residents of public and assisted housing and applicants in such housing. Additionally, organizations contact FHEO about policies and practices that they view as discriminatory.” *See* Peoples letter, p. 6.

¹¹⁵ HUD Interrogatory, pp. 28–29.

FHEO has public campaigns to reach minority and disabled communities. For example, FHEO became aware that some farm workers are reluctant to engage in the federal complaint process. The office decided that Title VI compliance enforcement to the farm worker community must have a strong public education component. The HUD regions participating in this campaign targeted certain geographical areas for outreach in FY 2004. To gauge the effectiveness of this campaign, HUD plans to compare post-campaign complaint data from these geographical areas with those from prior years.¹¹⁶ HUD also points out that its translation service translated fair housing materials, including complaint-related documents, into non-English languages, such as Spanish, Vietnamese, Chinese, Korean, and distributed them to underserved rural locales and areas with high concentrations of minorities.¹¹⁷ Moreover, agency officials say that HUD has established working relationships with minority and disability advocacy organizations, including those serving Native Americans, Alaska Natives, and farm workers, and the independent living centers throughout its regions. FHEO's public education campaign to reach the colonias, Native Americans has had mixed success, while anecdotal evidence suggests that the campaign for recipients and beneficiaries in the disability community has been more successful.¹¹⁸

HUD involves local advocacy and civil rights groups in education and outreach efforts. During compliance reviews, for example, HUD officials confer with these groups about the civil rights performance of the recipient in question. Agency officials say that through an outreach campaign, hundreds of organizations have been contacted about the protections of the federal fair housing law, although Title VI was not its specific focus. In addition, FHEO has ongoing discussions with local legal assistance agencies about Title VI requirements.¹¹⁹

In 1996, the Commission recommended that HUD model its Title VI education and outreach efforts on that of FHIP. The Commission now learns that FHIP does not have one education and outreach model. Its Education and Outreach Initiative encourages grantees to establish programs tailored to the local community. Educational activities that the initiative funded may be national, regional, local, or community-based in scope and include myriad activities, such as developing education materials, providing fair housing training, partnering with Community Development and Block Grant recipients to conduct analysis of impediments to housing choice, and providing housing counseling and classes. HUD itself uses a number of education and outreach models, for example, a Spanish-language electronic slide presentation on FHA and nondiscrimination requirements. Another example is HUD's cross-program model developed jointly with FHEO and other groups. For instance, FHEO, the state of Illinois, and the offices of Public and Indian Housing worked together to develop partnerships and plans to allow Housing Choice Vouchers to be used throughout the underserved northern area of Illinois.¹²⁰

HUD also draws on internal and external technological resources to aid in education and outreach. FHEO's Web site contains much useful information and downloadable documents, including fair housing administrative law decisions.¹²¹ As to use of external technological resources, HUD explains

¹¹⁶ *Ibid.*, p. 30.

¹¹⁷ In June 2003, HUD launched a Spanish-language Web site, espanol.hud.gov, to increase minority access to HUD's homeownership and educational materials. See U.S. Department of Housing and Urban Development, "Martinez Launches New Spanish-Language Web site *Espanol.hud.gov* to Increase Housing Education and Homeownership Opportunities," news release, June 19, 2003, <<http://www.hud.gov/news/release.cfm?content=pr03-074.cfm>> (last accessed May 6, 2004).

¹¹⁸ HUD Interrogatory, p. 29.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, p. 27. See *ibid.*, for a full list of the types of activities that FHIP funds. See Peoples letter, p. 6.

¹²¹ Peoples letter, p. 6. See HUD Interrogatory, pp. 30–31, for examples of downloadable documents.

that fair housing groups, academic institutions, and other private and public organizations conduct research and post findings on their Web sites. HUD says it appropriately uses the information and also publicizes the findings on its Web site to educate the public. Even HUD's complaint decisions are available on the Web sites of fair housing organizations, including FAIRHOUS, a Westlaw database searchable by key terms, thus furthering the public's awareness about the agency's enforcement efforts.¹²² Yet another way in which HUD taps into external technological resources for education and outreach is through FHEO's partnership with the National Fair Housing Alliance and the Ad Council to create Spanish and English radio and print advertisements to inform members of the public about their fair housing rights and responsibilities.¹²³ A second advertisement on predatory lending is under production. Finally, Fair Housing Accessibility FIRST, a HUD-sponsored initiative to promote compliance with FHA design and construction requirements, provides materials online and offers telephone or online assistance to persons with questions about constructing multifamily housing that is accessible to people with disabilities.¹²⁴ This initiative began in FY 2002 and is ongoing.¹²⁵

Among this section's key points are:

- Field staff are responsible for education and outreach.
- HUD uses a variety of approaches for education and outreach to reach recipients, affected communities, advocacy and community groups, and legal assistance agencies.
- FHIP's Education and Outreach Initiative encourages grantees to establish education and outreach programs targeted at the local communities.
- HUD draws on internal and external technological resources to assist in education and outreach.

Complaint Processing

The Commission's 1994 report showed that for a vast majority of fair housing cases, HUD did not make a determination within the 100-day congressional benchmark. Aged cases were undesirable as they were costlier for the disputing parties. It also reported wide variation in the methods regional offices used in case management and their inability to complete timely investigations. Hence, the Commission advised HUD to re-examine procedures and appropriately institute new ones to ensure timely complaint processing without loss of quality. Moreover, the Commission said that each region's overall performance should be evaluated and identified inadequacies corrected.¹²⁶

¹²² HUD Interrogatory, p. 30; Peoples letter, p. 7.

¹²³ "The Ad Council is a private, non-profit organization that marshals volunteer talent from the advertising and communications industries, the facilities of the media, and the resources of the business and non-profit communities to deliver critical messages to the American public. The Ad Council produces, distributes and promotes thousands of public service campaigns on behalf of non-profit organizations and government agencies in issue areas such as improving the quality of life for children, preventive health, education, community well being, environmental preservation and strengthening families." The Ad Council, "About Ad Council," <<http://www.adcouncil.org/about>> (last accessed Dec. 23, 2003).

¹²⁴ HUD Interrogatory, p. 30.

¹²⁵ Kirk I. Perry, senior program analyst, Office of Policy and Program Evaluation, U.S. Department of Housing and Urban Development, interview, Mar. 5, 2004 (hereafter cited as Perry interview, Mar. 5, 2004).

¹²⁶ USCCR, *Fair Housing Amendments Act Report*, pp. 223–24.

In the last several years, FHEO has rendered aged-case reduction a top priority.¹²⁷ The Commission's own investigation identifies that a strategic objective, "resolve discrimination complaints on a timely manner," includes two indicators. These are that the percentage of fair housing complaints over 100 days will decrease two percentage points from the FY 2003 level of the HUD inventory; and that the percentage of fair housing complaints over 100 days will decrease by two percentage points from the FY 2003 level of the inventory of substantially equivalent agencies.¹²⁸ The FHEO AMP incorporates these two indicators, and adds a third, "seventy-five percent of all non-complex cases will be closed within 100 days."¹²⁹ HUD officials also indicate that starting May 2004, HUD's Fair Housing Training Academy (FHTA) will provide continuing professional fair housing training and certification for current and future FHAP agency staff to ensure timely processing of fair housing complaints¹³⁰

Further, FHEO headquarters staff perform continuous case activity monitoring to determine the extent of reduction in aged cases, and to ensure timely processing of newly assigned cases. Quarterly, hub directors meet with FHEO headquarters senior staff to review progress in aged case reduction.¹³¹ FHEO also provides technical assistance to field offices, as necessary, to ensure timely and quality case processing. According to HUD, the Title VIII statute and implementing regulations state that investigation of fair housing complaints should be completed within 100 days of filing unless it is impracticable.¹³² The agency says that it has made every effort to complete investigations within 100 days of receipt, but that there are a large number of complex cases which often require more than 100 days to complete.¹³³ Cases may take longer when they involve many witnesses, voluminous evidence, or complex or novel matters of law.¹³⁴ Complex cases have these characteristics: (1) design and construction, (2) discriminatory financing, (3) steering, (4) reasonable accommodation, (5) discriminatory brokerage services, (6) redlining, (7) refusal to provide insurance, (8) discriminatory terms and conditions for making home loans, and (9) discriminatory appraisals of real properties.¹³⁵

At the beginning of FY 2003, FHAP agencies were processing about 64.5 percent of all (HUD and FHAP) open cases (complex and non-complex) and HUD, 35.5 percent. The average age of HUD's open cases was 143 days, compared with FHAP agencies' 165 (see table 5.2).¹³⁶ Thirty percent of

¹²⁷ HUD Interrogatory, p. 31.

In the interim rule published in 1996, HUD amended regulations governing fair housing complaint processing. In the supplementary information concerning the respondent's right to request a subpoena, it specifically cites the Commission's report, *The Fair Housing Amendments Act of 1988: The Enforcement Report*. The report discussed FHEO staff's explanations on why it was not possible to expect all cases to be investigated and a determination made within 100 days. The Commission advised HUD to re-examine procedures, staffing, and resources, and institute changes that would result in timely processing of cases. As a result, HUD conformed in investigative practices to those of other federal agencies. Office of the Assistant Secretary for Fair Housing and Equal Opportunity; Revision of HUD's Fair Housing Complaint Processing, 61 Fed. Reg. 41,480 (1996) (to be codified at 24 C.F.R. pt. 103).

¹²⁸ HUD, APP FY 2004, p. 49.

¹²⁹ U.S. Department of Housing and Urban Development, "FY 2004 Management Plan: Office of Fair Housing and Equal Opportunity," p. 4.

¹³⁰ HUD Interrogatory, p. 63. This is further discussed later in the chapter.

¹³¹ HUD Interrogatory, p. 31.

¹³² 24 C.F.R. § 103.225 (2004).

¹³³ HUD Interrogatory, p. 31.

¹³⁴ Peoples letter, p. 7.

¹³⁵ Ibid.

¹³⁶ This paragraph focuses on HUD's non-complex open cases.

HUD's open cases were aged (over 100 days old) compared with FHAP agencies' 44.7 percent. The average age of HUD's aged cases was 400 days, compared with FHAP agencies' 317.

TABLE 5.2
HUD and FHAP Aged Cases (over 100 days old), FY 2003

	Total open cases	Average age of open cases	Percent of aged cases	Average age of aged cases
HUD	1,577	143	30.0%	400
FHA	2,861	165	44.7%	317

Source: Carolyn Peoples, assistant secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter (attachment), May 18, 2004, p. 8.

As to the Commission's previously stated concern on the wide variation in the methods that regional offices use in case management, FHEO has established standard procedures in *Handbook 8024.01, Title VIII Intake, Investigation, and Conciliation Handbook* that field staff use for investigation and disposition. Each FHEO regional director has limited discretion to tailor procedures to local intake needs. However, standard procedures in the *Consolidated HUD Hearing Procedures for Civil Rights Matters* govern disposition of FHA discrimination charges.¹³⁷ Further, OGC issues memoranda on internal procedures for FHA cases to regional counsel; and its headquarters Office of Fair Housing Enforcement Division has desk officers assigned to assist specific regional counsel offices. HUD also sought to standardize processing through OGC training. During training, OGC provides current information on FHA enforcement policies and procedures to all fair housing attorneys.¹³⁸ HUD has not, however, assessed if the training reduces the wide variation in the methods regional offices use in case management.¹³⁹

FHA authorized the HUD Secretary to file a complaint on her or his own initiative.¹⁴⁰ The HUD Secretary delegated this authority to the FHEO assistant secretary.¹⁴¹ A secretary-initiated complaint allows HUD to pursue cases that involve a pattern or practice of discrimination, and as such, is a valuable enforcement tool. The Commission's 1994 report, however, found that secretary-initiated complaints were underutilized, and recommended that HUD develop secretary-initiated complaints, issue guidance or regulations detailing the subjects appropriate for such complaints, and increase substantially the staff and resources for this purpose.¹⁴²

The secretary-initiated complaint remains a little used tool. The Secretary, through the FHEO assistant secretary, filed only four such complaints over the six-year period between FY 1998 and 2003; one each in FY 2000 and 2002, and two in FY 2003.¹⁴³ Furthermore, HUD eliminated separate fund-

¹³⁷ 24 C.F.R. Part 180 contains the rules and procedures for administrative law judges dealing with discrimination charges. See HUD Interrogatory, p. 32.

¹³⁸ HUD Interrogatory, p. 32.

¹³⁹ Perry interview, Mar. 5, 2004.

¹⁴⁰ 42 U.S.C. § 3610(e) (2004). USCCR, *Fair Housing Amendments Act Report*, p. 11.

¹⁴¹ 24 C.F.R. § 103.400 (2004). USCCR, *Fair Housing Amendments Act Report*, p. 163.

¹⁴² USCCR, *Fair Housing Amendments Act Report*, p. 229.

¹⁴³ Peoples letter, p. 8.

ing and staff for secretary-initiated complaints.¹⁴⁴ The National Council on Disability called on HUD to make greater strategic use of secretary-initiated complaints as a part of its comprehensive effort to more effectively enforce FHA.¹⁴⁵ FHEO states that it plans to set up a systemic investigations unit to improve enforcement capability.¹⁴⁶ The FHEO assistant secretary has endorsed the systemic investigations unit, pending HUD secretary approval.¹⁴⁷ The unit will have dedicated resources to identify, coordinate, and conduct the investigation and conciliation of systemic complaints, complaints involving novel and/or complex issues, and high-profile complaints. In addition, the unit will propose and coordinate secretary-initiated investigations and manage secretary-initiated complaints.¹⁴⁸

The Commission recently analyzed Title VI complaints filed with HUD and FHA complaints filed with HUD and with the FHAP agencies combined.¹⁴⁹ HUD received far fewer Title VI complaints than FHA complaints; between FY 1999 and 2002, Title VI complaints made up between 10.6 to 14.8 percent of the agency's combined Title VI and FHA complaints (excluding FHAP agencies' FHA complaints).¹⁵⁰ Title VI complaints increased from 239 in FY 1999 to 284 in FY 2000, thereafter tapering to 276 in FY 2001, before rising to 375 in FY 2002,¹⁵¹ attaining an average annual increase of 5.2 percent.

As to FHA complaints, between FY 1998 and 2002, the combined number of HUD and FHAP FHA complaints filed increased yearly, the greatest being 13.6 percent in FY 2000 (see table 5.3). In regard to HUD's FHA complaints, of the FHA complaints (HUD and FHAP combined) received, HUD's share was generally about a third, hovering between 27.9 to 36.6 percent, with FHAP agencies receiving the majority share.¹⁵² During the review period, HUD's FHA complaints showed a fluctuating trend. Meanwhile, complaints filed with FHAP increased every year.

It is helpful to view HUD and FHAP FHA complaints in a larger context. The National Fair Housing Alliance maintains records on complaints filed with the organization and collects similar data from HUD, FHAP, and DOJ. The combined total from these sources for 2002 was 25,246. According to alliance's president, Shanna Smith, this figure "is less than one percent of the estimated incidence of illegal housing discrimination that occurs each year in the United States."¹⁵³ Persons who do not

¹⁴⁴ U.S. Commission on Civil Rights Document Request #5.

¹⁴⁵ National Council on Disability, *Reconstructing Fair Housing*, Nov. 6, 2001, p. 12.

¹⁴⁶ HUD Interrogatory, p. 64.

¹⁴⁷ Perry interview, Mar. 5, 2004.

¹⁴⁸ HUD Interrogatory, p. 64.

¹⁴⁹ As part of its data request, the Commission also sought data on the resolution of these complaints. To date, this information has not been received.

¹⁵⁰ Data calculated from U.S. Commission on Civil Rights Document Request #20. The figures for FY 1999–2002 in percentages are 10.6, 13.3, 14.1, and 14.8, respectively. Title VI complaint data for FY 1998 were incomplete in HUD's database, TEAPOTS, and thus excluded in this analysis. Also note that FHAP complaints were excluded in this instance as the focus here is on Title VI and FHA complaints filed with HUD.

¹⁵¹ U.S. Commission on Civil Rights Document Request #20.

¹⁵² Data calculated from U.S. Commission on Civil Rights Document Request #20. The figures for FY 1998–2002 in percentages are 34.8, 36.6, 30.7, 27.9, and 33.2, respectively.

¹⁵³ National Fair Housing Alliance, "Less than One Percent of Illegal Housing Discrimination Reported, According to New Report by National Fair Housing Alliance," press release, Apr. 16, 2003.

know their rights and where to complain are not likely to do so.¹⁵⁴ Combined HUD and FHAP 2002 complaints made up 30.3 percent of the combined total.

TABLE 5.3
HUD and FHAP (all FHAP agencies) Title VIII Complaints, 1998–2002

Fiscal year				% HUD complaints of HUD and FHAP combined	Year-to-year change		
	HUD	FHAP	Combined HUD and FHAP		HUD	FHAP	Combined HUD and FHAP
1998	2,025	3,793	5,818*	34.8%	--	--	--
1999	2,248	3,891	6,139	36.6%	11.0%	2.6%	5.5%
2000	2,142	4,831	6,973	30.7%	-4.7%	24.2%	13.6%
2001	1,959	5,051	7,010	27.9%	-8.5%	4.6%	0.5%
2002	2,538	5,111	7,649	33.2%	29.6%	1.2%	9.1%
<i>Average annual change:</i>				32.7%	6.8%	8.1%	7.2%

*HUD provided a figure of 5,918, but 2,025 plus 3,793 sum to 5,818.
Source: U.S. Commission on Civil Rights Request #20.

Among this section's key points are:

- Hub and field staff are primarily responsible for processing complaints.
- HUD has made reducing aged complaint cases a priority, creating two indicators in the APP on this issue. FHEO has adopted them in its AMP and created a third indicator.
- At the beginning of FY 2003, 30 percent of all HUD's open case inventory and 44.7 percent of FHAP's, were aged. The average age of aged cases for HUD and FHAP is 400 and 317, respectively.
- HUD does not maximize the use of secretary-initiated complaints as a strategy against broad-based discrimination. Over a six-year period, only four such complaints were filed.
- FHEO has established standard complaint in *Handbook 8024.01, Title VIII Intake, Investigation, and Conciliation Handbook*, and *Consolidated HUD Hearing Procedures for Civil Rights Matters* set forth standard procedures that govern disposition of FHA charges of discrimination.
- FHA complaints made up the bulk of HUD's complaints. The agency received about one-third of all (HUD and FHA combined) FHA complaints, while FHAP agencies received the other two-thirds.

¹⁵⁴ A 2001 George Washington University study on segregation in Washington, D.C., found that one of the main reasons that persons who suffered discrimination did not take legal action was that they thought nothing would come of it. A 2002 HUD study, "How Much Do We Know? Public Awareness of the Nation's Fair Housing Laws," concluded that one in five people who believed they experienced housing discriminating did not know what their rights were or where to complain. National Fair Housing Alliance, "Less than One Percent of Illegal Housing Discrimination Reported, According to New Report by National Fair Housing Alliance," press release, Apr. 16, 2003.

- The total number of complaints filed each year with HUD, FHAP agencies, DOJ, and the National Fair Housing Alliance make up less than 1 percent of the estimated acts of illegal housing discrimination that occur annually.

Compliance Reviews

The Commission's 1996 report found that HUD conducted numerous Title VI pre-award reviews. The small number of work years devoted to them, however, suggested that the reviews were not thorough.¹⁵⁵ The Commission advised FHEO to concentrate on a quality pre-award review process that included examination of (1) implementation and enforcement policies and documentary information on specific compliance activities; (2) statistical data on program and activity participation rates by racial/ethnic minorities; (3) application or interview materials related to program or participation acceptance or selection; (4) the demographic make-up of the program's affected community or pool of potential participants; (5) statistical data on application rejection rates; and (6) community outreach and public education materials. The Commission understood that inadequate resources may not permit quality pre-award review of all applicants. Thus, HUD should develop alternative strategies that would permit meaningful and efficient pre-award reviews on as many applicants as possible. The Commission also made clear that such strategies only serve as a secondary alternative to the optimal pre-award review process proposed.¹⁵⁶

HUD now explains that civil rights enforcement is an agencywide mission; FHEO and the program office share responsibility for conducting pre-award reviews.¹⁵⁷ There are two broad categories of grants, competitive and noncompetitive, each with its respective pre-award review process; focus here is on competitive grants. Agency officials report that all applicants applying for competitive program funds through the Super Notice of Funding Availability (NOFA) or stand-alone NOFA must pass civil rights threshold requirements or pre-award reviews that FHEO and HUD program offices conduct. Applicants are ineligible if they have an outstanding letter of noncompliance under Title VI as of the application deadline stated in the individual program NOFAs. Moreover, all noncompliance issues must be resolved through a voluntary compliance agreement, conciliation agreement, consent order or consent decree, a judicial ruling, or a HUD ALJ's decision exonerating the respondent of any discrimination allegations. The pre-award review process requires that FHEO, in coordination with DOJ's Civil Rights Division, issue quarterly a Civil Rights Violations List that identifies organizations that have outstanding letters of findings.¹⁵⁸ HUD's Grants Management Center and Program Office will not consider any applicant on the Civil Rights Violations List; and will inform the applicant of its ineligibility under NOFA.¹⁵⁹

The Commission reviewed HUD's pre-award review data.¹⁶⁰ Between FY 1998 and 2001, pre-award on-site reviews composed about 1.7 to 3.3 percent of all pre-award reviews (see table 5.4). The per-

¹⁵⁵ A work year is equivalent to 2,000 hours. It refers to the total time spent on an activity, such as pre-award review, within a fiscal year. Perry interview, Mar. 5, 2004.

¹⁵⁶ USCCR, *Federal Title VI Enforcement*, pp. 347–48.

¹⁵⁷ HUD Interrogatory, p. 40.

¹⁵⁸ The Civil Rights Violation List is on HUD's internal Web site. A letter of finding is a finding of noncompliance following a compliance review in this context. Peoples letter, p. 8.

¹⁵⁹ HUD Interrogatory, pp. 37–38.

¹⁶⁰ Pre-award and post-award review data are extracted from relevant pages of CRIPs that HUD sent in response to the Commission's request for such data. DOJ's new reporting format, effective in FY 2003 for reporting on CRIP activities in

centage of noncompliance findings was relatively small, no larger than 5 percent during this period. The trend in the total number of pre-award reviews conducted during the period is checked, ranging from a low of 2,971 to a high of 3,980.

TABLE 5.4
HUD Title VI Pre-Award Reviews

Fiscal year	Total pre-award reviews	On-site reviews	Desk-audit reviews	Percent not in compliance	Percent on-site reviews
1998	3,352	111	3,241	5%	3.3%
1999	3,758	82	3,676	1%	2.2%
2000	2,971	81	2,890	1%	2.7%
2001	3,980	68	3,912	1%	1.7%

Source: U.S. Department of Housing and Urban Development, Civil Rights Workload Performance Data for FY 1998–FY 2001.

The Commission reported in 1996 that FHEO did not perform post-award desk-audit reviews of Title VI HUD funding recipients. The Commission said well-executed post-award desk-audit reviews could be as comprehensive as post-award on-site reviews, and done more quickly and economically. Hence, FHEO needed to use preliminary post-award desk-audit reviews before committing staff to costlier on-site compliance reviews. Moreover, post-award desk-audit reviews needed to (1) identify deficiencies in recipients' delivery of program services to potential and actual beneficiaries, (2) investigate allegations of discriminatory barriers to program participation, (3) evaluate the accessibility of recipients' public education and outreach programs, and (4) identify recipients in need of technical assistance or further on-site investigation.¹⁶¹

HUD now says it has established four post-award desk-audit review processes that contribute information for Title VI compliance reviews. The first is local FHEO staff review of the Consolidated Annual Performance and Evaluation Reports of all local and State Consolidated Plan jurisdictions. HUD's review and approval of Public Housing Agency (PHA) plans is the second Title VI post-award desk-audit process. HUD states that the housing plans include PHA certification of compliance with civil rights laws and with FHA's requirements to affirmatively further FHA objectives. The Civil Rights Limited Monitoring Review Protocol is the third process. In 1999, FHEO and its headquarters program offices developed joint protocols wherein program office evaluation units would conduct civil rights-related front-end and limited monitoring reviews. The Civil Rights Limited Monitoring Review Protocol thus promotes civil rights enforcement as an agencywide mission. Risk analysis is the fourth process. FHEO has developed the Risk Analysis Data Management System, implemented in all FHEO field offices, for predicting recipients' civil rights-related risk potential. High-risk recipients require either on-site program monitoring or compliance reviews under Title VI

FY 2002, changed the classificatory categories for pre-award and post-award activities. Because of the incomparability of pre-award review classificatory categories between FY 1998 and 2001 and FY 2002, and little assurance that information in pre-award and post-award analysis in the new and old formats are comparable, FY 2002 data are excluded from this analysis.

¹⁶¹ USCCR, *Federal Title VI Enforcement*, p. 348.

or other civil rights statutes; moderate-risk recipients may also be monitored on-site, depending on travel and staff resources.¹⁶²

The Commission's 1996 report also found that HUD limited post-award on-site compliance reviews to public housing authority recipients. HUD should conduct post-award on-site compliance reviews of all grant recipients on a rotating basis, at least once every three years. In addition, during post-award on-site compliance reviews, the Commission said FHEO should ensure that (1) the recipient's facility be investigated thoroughly to identify potentially discriminatory housing patterns or potentially discriminatory services; (2) funding recipient officials, communities affected by the recipient's programs or activities, program participants or beneficiaries, and interviewers responsible for assisting applicants' participation be interviewed; (3) compliance policies be ascertained and examined carefully; (4) statistical data on participation and rejection rates be examined; (5) applications for assistance be reviewed to detect possible barriers to participation; and (6) recipient's efforts to educate the public and communities affected by programs and activities be evaluated, especially efforts to provide program accessibility for limited English proficient communities. Finally, the Commission said FHEO should evaluate both post-award review processes to ensure ready identification of funding recipients not in compliance with Title VI.¹⁶³

HUD now states that it has more than 40,000 federal assistance recipients and that current staffing and funding are inadequate for post-award on-site compliance review of all grant recipients on a rotating triennial basis. Instead, since the Commission's 1996 report, HUD has concentrated on compliance reviews of certain categories of PHAs and a small select number of recipients in each hub. Rigorous post-award review of a significant number of recipients is a strategy key to civil rights enforcement. HUD's criteria for selecting a recipient for a compliance review include complaints against the recipient, outcomes of risk analysis, whether litigation has been filed, and hub resources. Agency officials emphasize that an on-site investigation is comprehensive. It encompasses, for example, a review of racial and ethnic data for each development or facility; interviews with key staff, beneficiaries, and community advocates; and reviews of tenant files for waiting times. FHEO says it has conducted a limited number of reviews of recipient's efforts to provide program accessibility for limited English proficient communities, and informs the Commission that questions relating to this coverage would be added to future reviews.¹⁶⁴

The Commission's 2004 examination of HUD's post-award review data for FY 1998–2001 shows the number of reviews completed grew sizably every year with one exception, FY 1999 (see table 5.5), resulting in an average yearly increase of 87.7 percent for reviews completed.¹⁶⁵ The percentage of post-award reviews resulting in noncompliance is low with 5 percent being the highest for the review period. Post-award reviews pending after 180 days had declined considerably. Although these findings are positive, it should be kept in mind that they are based on HUD's limited post-award compliance reviews—a small number of recipients in each hub and select PHAs.

¹⁶² HUD Interrogatory, p. 41.

¹⁶³ USCCR, *Federal Title VI Enforcement*, pp. 348–50.

¹⁶⁴ HUD Interrogatory, pp. 43–44.

¹⁶⁵ The total number of post-award compliance reviews completed combined field offices' monitoring reviews and hub offices' compliance reviews, and included carry-overs from previous years. See U.S. Department of Housing and Urban Development, "FY 2000 Civil Rights Workload and Performance Data (Federally Assisted Programs)."

TABLE 5.5
HUD Title VI Post-Award Reviews

Fiscal year	Post-award reviews completed	Desk audit and on-site reviews	Desk-audit reviews only	Percent desk-audit reviews only	Percent not in compliance	Still pending after 180 days
1998	2,755	981	1,774	64.4%	1%	116
1999	970	772	198	20.4%	5%	21
2000	3,480	1,995	1,485	42.7%	2%	39
2001	5,890	4,015	1,875	31.8%	1%	1

Note: Post-award reviews include monitoring reviews by field offices and compliance reviews by hubs. The total number of post-award reviews completed in each fiscal year included those initiated in previous years.

Source: U.S. Department of Housing and Urban Development, Civil Rights Workload Performance Data for FY 1998–FY 2001.

Among this section's key points are:

- HUD has made civil rights enforcement an agencywide mission; FHEO and program offices now share enforcement responsibility through compliance reviews and program monitoring, respectively.
- HUD has established four processes that contribute information to post-award compliance reviews.
- HUD concentrated compliance reviews on some categories of PHAs and a small select number of recipients in each hub due to lack of resources.
- Pre-award reviews and post-award reviews show average yearly increase over the respective review periods.

Staff Training

FHA

In 1992, the Commission advised HUD to improve staff training. It stated that headquarters and field staff tasked to assist state and local agencies seeking certification in the FHAP were inadequately trained on the federal requirements for complaint processing. The Commission recommended that HUD provide formal training to them on a priority basis that included instruction on the criteria the agency used to determine “meaning and intent” of state and local laws.¹⁶⁶ By the time the Commission issued its 1994 report, training for FHEO staff improved, but was sporadic and uneven, and the training budget varied enormously from year to year. Training generally consisted of national or regional sessions of a few days' duration. Regional offices were mostly left to provide on-the-job training for their staff without national goals or standards for guidance. The Commission therefore recommended that HUD implement a comprehensive approach to training new and continuing FHEO staff that included clearly defined training goals and adequate budgets. The Commission also encouraged HUD to explore arrangements for ongoing professional training for regional hub and field office staff using educational resources available at local law schools and paralegal training programs.¹⁶⁷

¹⁶⁶ USCCR, *Federal Fair Housing System*, p. 33.

¹⁶⁷ USCCR, *Fair Housing Amendments Act Report*, p. 222.

Extreme fluctuations in FHA enforcement funding levels from 1997 to the present have not allowed FHEO to implement a comprehensive approach to FHA training for new and continuing FHEO staff.¹⁶⁸ The Commission's current analysis of FHA training funds for FY 1998–2003 confirms wide fluctuations, most notably since FY 2000.¹⁶⁹ Nevertheless, HUD says training continues with existing resources. For example, between FY 1998 and 2000, HUD indicates that it contracted with the John Marshall Law School Fair Housing Legal Support Center of Chicago to provide FHA investigative and testing skills training for FHEO headquarters and regional field office staff. In 2001, HUD charged FHEO headquarters Office of Enforcement with planning, designing, and conducting Title VIII staff training using funds from HUD's Fair Housing Training Academy (FHTA). In spring 2002, FHEO staff designed a "Title VIII Basic Investigator Training" of several days' duration. In fall 2002, FHEO staff submitted a training plan for FY 2003 to provide basic investigative training and conciliation skills training to new staff. This plan was aborted as a result of the budget constraints at HUD's training academy. FHEO located sufficient funding for a shortened training program.¹⁷⁰

Recent HUD training includes a five-day course titled "Overview of Title VIII" and a three-day course titled "Title VIII Conciliation Skills." Examination of the content of "Overview of VIII" offers a sense of coverage of the subject area. Topics usually discussed include the purpose of the statute and the implementing regulations, protected classes, the elements of jurisdiction, First Amendment issues, statutory exemptions, theories of discrimination and defenses, special familial status issues (such as steering and nongovernmental occupancy standards); special disability issues (such as reasonable modifications, reasonable accommodations, and the accessibility requirements); and Section 818 issues (such as harassment, intimidation, retaliation, and sexual harassment).¹⁷¹ Other VIII training opportunities for staff include fair housing and Title VI training that OGC offers to fair housing attorneys and regional counsel.¹⁷² In addition, in March 2003, HUD sponsored its first training specifically geared to attorneys who are litigating cases for FHAP agencies. HUD plans a similar training in 2004.¹⁷³

Beginning in May 2004, HUD's FHTA will offer continuing professional fair housing training and certification for current and future FHAP agency staff. This training is intended to ensure that fair housing complaints are processed consistently and timely and that all program participants receive similar guidance. FHTA certification signifies nationally recognized and respected credentials for fair housing enforcement and investigation.¹⁷⁴

Title VI

The Commission's 1996 report found that only a small percentage of training was devoted to Title VI implementation and enforcement responsibilities and activities. Hence, the Commission advised HUD to provide FHEO and recipients' staff formal training on Title VI enforcement and compliance. The training should include but not be limited to (1) Title VI nondiscrimination requirements in HUD programs, (2) the nexus between Title VI and other civil rights enforcement provisions relevant to

¹⁶⁸ HUD Interrogatory, p. 48.

¹⁶⁹ See U.S. Commission on Civil Rights Document Request #2.

¹⁷⁰ HUD Interrogatory, pp. 46–47.

¹⁷¹ *Ibid.*, p. 49.

¹⁷² *Ibid.*, p. 47. See *ibid.*, p. 49, for topics covered in "Title VIII Conciliation Skills."

¹⁷³ *Ibid.*, p. 63.

¹⁷⁴ *Ibid.*

ensuring nondiscrimination in federally funded activities, and (3) the nexus between Title VI and a particular program's objectives and administration.¹⁷⁵

HUD says OGC and FHEO, and DOJ's Coordination and Review Section staff provide training on Title VI.¹⁷⁶ Each training session lasts a week. Training focuses on the scope of Title VI, theories of discrimination, the impact of the Civil Rights Restoration Act, interviewing techniques, the use of statistics including sampling, and procedures of document control. In addition, emphasis is placed on writing skills related to interviews, the structure of the letters of finding, and the preparation and monitoring of legally sufficient Voluntary Compliance Agreements. HUD officials state that in FY 2003, approximately 25 percent of staff training was related to Title VI. Only two of the six years under review, FY 2001 and 2002, showed a Title VI training budget with amounts of \$33,192 and \$32,250, respectively,¹⁷⁷ a stark contrast to funding for Title VIII in regard to annual availability of funds and funding level.

Among this section's key points are:

- Inadequate and fluctuating training funds prohibit HUD from developing a comprehensive training system, but the agency continues to provide some training with its limited resources.
- OGC and FHEO, and DOJ's Coordination and Review Section staff provide training on Title VI.
- OGC offers training to fair housing attorneys and regional counsel.
- HUD's Fair Housing Training Academy will offer in May 2004 continuing professional fair housing training and certification for current and future FHAP agency staff. FHTA certification signifies nationally recognized and respected credentials for fair housing enforcement and investigation.

Oversight and Quality Assurance

The Commission's 1996 report found that HUD did not institute a uniform system for monitoring and evaluating Title VI compliance activities of state recipients in state and locally administered programs, such as Community Development Block Grant programs. Thus, it recommended that FHEO establish and implement such a system. As part of the monitoring system, FHEO must require state and local governments to submit methods of administration demonstrating how they intend to ensure recipient compliance with Title VI. Accordingly, the methods of administration should include (1) a specific public outreach and education plan for notifying subrecipients of Title VI requirements; (2) a training program for state and local program staff and subrecipients regarding HUD's nondiscrimination policies and procedures; (3) procedures for processing complaints, notifying the funding agency, informing beneficiaries of their rights; (4) a program that assesses and reports periodically on the status of Title VI compliance that involves more than merely a checklist of assurances; and (5) detailed plans for bringing discriminatory programs into compliance. Furthermore, FHEO should (6)

¹⁷⁵ USCCR, *Federal Title VI Enforcement*, p. 351.

¹⁷⁶ HUD Interrogatory, p. 48.

¹⁷⁷ U.S. Commission on Civil Right Document Request #2.

review the Title VI compliance policies and activities of state and local government recipients; and (7) monitor and oversee states' and local agencies' data collection and analysis program.¹⁷⁸

FHEO has established and implemented an oversight and monitoring program to systematically evaluate Title VI policy and compliance activities—the Risk Analysis Data Management System, discussed earlier. The agency does not require recipients to indicate their plans for training their staff and subrecipients on how to administer programs according to Title VI. FHEO requires state and local jurisdictions, as part of its consolidated planning process, to comprehensively address fair housing impediments identified through Analysis of Impediments to Fair Housing Choice.¹⁷⁹ HUD is able to assess and report periodically on the status of Title VI compliance. Consolidated Plan submission does not require states' and localities' detailed plans for bringing discriminatory programs into compliance. However, FHEO does obtain detailed plans through Voluntary Compliance Agreements and during its review and monitoring of a Community Development Block Grant entitlement jurisdiction's certification of compliance with Title VI. FHEO reviews states' or local agencies' Title VI compliance policies and activities and monitors their data collection and analysis programs.¹⁸⁰

Among this section's key points are:

- FHEO has established the Risk Analysis Data Management System to assist in determining the potential of a recipient for violating program-related civil rights requirements.
- FHEO requires state and local jurisdictions to address fair housing impediments on a comprehensive basis.
- FHEO reviews states' or local agencies' Title VI compliance policies and activities and monitors their data collection and analysis programs.
- HUD is able to assess and report periodically on the status of Title VI compliance.

Certification of State and Local Fair Housing Agencies

The Commission stated in its 1992 report that despite improvement in timeliness and quality of HUD's technical assistance, many agencies did not understand the procedures or criteria for attaining "substantial equivalence."¹⁸¹ The Commission therefore recommended that HUD develop a clear working definition of "substantially equivalent," and provide uniform guidelines on the different phases of the certification process.¹⁸² Furthermore, HUD should develop an instructional manual on the certification process to ensure consistency in technical assistance. Together, these documents would help agencies better understand the process and encourage them to gain certification, thereby increasing the pool of agencies eligible to process fair housing cases under FHA.¹⁸³

¹⁷⁸ USCCR, *Federal Title VI Enforcement*, pp. 350–51.

¹⁷⁹ HUD Interrogatory, pp. 52–54. Analysis of Impediments is a HUD requirement for each state to conduct an analysis to determine impediments to fair housing choice within the state. The state must take appropriate actions to overcome the effects of any impediments identified through that analysis. See U.S. Department of Housing and Urban Development, "HUD's Glossary of Terms," <<http://www.hud.gov/cfo/glossary.html>> (last accessed Feb. 27, 2004).

¹⁸⁰ HUD Interrogatory, p. 55.

¹⁸¹ USCCR, *Federal Fair Housing System*, p. 32.

¹⁸² *Ibid.*, p. 2.

¹⁸³ *Ibid.*, pp. 32–33.

FHEO's assistant secretary has both retained and redelegated authority to FHEO's general deputy assistant secretary to certify that a state or local fair housing law is substantially equivalent (significantly comparable) to FHA.¹⁸⁴ HUD has published the "Substantial Equivalence Certification Process Manual." This manual provides an overview of substantial equivalency certification, its benefits, and answers to frequently asked questions on the process.¹⁸⁵ Briefly, a state or local fair housing law is significantly comparable to FHA when a state or local agency applies for certification, and HUD determines that the agency enforces a law that provides substantive rights, procedures, remedies and judicial review provisions substantially equivalent to the FHA.¹⁸⁶ HUD has also published certification guidelines for substantial equivalence in the *Federal Register* of August 7, 1996, "Office of the Assistant Secretary for Fair Housing and Equal Opportunity Regulatory Reinvention; Certification and Funding of State and Local Fair Housing Enforcement Agencies."¹⁸⁷ This rule, effective September 6, 1996, "finalizes policies and procedures [concerning certification and funding of state and local fair housing agencies] set forth in the February 28, 1996 interim rule and takes into consideration public comments submitted on the interim rule."¹⁸⁸

State and local agency efforts to enact substantially equivalent fair housing laws were hampered, according to the Commission's 1992 report, because of a lack of involvement from federal, state, and local business and civic leaders in the certification process. Thus, support for certification was not generated within these communities, resulting in proposed or revised fair housing statutes being rejected or delayed by the local legislative body. Furthermore, most of the agencies that received Interim Referral Agreements cited strong support from and involvement of such groups as civic and government leaders and private fair housing entities. Moreover, in some HUD regions, regional administrators and regional FHEO directors were active in certification, often lending support to staff efforts. The Commission therefore recommended that HUD ask federal, state, and local business and civic leaders to actively support the certification of HUD state and local agency fair housing laws as substantially equivalent to FHA. Furthermore, hub directors should (1) contact state and local agency directors periodically regarding their certification process, (2) issue memoranda in support of state and local agencies seeking substantial equivalence, and (3) attend meetings on issues related to substantial equivalence.¹⁸⁹

HUD now has invited city and state officials to HUD-sponsored conferences (such as the FY 2002 National Policy Conference) and plans to invite them to the FY 2004 National Policy Summit. HUD also met with city and state officials to discuss the certification process. Furthermore, HUD says it conducts outreach in different cities, distributed information on the FHAP program, and posted a Web page on how to become substantially equivalent. According to agency officials, these outreach techniques, along with the Web site, resulted in several agencies' applying for the FHAP program; although HUD could not provide supporting evidence. HUD officials also indicated that FHEO re-

¹⁸⁴ HUD Interrogatory, p. 56. Redelegation of the authority to certify that a state or local fair housing law substantially equivalent to FHA to FHEO's general deputy assistant secretary is not in the regulations.

¹⁸⁵ U.S. Commission on Civil Rights Document Request #14. HUD provided a copy of the manual. It is available online; U.S. Department of Housing and Urban Development, "Substantial Equivalency Certification," <<http://www.hud.gov:80/offices/fheo/partners/FHAP/equivalency.cfm>> (last accessed Dec. 31, 2003).

¹⁸⁶ U.S. Commission on Civil Rights Document Request #14, "Substantial Equivalence Certification Process Manual."

¹⁸⁷ 24 C.F.R. pts. 111 and 115. See Part VII, *Federal Register*, Aug. 7, 1996.

¹⁸⁸ 61 Fed. Reg. 41,282 (1996) (to be codified at 24 C.F.R. pts. 111 and 115). See Part VII, *Federal Register*, Aug. 7, 1996, pp. 41284-91. HUD provided a copy of the guidelines.

¹⁸⁹ USCCR, *Federal Fair Housing System*, pp. 32-34.

gional directors provide ongoing technical assistance to potential FHAP agencies in a variety of ways, such as giving legal advice to state and local agencies on their proposed legislation and assigning HUD staff to provide sustained and timely assistance to agency representatives in drafting their laws to be substantially equivalent. Moreover, hub directors meet with the potential FHAP agencies to discuss the progress of the agency's certification, and invite them to HUD-sponsored conferences and seminars, such as the policy conferences and attorney training. Headquarters FHEO staff are also available to provide technical assistance to potential FHAP agencies.¹⁹⁰

The Commission's 1994 report stated that in two separate evaluations for substantial equivalency status, HUD did not consult knowledgeable civil rights or women's organizations, or any fair housing groups on the aforementioned agencies' performance. Furthermore, no outreach efforts had been made to local interested parties to ascertain their perspectives. The Commission advised HUD to consult broadly and also consider making available its *Federal Register* notice inviting comments on the performance of agencies seeking certification to relevant interested parties.¹⁹¹

HUD states that the assistant secretary now periodically publishes public notices in the *Federal Register* seeking comments on the existing fair housing law that an agency enforces and its performance in enforcing that law before making a final decision on whether to grant certification of FHA equivalency. Only two such notices have been published.¹⁹² In FY 2002, HUD published a list of existing FHAP agencies and invited comments on their performance. HUD also published a list of all agencies that had interim certification or certification, and agencies to which a notice of denial of interim certification had been issued, or for which withdrawal of certification had been proposed for public information.¹⁹³

This chapter had planned to show the universe of potential state and local agencies that HUD could target as participants in FHAP. HUD could not, however, produce this information. Instead, it offered data showing the number of agencies that had contacted HUD to inquire about certification. As of FY 2004, 49 state and local agencies from eight of HUD's 10 regional hubs had contacted the agency about becoming certified. Twenty-four of the agencies, or close to 49 percent, are from Midwest and the Southeast Caribbean regional hubs.¹⁹⁴ HUD only has 98 FHAP agencies, almost 15 years after FHA was enacted. Of the 98 FHAP agencies, 69 percent are certified while 31 percent are in interim

¹⁹⁰ HUD Interrogatory, p. 59.

¹⁹¹ USCCR, *Federal Title VI Enforcement*, p. 226.

¹⁹² These are (1) 68 FR 42184, Notices, Department of Housing and Urban Development (HUD) Office of the Assistant Secretary for Fair Housing and Equal Opportunity [Docket No. FR-4688-N-02], Responses to Notice of Certification and Funding of State and Local Fair Housing Enforcement Agencies Under the Fair Housing Assistance Program (FHAP), Part III, Wednesday, July 16, 2003, Action: Notice, *Federal Register*, vol. 68, no. 136. (2) 67 FR 9138, Notices, Department of Housing and Urban Development (HUD) Office of the Assistant Secretary for Fair Housing and Equal Opportunity [Docket No. FR-4688-N-01], Notice of Certification and Funding of State and Local Fair Housing Enforcement Agencies Under the Fair Housing Assistance Program (FHAP); Request for Comments, Part V, Feb. 27, 2002, Action: Notice and Request for Comments, *Federal Register*, vol. 67, no. 39.

¹⁹³ HUD Interrogatory, p. 59.

¹⁹⁴ John M. Sheehy, program analyst, U.S. Department of Housing and Urban Development, e-mail, Oct. 31, 2003. Ten or more agencies in each of the aforementioned hubs made contact with HUD.

status;¹⁹⁵ 36 of the 98 are state agencies (including the District of Columbia), while the remaining 62 are local agencies.¹⁹⁶

Among this section's key points are:

- HUD has developed the “Substantial Equivalence Certification Process Manual” and certification guidelines.
- HUD has involved state and city officials in its National Policy Conferences, and regional directors provide ongoing technical assistance to potential substantially equivalent state and local agencies.
- HUD does not have a list showing the universe of all state and local fair housing in the nation and their certification status.
- Nearly 15 years after FHA became operational, HUD only has 98 FHAP agencies, of which 31 percent are in interim status.

Creating New Private Fair Housing Organizations

The Commission's 1994 report found that FHIP funds were mainly distributed in the Northeast and Midwest, thus underserving the rest of the country. Thus, it recommended that HUD use FHIP funds allocated under the Fair Housing Organization Initiative to create new fair housing groups as well as expand existing ones in the underserved areas of the country.¹⁹⁷

HUD identifies three initiatives to promote the formation of fair housing groups. The first is through FHIP's Education and Outreach Initiative. Agency officials report that two new regional/local community-based components, the Hispanic Fair Housing Awareness Component and the Fair Housing and Minority Homeownership Component, have been added to the FHIP initiative to provide outreach to minority group members. The second initiative is FHIP's modification of NOFA. For example, in FY 2003, the FHIP NOFA made clear that an additional five points would be awarded to applicant-organizations located in underserved areas of the country. HUD states that this incentive helps create new organizations and assists in building the capacity of fledgling organizations in underserved areas. Finally, NOFA specifies that the Fair Housing Organization Initiative supports the creation of new organizations in underserved or unserved areas of the United States. Applicants to this initiative must provide data and statistical information supporting the need for new fair housing organizations in their recommended areas as well as demonstrate how these are currently underserved.¹⁹⁸

The current study also analyzed HUD data on the number of new private fair housing enforcement organizations that had been created. Between FY 1998 and 2002, such organizations had been created in all 10 regions. There are, however, noticeable differences. Larger numbers of new fair housing offices were found in four hub regions: Midwest (40) Southeast Caribbean (37), Mid-Atlantic (25), and Pacific-Hawaii (25). Together the four regions contained 62.9 percent of the new organiza-

¹⁹⁵ U.S. Commission on Civil Rights Document Request #24.

¹⁹⁶ Elizabeth Frank, deputy director, Office of Enforcement, U.S. Department of Housing and Urban Development, through Kirk I. Perry, senior program analyst, Office of Policy and Program Evaluation, U.S. Department of Housing and Urban Development, e-mail, Feb. 25, 2004.

¹⁹⁷ USCCR, *Fair Housing Amendments Act Report*, p. 227.

¹⁹⁸ HUD Interrogatory, p. 61.

tions. Two of these regions, Midwest and Southeast Caribbean, had the highest number of agencies contacting HUD in FY 2003 on certification. The remaining 75 new fair housing offices, or 37.1 percent, are spread out in six hub regions.

Among this section's key points are:

- HUD identifies three initiatives to increase the number of new fair housing organizations.
- The regional distribution of new private fair housing enforcement organizations remains somewhat unbalanced.

Conclusion

HUD is commended for responding to the Commission's interrogatory for this study in a detailed and thorough manner. Evidence shows that HUD considered the Commission's previous recommendations and implemented many of them.

The Commission has concerns and reasons for encouragement. Foremost among the concerns is the adequacy of the existing staffing and funding levels in light of increase over time in the number of Title VI and FHA complaints filed and pre-award and post-award reviews conducted. Besides, FHEO had to divert resources in order to implement an initiative to reduce aged cases. The wide fluctuation in training funds did not inspire confidence nor did the abortion of a FHEO training plan because of funding constraints. As to oversight, insufficient staff and funding did not permit HUD to perform the full range of enforcement activities that it should; for example, on-site monitoring of recipients whose civil rights risk was moderate occurred when there were travel and staff resources. HUD's cash buyout effort to reduce the total number of employees to meet the congressional mandated ceiling of 9,177 centers on four offices, one of which is FHEO.

The addition of a general deputy assistant secretary and having the DASs and hub and field oversight staff reporting to this staff member formally further distanced the FHEO assistant secretary from headquarters and hub and field Title VI and Title VIII staff. Recent HUD communication states that this is only a reporting structure. In practice, there are informal and scheduled formal meetings between the assistant secretary and the DASs and hub field staff.

HUD had traveled some distance with regard to the update, revision, development, and issuance of policy guidance and manuals since the Commission's previous reports. It had also shown considerable improvement in providing Title VI and FHA technical assistance.

The total number of complaints filed each year with HUD, FHAP, DOJ, and the National Fair Housing Alliance makes up less than 1 percent of the estimated acts of illegal housing discrimination that occur annually. At the beginning of FY 2003, about 30 percent of HUD's open case inventory and 44.7 percent of FHAP's, were aged. The average age of aged cases for HUD and FHAP was 400 and 317 days, respectively. Secretary-initiated complaints remained significantly underutilized, with only four cases filed over a six-year period. This is a powerful strategy against broad-based discrimination and its regular and frequent use advances civil rights enforcement. Taken together, it is reasonable to conclude that justice may not be forthcoming in a timely way for many victims of housing discrimination.

HUD's overall evaluative framework is its strategic plan. HUD had measurable indicators in its strategic plan and APP as well as in FHEO's AMP. HUD should ensure performance indicators measured results of processes as well as the extent to which HUD achieved its mission, "to increase homeownership, support community development and increase access to affordable housing free

from discrimination.” More generally, HUD sometimes evaluated initiative results. Perhaps the best example was its education and outreach campaign to engage farm workers in the federal complaint process. HUD made a deliberate decision to determine the campaign’s impact. On the other hand, there were instances in which no efforts were made to assess initiative results. Assessment is integral to success.

HUD is to be commended for its initiatives to create more fair housing enforcement organizations, particularly in the underserved areas. Regional distribution of new fair housing organizations, however, was still somewhat unbalanced.

At the same time, it was not possible to characterize the current certification status of all state and local agencies because HUD did not have a list of all such agencies with their corresponding status. This major data limitation was an obstacle to the agency’s education and outreach, and to increasing the number of HUD-certified state and local fair housing agencies to investigate complaints. Finally, almost 15 years after FHA became operational, there were just 98 state and local substantially equivalent agencies participating in FHAP to process complaints, and only 69 percent of them are certified.

Chapter 6: Findings and Recommendations

The Commission's investigation of the extent to which the Departments of Education (DOEd), Health and Human Services (HHS), Housing and Urban Development (HUD), and the Equal Employment Opportunity Commission (EEOC) implemented recommendations made in its previous reports finds mixed results. Overall, the record is uneven. HUD implemented many of the Commission's recommendations; DOEd indicates that some recommendations were not addressed because the specific issues were no longer priorities within the Office for Civil Rights (OCR); HHS implemented some but not most of the recommendations; EEOC implemented few recommendations, asserting that existing or other practices better served it.

Follow-up and new findings and recommendations are based on elements critical to civil rights enforcement, such as priority of civil rights, education and outreach, and resources.¹ However, the Commission does not offer recommendations when a critical area is unrelated to evidence in this report, or not relevant to an agency; for example, some agencies lack basic infrastructure necessary to respond to some recommendations. At the same time, when an element is relevant to more than one agency, the Commission's issue focus may be different as its critique is agency specific.

The Commission discovers several problems that continue to affect civil rights enforcement. For example, resources remain an issue for some agencies, whether they elect to publicly acknowledge it or not. DOEd's Office for Civil Rights asserts that a 6 percent decrease in full-time-equivalent staff (FTEs) between FY 2002 and 2003 without a commensurate decrease in mission or workload does not hinder its ability to fulfill its responsibilities. And despite past Commission recommendations urging the President and Congress to increase HUD resources, its funding and staffing remain insufficient. In addition, agencies emphasize performance indicators that measure process, such as the number of mediations resolved, and not achievement of agency mission, such as eradication of discrimination. Moreover, guidance issuance and update remain weak. HHS' OCR still needs to revise and update the case resolution manual that investigators use in their enforcement work. EEOC's guidance on definitions of key terms relevant to the Americans with Disabilities Act (ADA) was primarily issued between FY 1993 and 2000 and is in need of review to determine relevance and currency. Finally, the Commission finds that assessment of initiatives and follow-up with target groups to obtain feedback are infrequently carried out. This situation gives rise to some new recommendations.

Consistent with its mission and the purpose of this report, to determine the extent to which the agencies have abided by past recommendations, the Commission offers the following.

¹ See chapter 1 for a full list of the elements.

1. DEPARTMENT OF EDUCATION

Priority of Civil Rights

Finding 1.1: OCR's organizational structure has changed since 1996. Appropriately, the assistant secretary for civil rights reports directly to both the Secretary and the deputy secretary. A deputy assistant secretary for enforcement and a deputy assistant secretary for policy report to the assistant secretary for civil rights. However, two key positions are vacant. The assistant secretary for civil rights resigned October 31, 2003, and has not been replaced. The position of deputy assistant secretary for policy became vacant in November 2003; no one is acting in this position. The deputy assistant secretary for enforcement is "delegated the authority to perform the functions of the assistant secretary for civil rights" until Congress confirms a successor.

Recommendation 1.1: To ensure that OCR's enforcement program continues to remain viable, the two top vacant positions must be filled expeditiously, even if with acting personnel on a short-term basis until filled permanently.

Resources—Funding and Staffing

Finding 1.2: Although the number of FTEs decreased 6 percent between FY 2002 and 2003, OCR does not believe that decreased staffing has hindered its ability to fulfill its responsibilities. Based on an analysis of OCR's workload and the initiatives that it is not pursuing because of other competing priorities, the Commission is not convinced that OCR has enough staff to handle its many responsibilities. One demonstration is its reference throughout this study to its inability to implement programs that the Commission and others have advised were important.

Recommendation 1.2: OCR should develop and present to DOEd officials and Congress its strongest possible case justification for additional staff that would ensure it can fulfill its responsibilities without having to choose among activities, all of which are critical to the agency's mission.

Finding 1.3: None of DOEd's systems has ever tracked expenditures separately for different civil rights activities. OCR replaced its former tracking system and now uses Oracle Financials, the department's automated accounting system, to track expenditures. The system tracks resources expended, such as travel and computer technology, but it still cannot segregate expenditures for OCR's different civil rights activities.

Recommendation 1.3: The Commission once again recommends that OCR track staff resources by issue area and program activity, such as complaint investigation, compliance reviews, and outreach and education. Tracking resources in this manner would allow OCR to engage in management planning necessary to ensure that civil rights statutes are being effectively enforced.

Policy Guidance

Finding 1.4: DOEd still has not issued Title VI guidelines for each of its federally assisted programs. Instead, as program offices bring forth problems on which they need guidance, OCR considers each and responds case by case. OCR identified this as a more effective means than published guidance for ensuring that the agency implements programs consistently with applicable Title VI requirements. Informal guidance procedures do not ensure consistency or uniformity among the many individuals involved in the compliance process.

Recommendation 1.4: The Commission reiterates its recommendation that OCR issue program specific Title VI guidelines for each of its federally assisted programs that (1) provide program-specific interpretations of the Title VI compliance obligations; (2) give examples pertaining to the particular program of compliance and noncompliance; (3) contain specific data reporting requirements for recipients; and (4) provide specific instructions on the information OCR should review and the civil rights analyses it should conduct in determining whether a program recipient is in compliance. The guidance should be made readily available to applicants, recipients, participants, beneficiaries, and the general public.

Finding 1.5: OCR's case resolution and investigative manual, issued June 2004, is used to establish different approaches to the complaint resolution process. Aside from outlining complaint investigation procedures, it offers a small section that instructs staff to use the same investigative procedures for conducting compliance reviews as they do for complaint resolution. The manual does not delineate procedures for pre-award or post-award reviews, nor does it contain separate sections for conducting compliance reviews for different types of DOEd programs.

Recommendation 1.5: Because the procedures for conducting compliance reviews of school districts are dissimilar to the procedures for conducting compliance reviews of a college or university, the Commission again recommends that OCR update its case resolution and investigative manual to include separate sections for conducting compliance reviews of different types.

Finding 1.6: In December 2000, OCR issued "The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy Makers" and archived it in 2001 after the administration changed. OCR asserts that it does not disseminate the publication internally because employees rely on statute, regulations, and case law for guidance. OCR also said that the publication is available on request through its archived documents or under the Freedom of Information Act (FOIA). However, this is only partly responsive to the Commission's concern. First, there is a wider audience, such as recipients, beneficiaries, students, state officials, educators, and parents, to whom the publication could be useful. However, they are unlikely to request a document that they do not know exists. Second, distribution on request from archives or under FOIA underutilizes the publication as a resource.

Recommendation 1.6: OCR should make this important document available to the public through other avenues in addition to its Web site and in response to FOIA requests. For example, OCR should regularly distribute the publication during conferences and meetings, and when it provides proactive technical assistance and initiates outreach and education. Further, it should widely publicize the document's availability through state and local education agencies' and parent and teacher associations' newsletters, newspapers, and magazines. At a time when federal, state, and local offices are developing and implementing tests as part of high-stakes decision-making for students, this guide must reach a wider public audience. It is a necessary and important tool for educators and policy-makers because it provides information on test measurement standards, legal principles, and resources that assist them in ensuring that tests accurately reflect educational standards and are not discriminatory.

Finding 1.7: OCR's Internet site provides the general public access to OCR's current education and technical assistance materials and some policy and investigative guidance documents. Although the list of documents is not inclusive, the public may request other documents.

Recommendation 1.7: The Commission commends OCR for providing the public access to a wealth of information on its Web site. OCR should continue to keep the public well informed by up-

dating existing information on its Web site, in addition to expeditiously posting new information as it becomes available.

Technical Assistance

Finding 1.8: OCR originally formed the “Lau Network,” composed of headquarters and regional staff whose members were subject-matter experts, to create informational materials for various regional compliance specialists and state and local school district personnel. OCR has since established other networks on different programmatic issues, such as access to gifted and talented programs and ability grouping; racial and sexual harassment; minorities and special education; services to English language learners; disability; testing and assessment; elementary and secondary desegregation; and athletics. These networks are intended to build knowledge and expertise in select areas, coordinate and enhance OCR’s ability to identify and obtain strong remedies, help OCR refine its case resolution approaches, and develop ways to monitor resolution agreements more effectively.

Recommendation 1.8: The Commission commends OCR for establishing subject-matter expert groups to provide outreach, education, and technical assistance on different programmatic issues. As new issues emerge, OCR should continue its practice of forming new networks as a means of enhancing its ability to fulfill its civil rights responsibilities.

Compliance Reviews

Finding 1.9: OCR initiated fewer compliance reviews between FY 1998 and 2002 due to an increased monitoring workload. According to OCR, during the four years between FY 1994 and 1998 it resolved 681 compliance reviews. This large number of resolved reviews created an enormous monitoring workload for OCR staff. With the number of complaints rising, OCR needed to reduce the number of compliance reviews it initiated. The number of initiated compliance reviews is again rising. OCR initiated 74 compliance reviews in FY 2003, compared with 11 in FY 2002.

Recommendation 1.9: The Commission reiterates its past recommendation that although OCR should continue to conduct on-site compliance reviews they should be based on priority issues and not on the size of OCR’s complaint workload. OCR also should conduct comprehensive reviews that assess recipients’ entire operations, not only compliance on priority issues. If OCR lacks resources to fulfill its duties, it should apply staff resources differently and experiment with contract, detail, and temporary employees. In addition, OCR should justify to Congress its need for additional FTEs, to specifically perform compliance reviews, since its resources are not infinite and it must choose its activity level based on how many compliance reviews its staff level can support.

Deficiencies, Remedies, and Sanctions

Finding 1.10: When OCR has found noncompliance, it has been able to secure compliance through voluntary agreements with recipients. OCR issues formal letters of violation if recipients refuse to enter into voluntary agreements. If recipients still refuse to remedy the violation, OCR either (1) files a “Notice of Opportunity for Hearing” to initiate fund termination proceedings or (2) refers the violations to the Department of Justice (DOJ) for judicial enforcement. Between 1996 and 2003, although OCR did not defer or terminate federal financial assistance, it initiated fund termination hearings against two recipients. OCR also referred two cases to DOJ for judicial enforcement.

Recommendation 1.10: The Commission commends DOEd for making effective use of myriad enforcement options available to it, including fund termination and deferral and referral of cases to DOJ. To further ensure nondiscrimination, OCR should access and utilize penalties against recipients. Other federal agencies that encounter serious violations should do the same.

Staff Training

Finding 1.11: DOEd encourages its staff to develop individual training plans and offers courses on management and skills training. OCR encourages its enforcement staff to attend conferences and meetings relevant to their work. Staff attended recent training that included relevant Title VI enforcement topics such as interviewing skills, negotiation skills, telephone skills, accessibility of facilities, individualized instruction, evidence, sexual harassment, and First Amendment requirements. Staff may also utilize the Regional Training Centers' training and career development resources. In recent years, OCR has consistently allocated hundreds of thousands of dollars yearly for staff training.

Recommendation 1.11: The Commission commends OCR for allotting a budget that supports relevant staff training. OCR should continue to instill a culture that encourages staff to attend conferences and meetings relevant to their work. OCR should make individual training plans mandatory for all staff; managers should work with staff to develop and implement such plans. OCR should augment its system of regular training with annual refresher programs to reinforce staff capabilities.

Output Evaluation

Finding 1.12: While OCR measures outcomes, its methods are process oriented. It does not apply social science or behavioral methods, such as public surveys, focus groups, or research data, to evaluate its success in eradicating discrimination in educational practices within schools. Furthermore, OCR has neither planned nor implemented means to distinguish its activities' individual effects on the organization's efficiency and effectiveness or the overall goal of eradicating discrimination. Measures that ascertain the extent to which OCR activities achieve administrative and programmatic targets are important. However, such measures alone are not sufficient to determine whether OCR has been successful in eradicating discrimination in access to education.

Recommendation 1.12: In addition to process measures already in use, OCR should establish appropriate mission-oriented performance measures and, where applicable, use social science methodology, such as testing, experimentation, analysis of behavioral data, or public surveys, to set goals and assess progress.

2. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Planning and Performance Measurement

Finding 2.1: Among the key changes during the tenure of the current chair was the development of a new strategic plan for FY 2004–2009. This plan states specific objectives and expresses measurable outcomes with deadlines as well as strategies for accomplishment. The plan incorporates a program evaluation schedule for private and federal sector mediation programs and administrative processing of private sector charges.

EEOC said that many of its existing measures in the strategic plan get close to assessing the outcome of its work on employers and society. These are new measures and the agency is only beginning to develop approaches and expects to build databases. EEOC says that it now uses surveys to gather information, but that not all social science methods are appropriate in its line of work.

Recommendation 2.1: EEOC should develop performance measures that assess the extent to which employment discrimination in the workplace is being eradicated. It should employ appropriate social science methodology in setting goals and evaluating progress toward elimination of employment discrimination.

Finding 2.2: EEOC has accomplished a substantial amount of planning in recent years. The agency developed a strategic plan and a Five-Point Plan, and charged a workgroup to develop a strategic enforcement and litigation plan to implement one of the points of the Five-Point Plan. The Revolving Fund Division developed a five-year Revolving Fund business plan and requires each district office to submit annual plans for fee-based Technical Assistance Program Seminars (TAPS) as well as annual outreach plans.

Recommendation 2.2: The Commission agrees that plans are necessary as road maps and commends EEOC for the vigor with which it develops plans. However, far too much EEOC energy may be exhausted on developing but not necessarily implementing plans. EEOC's interrogatory responses give evidence of plan development, but little of plan implementation. EEOC should become more action oriented and expend adequate staff time on plan execution and assessing results.

Policy Guidance

Finding 2.3: EEOC's compliance manual is a primary source of guidance on the law and agency procedures for investigators. After the agency named retaliation as a priority, it updated the original guidance on the subject area in the compliance manual. Since 1998, however, EEOC only issued two sections of its new compliance manual. Thus, the Commission said in 2000 that it should complete and issue a new manual. Today, EEOC still has not issued a new compliance manual.

EEOC asserts that it constantly updates sections of the compliance manual as legal and policy developments require such updating. Field staff replace outdated sections from their binders with current versions. EEOC argues that this approach is more cost effective and quicker than replacing an entire compliance manual each time a section is revised.

Recommendation 2.3: There is no guarantee that all field staff will always diligently replace old sections with new ones or not lose sections. EEOC should complete and issue a new compliance manual in FY 2005. This manual should be posted on EEOC's public Web site so that stakeholders, employees and employers, community and advocacy groups, the bar, and public have direct access. Hard copies of the manual should be available on request, even to those who have ready access to the Internet. This manual should be annually reviewed and updated. A formal review process ensures that legal and policy developments are updated as needed.

Finding 2.4: The Americans with Disabilities Act's broad framework for ensuring equal employment opportunity and nondiscrimination for employed people with disabilities invariably leaves employers too much discretion to apply different definitions to key ADA-related terms. The Commission said in 1988 that EEOC needed to issue policy guidance to clarify its position on such key terms as "health insurance and disability-based insurance," "major life activity," "qualified individual," "reasonable accommodations and undue hardships," and "job-related and business neces-

sity.” EEOC has issued definitions and guidance to clarify its position on such key terms; however, most of the guidance documents were issued between FY 1993 and 2000.

Recommendation 2.4: EEOC should review the definitions that it has established and, where necessary, disseminate new ADA guidance that clarifies or updates to ensure relevance and usefulness. The agency should also survey other key terms pertinent to the ADA that have entered the popular lexicon since 2001 and appropriately issue guidance to clarify. These necessary actions would allow employers and employees to have the most current information to ensure nondiscrimination.

Finding 2.5: Many activities and issues EEOC addressed required the advice of experts in social sciences and medicine. EEOC’s Research and Analytic Services (RAS) unit in the Office of Legal Counsel (OLC) had on staff social scientists, economists, and psychologists. The Commission said in 1988 that OLC and its ADA Policy Division had little contact with this unit. The Commission said that OLC staff should make use of in-house subject-matter experts during policy guidance development. OLC now confers with RAS on technically complex subjects such as economic impact analyses and statistical/systemic analyses, and investigations. OLC has encouraged field offices to also confer with its staff and RAS on technical issues.

Recommendation 2.5: OLC should require field offices to seek RAS assistance and hold them accountable when dealing with complex technical subjects and conducting investigations. Further, OLC should monitor field offices to ensure that they seek RAS advice and assess them accordingly on this matter during staff performance evaluation.

Finding 2.6: In 2000, EEOC did not follow established intervals for reviewing, developing, and issuing subregulatory policy guidance. The Commission said that the agency needed to develop a timetable for this purpose. Today, EEOC still does not have a formal time schedule for subregulatory policy guidance review, development, and issuance. It asserts that agency attorneys routinely keep abreast of developing case law, statutory amendments, and pertinent legal treatises and law review notes and articles. This approach is not a substitute for regularly scheduled, comprehensive review.

Recommendation 2.6: The Commission reiterates its 2000 recommendation that EEOC develop a formal time schedule to review, develop, and issue subregulatory policy guidance. EEOC also should establish formal processes that (1) collect quality input and feedback from affected partners and stakeholders and (2) guarantee completion by associating tasks with milestone and deadlines.

Technical Assistance

Finding 2.7: EEOC evaluation of TAPS and customer-specific training assessed how well the content met employers’ needs, but did not focus on whether employers changed their practices or company policies as a result of the training. The Commission advised EEOC in 2000 to strengthen the evaluation to include this component.

EEOC’s TAPS evaluation still does not determine if employers change their practices or company policies as a result of training. Instead, TAPS trainees complete evaluation forms that assess the overall seminar, instructors, handouts, audiovisuals, and individual sessions. Trainers also ask them to identify most useful sessions and indicate if training would help them perform more effectively on the job, bring about changes in the organization’s practices, or enable the organization to prevent or resolve discrimination claims more effectively.

Recommendation 2.7: The Commission reiterates its previous recommendation that EEOC strengthen TAPS evaluation. It could, for example, include a follow-up to determine whether employers have changed policies as a result of attending TAPS and if they are less likely to be respondents to charges.

Education and Outreach

Finding 2.8: According to the Commission in 2000, district offices employed different means to reach Hispanic, Asian, and Native American communities. Outreach emphasized contacting ethnic media, hiring bilingual investigators and program analysts, and working with community groups. The Commission encouraged more innovation and urged district offices to exceed routine outreach approaches. District offices, it said, should develop and implement comprehensive programs to design and execute outreach projects that were not limited to daily enforcement activities.

Since then, EEOC's education and outreach activities have grown more extensive. For example, approaches to reach underserved minority communities include community forums and town hall meetings. Just before a meeting, EEOC arranges local press announcements of the event and press interviews with staff. Trainers offer day sessions aimed at employers and evening sessions geared toward employees and the public. EEOC also utilizes "expanded presence activities," which offer off-site individual counseling and charge-taking in partnership with local community groups, such as the Urban League and the Spanish American Committee, and service organizations, such as the State Workforce Centers. As before, staff advertise and promote such opportunities through the media and local community organizations.

Recommendation 2.8: The Commission commends EEOC for its more extensive education and outreach than the Commission found four years ago. Other federal agencies might study some of EEOC's and consider emulating them, as appropriate.

Complaint Processing

Finding 2.9: EEOC guidelines, the Commission said in 2000, indicated that the investigation of a charge should generally be completed within 120 days of the time the charge was initially categorized. Inadequate resources, however, required EEOC to amend this goal. Data from EEOC's Charge Data System showed that the average processing time for a charge was 325 days, but declined since the implementation of the Priority Charge Handling Procedures (PCHP). The Commission recommended that EEOC re-establish the 120-day goal for processing charges. EEOC now reports that the average processing time was 171 days in FY 2002.

Recommendation 2.9: EEOC should complete investigation of a charge within 120 days of the time the charge was initially categorized.

Finding 2.10: In 2000, the Commission established that PCHP stopped the issuance of letters to convey the reasons for decisions that investigations did not discover a violation (letter of determination). Instead, EEOC implemented a short standardized determination letter stating that the investigation failed to find a violation but which did not disclose reasons. The Commission recommended that EEOC staff be required to inform the charging party of how it reached the determination, and that staff conduct predetermination interviews with charging parties giving the latter the opportunity to provide any additional information before having their case dismissed.

EEOC did not institute an explanatory letter but now informs charging parties that request an explanation through in-person interviews, telephone or conference calls, or written statements that accompany the standardized letter of determination. Further, there is no evidence that EEOC staff conduct predetermination interviews.

Recommendation 2.10: EEOC should ensure that all charging parties receive a letter that provides reasons for the decision not just when requested. Such a written document would help charging parties in pursuing private action. In addition, the Commission reiterates its 2000 recommendation that EEOC staff offer and conduct predetermination interviews with charging parties, whether they request it or not, to give them opportunity to provide any additional information before having their case dismissed.

Finding 2.11: Various groups criticized EEOC for its charge intake procedures. The Commission indicated in 2000 that some groups said that EEOC staff discouraged individuals from filing charges and did not clearly explain the charge handling process. Others stated that it was difficult to reach EEOC staff or communicate with them. As part of its efforts to improve intake procedures so that customers benefit, EEOC needed to survey charging parties after charge intake to receive feedback on experience with the agency. There is no evidence that EEOC now surveys charging parties for this purpose. Customer feedback is important since EEOC needs to identify and eradicate problems that charging parties face.

In subsequent communication with the Commission, EEOC states that field offices previously distributed surveys to potential charging parties, and its Office of Research Information collected the completed surveys for analysis. The return rates, however, were too low for findings to be reliable.

Recommendation 2.11: The Commission reiterates its previous recommendation that EEOC staff survey charging parties after intake to receive feedback on experience with the agency. EEOC should set up and charge a committee to determine reasons for low return rates and find ways to improve. In addition, EEOC should review the survey results and make necessary changes to improve the intake process. It should also appropriately use survey findings in intake training.

Staff Training

Finding 2.12: In 2000, the Commission concluded that EEOC should more appropriately train legal, investigative, outreach, and mediation staff. Fact-finding in 2004 shows that during the past five years, headquarters and the Office of the General Counsel (OGC) offered a number of nationwide training programs on a host of appropriate topics to different staff. The training programs that EEOC discussed in its interrogatory response were almost all held between FY 1999 and 2002; the only exception was a telephonic conference held in FY 2003. Thus, while EEOC can demonstrate a commitment to staff training, it is not evident in the past 18 months.

Recommendation 2.12: EEOC should offer biannual orientation, subject-matter, and refresher training to staff. New staff should be given training within three months of joining the agency. The Commission also urges the agency to examine college and university distance education formats, such as interactive audio or video conferencing, computer conferencing or electric mail, and use of prerecorded videotape, to determine the feasibility of such opportunities for maximizing resources.

3. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Resources—Funding and Staffing

Finding 3.1: In 1996 and 1999, HHS/OCR's Title VI resources decreased while civil rights responsibilities increased. This notwithstanding, OCR did not provide a detailed plan to the agency on how additional resources would be expended. OCR now prepares a detailed budget plan that outlines resource allocation for civil rights enforcement. It also reports funding and staffing by OCR component and activity. In 2002, OCR implemented the Program Management Information System to upgrade and integrate its information and management capabilities. OCR's FY 2004 budget is 64.6 percent higher than in FY 1999. It concludes that resources are sufficient to support civil rights responsibilities without necessitating a shift in resources. However, OCR is not always efficient in its use of resources. For example, OCR shifts headquarters staff to assist regional or field offices with enforcement, and expends resources and staff to carry out functions such as technical assistance to grant recipients.

Recommendation 3.1: OCR should thoroughly assess the use of its funds and staff. It should study the feasibility of using operating divisions to provide technical assistance to recipients, thus freeing OCR resources for other enforcement functions. Further, instead of using headquarters staff to assist regional offices in enforcement activities, OCR should similarly give serious thought to using staff of eligible operating divisions for this purpose.

Policy Guidance

Finding 3.2: In 1996, an investigative procedures manual guided OCR's operations. It contained procedures for Title VI complaint investigations, compliance reviews, and pre-award reviews. The manual did not, however, include comprehensive Title VI enforcement instructions. OCR needed to provide a manual with step-by-step instructions for implementing Title VI, from the application stage through compliance reviews. By 1999, OCR had replaced the investigative procedures manual with the case resolution manual. Some of the same deficiencies, however, were found in the case resolution manual. For example, it was too brief and cursory to serve as a procedural guide for compliance reviews and complaint investigations. In addition, the manual did not provide a sufficient level of comprehensive reference necessary for enforcement. OCR intended to revise and update the manual; however, it has not done so and continues to use the outdated document.

Recommendation 3.2: OCR should revise and update the case resolution manual annually to assist investigators in their enforcement work. The manual should include detailed instructions on compliance activities and data collection. It also should provide clearer instructions to recipients for implementing policy in an effective and nondiscriminatory manner.

Compliance Reviews

Pre-Award Reviews

Finding 3.3: HHS provides federal assistance to 230,000 entities. In 1996 and 1999, HHS lacked a comprehensive pre-award process that included all program applicants. As of the 1960s, only new institutional Medicare applicants and Medicare recipients that reapply for federal financial assistance because of a name or ownership change undergo pre-award reviews. These applicants and recipients include hospitals, hospices, and nursing homes. A review of written assurances and desk audits of these Medicare applicants do not inform OCR of possible discrimination in the administration of

HHS' other federally assisted programs. In addition, the number of applicants that undergo pre-award reviews is far below the number that receives funding. The small percentage of applicants that undergo pre-award reviews raises the alarming prospect that many other applicants may be discriminating, yet receiving funds. Furthermore, the pre-award reviews did not include on-site visits nor did OCR have a data collection system to collect and store useful information about applicants' administration of programs. The Commission suggested that OCR increase the pool of applicants reviewed, institute on-site visits, assign desk audits to eligible operating divisions, and collect demographic data on applicants and beneficiaries.

However, OCR has not increased the pool of applicants reviewed, instituted on-site visits, or developed a data collection system to collect and store information on applicants and beneficiaries. While some regions collect demographic information on the program's affected community, OCR has very little demographic data on applicants or applicant beneficiaries, and no information on beneficiaries that applicants reject.

Recommendation 3.3: OCR should re-engineer its pre-award process to serve as a strategy for identifying problems and corrective measures before discrimination occurs. OCR should increase the number of applicants that undergo pre-award reviews. It should conduct on-site visits of applicants as part of the pre-award review process, particularly those applicants that would be new grantees. In addition, it should require demographic information from applicants on communities and beneficiaries, and develop criteria for selecting applicants that undergo pre-award reviews.

Post-Award Reviews

Finding 3.4: OCR uses post-award reviews to identify deficiencies in program administration, allegations of barriers to program participation, and recipients' need for education and technical assistance. In 1996, the number of post-award reviews, including desk audits and on-site visits, was small relative to the number of recipients. OCR attributed the small number to a lack of resources. It implemented limited-scope reviews, which usually require fewer resources and a small number of on-site visits, to increase the number of post-award reviews. By 1999, the majority of OCR's post-award reviews were limited-scope desk audits. The Commission recommended that OCR set goals for a minimum number of full-scope reviews, which address a broad range of issues, cover at least one statute thoroughly, and include on-site visits. OCR now conducts limited- and full-scope reviews and since 2000, the number of full-scope reviews has increased significantly. However, the overall number of post-award reviews has continuously declined, from 270 in FY 1999 to 136 in FY 2002, and on-site reviews made up less than 20 percent of the reviews conducted.

Recommendation 3.4: OCR should increase the number of post-award reviews, particularly the number of on-site visits. Eligible operating divisions could perform desk-audit reviews, enabling OCR to increase the number of post-award reviews, on-site visits, and full-scope reviews.

Data Collection and Analysis

Finding 3.5: Demographic data are essential in eliminating discrimination and disparities in health care. In the 1990s, OCR did not collect a sufficient amount of racial and ethnic information. Most states and federal health agencies made minimal efforts to collect health-related data on minority groups. Apart from the Hill-Burton Act, which requires racial and ethnic data collection, OCR did not request such information from recipients until compliance investigations and reviews. It did not collect demographic data routinely to determine minority communities' access to quality health care.

The Commission recommended that HHS collect and report public health data separately for minority subgroups, and suggested formal regulations that specify elements. OCR still does not collect racial information except for the Hill-Burton Act. Similarly, it continues to collect racial and ethnic data from recipients only during compliance reviews and investigations. It will collect information on minority subgroups when compliance work involves or requires comparisons among Asian Americans and Pacific Islanders and/or Hispanics, as examples.

Recommendation 3.5: OCR should establish formal regulations that specify data elements, including (1) the race, color, or national origin of the population served; (2) data on bilingual employees who assist non-English-speaking beneficiaries; (3) demographic information on members of any planning or advisory group that is an integral part of a federally assisted program; and (4) the location of existing or proposed facilities and information on whether the location will have the effect of denying access to any person on the basis of prohibited discrimination.

Delegation

Finding 3.6: In 1996 and 1999, OCR reported deficiencies in almost every enforcement activity, including technical assistance, education and outreach, data collection, and complaint processing. The Commission suggested that OCR could delegate some enforcement responsibilities to operating divisions, enabling OCR to concentrate on compliance reviews and investigations. However, delegation of authority could not take place without the Secretary's endorsement and OCR's leadership, guidance, and instruction. The Commission also recommended that OCR develop procedures for training and guidance, and oversight mechanisms to monitor the operating divisions' enforcement. Since then, the Secretary has not issued a directive stating that OCR should share enforcement responsibilities with operating divisions, nor does OCR support such a directive. OCR believes that its organizational separation from the operating divisions allows promotion of civil rights compliance without potential conflicts or inconsistency. However, compliance reviews have not improved, and OCR shifts staff and assignments to meet some of its responsibilities.

Recommendation 3.6: The Commission restates its previous recommendation that OCR should consider delegation as a strategy to improve enforcement. With the Secretary's endorsement, OCR should establish a pilot program with a few, select operating divisions that have experience with external civil rights enforcement. OCR should delegate certain responsibilities to them and concentrate on compliance reviews and investigations. After one year, OCR should evaluate the pilot program and submit a report to the Secretary. Based on OCR's findings and recommendations, the Secretary should issue a directive to (1) make delegation a policy, (2) extend the pilot program for additional study and evaluation, or (3) discontinue the pilot program.

4. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Resources—Funding and Staffing

Finding 4.1: Despite the Commission's recommendations in 1992 and 1994 to the President and Congress to increase resources for HUD, funding remains discouraging. The budget for salaries and expenses showed scant annual increases between FY 1998 and 2001, and only began to show some improvement in FY 2002 and 2003. The Office of Fair Housing and Equal Opportunity's (FHEO) staffing status is foreboding and deserves monitoring. The FY 2003 FTE level of 758 merely exceeds that of FY 1992 by 15. Current funding and staffing levels have affected FHEO's ability to carry out

essential enforcement duties, such as performing a significant number of post-award compliance reviews. In regard to maintaining separate budgets for civil rights statutes, HUD's Total Estimation and Allocation Mechanism (TEAM), when fully implemented, will be able to track FHEO's manpower and cost for enforcement activities.

Recommendation 4.1: HUD should mount a forceful campaign to persuade the President and Congress to increase its budget such that it can fully enforce civil rights and root out housing discrimination. In addition, the Commission advises HUD to expeditiously fully implement TEAM to allow FHEO to correlate budgets with civil rights statutes and related regulatory execution to ensure that there is adequate enforcement funding.

Finding 4.2: Congress funds the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP) separately from HUD. The annual increase in funding for FHAP between FY 1998 and 2003 is small except for FY 2000. However, fair housing complaints filed with FHAP agencies have increased yearly. Over the same review period, FHIP funding decreased in FY 2001 and remained unchanged in FY 2002. Notably, the total number of fair housing complaints filed each year with the National Fair Housing Alliance, Department of Justice (DOJ), HUD, and FHAP agencies constitutes less than 1 percent of the estimated illegal incidence of housing discrimination that occurs yearly. Further, a 2001 George Washington University study on segregation concluded that one of the key reasons that persons who suffered discrimination do not take legal action is doubt that doing so will produce results. The implication of the latter two facts is that there are many persons who have suffered discrimination, but have not filed complaints because of a lack of trust in the enforcement system.

Recommendation 4.2: FHAP and FHIP's limited resources, negligibly low numbers of fair housing complaints filed, and doubt about the enforcement system on the part of persons who experienced discrimination compellingly advocate for a funding increase for these two programs. Accordingly, HUD should urge the President and Congress to improve resources for FHAP and FHIP such that they carefully carry out duties associated with complaint processing and education and outreach, respectively.

Planning and Performance Measurement

Finding 4.3: The Commission evaluated HUD's Title VI Civil Rights Implementation Plans (CRIPs) for 1990 through 1994 in its 1996 report and found them wanting. HUD should revise the Title VI CRIP according to the Department of Justice's "Guidelines on Agency Implementation Plans." The Commission also advised HUD to develop a "comprehensive civil rights enforcement plan" for all its civil rights responsibilities. This plan, it said, should be updated every three months and adjustable to increases and decreases in actual compliance activities and new or developing issues.

HUD now states that the FY 2003–2008 strategic plan incorporates CRIP and a comprehensive civil rights enforcement plan. It contains measurable indicators and timelines and identifies long-term and intermediate performance measures/indicators for each of HUD's six strategic goals. The agency Annual Performance Plan (APP) and FHEO Annual Management Plan (AMP) contain numerical criteria against which actual performance is measured. Both plans can be adjusted during the fiscal year to accommodate unexpected events, such as an emerging issue that needs priority attention. Furthermore, DOJ revised the format for its CRIP report, "Information and Reporting Requirements for Agencies Covered by Executive Order 12,250," to be effective in FY 2003. DOJ's new format does not require objectives on Title VI, depends heavily on agencies' readily accessible quantitative data,

and does not expect agencies to provide lengthy narratives. Through the revised format, DOJ seeks to capture a “snapshot” of an agency’s activities. HUD’s FY 2003 “Information and Reporting Requirements for Agencies Covered by Executive Order 12,250” responded to DOJ questions and data requests.

Recommendation 4.3: HUD should ensure that its plans include indicators that not only measure process results, such as the number of compliance reviews conducted, but mission accomplishment as well, such as eradication of discrimination in access to housing. Both types of measures are essential for determining overall progress. HUD should employ social science methodology, such as testing, experimentation, and analysis of public surveys, in evaluating mission progress.

Technical Assistance

Finding 4.4: The Commission advised HUD in 1992 that it should provide technical assistance to state and local agencies that were not already in the federal fair housing system to encourage participation. FHEO now offers ongoing technical assistance to state and local jurisdictions whose laws are not certified as significantly comparable (substantially equivalent) to Title VIII of the Civil Rights Act of 1968, as amended (the Fair Housing Act) (FHA)). Such assistance helps the agencies understand the substantial-equivalence certification process and provides opportunities to raise concerns and questions. For example, at the FY 2002 biennial National Policy Conference Forum, FHEO invited such agencies to learn more about how they could become certified.

Recommendation 4.4: FHEO should evaluate the effectiveness of all technical assistance programs designed to encourage state and local jurisdictions whose laws are not significantly comparable to FHA to pursue substantial-equivalence certification. Thus, FHEO should monitor agencies that participate in such programs to determine if they pursue certification and become certified. FHEO should also ask them to evaluate the usefulness of the technical assistance and seek feedback for improvement.

Finding 4.5: In 1996, FHEO technical assistance seminars had a limited focus on Title VI. The Commission said FHEO should train recipients and HUD civil rights staff on Title VI regularly. Today, HUD offers Title VI technical assistance based on DOJ guidance as needed to headquarters, hubs, and field staff but not in regular intervals. Technical assistance includes implications of the Civil Rights Restoration Act for funding recipients.

Recommendation 4.5: HUD should offer Title VI technical assistance to headquarters, hubs, and field staff on an established schedule, at least once a year. Moreover, HUD should conduct follow-up evaluations or seminar post-mortems and feedback sessions with staff to determine how the efforts assisted them in their work and may be improved.

Education and Outreach

Finding 4.6: HUD taps into external technological resources for education and outreach. FHEO has established partnerships with the National Fair Housing Alliance and the Ad Council to create Spanish and English radio and print advertisements to inform members of the public about their fair housing rights and responsibilities. A second advertisement on predatory lending is under production. Fair Housing Accessibility FIRST, a HUD-sponsored initiative to promote compliance with FHA design and construction requirements, provides materials online and offers telephone or online assistance to persons with questions about constructing multifamily housing that is accessible to persons with dis-

abilities. This initiative began in FY 2002 and is ongoing. FHEO and its partners, however, do not formally evaluate the effectiveness of these efforts and collect feedback to help them determine how to improve.

Recommendation 4.6: HUD should develop a rigorous evaluation program. For every education and outreach program HUD and its partners also should establish goals as well as develop measurable indicators against which actual results may be compared to determine progress. Further, they should obtain feedback from targeted groups to re-tool the education and outreach programs where necessary.

Finding 4.7: The underreporting of fair housing complaints as reported in Finding 4.3 also has implications for HUD's education and outreach. It points to the need for extensive, systematic, sustained, and culturally sensitive education and outreach throughout the nation.

Recommendation 4.7: HUD should establish an adequately funded and staffed Office of Education and Outreach at FHEO headquarters to coordinate all education and outreach activities. Part of the education and outreach efforts should be to improve confidence in the federal enforcement system to encourage persons who experienced housing discrimination to file complaints. Working with headquarters, hub, and field offices, this office should establish education and outreach goals and evaluate success.

Certification of State and Local Fair Housing Agencies

Finding 4.8: HUD has only 98 FHAP agencies eligible to process federal fair housing complaints nearly 15 years after FHA became operational; of these, 31 percent are still in interim status. HUD now should have at least 122 fully certified FHAP agencies, the number Congress grandfathered in the federal fair housing system in 1988 when it signed FHA into law. Moreover, HUD does not compile or maintain lists of all noncertified state and local fair housing agencies in the United States. Such lists would allow HUD to contact and encourage certification and increase the number of substantially equivalent agencies that can help process fair housing complaints.

Recommendation: 4.8: HUD should vastly increase the number of certified FHAP agencies for civil rights enforcement. The agency should use the Internet, directories, conference exhibits, and other sources to identify all state and local fair housing agencies that do not have HUD certification. Through education and outreach efforts, and certification-eligibility training, HUD should encourage and help them to seek certification.

Complaint Processing

Finding 4.9: The Commission's 1994 report showed that the secretary-initiated complaint was an underutilized tool in eradicating housing discrimination. The Commission said that HUD should develop secretary-initiated complaints, issue guidance or regulations detailing the subjects appropriate for such complaints, and increase substantially the staff and resources for this purpose.

Today, the secretary-initiated complaint remains an underused tool. The Secretary, through the FHEO assistant secretary, filed only four such complaints in the six years between FY 1998 and 2003. Furthermore, HUD eliminated separate funding and staff for secretary-initiated complaints, thus signaling that the activity was a low priority. The FHEO assistant secretary has endorsed a systemic investigation unit pending the HUD Secretary's approval.

Recommendation 4.9: HUD should expeditiously reinstate separate funding and staff for secretary-initiated complaints. Moreover, it should without delay increase use of secretary-initiated complaints and issue guidance or regulations detailing the subjects appropriate for such complaints. The systemic investigation unit is a step in the right direction. The HUD Secretary should approve and fund it adequately for implementation in FY 2005. If the systemic investigation unit is approved, HUD should ensure annual evaluation to determine whether it is serving its purpose.

Finding 4.10: For a vast majority of fair housing cases, HUD did not make a determination of cause or no cause within the 100-day congressional benchmark. The Commission advised HUD in its 1994 report to re-examine procedures and appropriately institute new ones to ensure timely complaint processing without loss of quality.

HUD states in 2004 that the average age of its open cases in FY 2003 is 143 days. However, about 30.0 percent of the open cases are aged more than 100 days and of those, the average age is 400 days. The average age of FHAP's open cases is 165 days, 44.7 percent of which are aged; and the average age of aged cases is 317 days.

Recommendation 4.10: The HUD Secretary should provide resources to FHEO and FHAP agencies to hire and train qualified and experienced contract workers to reduce the backlog of aged cases. This would allow FHEO and FHAP agencies to pay sufficient attention to new cases so that they do not suffer the same fate.

Finding 4.11: In 1994, the Commission reported wide variation in the methods regional offices used in case management. Now FHEO makes numerous efforts to reduce such variation. It established standard procedures in staff handbooks. OGC regularly issues memoranda to regional counsel specifying changes in internal procedures for referencing FHA cases. OGC headquarters Office of Fair Housing Enforcement Division assigns desk officers to assist specific regional counsel offices. Moreover, OGC offers training to all fair housing attorneys and makes available current information on FHA enforcement policies and procedures.

Recommendation 4.11: FHEO should now assess if wide methodological variation in case management in regional offices is still a problem. It could enlist the help of audit teams for this purpose. Furthermore, it should obtain feedback from regional offices to determine which of the above approaches for reducing methodological variation in case management is most effective and to make improvement.

Compliance Reviews

Finding 4.12: Post-award compliance reviews are a key component of civil rights enforcement and as such needed to be carried out consistently and effectively to ensure nondiscrimination. The Commission established in 1996 that the number of compliance reviews FHEO conducted varied considerably from year to year. Moreover, the number of Title VI compliance reviews conducted was small compared with the number of HUD funding recipients. Consequently, the Commission advised HUD to conduct compliance reviews of all grant recipients on a rotating basis, at least once every three years.

HUD says it gives grants to more than 40,000 agencies that help it to assist the public with housing problems. It states that current staffing and funding are inadequate to support the level of post-award on-site compliance reviews it should perform on a rotating triennial basis. Instead of reaching this standard for all recipients, HUD selects Public Housing Agencies and a small select number of recipients in each hub.

Recommendation 4.12: The Commission reiterates its 1996 recommendation that FHEO take action to reach the standard of conducting compliance reviews of all grant recipients on a rotating basis, at least once every three years. The HUD Secretary should ensure FHEO has resources to reach this standard.

Finding 4.13: FHEO developed the Risk Analysis Data Management System that is implemented in all FHEO field offices for determining recipients' civil rights-related risk potential. Recipients identified as high risk require either on-site program monitoring or compliance reviews under Title VI or other civil rights statutes; recipients identified as moderate may also be monitored on site, depending on travel and staff resources.

Recommendation 4.13: The Commission commends HUD for developing and implementing the Risk Analysis Data Management System. Other civil rights federal investigations unit agencies should review this system and create similar ones where appropriate.

Staff Training

Finding 4.14: The Commission has advised HUD to improve staff training since 1992. Its 1992 report stated that headquarters and field staff tasked to assist state and local agencies seeking certification of substantial equivalency and to instruct such agencies on the federal requirements for complaint processing did not have the necessary training. By the time the Commission issued its 1994 report, training for FHEO staff improved but was sporadic and uneven, with a training budget that varied enormously from year to year. The Commission therefore recommended that HUD implement a comprehensive approach to training new and continuing FHEO staff that included clearly defined training goals and adequate budgets.

From 1997 to the present, extreme fluctuations in FHA enforcement funding levels prevented FHEO from implementing a comprehensive approach to FHA training for new and continuing FHEO staff. Beginning in May 2004, HUD's Fair Housing Training Academy (FHTA) plans to offer continuing professional fair housing training and certification for FHAP agency staff for the first time. FHTA certification signifies nationally recognized and respected credentials for fair housing enforcement and investigation.

Recommendation 4.14: The Commission recommends that the HUD Secretary also provide continuing professional fair housing training and certification for current and future FHEO enforcement staff so that they too have the opportunity acquire FHTA certification. This would allow HUD to have fair housing enforcement and investigative staff with nationally recognized and respected credentials. HUD should consider using FHTA for all appropriate staff training. Senior FHEO enforcement staff could collaborate with FHTA to develop pertinent curricula and training goals, serve on instructional teams along with outside experts, and assess training results.

Statement of Commissioner Jennifer C. Braceras

On July 16, 2004, I voted against the report, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume IV*, for the following reasons:

As previously noted in published statements dissenting from earlier volumes in this series, I have serious reservations as to the scope and methodology used to prepare this entire series of reports.

I continue to have concerns about the check-list developed in Volume I that serves as the framework for all subsequent volumes. In particular, I continue to object to the check-list's call for extensive involvement by outside special-interest groups in the development and enforcement of federal civil rights policy.

Moreover, I remain concerned about the Commission's emphasis on "inputs" rather than "outputs" in evaluating the effectiveness of federal civil rights agencies. In this volume, the Commission continues to emphasize budget and staffing levels as measures of civil rights enforcement success. For example, in the introductory section to Chapter 6, the report states that the Department of Education's Office for Civil Rights has experienced a 6 percent reduction in full-time equivalent staff. Although the agency reported that the vacancies did *not* hinder its abilities to fulfill its mission and responsibilities, the Commission report treats the reduction in staff as a "problem." Instead of focusing on the number of FTEs and dollars spent by civil rights divisions, the Commission should limit the scope of its review to examining the productivity of these divisions and their level of success in reducing, deterring, and punishing discrimination.

More globally, I wish to note that I object to the underlying premise of this entire project. This series of reports examines whether and how agencies have adopted previous recommendations of this Commission, many of which I believe to be unsound. Because I disagree with many of the underlying recommendations advanced by this Commission in previous reports, I cannot endorse a report that seeks to hold agencies responsible for implementing those recommendations.

Accordingly, I respectfully dissent.

Commissioner Jennifer C. Braceras

July 31, 2004