

al claim against Commissioner O'Neill, I will not retain pendent jurisdiction over the state claims asserted against him. See *Al-dinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976).

(2) All federal claims against the City of Philadelphia, with the exception of those brought under 42 U.S.C. § 1981, will be dismissed. Pendent jurisdiction will continue to provide a basis for the various state law claims against the City.

(3) As against the individual officers, the motion to dismiss will be denied in its entirety.



**NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, Puerto Rican Civil Rights League,
Inc., Older Americans Coalition, Wil-
mington United Neighborhoods, Bran-
dywine Trinity United Methodist
Church, Raymond W. Brown, Maria Gal-
indez, for herself and as parent and
guardian for her minor children Reynal-
do Galindez and Pedro Galindez, Milag-
ro Quinones, Denise Smokes, Maria Mi-
ran, on behalf of themselves and others
similarly situated, and City of Wilming-
ton, a Municipal Corporation, Plaintiffs,**

v.

**The WILMINGTON MEDICAL CENTER,
INC., Defendant.**

Civ. A. No. 76-298.

United States District Court,
D. Delaware.

May 13, 1980.

A number of civil rights groups brought suit challenging a medical center's plan to relocate a portion of its urban hospital facilities to a suburban location. The District Court, Latchum, Chief Judge, held

that medical center's plan to relocate portion of urban hospital facilities to suburban location, as modified by supplemental agreement with Department of Health, Education and Welfare, would improve delivery of health care for everyone without any substantial discriminatory effects upon minorities, the handicapped or the elderly; plaintiffs, a number of civil rights groups which claimed that the new location would make it harder for minority group members to obtain services and to obtain employment at the hospital, failed in all respects to show a violation of Title VI, Rehabilitation Act or Age Discrimination Act.

Judgment in favor of defendant on all claims.

1. Civil Rights ⇐43

Under impact test for determining whether a prima facie case of a violation of Title VI has been established, plaintiff, who has ultimate burden of proof, bears burden of going forward with evidence proving discriminatory effect and upon meeting such burden, burden of going forward shifts to defendant to prove or to articulate a non-discriminatory justification for the challenged actions. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

2. Civil Rights ⇐13.13(1), 43

In order to rebut a prima facie case of discrimination under Fourteenth Amendment, a compelling interest must be shown while, under Title VII, defendant must show a business necessity and under Title VIII, a defendant must show a legitimate bona fide interest which can be served by no less discriminatory alternative. U.S.C.A. Const. Amend. 14; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

3. Civil Rights ⇐43

In order to rebut a prima facie case under Title VI, medical center was required to go forward with evidence that its plan to relocate portion of urban hospital facilities to suburban location would in theory and practice serve a legitimate bona

fide interest of medical center and was required to show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact and once medical center produced some evidence showing that other alternatives would not adequately meet its needs, plaintiffs were required to rebut by showing and proving that the needs asserted were only pretexts or that some less discriminatory alternative would meet those needs as well or better than the challenged action. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

4. Labor Relations ⇐20.10

In a private cause of action under Age Discrimination Act, defendant has only the burden of going forward. Age Discrimination Act of 1975, § 302 et seq., 42 U.S.C.A. § 6101 et seq.

5. Statutes ⇐219(1)

Great deference should be afforded interpretation given to a statute by officers or agency charged with its administration and that interpretation should be followed unless unreasonable.

6. Labor Relations ⇐20.10

Where a defendant in a suit under Age Discrimination Act actually adduces some evidence showing that he based his action upon a nonage-related factor that meets criteria set out in the Act and regulations, he need not also adduce evidence showing that his action was the least discriminatory alternative. Age Discrimination Act of 1975, § 302 et seq., 42 U.S.C.A. § 6101 et seq.

7. United States ⇐82(2)

Section of Rehabilitation Act prohibiting discrimination against the handicapped by recipients of federal funds requires recipients of federal funds to take affirmative action to make their programs equally accessible to the handicapped as well as forbidding them from taking actions which will have disparate adverse effect upon the handicapped and failure to comply with either requirement constitutes a prima facie violation of that section. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

8. Hospitals ⇐3

Medical center's plan to relocate portion of urban hospital facilities to suburban location, as modified by supplemental agreement with Department of Health, Education and Welfare, would improve delivery of health care for everyone without any substantial discriminatory effects upon minorities, the handicapped or the elderly; plaintiffs, a number of civil rights groups which claimed that the new location would make it harder for minority group members to obtain services and to obtain employment at the hospital, failed in all respects to show a violation of Title VI, Rehabilitation Act or Age Discrimination Act. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Age Discrimination Act of 1975, § 303, 42 U.S.C.A. § 6102.

Douglas A. Shachtman of Community Legal Aid Society, Inc., Wilmington, Del., Marilyn G. Rose and Sanford Newman, Center for Law and Social Policy, Washington, D. C., for all plaintiffs, except the City of Wilmington.

Jeffrey S. Goddess and Jerome M. Capone of City of Wilmington Law Dept., Wilmington, Del., for plaintiff City of Wilmington.

Rodney M. Layton and William J. Wade of Richards, Layton & Finger, Wilmington, Del., for defendant Wilmington Medical Center, Inc.

OPINION

LATCHUM, Chief Judge.

Once again this Court is called upon to consider the legality of "Plan Omega," the controversial proposal of the defendant Wilmington Medical Center, Inc. ("WMC") to relocate a major portion of its urban hospital facilities and services to a suburban location. The case has been in active litigation before this Court and the Court of Appeals for more than three and a half

years and thus far has spawned eight reported opinions.¹

In order to understand the issues presently before the Court it is necessary first to review the procedural history of this bitterly contested action.

I. PROCEDURAL HISTORY

Certain black, Puerto Rican and handicapped individuals, and groups representing similar persons (the "plaintiffs") commenced this action on September 10, 1976, naming as defendants WMC, the Secretary of the Department of Health, Education and Welfare ("HEW"), the Director of the [Delaware] Bureau of Comprehensive Health Planning ("BCHP"), and the Chairman of Health Planning Council, Inc. ("HPC"). The gravamen of the original complaint against WMC claimed that it, as a recipient of federal funds under the medicare and medicaid programs, had violated its obligations to the plaintiffs, beneficiaries of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, by commencing to implement Plan Omega.² In addition, plaintiffs alleged that HEW had violated its duty to enforce Title VI and Section 504: (1) by approving Plan Omega under Section 1122 of the Social Security Act, 42 U.S.C. § 1320a-1 ("Section 1122"); (2) by approving regulations thereunder which failed to require that a proposal under Section 1122 comply with Title VI and Section 504; (3) by entering into an agreement with BCHP which failed to ensure that proposals under Section 1122 comply with Title VI and Section 504; (4) by adopting a procedure which prohibited

HEW review of Section 1122 proposals for substantive compliance with Title VI and Section 504; (5) by following such an allegedly improper procedure in approving Plan Omega; and (6) by failing to file an environmental impact statement concerning Plan Omega under the National Environmental Protection Act of 1969, 42 U.S.C. § 4321 *et seq.* (the "NEPA claim").³ Finally, the complaint charged that BCHP and HPC had violated Title VI and Section 504 by not adopting procedures to ensure that proposals under Section 1122 comply with Title VI and Section 504 and by making findings and recommending approval of Plan Omega.⁴

This Court subsequently stayed its actions on the complaint and ordered HEW to conduct a civil rights investigation of plaintiffs' allegations. 426 F.Supp. 919 (D.Del. 1977). That investigation led to a finding that Plan Omega, as then proposed, constituted a *prima facie* violation of Title VI and Section 504.⁵ HEW also found, however, that, by giving written assurances in certain areas, WMC could bring Plan Omega into compliance with Title VI and Section 504. Consequently, after negotiations between HEW and WMC, the parties entered into a contract drafted in open-ended, normative language which obligated WMC to modify and supplement those particular features which HEW had determined would otherwise have a *prima facie* discriminatory effect (the "Supplemental Agreement").⁶

In an opinion filed on April 7, 1978, this Court reviewed HEW's findings and held that HEW's conclusion, that Plan Omega as modified by the Supplemental Agreement, would not violate Title VI or Section 504,

was affirmed by the Third Circuit Court of Appeals in *NAACP v. WMC, Inc.*, 584 F.2d 619 (C.A.3, 1978).

1. *NAACP v. WMC*, 426 F.Supp. 919 (D.Del. 1977); *NAACP v. WMC*, 436 F.Supp. 1194 (D.Del.1977), *aff'd* 584 F.2d 619 (C.A.3, 1978); *NAACP v. WMC*, 453 F.Supp. 280 (D.Del.1978), *rev'd in part* 599 F.2d 1247 (C.A.3, 1979); *NAACP v. WMC*, 453 F.Supp. 330 (D.Del. 1978); *Wilmington United Neighborhoods v. H.E.W.*, 458 F.Supp. 628 (D.Del.1978), *aff'd* 615 F.2d 112 (C.A.3, 1980).

2. Docket Item ("D.I.") 1.

3. This Court granted summary judgment in favor of HEW on the NEPA claim, *NAACP v. WMC, Inc.*, 436 F.Supp. 1194 (D.Del.1977) and

4. D.I. 1, ¶ 30.

5. D.I. 1, ¶ 31.

6. D.I. 124.

7. Plaintiff Exhibit ("PX") 2. Plan Omega and the Supplemental Agreement are described in greater detail *infra*.

was not arbitrary and capricious. *NAACP v. WMC, Inc.*, 453 F.Supp. 280 (D.Del.1978). This Court further held that the plaintiffs had no right to bring a private action under those statutes and granted summary judgment in favor of the defendants, HEW and WMC.⁸ Plaintiffs appealed that decision and the Court of Appeals reversed in part, holding that the plaintiffs did have a private right to a trial *de novo* in this Court on their Title VI and Section 504 claims. *NAACP v. WMC, Inc.*, 599 F.2d 1247 (C.A.3, 1979). The Court of Appeals therefore remanded the case to this Court for a trial on the merits.

Following remand, this Court, in accordance with the mandate of the Third Circuit, dismissed HEW from this action for the purposes of the trial on plaintiffs' private right of action.⁹ BCHP, HPC and their respective directors were dismissed from this action by agreement of all parties by court order dated July 17, 1979.¹⁰

On September 4, 1979, this Court granted plaintiffs leave to file a Third Amended and Supplemental Complaint.¹¹ This amendment added the City of Wilmington as a party plaintiff and struck those paragraphs relating to HEW in the complaint. Also added were allegations of violations of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 ("Section 6102" claim)¹² and an allegation charging WMC with "intending" the discriminatory consequences alleged under all three civil rights acts.

8. On June 21, 1978, this Court handed down another opinion, *NAACP v. WMC, Inc.*, 453 F.Supp. 330 (D.Del.1978), which rejected the plaintiffs' claims that HEW's failure to provide the plaintiffs a hearing during its administrative investigation of possible Title VI and Section 504 violations contravened the due process clause of the Fifth Amendment. These due process claims had first been raised by the plaintiffs in their second amended complaint, filed November 22, 1977. (D.I. 197). Although both the June 21 and the April 7 opinions were appealed to the Third Circuit together, the Court of Appeals, because of its finding that the plaintiffs had a right to a trial *de novo* under Title VI and Section 504, found it unnecessary to decide the due process issue.

In a later opinion, handed down in a different but related action, this Court also rejected vari-

The trial to the Court sitting without a jury commenced on October 9, 1979, and concluded on November 15, 1979. Some 28 witnesses testified for plaintiffs in their case in chief, 18 witnesses testified for WMC in its case in chief, 3 witnesses testified for plaintiffs in rebuttal, and 4 witnesses testified for WMC on surrebuttal. The trial transcript consists of 3,349 pages of testimony. Over 400 exhibits were introduced into evidence. Post-trial briefing¹³ was completed on January 24, 1980, and the case is now ready for final disposition.

This opinion shall constitute the Court's findings of fact and conclusions of law as required by Rule 52(a), F.R.Civ.P.

II. FACTS

The Court finds itself unwillingly cast by this litigation into the role of a modern day Nostradamus. The Court is not being asked to perform those traditional tasks for which courts have a special competence—the determination of facts relating to actual events which have occurred in the past. Rather, the Court is required to prophesy the consequences of events which may or may not occur in the future. Lacking a crystal ball or any other reliable talismanic symbol, the Court must look to the facts as they exist today, the modified plans of WMC, and the conflicting judgments of the medical and social experts who testified at trial in an attempt to pierce the mists that obscure future events.

ous challenges mounted against HEW's approval of Omega under Section 1122. *Wilmington United Neighborhoods v. United States*, 458 F.Supp. 628 (D.Del.1978), *aff'd*, 615 F.2d 112 (C.A.3, 1980).

9. D.I. 293.

10. D.I. 294.

11. D.I. 343.

12. While not deciding the issue, the Court will assume for the purposes of this decision that the plaintiffs may bring a private cause of action under Section 6102.

13. The parties submitted briefs totaling 486 pages. (D.I. 408, 410 & 414).

The Court will begin its prognostications with a description of the present demographic characteristics of New Castle County and the role played by WMC in providing health care today. One must look at this actual world in order to determine first how Plan Omega would differ from the present and, second, what impacts those possible differences might have on the various minorities who are protected by the statutes invoked by the plaintiffs in this case.

A. WMC And Its Role In Providing Health Care

WMC is the major provider of hospital care services to the people of New Castle County. This privately owned, non-profit corporation has a capacity of 1104 of the 1471 non-profit, acute general hospital beds in New Castle County. That number represents 55% of similar beds in the entire State. In addition, it includes a 60 bed rehabilitation center in New Castle County ("Pelleport") which will not be affected by Plan Omega.¹⁴ Acute hospital care is provided at three "divisions" of WMC—the General, Memorial and Delaware Divisions. All three divisions are located in different areas of the City of Wilmington¹⁵ and are well served by bus routes which run throughout the heavily populated portions of the County.¹⁶ WMC provides both general medical and surgical services and secondary and tertiary hospital care.¹⁷ Many of the latter types of services are provided exclusively by WMC.¹⁸ Indeed, WMC is the

sole provider of tertiary hospital care in the State of Delaware.¹⁹

WMC was organized in 1965 through the merger of three non-profit hospitals—Wilmington General, Memorial and Delaware Hospitals. These three hospitals currently constitute the three divisions of WMC. Two primary reasons prompted the merger: (1) to reduce the duplication of facilities and concentrate hospital care available to the community, and (2) to provide the scope of clinical experience to attract the support of a major teaching university toward a resident program. By 1965, the intern and resident programs at the three independent hospitals had reached a crises point. The programs needed strengthening in order to attract residents who would become physicians and serve in the state and community.²⁰ These objectives were perceived, and are still perceived, by the doctors on WMC's staff as being best served by placing all the medical and surgical services under one roof. The goal of physical consolidation of all health care services was viewed by the staff in 1965, and at present, as the best method for providing first class hospital care for the residents of New Castle County.²¹

Although the major provider of hospital care, WMC is by no means the only provider of such care to county residents. St. Francis Hospital maintains between 250 to 300 hospitals beds and Riverside Hospital, an Osteopathic facility, operates with a 100 bed capacity.²² Both of these facilities are lo-

14. PX 1, p. 6-7.

15. The locations of the three divisions are shown on the map, PX 299.

16. See, Map, PX 305.

17. General medical and general surgical services are the usual medical and surgical services required by mankind, such as the repair of a hernia, a tonsillectomy, or treatment of disease, such as pneumonia, which cannot be treated on an ambulatory or outpatient basis. Secondary and tertiary care involves more specialized and often more capital intensive services, such as intensive care and coronary care units. (Trial Transcript ("Tr") 674-675).

18. PX 1.

19. Tr. 1205.

20. PX 1, p. 6-7; Tr. 1141, 1385-1387.

21. Tr. 1212, 1375, 1449 *et seq.*, 2325.

22. In 1976, St. Francis was a 267 bed hospital and Riverside was a 100 bed hospital. (PX 1, p. 6-2). At that time St. Francis had undertaken an expansion program and planned to have 293 beds in service in 1980. (PX 1, p. 6-2).

The Veterans' Administration Hospital, located at Elsmere, Delaware, just outside the corporate limits of Wilmington, also provides hospital services, but since it serves restricted population groups, it should not be considered in an analysis of the health care available to the

cated in Wilmington. The result of this concentration is that Wilmington has more beds than would be desirable under national standards and the rapidly growing southwestern portion of the County around Newark, Delaware, is grossly underserved.²³ The Newark area is presently served only by an emergency room. The need for hospital facilities in the vicinity of Newark is widely recognized²⁴ and the Delaware Health Planning Council has recommended that hospital beds be provided to serve that area.²⁵

Although the services provided by St. Francis, Riverside, and WMC are not the same, the quality of physicians that are available at all three hospitals is roughly equivalent. A majority of WMC's staff have privileges at St. Francis²⁶ while as many as 60 to 70 WMC physicians are on the consulting staff of Riverside.²⁷ Riverside is also a teaching hospital qualified by the American Osteopathic Association.²⁸

While WMC is, in a sense, one of three operational hospitals in New Castle County, the role played by WMC as a health care provider is quite different from the other two hospitals. All three hospitals provide general medical, surgical and pediatrics services.²⁹ However, WMC is almost the sole provider of obstetrical services. Riverside has only 2 OB beds³⁰ and St. Francis

has closed its OB unit. WMC is the only provider of many aspects of tertiary hospital care; certain advanced medical treatment facilities, such as x-ray therapy, cobalt therapy, radium therapy, therapeutic radioscopy, and inpatient renal dialysis facilities, are provided only at WMC.³¹ Certain subspecialties of medicine are almost exclusively available at WMC.³²

WMC is the only hospital in the County with a teaching program recognized by the American Medical Association. Because the potential effect of Omega upon the quality and operation of this teaching program has become a major issue in this case, the Court will describe that program at some length.

The witnesses at trial unanimously agreed that continuance of WMC's teaching program was essential to its maintenance of a high quality system of health care to the County and State.³³ First, lacking a medical school, Delaware has traditionally depended upon out-of-state physicians for its quota of doctors. WMC's student and residency program has been one of the primary means of attracting medical students to become physicians to serve the State and the community.³⁴ Even more important, WMC's residency program is absolutely essential to enable WMC to provide the best

whole population of New Castle County. (PX 323, p. 94).

23. PX 1, p. 6-10; PX 323.

24. This need was noted at trial by Newark residents (Tr. 1767-1773), WMC staff members (Tr. 1142-1143, 1165-1168), and by members of WMC's board of directors (Tr. 1406, 1408, 1548).

25. Defendant Exhibit ("DX") 6.

26. Tr. 1166-1167, 1202, 2217.

27. Tr. 1166-1167.

28. PX 1, p. 6-3.

29. PX 1, p. 1-4; PX 323, p. 201.

30. Riverside is served by WMC obstetricians. (Tr. 1149-1150; PX 1, p. 4-1; PX 323, p. 174).

31. PX 1, p. 6-4. St. Francis and Riverside do have some tertiary care capabilities. For example, both have intensive care units ("ICU") and intensive cardiac care units.

32. A discussion of these subspecialties will be undertaken later when the division of services is reviewed under Plan Omega. Only those subspecialties that will be moved to the Southwest site will have an effect on care.

33. PX 1, pp. 6-2-6-3.

34. PX 1, p. 6-7; Tr. 1141, 1385-1387.

medical care possible for its patients.³⁵ Indeed, without that program, WMC's ability to function as a tertiary care institution would be seriously impaired. Residents are needed to supervise the care of patients whose lives are dependent upon artificial life support equipment. WMC would be unable to maintain facilities such as the surgical ICU or to support highly sophisticated medical procedures such as those performed by the trauma team without a residency program.³⁶ Furthermore, without the 142 residents it now has, WMC would be unable to provide many health care services for lack of an adequate staff.³⁷ For example, residents staff the outpatient clinics where a great deal of primary care is provided to indigent and semi-indigent people.³⁸ In fact, practically all the services are staffed by residents.

While engaged in a residency, a resident, as an integral part of his medical education and training, will rotate among the various services attending to different types of medical problems and patients. These rotations follow variable schedules so that residents will serve at various times on different floors among the four hospitals that make up WMC.³⁹ As a result, residents are exposed to varied educational experiences and WMC obtains an essential staff. For instance, a second or third year pediatrics resident is always assigned to the Emergency Room to aid its staff in making the often difficult pediatric diagnosis.⁴⁰

WMC has both residents and medical students from The Thomas Jefferson Medical School in Philadelphia in its educational program. Medical students require a great

deal of supervision but as the student progresses and proves his or her ability to handle responsibility less and less supervision is required.⁴¹ At the clinics and on night duty residents frequently attend patients without staff physicians even being present. Naturally, if a complicated problem arises, the resident may consult with a fully trained board certified physician.⁴² Supervision of residents and medical students by board certified physicians is essential to the ability of these doctors-in-training to deliver quality care. As a general proposition inadequately supervised students and residents will undergo an inferior educational experience and deliver an inferior quality of health care.⁴³

WMC also differs from the other hospitals in New Castle County in the amount of free care which it provides. It is the largest provider of free care in the County to those who are both unable to pay for care themselves and unable to qualify for government assistance. To this end, WMC spends approximately \$8,000,000 a year, a figure which represents 9.2% of all patient care provided by the institution.⁴⁴ This care is subsidized entirely from endowment funds and funds which are derived from higher rates that are charged to paying patients and their private insurers. Partly as a result of this subsidization, WMC's hospital rates are the highest in the State of Delaware.⁴⁵

WMC is also unique in the type and scope of outpatient services which it provides, in particular, its clinics. WMC provides both primary care clinics and certain specialty clinics. The primary care clinics, which

35. Tr. 1228-1229, 2325, 1386-1387.

36. Tr. 1230. A trauma team is a group of highly trained medical specialists who are available 24 hours a day to provide immediate care for patients who have suffered massive trauma. (Tr. 2236-2238).

37. Tr. 1387.

38. Tr. 1925-1927.

39. Tr. 1936-1939, 2628 *et seq.*

40. Tr. 2313-2318.

41. Tr. 1926-1929.

42. Tr. 1928-1930, 1955-1960.

43. Tr. 896-911.

44. Tr. 1374, 2719.

45. Tr. 2723. Medicare and Medicaid will not reimburse WMC for any portion of its fees which may be due to the subsidization of free care. Thus, the entire burden of free care falls upon paying patients and WMC's endowment funds. (Tr. 2719-2720).

WMC maintains in all major medical specialties, along with the Emergency Room, are used by the poor in much the same way as more affluent people use the services of a private physician.⁴⁶ Given the importance of primary care as a means of detecting an illness in its early stages or preventing an illness from occurring, if the clinics offer a poorer quality of care under Omega or if their organization is changed so as to discourage their use (if "barriers" arise), the quality of the health of the poor in general, and minorities in particular, may very well suffer. WMC maintains a second type of clinic, its specialty clinics.⁴⁷ These clinics are used by all socio-economic classes. Patients are referred to a specialty clinic by their primary care physicians. These clinics often require sophisticated equipment for diagnosis and treatment.⁴⁸

WMC's ability to provide all of the services just discussed is hampered at the present time by an inadequate physical plant. The numerous inadequacies of that plant threaten both the Center's ability to continue its all-important educational program and its ability to maintain in the future the high quality of care which it presently delivers. The fragmentation of programs which is caused by the physical dispersal of the hospital has a present adverse effect both upon patient care and upon the teaching program. Because a whole patient is treated and not a specific organ, it is important to have specialists trained in the diagnosis and treatment of the ailments of all parts of the body available at the site where care is rendered. Similarly, interaction with physicians and residents in other specialties is important for the education of residents.⁴⁹ The fact that WMC presently has its services split among three buildings reduces this type of interac-

tion. For these reasons, the staff and all who expressed an opinion on the matter agreed that the optimal situation would be a hospital under one roof.⁵⁰

WMC's present buildings also lack research facilities and adequate conference space. Both are necessary for a high quality residency program. The lack of research facilities has caused WMC's surgical residency program to be put on probation by its accrediting body.⁵¹

Finally, WMC's physical facilities are aging and in various states of disrepair.⁵² Moreover, because of changes in hospital standards that have occurred since the buildings were constructed, the facilities are presently not in compliance with the State's hospital licensing law.⁵³ The poor state of WMC's buildings has hampered the hospital's ability to recruit high quality residents.⁵⁴ However, the most serious problem posed for WMC by its deteriorating facilities is the possibility that they could cause it to lose its accreditation. On the last two occasions that WMC was evaluated by the Joint Commission on Accreditation of Hospitals, it received only one year "probational" accreditations. It has not been granted full accreditation because of various deficiencies in the hospitals' physical plants. If WMC should receive three one-year accreditations in succession, it would be reviewed intensively to determine whether it should lose its accreditation entirely. If WMC were to lose its accreditation, the AMA would no longer qualify its educational program. Loss of AMA qualification would effectively destroy that program. Loss of accreditation could also result in a loss of Medicare and Medicaid funds.⁵⁵ A loss of these funds would effectively destroy WMC financially. In 1975,

46. Tr. 670-672.

47. Tr. 723-733, 857 et seq., 2273.

48. Tr. 671-672, 2133-2137.

49. Tr. 684 et seq., 1939.

50. Tr. 684-688, 1205, 1210, 1382-1384, 2158-2159, 2325-2328.

51. Tr. 2209-2212.

52. Tr. 1607-1609.

53. Tr. 1745.

54. Tr. 1943-1945, 2208-2209.

55. Tr. 1376-1377, 1686-1692; DX 15; DX 15A.

\$19.4 million, 38% of WMC's income, was derived from Medicare and Medicaid.⁵⁶

Thus, WMC is presently under the compulsion of both law and necessity to bring its three major divisions into compliance with various code standards. The estimated cost of doing so in 1976 was in excess of \$20 million. These renovations would also cause WMC's bed capacity to be reduced by 200 beds. WMC would consequently lose any associated revenues.⁵⁷ Moreover, without the construction of any new facilities, the community would suffer a shortage of acute care hospital beds. All this would be required to maintain the wholly unsatisfactory three-roof situation.

B. Plan Omega

1. Division of services

Under Plan Omega, two of WMC's deteriorated facilities, the General Division and the Memorial Division, will be closed entirely. The Delaware Division will be reduced from its present 480 beds to 250 beds.⁵⁸ This reduction in capacity will be due almost entirely to the elimination of "non-conforming" beds and the use of that space for other functions, such as administrative office space. Finally, a new 780 bed hospital will be built on a site south of Stanton, Delaware ("Southwest Division" or "Stanton Division"),⁵⁹ located 9.35 miles southwest of the Delaware Division.⁶⁰ The site is located in a rural area with virtually no population living within a mile of it. It is

presently served by neither bus routes nor any other form of mass transportation. A representative of the Delaware Area Regional Transportation Authority ("DART") testified that DART has no present plans to establish bus routes to the site even if a hospital were built there.⁶¹

Omega involves more than simply closing beds in the city and moving them to the suburbs. Some major hospital services will be located exclusively at Stanton while others will be located exclusively at the Delaware Division.⁶² Included among the inpatient services which will be located exclusively at the Southwest Division are all obstetrical, gynecological, and pediatric services,⁶³ certain subspecialties of medicine such as oncology, gastroenterology, nephrology, and neurology,⁶⁴ and certain subspecialties of surgery such as neurosurgery, orthopedic surgery, and thoracic surgery.⁶⁵ Some clinic, outpatient, and support services will also be located exclusively at Stanton, including the high-risk prenatal and specialty pediatric and gynecological clinics, and the specialty cardiac, radiation therapy and hemodialysis support services.⁶⁶ The Delaware Division will exclusively house the psychiatry, ear, eye, and nose, and dentistry specialties. The primary care clinics will be consolidated and located exclusively at the Delaware Division.⁶⁷ Thus, with the exception of the few lightly utilized specialty clinics mentioned earlier, all clinics will be located at the Delaware Division.

56. D.I. 311, ¶ 15; D.I. 356, ¶ 15.

57. PX 1, pp. 6-11-6-12.

58. Since the number of beds varies in different documents, all numbers are approximations. Planning on Omega has gone into limbo during the pendency of this litigation. Consequently, no plans or estimates are final.

59. PX 1; PX 2. For the location of the Southwest Division, see PX 299.

60. PX 54g, p. 138.

61. Tr. 918-920. However, if significant demand should arise after the construction of the hospital, DART would study the feasibility of establishing bus lines to and from the site. *Id.*

62. The actual division of services has been set out in an earlier opinion. *NAACP v. WMC, Inc.*, 453 F.Supp. 280, 286-87, n.14 (D.Del. 1978). Only a brief overview of the division of services will be given here.

63. PX 24c; PX 2, Appendix A, pp. 4-5. Actually, as noted below, two pediatric holding beds will be maintained at the Delaware Division as well as equipment capable of handling emergency treatment of all specialties.

64. PX 2, Appendix A, p. 4.

65. PX 2, Appendix A, p. 5.

66. PX 24c.

67. PX 1.

A number of services will be provided at both facilities. Both will provide general medical and general surgical services on an inpatient basis, the bed capacity for these services being 154 at the Delaware Division and 451 at the Southwest Division.⁶⁸ Both will also have a family practice service which provides general medical service.⁶⁹ Both facilities will be tertiary care institutions, and certain forms of tertiary care will be duplicated in the two. For example, both will house fully staffed and equipped⁷⁰ medical and surgical Intensive Care Units and Intensive Coronary Care Units.⁷¹ Both will even include pediatric intensive care units (also called intensive care nurseries). Thus, even though the pediatrics service will be located at Stanton, both divisions will be able to treat pediatric emergencies.⁷² Both will have operating rooms fully equipped with all the latest materials and devices, including such highly sophisticated equipment as a CAT scan.⁷³ Finally, both divisions will house Class I Emergency Rooms⁷⁴ and various necessary support services, such as diagnostic x-rays.⁷⁵ The Emergency Rooms will be fully equipped to handle any and all surgical, medical, pediatric, gynecological and obstetrical emergencies.⁷⁶

2. Effect of the Supplemental Agreement

Omega cannot be considered without reference to the Supplemental Agreement entered into by HEW and WMC for the purpose of assuring that Omega would have no discriminatory impacts. That agreement will govern the operations of WMC under

Omega.⁷⁷ For the purposes of this Court's predictions of the future effects of Omega, it finds that, where the Supplemental Agreement imposes what the Court has designated "categorical obligations" (see below), WMC will meet those obligations. Consequently, in these areas, the contract itself is found to be the best forecaster of future events.

Much of the evidence adduced by the plaintiffs was presented to demonstrate that certain means prescribed by the Supplemental Agreement would not achieve the ends which were required by that contract. To the extent that plaintiffs have adduced such evidence, this Court finds it irrelevant. In presenting their arguments, the plaintiffs have failed to take into consideration the fact that the contract, without distinguishing between the two, imposes two different types of obligations. Some obligations are categorical ones ("categorical obligations") which must be achieved in order to maintain compliance with the civil rights statutes. Others are merely plans of action ("minimal obligations") prescribed solely for the purpose of achieving the categorical obligations. In general, the contract provides that if, after implementing the prescribed minimal obligations, WMC still fails to meet the categorical obligations, WMC will have to take additional actions to enable it to meet the categorical obligations. Plaintiffs adduced a great deal of evidence for the purpose of showing that the minimal obligations would not achieve the categorical obligations, completely ignoring the fact that the contract would require revisions of the minimal obligations

necessary for resuscitation of severe cardiac illness and trauma and adequate in-house back-up in all major specialties (i. e., surgery, medicine, pediatrics, anesthesia, etc.); more highly specialized physicians, such as neurologists and neurosurgeons, must be within 30 minutes call to the hospital. Tr. 2372-2374; Tr. 2263-2264; PX 1, Ex. B.

68. PX 24c, p. 12.

69. Pretrial Order, Appendix A, p. 5(a).

70. Tr. 2214.

71. PX 24c; Tr. 2214-2215.

72. Tr. 2321-2322; PX 24c, p. 4.

73. Tr. 2214-2215.

74. A Class I Emergency Room, as defined by the American College of Emergency Physicians, is an emergency room which is staffed 24 hours a day by emergency physicians and specially trained nurses. It has all the equipment

75. PX 24c.

76. Tr. 2154.

77. PX 2.

in order for WMC to meet the categorical obligations of the contract.

An example of the interplay between the various types of obligations in the Supplemental Agreement is presented by the requirements relating to racial identifiability. The Supplemental Agreement imposes upon WMC the categorical obligation to prevent either division of the hospital under Omega from becoming racially identifiable.⁷⁸ To achieve that end, the Supplemental Agreement prescribes other minimal requirements. It both requires a certain division of inpatient services between the two divisions and requires that for services offered at both divisions a patient be offered admission first to the Division closest to his or her home as determined by ZIP codes.⁷⁹ The agreement further provides that if, at any time, compliance with these minimal obligations does not result in the achievement of the categorical obligation that neither division become racially identifiable, "WMC shall have 180 days thereafter to remedy said racial identifiability by whatever means necessary." Failure to remedy said racial identifiability is deemed a *prima facie* violation of Title VI.⁸⁰ Thus, the testimony adduced by plaintiffs in an attempt to show that the present inpatient utilization plan (one of the minimal requirements) will produce racial identifiability⁸¹ is simply irrelevant to the possible occurrence of future events, because, if plaintiffs' predictions occur, the contract requires new remedial actions on the part of WMC. For that reason, the Court must find that neither division will become racially identifiable under Omega. Similarly, in other cases where the contract imposes categorical obligations, the Court finds that WMC will comply with those obligations.⁸²

78. PX 2, ¶ 6. A division will be deemed to be racially identifiable if it shows "in excess of a 25% minority inpatient utilization" based upon patient days.

79. It also requires that ambulances be instructed to transport patients to the nearest WMC emergency room from the point of origin. PX 2, ¶ 5.

80. PX 2, ¶ 6.

The plaintiffs nevertheless argue that WMC will somehow avoid the contract's categorical obligations. The Court disagrees. The obligations cannot be avoided if avoidance would create a discriminatory impact. The obligations are imposed without temporal limit, extending indefinitely into the future. They are imposed "regardless of cost." In addition, any failure to comply with either the minimal or categorical obligations is automatically considered:

a *prima facie* violation of said Title VI and/or said Section 504, and will further constitute grounds for the termination of other federal assistance.⁸³

The contract also provides that HEW can monitor WMC's activities, thus assuring that, if WMC does not meet its obligations, sanctions will be applied. WMC is required to keep and to submit on a regular basis numerous records and reports which will enable HEW to ascertain whether the hospital stays in compliance with the Supplemental Agreement and that none of WMC's operations becomes discriminatory.⁸⁴ Furthermore, many of the terms of the Supplemental Agreement are drafted in such open-ended and normative language that HEW will be afforded an ample opportunity to intervene if any WMC practice, not explicitly covered by the Supplemental Agreement, should appear to the agency to have a discriminatory impact. The contract's requirements may only be altered with the concurrence of HEW and then only in the event that changes occur in the community's systems for the delivery of health care and/or changes occur in community needs.⁸⁵

Plaintiffs have also argued that HEW would excuse WMC from compliance with

81. See, e. g., testimony of Michael L. Ziegler, Tr. 563-633.

82. Of course, if an obligation were physically impossible to meet, the Court could not find that it would be met.

83. PX 2, ¶ 15.

84. PX 2, ¶ 9.

85. PX 2, ¶ 14.

the Supplemental Agreement in the event that the hospital met with financial difficulties. The Court cannot assume that the agency would act in a manner contrary to its statutory duties or authorize any practice or practices having a discriminatory impact. The Court must conclude that the agency will closely scrutinize WMC's operations and will enforce both the contract and the civil rights acts with due diligence.⁸⁶

3. Requirements of the Supplemental Agreement

The Supplemental Agreement imposes both minimal and categorical obligations in a number of other areas. Those requirements will be briefly summarized at this point.⁸⁷

Perhaps one of the most important provisions of the Supplemental Agreement in terms of the effect on the quality of patient care that will be rendered by WMC under Omega is the provision which requires WMC to operate the Delaware Division and the Southwest Division on a unitary basis. WMC must maintain a unitary medical

staff, a unitary teaching program, a unitary administration and wholly unitary finances.⁸⁸ The requirement of a unitary medical staff and unitary teaching program with rotations of residents required between the Delaware and the Southwest Divisions ensures that the quality of physicians serving the two divisions will be equal. The effect of this upon the relative quality of care between the two divisions is obvious.

The Supplemental Agreement also contains provisions requiring certain changes and controlling other possible future changes in WMC's physical facilities. The agreement imposes upon WMC the categorical obligation "to complete renovation of the Delaware Division, *regardless of cost*, within three (3) years of the date on which the construction of the Southwest Division is completed" (emphasis added), and imposes the minimal obligation that WMC set aside \$2.8 million to be devoted exclusively to that renovation.⁸⁹ The agreement also requires that before taking any actions that would individually or *cumulatively* expand the service capacity of the Southwest Division

to describe the terms of the Supplemental Agreement in detail.

86. In fact, under both the Supplemental Agreement and the civil rights statutes, HEW has a much wider range of possible control strategies than does the Court. See, generally, 45 C.F.R. §§ 80, 84, and 90. While the relief requested in the present case and the nature of the evidence presented would allow this Court only to enjoin a particular course of action, HEW, on the other hand, can impose a wide range of affirmative remedies. Moreover, HEW has a great deal of flexibility to vary any requirements if changing circumstances would so warrant. Indeed, the institutional competence of HEW is much greater for this essentially administrative task than that possessed by a court. See, *Atlantis Community, Inc. v. Adams*, 453 F.Supp. 825 (D.Colo.1978). Although the role of the courts has expanded greatly in recent years, this expansion has not and should not lead to the eclipse of the administrative functions of the executive branch. In the instant case, as is generally true, the appropriate function of the court should be to review administrative action carried out by the executive branch, not to undertake that administrative function itself. See, *Hayburn's Case*, 2 Dall. 408, 1 L.Ed. 436 (1872).

88. PX 2, ¶ 7.

89. PX 2, ¶ 12. Failure to complete renovations within the three year period will constitute a *prima facie* violation of the civil rights acts. This categorical obligation differs somewhat from other obligations imposed by the contract in that since the term "renovation" is totally undefined, there is uncertainty as to the exact nature of the obligation. WMC has taken the position that it is required only to renovate those areas relating to patient care in such a way as to make the Delaware Division equal to the Southwest Division in its capacity to deliver such care. It further contends that all such renovations can be completed with the expenditure of the \$2.8 million which it must set aside. The plaintiffs, on the other hand, contend that the two divisions must be made equal in all respects, even where a renovation in the Delaware Division would not be cost effective and, in the judgment of plaintiffs' own expert, ought not be made. The Court believes that a rule of reason should prevail and that the renovations intended are those that will assure equal ability to deliver patient care in surroundings that are equally safe and pleasant.

87. In *NAACP v. WMC, Inc.*, 453 F.Supp. 280, 310-330 (D.Del.1978), this Court had occasion

sion or reduce the service capacity of the Delaware Division by 5%, WMC must submit plans for those actions to HEW to allow that agency to determine whether the action would be consistent with the civil rights acts.⁹⁰ Thus, the agreement forecloses the possibility that even incremental changes in the relative distribution of beds could occur without review for compliance with the civil rights acts. Consequently, plaintiffs' fears that WMC can and will allow the gradual decline and eventual closing of the Delaware Division can never become a reality, absent some major change in either the health care systems or demographic patterns of New Castle County.

A third important aspect of the Supplemental Agreement is its requirements regarding transportation to and from the Southwest Division. The agreement contains categorical obligations that WMC provide "free" and "adequate" transportation for patients, visitors, and employees between the Delaware Division and the Southwest Division and that that transportation "be equipped to provide convenient service to the handicapped."⁹¹ To this end, the agreement imposes the minimal requirements that WMC maintain in operation four 20-30 passenger buses (not less than two equipped to provide convenient service to the handicapped), three ambulances, and two van-type station wagons (both equipped to provide convenient service to the handicapped). Those vehicles must be maintained in a shuttle service running every 15 minutes between the Southwest Division and the Delaware Division during specified hours. The availability of this transportation system generally⁹² and the availability of transportation to the handicapped, in particular,⁹³ must be advertised both in English and Spanish.

90. PX 2, ¶¶ 10 and 11.

91. PX 2, ¶ 1.

92. PX 2, ¶ 4.

93. PX 2, ¶ 2.

94. PX 2, ¶ 8.

95. PX 2, ¶ 6.

Besides requiring that WMC provide transportation that is convenient to the handicapped, the agreement also requires that the Southwest Division be built and the Delaware Division be renovated so as to be accessible to the handicapped as mandated by Section 504.⁹⁴

The requirement that WMC allow neither division to become racially identifiable has already been discussed.⁹⁵ WMC has also agreed to pay particular attention to the need for employment opportunities for urban minority groups,⁹⁶ and to take into account these needs in its employment policies under Omega. Finally, the agreement calls for the appointment of a bilingual ombudsperson to receive and to act upon any complaints relating to discrimination.⁹⁷

C. The Present And Future Socio-Economic And Demographic Characteristics Of New Castle County

The final set of facts needed in order to project the impact of Omega consists of the present and future social, economic and demographic characteristics of the area which WMC serves. In all probability the future characteristics will not differ in any significant respect from the present characteristics. Dr. Harold Brown, the chief demographer in the State of Delaware for the past twenty years, testified without contradiction that the statistics found in the 1970 census are reasonable reflections of the current socio-economic picture⁹⁸ and that this picture should remain unchanged through the 1980's.⁹⁹

1. *Distribution and economic status of minority, elderly and handicapped populations of New Castle County*

The minority and elderly populations of New Castle County are concentrated heavily

96. PX 2, ¶ 13.

97. PX 2, ¶ 3.

98. Tr. 112.

99. Tr. 114-115; Dr. Brown admitted that projecting population changes in Delaware because of its small geographical area is difficult. (Tr. 94-95).

ly in the City of Wilmington and those ZIP codes assigned to the Delaware Division for duplicated services under Plan Omega.¹⁰⁰ These population groups are thus concentrated in areas that are quite close to the Delaware Division and the other two present divisions of the Wilmington Medical Center.¹⁰¹ These groups are overwhelmingly and disproportionately low-income in relation to the total population of the County¹⁰² and comprise the bulk of households in the County that are without access to private means of transportation.¹⁰³

Of the blacks in New Castle County, 72% live in the Wilmington/Elsmere area, while another 14% live in the Southbridge/New Castle corridor.¹⁰⁴ Approximately 80 times as many blacks live within 2.5 miles of the Delaware Division as live within 2.5 miles of the proposed Southwest Division.¹⁰⁵ Data developed by WMC shows that the minority population using WMC is similarly distributed. In the 90-day period between December 1, 1976 and February 28, 1977, some 76% of WMC's minority inpatients (black and Puerto Rican)¹⁰⁶ and 81.8% of WMC's minority service employees¹⁰⁷ lived in the Wilmington/Elsmere area.

The elderly¹⁰⁸ comprise 7% of the population of New Castle County.¹⁰⁹ About 12 times as many elderly people live within 2.5

miles of the Delaware Division as within 2.5 miles of the Stanton site.¹¹⁰ A total of 76.3% of the elderly live in communities located in northern and eastern New Castle County, 38.9% live in the City of Wilmington alone. In contrast, only 5.9% live in the Greater Newark area.¹¹¹ Dr. Brown predicted that the elderly population would remain more or less in the same location with some increase occurring in the Brandywine Hundred, an area north of the City of Wilmington.¹¹² The general past emigration from the City of Wilmington did not include the elderly who tended to remain because of their inability to afford to go elsewhere and because of the concentration of public housing for the elderly in Wilmington.¹¹³

Absolutely no credible evidence has been developed in this case concerning the distribution of handicapped people in New Castle County. Plaintiffs have argued that contradicted testimony that the elderly have a disproportionately higher incidence of mobile limiting handicaps¹¹⁴ will also establish the proposition that the distribution of the handicapped population mirrors the distribution of the elderly.¹¹⁵ To make such an extrapolation upon such meager evidence would be totally unwarranted.¹¹⁶ Since the

100. PX 23; PX 23b; PX 45a; PX 176.

101. Pretrial Order, Appendix A, ¶ 1(i), (i), (j), and (k).

102. PX 45d; PX 176.

103. PX 45c; PX 301; PX 302.

104. PX 45a, p. 48; *see also*, PX 23(a).

105. Pretrial Order, Appendix A, ¶ 1(g).

106. PX 207; PX 23d.

107. PX 207; PX 23h. Service employees include registered nurses, licensed practical nurses, aides, orderlies, service workers, and building maintenance workers.

108. As used herein, the term "elderly" refers to people aged 65 years and older.

109. Pretrial Order, Appendix A, ¶ 1(i).

110. *Id.*, Appendix A, ¶ 1(i); PX 23b.

111. PX 45a, p. 47.

112. Tr. 114-115.

113. Tr. 109-110.

114. Tr. 740-741.

115. D.I. 408, p. 8, n. 3a, pp. 36-39, n. 19.

116. While the fact that the elderly are disproportionately handicapped means that the handicapped are disproportionately elderly, it does not lead to the conclusion that the handicapped are predominantly elderly or to the conclusion that the elderly can be used as a surrogate for the handicapped. An examination of some statistics readily reveals why the plaintiffs' extrapolation cannot be made. According to PX 176, the elderly population of New Castle County is 38,530 while the rest of the population numbers 460,963. (PX 176, Table P-1). This works out to a ratio of 11.96 non-elderly to 1 elderly person. Even if an elderly person were six times as likely as a non-elderly person to be

plaintiffs bear all burdens of proof on the issue of impact, the Court must assume that the distribution of the handicapped in New Castle County mirrors the distribution of the population as a whole.

The black and elderly populations of New Castle County are also disproportionately low income. If one divides the income range of New Castle County into terciles, about 61% of the black households are in the bottom tercile compared to 30% of the white households.¹¹⁷ The elderly, who compose only 7.7% of the total population of New Castle County,¹¹⁸ account for 15.8% of the population with income below the poverty level.¹¹⁹

2. *Transportation characteristics of New Castle County*

In New Castle County, as in the United States as a whole, by far the predominant means of transportation is the private automobile. The County and the State as a whole are well served by the state highway system. Most people in the State with access to an automobile can easily reach medical facilities.¹²⁰ Indeed, in a survey of inpatients arriving at WMC, it was determined that 79% of WMC's patients arrived in an automobile driven by the patient, a friend, or a member of the family.¹²¹

handicapped, only one third of the handicapped population would be composed of elderly people. Since 66% of the elderly population lives in the Wilmington/Elsmere area and the northern suburbs (D.I. 408, pp. 36-37), plaintiffs have shown only that at least 22% of the handicapped live in areas closer to the Delaware Division. Even if the elderly were 10 times more likely to be handicapped, plaintiffs would have shown only that 30% of the handicapped live closer to the Delaware Division. Table 14 of DX 3 contains statistics showing the distribution of mobility limitations among different age groups. From these figures, one can derive the facts that only 31% of those who are limited in activity are elderly, 29.8% of those limited in amount or kind of major activity are elderly, and 53.6% of those unable to carry on major activity are elderly. Thus, given the 66% figure, plaintiffs have succeeded only in showing that 20.7%, 19.7%, and 35.4%, of those categories, respectively, live nearer to the Delaware Division than to the Southwest Division.

117. PX 45d.

Emergency ambulance service is also available throughout the State of Delaware and County ambulance service is readily accessible to all residents of New Castle County.¹²² A privately owned non-emergency ambulance service based in Wilmington also provides transport but at a very high cost.¹²³ In the survey of inpatient modes of transportation, 16.7% of WMC's inpatients arrived by ambulance.¹²⁴

The Southwest Division will be located in an area which is readily accessible to Interstate I-95.¹²⁵ Given that fact, it will be readily accessible to that vast majority of WMC's patients who arrive by ambulance or by private automobile.¹²⁶

The picture is not as bright for the 3% of WMC's inpatients who must rely upon other means of transport. That 3% is predominantly composed of minority and elderly individuals living in or near the City of Wilmington. Of the 16,000 households in the County which lack access to automobiles,¹²⁷ 73.8% are in the Wilmington/Elsmere area while only 12.3% are in the southwestern part of the County.¹²⁸ Altogether, 38% of Wilmington's households lack access to automobiles while only 4% of Greater Newark's households lack such access.¹²⁹ Of the households without cars in

118. PX 176, Table P-1.

119. PX 176, Table P-4.

120. PX 323, p. 37.

121. DX 25, Table (D).

122. PX 323, p. 37; Tr. 2157.

123. PX 323, p. 37.

124. DX 25, Table (D).

125. See, location on PX 299.

126. 97% of WMC's inpatients arrive by private vehicle (DX 25, Table (D)).

127. PX 45c.

128. PX 201.

129. PX 45c.

Wilmington/Elsmere and the northern suburbs, 71.3% are non-black elderly or blacks of all ages.¹³⁰ Those people who lack access to automobiles and who do not qualify for the use of an ambulance must rely upon public transportation, private organizations or some other limited options.

The major public transportation system in New Castle County is the public bus system, DART, the Delaware Authority for Regional Transit.¹³¹ DART has no present or presently proposed routes which will serve the Southwest Division site.¹³²

DART is the only form of public transportation in New Castle County that operates on regular routes. Other transportation is demand oriented. Taxicabs are unreliable¹³³ and expensive. A round trip from the Delaware Division to the Southwest Division costs approximately \$15.00.¹³⁴

Another transportation resource, which under state law is only available to those handicapped and elderly individuals who are unable to use other modes of transportation, is the Delaware Authority for Specialized Transportation ("DAST").¹³⁵ DAST contracts with various agencies to provide transportation which is paid for by those agencies.¹³⁶ WMC has not contracted with DAST to provide such services for its patients, visitors or employees.¹³⁷ A DAST representative testified that if DAST were required to transport many of those it now takes to the various divisions of WMC to the Southwest Division, the greater dis-

tance and lesser ability to provide multipurpose trips (the inner city locations are near many other services used by the handicapped) could strain DAST's resources and reduce its services to the handicapped.¹³⁸ However, given the fact that WMC, under the Supplemental Agreement, is required to provide a free shuttle between the Delaware Division and the Southwest Division equipped to transport handicapped, the Court finds that this overload will not develop.¹³⁹

Other transportation and escort services are also presently provided by volunteers¹⁴⁰ or senior citizen centers.¹⁴¹ Because of the greater distances involved, these services may not be provided for people going to the Southwest Division.¹⁴² However, many, if not most, of the trips provided by these sources are for the purpose of clinic visits.¹⁴³ Since the clinics will not be moved, this source of transportation presumably will still be provided for that purpose. There are also some large well established volunteer organizations which presently provide transportation to hospitals and will probably remain undeterred by any possible extra distance to the Southwest Division. The American Cancer Society will transport cancer patients to and from treatment. The American Red Cross provides weekday transport.¹⁴⁴

Finally, WMC itself has for years been providing transportation among its three

130. PX 301, Table 4.

131. Its routes are shown on the map, PX 305.

132. Pretrial Order, Appendix A, ¶4(b). Of course, such routes may be established at some time in the future if demand so warrants. (Tr. 918-920).

133. Tr. 245.

134. Current taxi fares in New Castle County are \$.95 for the first one-seventh of a mile and \$.10 for each additional one-seventh of a mile thereafter. (Pretrial Order, Appendix A, ¶8, v.)

135. Tr. 520-521.

136. Tr. 521.

137. Tr. 522.

138. Tr. 530-531.

139. See description of the transportation required by the Supplemental Agreement, *supra*. See also, the Court's findings on transportation impacts upon the handicapped *infra*.

140. Tr. 553.

141. Tr. 538, 835.

142. Tr. 542, 556, 839.

143. Tr. 545-546.

144. PX 323, p. 38.

city divisions.¹⁴⁵ The Center presently provides free ambulance service among its four present divisions, and because of the split of its services, has developed a great deal of expertise in transporting even very ill patients. For example, WMC has the present ability and sophisticated equipment needed to transport an abnormally small baby delivered in an Emergency Room over long distances with no adverse effects.¹⁴⁶

Of course, under the Supplemental Agreement, WMC will also have to operate the free shuttle described earlier. This shuttle must fill any hospital related transportation demand that the sources just discussed fail to meet. The Court finds that WMC will do so.¹⁴⁷

3. *Health needs of minority groups and the elderly for the services being relocated exclusively to the Southwest Division*

Minorities and the elderly have a disproportionately high need for many of the services which will be located exclusively at the Southwest Division under Omega. A number of witnesses for the plaintiffs questioned the rationality of locating those services which are most needed by minorities outside of the city and reached the conclusion that because of the relocation the health of the minority populations would suffer relative to the white population.¹⁴⁸

145. Tr. 1452; PX 1, p. 6-8; PX 68, p. 13; PX 68, F-4.

146. Tr. 2320-2321.

147. Tr. See, transportation impacts discussion, *infra*.

148. See testimony of Dr. John Levinson (Tr. 1143-1149), Dr. Samuel Wolfe (Tr. 761-762), Dr. Janet Baillie Hardy (Tr. 879-887) and Dr. Albert Gelb (Tr. 1205-1206). The Court has, of course, found otherwise. Many of the opinions were premised on misunderstandings of WMC's present situation and of its plans for Omega.

149. The location of obstetric and pediatric inpatient services at the Southwest Division is the "catch-22" of the Omega Plan. Given the heavy minority utilization of these services, their location in the Delaware Division would contribute considerably to the racial identifica-

The best example of this particular aspect of Omega is presented by those services relating to childbearing and the health of infants.¹⁴⁹ The high-risk obstetrics clinics, special pediatric clinics, and all obstetrics, gynecology and pediatric (except for two holding beds) inpatient services will be located at the Southwest Division.¹⁵⁰ These services are among those that are most heavily used by minorities. For example, while minorities comprise only 13% of the New Castle County population, they represent 33% of the patient days in pediatrics, 24% of the patient days in obstetrics, and 45.9% of the patient days in the premature nursery.¹⁵¹

Certain socio-economic factors are primarily responsible for the disparate needs of minorities for these services.¹⁵² First, the evidence indicated that minority teenagers are more likely than white teenagers to become pregnant, and that teenage mothers have a substantially higher risk of adverse pregnancy outcome than do other mothers. This is so, according to the testimony, because adolescents are, in general, very poor users of health care, tending not to seek primary medical care in the early stages of pregnancy and tending to miss appointments even once such care has been initiated.¹⁵³ As a result, babies of teenage pregnancies have significantly higher inci-

bility of that division. Such racial identifiability can best be avoided by locating those services in the suburbs. However, this solution results in the location of those services most needed by the inner city population in the location farthest away from that population. Plaintiffs contend that because of this, Omega is inherently flawed and could only be made non-discriminatory by a different allocation of bed numbers. Defendants claim that other measures which have and will be taken not only obviate the problems but will result in a marked improvement of care.

150. *Supra*.

151. PX 43; Tr. 620.

152. Tr. 714-715, 718-719, 725, 727-733.

153. Tr. 849.

dences of perinatal death, mental retardation, and other neurological problems.¹⁵⁴

A second factor contributing to the greater need of minorities for obstetrical and pediatric services is the fact that black and hispanic women tend to bear more children than do their white counterparts.¹⁵⁵ This in and of itself helps to account for the higher minority utilization of obstetrical and pediatric services. This factor, however, also increases minority need for these services in another way. Women who bear children when they are over 35 years of age or are in their fourth or subsequent pregnancy are at especially high risk of having complications in their pregnancy or childbirth.¹⁵⁶

The testimony also indicated that minorities are also more likely than whites to have certain diseases, such as organic heart disease, pneumonia, diabetes, and hypertension, which increase pregnancy risks.¹⁵⁷ Moreover, since minorities are more likely than whites to fail to obtain early care during pregnancy, these diseases are more likely to result in pregnancy complications in minorities than they are in whites.¹⁵⁸

As a result of all of these factors, the testimony indicated that minorities as a group are much more likely to be at higher risk than are whites. Overall, only 20% of white mothers but 40% of black mothers fall into the high risk category.¹⁵⁹

154. Tr. 848.

155. Tr. 867.

156. Tr. 861-863, 894.

157. Tr. 862-863.

158. Tr. 867-876. While this description is framed in terms of comparisons between minorities and whites, it would be more accurate to frame it in terms of comparisons between economic classes. The characteristics attributed to whites are actually those of the well-to-do while those attributed to minorities are actually those of the poor. If one compared minority and white groups from identical socio-economic niches, the differences in infant mortality rates would be practically no different with the exception that even then minority infants would be somewhat more likely to be classified as premature. (Tr. 714, 718-719). Because minorities are more likely than whites to be poor, differences caused by socio-economic factors appear as differences between the races.

These differences are reflected both in the higher relative minority presence in the WMC services relating to obstetrics and pediatrics noted earlier and in national and state health statistics. National infant mortality rates show a differential related to race with black infants showing significantly higher rates of newborn and infant death than white infants.¹⁶⁰ Out of every 1000 black legitimate live births, 39.5 die in the first year of life while only 20.8 out of every 1000 white births die during that period.¹⁶¹ In Delaware, the neonatal death rate for minorities was more than twice that for Caucasians in 1977 (14.6 versus 6.8 per thousand) and later infancy death was three times as high for minorities in that year (6.0 versus 2.0 per thousand).¹⁶²

Minorities also have a disproportionate need for services related to cerebral vascular diseases and for those related to the treatment of cancer. Neurosurgery, special cardiovascular laboratories, nephrology (cerebral vascular related services) and radiation therapy and oncology (cancer related) will all be located exclusively at Stanton.¹⁶³ The disparate needs of minorities for these services is demonstrated by national statistics. Minorities have an age adjusted death rate from cerebral vascular diseases of 91

One might question whether impacts for which poverty is primarily responsible can be considered adverse impacts under Title VI. The short answer to this is that in the United States, both now and at the time Title VI was passed, poverty and minority status were deemed so closely correlated as to be almost indistinguishable. Thus actions adversely impacting the poor will almost invariably adversely impact upon minority groups. The fact that the disparate impact is caused by socio-economic differences between the races rather than genetic ones is irrelevant.

159. Tr. 864.

160. PX 288, Table 14; PX 293; PX 294.

161. Tr. 718.

162. PX 297.

163. See, discussion *supra*.

per 100,000, while for whites the rate is 56.¹⁶⁴ The minority death rate from cancer (malignant neoplasms) is 157 per 100,000, compared to 129 for whites.¹⁶⁵

The elderly also, not surprisingly, show a disproportionate need both for WMC's services in general and for some of the services in particular which will be located exclusively at the Southwest site. The elderly comprise only 7% of the general population but that group accounts for 16.6% of WMC's admissions.¹⁶⁶ Moreover, because of the longer length of stay experienced by the elderly,¹⁶⁷ they account for approximately 29% of WMC's patient days.¹⁶⁸ The elderly have a particular need for services relating to cerebral vascular and cardiovascular diseases. For cerebral vascular diseases, the national rate of discharge for those 65 and older is 20 per 1,000 population compared to a rate of 2.9 for all people.¹⁶⁹ The elderly have a disproportionate need for some of the other services that will be located exclusively at the Southwest Division. For example, the elderly represented 23% of the admissions to gastroenterology, 31% of the admissions to thoracic surgery and 36% of the admissions for radiation therapy.¹⁷⁰

Thus, under Omega, certain services will be moved 9.35 miles farther from the populations that need them most. There is little dispute between the parties on this fact. There is also overwhelming evidence to the effect that by achieving greater consolidation of services, by effecting extensive modernization, and by providing service to the southwestern areas that have heretofore lacked any hospital beds, Plan Omega will achieve an overall improvement of the level of hospital care provided to WMC's service population as a whole.¹⁷¹ The real issue of fact is whether that overall improvement is being effected at the cost of decreasing the

quality of care for minorities. Plaintiffs so argue. Defendants, on the other hand, contend that because of the way services will be divided between the two locations and because of the availability of the shuttle and emergency transportation, the added 9.35 miles will have only a minimal effect at best and that the other improvements will result in much better care for minorities than exists at present. The Court will now set forth the parties' contentions in greater detail.

III. THE PARTIES' CONTENTIONS

The numerous, disparate, adverse impacts which plaintiffs allege Omega will have upon minorities, the elderly and the handicapped fall into three major categories. One category relates to minority access to health care under Omega. A second category relates to the quality of health care that minorities will receive under Omega. The third relates to the racial identifiability of the Delaware Division under Omega.

Plaintiffs first charge that access to health care for the minority groups under Omega will be inadequate in many respects. They contend that since the various minority groups are concentrated in Wilmington and its northern suburbs and since these groups disproportionately lack access to private transportation, they will disproportionately be forced to rely upon the WMC shuttle to travel to the Southwest Division. Forced reliance upon the shuttle, plaintiffs contend, will be an adverse impact in and of itself. They argue that the shuttle is inadequately planned and cannot operate on the schedule set with the number of vehicles to be used. Second, there are persons who, because of their health or the nature of their treatment at WMC, will not be able to use the shuttle. Third, the shuttle will increase the risk to passengers of contracting

164. PX 288, Table 11; Tr. 716.

165. PX 288, Table 11; Tr. 716-717.

166. PX 4e.

167. PX 414, Table M, revised.

168. PX 84, p. 88.

169. PX 289; Tr. 721-726.

170. PX 4e; Tr. 743-744.

171. Tr. 1943-1945, 2049-2053, 2158, 2208-2209, 2212-2215, 2272-2278, 2325-2328, 2383-2385; DX 6.

a communicable disease. Fourth, some people, especially working people, will not have the extra time to use the shuttle and still connect with other transportation (primarily DART) to get home, or to pick up children from a day-care center, or take care of other responsibilities. Another segment of the population will be deterred by the travel time, and the strangeness of the rural Stanton area, from going to the new hospital. Fifth, the shuttles may not be adequately equipped and staffed to serve the handicapped.

Plaintiffs then argue that these "inadequacies" will translate into medical problems for the shuttle users. First, senior citizens, who are apt to be confused or timid, and who will often need some form of escort service, will be deterred from seeking needed treatment altogether. Cancer patients, plaintiffs claim, will postpone visits for treatment or decrease their number of visits for treatment, thus harming their health. Mothers required to use the high risk clinics will delay initiation of care and increase the number of missed visits. This decreased prenatal care will translate into greater risks for the mother and a greater likelihood of death or poor health for the infant. Plaintiffs also argue that there will be a decreased number of visitors and that because of the great importance of visitors to the care and recovery of the elderly, young children and post-partum mothers, the health of those groups will suffer.

Plaintiffs also contend that special problems will arise for Hispanics who rely upon community workers, friends or family for translating services. Claiming that WMC now inadequately provides for those who speak only Spanish, plaintiffs contend that Omega will accentuate the problem, both by making it less likely that outside translators will be able to accompany patients to the more distant hospital and by assuring that fewer WMC bilingual workers will be located at Stanton.

Finally plaintiffs focus upon certain travel related impacts which will affect both those who use the shuttle and those who will not. The time required to reach WMC

facilities will be increased disproportionately for the minority groups. This, plaintiffs charge, is itself an adverse impact. The extra time will deter both users of the shuttle and those who drive themselves from seeking care.

Plaintiffs' second category of contentions centers around their general contention that the quality of care offered at the Delaware Division will be inferior both to that offered at the Southwest Division and to that presently offered at WMC in many respects. This inferiority, they contend, will be experienced disproportionately by minorities, the elderly, and the handicapped because of a disproportionately high use of the Delaware Division by those groups.

In this regard, plaintiffs first argue that the quality of inpatient care offered at the Delaware Division in the General Medical, General Surgical and Cardiology Services will be inferior to that offered in those services at the Southwest Division. They contend that the physician staff will be inadequate. The Southwest Division will act as a magnet for physicians in New Castle County according to plaintiffs' predictions. Doctors will locate their offices near Stanton and will tend to practice exclusively at the "newer, more sophisticated" facility. This will be especially so for certain subspecialists. As a result, these subspecialists will not be available for consultations or for treatment when complications arise in procedures being performed at the Delaware Division. Most private attending physicians, who will be primarily located at Stanton, will tend to come late and to leave early from the Delaware Division, thus decreasing both the quality of teaching the resident staff will receive and the quality of care at the Delaware Division. Finally, plaintiffs contend that any shortages in medical personnel will be experienced primarily by the Delaware Division because most doctors will prefer the Southwest Division. For example, the present shortage of cardiologists and of surgical residents will result in a shortage of those personnel at the Delaware Division with a consequent decline in the quality of care.

Plaintiffs also contend that the Delaware Division will be physically inferior to the

Southwest Division. They maintain that renovation of the Delaware Division has not been adequately planned and that WMC will never make the Delaware Division capable of delivering a quality of care equal to that which will be delivered at the Southwest Division. They further contend that WMC has not and will not be able to devote the financial resources sufficient to effect the modernization which the Supplemental Agreement requires. Indeed, they argue that Plan Omega is likely to bankrupt WMC altogether.

Thirdly, plaintiffs allege that the quality of clinic care will decline under Omega because of lack of supervision of the residents staffing the clinics, because of the separation of outpatient facilities from inpatient facilities, and because of inevitable understaffing.

Finally, plaintiffs contend that the quality of care that will be offered at the Delaware Division Emergency Room will be inferior. The poor care will primarily be due to the lack of specialists to provide back-up service in cases whose difficulties exceed the capabilities of the jack-of-all trades Emergency Medicine physicians. Plaintiffs particularly emphasize the problems that may arise in obstetrics, where problems in diagnosis and treatment beyond the ken of the Emergency Physician are likely to arise and to need such immediate attention that dire consequences could ensue before a trained obstetrician could be called from his or her office, his or her home, or the Southwest Division and travel to the Delaware Division. Similar problems could allegedly arise if emergencies arose in any area of medical specialty which will be located exclusively at Stanton.

Plaintiffs' final broad category of contention regarding impacts is that under the proposed assignment plan, the Delaware Division will become racially identifiable,¹⁷² having a minority inpatient presence greater than 25%. Thus, plaintiffs argue, the Delaware Division will become a classic

"ghetto hospital"—populated by minorities, understaffed with inferior doctors, and housed in inadequate, deteriorated and overcrowded facilities. Omega, plaintiffs conclude, is just the first step in WMC's total abandonment of the city.

In addition, plaintiffs claim that WMC has adopted this discriminatory plan for no good reason. They insist that WMC has failed to articulate any overriding necessity for Omega and that the reasons proffered by WMC for the adoption of the plan are either specious or unfounded in fact. Moreover, plaintiffs argue, many less discriminatory plans exist which could achieve WMC's objectives more effectively than Omega will. Specifically, they contend that a plan consisting of an 800 bed Delaware Division and a 200 bed Southwest Division ("Reverse Omega") would be far superior to Plan Omega and would lack Omega's discriminatory effects.

Finally, plaintiffs contend that WMC intended to discriminate against the plaintiff classes in the planning and design of Omega.

WMC, naturally, disagrees with the plaintiffs on all these points. WMC contends that all health care will be immensely improved under Omega, that the Delaware Division and the Southwest Division will deliver an equally high quality of care, and neither will be racially identifiable.

WMC also contends that of the almost fifty different plans or variations of plans studied by WMC in its decade-long planning process,¹⁷³ Omega was the only one which could possibly fulfill the Center's vital needs. Defendants contend that hospital facilities are needed both in the Newark area and the City of Wilmington. Moreover, it is necessary that WMC provide those facilities, because if another entity were to build a hospital in Newark, that new hospital would siphon off paying patients and thereby deprive WMC of needed revenues. The loss of such revenues, WMC

deed, segregation is discrimination in its most classic form.

172. Although plaintiffs argue their racial identifiability point in the section of their brief dealing with discriminatory intent, racial identifiability can be itself a discriminatory impact as well as evidence of intent to discriminate. In-

173. Tr. 1580-1606; DX 7.

contends, would result in dramatic fee increases and would perhaps curtail the hospital's ability to offer free care. WMC also contends that some new building is necessary; changing government codes and the deterioration of its present facilities has made extensive renovations necessary. If such renovations are not made, the deteriorated state of the buildings puts WMC at risk of losing its accreditation with the consequent possible loss of Medicare and Medicaid qualification as well as the destruction of its residency program. Finally, WMC contends that greater consolidation of physical facilities is needed both to improve the quality of its hospital care and to improve its residency program. While a complex under one roof would best achieve this goal, WMC contends that a 780-250 bed split is the closest to that ideal that can be achieved if WMC's other goal of providing beds both in the city and in the southwest is to be met.

Omega is the only plan, WMC claims, that is within its financial means and that can achieve the triple goal of modernization, consolidation and provision of beds both in the city and in the southwest. Plans which would locate the bulk of beds in the city, WMC argues, would be so costly as to be beyond its financial resources.

Finally, WMC contends that it did not intend to discriminate and that such discriminatory intent is necessary to state a cause of action under the statutes upon which plaintiffs rely. The Court will first address this last contention in its discussion of the proper standard of review.

IV. THE APPROPRIATE LEGAL STANDARDS

A. The *Prima Facie* Case: Impact Or Intent

Title VI broadly proscribes racial discrimination in any program receiving Federal funds. It provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Section 504 and Section 6102 employ practically identical language to extend, with certain exceptions, the type of protection afforded racial minorities by Title VI to the handicapped and to the elderly.¹⁷⁴ Section 504 provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794. Section 6102 provides:

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 6102.

WMC contends that under these statutes, as under the Fourteenth Amendment,¹⁷⁵ a *prima facie* case of discrimination can be made out only upon a showing that the challenged action has a disparate, adverse impact upon minorities and that the actor intended to discriminate. Plaintiffs, on the

¹⁷⁴ Both, in fact, were expressly modeled on Title VI. See, 4 U.S. Code Cong. & Admin. News 1974 at pp. 6390-6391 and Conference Report, Older Americans Amendments of 1975, 94th Cong., 1st Sess., Report No. 94-670 (Nov. 17, 1975). Any relevant differences will be discussed, *infra*.

¹⁷⁵ *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). See, generally, Eisenberg, Theodore, Disproportionate Impact and Illicit

other hand, contend that, as under Title VII,¹⁷⁶ 42 U.S.C. § 2000e *et seq.*, and Title VIII,¹⁷⁷ 42 U.S.C. § 3601 *et seq.*, a showing of disparate adverse impact alone should establish a *prima facie* case. Plaintiffs point out that Federal agencies which have published implementing regulations under

the Acts have all found that disparate impact alone will establish a *prima facie* violation.¹⁷⁸ Plaintiffs also rely upon numerous federal court opinions holding that disparate racial impact alone will establish a *prima facie* violation of Title VI.¹⁷⁹ WMC, on the other hand, points to Supreme Court

Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L.Rev. 36 (1977).

176. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

177. *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (C.A.3, 1977), cert. denied, *Whitman Area Improv. Council v. Resident Advisory Board*, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499 (1978).

178. HEW's regulations implementing Title VI generally prohibit actions with a discriminatory effect and specifically prohibit site location decisions having a discriminatory effect. No intent is required. 45 C.F.R. § 80.3(b)(1) specifies that recipients of federal funds may not:

(i) deny an individual any service, financial aid, or other benefit provided under the program;

(ii) provide any service or other benefit to an individual which is different, or as provided in a different manner, from that provided to others under the program;

(iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service or other benefit under the program;

(iv) restrict the individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service or other benefit under the program.

45 C.F.R. § 80.3(b)(2) provides:

(2) A recipient, in determining the types of services or facilities which will be provided under any such program

or the situations in which, such services or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not

utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeat-

ing or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

45 C.F.R. § 80.3(b)(3) provides:

(3) In determining the site or location of a facility, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

On July 5, 1973, every federal agency published amendments to their regulations, in part, to ensure that each agency had a provision similar to 45 C.F.R. § 80.3(b)(3), prohibiting site location decisions having disparate impacts upon minorities.

HEW's implementing regulations for Section 504 also apply a disparate impact standard. See, 45 C.F.R. § 84.4. These regulations apply specifically to site location decisions. See, 45 C.F.R. § 84.4(b)(5).

While HEW's Section 6102 regulations are not quite as explicit, they clearly apply to actions taken without discriminatory intent. See, 45 C.F.R. § 90.15 and comments appearing at 55 Fed.Reg. 33782 (June 12, 1979).

179. *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *New York City Board of Ed. v. Califano*, 584 F.2d 576 (C.A.2, 1978), affirmed on other grounds sub nom. *Board of Education of New York City v. Harris*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979); *Guadalupe Org. Inc. v. Tempe Elementary School No. 3*, 587 F.2d 1022 (C.A.9, 1978); *Larry P. v. Riles*, 48 U.S.L.W. 2298 (N.D.Cal. 1979); *Jackson v. Conway*, 476 F.Supp. 896 (E.D.Mo.1979); *Johnson v. City of Arcadia*, 450 F.Supp. 1363 (M.D.Fla.1978); *Lora v. Bd. of Ed. of City of New York*, 456 F.Supp. 1211 (E.D.N.Y.1978); *Soria v. Oxnard School District Board of Trustees*, 386 F.Supp. 539 (C.D.Cal.1974); contra *Otero v. Mesa County Valley School District*, 470 F.Supp. 326 (D. Colo.1979).

dicta which, it claims, indicate that the standard required to establish discrimination under Title VI is the same as the standard under the Fourteenth Amendment.¹⁸⁰

180. *Regents of the University of California v. Bakke*, 438 U.S. 265, 284-287, 325-355, 98 S.Ct. 2733, 2745-2747, 2766-2771, 57 L.Ed.2d 750 (1977) (Concurring Opinion of Powell, J. and Dissenting Opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Board of Ed. of New York v. Harris*, 444 U.S. 130, 100 S.Ct. 363, 375, 62 L.Ed.2d 275 (1979) (Dissenting Opinion of Stewart, Powell, and Rehnquist, JJ.). The majority in *Harris* expressly reserved the question of whether Title VI employs an impact standard. Even the dissent in *Harris* does not unambiguously reject the impact test. While they would have had the court hold that the notion of discrimination embodied in Title VI and all parallel statutes is the same as that embodied in the Fourteenth Amendment, and hence requires a showing of intent, they also intimated that intent may be determined by use of an impact test. They suggested that the Title VII test, the original impact test, is merely a "procedural mechanism designed to provide a means of inferring an employer's motive in the absence of direct evidence." 100 S.Ct. at 381, n. 10. See, Perry, Michael, "The Disproportionate Impact Theory of Racial Discrimination," 125 U.Penn.L.Rev. 540 (1977).

181. In finding that WMC had no intent to discriminate, the Court has been guided by the discussion of that issue in *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 141-145 (C.A.3, 1977), cert. denied, *Whitman Area Improv. Council v. Resident Advisory Board*, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499 (1978). In *Rizzo*, the circuit court enumerated several factors that should be considered in making a determination of whether or not a given action was taken with an "invidious discriminatory purpose." In addition to any direct evidence of intent, the reviewing court should consider:

- (1) discriminatory impact;
- (2) the historical background of the attacked decision;
- (3) the "sequence of events leading up to the challenged decision";
- (4) departures from "normal procedural sequences"; and
- (5) departures from normal substantive criteria.

Id. at 143.

Having carefully considered these factors and having carefully examined the record, the Court is convinced that the evidence is overwhelming that WMC not only lacked an intent to discriminate but was actually motivated by concern for the welfare of its urban and minority patients during the planning of Omega.

The Court finds it unnecessary to resolve this issue. The outcome of this litigation will be the same whichever standard is applied. The Court has found absolutely no evidence of discriminatory purpose.¹⁸¹

First, the record is utterly devoid of any direct evidence of discrimination. While plaintiffs point to a few isolated statements made in the course of the ten-year planning effort, the Court finds that those statements fail to show any discriminatory purpose. To the contrary, one such statement shows that WMC was aware of the necessity for planning for the special health care needs of the inner city poor. (See, PX 31h, pp. 3-4). Others, when read in context, fail to show any intent to discriminate. (See, PX 33e, p. 4).

Secondly, the Court has found that Omega as amended by the Supplemental Agreement will have minimal discriminatory impacts at best. The discriminatory impacts of Omega without the Supplemental Agreement might have been greater. HEW found that without the Agreement, WMC would have been in violation of Title VI. However, any inference of intent to discriminate that may be raised by this fact is dissipated by the fact that WMC quickly and voluntarily entered into a burdensome contract of assurances that HEW found would eliminate any discriminatory effects.

The historical background of the decision to implement Omega also fails to show any intent to discriminate. WMC engaged in a ten-year planning process in which it investigated almost 50 different plans or variations thereof. (Tr. 1580-1606; DX 7). Many of those plans were developed and analyzed at high cost by professional hospital planning consultants. (Tr. 1380-1384). WMC's Board of Directors, in making its decisions, paid careful attention to the conclusions of these experts, as well as the recommendations of WMC's Medical-Dental staff and WMC's administration. (See, generally, testimony of Joseph Dallas, Tr. 1371-1384, and testimony of John Fulenwider, Tr. 1550-1574). The plans actually studied included plans placing the bulk of beds in the city, plans placing the bulk of beds in the suburbs, and plans dividing beds evenly between the city and the suburbs. The number of plans in each of the three categories is roughly equal. (See, DX 7). Moreover, at one time or another, the administration advocated the implementation of at least one plan falling into each category. Health care planning expert Richard James Coffey, after examining the history of WMC's planning effort, concluded that that effort was identical to his own model of a perfect, rational hospital planning process in all respects but three. He found it departed from his model in that: (1) WMC put an artificial constraint upon itself by committing itself to the maintenance

Therefore, if the intent standard applies, the plaintiffs have failed to make out a *prima facie* case and WMC must prevail. On the other hand, as indicated in the discussion to follow, the Court has also found that if the case is decided under the disparate impact standard, WMC must also prevail. Therefore, the Court will now apply the standard most favorable to the plaintiffs—the impact standard to the facts of this case.

B. The Elements Of The Impact Test

[1] Having determined that it will apply an impact test, the Court will now consider the elements of that test. The impact test is, in general, characterized by a shifting burden of proof. The plaintiff bears the burden of proving discriminatory effect. If it meets this burden, the burden shifts to

of at least one facility in the city; (2) WMC failed to evaluate all alternatives at the same time; and (3) WMC engaged in an overly long planning process. (Tr. 1994–2011). One of the deviations from the *ideal* planning process mentioned by Dr. Coffey was, in part, the result of WMC's concern for continuing to provide service in the city for the city's minority populations. The other two factors do not show an intent to discriminate. The length of the planning process is explained both by changes in demographic projections which necessitated changes in WMC's planning goals (Tr. 1411, 1565–1566) and by the fact that WMC deemed it necessary to give in-depth consideration to a plan proposed by the City of Wilmington which would have located the bulk of WMC's facilities in the city. (Tr. 1380–1382). The failure to compare all plans at one time is explainable in light of the fact that most other plans had been considered exhaustively over a number of years at great cost and had been rejected at the time of investigation as impractical. The reasons for rejection seemed to the Board members to apply still at the time Omega was presented. (Tr. 1449, 1504, 2486, 2034). Plaintiffs appear to argue that WMC's awareness and consideration of the demographic characteristics of New Castle County indicates racially motivated decision-making. All witnesses, both those of the plaintiffs and those of the defendant, agreed that it is essential to consider demographic characteristics—especially the location of minority populations—in hospital planning. (See, e. g., Plaintiffs' Post Trial Opening Brief, D.I. 408, p. 193). Thus, the history of WMC's planning effort gives absolutely no indication of an intent to discriminate.

Examination of the "sequence of events leading up to the challenged decisions" and any

the defendant to "prove" or to "articulate" a non-discriminatory justification for the challenged actions. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 280 (1973) (Title VII); *Resident Advisory Bd. v. Rizzo*, *supra* (Title VIII); *New York City Board of Ed. v. Califano*, *supra*; *Lora v. Board of Education of City of New York*, *supra*; and *Larry P. v. Riles*, *supra* (Title VI). See, Perry, Michael, *op. cit.* This general formulation obviously fails to specify either the nature of the evidentiary burdens imposed upon the parties or the types of justifications which will be recognized. The Court turns to a consideration of these two questions *seriatim*.

Courts which have applied this shifting burden of proof have, for the most part,

possible "departures from 'normal procedural sequences'" fails to show any intent to discriminate. Upon examining the procedures employed by WMC, Dr. Coffey found them normal with the three exceptions noted earlier. (Tr. 1994–2011). The Court has found that these exceptions were due to factors unrelated to discrimination. The plaintiffs have made much of the fact that Omega itself was developed in approximately a month's time. The Court does not find this unusual in light of the explanation given by Oliver Deehan, WMC's in-house planner. The plan was developed as a result of an intense effort, carried out in conjunction with outside expert architects, and was built upon the data developed by the many earlier plans. (Tr. 1709–1714, 1803–1804). Thus, these two criteria reveal no intent to discriminate.

The final criteria mentioned in *Rizzo* is "departures from normal substantive criteria." This factor is similar to defendant's burden of proof in an impact test—need for the discriminatory plan and unavailability of less discriminatory alternatives. This Court has found *infra* that Omega is a response to legitimate health care objectives and that no alternatives other than Omega have been demonstrated which could meet those objectives. Thus, the Court has found no significant departures from normal substantive criteria.

Overall, the Court finds the evidence of lack of discriminatory intent or purpose overwhelming. While plaintiffs have addressed other pieces of evidence which, they contend, point to discriminatory intent, the Court finds their contentions without merit.

failed to distinguish whether they were referring to the burden of going forward with evidence or the burden of persuasion. This imprecision is by no means unique to this area of the law. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1200 (C.A.3, 1978). A recent line of cases under Title VII, however, has served to clarify the issue. *Furnco Construction Corp. v. Waters*, *supra*; *Board of Trustees v. Sweeney*, 439 U.S. 24, 25, 99 S.Ct. 295, 296, 58 L.Ed.2d 216 (1978); *Kunda v. Muhlenberg College*, 621 F.2d 532 (C.A.3, 1980). It is clear from these cases that it is the burden of going forward with evidence which shifts, while the burden of persuasion remains, throughout, with the plaintiff. Thus, the plaintiff first has both the burden of adducing evidence of a discriminatory impact and the burden of persuasion on the issue of discriminatory impact. If the issue of discriminatory impact. If the plaintiff meets both of these burdens, the burden shifts to the defendant to go forward with evidence showing that he took the challenged action for a non-discriminatory reason. If he meets that burden and can produce some evidence showing a non-discriminatory reason for the action, the burden of going forward shifts back to the plaintiff who must then adduce evidence showing that the reason is a pretext. At all times, the burden of persuasion remains with the plaintiff. See, *Board of Trustees v. Sweeney*, *supra*, 439 U.S. at 28-29, 99 S.Ct. at 297-298.¹⁸²

[2] The nature of the justification that will serve to rebut a *prima facie* case of discrimination varies according to the civil rights act which is invoked. These variances reflect differences in the nature of the entities which are subject to the provisions of the various acts, differences in the groups that are protected, and differences in the nature of the discrimination. Thus,

182. In the foregoing discussion the Court has adopted the reasoning found in the dissent in *Sweeney*. A close reading of the case reveals that the dissenters and the majority were in agreement that the shifting burden was the burden of going forward. The difference between the two groups lay only in their interpretations of the language used by the lower court. This interpretation of *Sweeney* was apparently

under the Fourteenth Amendment, intentional discrimination, a particularly invidious type of discrimination, may be rebutted only upon a showing of "compelling interest." Under Title VII, controlling employment, the defendant must show a "business necessity." Finally, in Title VIII, an act dealing with housing, where the interests of the defendants in a particular choice tend to be more diffuse and less quantifiable, the defendant must show a "legitimate *bona fide* interest" which can be served by no less discriminatory alternative. *Resident Advisory Board v. Rizzo*, *supra* at 148-149. Because the nature of the justification that will serve to rebut a *prima facie* case of discrimination varies among the civil rights acts, the Court will now consider each of the acts invoked in this case separately with a view to determining the nature of justification appropriate to each act.

1. Justification of discriminatory impacts under Title VI

[3] Upon consideration, the Court has concluded that, because of the similarities of a housing location decision and a hospital site determination, it should be guided by the rough criteria set out by the Third Circuit in *Resident Advisory Board v. Rizzo*, *supra*.¹⁸³ The interests affected by both types of decision are nebulous and not subject to quantification. Moreover, as is the case with any decision in the context of "social engineering," numerous interests will be served and disserved and secondary and tertiary effects will abound. Therefore, as in Title VIII, the Court holds that in order to rebut a *prima facie* case under Title VI, WMC must go forward with evidence that Omega will "in theory and practice" serve "a legitimate *bona fide* interest of [WMC] . . . , and [WMC] must

adopted by the Third Circuit in *Kunda v. Muhlenberg College*, *supra*.

183. Title VI, itself, could be applied to a wide range of entities and to an equally diverse range of decisions. For that reason, the nature of the justification required might vary in other cases.

show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id.* at 149. The requirement that defendants adduce some evidence showing that less discriminatory alternatives would not adequately serve their interests is particularly important in Title VIII cases and Title VI cases dealing with site decisions. Such a decision almost always involves choices among many alternatives and will often serve many legitimate interests.¹⁸⁴ Therefore, a mere showing that a given choice could be supported by non-discriminatory interests without a showing that those interests led to the rejection of alternative sites that may have been less discriminatory would do little to rebut the inference of discrimination raised by the showing of discriminatory impact.

As in Title VIII, the nature of the interests which a defendant may assert will vary. In the present case, WMC has asserted reasons relating to financial necessity, to its ability to maintain a quality medical program and to its ability to deliver efficient, high quality medical care. Given the nature of WMC, these are legitimate interests. Other interests might be asserted by a difference type of institution.

Because the plaintiff at all times retains the burden of persuasion, once the defendant produces some evidence showing that other alternatives would not adequately meet its needs, the plaintiff must rebut this by proving that the needs asserted are only pretexts or that some less discriminatory alternative would meet those needs as well or better than the challenged action.¹⁸⁵

2. Justification of discriminatory impacts under Section 6102

[4] The Age Discrimination Act differs somewhat from the other civil rights statutes in that the Age Discrimination Act

itself specifies certain categories of age discrimination which will be considered permissible. These standards for justification are found at § 6103(b) and (c) of that Act. Only § 6103(b)(1)(B) is relevant to the present litigation. That provision reads:

(b)(1) It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title, if in the program or activity involved—

* * * * *

(B) the differentiation made by such action is based upon reasonable factors other than age.

HEW regulations flesh out this exception further. 45 C.F.R. § 90.15 provides:

A recipient is permitted to take an action otherwise prohibited by section 90.12 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

Normal operation is elsewhere defined:

"Normal operation" means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

Finally, the regulations explicitly impose the burden of proving that a given action falls within an exception upon the defendant.¹⁸⁶ Although the regulations contain no indication whether they are referring to the burden of persuasion or the burden of going forward with evidence, the Court finds that in a private cause of action, such as asserted here, under the Age Discrimination Act, the

¹⁸⁴ For example, WMC selected Omega from among the almost fifty alternatives with which it was presented.

¹⁸⁵ The availability of feasible alternatives is itself, of course, a means of showing that the asserted needs are only pretexts.

¹⁸⁶ "The burden of proving that an age distinction or other action falls within the exceptions outlined in sections 90.14 and 90.15 is on the recipient of Federal financial assistance." 45 C.F.R. § 90.16.

Cite as 491 F.Supp. 290 (1980)

defendant has only the burden of going forward.

[5] The Court will be guided by the criteria set out in the HEW regulations. Great deference should be afforded the interpretation given to a statute by the officers or agency charged with its administration and that interpretation should be followed unless unreasonable. *Ford Motor Credit Co. v. Milhollin*, — U.S. —, —, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

[6] It should be noted that the Age Discrimination Act and the HEW regulations promulgated thereunder contain no requirement that the least discriminatory alternative be adopted. Of course, the presence of less discriminatory alternatives that would better meet the non-age-related objective is relevant to the question of whether the discriminatory action was actually taken to accomplish that objective. However, where the defendant actually adduces some evidence showing that he based his action upon a non-age-related factor that meets the criteria set out in the act and the regulations, he need not also adduce evidence showing that his action was the least discriminatory alternative. This interpretation is in accord with the Congressional intent to apply a lesser degree of scrutiny to actions resulting in age discrimination than to those resulting in racial discrimination. Congress intended only to prohibit "unreasonable age discrimination." Conference Report, Older Americans Amendments of 1975, Report No. 94-670, House of Representatives, 94th Congress, 1st Sess. (1975), at p. 56.¹⁸⁷

3. The disparate impact test for Section 504

Although Section 504 was patterned after and is almost identical to Title VI, important differences between the two acts warrant a full discussion of both the *prima facie* portion and the justification portion of the impact test under Section 504. These

differences reflect the differences between the type of discrimination suffered by the handicapped and minorities. While racial discrimination tends to be invidious, the handicapped are wont to suffer from benign neglect. Thus Section 504 was enacted both to eliminate invidious discrimination and increase access for the handicapped. Congress expressly directed that, "Where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." Conference Report, 4 U.S.Code Cong. & Admin.News '74, at pp. 6390-6391. Of course, in some cases, Title VI will impose affirmative obligations of some kind. *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). However, the affirmative component of Section 504 is much stronger, both because of the intent of Congress in enacting the section and because of the different nature of the discrimination suffered by the handicapped. Federal courts applying Section 504 have recognized the strong affirmative action component, noting that failure of recipients of federal funds to make "special efforts" or to take "affirmative action" to plan for the needs of the handicapped would constitute a violation of the requirements of Section 504. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (C.A.7, 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (C.A.8, 1977); *Leary v. Crapsey*, 566 F.2d 863 (C.A.2, 1977); *Atlantis Community, Inc. v. Adams*, 453 F.Supp. 825 (D.Colo. 1978); *Bartels v. Biernat*, 427 F.Supp. 226 (S.D.Wis.1977). This strong affirmative action component of Section 504 alters the nature of the test which must be applied, both in the impact stage and the justification stage of the test.

[7] Thus, Section 504 requires that recipients of federal funds take affirmative action to make their programs equally accessible to the handicapped as well as forbidding them from taking actions which will have a disparate adverse effect upon

187. See also, HEW responses to comments on its regulations, 44 Fed.Reg. 33782-33783 (June 12, 1979).

the handicapped. Failure to comply with either requirement constitutes a *prima facie* violation of Section 504. HEW regulations implementing Section 504 incorporate both types of requirement. Among the relevant forms of discrimination which these regulations prohibit are the following:

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

* * * * *

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

45 C.F.R. § 84.4. The regulations further make it explicit that the equality of treatment required is not the provision of a service that produces an identical level of achievement but one which affords the handicapped "equal opportunity to obtain the same result [or] to gain the same benefit." 45 C.F.R. § 84.5(b)(2). Thus, in the context of the case at bar, if the handicapped are given access to medical care equal to that afforded the general population, no discrimination will be found.

The Court will not have to address the thorny questions relating to the disposition of a case where a *prima facie* case has been established under Section 504. See, *Atlantis Community, Inc. v. Adams*, *supra* at 831. The Court has found, *infra*, that, with the assurances required by HEW and with the continued oversight that HEW will perform, the facilities of WMC under Omega will be equally accessible to the handicapped and the non-handicapped.

Having determined the standards under which it will review Plan Omega, the Court will now turn and examine the plan to determine whether or not the alleged discriminatory effects will in fact occur.

V. THE IMPACTS OF OMEGA UPON MINORITY, HANDICAPPED, AND ELDERLY RESIDENTS OF NEW CASTLE COUNTY

[8] Upon consideration of the impacts that Plan Omega will have upon the minority, handicapped and elderly residents of New Castle County, the Court has determined that those impacts are of such minor import that it must conclude that the plaintiffs have failed to make out a *prima facie* case under any of the statutes which they invoke. Specifically, the Court finds that the plaintiffs have wholly failed to show any adverse impact whatsoever upon the handicapped. The Court further finds that Omega may have, at most, *de minimus* adverse impacts upon the elderly. Finally, the Court finds that Omega may have some negative impacts upon the blacks and Hispanics so insignificant as not to make out a *prima facie* case under Title VI. Overall

Omega will effect vast improvements in the quality of care which all minorities will receive along with the general population.

The Court will begin its discussion with an analysis of Omega's effect upon access. It will then analyze Omega's effects upon the quality of care which will be rendered in the various medical specialties, considering inpatient, clinic and emergency care together under each specialty category. Finally, the Court will consider the allegations of linguistic discrimination against Hispanics and the allegations relating to racial identifiability of the Delaware Division.

A. Effects Of Omega On Accessibility

Many of the adverse impacts projected by the plaintiffs stem from their claim that minority groups will lack adequate access to the Southwest Division. This argument, in turn, is based upon their contentions that the shuttle will be inadequate, and even if it is adequate, that the additional time spent traveling to the Southwest Division will present a barrier to the use of that facility by minorities. In so arguing, plaintiffs rely upon the testimony of transportation expert Dr. Marvin Manheim.¹⁸⁸ The Court will consider plaintiffs' two contentions regarding access separately.¹⁸⁹

1. *The shuttle will adequately meet transportation demand*

Dr. Manheim presented projections showing that, under the minimal requirements imposed by the Supplemental Agreement, demand for the shuttle will far exceed supply and will create prohibitively long waiting periods for passengers. The Court finds this testimony irrelevant. As previously

¹⁸⁸. Tr. 164-395.

¹⁸⁹. The plaintiffs in their briefs have also asserted that the mere fact that minorities will have to use the shuttle bus will be a burden because it will cause the users to be exposed to contagious diseases. This is unsupported on the record. There is no evidence showing that a person riding the shuttle will face a greater risk of contagion than does a person riding a DART bus to and from the Delaware Division today.

¹⁹⁰. PX 2, ¶ 1.

noted, the Supplemental Agreement includes a categorical obligation to "provide adequate transportation for patients, visitors and employees."¹⁹⁰ The conditions projected by Dr. Manheim, of course, would obviously not be adequate transportation, but, if such a deficit in supply should develop, WMC would be obliged to provide such additional transportation as necessary to meet that demand.

The Court further finds that WMC is ready and able to provide such additional transportation. WMC's financial director, James Tyler, testified that, if waiting periods did occur, WMC would provide more buses.¹⁹¹ If demand warranted it, WMC would provide additional buses equipped to serve the handicapped.¹⁹² Even if the worst case hypothesized by Dr. Manheim were to develop, the additional costs of providing extra transportation would be minimal in comparison to WMC's annual budget, and those costs could be absorbed by WMC with no strain upon the institution's financial resources.¹⁹³

2. *Omega will cause a disproportionate increase in travel time required by minority and elderly inpatients and visitors*

Dr. Manheim's analysis of the effects of Omega included a study of the relative changes in travel times for minority inpatients, visitors and employees under Omega.¹⁹⁴ Considering only the groups of WMC users that will be using the Southwest Division, he forecast a disproportionate increase in travel time for minorities and the elder-

¹⁹¹. Tr. 2631-2632.

¹⁹². Tr. 2647.

¹⁹³. Tr. 2642-2647.

¹⁹⁴. Although a separate analysis was not done for the elderly, the impact upon the elderly should mirror the impact upon minorities, since elderly distribution and lack of access to transportation mirrors those characteristics in the minority population.

ly.¹⁹⁵ WMC's expert on data manipulation, Mr. Tyler, presented data showing that there would be no disparate impact if the impact upon *all* WMC users, including both users of the Delaware Division and all of the clinics, were measured rather than simply the impact upon users of the Southwest Division. The real dispute between the parties on this issue, then, is over the measurement of the impact. The Court finds that both positions have some merit and that the truth lies somewhere in-between.

The Court finds that, as WMC has argued, users of both the Delaware Division and the Southwest Division should be considered together for the purpose of determining relative racial impacts.¹⁹⁶ On the other hand, WMC overstates its position because it would indiscriminately add all categories of users together, combining inpatients, visitors, and clinic users. Since

the relative use by race of these categories varies dramatically,¹⁹⁷ an impact or lack of impact upon one category could mask the disparate effect upon another category of user. The proper approach would be to measure impact upon each category of WMC user separately.¹⁹⁸ Consequently, the Court has adjusted the figures presented by Mr. Tyler and Dr. Manheim, crediting users of the Delaware Division with a zero time impact but keeping categories of user separate.

So adjusted, the figures forecast that minority inpatients and visitors will suffer a disproportionate increase in the amount of time which they must spend to reach WMC's facilities.

The figures are illustrated in the following tables:¹⁹⁹

195. PX 239, 240, 243, 245, 246, 248, 249, 250, and 251.

196. The plaintiffs focus only upon those individuals whose position will be changed by Omega because they will have to use hospital beds located at the Southwest Division rather than the city. While in many cases this emphasis might be proper, in this case, it distorts the picture. Omega is, in a large part, a reaction to the reality that major population shifts to the southwest have occurred within the county. Therefore, in order to serve the overall population best, some beds must be located in the suburbs. All parties agree on that point. However, if one measures only those affected by the move, even a relocation of 200 beds, which the plaintiffs advocate, would have a discriminatory impact. In a relocation of 200 beds, conceivably some inner city blacks would have to travel to Stanton. The impact on the small number affected would appear as a disparate impact.

197. Blacks are much more heavily represented among clinic users than they are among inpatients.

198. This should be done for another reason, as well. The effects of increased travel time will be felt differently by the different categories of users. Visitors will be much more likely to be deterred from traveling to a hospital by an increase in travel time than will those seeking medical care. There are similar differences between those who seek primary care at clinics and those referred by a physician to a medical facility or those seeking inpatient care. Ac-

cording to WMC's expert Dr. Thorpe, the patient seeking primary clinical care is more likely to be deterred by increases in travel time. (Tr. 2273-2275, 2293-2294).

The error of lumping all categories of users together is illustrated by the fact that if this approach were adopted when measuring racial identifiability, the Delaware Division would be racially identifiable under Omega even if it had no minority inpatients. (On Table S in DX 25, Mr. Tyler presented the number of daily clinic users broken down by race. If one uses that number and assumes that all 250 beds were filled with whites, one would get a minority presence of 31%. This actually understates the percentage that would be derived, since inpatient occupancy is actually only approximately 85% [Tr. 595] and since Mr. Tyler derived his daily figure incorrectly. He divided the total number of clinic visitors during the 90-day study by 90 rather than by the number of weekdays. Clinics are held only on weekdays.)

199. All tables and figures are taken from DX 25 and restate Table T found therein. The methodology used is the same as that described by Mr. Tyler. Where two numbers are given, this reflects the fact that Dr. Manheim often stated his numbers in ranges to reflect uncertainty. When such ranges are given the lower numbers for one racial group correlate with the lower numbers for the other racial groups. This correlation extends throughout the range of numbers. (Tr. 262-263).

INPATIENTS
(in %)

Change in travel time (in minutes)	White	Black/P.R.	Other	All
-5 or less	32	7	-	28
0	42/46	43/50	-	42/47
10	12/17	29/43	-	15/22
25 or more	5/14	14/29	-	6/16
(cumulative totals)				
0 or less	74/78	50/57	-	70/75
10 or more	26/22	50/43	-	30/25

VISITORS
(in %)

-5 or less	41	13	40	37
0	27/32	21/25	20	26/31
10	15/20	34/47	40	18/25
25 or more	5/17	14/32	0	7/19
(cumulative totals)				
0 or less	68/73	34/38	60	63/67
10 or more	32/27	66/62	40	37/33

CLINIC PATIENTS
(in %)

0 or less	100	99	100	99
10 or more	0	1	0	1

For clinic patients, while minorities will suffer a minimally greater increase in travel time than will whites, the small numbers of patients using the specialty clinics²⁰⁰ at the Southwest Division make the figures insignificant.

The Court has not considered any possible impacts upon employees. Because none of the federal funds received by WMC are for the purpose of providing employment, Title VI cannot be applied to WMC's employment practices.²⁰¹

^{200.} Only two minority clinic users will, on the average, travel to the Southwest Division per day.

^{201.} Title VI expressly provides that it shall not apply to employment practices unless the federal funds which a defendant receives are furnished for the purpose of providing employment. 42 U.S.C. § 2000d-3. Plaintiffs have not shown any such funds. Title VI has been construed to apply to employment practices where discrimination in employment affects the programs for which funds have been given.

3. *The increases in travel time and distance that will occur under Omega will deter use of the Southwest Division by minorities and the elderly in a few very limited respects*

While the small increase in travel time which will occur under Omega is itself an adverse impact, that alone would by no means constitute a *prima facie* violation of Section 6102 or Title VI in a case such as the present one, where the primary service being rendered by the defendant is the delivery of health care. However, because of

Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (C.A.5, 1969); *United States v. El Camino Community College Dist.*, 454 F.Supp. 825 (C.D.Cal.1978). No such showing has been made here.

This finding does not in any way diminish WMC's contractual obligation to abide by those portions of the Supplemental Agreement relating to employee assignments, transportation, and hiring. See, *United States v. El Camino Community College Dist.*, *supra*.

the nature of the populations affected, viz., the elderly and minorities, an increase in travel time may possibly translate into some decrease in the use of health care. Plaintiffs adduced testimony that some of the minority population and the elderly may hesitate to go to unfamiliar places outside of their own neighborhoods and, in some cases, may forego care rather than travel to the new place, even in cases where transportation is available.²⁰² Testimony was also given that extra travel time could also be a burden for the poor for whom this extra time might mean lost wages and could be a burden for the mother with small children.²⁰³ In addition, because the DART buses, upon which many rely for transportation, stop running at 7:00 p. m. in Wilmington, the extra time required to travel to the Southwest could effectively prevent some minority workers from being able to visit that division.²⁰⁴ Finally, there may be some few who may be too sick or otherwise physically unable to use the shuttle.²⁰⁵

The Court finds, however, that with one minor exception, minority and elderly patients will not be deterred from seeking care at WMC's facilities under Omega. Obviously, they will not be deterred from seeking care at any of the services located at the Delaware Division. Any deterrent referred to above will only occur with services located exclusively at the Southwest Division. Moreover, increases in time and distance will usually only deter those seeking primary care and will have no effect upon those who will be inpatients, those who are acutely ill, or those who are referred by their doctor to a facility to receive specialized care.²⁰⁶ Since only doctor referred specialty clinics, inpatient facilities, and doctor referred specialty outpatient treatment fa-

cilities will be located at the Southwest Division, this deterrent factor should, for the most part, not apply. The one minor exception is specialty OB care located at the Southwest Division. There, the deterrent effect may cause a few minority women to skip some appointments.²⁰⁷ While some patients may be too sick or otherwise unable to use the shuttle, ambulances, WMC vans or other volunteer services will provide them with transportation.²⁰⁸

Visitors may be a somewhat different story. The Court finds that they may be deterred and that there will be a disproportionate decrease in the number of minority and elderly visitors to the Southwest Division under Omega.

Plaintiffs' witnesses testified that the increase in missed prenatal visits and the decrease in visitors are important principally because they will have some impacts upon health care and health in general. These impacts will be discussed in relation to the effects of Omega on different categories of patient care.

4. *Plan Omega will have no adverse impacts upon the handicapped population of New Castle County and will make WMC's facilities more accessible to the handicapped*

The plaintiffs have failed to show that Plan Omega will in any way render the facilities of WMC inaccessible to the handicapped. Rather the evidence indicates that WMC facilities will be more accessible to the handicapped under Omega than they are at present. Plaintiffs have wholly failed to meet their burden under Section 504 of demonstrating that Omega will have any adverse impact whatsoever upon the

the initiation of care, the Court finds otherwise. Care would, in all cases, be initiated at the general OB clinics at the Delaware Division and then, if a woman's condition warranted it, her doctor would refer her to a specialty clinic. Since all general OB clinics will be located at the Delaware Division, there should be no delays in the initiation of care.

202. Tr. 539-540, 865-866, 879-881.

203. Tr. 879-881.

204. Tr. 467-472, 1155-1191.

205. Tr. 546-550, 1192-1196.

206. Tr. 883-884, 2273-2275, 2293-2294.

207. Tr. 882-884. While Dr. Hardy testified that the increase in travel time necessary to reach the specialty OB clinics would also delay

208. See, Facts, *supra*.

handicapped. The record is remarkable in its lack of evidentiary support for this cause of action.

As noted earlier, plaintiffs have failed to adduce any reliable demographic evidence concerning the handicapped. Notably, no evidence has been adduced showing that the handicapped population is concentrated in areas nearer to the Delaware Division than to the Southwest Division or that a disproportionate number of handicapped people will be forced to rely upon the shuttle.²⁰⁹ Given this failure the Court has concluded that the handicapped are distributed randomly throughout the population and that their reliance upon public transportation mirrors that of the general population.

Consequently, in most respects, the impact of Omega on the handicapped will be identical to its impact on the population at large. Specifically, the percentage of handicapped at the Delaware Division and the Southwest Division should be the same as the percentage of the general population at each Division. The quality of care received by the handicapped will increase dramatically and to the same degree as the quality of care received by the population as a whole. Finally, because facilities will be located both in the southwest and in the city, the average distance of hospital facilities from the handicapped should decrease, as the average distance will decrease for the general population.

However, while a decrease in distance will usually mean an increase in accessibility for the general population, this is not necessarily so for the handicapped. Handicapped people often require both special means of transportation and special devices or structures to allow them to get into a building and get around inside. A mere decrease in distance will matter little to the handicapped person who depends upon specialized transportation when that specializ-

ed transportation cannot carry him to the new location. Similarly, a decrease in distance will not help the individual who cannot enter or move about a building once he or she arrives. It is for this reason that Section 504 contains the affirmative requirement that facilities of institutions receiving federal funds be constructed so as to make them accessible to the handicapped. The Court is convinced that WMC will fulfill its affirmative obligation under the statute to make its facilities accessible in all respects to the handicapped.

The Supplemental Agreement assures that the handicapped person who arrives at a WMC facility will not be confronted with barriers to entry or free movement within the facility. The Delaware Division must be renovated in accordance with Section 504 and the Southwest Division must be similarly constructed. Thus, under Omega WMC facilities will be more accessible in this respect to the handicapped than are WMC's present facilities.

The Court also finds that access to the WMC facilities will not be decreased because of lack of the specialized transportation often required by the handicapped. The only evidence that would indicate otherwise was testimony by a representative of DAST who testified that the implementation of Omega would cause a reduction in the level of services which DAST could render.²¹⁰ The Court finds this testimony partially unreliable because it was based upon a misunderstanding of the demographic characteristics of the county. The representative based her conclusion, in part, on the assumption that the relocation of beds to the Southwest would increase DAST's average trip length. The Court has found that WMC facilities will be located, on the average, closer to the handicapped population under Omega than they are at present. Thus, the average trip length will decrease.²¹¹ The witness also based her conclusion on an assumption that the num-

ber of handicapped persons in the Wilmington area is increasing. This, however, is apparently because so many of the county's businesses and services are located there and not because the handicapped are concentrated in the area. (Tr. 531-532).

209. See, the Facts section of this opinion, *supra*.

210. Tr. 530-532.

211. The witness did testify that a majority of DAST trips either originated or ended in Wil-

ber of DAST's multi-purpose trips would decrease, since the Southwest Division, unlike the Delaware Division, will be located in an area which is not close to other businesses and services. The Court finds that the efficiency of DAST may be somewhat reduced because of this and that the level of services which it could provide may be reduced.

However, the Court is convinced that under Omega there will be no overall decrease in the transportation available to the handicapped and that most probably there will be an increase. The reduction in service experienced by DAST will be more than offset by the new transportation provided by WMC. WMC must provide at least two full sized buses as well as two vans equipped to transport the handicapped.²¹² Thus, WMC itself could provide free transportation in the vans on an individualized basis. Moreover, handicapped passengers could be left by DAST at the Delaware Division and from there they could take the WMC shuttle to the Southwest Division. If the latter approach were adopted by DAST there would be no decrease in the number of multi-purpose trips.²¹³

The most probable scenario would be that Omega will increase accessibility for the handicapped. For those handicapped people living in the Southwestern portion of the county traveling to the Southwest Division, trip lengths will decrease and demand for DAST services will correspondingly decrease. Furthermore, while the greater distances which must be traveled by those in Wilmington and the Brandywine Hundred will increase the demands upon DAST, as will the decrease in multi-purpose trips, the supply of specialized transportation will increase dramatically as a result of the additions of WMC's transportation fleet.

212. See, Facts section of this opinion, *supra*.

213. Plaintiffs argue that the shuttle will not provide adequate transportation because, contrary to the Supplemental Agreement, WMC may not adequately equip its buses and vans and because the drivers may not be adequately trained: (D.I. 408 at 49-50). The basis for these contentions is pure speculation and the Court does not find them credible. As noted earlier, the Court finds that WMC will abide by the Supplemental Agreement since non-compli-

Thus, given the facts that under Omega the supply of specialized transportation will be greater, WMC facilities will be located closer to a substantial number of handicapped individuals, and WMC facilities will be constructed to make them accessible, this Court concludes that WMC will be more accessible to the handicapped under Omega than it is at present.

B. The Quality Of Care Which Will Be Received By Minorities And The Elderly In The Medical Specialties Of General Medicine, General Surgery And Related Subspecialties Will Be Equal To That Received By The General Population

The Court finds that the plaintiffs' charges, that the elderly and minorities will receive poorer care than the general population in the medical specialties of general medicine and general surgery and related subspecialties under Omega, are unfounded. It concludes that under Omega the quality of care rendered in those specialties will be better than that which is presently afforded by WMC and that the quality received by minorities will be equal to that received by the general population.

Plaintiffs base their charges of inferior care noted above in a large part upon their dual contentions that (1) the quality of care which will be rendered at the Delaware Division will be inferior to that rendered at the Southwest Division and (2) that a disproportionately high percentage of elderly and minority patients will receive the inferior care that will be rendered at the Delaware Division.²¹⁴ In support of their contention that a disproportionately high number of minorities and elderly will rely upon the Delaware Division for general medical and general surgical care, the plaintiffs

ance will automatically invoke the same penalties that this Court could now impose.

214. The Supplemental Agreement, of course, requires that minority inpatient utilization of the Delaware Division not exceed 25%. However, since only 13% of New Castle County's population is minority, it is entirely possible that a disproportionately high number of minority inpatients (any number greater than

note that 72% of the minority and elderly populations live in the ZIP codes assigned to the Delaware Division for these services²¹⁵ and consequently will rely primarily upon the Delaware Division for such care.²¹⁶ Similarly, because a majority of clinic patients are members of minority groups,²¹⁷ poorer clinic care (almost all clinic care will be rendered at the Delaware Division) would have a greater effect upon them than upon whites. Finally, plaintiffs point to evidence showing that poorer care at the Delaware Division Emergency Room might also have a disparate impact. The elderly and minorities, whose living quarters are concentrated in areas nearest to the Delaware Division, might use the Emergency Room of the Delaware Division at a disproportionately high rate.²¹⁸

The Court finds, however, that regardless of where the minorities and elderly will receive general medical and general surgical care under Omega, the care which they will receive will be equal to that which will be received by the general population. This will be so because the general medical and surgical care that will be rendered at the Delaware Division under Omega will be entirely equal to that rendered at the Southwest Division and superior to that which is now rendered by WMC.

1. *The physical quality of the Delaware Division will be equal to that of the Southwest Division in ability to provide patient care and in aesthetics and will be superior to the physical quality of WMC's present facilities*

The plaintiffs contend that care provided at the Delaware Division will be inferior to

13%) could be located at the Delaware Division without that Division being deemed racially identifiable.

215. PX 45a, p. 48; see also, PX 23a.

216. Plaintiffs adduced testimony that this would occur even if the minority presence at the Delaware Division remains below 25%. (Tr. 592).

217. PX 52b, ¶ 37(a).

218. This has not been established by the testimony. During the day, white suburbanites commute into Wilmington to work. Any emer-

that given at the Southwest Division because the Delaware Division will be an inferior building in that the proposed renovations will be insufficient to make it equal to the Southwest Division and that WMC may not even be able financially to complete the proposed renovations. The Court finds these contentions to be purely speculative and wholly unsupported on the record.

As mentioned earlier, the Supplemental Agreement imposes the categorical obligation that the Delaware Division be renovated regardless of cost and imposes the minimal obligation that \$2.8 million be set aside for that renovation. Plaintiffs' expert, Howard Juster, relying upon still fragmentary plans for renovating the Delaware Division and some earlier unrelated studies, constructed an estimate of the cost of renovating the Delaware Division into a facility that would be equal to the Southwest Division. His estimate yielded a project cost of \$24,700,000 exclusive of financing charges.²¹⁹ Comparing this figure to the \$2.8 million set aside under the Supplemental Agreement for renovations, plaintiffs leap to the unsupported conclusion that the Delaware Division is underplanned and that the underestimate of the cost could lead to WMC's failure to complete the renovations.

First, the Court for reasons already stated has found that WMC will abide by the categorical requirements of the Supplemental Agreement and that HEW will enforce that Agreement. Thus, the Court on this basis alone finds that the Delaware Division will be renovated into a facility equal to the

gencies, such as heart attacks, that occur in that population during the day would be treated in the Delaware Division. (Tr. 1458). Plaintiffs' experts based all admission and use projections upon the racial living patterns only. (DX 3, p. 24). Because Emergency Room admissions will depend upon where the emergency occurs and not upon where the patient lives, the Court cannot find that plaintiffs have established that the Delaware Division Emergency Room will be used disproportionately by minorities.

219. Tr. 1274-1275.

Southwest Division. However, other evidence has been adduced which independently leads the Court to this same conclusion.

The testimony indicates that WMC's board members have a present intention to renovate the Delaware Division and commit funds beyond those required by the Supplemental Agreement to that task. The Board considers it a business necessity to maintain a first rate unit in the city. A substandard unit, in the board's opinion, would cause the Center to lose essential revenues.²²⁰ Furthermore, many members of WMC's boards and its officers work in office buildings located within the city and have a personal stake in assuring that a first rate facility be located in the city to treat them should some emergency, such as a heart attack, arise while they are at work.²²¹

There is also overwhelming objective evidence indicating that WMC intends fully to renovate the Delaware Division. Between 1969 and 1979 WMC committed some \$12,-

220. Tr. 1384-1385.

221. Tr. 1457-1458.

222. In DX 14, Mr. Deehan, WMC's planner, presented the following list of projects authorized, completed and/or in progress between 1969 and 1979 relating to the Delaware Division. (Any appropriate references to the transcript are noted in parentheses.)

PROJECT	COST
Emergency Room Addition	\$ 3,500,000
Radiology (including CAT Scanner)	1,174,000
Coronary Care Unit	344,000
Blood Bank	300,000
Lab Equipment (5)	299,000
Dental Clinic	225,000
Intensive Care Units	184,000
Others (18)	180,000
Specialty Nursing Units	154,000
Cardiac Cath Lab	134,000
Ambulatory Care Services	115,000
On-Call Quarters	74,000
Minimal Care Unit	70,000
Family Practice Offices	60,000
Nuclear Medicine	56,000
Medical Records File Storage	51,000
Parking Garage (Tr. 1680)	2,000,000
Land for Parking Garage (Tr. 1680)	782,000
Utility Services (Tr. 1597, 1680)	2,230,000
Boiler Economizers (Tr. 1685)	226,000
Parking Expansion (Tr. 1685)	45,500
Roof Repairs (Tr. 1685)	99,000
Burn Care Room (Tr. 1685)	89,000
TOTAL	\$12,616,500

616,500 to renovation projects in the Delaware Division.²²²

In addition, a number of renovations are currently underway. These renovations were identified by Mr. Juster as having a cost of \$7,479,823, but they will probably be completed at a "considerably lower" cost.²²³ Including the monies set aside under the Supplemental Agreement, the Court finds that WMC has recently committed or will probably soon commit a grand total of over \$18 million to the renovation of the Delaware Division. Such a major commitment certainly does not presage an intention to renege on the renovation of that facility.

The Court also finds that WMC will easily be able to produce the funds that will be necessary to complete necessary renovations. If one excludes (1) those renovation costs in Mr. Juster's estimate which need not and will not be completed at the Delaware Division²²⁴ and (2) the renovation

223. Mr. Deehan testified that the following renovations are currently in progress:

ITEM	JUSTER'S COST (not applying multipliers) \$
1. Sprinklers (Now being worked on and work is almost complete.) (Tr. 1664).	\$ 139,301
2. Dutch Doors and other Miscellaneous Remodeling (Some doors have already been removed and, some may yet have to be done. Tr. 1669)	140,522
3. STEP 4. General Face Lift (Now being done at a cost considerably lower than that identified by Mr. Juster. Tr. 1670)	7,200,000
Adjusted by the Court to a considerably lower figure	or 2,500,000
PROBABLE TOTAL	\$2,779,823
JUSTER TOTAL	\$7,479,823

224. For example, neither the Delaware Division nor the Southwest Division will need or contain a Mosler Telalift. (Tr. 1661, 1825-1837) A materials handling elevator (Tr. 1661, 1833), heavy renovations on spaces which will not be used for anything (Tr. 1657) and sprinklers which would cover the entire hospital are neither planned nor warranted for a 250-bed Delaware Division.

costs for areas which will not be used by patients or directly for patients, such as office spaces,²²⁵ only \$4,006,710 of the necessary renovations identified by Mr. Juster will remain incomplete after the Supplemental Agreement funds have been exhausted.²²⁶ These renovations are planned by WMC²²⁷ and are of the type that would normally be met by use of funds from the operating budget.²²⁸ In comparison with projects which WMC has funded out of the operating budget in the past, the cost of the patient care renovations that will have to be performed with non-Supplemental Agreement funds is minor. In any case,

non-operating budget funds, which were identified at trial by WMC's financial director, James Tyler, could easily meet those expenses and leave sufficient money available to meet the costs necessary for the renovation of office spaces.²²⁹

Plaintiffs contend, that regardless of WMC's good intentions, WMC will be financially unable to complete the renovations of the Delaware Division because Omega's high costs could cause WMC to experience substantial deficits which may be so great as to force WMC to discontinue free care. While the plaintiffs have adduced evidence raising some questions concerning Omega's

Plaintiffs contend that sprinklers would be necessary to make the Delaware Division equal to the Southwest Division. Their expert, Mr. Juster, testified at length that sprinklers would not really be necessary and they often did not accomplish what they were supposed to accomplish in any case. Only upon prompting by counsel did Mr. Juster "guess" that sprinklers "might" be necessary to make the Delaware Division equal to the Southwest Division. Given the weakness of his reply when contrasted to his cogent, unprompted earlier discussion and given the fact that sprinklers have been or are being installed in the areas where they are important for safety, the Court concludes that complete sprinklering is not necessary to make the Delaware Division equal to the Southwest Division. (Tr. 1302-1304).

225. If office space renovations were not completed and older less desirable offices were used elsewhere in the Center, the only people affected would be the employees who would work in those offices. If there were any translation of poorer working conditions into poorer patient care, that would affect the entire Medical Center and all of its patients without disparity.

226. The following items were identified by both Mr. Juster and either WMC's architect, Mr. Velsey, or Mr. Deehan as planned and necessary but not falling into the abovementioned categories. (All information is derived in part from PX 317. If another source is relied upon it is noted.)

ITEM	COST
1. Clinic expansion and alterations (Tr. 1650-1651)	\$1,633,442
2. Respiratory Out patient Therapy (Tr. 1657)	56,531
3. Nuclear Medicine	142,689
4. Bed Head Units (Velsey not sure whether necessary. Tr. 1839) Third Floor	55,045

ITEM	COST
Fourth Floor	49,050
Fifth Floor	9,265
5. Mechanical Systems (Tr. 1664-1665; Tr. 1884)	
Plumbing	249,500
Hood Fire Suppression	52,937
6. Medical Equipment (Built-in) (Tr. 1662-1663, 1833, 1852)	756,250
7. Laundry Equipment (Tr. 1662, 1833, 1852)	1,002,001
TOTAL	\$4,006,710

227. See references in Footnote 226, *supra*.

228. Tr. 1662.

229. Tr. 2739-2742. In fact, at least \$9 to \$10 million in unrestricted funds will be available to pay for renovations outright. That would mean that at least \$5 million would be available for any office space renovation even if these unrestricted funds were used exclusively for the renovation of the patient care related spaces. If more money were needed, that could be supplied by the excess depreciation that would be generated by the new Southwest Division in the early years of Omega.

In fact, the Court has found that the total cost of renovating the Delaware Division, exclusive of financing, will be approximately \$14 million. If one multiplies the cost of the items which WMC is now completing by the project cost figure of 1.37 used by Mr. Juster (Tr. 3306-3326), one can derive the amount of that total figure represented by projects now underway. That figure is approximately \$3.8 million. Thus, only approximately \$10.2 million (including the \$2.8 million that must be set aside at the beginning of Omega under the Supplemental Agreement) in additional funds will be necessary to complete all renovations. The sources identified by Mr. Tyler could readily meet those needs.

financial feasibility,²³⁰ the Court finds that evidence irrelevant. Rather than attempting to predict the financial consequences of Omega at this point, the Court believes that this question is better left for determination by the commercial market. The market will be able to apply sanctions as swiftly, surely and with greater accuracy as any this Court could apply. First, sanctions could be applied at or near the time that WMC attempts to market the bonds necessary to finance Omega. Before any such bonds could be underwritten and sold, Omega will be subjected to the same type of rigorous financial feasibility study as that advocated by the plaintiffs' expert.²³¹ The facts which the plaintiffs have produced at trial and any new updated information will be evaluated by financial experts at that time, and the bond sale could proceed only if those experts pronounced the plan financially sound. Secondly, the financial feasibility of Omega also will be subject to scrutiny by a second group before any bonds can be sold—the investors themselves. These investors will be aware of WMC's commitment to renovate the Delaware Division regardless of cost, as well as the other facts which have been adduced at this trial. If they had any doubts concerning Omega's financial feasibility, no bonds could be underwritten and sold and Omega would never become a reality. However, even if the bonds were sold and, contrary to the expectations of the financial world, WMC becomes unable to fund the renovations of the Delaware Division, the sanctions required under Title VI would be applied by HEW in any case—funds would be cut off.

While the plaintiffs' evidence and the seriousness of the possible consequences of error might lead the Court, if it were a

230. For example, plaintiffs presented strong evidence that Mr. Tyler overestimated patient days and hence revenues under Omega. (Tr. 3204-3214; PX 14, Table K).

231. Tr. 2401-2421.

232. Tr. 1334-1337, 3046. His testimony that the Delaware Division would be inferior was apparently based on the assumption that only

member of WMC's administration or board, to take a hard second look at the plan, the Court refuses to construe the civil rights statutes as a license for this Court to act as a financial overseer to those who provide services to minorities. It would especially hesitate to assume that role in a case such as this, where the sanctions available to the Court could be applied by the market place as effectively and certainly with more accuracy.

The Court next finds that when the Delaware Division is renovated its ability to deliver medical care will be equal to that of the Southwest Division and the care will be provided in equally safe and aesthetic surroundings. While Mr. Juster, plaintiffs' expert, testified that the Delaware Division would be oversized, and inefficient, he also testified and that the Southwest Division would be undersized, and inefficient.²³² The plaintiffs adduced no other evidence regarding efficiency and therefore the Court cannot conclude that the renovated Delaware Division will be any less efficient than the Southwest Division. The Court has previously found that WMC will complete all renovations which plaintiffs' expert Mr. Juster believed to be necessary to make the Delaware Division equal to the Southwest Division.²³³ The inference from that testimony is that the two divisions will be equal once the renovations are completed. In addition, there is credible evidence that even with less renovation, the two divisions would have an equal ability to deliver care.²³⁴ Certainly both will be fully equipped hospitals with the physical capability to meet any medical or surgical emergency, as the Court noted earlier.²³⁵

The Court therefore concludes that the physical capabilities of the Delaware Division

\$2.8 million would be expended for renovations. (Tr. 1260).

233. Of course, the Court has also found that some of the work which Mr. Juster included in his cost estimate will be unnecessary.

234. Tr. 1716-1717.

235. Tr. 2247; see also, Facts, *supra*.

sion as it will be renovated will be equal to those of the Southwest Division.

2. *The care delivered by board certified physicians in General Medicine and General Surgery will be equal at the Delaware Division and the Southwest Division*

Plaintiffs argue that the quality of medical care which will be delivered at the Delaware Division by board certified physicians in General Medicine and General Surgery will be inferior to that delivered at the Southwest Division. Plaintiffs contend that this will result for two reasons: (1) physicians certified in those subspecialties that will be located exclusively at the Southwest Division will be unavailable for consultation and treatment at the Delaware Division and (2) the Delaware Division will be abandoned even by those physicians certified in those specialties which will be duplicated at the two divisions. Consequently, plaintiffs maintain that this shortage of competent board certified physicians at the Delaware Division will result in adverse impacts on the minorities treated there.

The Court disagrees. The Court finds that under Omega subspecialists in services located exclusively at the Southwest Division will be available for consultation and the treatment of patients at the Delaware Division. Under Omega, as is the case now, WMC regulations will require a subspecialist in each subspecialty area to be "on call" and thus available to both divisions both day and night.²³⁶ Consequently, if an emergency arises in a subspecialty for a patient admitted at the Delaware Division, the subspecialist "on call" could and would respond promptly.²³⁷

236. Tr. 2224-2225.

237. PX 2, Ex. A, p. 2.

238. Tr. 1139, 2197; DX 13.

239. Tr. 2214-2215.

240. Tr. 2383.

241. Tr. 2336-2338.

242. Some very specialized equipment relating to diagnosis and treatment may be located ex-

The Court also finds that either a subspecialist on call or some other subspecialist will likely be at a location in or near the city from which he could promptly reach the Delaware Division. While many subspecialists may open new offices in Stanton and primarily practice in the Southwest Division (if their service is located exclusively there), many will likely continue to maintain offices in the city. Physicians presently locate their offices to be convenient to their patients and many now have offices both in Wilmington and Newark despite the lack of hospital facilities in the Southwest.²³⁸ There is no reason to believe that this pattern will be disrupted under Omega. Moreover, since most doctors are on the staffs of the other Wilmington hospitals, it is likely that many subspecialists frequently will be available in the city because of their duties at those hospitals.

Furthermore, it is clear that the various subspecialists will be able to treat patients adequately once they arrive at the Delaware Division. Since the Delaware Division will be a fully equipped hospital, the subspecialists will have all the necessary equipment available.²³⁹ Indeed, the Delaware Division will have a trauma team,²⁴⁰ which will include subspecialists, such as neurosurgeons,²⁴¹ whose services will be located exclusively at the Southwest Division. In order to support such a trauma team, adequate equipment will have to be located at the Delaware Division.²⁴²

In most cases, of course, patients in need of subspecialty services will be admitted directly to the Southwest Division. In non-

clusively at the Southwest Division. However, most testimony seems to indicate that with the advanced equipment that will be located at the Delaware Division, all foreseeable emergencies and all foreseeable complications could be treated. The testimony relating to inability to provide treatment in the subspecialty areas related primarily to a predicted lack of subspecialists not a lack of equipment. Any discussion of equipment is difficult at this point in time since plans remain fluid.

critical cases, patients can easily be transferred to the Southwest Division by means of WMC's interdivisional ambulances.

Thus, the Court concludes that the quality of care delivered in General Medicine and General Surgery will not be prejudiced in any way by the location of certain subspecialty services exclusively in the Southwest Division.

Plaintiffs' second argument is that the Delaware Division will be understaffed even in those services duplicated at the two divisions because the majority of doctors in those services will elect to practice exclusively at the newer hospital and relocate their private offices close to that hospital. The Court finds these conjectures unfounded in fact.

First, under the Supplemental Agreement, a doctor *cannot* decide to limit his practice to one division, as the plaintiffs contend, unless that doctor either disobeys WMC's policies implementing the Supplemental Agreement or decides to refuse to treat patients from certain ZIP codes assigned to the Delaware Division. The Court finds that doctors in order to enjoy staff privileges at WMC will abide by WMC's procedures implementing the Supplemental Agreement²⁴³ and that they will not choose their patients on the basis of ZIP codes. Consequently, all doctors enjoying WMC staff privileges in duplicated services will have patients who will be admitted to

the Delaware Division and those doctors will practice at that division.

The Court also finds independently that the majority of doctors in duplicated services will not elect to practice exclusively in and around the Southwest Division. The services which are duplicated are the general ones which would be provided by any hospital. Hence, doctors on these services will probably have duties at Riverside and St. Francis thus creating less of an incentive to move their practices out of the city as plaintiffs predict. Indeed, given the fact that under Omega the number of hospital beds within the city will approximate the number that are at the Southwest Division and many of the beds in the Southwest will be subspecialty beds, it is not unlikely that there will be more general service beds located in the city (Delaware Division, St. Francis and Riverside) than there will in the suburbs. While the present imbalance of doctors offices in the county²⁴⁴ will be redressed under Omega and some doctors will move their offices from Wilmington to the Southwest, the Court finds that many doctors will remain in Wilmington, will practice at the Delaware Division, and will continue to be available at that division. The Court finds absolutely no merit to plaintiffs' contention that the doctors of New Castle County will all rush to the Southwest Division.²⁴⁵

243. Tr. 1225-1228, 2245. Of course, if they did not, WMC would be required to take more stringent, perhaps compulsory measures.

244. See, DX 13.

245. This contention is typical of many of the dire predictions which plaintiffs have developed for this case. Starting with a single fact which, in itself, is plausible, plaintiffs build a scenario, on the basis of conjecture, which is wholly implausible. For example, here, the plaintiffs have shown that doctors and patients will tend to prefer a newer, more sophisticated hospital. This is perfectly plausible and supported by credible evidence. However, at this point plaintiffs, and occasionally their experts, depart from reality and develop the incredible forecast of doctors scurrying from the Delaware Division like rats from a sinking ship. Plaintiffs assume that because of the general preference for a new hospital, doctors will

flaunt the Supplemental Agreement and neither the WMC administration nor HEW will intervene. Moreover, plaintiffs ignore the pull of other hospitals which will remain in the city and the historical patterns relating to the location of doctors offices.

By repeating this pattern many times, plaintiffs have managed to construct predictions in which the Delaware Division under Omega would be a truly substandard ghetto hospital. However, when subjected to scrutiny, this picture has an extremely limited basis in fact. If the actual facts which plaintiffs have developed are considered alone, their case appears to have very little substance. However, because they have forecast such horrendous consequences, the Court is required to consider each of them with the consequence that even this opinion may give the impression that, overall, minorities will be disadvantaged by Omega. The Court, after careful consideration of the

Because all board certified physicians on WMC's staff in the duplicated specialties will practice at the Delaware Division and maintain offices in Wilmington, there is no basis for plaintiffs' contentions that they will come late to clinics, leave early and skip clinics. Similarly, there is no merit to their contention that residents in the duplicated services will have less supervision by board certified physicians at the Delaware Division than they will at the Southwest Division. In sum, the Court concludes that the services performed by board certified physicians in duplicated services will be equal in the two divisions of WMC under Omega.

3. *Services rendered by residents will be equal at the two divisions of Omega in duplicated services.*

Plaintiffs also contend that services rendered by the resident staff in duplicated services will be inferior at the Delaware Division because that division will be understaffed with residents, staffed with residents of poorer quality, and will be less well supervised. The Court finds otherwise.

First, the Court has previously found that the presence of board certified physicians in the Delaware Division at all times will assure that that Division will be as well supervised in duplicated services as will the Southwest Division. Second, the Court finds that plaintiffs have failed to adduce any credible evidence to support their contention that, if there is a shortage of residents, that shortage will be experienced solely by the Delaware Division. In fact, the evidence indicates otherwise. The Supplemental Agreement categorically requires that the residency program be operated on a unified basis. WMC's director of the educational program plans to rotate residents among all the floors of the two divisions under Omega in the same way they are now rotated among the floors of WMC's three

present divisions.²⁴⁶ There is no indication that rotations in the Delaware Division will be dropped if a shortage should develop. In fact, with new improved facilities, there is less likelihood that there will be a shortage of residents because recruitment will be facilitated.²⁴⁷ Finally, the requirement of a unified program will assure that the residents of the two divisions will be the same individuals. Indeed, the quality of the residents should improve over the present because the improved program in rejuvenated and newer facilities will attract more qualified residents and will provide them with better training.²⁴⁸

4. *Clinic care and Emergency Room care in duplicated specialties at the Delaware Division will not be adversely affected by Omega.*

The Court's earlier findings that in general medicine, general surgery and related subspecialties, the Delaware Division will be fully and equally staffed and equipped compel the conclusion that clinic care and Emergency Room care in these specialties will not be adversely affected by Omega.

Undoubtedly, clinic care will greatly improve under Omega. The clinics will have more space and the concentration of clinics will facilitate interdisciplinary consultation.²⁴⁹ Physicians who are board certified in general medicine and general surgery will always be present at the Delaware Division for consultation. Finally, residents will be less likely to be pulled out of the clinics for other duties if the clinics are concentrated at the Delaware Division.²⁵⁰ Thus, shortages of physicians at the clinics will occur less frequently under Omega.

The Emergency care in these specialty areas at the Delaware Division will also be equal not only to the present level of care but also to the level of care that will be delivered at the Southwest Division. The

facts and examination of the record as a whole disagrees emphatically.

246. Tr. 1943-1945, 2208-2209.

247. Tr. 1935-1941.

248. Tr. 1943-1945.

249. Tr. 1943-1945, 2208-2209.

250. Tr. 1974.

same staff will serve the Delaware Division and the Southwest Division. Both divisions will have Class I emergency rooms and will have backup capacity in all required medical specialties. The two emergency rooms will be mirror images.²⁵¹ Moreover, in the areas of general medicine and surgery, backup specialists will be located on the premises both for consultation and treatment. Subspecialists would, of course, be on call and available also.

5. *Minority and elderly users of the subspecialties of medicine and surgery which will be located exclusively at the Southwest Division will suffer no significant adverse impact*

The Court also finds, contrary to plaintiffs' contention, that minority and elderly users of the subspecialties of medicine and surgery, that will be located exclusively at the Southwest Division, will suffer no significant adverse impact. The Court has already found that the location of those subspecialties at the Southwest Division will not adversely affect the quality of care rendered in general medicine and surgery at the Delaware Division. The Court has also found that since means of transportation are available and small differences in distances do not affect inpatient utilization, use of these services by minorities and the elderly will not be diminished under Omega.

In fact, the Court concludes that the quality of inpatient care that minorities and the elderly will receive in these specialties will be negatively affected by Omega in only one very minor respect. Visitors may be deterred from going to the Southwest Division. A lack of visitors could have both psychic and physical deleterious effects upon the elderly²⁵² who have a disproportionately high use of many of these serv-

ices. In all other respects, the quality of inpatient care will be improved.

The Court also finds that no adverse effects upon minorities and the elderly will follow from the exclusive relocation of the outpatient services for these subspecialties. Plaintiffs argue that use of these services by minorities and the elderly will be deferred or even blocked by the increased distance, and point to the testimony of one elderly individual who said that she would have given up in despair had she had to obtain radiation therapy in Stanton. The Court gives this testimony no credence. As mentioned earlier, utilization of services to which one is referred by a doctor, such as those under consideration here, is not reduced by small increases in time or distance. Indeed, plaintiffs' own expert noted that those who are acutely sick are more likely to surmount barriers of distance than those who seek only preventative care.²⁵³ This Court, therefore, simply cannot believe that people will forego treatment for cancer, diagnosis or treatment for a neurological disorder, or care in any of the other subspecialty outpatient services merely because of a twenty-five minute increase in travel to and from the hospital in each direction.²⁵⁴

6. *Conclusions*

The Court therefore concludes that the plaintiffs have failed to prove that any adverse effects upon the plaintiff classes will occur under Omega in the specialties relating to medicine and surgery other than a slight negative effect upon the quality of care for the elderly due solely to the fact that they may have fewer visitors when admitted to the Southwest Division.

The Court has, to this point, completed its consideration of all the negative impacts which will affect the elderly²⁵⁵ and can

of cancer therapy) could be transported to and/or from their treatment in WMC vans or ambulances.

255. The only impacts which the Court has not yet discussed relate to obstetrics, pediatrics, racial identifiability and linguistic discrimination.

251. Tr. 2377. See generally Tr. 2368-2388.

252. Tr. 789-791.

253. Tr. 883-884.

254. Of course, those unable to use the shuttle or another form of transportation because they are too sick or debilitated from their treatment (such as those who have received some forms

therefore conclude that the plaintiffs have failed to establish a *prima facie* case under Section 6102. All that plaintiffs have shown is (1) a slight disparate increase in travel time, (2) a decrease in the ability to visit patients at the Southwest Division and (3) the slight negative effect which the decrease in visitors may have upon the quality of care.²⁵⁶ These impacts are, at best, *de minimus*.²⁵⁷

C. Plan Omega May Improve Minority Obstetrical Care Somewhat Less Than It Will Improve White Obstetrical Care

While Omega will achieve marked improvements in the quality of obstetrical ("OB") care delivered by WMC, the Court finds that certain characteristics of the plan, enumerated below, may have a slight adverse effect upon minority OB health. Because of these potential negative effects, the quality of OB care and health may not improve as much under Omega for minorities as it will for whites. Any difference in improvement, however, will be so insubstantial that it could not be considered a *prima facie* violation of Title VI.²⁵⁸

Plaintiffs contend that minority obstetrical care will be negatively affected because all inpatient OB services and some specialty clinics will be located at the Southwest Division. Specifically, plaintiffs maintain (1) that this configuration will adversely affect the quality of care delivered at the non-specialty OB clinics which will be located at the Delaware Division, (2) that it will adversely affect the quality of emergency obstetrical care delivered at the Delaware Division,

and (3) that it will decrease minority utilization of the high risk (specialty) clinics.

1. *The quality of care which minorities will receive at the general OB clinics and in OB inpatient services will either improve or remain the same under Omega and will be no different from the quality of care received by whites*

The Court finds that the quality of care which WMC will deliver at its OB clinics located in the Delaware Division under Omega will either improve or remain the same. Plaintiffs predict that the quality of care that will be received at these clinics will decline because all board certified obstetricians will be located in the Southwest Division and, consequently, will be unable to provide supervision for the residents who run the OB clinics at the Delaware Division and also will be unavailable for consultations. The Court rejects this contention because it is based upon a misunderstanding of the present situation.

There are now no attending physicians present at OB clinics which are managed entirely by the nursing staff and senior residents.²⁵⁹ Thus, plaintiffs' projected lack of supervision can have no adverse effect, since it would represent no change from the present state of affairs. Under Omega, as now, if a resident decides that he needs a consultation, he can simply call an attending physician on the telephone.²⁶⁰ The only adverse effect that Omega could have upon OB clinic care would be due to the possibility that residents may be somewhat less

256. Of course, this conclusion must be considered in the context of the Court's finding that the overall level of care will increase because of the benefits of greater consolidation, better residents, and improved facilities.

257. Even if the Court did find that these impacts made out a *prima facie* case, it would find that WMC had met its burden of showing need.

258. HEW regulations provide that Title VI will be violated if actions are taken "which will have the effect of defeating or substantially impairing the accomplishment of the objective of the program as respect [sic] individuals of a

particular race, color, or national origin." 45 C.F.R. § 80.3(b)(2). This would seem to apply to cases where a lesser benefit is conferred on minorities than is conferred on whites. However, a violation could be found only when the benefit is "substantially" less. Indeed, it is almost impossible to imagine an act which would have an absolutely equal effect upon all the different groups into which a society may be divided.

259. Tr. 2135-2137.

260. Tr. 2156.

inclined to ask a doctor to travel nine miles for a consultation in person and the doctor himself may be less inclined to come.²⁶¹ However, because the senior resident who will be on duty there has already completed most of his training, few such consultations will be necessary.

This minor adverse effect will be counterbalanced by many changes which will effect dramatic improvements in OB care. The increase in space and increased interaction with other medical specialties made possible by the consolidation of the clinics will improve care.²⁶² Furthermore, the tendency to pull residents out of the clinics so that they can help with obstetrical surgery, a problem at the present time, will be eliminated under Omega.²⁶³

The Court also finds that the quality of OB inpatient care will improve under Omega and that the exclusive relocation of these services to the Southwest Division will, with one minor exception, have no negative effects upon minorities. OB inpatient care will improve for the same reasons inpatient care will improve in other specialties. Modernized facilities, consolidation of medical specialties under one roof, an improved educational program, and better residents²⁶⁴ will all work to improve care for OB inpatients. This improved care will be completely accessible to minorities because of the availability of state-wide ambulance service and the WMC shuttle. No witness even suggested that an increase in travel time would deter one from seeking inpatient care.

Plan Omega will have only one very minor adverse effect upon minority users of WMC's OB inpatient services. OB inpatients have a great need for visitors.²⁶⁵ Because Omega will deter some minority visitation, this need will be unfulfilled for a

few minority OB inpatients. The Court finds this effect, however, insubstantial.

2. *The relocation of the high risk OB clinics to the Southwest Division may deter some minority use of those clinics and may have a minor effect upon minority health*

Plaintiffs next assert that, since minorities have a disproportionate number of "high risk" pregnancies, they will have a greater need for the so-called "high risk" obstetrical clinics. They contend that the location of these clinics in the Southwest Division will deter minority utilization with the result of an adverse effect on minority health. The Court agrees only to a limited degree. The Court finds that the potentially serious adverse impacts of this relocation will be minimized under Omega. It finds first that because of a misunderstanding of the nature of WMC's high risk clinics, plaintiffs' experts grossly overestimated the number of minority patients who would utilize those clinics. The Court also finds that plaintiffs' experts overestimated the effect of the relocation on those who would use the high risk clinics because the experts were unaware of a number of mitigating factors.

It is true that minority patients will have a greater need for the high risk clinics which will be located at the Southwest Division than will whites. Although only patients with specifically identified medical and obstetrical conditions will be referred to the high risk clinics at the Southwest,²⁶⁶ minorities may be referred there at a disproportionately high rate because of the high incidence in the minority population of the types of medical and obstetrical conditions that would warrant referral.²⁶⁷

261. Tr. 906-907.

262. Tr. 2158.

263. Tr. 1973-1974.

264. Tr. 2052-2053, 2158.

265. Tr. 937-947.

266. Tr. 2141-2144.

267. Tr. 862-864, 867, 894. Among the conditions which would warrant referral to a high risk clinic are hypertension, cardiac disease, diabetes, a prior Caesarian Section, or a history of pre-eclampsia. (Tr. 2142). The Court has already discussed the disproportionate incidence of many of these conditions in minority populations, *supra*.

The Court also finds that minority patients will be somewhat deterred from seeking care at the high risk clinics at the Southwest. Although distance is less likely to deter treatment in cases where a doctor refers the patient for treatment (as will be the case for the high risk clinics at the Southwest), people seeking pre-natal care are more likely to be deterred from seeking medical care than are other classes of patients. This is so because, even in the case of high risk pregnancies, there are often no symptoms which might worry the mother. This would be especially true, for example, in the case of a mother with hypertension.²⁶⁸ Consequently, some minority users of the specialty OB clinics may skip more appointments at those clinics under Omega and their health and the health of their babies could suffer from this.

However, the Court also finds that the use of the high risk clinics at the Southwest by minorities will be only very slightly greater (proportionately) than use by whites. Plaintiffs and their expert overestimated minority use (and consequently adverse effects) because of a misunderstanding of the nature of WMC's high risk clinics. Plaintiffs' expert testified that pregnant minority teenagers, who are poor users of health care²⁶⁹ and are statistically more likely to have pregnancies with adverse outcomes,²⁷⁰ would be especially affected by the location of the high risk clinics at the Southwest and would be more likely to skip visits or delay the initiation of care.²⁷¹ The fact is, however, that the special clinics which WMC maintains for teenagers and Hispanics are not called "high risk clinics" and will be located at the Delaware Division under Omega.²⁷² Thus, the adverse effects of the relocation predicted by plaintiffs' expert for this large group of minority patients will never materialize.

The Court also finds that a number of factors will work to minimize any potentially adverse effect of the relocation of the high risk clinics for the much reduced groups of minority patients who will have to use them under Omega. First, Dr. Slate, WMC's Director of the Department of Obstetrics and Gynecology, testified that if a large number of high risk patients did appear at the Delaware Division, these patients would be identified, grouped in a special high risk clinic located at the Delaware Division, and treated by an attending physician.²⁷³ Of course, even in that case some treatments might have to occur at the Southwest Division because that will be the site where the most sophisticated obstetrical equipment will be found.²⁷⁴ Second, even if no special high risk clinic were established at the Delaware Division and minority patients were unwilling or unable to travel to the Southwest Division, they could still receive most necessary pre-natal care at the Delaware Division where WMC obstetricians would do "the best we can."²⁷⁵

3. *An increase in obstetrical emergencies presenting at the Delaware Division Emergency Room will have a negative effect upon minority obstetrical health in only rare instances, if ever*

Plaintiffs' final prediction regarding the quality of minority OB care that will be delivered under Omega relates to the quality of obstetrical care that will be rendered at the Delaware Division Emergency Room. They first contend that the number of OB problems presenting themselves to the Emergency Room will increase because of the almost total lack of OB inpatient facilities in the city. Secondly, they contend that, because no OB inpatient services will be located in the Delaware Division, the care rendered by the Emergency Room will be inferior.

268. Tr. 879-887.

269. Tr. 849.

270. Tr. 888-893.

271. Tr. 879-888.

272. Tr. 2133-2137.

273. Tr. 2140.

274. Tr. 2149.

275. Tr. 2150.

The Court finds that the vast majority of women with obstetrical problems will go directly to the Southwest Division or will be taken there by ambulance. There nevertheless will be a few who will go directly to the Delaware Division Emergency Room. This is so because obstetrical problems can have a very rapid onset and in some cases there will simply not be the time to travel nine miles to the Southwest Division.²⁷⁶

The Court also finds that the care of women who do arrive at the Delaware Division Emergency Room with OB problems will rarely, if ever, suffer because of the lack of inpatient facilities in the building. There are certain obstetrical problems which no physician other than one trained in obstetrics could diagnose and treat. When such cases arrive at the Delaware Division Emergency Room, an obstetrician should be called in for consultation or treatment, and the lack of any in-house obstetrician in some very rare cases could prejudice the quality of care received.²⁷⁷ Such problems are very rare and will arise only infrequently in the limited population of OB patients using the Delaware Division Emergency Room. Moreover, in the vast majority, if not all, of those very rare cases, the problems will be adequately treated.

First, a senior obstetrics resident will always be present at the Delaware Division during clinic hours. He or she could be called for consultation and treatment at the Emergency Room if necessary during that time.²⁷⁸ Because the Emergency Room will be equipped with all the apparatus necessary to handle obstetrical emergencies,²⁷⁹ the obstetrical resident will be able to give definitive treatment for difficult obstetrical emergencies arriving during clinic hours.

At all times, obstetricians can be called for treatment and consultation. The obstetrician "on call" would have the responsibility for such cases assigned to him or her. The only cases then, where care would be in any way prejudiced would be the extremely rare ones where the condition would not be diagnosed as an obstetrical problem by the personnel immediately available to the Emergency Room and ones where an obstetrician could not reach the Delaware Division in time.

Such cases will almost never occur. The staff which will be located in the Delaware Division has the capability of handling most OB problems. Family medicine will be located in the Delaware Division. Family practitioners are skilled at delivering most babies.²⁸⁰ First year residents in Obstetrics and Gynecology rotate through the Emergency Room and their expertise will often be available.²⁸¹ Finally, Emergency Medicine residents themselves get training in OB-GYN and will rotate through that department.²⁸² Emergency Medicine physicians can diagnose even the rarest of obstetrical emergencies, including ruptured ectopic pregnancies²⁸³ and placenta previa.²⁸⁴ Furthermore, since emergency physicians specialize in patient stabilization, they could stabilize an OB patient in almost all cases until an obstetrician could arrive to render definitive treatment.²⁸⁵

Thus, the Court concludes that the cases in which a minority patient will receive inadequate care at the Delaware Division Emergency Room for an obstetrical emergency will be so rare (assuming that any occur at all) that the effect will be insignificant.

276. Tr. 897-902, 953-959, 973-974. Since OB inpatient services are currently located only blocks away from the site of the Emergency Room, this distance factor does not obtain and obstetrical cases arriving at the Emergency Room are rare indeed. (Tr. 2152).

277. Tr. 678-688, 897-923, 2072.

278. Tr. 2151-2154.

279. Tr. 2154.

280. Tr. 1942.

281. Tr. 2153-2154.

282. Tr. 2153.

283. Tr. 2379-2380.

284. Tr. 2381.

285. Tr. 2380.

4. *Conclusions*

While the factors described above may, in some very rare cases, have a negative effect upon the quality of obstetrical care which minorities will receive, these negative effects are only insignificant when compared to the vast improvements in the quality of care that will be gained by Omega. There may be a few minority high risk patients who will miss some appointments at the specialty clinics and in the rarest of cases an obstetrical emergency may arrive at the Delaware Division Emergency Room and receive inadequate treatment. These effects will be so unusual that the Court cannot find that they would establish a *prima facie* case under Title VI, even when considered in conjunction with the other very minor effects which plaintiffs have shown.

D. The Quality Of Pediatric Care Received By Minorities Will Improve Under Omega And Will Be The Same As That Received By The General Population

The Court finds plaintiffs' forecasts regarding the effects of Omega upon pediatric care to be unfounded in fact. Under Omega, pediatric inpatient services will be almost exclusively located at the Southwest Division. Plaintiffs maintain that this will adversely affect the quality of Emergency Room care and clinic care at the Delaware Division, thus having a disparate impact on minorities. They also assert that the lack of visitors for inpatients and an alleged decrease in flexibility will likewise have an adverse impact upon minorities.²⁸⁶ The Court finds that the care which minority children will receive under Omega will equal that received by white children in all respects.

First, Omega will have no negative effects upon the quality of care at the pediatrics clinics. The general outpatient clinics will be located in the Delaware Division and will be fully supervised by a board certified pediatrician who will be present for all clinics. This physician is an excellent teacher.²⁸⁷ To the extent that any specialty outpatient services may be located at the Southwest Division, the Court finds that they will be accessible and utilized for the same reasons it found that outpatient specialty services related to general medicine and surgery which will be located at the Southwest Division would be accessible and utilized.

Secondly, the Court finds that the quality of care received in the Delaware Division Emergency Room will be the same for pediatrics patients as that received in the Southwest Division Emergency Room. A senior pediatrics resident will be stationed at the Delaware Division Emergency Room at all times. He or she will be required to examine any infant less than three months of age coming into the Emergency Room and will always be available for consultation. Thus, someone will always be present who can diagnose and treat the often obscure childhood diseases²⁸⁸ and this resident will have adequate backup support from board certified pediatricians. One will be present in the Delaware Division from 9:00 a. m. to 5:00 p. m. and numerous board certified pediatricians will be on call who can be consulted during other hours.²⁸⁹ The Emergency Room will further be supported by two or three pediatrics inpatient holding beds²⁹⁰ and will be equipped with those devices that may be necessary for diagnosis and treatment in pediatrics, including an intensive care nursery.²⁹¹ Even if the child should have to be moved to the Southwest Division, WMC has both the transport equipment and the experience necessary to

286. Thus, for the most part, the types of effects alleged for pediatric care echo those alleged for obstetrical care.

287. Tr. 2313-2314, 2316-2317, 2319.

288. Tr. 2315-2318.

289. Tr. 2316-2317.

290. Tr. 2314.

291. Tr. 2321-2322, 2372.

move even critically ill children without adverse consequences.²⁹²

Thirdly, the Court finds that the location of most pediatric inpatient beds at the Southwest Division will have no negative effects upon minority inpatients. Plaintiffs contend that the decrease in minority visitors will have an adverse effect upon the health of minority pediatrics inpatients. The Court does not agree. Although visits by family members are "extremely important" for sick children,²⁹³ the full benefits of visiting are felt with just a few visitors.²⁹⁴ WMC has in force policies which will ensure that under Omega no minority child will lack those few visitors. The pediatrics staff strongly encourages parents to stay with their children and requires that they do so for patients under three years of age.²⁹⁵ Because of that fact, this type of visiting, unlike other types, would be similar to doctor-referred outpatient services and would be relatively undeterred by increases in time and distance. Furthermore, WMC makes special arrangements to enable members of the family to spend the night with the child, thus eliminating any problems that the cessation of bus service at 7:00 p. m. might have.²⁹⁶ Even in those rare cases where parents would be unable to remain with an infant, WMC provides surrogate parents to provide the atmosphere of love and attention that is essential to the child's well-being and recovery.²⁹⁷

Finally, the Court finds that, contrary to plaintiffs' predictions, Omega will not reduce flexibility or deter WMC's ability to deal with pediatric epidemics. The pediatrics department, presently split between two divisions,²⁹⁸ has thus far had no problems with flexibility during epidemics.²⁹⁹ Omega, by locating all inpatient services in

a single building, should not reduce flexibility, but should increase it.

The pediatrics department will also benefit from all the improvements in care that have been mentioned in relation to the other medical specialties. Under Omega both medical education and the quality of patient care will improve because of the benefits of consolidation.³⁰⁰ Given this fact, and the fact that no negative effects upon minorities have been shown in pediatrics, the Court concludes that pediatrics care for minorities will improve and will improve as much as care for whites.

E. Omega Will Have No Other Discriminatory Effects

The Court finds that all of plaintiffs' other contentions relating to discriminatory effects are without merit.

Plaintiffs have claimed that Omega will discriminate linguistically against Hispanics. They charge that WMC presently has inadequate facilities for providing interpreters for Hispanics and that this inadequacy will be exacerbated under Omega because the people from the community who presently serve as interpreters will be unable to take the extra time necessary to accompany patients to Stanton. The Court finds that there is no shortage of WMC personnel capable of acting as interpreters and that no shortage will arise under Omega.

WMC currently maintains a list of all employees who are capable of acting as interpreters. These lists are constantly updated and are periodically made available to all divisions.³⁰¹ WMC physicians testified that under these arrangements they had always been able to find a capable interpreter from among the WMC staff.³⁰²

292. Tr. 2322-2324.

293. Tr. 940-947, 2323-2324.

294. Tr. 2324.

295. Tr. 2352.

296. Tr. 2324, 2352.

297. Tr. 2353-2354.

298. Tr. 2325.

299. Tr. 2319.

300. Tr. 2325.

301. PX 62, pp. 17-18.

302. Tr. 2154, 2219.

Plaintiffs nevertheless maintain that the interpreters provided under this arrangement are often inadequate. They say that, in some cases, no bilingual doctor, resident, medical student, or nurse is available to serve as an interpreter and that a member of WMC's non-medical staff must be relied upon. This, they contend, is inadequate because these persons are untrained in medicine and unfamiliar with technical medical terms. The Court finds this contention unfounded. A number of doctors testified that they had never experienced any difficulties in using non-medically trained personnel to question patients. Since the patients themselves are untrained in medicine and unfamiliar with medical terms, there is no need to have an interpreter who is familiar with those terms.³⁰³ Plaintiffs also maintain that interpreters drawn from the non-medical staff will be inadequate because Hispanic women will be shy in discussing their medical problems in their presence. Testimony, however, established that modesty is rarely a problem when a medical history is being taken by a doctor.³⁰⁴ Thus the Court finds this contention frivolous.

Plaintiffs' final major contention is that under the minimal requirements of the Supplemental Agreement, the Delaware Division will inexorably become racially identifiable. Specifically they argue that the Supplemental Agreement's patient assignment plan by ZIP code will cause overcrowding that can be alleviated only in such a way as to make the minority presence at the Delaware Division exceed 25%. The Court, for reasons stated earlier, finds that WMC will not violate the categorical requirement of the Supplemental Agreement that neither division shall become racially identifiable and that WMC will implement the necessary means to correct any potential overcrowding without making the Dela-

ware Division racially identifiable. The Court further finds that WMC will be able to accomplish this with only a minimal administrative burden. In order to solve plaintiffs' overcrowding problem WMC need only shift approximately four patients a day from the Delaware Division to the Southwest Division.³⁰⁵

The Court has considered all other contentions proffered by the plaintiffs and has found them to be frivolous.

F. Conclusions

The Court has thus concluded that Omega, as modified by the Supplemental Agreement, will have minimal negative impacts at most on the plaintiff classes. The Court has found no cognizable impact whatsoever upon the handicapped and utterly *de minimus* effects upon the elderly. Although the Court has found that Omega may have certain minor negative effects upon the quality of minority care, it has found that even when considered cumulatively these effects will be insignificant. The Court therefore holds that plaintiffs have failed to meet their initial burden of proving disparate impact under the civil rights statutes invoked upon any of the plaintiff classes.

Nevertheless, the Court will now assume *arguendo* that the minimal impacts upon minorities that have been discussed do make out a *prima facie* case under Title VI and will proceed to determine whether WMC has met its burden in rebuttal of showing legitimate needs that could not be met by a less discriminatory alternative.

VI. WMC HAS MET ITS BURDEN OF GOING FORWARD WITH EVIDENCE SHOWING THAT OMEGA IS THE ONLY PLAN WHICH COULD MEET WMC'S PRESSING AND LEGITIMATE NEEDS

In order to meet its burden on rebuttal, WMC must produce evidence showing that

community workers unavailable to act as interpreters. These people are obviously untrained in medicine.

304. Tr. 2250.

305. Tr. 2694.

303. Tr. 2154-2155, 2218-2219. Plaintiffs themselves have implicitly admitted that one need not be trained in medicine to serve perfectly well as an interpreter between a patient and his or her doctor by arguing that Omega will have an adverse effect upon Hispanics because it will make family members, friends, and com-

it has *bona fide* needs, that Omega will meet those needs, and that other less discriminatory plans will not. WMC has produced such evidence and the Court holds that, even assuming that a *prima facie* case has been established, WMC has met its burden of producing evidence to rebut that case.

A. WMC Has Invoked *Bona Fide* Needs

The needs for the changes that will be effected by Omega have already been thoroughly discussed. The Court finds that these needs are real and legitimate and that Omega will meet them. They will be reviewed briefly below.

First, WMC has shown a need to renovate its facilities so that it can (1) preserve its qualification to receive federal funds, (2) preserve its educational program, (3) maintain its competitive position, and (4) bring itself into compliance with the State hospital code.³⁰⁶ Omega will effect these renovations by building a new hospital and renovating the Delaware Division.

Secondly, WMC has shown a need to consolidate its beds and services into a single facility. The medical advantages of a one-roof facility or a plan coming as close to that ideal as possible were well established by extensive testimony. Plan Omega, with its 780-250 split of beds, comes as close to that ideal as is possible if the goal is to locate hospital facilities in both the suburbs and the city.³⁰⁷

306. See, Facts section, *supra*.

307. Tr. 1143, 1205, 1210, 1382-1384, 2051-2053, 2324-2325, 2158-2159; PX 1, pp. 6-9-6-10.

308. See, Facts section, *supra*.

309. DX 12.

310. Tr. 1373-1374, 2718-2726; DX 29.

311. Tr. 1476-1487, 1559-1560, 1709-1716, 2702-2747; DX 29.

312. Tr. 1403-1404, 1553, 1559-1560, 1903-1904.

WMC has, thirdly, established a need to provide hospital beds in both the city and the suburbs. It is undisputed that WMC's services are needed in the city and it has been established perforce that beds are needed in the growing Southwest.³⁰⁸ WMC's Board of Directors recognized this dual need at an early stage of the planning process and committed itself to maintaining facilities in both areas.³⁰⁹

WMC has shown a fourth interest in keeping itself financially healthy. First, it must hold all costs down to enable it to keep its rates at a relatively low, affordable level while continuing to provide free care for the needy.³¹⁰ Secondly, WMC cannot undertake any enterprise which would financially jeopardize the institution's future. Omega can be completed within WMC's means and will allow WMC to hold its costs down.³¹¹

Finally, any plan which WMC adopts must have sufficient flexibility to allow the institution to expand in response to any increases in bed demand which might occur in New Castle County in the future. Omega is so designed.³¹²

B. Omega Is The Only Plan Which Can Adequately Meet WMC's Needs

The Court also finds that WMC has met its burden of going forward with evidence showing that it has chosen the least discriminatory alternative. WMC has shown that none of the six possible, less discriminatory³¹³ alternatives to Omega would adequately meet WMC's needs.³¹⁴

313. The Court assumes for the purposes of this discussion that, as the plaintiffs argue, any plan leaving all beds or substantially more beds in Wilmington than does Omega would be less discriminatory.

314. A plethora of other plans varying according to the number, size, and location of the facilities could be devised. Indeed, WMC investigated approximately 50 different plans, all of which it rejected for *bona fide* reasons. (Tr. 1580-1606; DX 7). The Court need not and could not examine all less discriminatory alternatives. Those plans which the Court will not discuss here either obviously fail to meet WMC's needs or vary in only insignificant details from the ones which are considered.

The first possible less discriminatory alternative would be to do nothing. WMC would, however, still have to renovate its facilities at a considerable cost or lose its accreditation. Renovation would entail a loss of two hundred beds and a commensurate shortage of hospital beds in the community. The plan would, meanwhile, do nothing to consolidate WMC's facilities and would provide no beds in the Southwest. If, in fact, WMC were to do nothing, it is likely that another institution would build a 200 bed hospital in the Southwest.³¹⁵ Such a hospital would attract WMC's paying patients and siphon off WMC's revenues while leaving WMC's free care load unaltered and its costs substantially unchanged. Given this situation, WMC would be forced into making a choice between increasing rates to exorbitant levels and either discontinuing or substantially curtailing free care.³¹⁶ Thus, the do-nothing alternative is entirely unacceptable.³¹⁷

The second possible less discriminatory alternative would be to renovate the present facilities and to build a new 200 bed hospital in the Southwest. This plan, however, would have the effect of imposing even greater fragmentation upon the Center with the concomitant disadvantages. In fact, the additional investment in the present facilities which this plan would entail would tie WMC into a fragmented pattern and would make the ideal of consolidation even more difficult to achieve in the future.³¹⁸ This four-roof plan was at one time proposed by WMC's Administration

and Board of Directors but was withdrawn because of the vehement objections of the physicians on WMC's staff.³¹⁹ Thus, the Court concludes that it, too, would be unacceptable.³²⁰

A third alternative would be to build a single large hospital somewhere in the city. Such a plan would probably be neither physically nor financially feasible³²¹ and, in any case, would be clearly unacceptable because it would not locate any beds in the Southwest.

A fourth alternative would be to renovate the Delaware Division into a 450 bed hospital and to build a 570 bed hospital on the Southwest Site. This plan³²² was also advocated by WMC's administration at one point in the planning process.³²³ It was, however, unacceptable to the Medical-Dental Staff who felt that such an even split would effect a permanent schism in the staff and would fail to achieve the benefits of consolidation.³²⁴ The Medical-Dental Staff and the City of Wilmington were so dissatisfied with this plan that they approached WMC with a counter proposal for an 800 bed hospital in the city and a 200 bed hospital in the suburbs.³²⁵

The latter plan, a fifth possible less discriminatory alternative, would require the renovation and expansion of the Delaware Division into an 800 bed hospital and the construction of a 200 bed hospital in the Southwest ("Reverse Omega"). It would meet most of WMC's needs, allowing the

tion by making one division more remote from the others.

315. Tr. 1165-1166, 1407-1408, 1548-1549, 1765-1769. Local planning agencies would probably give approval to such a hospital. See, DX 6.

316. Tr. 1407-1408, 1548-1549, 2717-2726, 2737-2738; DX 29, Chart D.

317. See also, PX 1, p. 6-12; Tr. 1514-1515.

318. PX 1, pp. 6-12-6-13.

319. Tr. 1501-1511.

320. Variations of this plan which would involve closing one of the present divisions and building a new division in the Southwest (various three-roof plans) would be unacceptable for similar reasons. Such three-roof plans would merely exacerbate WMC's present fragmenta-

321. There may not be a site sufficiently large to accommodate a hospital that is not a high rise. (Tr. 1550-1574). Construction of a high rise would involve both prohibitively high construction costs and higher operating costs. (Tr. 1560).

322. See, DX 16.

323. Tr. 1378-1383, 1600-1605.

324. PX 1, p. 6-14.

325. Tr. 1378-1383, 1600-1605.

Center to achieve the maximum amount of consolidation possible, while locating beds both in the city and the suburbs. It would also give the Center enough flexibility to meet any future growth in demand. Reverse Omega is not, however, feasible because it would be prohibitively expensive. The architectural firm of Metcalf and Associates estimated that Reverse Omega would cost \$179,315,776³²⁶ as compared with WMC's estimated \$90,533,396 price tag for Omega. Costs for Reverse Omega could be cut somewhat, but by no more than ten to twenty percent.³²⁷ Even if costs were cut by twenty percent, Reverse Omega would still require borrowing beyond the maximum of \$73 million which WMC's finances could support.³²⁸

There are a number of factors which make Reverse Omega inherently more expensive than Omega. Ironically, the major reason for this inherent cost differential is the fact that Omega, unlike Reverse Omega, is able to maximize the savings that can be achieved from renovation.³²⁹ Omega locates uses, such as nursing stations (inpatient rooms), which would require heavy remodeling if they were located in the Delaware Division (at a cost of 112% the cost of new construction)³³⁰ in new construction in the Southwest Division. Moreover, it uses those same spaces left in the Delaware Division for offices and outpatient rooms, which require only moderate or minimum

renovation, at a cost only 80% or 30% the cost of new construction, respectively.³³¹ A second reason for the inherently lower cost of Omega is that it concentrates building in the suburbs where construction costs are lower.³³² Finally, Reverse Omega is inherently more costly because a number of especially costly systems are required to transform the Delaware Division into a completely integrated 800 bed facility.³³³ Thus, the Court finds that WMC has met its burden of going forward with evidence showing that its choice of Omega over this alternative was justified on financial grounds.³³⁴

The final possible alternative would be to build a non-integrated or semi-integrated hospital beside the Delaware Division and a 200 bed hospital at the Southwest site—a modified Reverse Omega. Although this alternative was never studied in depth,³³⁵ the Court finds that sufficient evidence was adduced to show that it, too, would fail to meet WMC's needs adequately. First, a non-integrated hospital would not achieve many of the benefits of consolidation. The idea of a second, free-standing hospital beside the Delaware Division was opposed by the Medical-Dental Staff, who vigorously made it known that it wanted a fully integrated hospital.³³⁶ There is also evidence strongly suggesting that such a structure would be more costly than Omega. The Court can imagine two basic ways in which such a plan could be implemented.³³⁷ First,

326. The study generating this estimate was a major one, costing WMC approximately \$150,000. (Tr. 1380-1384). It generated the "Blue Book" (PX 17), a plan for an 800 bed Delaware Division and the "Green Book" (DX 17), a plan for a 264 bed Southwest Division. The "Green Book Modified" (PX 146), a plan for a 200 bed Southwest Division, was later based on this study.

327. PX 1, p. 6-14. The same types of cost-cutting measures could be taken for Reverse Omega as were taken for Omega. (See, Tr. 1709-1716.)

328. Tr. 1382, 1487, 1494, 1524-1526; PX 1, p. 6-14.

329. Tr. 1613-1614, 1709.

330. PX 17, p. 15.

331. *Id.*

332. Tr. 1559-1560; PX 1, p. 6-15; PX 411, p. IV-26.

333. PX 1, p. 6-14; PX 411, p. IV-14.

334. The Court has thus found that the defendants have produced sufficient evidence showing that the Blue Book plan or a similar one would be prohibitively costly and much more costly than Omega to throw the burden upon the plaintiffs to prove that that plan or another less discriminatory one would be feasible.

335. PX 1, pp. 6-14-6-15.

336. Tr. 1380-1381, 1733-1736, 2799-2800.

337. There are actually a large number of ways in which the plan could be implemented. All would be hybrids of the two considered by the Court.

the Delaware Division could be entirely renovated in such a way as to maintain its current number of beds and a 350 bed structure could be built beside it. This, however, would still be likely to be more costly than Omega because it would be unable to maximize the savings that can be had from renovation.³³⁸ The second possible way to implement non-integrated Reverse Omega would be to retain Omega's 250 bed Delaware Division and to build a 550 bed hospital beside it. This would differ from Omega only in that the 800 new beds would be incorporated in two structures rather than one. That fact would make it significantly more costly than Omega.³³⁹ In addition, any non-integrated Reverse Omega would involve more of the costly inner city construction than would Omega.³⁴⁰

The Court, therefore, concludes that WMC has met its burden upon rebuttal by showing that even if Omega may have some meager disparate impacts, those impacts are justified by *bona fide* needs which could not be accomplished by any less discriminatory plan.

VII. PLAINTIFFS HAVE FAILED TO PROVE THAT A FEASIBLE ALTERNATIVE TO OMEGA IS AVAILABLE

The Court finds that the plaintiffs have failed to meet their burden of persuasion in showing that a less discriminatory alternative to Omega would, in fact, be feasible. Although plaintiffs aver that other alternatives, such as non-integrated Reverse Omega, would be feasible, they adduced evidence on only one alternative, i. e., Reverse Omega. The evidence produced by WMC indicating the infeasibility of other alterna-

tives thus remains unrebutted. The Court finds also that the evidence which plaintiffs produced on Reverse Omega does not make it appear more likely than not that that alternative would be a feasible one.

WMC's evidence of the infeasibility of Reverse Omega is convincing. First, WMC showed that certain features of Omega would make it inherently less expensive than a Reverse Omega plan. It also produced an elaborate and costly study of the feasibility of Reverse Omega, conducted by outside experts, which proved that the Reverse Omega plan would exceed WMC's estimated cost for Omega by some \$89 million.³⁴¹ Finally, the accuracy of WMC's estimated cost for Omega is confirmed by the fact that WMC's contractors offered, in 1976, to complete the Southwest Division of Omega for \$61,254,000.³⁴²

Rather than challenging the accuracy of these highly reliable estimates, plaintiffs claim that the large cost differential is due to the fact that the hospital complexes that the two plans would create would not be equal facilities. They claim that the Omega Plan hospitals would be inferior to the hospitals planned for Reverse Omega. Plaintiffs point to the fact that the plan studied by WMC for Reverse Omega was developed without the tight cost constraints that were imposed upon Omega. WMC's Board of Directors, in fact, never did attempt to develop a plan for Reverse Omega using the same parameters that were used for Omega.³⁴³ The Board believed that this would be unnecessary because of its correct conclusion that certain characteristics of the

338. Renovation of the Delaware Division into a 450 bed hospital would require that all inpatient areas which do not comply with the various codes be renovated into complying inpatient areas, at a cost 112% the cost of new construction. Those spaces could then not be used to house office space or outpatient areas, which are located there under Omega at a cost considerably lower than the cost of placing them in new construction.

339. PX 1, p. 6-15.

340. *Id.*

341. Although plaintiffs produced other, lower estimates, including a preliminary estimate made by Metcalf and Associates before their more detailed study, the Court finds that the scopes of the studies producing these estimates were so limited as to make the estimates unreliable.

342. Tr. 3301-3302.

343. Tr. 1487-1497, 1994-1995, 3266-3268, 3344-3347.

two plans made Omega inherently less costly.³⁴⁴

Plaintiffs, therefore, through their expert in hospital planning and architecture, Mr. Juster, attempted to prove that if the same parameters were used for the two plans, Reverse Omega would be less costly than Omega. Mr. Juster testified that in order to compare the two plans as equivalents he could either reduce the scope of Reverse Omega or increase the scope of Omega. Because he believed that a comparison which was based upon an expansion of the Omega Plan would give WMC the benefit of the doubt,³⁴⁵ Mr. Juster increased the scope of Omega, creating a plan that never existed and was never contemplated ("Imaginary Omega"). He concluded that Imaginary Omega would cost \$152,332,386 while Reverse Omega would cost only \$133,705,127.³⁴⁶

The Court finds Mr. Juster's estimates unreliable. It finds them unreliable first, because in devising his estimates Mr. Juster relied upon documents that were never designed for the purpose of making the comparison he was attempting. Consequently, he made many factual errors.³⁴⁷ The unreliability of Mr. Juster's figures can be illustrated by a few examples. First, Mr. Juster included a financing charge in his derivation of the cost of the 800 bed Southwest Division of Imaginary Omega but failed to add the financing charge for any of the other three components. If this error alone were corrected, even Imaginary Omega would be slightly less expensive than Re-

verse Omega.³⁴⁸ Mr. Juster also made a large number of other factual errors. In some cases he required alterations which were neither planned nor needed. For example, he included in the cost of the Imaginary Omega Delaware Division costs for renovating nursing unit rooms which under Omega will remain vacant and unused.³⁴⁹ Similarly, he included costs for a Mosler Telalift and Materials Handling elevator, neither of which would be needed in a 250 bed hospital.³⁵⁰ In another case, he imposed costs for renovation to a nursing unit on space that was intended for outpatient services which would require lower renovation costs.³⁵¹ These errors are illustrative of the many errors that Mr. Juster made.

Mr. Juster's greatest error, however—the error which is primarily responsible for the Court's decision to give Mr. Juster's estimates no significant weight—was his failure to credit his Imaginary Omega with the main advantage that the real Omega plan has over any Reverse Omega plan. Mr. Juster allocated identical functions to his hypothetical 800 bed Southwest Division and his hypothetical 800 bed Delaware Division and identical functions to the two smaller components of the two plans. Thus, he failed to give Imaginary Omega the benefit of the fact that Omega concentrates functions for which renovation costs are at a minimum in the old building and functions for which new construction costs represent a minimum cost in new construction. Mr. Deehan explained that error at trial:

344. PX 1, p. 6-14; Tr. 1487-1497. The Court has found Omega to be inherently less costly for a slightly different reason from that expressed in the foregoing sources. The Court finds Omega less costly because it requires less costly types of renovations. The sources just cited believed it to be less costly because of a misguided belief that renovation would be inherently more costly.

345. Tr. 3030-3050.

346. Mr. Juster's estimates are found in his two reports, PX 317 and PX 411. The figures were summarized by Mr. Tyler in DX 32.

347. Tr. 3266-3268, 3344-3349. See generally, Tr. 1650-1671, 3273-3288.

348. When Mr. Tyler corrected this error for the two Reverse Omega Divisions, he derived a cost of \$157,505,127 for Reverse Omega and retained Mr. Juster's estimate of \$152,332,386 for Imaginary Omega. (Tr. 3308-3327; DX 32). Mr. Tyler failed to correct Mr. Juster's estimate for the cost of the Imaginary Omega Delaware Division. If the financing of that component is added, the cost of Imaginary Omega becomes \$156,144,687.

349. Tr. 1657.

350. Tr. 1661, 1825-1833.

351. Tr. 1652.

A. By the way, the terminology that Mr. Juster uses, I believe, is very confusing. He calls this counterpart plan of the 800-bed Delaware Division and 264, 200-bed Southwest Division, reverse Omega. That is not reverse Omega.

Q. Why do you say that, sir?

A. Well, again, looking at page IV-3, you see a column marked "Omega," and you see another column marked "reverse" of that. They simply are the reverse of each other in terms of numbers. If you go behind those numbers and look at the program, they are totally different programs. There is a different allocation of activities under each program or each plan between the two sites.

Q. Now, are you saying—if you take Plan Omega and put the 780-bed division at 14th and Washington Streets and the 250-bed Delaware Division on I-95, that you haven't got a reverse Omega?

A. Not simply shifting the beds, because the Wilmington Medical Center does not consist only of the two items listed here, that is, 780 beds in one unit and 264 in another. You have to add clinics, administrative support space, executive offices, and so forth, which are not reflected in those bed numbers.³⁵²

Because it finds Mr. Juster's estimates highly unreliable and WMC's estimates highly reliable, the Court concludes that plaintiffs have not met their burden of persuasion in showing that it is more likely than not that Plan Reverse Omega would be within the means of WMC.

In fact, the Court has made its own attempt to sift through the welter of garbled facts relating to costs in order to determine cost estimates for Omega and Reverse Omega which give credit to Omega for the fact that it minimizes costs by locating different functions in different facilities and which attempts to correct some of Mr. Juster's factual errors. Using Mr. Juster's figures as a starting point, the Court derived an estimated cost for Omega of \$128,397,735 and a cost of \$145,243,311 for Reverse Omega, a difference of almost \$17 million.

Even if the Court were to assume, as the plaintiffs' attorneys argue, that Mr. Juster's figures were premised on an inaccurate starting date and therefore over-inflated the costs of Reverse Omega, Omega would still be considerably less expensive, costing \$127,806,551 compared to a cost of \$139,979,105 for Reverse Omega. While the Court, having witnessed the confusion of highly trained experts on these matters, will not guarantee that these figures are accurate in all respects, they do confirm the opinions of WMC's experts as well as the estimates adduced by WMC.

For the foregoing reasons, the Court finds that the plaintiffs have failed to show that WMC's justification of any discriminatory impacts is a pretense and concludes, therefore, that plaintiffs have failed in all respects to show a violation of Title VI, Section 504 or Section 6102. They have failed to make out a *prima facie* case under any of the three acts. Moreover, even assuming that the minimal impacts shown do make out a *prima facie* case, WMC has shown justification and plaintiffs have failed to meet their burden of persuasion of showing a feasible, less discriminatory alternative.

VIII. CONCLUSION

This Court, after carefully considering the sufficiency and weight of the testimony adduced and the documentary evidence introduced at trial, finds that Plan Omega, like most human endeavors, is not a *perfect* plan for all users. It is, however, a comprehensive health care plan that is the *fairest* that can be achieved taking into consideration all the competing and sometimes conflicting needs of the entire community. Overall, Plan Omega will improve the delivery of health care for everyone and this will be accomplished without any substantial discriminatory effects upon the minorities, handicapped or elderly. Thus, based on the above findings of fact and conclusions of law, final judgment will be entered in favor of the defendant WMC and against the plaintiffs on all claims asserted in the Third Amended Complaint.

³⁵² Tr. 3346-3347.

Occidental Chemical Corp., 892
1449 (9th Cir.1990); *Shore v. Fed-*
ss Corp., 777 F.2d 1155, 1159 (6th
ff'd *McKnight v. General Motors*,
F.2d 1366 (7th Cir.1992). Accord-
eny defendants' motion to strike
quest for front pay.

Plaintiff's Motion to Strike

at in the chain of issues before
is plaintiff's motion to strike de-
epley Memorandum. In their Re-
nts' questioned Pelech's counsel's
assertion that her first notice that
al defendants had been deleted
EOC charge was when she re-
ght to sue letter from the EEOC
s, 1992.¹¹ As evidence that Bak-
or to October 6 that the EEOC
the individual from the charges,
point to an August 25, 1992 letter
to the EEOC, in which she listed
umbers of each party and identi-
company defendants, not the
Baker not only protests defen-
on, but seeks to strike the mem-
which it appears.

ropriately emphasizes the seri-
fendants' implicit attack on her
law, as in life, one's integrity is
most lawyers hold it dear. We
rove of an attorney lightly
another's reputation with un-
poorly supported, allegations.
fendants' evidence that Baker
d facts to this Court is not
particularly in light of the re-
received from the individual
suggesting that they had been
were participating in the EEOC.

ce, however, that attorneys are
nd to make arguments which
their clients' interests. While
will exercise good judgement in
arguments, we will not inter-
eir points are void of merit. In
e defendants' observation "that
n to question Plaintiff's coun-
that her first notice of the

Court.

deletion of the individuals was when she re-
ceived the right to sue letter on or about
October 6, 1992," has limited support, it has a
sufficient basis to prevent us from striking it.
Accordingly, we remind defendants and their
counsel not to tread cavalierly on the reputa-
tion of others, but deny plaintiff's motion.

III. Conclusion

For the foregoing reasons, we grant in
part and deny in part defendants' joint mo-
tion for summary judgment, grant its motion
to strike, and deny plaintiff's motion to
strike. It is so ordered.



Richard B. ROTHMAN, Plaintiff,

v.

EMORY UNIVERSITY, Defendant.

No. 93 C 1240.

United States District Court,
N.D. Illinois, E.D.

June 29, 1993.

Former law student, who suffered from
epilepsy, brought action against law school
for civil rights violations, violation of Family
Educational Rights and Privacy Act (FER-
PA), libel, invasion of privacy, and negligent
supervision. Law school moved to dismiss
and for transfer of venue. The District
Court, Moran, Chief Judge, held that: (1)
student stated claim under Americans with
Disabilities Act (ADA) arising from school's
letter to Illinois Board of Law Examiners;
(2) student stated claims under Rehabilita-
tion Act; (3) there was no private right of
action under FERPA; (4) student failed to
state § 1983 claim and civil rights conspiracy
claims; (5) communications with Board were
absolutely privileged for purposes of libel and
invasion of privacy claims; (6) student failed
to state claim for negligent supervision; and
to court would not transfer venue.

Motion to dismiss granted in part and
denied in part; motion to transfer venue
denied.

1. Civil Rights ⇨127.1

Private law schools are "places of public
accommodation" under Americans with Disa-
bilities Act (ADA). Americans with Disabili-
ties Act of 1990, § 301(7)(J), 42 U.S.C.A.
§ 12181(7)(J).

See publication Words and Phrases
for other judicial constructions and def-
initions.

2. Civil Rights ⇨102.1

Former law student, who suffered from
epilepsy, could not bring action under Ameri-
cans with Disabilities Act (ADA) for law
school's alleged discriminatory treatment of
him during his enrollment as that treatment
occurred prior to effective date of ADA sec-
tion prohibiting discrimination by public ac-
commodations. Americans with Disabilities
Act of 1990, § 302, 42 U.S.C.A. § 12182.

3. Civil Rights ⇨127.1

Law schools' recommendations of their
students for membership to bar are "servi-
ces" and "privileges" within meaning of Ameri-
cans with Disabilities Act (ADA); law
schools are expected to recommend their stu-
dents, and refusal to certify student's bar
application probably will prevent that student
from practising law. Americans with Disa-
bilities Act of 1990, § 302, 42 U.S.C.A.
§ 12182.

See publication Words and Phrases
for other judicial constructions and def-
initions.

4. Civil Rights ⇨235(2)

Former law student, who suffered from
epilepsy, stated claim against law school for
violation of Americans with Disabilities Act
(ADA); student alleged that dean sent letter
to Illinois Board of Law Examiners giving
student bad, or qualified, recommendation
based on his disability or in retaliation for his
complaints about law school's allegedly dis-
criminatory policies, and that, as result of
letter, student was required to go through
interview process beyond required of most
applicants to Illinois Bar, and law school's

lege" that virtually all law students expect to receive. Americans with Disabilities Act of 1990, § 302, 42 U.S.C.A. § 12182.

5. Civil Rights ⇨235(2)

Former law student, who suffered from epilepsy, stated disparate treatment claim against law school under Rehabilitation Act; student alleged that dean sent letter to Illinois Board of Law Examiners giving student bad, or qualified, recommendation based on his disability or in retaliation for his complaints about law school's allegedly discriminatory policies and that, as result, he was required to go through interview process beyond required of most applicants to Illinois Bar. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

6. Civil Rights ⇨235(2)

Former law student, who suffered from epilepsy, stated hostile environment disparate treatment claim against law school under Rehabilitation Act; student alleged that assistant dean's unsolicited conversations with him concerning his disability bothered him to such degree that his coursework suffered. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

7. Civil Rights ⇨235(2)

Former law student, who suffered from epilepsy, stated claim against law school under Rehabilitation Act; student alleged that law school officials harassed him in retaliation for complaining about violations of Act. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

8. Civil Rights ⇨107(1)

Retaliation claims are cognizable under Rehabilitation Act. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

9. Civil Rights ⇨127.1

Although Rehabilitation Act does not compel educational institutions to make substantial or fundamental modifications in their programs to allow disabled persons to participate, it does encompass some disparate impact claims. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

Law school's failure to alter its procedures for administering examinations for student who suffered from epilepsy could support disparate impact claim under Rehabilitation Act if student could prove that modifications were required to accommodate his disability and would not be substantial or fundamental. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

11. Colleges and Universities ⇨9.40

Family Educational Rights and Privacy Act (FERPA) did not create private right of action. Education Provisions Act, §§ 438, 438(f), as amended, 20 U.S.C.A. §§ 1232g, 1232g(f).

12. Civil Rights ⇨235(2)

Former law student, who suffered from epilepsy, failed to state claim under § 1983 against private law school for discrimination on basis of disability and for retaliation for his complaints; although student alleged that law school was acting in compliance with specific laws and court rules, he did not allege that law school ever acted in any governmental capacity or in conjunction with any governmental agency. 42 U.S.C.A. § 1983.

13. Conspiracy ⇨24(5)

Decisions reached collectively by agents of corporation cannot constitute civil rights conspiracies. 42 U.S.C.A. § 1985.

14. Conspiracy ⇨24(4.1)

Former law student, who suffered from epilepsy, failed to state claim against dean, assistant dean, and others at private law school for civil rights conspiracy arising from alleged discrimination on basis of his disability; university cannot conspire with itself, and there was no allegation that anyone else joined law school in any part of its allegedly discriminatory scheme. 42 U.S.C.A. § 1985.

15. Libel and Slander ⇨36

Torts ⇨16

Under Illinois law, former law student failed to state claim against law school for libel and invasion of privacy arising from dean's correspondence with Illinois Board of Law Examiners; Board is quasi-judicial body

16. Colleges and Universities ⇐5

Former law student failed to state claim against law school for negligent supervision of dean and assistant dean; in essence, claim asserted nothing more than proposition that law school's liability on state law claims for libel and invasion of privacy could be imputed from actions of its employees, and those state law claims had been dismissed.

17. Federal Courts ⇐106

District court would not transfer venue from Illinois to Georgia in civil rights action by former law student, who suffered from epilepsy, against law school alleging discrimination on basis of disability, even though law school was located in Georgia and, thus, officials implicated in action lived and worked in Georgia; other witnesses, including former student, lived in Illinois, student alleged that his medical condition would make transfer particularly burdensome, complaint had been reduced to few claims involving only a few people, and plaintiff's choice of forum is generally accorded deference. 28 U.S.C.A. § 1404(a).

Richard R. Rothman, pro se.

Algimantas P. Kezelis, Robert A. Kezelis, French, Kezelis & Kominiarek, P.C., Chicago, IL, for defendant Emory University.

MEMORANDUM AND ORDER

MORAN, Chief Judge.

Plaintiff Richard Rothman (Rothman) has filed a twelve-count complaint against defendant Emory University (Emory), from whose law school he graduated in 1992. Rothman suffers from a disabling seizure disorder commonly known as epilepsy, and the bulk of his complaint concerns charges that Emory discriminated against him on the basis of that disability. Emory now moves to dismiss the complaint and to transfer the case to the United States District Court for the Northern District of Georgia. Emory's motion to dismiss is granted in part and denied in part. Its motion to transfer the case is denied.

The court assumes the truth of the facts alleged in Rothman's complaint. Rothman is thirty years old and has suffered from a seizure disorder for twenty years. He has been under the care of a neurologist since 1973 and has taken anticonvulsant medications since 1974. Despite his disability, Rothman has attained a good deal of academic success, earning a B.A. from Columbia University in 1984 and an M.A. from the University of Chicago in 1987. In 1989 he entered the Emory University School of Law (the law school) in Atlanta, Georgia.

During his first semester at Emory, the dean of students at the law school, Susan Stockwell, repeatedly summoned Rothman to her office. During their discussions she often told him that he looked unhappy and urged him to seek psychological counseling. Rothman replied that he thought her involvement in his affairs was counterproductive. According to Rothman, Stockwell's "arbitrary and capricious intermeddling interfered with plaintiff's coursework during Fall, 1989." After Rothman received a failing grade in a course on civil procedure and "mediocre" grades in other courses, Stockwell urged him to drop out of law school. Plaintiff believes that Stockwell urged other disabled students to drop out as well.

In January 1990 Rothman met with Stockwell and law school dean Howard Hunter (Hunter) to discuss his failing grade. Stockwell and Hunter decided to put off a determination of whether Rothman would have to repeat the civil procedure course he failed. They told him that the ultimate decision would depend on his second semester performance in a second course on civil procedure. Plaintiff protested that their refusal to decide the issue promptly would hinder him during the second semester.

One of Rothman's courses during the second semester was taught by Frank Alexander (Alexander). Rothman came to Alexander's class unprepared on several occasions and, as a result, Alexander threatened to remove him from the class. Rothman attributed his deficient preparation in Alexander's

course to the "extra effort" he was expected to put into his civil procedure course.

At the end of his second semester Rothman asked that he be given additional time to take his exams. He explained that additional time was necessary because of his disability and he provided a note from a neurologist to document his condition. Rothman requested that he be given an extra hour, and three of his professors acceded to his request. Alexander gave him only an extra half hour, however, and, unlike the other professors, he insisted that Rothman complete his entire exam in the same room as the other students. Rothman protested to Stockwell that Alexander's "partial accommodation" was insufficient and discriminatory. Rothman started Alexander's exam at the same time as the other students. During his extra half hour, as the others filed out of the room, he heard several classmates complain about the special treatment he was receiving. He had difficulty concentrating during his extra half hour because Alexander and several students lingered in the examination room to chat, and because Alexander also allowed some second-year students to use the room for a group study session while Rothman was still taking his exam. Alexander ultimately gave Rothman the lowest non-probationary grade that the law school allows, and the law school denied Rothman's request that the grade be removed from his transcript.

Rothman's discussions with Stockwell concerning the law school's response to his disability continued into the summer of 1990. During one conversation, Stockwell informed Rothman that he would receive no further accommodations in examination procedure unless he provided the school with updated medical reports. In August 1990 Rothman passed Hunter in a law school hallway and Hunter glowered at Rothman for about fifteen seconds. As a consequence of this "intimidation" from Stockwell and Hunter, as well as his humiliation during his examination for Professor Alexander's class, Rothman did not ask for any accommodations for his disability during his second year of law school.

During the spring of Rothman's second year, approximately twelve women filed complaints charging sexual harassment by a for-

mer professor at the school. Stockwell recommended to several of the women that they seek psychological counseling. Rothman wrote a letter to Hunter, which he also submitted for publication to Emory's student newspaper, criticizing the school's handling of the sexual harassment accusations.

Rothman had several more minor scrapes with Hunter and Stockwell before he graduated, most concerning a confidential memorandum Hunter wrote to Stockwell suggesting that Rothman be required to seek psychological help. Rothman received his J.D. degree on May 11, 1992. On June 16, 1992, Hunter submitted a school certification concerning Rothman's bar application to the Illinois Board of Law Examiners. Attached to the certification was a letter from Hunter, marked "confidential," which stated that Rothman was openly hostile to students and faculty, that he had received counseling from Stockwell concerning his hostility, and that he attributed all of his difficulties to his "chronic epilepsy." As a result of the letter the Illinois Board of Law Examiners called Rothman in for an interview, during which Rothman and a committee representative discussed Hunter's allegations. The committee representative informed Rothman that nothing in the letter rendered him unfit to practice law, and plaintiff was admitted to the bar. Rothman took his oath as an attorney on November 5, 1992.

Because plaintiff has advanced twelve separate claims why defendant should be liable to him for impeding his attaining the status he now has, the briefing on the legal issues within the restrictions of the local rules has been just that—brief. We think that many of plaintiff's claims are wide of the mark. As to some, however, we are not persuaded, from the abbreviated arguments presented, that plaintiff has no chance to prevail under any set of facts. Perhaps, with respect to some of them at least, we can be so persuaded after further consideration. For now, though, we rule as hereafter set forth.

DISCUSSION

Americans with Disabilities Act Claim (Claim 1)

[1] The Americans with Disabilities Act (ADA) provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

2 U.S.C. § 12182(a). The ADA defines discrimination to include

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, privileges, advantages, or accommodations.

§ 12182(b)(2)(A)(ii). Private law schools are considered places of public accommodation under the statute. § 12181(7)(J).

[2] The ADA was enacted on July 26, 1990, after Rothman's first year of law school. The section of the Act under which Rothman sues, § 12182, became effective eighteen months later, on January 26, 1992. P.L. 101-336 § 310. Except for Hunter's sending of a critical letter about Rothman to the Illinois Board of Law Examiners on June 16, 1992, none of the law school's allegedly illegal acts occurred while the ADA was in force. Accordingly, the court agrees with Emory that the portions of Rothman's ADA claim concerning his treatment while he was enrolled at Emory must be dismissed.

[3,4] The court does not agree with Emory, however, insofar as it suggests that a letter by a professional school's dean to a state licensing board can never form the basis of a valid claim under the ADA. Law schools like Emory are expected to recommend—and do recommend—virtually all of their graduates for membership to the bars of various states. Those recommendations are “services” and “privileges” that virtually all law students expect to receive. A law school's refusal to certify a student's bar application will probably prevent that student from practicing law. If, as Rothman alleges, Hunter gave him a bad, or qualified, recom-

mendation purely because of Rothman's disability, or in retaliation for Rothman's complaints about the law school's allegedly discriminatory policies, then Hunter's action would be violative of the ADA. Rothman's injury was relatively minor—after all, he passed the bar, so the only concrete harm he suffered was his having to go through an interview process beyond that required of most applicants to the Illinois bar—but it was not so small as to justify dismissing the remainder of his claim. Accordingly, the court will allow Rothman to proceed on the portion of his ADA claim relating to the school's correspondence with the Illinois Board of Law Examiners.

Rehabilitation Act Claims (Claims II, III and VI)

The ADA was not the first federal law to prohibit discrimination against persons with disabilities. Even before the ADA's enactment, Emory was subject to the Rehabilitation Act, 29 U.S.C. § 794, which provided:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. . . .

Section 794a provided that remedies available under Titles VI and VII, 42 U.S.C. § 2000d *et seq.*, and § 2000e *et seq.*, be available to redress complaints brought under the Rehabilitation Act. Emory was subject to the Rehabilitation Act throughout Rothman's law school career.

[5-8] Rothman makes two allegations that, if true, would support disparate treatment claims under the Rehabilitation Act. The first is his charge concerning the dean's letter to the Illinois Board of Law Examiners. The second is his charge concerning Stockwell's unsolicited conversations with him concerning his disability. Rothman asserts that her persistent “intermeddling” bothered him to such a degree that his coursework suffered. That, in essence, is a hostile environment claim of the sort recog-

nized in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). To be sure, Rothman's idea of what constitutes a hostile environment may well differ markedly from that of most reasonable people, whether or not disabled, but the merits of a claim cannot be resolved on a motion to dismiss. Rothman also alleges, in addition to his disparate treatment claims, that Emory officials harassed him in retaliation for complaining about those perceived violations. Retaliation claims are cognizable under the Act. *Hoyt v. St. Mary's Rehabilitation Center*, 711 F.2d 864, 867 (8th Cir. 1983).

[9, 10] The rest of Rothman's Rehabilitation Act allegations amount to a disparate impact claim concerning the law school's procedures for administering examinations. Although the Rehabilitation Act does not compel educational institutions to make substantial or fundamental modifications in their programs to allow disabled persons to participate, *Southeastern Community College v. Davis*, 442 U.S. 397, 405, 99 S.Ct. 2361, 2366, 60 L.Ed.2d 980 (1979), it does encompass some disparate impact claims. As the Court observed in *Southeastern Community College*, there are some circumstances under which a "refusal to modify an existing program might become unreasonable and discriminatory." *Id.* at 413, 99 S.Ct. at 2370. A law school's failure to alter its procedures for administering examinations to accommodate Rothman's disability may support a claim under the Rehabilitation Act if the plaintiff can prove that the modifications were required to accommodate his disability and would not be substantial or fundamental. Accordingly, Rothman may proceed, for now, with all of his Rehabilitation Act claims.

Family Educational Rights and Privacy Act Claim (Claim IV)

[11] Under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, Emory may not receive federal funds if it prevents its students from inspecting files that contain information directly concerning them. Rothman has sued under FERPA, alleging that the school refuses to show him a number of documents that he is

entitled to see. Defendant suggests that some of the documents are not covered by FERPA, but the court need not resolve that point. Only the Secretary of Education is empowered to enforce FERPA's provisions, § 1232g(f). In enacting FERPA, Congress did not create a private cause of action. *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir.1989), *cert. den.* 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990); *Fay v. South Colonie Central School Dist.*, 802 F.2d 21, 33 (2nd Cir.1986). Therefore, plaintiff's fourth claim must be dismissed.

Title VII Claim (Claim V)

Defendant argues that plaintiff's retaliation claim concerning his public statements about gender discrimination at Emory is not cognizable under Title VII, 42 U.S.C. § 2000e *et seq.*, and plaintiff concedes the point. The fifth claim is therefore dismissed. Plaintiff also asks that he be given leave to amend his complaint to convert the retaliation claim into a First Amendment claim. Because Emory has not yet filed a responsive pleading, Rothman may amend his complaint as a matter of course. *See* Fed. R.Civ.P. 15(a). However, the court would question the wisdom of bringing a First Amendment claim against a private university.

Section 1983 Claim (Claim VII)

[12] Rothman alleges that Emory violated § 1983 by discriminating against him on the basis of disability and by retaliating against him for complaining. Rothman notes that Emory was acting in compliance with certain laws and court rules, but he does not allege that Emory ever acted in any governmental capacity or in conjunction with any governmental agency. Because § 1983's state action requirement is not met, claim VII must be dismissed.

Section 1985 Claim (Claim VIII)

[13, 14] Rothman also alleges that Stockwell, Hunter, and others at Emory conspired against him in violation of § 1985. As Emory points out, the rule in this circuit, established in *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir.1972), is that decisions

**Joseph V. SCELISA, individually and as
Director of the John D. Calandra Ital-
ian American Institute of the City Uni-
versity of New York**

v.

**CITY UNIVERSITY OF NEW YORK and
W. Ann Reynolds, as Chancellor of the
CITY UNIVERSITY OF NEW YORK.**

No. 92 Civ. 6690 (CBM).

United States District Court,
S.D. New York.

Nov. 18, 1992.

Director of the John D. Calandra Italian American Institute of the City University of New York (CUNY) brought civil rights suit against CUNY, alleging employment discrimination against Italian-Americans. Complaint also alleged that in retaliation, plaintiff was stripped of his authority as director of the Institute and that programs of the Institute were transferred to other units of CUNY. On plaintiff's motion for preliminary injunction, the District Court, Motley, J., held that plaintiff was entitled to preliminary injunction, based on showing of irreparable harm, sufficiently serious questions going to the merits and balance of hardships tipping decidedly in favor of plaintiff.

Motion granted.

1. Injunction ⚡138.21

For purposes of preliminary injunction, an action is deemed to implicate the public interest only when it is taken pursuant to a regulatory or statutory scheme; thus, higher standard requiring that plaintiff show likelihood of success on the merits applies only in instances when plaintiff is trying to halt government implementation of such scheme, and is required in that context because challenged action has already been the subject of government process.

2. Civil Rights ⚡399

Higher preliminary injunction standard, pursuant to which plaintiff must es-

tablish likelihood of success on the merits, was not applicable to employment discrimination suit against university, on ground that university's actions implicated the public interest.

3. Injunction ⚡14

A constitutional deprivation constitutes per se irreparable harm for purposes of injunctive relief.

4. Civil Rights ⚡206(1)

Federal Courts ⚡265

States do not count as "persons" within meaning of § 1983, and thus Eleventh Amendment immunity bars suits against states for damages under that statute. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

5. Civil Rights ⚡206(1)

The City University of New York (CUNY) may not properly be named as defendant in a suit for equitable relief under § 1983 since it qualifies as an arm of the state of New York. U.S.C.A. Const. Amend. 11; 42 U.S.C.A. § 1983.

6. Federal Courts ⚡267

When prospective injunctive relief is sought against a state official, the Eleventh Amendment is no bar to using § 1983 as the vehicle for such relief. U.S.C.A. Const. Amend. 11; 42 U.S.C.A. § 1983.

7. Civil Rights ⚡262, 294

While an award of damages against a state entity is not recoverable under § 1981, by virtue of Eleventh Amendment immunity, appropriate prospective injunctive relief is available under § 1981, as well as attorney fees as part of costs, when suit is against appropriate officials named in their official capacity. 42 U.S.C.A. § 1981; U.S.C.A. Const. Amend. 11.

8. Administrative Law and Procedure ⚡229

Civil Rights ⚡194

Fact that an administrative procedure exists to address Title VI claims does not preclude suit on a Title VI cause of action in federal court before the exhaustion of

such remedies. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

Administrative Law and Procedure
§ 229

Civil Rights § 362

Under Title VII, administrative remedies need not be exhausted for federal courts to have subject matter jurisdiction to entertain claims; however, for an action to be properly brought, claim must be filed with appropriate agency; thus, one must invoke, but not necessarily exhaust, means of administrative redress. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights § 342

Title VII requirement that party claiming discrimination file complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days of alleged act of discrimination is not a jurisdictional prerequisite to suit in federal district court, and is subject to waiver, estoppel, and equitable tolling. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Administrative Law and Procedure
§ 229

Plaintiff need not exhaust or resort to administrative remedies where wrongs alleged could not or would not have been corrected by resort to the administrative hearing process.

12. Administrative Law and Procedure
§ 229

Exhaustion doctrine does not apply where petitioner may suffer irreparable harm if he is compelled to pursue administrative remedies.

13. Civil Rights § 201

In order to establish standing to sue under Title VI plaintiff must be the intended beneficiary of a federal spending program; while such fact need not be pleaded, it must eventually be proven in order for plaintiff to recover. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

14. Civil Rights § 126

Discriminatory impact, even absent proof of discriminatory intent, will suffice to support a private cause of action under Title VI. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

15. Civil Rights § 268

Plaintiffs in civil rights suit against the City University of New York (CUNY) were entitled to preliminary injunction barring CUNY from discriminating against Italian-Americans with respect to faculty recruitment and promotions, and from relocating the John D. Calandra Italian American Institute and transferring its operations to several different units of CUNY located around the city; plaintiffs showed irreparable harm, a balance of hardships tipping decidedly in their favor, and presented sufficiently serious questions going to the merits to make fair grounds for litigation.

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Howard R. Birnbach, Great Neck, N.Y.,
Michael Marinaccio, White Plains, N.Y., for
plaintiff.

Barbara B. Butler, Charles F. Sanders,
New York City, Gayle A. Sunnivan, Jane
M. Sovern, New York City, for defendants.

**OPINION ON MOTION
FOR PRELIMINARY
INJUNCTION**

MOTLEY, District Judge.

Plaintiff Dr. Joseph V. Scelsa, the Director of the John D. Calandra Italian American Institute ("Institute") of the City University of New York ("CUNY"), is before this court seeking a preliminary injunction barring defendants from employment discrimination against Italian-Americans and from relocating the Institute and transferring its operations to several different units of CUNY located around the city. Plaintiff's complaint alleges, in essence, that Italian-Americans have been discriminated against in employment because of their national origin, particularly

with respect to recruitment and promotion of faculty by defendants.

The complaint also alleges that in retaliation for plaintiffs having filed a complaint with the United States Department of Labor charging CUNY with discrimination against Italian Americans in violation of Title VI of the Civil Rights Act of 1964, Dr. Scelsa has been stripped of his authority as director of the Institute and the Institute's programs have been transferred to other CUNY units. For the reasons set forth below, a preliminary injunction is granted enjoining discrimination against Italian-Americans with respect to faculty recruitment and promotions and enjoining the dismemberment of the Institute and the removal of Dr. Scelsa as director of the Institute, pending the trial of this action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

A. Cuny is a State Institution

City University of New York is a self-governing assemblage of 21 educational subdivisions. The nine senior 4-year colleges are funded by the State of New York, see N.Y. Education Law § 6230 (McKinney 1992). The seven community colleges are funded jointly by the State and the City of New York. N.Y. Education Law § 6304 (McKinney 1992). While the College of Staten Island is a four-year senior college, it also accepts students who seek a two-year degree, and thus receives some City funds to help cover the costs of those students. N.Y. City Education Law § 6221(C)(i). The Italian American Institute is supported solely through state funds (Tr. 683). During the fiscal year 1992-1993, the Institute was allotted some

\$912,000; during fiscal year 1991-1992, roughly \$906,000; and in fiscal year 1990-1991, \$860,000 (Tr. 987).

B. History of Italian-Americans and the Italian American Institute at Cuny

In the mid- to late-1970s concern about the historical under-representation of Italian-Americans on the CUNY faculty and staff and the perception that there was widespread discrimination against Italian-Americans by CUNY led to action on the part of both CUNY and elected officials.

In 1976, Chancellor Kibbee of CUNY issued a directive to the CUNY Council of Presidents concerning the educational under-representation of Italian-Americans in the student body and on the faculty ("the Kibbee Memorandum"). Chancellor Kibbee stated in that letter that "I am designating Italian-Americans as an affirmative action category for this University *in addition to those so categorized under existing Federal statutes and regulations*. I also have instructed the Affirmative Action Office to include Italian-Americans in the data collected for affirmative action purposes." (Plaintiff's exhibit 4) (emphasis supplied).¹

In 1978, State Senator John Calandra, Chair of the Italian-American Legislator's Caucus, prepared a Report entitled "A History of Italian-American Discrimination at CUNY" (Plaintiff's Exhibit 16) ("Calandra Report"). In this Report Senator Calandra set forth the conclusions and beliefs of the Caucus of widespread discrimination against Italian-Americans but noting specifically Chancellor Kibbee's designation of Italian-Americans as an affirmative action group. (Calandra Report at 5). This Report also proposed the creation of an Ital-

1. Defendants contend that this directive had no effect whatsoever except as a voluntary, non-binding undertaking by CUNY to collect data in regards to Italian-Americans. See, e.g. Defendants' Response to Plaintiff's Proposed Findings of Fact and Conclusion of Law at 2-3. The clear language of the Kibbee Memorandum is to the contrary, e.g., the use of the word "also" to indicate that the University's accumulation of hiring data is in addition to CUNY's designation

of Italian-Americans as an affirmative action group in addition to the federally-recognized groups. Defendants clearly assumed the duty to include Italian-Americans as an affirmative action group. For defendants to argue that this language has no effect is disingenuous. The mere fact that CUNY has not kept its promises to Italian-Americans does not mean that such promises do not exist.

ian-American Institute at CUNY to address the perceived problem of discrimination, whose function would be "to generate a comprehensive guidance program, to develop a complementary cultural component, and to provide the related informational services." (Ex. 16 at 27).

As a result of these actions, the John D. Calandra Italian American Institute was created by the State legislature in 1979. (Tr. 64). Originally, the Institute was an entity separate and independent from CUNY. (Tr. 984). It was reorganized as a division within CUNY by the New York State Legislature in 1984-85. While not technically a "research institute" as defined by CUNY bylaws, it conducts much research into the role, place, and problems of Italian-Americans in New York City and within the CUNY system. In 1989, the Office of Management and Productivity conducted, at the request of the Governor, a management review of the Institute (Ct. Ex. 1, the MAP Report). As noted in the MAP Report, the research component is an active and integral aspect of the Institute, and its activities are coordinated "with CUNY's Office of Institutional Research and Analysis" (MAP Report at 22), indicating that the Institute's research initiatives are integrated with other campus research activities.

Much of the Institute's work is not pursuant to University directive; indeed, it appears from the record that CUNY pays little attention, if any, to the work, goals, and concerns of the Institute and Italian-Americans in general. Instead, much of the Institute's activity arises out of the initiative of its members, particularly its Director, Dr. Scelsa. It is this activity which, plaintiff contends, has drawn the discriminatory ire of the University. It is unclear whether the University dislike of Dr. Scelsa and the institute is motivated by an anti-Italian discriminatory animus. What is clear, however, is that CUNY is seeking to curtail the independence of the Institute and put Dr. Scelsa on a shorter leash, one on which he lacks the room to bite his master CUNY. The MAP Report advised that CUNY more directly administer the Institute and exercise oversight on

its activities. The MAP Report saw the Institute as too dependent on the views and direction of Dr. Scelsa, and not subject enough to the direct control and desires of the CUNY administration. (Ct. Ex. 1, MAP Report at 30-32).

Dr. Scelsa has been director of the Institute since August, 1984. He had also worked in the Office of Student Affairs and Special Programs at the University from September 1980 to October 1981 (Pl. Ex. 40).

The Institute is a central locus for Italian-American activism (See, e.g. Tr. 374-76; 553-54). The Institute currently is engaged in numerous outreach programs directed not only at the Italian-American community but also at fostering and improving intergroup relations. (See, e.g. Tr. at 288-92).

The directive embodied in the Kibbee Memorandum was reaffirmed in 1986 by Chancellor Joseph Murphy ("the Murphy letter"). "In December, 1976, Chancellor Robert J. Kibbee established Italian-American as an Affirmative Action Category within the City University of New York, a decision I now reaffirm. The 1976 action represented a *formal extension* of the Federally defined protected classes for purposes of the University's Affirmative Action Program to include an additional group as a protected class." (Plaintiff's Exhibit 4A) (emphasis added).

Still, the Murphy Letter left dissatisfied many officials and members of the Italian-American community who felt that Italian-Americans still suffered discrimination and were still under-represented at CUNY. In 1988, the New York State Italian-American Legislator's Club communicated its concerns and desires about the situation of Italian-Americans at CUNY to Chancellor Murphy. (Pl. Ex. 17). In this letter the Club conveyed to the Chancellor their frustration with what they perceived to be CUNY's inadequate response to the affirmative action designation of Italian-Americans. In addition, they urged that better space be provided for the Institute at the Graduate Center.

C. The Proposals to Restructure the Italian American Institute

In 1990, a Committee on Urban Public Higher Education (known as the Massaro Commission, after its Chair, State Supreme Court Justice Massaro) was formed by Italian-American political officials and community activists to investigate and redress perceived discrimination against Italian-Americans at CUNY. (Tr. 464-465). The Massaro Commission recommended, among other things, that the Institute be given more power and responsibilities. (1991 Report of the Advisory Committee on Urban Public Higher Education, Pl.Ex. 15 at 9). It also urged that the Institute be associated with the Graduate School for research purposes, with Dr. Scelsa being elevated to Dean of the Institute (Tr. 471; Pl.Ex. 44, 45).

However, the plan that CUNY eventually decided to adopt was significantly different from that proposed by the Massaro Commission. The CUNY plan, labelled the Volpe plan after President Volpe of the College of Staten Island, the official in charge of assembling it, provided for, *inter alia*, the relocation of the Italian American Institute to the College of Staten Island (where President Volpe would have authority over it) and the removal of Dr. Scelsa as Director. It appears that defendants want to, in their words, "elevate" the Institute, and in so doing, to sever the outreach, counselling, and research aspects of the Institute. Dr. Scelsa, a thorn in the side of the University, is to be shunted aside as its Director during this reconfiguration, to remain in charge of the outreach function. Not surprisingly, Dr. Scelsa is rather unhappy with this proposal, and foreseeing this outcome, defendants insured that at no time during the planning of this reconfiguration was the plaintiff (or any other member of the Institute, for that matter) made privy to the planning process.

During the latter half of 1991 and the first half of 1992 various university officials, including the Chancellor, Vice-Chancellor Bloom, Vice Chancellor Hershenson, Acting Vice Chancellor Keizs, Deputy Chancellor Mucciolo, and President Volpe

of the College of Staten Island, discussed among themselves plans for changing the role, location, and direction of the Institute. (Tr. 925-26). Dr. Scelsa was not part of this or any other in this series of meetings, (Tr. 926), nor was any other member of the Institute. The result of all of this is what has come to be known as the Volpe proposal (Defendants' Ex. E), in which the Institute would be transferred to the College of Staten Island, and Dr. Scelsa would be transferred to the admissions office at 31 Street. Fears that the Italian-American community might be ill-served by CUNY's attempt to reconfigure the Institute motivated numerous public officials and Italian-American community activists to contact CUNY officials to register their concerns. After contact with numerous elected officials, including New York City Council Speaker Peter Vallone, Chancellor Reynolds made several modifications to the Volpe proposal (Tr. 701), so that Dr. Scelsa would work on admissions at the Office of Admissions Services at 31 Street, while the rest of the Institute goes to the College of Staten Island. While rumors of the proposed modifications to the Institute were rampant, no one in the University hierarchy ever formally notified those affected by the plan of a move to take effect on September 1, 1992, until a letter dated August 26, 1992. (Pl.Ex. 20). Vice-Chancellor Kiezs was in charge of sending out this notification. (Tr. 1112-13). Only Dr. Scelsa was notified by letter dated August 26; other employees were notified by letter dated August 28. (Tr. 1165).

D. The Alleged Retaliation Against Plaintiffs

Dr. Scelsa and the Institute have played a significant role in the formulating of various civil rights complaints against CUNY. (Tr. 306-08).

Deputy Chancellor Muciolo testified that he was aware that plaintiffs had filed a discrimination complaint against CUNY with the Department of Labor and was aware that Dr. Scelsa was one of the named complainants. (Tr. 1072-73).

Dr. Scelsa asserts that his claims of retaliation are bolstered by proof that CUNY attempted to forestall his complaining of civil rights violations by, at one point, forbidding him to speak to public officials regarding CUNY's actions. (Pl.Ex. 28)

Plaintiff has alleged a widespread pattern and practice of discrimination against Italian-Americans at CUNY. On July 27, 1990 numerous Italian-American complainants filed a class action complaint with the Department of Labor regarding this alleged pattern and practice (Plaintiff's Exhibit 1). This complaint was signed by Dr. Castiglione, a CUNY faculty member at Queens College, and the contact person for the Italian-American Legal Defense and Higher Education Fund, the entity representing the plaintiffs in that complaint (Pl. Ex. 1). Plaintiff Scelsa and the Institute played a leading role in the Department of Labor complaint, assisting in its investigation and compilation. Dr. Scelsa and Dr. Castiglione arranged meetings with the listed complainants at the offices of the Institute (Tr. 308). Maria Fosco, Dr. Scelsa's secretary, also assisted in the filing of the complaint and offered secretarial support services (Tr. 345-46).

On August 26 and August 28 of this year (Tr. 1165) plaintiff and other members of the Institute were sent letters from the administration of the City University of New York, notifying them that on September 1, 1992, they and the Institute would be split up and moved to several of CUNY's units, and that the Institute, itself, would be relocated to the College of Staten Island from its current location on 43rd Street in rented space in the Grace Building in midtown Manhattan.

On September 9, 1992 plaintiff hurriedly sought and obtained a temporary restraining order blocking defendants CUNY and Chancellor W. Ann Reynolds from carrying out the planned move pending a hearing on plaintiff's motion for a preliminary injunction. From September 21 to October 6 this court heard testimony and received evidence relating to plaintiffs' civil rights claims.

E. Allegations of Discrimination Against Italian Americans in Faculty Recruitment and in Employment

Plaintiffs have alleged a long history of discrimination at CUNY, a history going back several decades. See Calandra Report, and Pl.Ex. 17. Currently, as noted above, there is pending a civil rights complaint with the Department of Labor's Office of Contract Compliance, outlining a number of instances and practices of alleged discrimination against Italian-Americans. See Pl.Ex. 1.

In this action, plaintiffs have presented much evidence of individuals of Italian-American background suffering from discrimination, supplementing their statistical analysis with evidence of individuals suffering disparate treatment.

Plaintiffs' testimony shows numerous examples of individual Italian-Americans who suffered adverse employment decisions, without any satisfactory explanations by defendants of a legitimate non-pretextual reason for this treatment. For example, Professor Manfredi Piccolomini testified that he was discriminated against on the basis of his national origin in regard to a promotion he sought. Prof. Piccolomini filed a formal complaint, which was eventually settled, with the complainant being promoted to the position in question. (Tr. 99-101).

Dr. Vincenzo Milione, plaintiff's witness as to the statistical case against CUNY, also testified that he suffered as an individual from discrimination. Dr. Milione is currently Assistant Director of Research and Education at the Calandra Institute, a position he has held since March of 1988. He currently teaches mathematics at LaGuardia Community College, as an Adjunct Associate Professor, and has previously taught as an adjunct at City College and Queens College (Tr. 125-26). Dr. Milione has a B.S. in Physics and an M.S. in Earth and Space Science from the State University of New York (SUNY), Stonybrook, and a Ph.D. from SUNY, Buffalo (Tr. 126). His doctoral work focused on social engineering, i.e. the study of population groups and

demographics and the design of systems to address social problems (Tr. 127). Dr. Milione also worked at the United States Department of Transportation where he was a program manager (Tr. 128).

Dr. Milione testified that following standard application procedures he applied for a position within the University, a position for which he was extremely well-qualified on the basis of his education, training and experience. Not only did Dr. Milione not receive the position he sought, he did not even obtain an interview. Instead, the position went to an individual, Dr. Braswell, who was found to have plagiarized large sections of Dr. Milione's work.² Dr. Milione was eventually told by a member of the CUNY unit with which he sought a job that his position in the Institute was held against him. Dr. Milione's testimony was unrebutted by defendants (Tr. 187-96).

Additionally, Maria Grace La Russo testified credibly as to the discrimination suffered by her at Hunter College. Ms. La Russo was hired to be a counselor at Hunter College, with a mission to meet with students of all backgrounds and ethnicities but with a concentration among the Italian-American students. Ms. La Russo was hired in 1980, and up until the present day has received a chilly and oftentimes vicious reception (Tr. 407-31). During her decade at Hunter, Ms. La Russo has received her doctorate and a post-master's certificate (Tr. 412) and also has consistently received above average evaluations. (Tr. 413). Nonetheless, in her twelve years at Hunter Dr. La Russo has failed to receive a single promotion (Tr. 411). Credible testimony established that her association with the Institute was held against her by members of the Hunter administration.

2. Dr. Milione eventually received recognition that the work in question was derived from his research and writings, and obtained a settlement with Dr. Braswell under which Dr. Milione received a portion of the royalties of the sales of the controverted work. This incident was known to CUNY at the time Dr. Milione submitted his application (Tr. at 194-95).
3. The only available useful statistical evidence is that generated by plaintiffs, as defendants have

In addition to the evidence detailing individual instances of discrimination, this court received statistical evidence regarding discrimination against Italian-Americans on a class-wide basis, in particular evidence concerning CUNY's failure to live up to the promises made in both the Kibbee Memorandum and the Murphy Letter. Not surprisingly, defendants contest the validity of the methodology used and the results obtained by plaintiffs.³

The crux of plaintiff's statistical evidence is comprised of two data surveys prepared by Dr. Milione. In the first, plaintiff utilized United States Census data of individuals with eight-plus years of post-secondary education (the "8+ years" criterion). Plaintiffs testify that they used the 8+ years criterion because the available census data does not include information on what advanced degrees census respondents have acquired. The plaintiff then filtered this data to develop the applicable labor pool by assuming that CUNY obtains its staff largely from the tri-state region; therefore, plaintiffs obtained the applicable labor pool by weighting the numbers of Italian-Americans in the tri-state region by 80%, and the Italian-American pool nationally by 20%, to arrive at the applicable labor pool of Italian-Americans available to CUNY (see testimony of Dr. Vincenzo Milione).

The second data survey involved an assessment of other area colleges and universities to determine the percentage of Italian-Americans employed in those institutions (Plaintiff's Ex. 35). The data in this survey were procured by "eyeballing;" i.e. by examining the faculty and staff rosters of the universities and colleges examined and counting apparently Italian surnames. (Plaintiffs acknowledge that this method

not, in the decade and a half following the identification of Italian-Americans as a protected class, developed any significant statistical data of their own. In fact, it was only during the hearing that defendants assembled a statistical analysis, due to the fact that since CUNY had not compiled that data as it had promised it was forced to cull its data from that presented during testimony on behalf of plaintiff. See, e.g. Defendant's Ex. 2.

has an unavoidable degree of inaccuracy, since "eyeballing" fails to identify as Italian-American those who are but who do not have identifiable surnames, e.g. women who have changed their names through marriage) (Tr. 170-72).

Defendants contest the force of these statistics. In respect to the first data survey, defendants challenge both the validity of the 8+ years criterion as a measurement of those employable at CUNY, as well as Dr. Milione's weighting of the statistics to emphasize population availability from the tri-state region. Defendants also challenged the results of the survey on the grounds that it used old data from the 1980 census. Defendants presented their own expert evidence to review the data submitted by plaintiffs, Dr. John Mollenkopf. He is a CUNY Graduate Center faculty member currently on leave (Tr. 1312-1313), and he disputed both the usefulness of the 8+ years criterion as well as the geographical weighting used by plaintiffs.

Defendants' analysis raised some doubts that plaintiffs' statistical evidence regarding the available labor pool of Italian-Americans is 100% accurate. However, plaintiffs need not present a perfect depiction of what is certainly a complex demographic phenomenon. For example, while it would be preferable to use data of a more recent vintage than that from the 1980 census, there is no other more recent data base available. The results of the 1990 census were not known at the time Dr. Milione conducted the study. Plaintiffs, it appears, used the best available evidence, and defendants should not complain since they have failed to produce a superior data base. Plaintiffs have convinced this court that, regardless of its stated intention to increase Italian-American representation on the staff and faculty, the percentage of Italian-Americans in the CUNY workforce is significantly less than the available labor pool. Regardless of the inadequacies in plaintiff's survey evidence, this court concludes that while the exact percentage by which CUNY underemploys Italian-Americans is not ascertainable with the exactitude one might like, it is clear that CUNY's employment of Italian-Ameri-

cans is not only significantly less than what it should be, according to the available pool, it also is unconscionable given the existence of an affirmative action commitment on the part of CUNY. CUNY undertook an obligation to increase Italian-American representation; regardless of the exact breadth of the available labor pool, CUNY must undertake to increase the numbers of Italian-American employed at CUNY, absent a showing on its part that such a task cannot be accomplished.

Defendants have failed to articulate a legitimate nondiscriminatory reason for the CUNY employment regime under which the percentage of Italian-Americans has remained constant even though in 1976 the University identified Italian-Americans as a protected class and vowed affirmative action to increase the representation of Italian-Americans.

In the first place, plaintiffs' testimony that there are no Italian-Americans at the Graduate Center is undisputed (Tr. 282). Defendants have not presented any reason, legitimate or not, as to why this is the case. Secondly, defendants have provided no reasons for the current low employment percentage of Italian-Americans in the CUNY staff and faculty workforce. When defendants in a civil rights case such as this can provide no reasons for the underrepresentation of a protected class within a workforce, the inference is that the only rational way to explain the disparity is discrimination. When, in addition, there has been an affirmative statement on the part of the defendant as to an intent to increase such representation through affirmative action of one kind or another, such a failure to explain the employment disparity is even more suspect.

Additionally, plaintiffs can satisfy their initial burden via the production of statistical evidence, and such evidence may be received with additional force if supplemented with additional evidence of individuals "with similar experience and qualifications" suffering disparate treatment. *Wade v. Mississippi Cooperative Extension Soc.*, 528 F.2d 508, 516-517 (5th Cir.),

on remand 424 F.Supp. 1242 (N.D.Miss. 1976). This plaintiffs have done.

Also, plaintiffs' comparison of the percentage of Italian-Americans at area colleges and universities demonstrates that many similarly situated employers in the immediate geographical vicinity employ a much higher percentage of Italian-Americans on staff and faculty. This achievement appears to have been accomplished notwithstanding the fact that these other institutions lack the stated policy commitment that CUNY has voluntarily undertaken, with the Kibbee Memorandum and the Murphy Letter, to increase Italian-American representation.

Defendants never sought to explain this disparity in CUNY employment and that of other area colleges and universities, which leads this court to conclude that not only have plaintiffs shown sufficiently serious questions going to the merits so as to make them a fair ground for litigation, but they also have demonstrated a likelihood of success on the merits.

In addition, while defendants contest the applicability of the 8+ years criterion for hiring faculty, they seem to have forgotten that this case involves discrimination in non-faculty employment as well. Plaintiff's data illustrate under-representation of Italian-Americans in the CUNY administration. Many of the administrators who testified in this action have only Bachelor's Degrees; therefore it appears that the 8+ years criterion would be very helpful in indicating the potential pool of administrative employees. Defendants have not presented any evidence to counter plaintiff's statistical evidence that Italian-Americans are under-represented on CUNY's non-faculty personnel.

II. CONCLUSIONS OF LAW

A. Standards for a Preliminary Injunction

The criteria that determine whether a party is entitled to a preliminary injunction are whether plaintiff has shown (a) irreparable harm and (b) either (1) the likelihood of success on the merits or (2) sufficiently serious questions going to the merits to

make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Wallace Int'l Silversmiths v. Godinger Silver Art Co.*, 916 F.2d 76, 78 (2d Cir.1990).

Defendants claim, however, that since this action "implicates the public interest" (Defendants Supporting Memorandum of Law at 45) a higher standard must apply, mandating that plaintiffs show likelihood of success on the merits. Defendants' contention seems to be that any suit involving a public entity implicates the public interest by definition. Such a contention is clearly wrong, as a quick perusal of the case law regarding attempts to secure equitable relief against illegal action by state actors will reveal.

In the first place, the "public interest" (nowhere defined in defendants' papers) is too nebulous a standard to be applied consonant with the demands of due process. Almost every lawsuit involving a public entity implicates the public interest, almost by definition.

[1,2] Secondly, the cases cited by the defendants, such as *Medical Soc. of New York v. Toia*, 560 F.2d 535 (2d Cir.1977) and *New York Pathological & X-Ray Laboratories v. Immigration & Naturalization Service*, 523 F.2d 79 (2d Cir.1975), as well as those noted by plaintiffs, make crystal clear that in this Circuit an action is deemed to implicate the public interest only when taken pursuant to a regulatory or statutory scheme. See, e.g. *La Plaza Defense League v. Kemp*, 742 F.Supp. 792 (S.D.N.Y.1990). Thus, the higher "likelihood of success on the merits" standard applies only in instances where plaintiffs are trying to halt government implementation of regulation, for example, and is required in that context because the challenged action has already been the subject of government process. Principles of federalism militate against overmuch interference in a State's rulemaking or legislative process by a federal district court; no such concerns are, however, implicated here. Here, in contradistinction, the challenged

decisions of defendant CUNY were taken with a high degree of secrecy, and the removal of the Institute was intended to take place with only the most minimal of notice to those affected. When a party is challenging as contrary to federal law the actions of a government actor, those actions are, by definition, not pursuant to a regulatory or statutory scheme. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Plaintiffs will suffer irreparable harm

The plaintiff's papers in this action have been, to say the least, inartfully drawn, leading to some confusion as to what the causes of action are and who are the actual parties to the controversy. Defendants contend that the only plaintiffs presented are the Institute and Dr. Scelsa as an individual. They further claim that as an arm of CUNY, the Institute cannot bring suit against the University. Plaintiffs, on the other hand, appear to present a more broadly-based complaint, with Dr. Scelsa as Director of the Institute representing the interests of the Italian-American community.

Throughout the lengthy hearing on the preliminary injunction, both plaintiffs and defendants treated this action as one in which Dr. Scelsa represented the interests of the Italian-American community vis-a-vis CUNY. Dr. Scelsa can legitimately represent those interests in court; since civil rights suits seeking to vindicate the rights of a minority have historically proceeded in this fashion. See, e.g. *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). The caption of the complaint also indicates that Dr. Scelsa is suing "as Director" of the Institute, i.e. as flagbearer for the Italian-American community. It is clear from all the evidence and arguments presented by *all parties* that the questions of discrimination involved herein relate not only to Dr. Scelsa but to Italian-Americans as a group. Thus this court, in accordance with the postures of both sides, will treat this action as such.

Plaintiffs have shouldered their burden of demonstrating that the planned move of

the Institute will cause irreparable harm, not only to Dr. Scelsa but to the Italian-American community. As the Second Circuit has ruled, "improper conduct for which monetary remedies cannot provide adequate compensation suffices to establish irreparable harm." *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir.1991).

Much of the community work of the Institution would be rendered extremely difficult due to the location of the campus of the College of Staten Island. The Institute, as guided by Dr. Scelsa, is involved in a wide array of community activities, involving the promotion of Italian-American interests as well as fostering intergroup harmony among the many racial, ethnic, and religious divisions of the metropolitan area. (Tr. 288-92). Uncontradicted testimony confirmed plaintiff's argument that the central Manhattan location of the Institute is central to this function.

Uncontradicted testimony also demonstrated the Institution and Dr. Scelsa's pivotal role in attempting to vindicate the rights of Italian-Americans via the lawful petition of elected officials and the submission of civil rights complaints with the appropriate authorities. The removal of Dr. Scelsa along with the relocation of the Institute to the College of State Island would render far more difficult the continuation of these activities. Defendant's argument that, if CUNY ultimately loses this lawsuit, all parties can be re-located and the relationships and the activities interrupted re-established without any harm to the plaintiffs, is unsupported by the evidence. Thus we find that plaintiffs have established that they will suffer irreparable harm if they are not granted the preliminary injunction they seek.

[3] In addition, plaintiff has alleged violations of the constitutional right to the equal protection of the laws. The law in this Circuit is that a constitutional deprivation constitutes per se irreparable harm. *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir.1992); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir.1984).

The Balance of Hardships

The balance of hardships also tilts decidedly in plaintiff's favor. Plaintiff, Dr. Scelsa, is threatened with loss of status in the CUNY community, and the removal of the Institute to the College of Staten Island. Defendants have, throughout this action, repeatedly pressed for shorter deadlines and a faster resolution of the issues involved (see, e.g. Tr. at 1393) so that they can remove plaintiff. The costs to defendants of continuing to keep the Institute in its current location are small in comparison to the importance of the issues involved. As noted by plaintiffs in their Memorandum of Law at 72, "the inability of persons to use the unique resources of the Institute is not financially compensable. The plaintiffs will suffer a hardship many fold that of the university if they lose."

Plaintiffs have demonstrated sufficiently serious questions going to the merits to make them fair grounds for litigation.

Defendants have argued that this court lacks the adjudicative authority to hear some of the claims presented in this controversy. Thus, in order to show a fair grounds for litigation or a likelihood of success on the merits, this court must first establish its capacity to hear the claims presented.

4. 42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. While plaintiff's complaint and following submissions, not models of clarity and cogency, did not specifically raise § 1981 as a ground for recovery, federal courts have the adjudicative authority to decide this issue by virtue of F.R.Civ.P. 8(a)(2) and 54(c). 8(a)(2) mandates that a party's pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This the plaintiff has done in his attempt to obtain a preliminary injunction. In addition, F.R.Civ.P. 54(c) notes that the federal court issuing a judgment has authority to "grant the relief to which the party

B. Subject Matter Jurisdiction

Section 1981 and 1983

Section 1983 does not by itself confer jurisdiction.⁴ While 42 U.S.C. § 1983 provides plaintiffs with a cause of action, it does not confer subject matter jurisdiction on a federal district court. Federal jurisdiction over section 1983 claims is provided for by 28 U.S.C. § 1343(a)(3).

Section 1981, as amended by the Civil Rights Act of 1991, bars discrimination in the making and enforcement of contracts, defined in 42 U.S.C. § 1981 as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."⁵ District court jurisdiction is likewise conferred by 28 U.S.C. § 1343(a)(3).

Title VI and Title VII

28 U.S.C. § 1343(a)(4) gives the federal district courts jurisdiction over a suit "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights."

42 U.S.C. § 2000d⁶, Title VI, is one such statute that is hearable in district court via § 1343(a)(3).

Jurisdiction for 42 U.S.C. § 2000e-3(a)⁷, Title VII, is also established under

in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

6. "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Defendants now and at all relevant times have received unspecified federal moneys.

7. Title VII reads in relevant part, that "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, to discriminate against any individual, or for a labor organization to discriminate against any member thereof, because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this title."

§ 1343(a)(3). The same analysis applies to 42 U.S.C. § 2000e-2(a).⁸

C. Eleventh Amendment Immunity

Section 1983 and 1981 claims

Defendants allege that the Eleventh Amendment to the United States Constitution bars suit against CUNY.⁹ The complaint is fashioned as one against both CUNY and Anne Reynolds "as Chancellor". It is therefore a suit against CUNY as an institution and the Chancellor acting in her official capacity.

[4] States do not count as "persons" under 42 U.S.C. § 1983, and thus their 11th Amendment immunity bars suits for damages under that statute. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity." 491 U.S. at 66, 109 S.Ct. at 2309, 105 L.Ed.2d at 55.

[5] CUNY therefore may not properly be named as defendant in a suit for equitable relief under § 1983 since it qualifies as an arm of the State of New York. In *Kovats v. Rutgers*, 822 F.2d 1303 (3d Cir. 1987) the Third Circuit found that Rutgers University, although denominated the "state university," lost its Eleventh

Amendment immunity from § 1983 damages suits because Rutgers could draw on private as well as state moneys to pay damages. This discretionary power rendered Rutgers liable to § 1983 damages lawsuits. Under this analysis, however, CUNY counts as an arm of the state. N.Y. Education Law § 6205(1) provides that New York State "shall save harmless and indemnify members of the board of trustees and any duly appointed member of the teaching or supervising staff, officer or employee of the senior colleges . . . against any claim, demand, suit or judgment arising by reason of any act or omission to act by such person occurring in the discharge of his duties and within the scope of his service on behalf of such university." N.Y. Education Law § 6205(1) (McKinneys 1985). See also *Moche v. City University of New York*, 781 F.Supp. 160 (E.D.N.Y. 1992).¹⁰

This court, in *Silver v. City University of New York*, 767 F.Supp. 494, 499 (S.D.N.Y.1991), aff'd 947 F.2d 1021 (2d Cir. 1991) recently ruled that CUNY enjoys Eleventh Amendment immunity from § 1983 suits for damages or equitable relief. See also *Torres v. City University of New York*, 1991 WL 143359, 1991 U.S. Dist. LEXIS 9977 (S.D.N.Y.1991), which held that while the President of John Jay College of Criminal Justice, Gerald Lynch, is subject to the equitable relief provisions of § 1983, John Jay College itself is immune.

has since been modified and now the claim is that Eleventh Amendment immunity bars continuation of the § 1983 suit against CUNY alone.

8. § 2000e-2(a) reads in relevant part: "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employment or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

9. Earlier in the hearing defendants claimed that Eleventh Amendment immunity barred suit under § 1983 against all defendants; this position

10. However, a successful plaintiff can recover money damages from any entity of the CUNY system under § 1983 if the recovery is paid for out of revenues from New York City. Certain community colleges receive moneys from the City of New York, and thus under *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) can be characterized as non-state entities, and thus are liable to § 1983 suits for damages as well as for injunctive relief. See, e.g. *Moche v. City University of New York*, 781 F.Supp. 160, 165-66 (E.D.N.Y. 1992).

However, a state official lacks such immunity when sued for equitable relief. In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court ruled that state officials can be sued under § 1983 in their official capacity for injunctive relief, 105 L.Ed.2d at 58, n. 10. See also *Derechin v. State University of New York*, 731 F.Supp. 1160, 1164 (W.D.N.Y.1989) (state officials acting in their official capacity only count as "persons" for the purposes of § 1983 when "they are sued for prospective injunctive relief").

[6] This distinction between CUNY as defendant and between Ann Reynolds as an official state actor, will avail defendants little in the instant controversy. For when prospective injunctive relief is sought, the Eleventh Amendment is no bar to using § 1983 as the vehicle for such relief. "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n. 10, 109 S.Ct. at 2311 n. 10, 105 L.Ed.2d at 58, n. 10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14, 87 L.Ed.2d 114 (1985).) See also *Torres v. City University of New York*, 1991 WL 143359, 1991 U.S. Dist. LEXIS 9977 (S.D.N.Y.1991).

A § 1983 suit against Chancellor Reynolds in her official capacity will serve plaintiff's purpose of obtaining a federal forum for seeking to cure, through litigation, CUNY's allegedly discriminatory practices. (Chancellor Reynolds did not become Chancellor until September, 1990). In fact § 1983 has been used in this manner just recently against CUNY in *Levin v. Harleston*, 966 F.2d 85 (2d Cir.1992) (affirming in part and vacating in part *Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y.1991). See also *Dube v. SUNY*, 900 F.2d 587, 595 (2d Cir.1990).

11. Attorneys fees can be awarded for the counsel who help attain injunctive relief, since attorneys fees are seen as ancillary to such relief, and are thus not treated as a damages award for Eleventh Amendment purposes. *Missouri v.*

[7] A § 1981 suit is treated in the same manner as a § 1983 action for purposes of Eleventh Amendment Immunity. Thus, while an award of damages against a state entity is not recoverable under § 1981, appropriate prospective injunctive relief would be available under the section, as well as attorneys fees as part of costs, when the suit is against the appropriate officials named in their official capacity.¹¹ There are extremely few legal rules as well established as this one. Defendants argue that since Chancellor Reynolds, acting in her official capacity, is an agent of CUNY, she therefore enjoys Eleventh Amendment immunity from plaintiffs' suit. This contention is clearly wrong, as a long line of cases, from *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) to the present clearly demonstrates.

Title VI and Title VII claims

CUNY enjoys no immunity in regard to plaintiffs Title VI and Title VII claims. "Since Title VII abrogates the Eleventh Amendment, a properly brought cause of action could exist against defendant CUNY." *Moche*, 781 F.Supp at 166. See also *Ritzie v. City University of New York*, 703 F.Supp. 271, 276 (S.D.N.Y.1989).

D. Procedural Requirements

Sections 1983 and 1981

There is no exhaustion requirement for section 1983 actions, *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), or for section 1981, *id.*

Title VI

In Title VI actions, one must first invoke administrative relief when seeking such relief would not be futile. "Where an agency has established an administrative procedure to insure that no person is denied benefits of a program receiving financial assistance from the agency and has adopted procedures for gathering informa-

Jenkins, 491 U.S. 274, 279, 109 S.Ct. 2463, 2466-67, 105 L.Ed.2d 229, 237 (1989); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

tion, investigating complaints and enforcing compliance with Title VI, plaintiffs are expected to exhaust those administrative remedies before seeking redress in the federal courts." *Wrenn v. Kansas*, 561 F.Supp. 1216, 122 (D.Kan.1983). Presumably, such an agency is the Department of Education, Office of Contract Compliance, with which the plaintiffs have already lodged numerous complaints. It is partly in response to defendants' alleged retaliation for such complaints that the current suit is brought.

[8] However, the fact that an administrative procedure exists to address Title VI claims does not preclude suit on a Title VI cause of action in federal court before the exhaustion of such remedies. *Neighborhood Action Coalition v. Canton*, 882 F.2d 1012, 1015 (6th Cir.1989). With respect to Title VI cases as with similar cases, "civil rights actions are barred for failure to exhaust available administrative remedies only in limited circumstances." *Jones v. Niagara Frontier Transp. Auth.*, 524 F.Supp. 233, 236¹² (W.D.N.Y.1981). We therefore find that since plaintiffs appear to have satisfied the procedural prerequisites of Title VI, this court can continue with the analysis and go to the likelihood of success on the merits.

Title VII

[9] Under Title VII, administrative remedies need not be exhausted for federal courts to have subject matter jurisdiction to entertain claims. *Womble v. Bhangu*, 864 F.2d 1212 (5th Cir.1989). However, in order for an action to be properly brought, a claim must be filed with an appropriate agency. *Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874, 878 (3d Cir.1990). One must invoke, but not necessarily exhaust, means of administrative redress.

[10] Title VII requires "that a party claiming discrimination must file a complaint with the EEOC within 180 days of the alleged act of discrimination" and thus a suit under Title VII in federal district

court is timely usually only if such charge was timely filed. *Torres v. CUNY*, 1991 WL 143359, *4, 1991 U.S. Dist LEXIS 9977, *11 (S.D.N.Y.1991); *Ritzie v. CUNY*, 703 F.Supp. 271, 278 (S.D.N.Y.1989). Charges can also be filed with other federal agencies or with the appropriate state agencies. *Moche v. City University*, 781 F.Supp. 160, 166 (E.D.N.Y.1992). However, this limitations period is not a jurisdictional prerequisite to suit in federal district court, and is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); *Mauro v. Board of Higher Education*, 658 F.Supp. 322, 324 (S.D.N.Y. 1986), aff'd 819 F.2d 1130 (2d Cir.1987).

[11,12] Additionally, plaintiff need not exhaust or resort to administrative remedies where "the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process," *J.G. v. Rochester City Sch. Dist. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir.1987); indeed, exhaustion doctrine does not apply here especially because "the petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies." *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir.1980).

Here, the letters notifying Dr. Scelsa and other members of the Institute of its reconfiguration and relocation to the College of Staten Island went out only days before the move was to go into effect. This case is a perfect illustration of the exception to the exhaustion doctrine, as forcing plaintiff to first exhaust administrative remedies would be futile, given the time constraints. CUNY cannot tarry until the last minute in announcing its plans, and then argue that for plaintiff to seek relief through the courts is premature.

In any event, this court has jurisdiction to entertain plaintiff's suit for equitable relief to maintain the status quo, even if plaintiff is required to exhaust, and not merely invoke, his administrative remedies

¹² Additionally, where the Title VI plaintiff is seeking a preliminary injunction, exhaustion of administrative remedies is not required. *Jones*,

524 F.Supp. at 237 (citing *Bryan v. Koch*, 627 F.2d 612, 620 (2d Cir.1980)).

and has failed to do so. *Holt v. Continental Group*, 708 F.2d 87, 89 (2d Cir.1983); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 881 (2d Cir.1981).

Again, since we find that plaintiff has shown a likelihood of success on the procedural prerequisites for both Title VI and Title VII, we can then turn to the substantive merits of the Title VI and Title VII claims.

E. On the Substantive Elements of the Causes of Action Involved in This Case, Plaintiffs Have Shown Either a Likelihood of Success on the Merits or Fair Grounds for Litigation

Title VI

[13] In order to establish standing to sue under this statute plaintiffs must be the intended beneficiaries of the federal spending program. While this need not be pleaded in plaintiff's filings, it must eventually be proven in order for plaintiffs to recover under this section. *Wrenn v. Kansas*, 561 F.Supp. 1216, 1221 (D.Kansas 1983). Title VI's scope encompasses those actions forbidden by the Equal Protection Clause. See, e.g. *Davis v. Halpern*, 768 F.Supp. 968, 974 (E.D.N.Y.1991).

"The two elements for establishing a cause of action pursuant to Title VI are (1) that the entity involved is engaging in racial or national origin discrimination and (2) the entity involved is receiving federal financial aid. As in Title VII cases, discriminatory effect alone is sufficient to satisfy the first element, intent to discriminate need not be proven." *Jackson v. Conway*, 476 F.Supp. 896, 903 (E.D.Mo.1979), aff'd 620 F.2d 680 (8th Cir.1980). It was decided in *Guardians Ass'n v. Civil Serv. Com.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) that in a private action under Title VI proof of discriminatory intent is not required. While intent will help support an action, "disproportionate impact is subject to the Title VI regime." 463 U.S. at 591, 103 S.Ct. at 3226, 77 L.Ed.2d at 874. However, the Court in *Guardians* limited the relief available in private action Title VI suits where intent is not proved to the injunctive relief where suit is brought to

"identify the violation and enjoin its continuance." 463 U.S. at 596, 103 S.Ct. at 3229, 77 L.Ed.2d at 788. See also *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

[14] Discriminatory impact, even absent proof of discriminatory intent, will suffice to support a private right of action under Title VI. "Under Title VI, plaintiffs must first establish that the proposed federally-aided administrative action involves 'some definite, measurable disparate impact.' *N.A.A.C.P. v. Medical Center Inc.*, 657 F.2d 1322, 1332 (3rd Cir.1981). If plaintiffs meet this initial burden, defendants must present a justification for their actions. The ultimate burden of proving illegal discrimination remains with plaintiff." *Coalition of Concerned Citizens v. Damian*, 608 F.Supp. 110, 127 (S.D.Ohio 1984) (involving a dispute over the siting of a highway in a predominantly minority community).

[15] The elements of a disparate impact case are first that the plaintiffs show a discriminatory effect. The burden then shifts to defendants to advance a non-discriminatory reason for the controverted action(s), and then the burden shifts again back to the plaintiffs to demonstrate that the proffered non-discriminatory reasons are really pretextual. *NAACP v. Wilmington Medical Center*, 491 F.Supp. 290, 314-315 (D.Del.1980).

In regard to the Title VI claim, while plaintiff's showing may not rise to a level of likelihood of success on the merits (a question that, because it is unnecessary to the decision, will not be considered here), it does amount to a showing of sufficiently serious questions going to the merits to make them a fair ground for litigation.

All defendants have done is attack the degree to which the survey data maps reality. Taking into account plaintiff's overestimation of the reliability of the survey data as well as defendants overly negative estimation, this court finds that the data do indicate a significant disparity in the available pool and the numbers of Italian-Americans employed by CUNY on its staff and

faculty. All that is required is that the "statistical disparities must be sufficiently substantial that they raise an inference of causation." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995, 108 S.Ct. 2777, 2789, 101 L.Ed.2d 827, 845 (1988). Plaintiffs have shown that there is a good-size pool of sufficient magnitude so that CUNY has no legitimate excuse for not increasing the representation of Italian-Americans in the CUNY workforce in the sixteen or so years that the Kibbee Memorandum and the Murphy Letter have been in effect. This is not a case where one side contends that the other has not increased the representation of a protected group by an adequate amount, and where the other party claims that the amount of the possible increase is constrained by the available labor pool. Instead, we have here a controversy where, although the employer has a stated commitment to increase the representation of Italian-Americans, such percentages have not increased significantly, and in fact in many campuses of CUNY have actually decreased.

Plaintiffs have shown sufficiently serious questions going to the merits to make them a fair ground for litigation in regard to the Title VI claim. Essentially, plaintiff's case involves two challenges; even though plaintiff's papers have not lucidly articulated these claims, they are at the heart of plaintiff's case. The first challenge is to specific actions taken by CUNY, such as the relocation of the Institute, and the failure to promote or treat fairly and in a non-discriminatory manner the witnesses who testified at the hearing. Secondly, plaintiff is challenging the employment regime at CUNY, a regime that has resulted in a severe underemployment of Italian-Americans on CUNY faculty, administration, and staff. This court understands that the basic thrust of plaintiff's complaint is the group-wide discrimination claim which is bolstered by evidence of discrimination regarding individual Italian-Americans.

13. Defendants, incredibly, contend that the Institute is not being moved; rather, they claim "new reporting lines were established for employees of the Institute." See Defendants' Re-

Thus, while CUNY may be able to proffer non-discriminatory reasons for discrete actions and for employment decisions taken with respect to specified individuals, plaintiffs may still prove their case if CUNY cannot legitimate an employment regime in which almost two decades of stated commitment to increase the representation of Italian-Americans has yielded no significant progress.

Thus, in terms of a systemic challenge to CUNY's hiring practices, plaintiff has shouldered the burden necessary to obtain a preliminary injunction.

Title VI may also support a retaliation cause of action, if plaintiff can show that adverse decisions followed Title VI lawsuits or claims of which defendants were aware. See *Davis v. Halpern*, 768 F.Supp. 968, 984-85 (E.D.N.Y.1991).

In the instant controversy, defendants have failed to articulate a legitimate non-discriminatory reason for the manner in which the relocation of the Institute and its staff was conducted. The removal was to take effect on September 1, 1992, a Tuesday. The letter to Dr. Scelsa was dated August 26, 1992, a Wednesday, and presumably sent to him immediately thereafter (Tr. 1164-65); letters to other staff members were dated the 28 of August, a Friday.

The administrator responsible for these notifications, Vice Chancellor Kiezs, met with Dr. Scelsa and other Institute staff members during the month of August on unrelated matters, after the decision to relocate the Institute had already been made (Tr. 1165). At no times during these meetings did she even mention in passing that come September 1, 1992, their work assignments would change radically, with some employees to be sent to different boroughs of New York City at least one hour away on public transportation from the current assignments.¹³ No reason was presented by defendants for this odd timing.

sponse to Plaintiff's Proposed Findings of Fact and Conclusions of Law at 2. Such linguistic shenanigans do not change the fundamental fact that the Institute and its staff are the subject

During the planning of the relocation of the Institute, not one member of the Institute, least of all its Director, Dr. Scelsa, was privy to the planning of the move. This deliberate removal from the decision making loop, as well as the timing of the notification of removal, leaves this court with the impression that plaintiffs were left in the dark so as to forestall any effective challenge to or input into the move. Uncontradicted testimony also shows that when CUNY administrators felt it imperative to communicate with staff members they did so via facsimile transmission. Oddly enough, the complete reconfiguration of the Institute and the relocation of its staff around the city did not, in defendants' view, merit this rapid form of communication. Defendants, having given no reason whatsoever for deliberately refusing to effectively communicate to those affected by the relocation only leads to the conclusion that the motivation for these actions was retaliation for the Institute's role in assisting in the filing of civil rights complaints by Italian-American faculty and staff members.

Defendants have also failed to demonstrate that there was a non-discriminatory reason for relocating the Institute to the College of Staten Island, instead of elevating it at the Graduate Center, the locus for CUNY's graduate programs. The court finds that the only possible rationale for this odd placement is that defendants wanted to inhibit the Institute's effectiveness in seeking to validate the civil rights of Italian-Americans. Thus we find that on the Title VI cause of action, plaintiffs have shown a likelihood of success on the merits so as to satisfy even the higher standard for the granting of the preliminary injunction they seek.

of CUNY's plans to relocate and reorganize the Institute, as the testimony and the evidence unequivocally establish.

14. "The plaintiff bears the initial burden of establishing by a preponderance of the evidence, a prima facie case of discrimination. *McDonnell Douglas [Corp. v. Green]*, 411 U.S. [792] at 802, 93 S.Ct. [1817] at 1824 [36 L.Ed.2d 668 (1973)]. If the plaintiff carries her burden, thus creating a rebuttable presumption of discrimination, the

Thus, this court finds sufficiently serious questions going to the merits of a disparate impact claim to grant a preliminary injunction pending trial. However, a convincing showing in terms of disparate treatment has not been made, as plaintiff has failed to adduce sufficiently compelling evidence of intentional anti-Italian-American animus on the part of CUNY.

In conclusion, as to the Title VI, cause of action plaintiffs have shown that they have satisfied the preliminary injunction standards of showing sufficiently serious questions indicating a fair grounds for litigation and a balance of hardships tipping in their favor.

Title VII

Title VII has two theories: disparate treatment, and disparate impact. While the first requires either some direct showing or inference of discriminatory intent, the latter does not.

A prima facie disparate treatment Title VII case puts on the plaintiff "the initial burden of alleging she was in a protected group; acts of the employer disadvantaging the employee; and disparate treatment by the employer of comparably qualified or situated persons of different races or sexes [or national origin]." *Ritzie*, 703 F.Supp. at 279. Once plaintiff meets his or her burden of showing qualifications for the positions denied, defendants must then articulate a non-discriminatory action for the conduct in question. *Silver v. CUNY*, 767 F.Supp. 494, 497 (S.D.N.Y.1991). The burden then shifts back to the plaintiff to show that these proffered reasons are pretextual. This "three-step" procedure is central to Title VII litigation, *Budd v. CUNY*, 749 F.Supp. 86, 88 (S.D.N.Y.1990), and such burden shifting determines the effect of the evidence adduced at trial. See, e.g. *Donaldson v. Merrill Lynch & Co.*, 794 F.Supp. 498, 503 (S.D.N.Y.1992).¹⁴

burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employees rejection." *Id.* The employer's burden is one of production only; it need not persuade the court that it was actually motivated by the proffered reason, but rather must put forth evidence that raises an issue of fact as to whether the reason was discriminatory. [*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. [248] at 254, 256, 101 S.Ct. [1089, at] 1094, 1095

While in a disparate treatment case, proof of discriminatory intent is required, in some cases it can be inferred from the "mere fact of difference in treatment." *Murphy v. Middletown Enlarged City School Dist.*, 525 F.Supp. 678, 689 (S.D.N.Y.1981). While mere statistics alone will not suffice to make plaintiff's prima facie case, "gross statistical disparities can establish a prima facie case of discrimination." *Silver*, 767 F.Supp. at 498. See also *Clady v. Los Angeles*, 770 F.2d 1421, 1427 (9th Cir.1985). Plaintiff can indirectly prove wrongful motivation in cases involving a protected class "from a sufficient showing of disparity between members of the plaintiff class and comparably qualified members of the majority group." *Segar v. Smith*, 738 F.2d 1249, 1265-66 (D.C.Cir.1984). "This usually means providing evidence—often in statistical form—of a disparity in the position of members of the plaintiff class and comparably qualified whites." *Id.* at 1267 (emphasis in original). If plaintiffs identify a significant disparity, they may even be freed from the burden of identifying the exact practice which caused the disparity, leaving that to the employer to identify and justify. *Segar*, 738 F.2d at 1271 ("employer's claim that it cannot isolate the cause of the disparity will be unlikely to deflect the force of the inference of discrimination from plaintiff's [statistical] proof").¹⁵

For the same reasons discussed above in the Title VI section, this court finds against plaintiff's request for a preliminary injunction on the grounds of Title VII's disparate treatment prong. Again, this court finds a sufficient showing of discriminatory intent lacking.

In a disparate impact prima facie case, however, no showing of intentional discrimination need be made; instead, plaintiff

must make out a practice of actions with discriminatory effect. "Under the disparate impact theory, a prima facie case is established by showing that a particular job requirement or standard of selection operates to select applicants for hire or promotion in a pattern significantly different from that of the pool of applicants. Under this theory a prima facie case is established even if the job requirement at issue is facially neutral and even if no showing of intentional discrimination is made." *Kachel v. Pueblo*, 743 F.Supp. 749, 756 (D.Colo.1990) (citations omitted). The burden that the plaintiff must carry is to show that defendants selection procedures have resulted in a pattern of employment in which members of the protected class are selected in numbers less than that which would be selected from the pool of qualified persons if there was no discrimination. Under this theory, plaintiffs must identify the practice on the part of the defendants that has led to the disparate impact. *Sousa v. Hunter*, 739 F.Supp. 756, 760 (E.D.N.Y.1990) (citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994, 108 S.Ct. 2777, 2788, 101 L.Ed.2d 827, 845 (1988)). However, even utilizing disparate impact analysis, plaintiffs need not identify with precision the exact procedure or practice that has caused the disparate impact; instead, even discretionary and subjective employment practices are subject to the Title VII regime. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

A key element of a disparate impact case is the definition of the relevant labor pool. One definition of a municipality's labor pool is the geographical area from which private employers in the city draw their workers. *Newark Branch NAACP v. Harrison*, 940 F.2d 792 (3d Cir.1991).

[67 L.Ed.2d 207 (1981)]; *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 n. 2, 99 S.Ct. 295, 296 n. 2, 58 L.Ed.2d 216 (1978); *Meiri [v. Dacon]*, 759 F.2d [1989] at 996 [2nd Cir.1985]. If the defendant produces such evidence, the presumption of discrimination disappears and the burden again shifts to the plaintiff to show that the articulated reason is merely a pretext for discrimination."

15. The *Segar* court justified placing this burden on the employer once the plaintiff class identifies a significant statistical disparity by noting that to place the burden on the plaintiff in such instances "permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII." 738 F.2d at 1271-72.

Title VII may also impose on an employer the duty to correct employment imbalances once they are aware of them. *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir.1986) (employer has duty to correct atmosphere of racial hostility). In the instant controversy, the 1976 Kibbee memorandum evidences on the part of CUNY an awareness of past discrimination against Italian-Americans as well as a realization of the current under-representation of Italian-Americans. This court gathers from statistics presented at trial regarding the employment levels of Italian-Americans at CUNY that this awareness has not led to significant action on the part of defendants (See Plaintiff Ex. 8, 9, 10, 62).

An analogous situation was presented recently in *Bridgeport Guardians v. Bridgeport*, 933 F.2d 1140 (2d Cir.1991). This case involved litigation over Bridgeport's hiring practices for officers in its police force, in which minorities, especially African-Americans and Latinos, were severely under-represented. The City was aware of this problem and had been advised by an industrial psychologist as to means to correct the racial imbalance via a race-neutral method of selection. The Second Circuit court affirmed the trial court's finding that the City's failure to take positive steps toward correcting the under-representation of minorities, and its persistence in not improving its selection methods, amounted to a Title VII violation.

In the instant controversy, the situation is slightly more clear cut. CUNY has known since the latter half of the 1970's that Italian-Americans are under-represented in both faculty and non-faculty personnel. Numerous times, Italian-American legislators, community leaders, and other officials have brought to CUNY's attention their perception of discrimination. CUNY has undertaken, with the Kibbee Memorandum and the Murphy Letter, a pledge to address and seek to correct this imbalance.

Plaintiffs allege that under 42 U.S.C. § 2000e-3(a) they suffered retaliation for filing of discrimination charges. "To establish a prima facie retaliation claim, plaintiff must show: protected partic-

ipation or opposition under Title VII known by the alleged retaliator; an employment action disadvantaging the person engaged in the protected activity; and a causal connection between the protected activity and the disadvantageous employment activity." *Long v. A.T. & T. Information Systems*, 733 F.Supp. 188, 204 (S.D.N.Y.1990). Causality may be proven indirectly by a showing that the protected activity is followed by defendant's adverse treatment. *Id.* The same burden-shifting scheme at work in disparate treatment actions is in effect here as well: "once plaintiff has established a prima facie case, the employer can show a legitimate non-retaliatory reason for the alleged mistreatment. The employee is then entitled to prove that the employer's reason is pretextual." *Id.* An employee's actions complaining of discrimination are protected from retaliation regardless of the ultimate merit of the charges filed. *Gonzalez v. Bolger*, 486 F.Supp. 595, 600 (D.C.D.C.1980), *aff'd* 656 F.2d 899 (D.C.Cir. 1981).

The same facts that illustrate sufficiently serious questions going to the merits of the Title VI retaliation claim also apply in the Title VII context.

Section 1983

"In order to state a claim under § 1983, a plaintiff must allege that, first, the conduct complained of was committed by a person acting under color of state law, and, second, that such conduct deprived plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981)." *Weg v. Macchiarola*, 729 F.Supp. 328, 333 (S.D.N.Y.1990); see also *Sean R. by Dwight R. v. Bd. of Education*, 794 F.Supp. 467, 469 (D.Conn.1992).

This court understands the gravamen of plaintiff's § 1983 complaint to be an Equal Protection Clause violation. It was understood that plaintiffs were alleging that Dr. Scelsa and the Institute have not enjoyed the equal protection of the laws since they were treated differently due to their status as Italian-Americans or Italian-American representatives. The hearing was conduct-

ed by all parties on the understanding that this was the core of the § 1983 cause of action. Defendants' Proposed Findings of Fact and Conclusions of Law treat plaintiffs' § 1983 claim as an Equal Protection violation (at page 51), a treatment fully justified by the hearing testimony. Indeed, plaintiffs alleged, at page 4 of their Second Amended Complaint, that the plaintiff Institute is being deprived of its constitutional right to the equal protection of the laws in that it "is being treated in a manner at substantial variance to that of similar organizations."

Plaintiffs now seem to claim in their post-Hearing papers that the § 1983 violation they had in mind involved an infringement of Dr. Scelsa's First Amendment rights. Since plaintiffs have at all times conducted the hearing as if Equal Protection was at the heart of the § 1983 claim, leading both the court and the defendants to believe accordingly, the § 1983 claim will be dealt with as such, and not as a First Amendment claim.

This court credits the testimony, largely uncontested by defendants, that the percentages of Italian-American faculty, administrators, and other staff at CUNY do not reflect the percentages of Italian-Americans in the student body or the population at large. The percentage of Italian-Americans in all staff bodies has stayed at extremely low levels, barely changing, sometimes decreasing, since 1978, even though both the Kibbee Memorandum and the Murphy Letter expressed clear directives to increase those numbers. (Tr. 144-48).

Thus we find that on their § 1983 claim plaintiffs have satisfied the requirements for the granting of a preliminary injunction.

Section 1981

Discrimination on the basis of national origin is encompassed within the scope of activities prohibited by section 1981. *St. Francis College v. Al-Khazraji*, 481 U.S.

604, 613, 107 S.Ct. 2022, 2028, 95 L.Ed.2d 582, 592 (1987).¹⁶

The elements of a section 1981 claim are identical to those of a Title VII disparate treatment action. See *Richards v. N.Y.C. Board of Education*, 668 F.Supp. 259, 264 (S.D.N.Y.1987), aff'd 842 F.2d 1288 (2d Cir. 1988). Unlike Title VII, section 1981 has no disparate impact prong: impact alone is insufficient since purposeful discrimination must be shown. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390, 102 S.Ct. 3141, 3149, 73 L.Ed.2d 835, 849 (1982); *Richards*, 668 F.Supp. 259 at 264; *Gibralter v. New York*, 612 F.Supp. 125, 129 (E.D.N.Y.1985).

To prevail under section 1981 plaintiff need not demonstrate that discriminatory animus was the sole motivating factor in defendant's employment decisions. See *Lenihan v. New York*, 636 F.Supp. 998, 1009-10 (S.D.N.Y.1985). Such motivation may also be established via circumstantial evidence. *Richards*, 668 F.Supp. at 265. Courts will accept such circumstantial evidence, *Lenihan*, 636 F.Supp. at 1009, due to the fact that an employer's decisions are often shrouded from clear discovery so that the only evidence available is circumstantial. If the employment decision can only be rationally understood as the result of discrimination, then courts will understand the circumstantial evidence presented to indicate the presence of a section 1981 violation.

A § 1981 violation may be established not only via presentation of evidence regarding defendant's affirmative acts but also by evidence regarding defendant's omissions when defendant is under some duty to act. For example, if there is an affirmative action plan in force, a publicized program of change recognizing a past of discrimination, or some other goal-directed agenda to increase the representation of a protected class, and the defendant has failed to adhere to these plans or programs, "common sense dictates that defendant's disregard of these guidelines is im-

F.Supp. 256 (E.D.Mich.1981).

¹⁶ Section 1981 has been explicitly applied to Italian-Americans. *Kemerer v. Davis*, 520

portant evidence of discriminatory intent." *Richards*, 668 F.Supp. at 266.

Such disregard can be found here. Throughout the hearing for the preliminary injunction, defendants accepted as valid the Kibbee Memorandum and the Murphy Letter. Defendants also admit that the number of Italian-Americans on the CUNY executive staff and faculty has remained constant, at around five percent, from 1978 to the present (Defendants Proposed Findings of Fact and Conclusions of Law at 32-33). Yet certain key individual administrators denied on record that Italian-Americans were either a protected class or the subject of affirmative action within CUNY. Sylvia Miranda, the ex-Director of the Office of Affirmative Action, stated that she knew of no plan to include Italian-Americans as a protected class, and that between 1988 and 1989, when she was Director, the Office had no plans whatsoever to increase Italian-American representation, 14 years after the creation of such a plan had been directed (Tr. 1273-1277). The present Chancellor of CUNY, W. Ann Reynolds, testified that Italian-Americans are not a designated affirmative action group. (Tr. 727-728). The Chancellor stated (Tr. 730) that she would not be convinced of the existence of any problem until the analysis of the 1990 United States Census was complete, even though the identification of the problem was made a decade and a half ago. This court must find that CUNY's current policy represents either an attempt to renege on the promises of the past or, by denying that such promises were ever made or intended to be kept, a reaffirmation of the original finding of discrimination against and under-representation of Italian-American that motivated the original Kibbee Memorandum and its reaffirmation with the Murphy letter.

CONCLUSION

This court finds that plaintiffs have shown irreparable harm and have presented sufficiently serious questions going to the merits to make them fair grounds for litigation and have shown a balance of hardships tipping decidedly in their favor. For these reasons, plaintiff's request for a

preliminary injunction barring defendants from discriminating against Italian Americans in employment and relocating the Institute pending trial is granted.

"Once a violation of Title VII has been established, the district court has broad, albeit not unlimited, power to fashion the relief it deems appropriate. The bounds of the court's discretion are set in part by Title VII's goals of preventing discrimination and achieving equal employment opportunity." *Bridgeport Guardians*, 933 F.2d at 1149.

Defendants contend (See, e.g. Defendants' Proposed Findings of Fact and Conclusions of Law at p. 22) that the commitment embodied in the Kibbee Memorandum and in the Murphy Letter has absolutely no binding legal force because it was not obtained as a result of a court-ordered settlement or as part of a finding of discrimination. Not only does this contention ignore the historical context in which these obligations were undertaken, and the fact that CUNY made these promises partly in reaction to findings by certain legislative groups of past discrimination, it also misstates the applicable law. Under Title VII, voluntary compliance and achievement of a remedial scheme is preferred. *Bushey v. N.Y. Civil Serv. Com'n*, 733 F.2d 220, 226-27 (2d Cir.1984). CUNY's promises are not to be avoided merely because CUNY undertook its commitment to increase Italian-American representation without forcing all parties to suffer through what would probably be lengthy and expensive litigation. An employer is entitled to seek to remedy the under-representation of a minority via the voluntary adoption of schemes designed to increase such representation. A "manifest imbalance" that reflects under-representation of Italian-Americans at CUNY would serve to justify such a program. *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32, 107 S.Ct. 1442, 1451-52, 94 L.Ed.2d 615, 630-31 (1987); *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). CUNY has been made aware with complaints and reports by government officials (See, e.g. the 1978 Calandra Report, Pl. Ex 16, the Report of the Massaro Commission,

Pl.Ex. 15, and the 1988 Letter from the New York State Italian-American Legislators Club, Pl.Ex. 17) of the problem of anti-Italian-American discrimination and underrepresentation, and has twice undertaken to rectify the imbalances identified (Pl.Ex. 4, 4A).

Defendant CUNY undertook an obligation to increase the numbers of Italian-Americans employed in its workforce, an obligation it has failed to discharge. Plaintiff is granted the relief sought, on the grounds that his presence at the Institute, as currently configured, has acted as a spur to CUNY. This court lacks the confidence that, pending trial, CUNY will address these problems without Dr. Scelsa at his present position. Dr. Scelsa must remain in place, pending trial. At trial, CUNY is invited to present for the court's satisfaction a plan to set the goals and fulfill the promises first undertaken in the 1976 Kibbee Memorandum but ignored since then.¹⁷ Until this court is convinced that CUNY has presented a viable plan to achieve these long-unfulfilled promises, the status quo as to the Calandra Institute is preserved pending resolution of the issues presented as to same at trial. The Chancellor and CUNY are enjoined pending trial from discriminating against Italian-Americans in employment.

Submit Order on 15 days notice.



17. As long as CUNY demonstrates its commitment to fulfill the promises laid out in the Kibbee Memorandum and the Murphy Letter, the manner in which it does so is, of course, a matter best left to CUNY's discretion. Whether CUNY intends as part of its plan to elevate the Calandra Institute at the Graduate Center or at another location in Manhattan, with Dr. Scelsa as its head, or whether it relocates it elsewhere and places Dr. Scelsa or another qualified person as Director of CUNY's Italian-American affirmative action program, or whether another

CITY OF PEEKSKILL, Plaintiff,

v.

REHABILITATION SUPPORT
SERVICES, INC. et al.,
Defendants.

No. 92 Civ. 7845 (GLG).

United States District Court,
S.D. New York.

Nov. 18, 1992.

City seeking to prevent acquisition of condominium units proposed as locations for transitional housing for homeless mentally disabled persons brought action against acquiring corporation, Department of Housing and Urban Development (HUD), HUD officials, Commissioner of New York's Department of Mental Hygiene, State of New York, and United States, asserting that proposed project ran afoul of several state and federal laws and regulations. On city's motion for preliminary injunction, the District Court, Goettel, J., held that city had failed to demonstrate likelihood of success on merits of its claims.

Motion denied.

1. Injunction ¶138.45

To garner issuance of preliminary injunction preventing acquisition of condominium units as transitional housing for homeless mentally disabled persons, city had to establish that irreparable harm would result if no injunction issued and likelihood of success on merits.

plan is ultimately adopted is up to CUNY. What must be done is to satisfy this court that CUNY is committed to achieving the results of greater Italian-American representation at all levels of the CUNY workforce. The route by which CUNY accomplishes this task is a matter best left to the University's self-governance. Of course, it might be easier to achieve these goals with the willing involvement of Dr. Scelsa and the Italian-American community in New York City—how CUNY does so is up to CUNY.

§ 2(3) of the National Labor
NLRA"), 29 U.S.C. § 152(3),
MRA.

General Contractors v.
d 271 (9th Cir. 1977), the
erein litigated the issue of
operators were employees
the NLRA. In that case,
it determined that owner-
dependent contractors and
expressly excluded as employ-
LRA. Thus, if the defini-
ee" under § 2(3) of the
ed by *Associated General*,
ible in the context of the
er-operators are not em-
302 of the LMRA. Based
contributions to plaintiffs'
defendant Employers on be-
erators would be illegal

cludes that the statutory
es this result. Section
RA, 29 U.S.C. § 142, pro-
posed in that Act, the term
ave the same meaning as
NLRA. Whatever the
ending these benefits to
rs may be, it is clear that
in light of *Associated*
quires this Court to hold
rs are not employees un-
IRA. Thus, owner-oper-
from being beneficiaries
nanced trust fund, and
eir behalf to plaintiffs'
ral.

by plaintiff, *Blassie v.*
l 58 (8th Cir. 1965), and
on, 581 F.2d 1266, 1276
ot preclude the applica-
nition of "employee" in
l the LMRA. As the
s indicated in *Allied*
Workers of America
ugh Plate Glass Co.,
S. 157, 169-70, 92 S.Ct.
d 341 (1971), the *Blas-*
atment of retired em-
ine "employee" under
differently from the

way in which the term is defined under
§ 2(3) of the NLRA. The apparent increase
in scope of the "employee" classification
resulted from the *Blassie* court's determina-
tion of employee status as of the time of
the employer's payments to the trust fund,
rather than as of the time of the trust's
payment of benefits to the employee. The
focus on the timing of the payments to the
employees did not effect any modification
of the definition of the term "employee."
The categories of workers subsumed by the
term "employee" remain unchanged.

The Court having concluded that owner-
operators are not employees within the
meaning of § 302 of the LMRA and that
contributions by Employers to plaintiffs'
trust fund on their behalf are illegal,

IT IS HEREBY ORDERED that defend-
ants' Motion for Judgment on the Pleadings
is granted and plaintiffs' Motion for Judg-
ment on the Pleadings is denied. Further,

IT IS HEREBY ORDERED, AD-
JUDGED AND DECREED that judgment
be entered in defendants' favor.



L. Lea NABKE, Plaintiff,

v.

U. S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, et
al., Defendants.

No. G 79-678 CA 1.

United States District Court,
W. D. Michigan, S. D.

March 11, 1981.

Applicant for home repair loan, whose
application was denied and to whom legal
aid program declined legal assistance in su-
ing for denial of housing funds, brought
action against United States Department of

Housing and Urban Development, city de-
partment of housing and community devel-
opment, legal aid program, and Legal Ser-
vices Corporation, alleging discrimination
and misuse of federal funds. On defend-
ants' motions to dismiss for failure to state
a claim, the District Court, Miles, Chief
Judge, held that: (1) there was no private
right of action under Legal Services Act
against Legal Services Corporation and le-
gal aid programs; (2) Housing and Com-
munity Development Act implied no private
remedy for plaintiff against United States
Department of Housing and Urban Devel-
opment and the city; and (3) plaintiff had
no implied damage remedy under Civil
Rights Act of 1964 against any of four
defendants.

Motions granted.

1. Federal Civil Procedure ⇐ 1773, 1835

On motion to dismiss for failure to
state a claim on which relief can be grant-
ed, a court is obligated to take the com-
plaint and all fair inferences as true, and
dismiss only if there is no set of facts which
plaintiff might prove in support of her
claims. Fed.Rules Civ.Proc. Rule 12(b)(6),
28 U.S.C.A.

2. Federal Civil Procedure ⇐ 1829

On motion to dismiss for failure to
state a claim upon which relief can be
granted, court is obligated to construe
pleadings of pro se plaintiffs liberally. Fed.
Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

3. Corporations ⇐ 377½

Plaintiff had no private right of action
under Legal Services Act for alleged dis-
crimination and misuse of federal funds by
legal aid program and Legal Services Cor-
poration, which denied her legal assistance,
notwithstanding that she was one of class
of possible beneficiaries for whose benefit
statute was enacted, where priority alloca-
tion of inadequate resources was part of
statutory scheme, section of proposed act
explicitly providing a private remedy was
deleted in committee in both houses prior to
enactment, and implication of private reme-
dy would undercut purpose of Act, which

was to deliver the maximum legal services to the poor on a priority basis with limited funds. Legal Services Corporation Act of 1974, § 1001, 42 U.S.C.A. § 2996.

4. United States ⇌ 53(9)

Housing and Community Development Act implied no private remedy for home repair loan applicant against United States Department of Housing and Urban Development and city housing department for alleged discrimination and misuse of funds under Act, notwithstanding that, as possible recipient of home repair loan, plaintiff was one of class for whose benefit statute was enacted, where legislative history was inconclusive as to legislative intent to authorize private remedy, and damage remedy would be inconsistent with purpose of program to rebuild and rehabilitate decaying urban areas in that it would divert program resources. Housing and Community Development Act of 1974, §§ 101 et seq., 109, 42 U.S.C.A. §§ 5301 et seq., 5309.

5. Civil Rights ⇌ 13.4(1)

Home repair loan applicant had no implied damage remedy under Civil Rights Act of 1964 for alleged discrimination and misuse of federal funds by United States Department of Housing and Urban Development, city housing department and legal services programs, notwithstanding that applicant was one of broad class which Congress sought to protect by prohibiting discrimination under any federally funded program, where major expansion of jurisdiction of federal courts was better left to explicit act of Congress, there was much in legislative history from which intent to deny private remedy could be inferred, private right of action was inconsistent with administrative scheme of act, federal discrimination claim was not one traditionally left to state law, and damage remedy would deter discrimination only indirectly. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

L. Lea Nabke, in pro. per.

Robert C. Greene, U. S. Atty., Grand Rapids, Mich., for H.U.D.

Thomas F. Koernke, Grand Rapids, Mich., for Legal Aid of Western Michigan.

Janice M. Fuller, Asst. City Atty., Grand Rapids, Mich., for City of Grand Rapids.

Mario Manuel Lewis, Legal Services, Washington, D. C. and Dennis Kolenda, Grand Rapids, Mich., for Legal Services.

OPINION ON MOTIONS TO DISMISS

MILES, Chief Judge.

The plaintiff applied for a home repair loan under a community development block grant program, but her application was denied in February, 1979, by defendant City of Grand Rapids Department of Housing and Community Development. The plaintiff's complaints to defendant United States Department of Housing and Urban Development brought no change in her situation. She brought this suit against these two defendants asking damages in the amount of \$150,000 charging discrimination and misuse of federal funds in violation of the Housing and Community Development Act of 1974, as amended by the Housing and Community Development Act of 1977, 42 U.S.C. § 5301 et seq., and the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Defendant also sought assistance from defendant Legal Aid of Western Michigan, Inc., which declined to assist her. Complaints to defendant Legal Services, Inc. brought no change in the situation, and defendant brought this suit against these two defendants for damages in the amount of \$150,000, again alleging discrimination and misuse of federal funds, in violation of the Economic Opportunity Act, 42 U.S.C. § 2701 et seq., the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the Legal Services Act, 42 U.S.C. § 2996 et seq., and the regulations promulgated thereunder in 45 C.F.R. § 1601 et seq.

Pursuant to Fed.R.Civ.P. 12(b)(6), all four defendants moved to dismiss for failure to state a claim on which relief can be granted. Their arguments are essentially that the statutes in question provide no private right of action to the plaintiff, and that she

has failed, in the alternative, to plead a claim if there are private rights of action. A hearing was held on these motions on February 17, 1981.

[1, 2] While the complaint is somewhat unclear as to the exact basis of the alleged discrimination, a court is obligated to take the complaint and all fair inferences as true, and dismiss only if there is no set of facts which the plaintiff might prove in support of her claims. The court is also obligated to construe the pleadings of a pro se plaintiff even more liberally. At the hearing, the plaintiff, a white female, was asked what the basis of the discrimination was, whether it was race, color, national origin, sex, age, or something else. Her response indicated that it was all of those, that she had been discriminated against in every possible way. Accordingly, the complaint must be taken, under the circumstances, to allege discrimination sufficient to violate the statutes in question, and this court must decide whether those statutes authorize or imply a private right of action. Only if they do not may the complaint be dismissed.

None of the statutes in question explicitly authorizes a private cause of action. Rather, the statutes set up programs of federal grants, in one case through the Department of Housing and Urban Development to local community development programs, in the other through the Legal Services Corporation to local legal aid organizations. Each statute contains detailed provisions for administrative proceedings against the local agency by the granting agency, the ultimate penalty being the revocation of funding.

Whether the plaintiff has an implied right of action under these same statutes must be determined under the four pronged test of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975):

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," ... that is, does the statute create a federal right in favor of the plaintiff?

Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy, or to deny one?

Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? ... And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78, 95 S.Ct. at 2088. The final prong of the test is no bar in this case. The remaining parts of the test are best discussed with regard to each statute individually.

The Economic Opportunity Act

This court is convinced that the plaintiff cited the Economic Opportunity Act, 42 U.S.C. §§ 2701 through 2995 under the mistaken impression that they were a part of the Legal Services Act, 42 U.S.C. § 2996. Nothing in the former Act would seem to apply to the plaintiff's claims against any of the defendants.

The Legal Services Act

The Legal Services Act, 42 U.S.C. § 2996, establishes the Legal Services Corporation, which in turn funds local legal aid programs, including Legal Aid of Western Michigan, Inc., out of annual appropriations by Congress. Foreseeing that demand for legal services by the poor would exceed the resources allocated, Congress provided in § 2996F of the Act for the establishment of guidelines and priorities in the use of these resources by local legal aid chapters. Pursuant to the authority granted in § 2996g(e), regulations were promulgated which appear in 45 C.F.R. § 1600 *et seq.* Section 1620 of the regulations establishes a system for the priority allocation of resources among competing claims. Section 1621 mandates the establishment by local legal aid chapters of an administrative client grievance procedure meeting minimum requirements. Section 1624 prohibits discrimination on the basis of handicap.

[3] It is obvious that both Congress and the Legal Services Corporation foresaw that not every applicant could receive assistance from legal aid. With regard to the first prong of the *Cort v. Ash* test, the plaintiff is one of a class of possible beneficiaries for whose benefit the statute was enacted, but it does not follow that there is a federal right to such assistance where the priority allocation of inadequate resources is so plainly a part of the statutory scheme.

Second, the legislative history of the Act shows congressional intent to deny such a remedy. A section of the proposed act explicitly providing a private remedy was deleted in committee in both houses, see S.Rep.No. 93-475, 93rd Cong., 1st Sess. (1973); H.Rep.No.93-247, 93rd Cong., 1st Sess. (1973), reprinted in [1974] U.S.Code Cong. & Ad.News 3872, 3894-6 (minority views of Rep. Landgrebe). Efforts to amend the bill on the floor of the House to reinsert the private remedy provision were defeated, 119 Cong.Rec. 20725-20729 (1973).

Third, the implication of a private remedy would undercut the purpose of the Act, which is to deliver maximum legal services to the poor on a priority basis with limited funds. The necessity of defending lawsuits and paying judgments would rechannel those funds and services away from this intended purpose.

The factors of the *Cort v. Ash* test compel the conclusion that there is no private right of action under 42 U.S.C. § 2996 against defendants Legal Services Corporation and Legal Aid of Western Michigan, Inc.

The Housing and Community Development Act

The Housing and Community Development Act, 42 U.S.C. § 5301, *et seq.*, authorizes the Department of Housing and Urban Development to fund by block grant local community development programs which meet the requirements of the Act. The Act contains no explicit authorization of a private remedy, but it does contain a specific antidiscrimination clause:

No person in the United States shall, on the ground of race, color, national origin,

or sex be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity funded in whole or in part with funds made available under this chapter.

42 U.S.C. § 5309(a). Subsection 'B' provides for enforcement of subsection 'A' by the Secretary of Housing and Urban Development, who may work through the state governor, refer the matter to the Attorney General for civil action, or take other action including the termination or reduction of funding.

The language of § 5309 is strikingly similar to the language of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court held the latter section to imply a private right of action to a woman denied admission to medical school on account of her sex. However, that holding depended largely upon the Court's finding that Congress intended to imply such a right by enacting language similar to that in the Civil Rights Act of 1964, which was then thought to imply such a right. Section 5309 was passed in 1974, prior to the decision in *Cort v. Ash*.

[4] First, given the language of the statute, the opinion in *Cannon* compels the conclusion that the plaintiff is one of the class for whose benefit the statute was enacted, as a possible recipient of a home repair loan. Second, nothing in the legislative history suggests any congressional intent to authorize or deny a private remedy, as the legislative history doesn't even mention the antidiscrimination clause. Absent is the discussion and debate of private remedies on which the court, in *Cannon*, based a finding of congressional intent. The section was not modified in 1977, after *Cort v. Ash*, but little can be devined from this fact. As the Court stated in *Cort*, "... it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling." 422 U.S. at 82, 95 S.Ct. at 2090. In the instant case, this prong of the analysis is inconclusive as to

legislative intent, despite the similarity of § 5309 to Title IX. Third a *damage* remedy would be inconsistent with the purpose of the program in that it would divert program resources from the purpose of the Act, which is to rebuild and rehabilitate decaying urban areas. Even the cost of defending a lawsuit might easily exceed the amount of a typical rehabilitation loan.

This case does not present "the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present." *Cannon*, 441 U.S. at 717, 99 S.Ct. at 1968. Therefore, the Housing and Community Development Act, 42 U.S.C. § 5301 *et seq.*, implies no private remedy for the plaintiff against defendants United States Department of Housing and Urban Development and City of Grand Rapids.

The Civil Rights Act of 1964

The Civil Rights Act of 1964 contains the following prohibition against discrimination in federally funded programs:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000D. The question in this case is whether this statute implies a private damage remedy in favor of the plaintiff. The section has been much discussed but rarely definitively construed by the courts, most recently in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). The Court based its holding in that case, that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 implied a private remedy, in part on a finding that Congress, in 1972, probably assumed that § 2000d implied such a remedy, and adopted similar language in § 1681. But the Court has never actually *held* that § 2000d provides a private remedy. Rather, the Court pointed out that Congress was aware of a number of decisions by lower federal courts implying private rights under

§ 2000d. In *Bossier Parrish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. denied* 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350, the Court of Appeals for the Fifth Circuit held that § 2000d provided a private remedy adequate to support a class action seeking a school desegregation order. By 1972, several federal district courts had relied on *Bossier* in holding that § 2000d implied rights of action for declaratory judgment against discrimination in Small Business Administration Loans, *Southern Christian Leadership Conference v. Connolly*, 331 F.Supp. 940 (E.D.Mich.1971); for injunction against the discriminatory location of public housing, in class actions, *Blackshear Residents Organization v. Housing Authority of Austin*, 347 F.Supp. 1138 (W.D.Tex.1972); *Gautreaux v. Chicago Housing Authority*, 265 F.Supp. 582 (N.D. Ill.1967); and for relief against discriminatory membership policies of a private club built with federal loans, *Hawthorne v. Kenbridge Recreation Association*, 341 F.Supp. 1382 (E.D.Va.1972). Class action declaratory and injunctive relief against discriminatory police department promotion practices was upheld in *Afro American Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974). Other courts have since found an implied remedy of injunctive relief and declaratory judgment under § 2000d, *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979). None of these cases, however, have implied a *damage* remedy under the Act.

The Supreme Court also left open the issue whether § 2000d implies a private remedy in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Justice Powell wrote, We find it unnecessary to resolve the question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this court has been hesitant to review questions not addressed below. . . . We therefore do not address this difficult issue. Similarly, we need not pass upon petitioner's claim that private plaintiffs

under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI.

Id. at 283-284, 98 S.Ct. 2744-45. Justices Brennan, Marshall, and Blackmun agreed. Justice Stevens, joined by the Chief Justice and Justices Stewart and Rehnquist, similarly wrote:

Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us.

Id. at 419, 98 S.Ct. at 2813-14. Only Justice White addressed the issue, and he concluded that Title VI provides no private remedy because, under two of the prongs of the *Cort v. Ash* test, such a remedy

... would not be "consistent with the purposes of the underlying legislative scheme" and would be contrary to the legislative intent.

Id. at 381, 98 S.Ct. at 2794. Against this background, this court is left free to determine whether Title VI, 42 U.S.C. § 2000d, implies a damage remedy for the plaintiff.

[5] First, the plaintiff, a potential beneficiary of two federally funded programs, is one of the broad class indeed which Congress sought to protect by prohibiting discrimination under any federally funded program. There is, however, a policy reason against inferring that a remedy follows from this federal right. Section 2000d is different from other more narrowly drawn statutes with similar language under which private rights of action have been implied. The breadth of the statute, encompassing the class of every potential beneficiary of every program funded, in whole or in part, with federal funds would work a massive expansion of the jurisdiction of the federal courts. Such a major expansion is better left to an explicit act of Congress, rather than second guessing the intent of congress by the courts.

Second, there is much in the legislative history of the Act from which the intent to deny a private remedy may be inferred, as Justice White pointed out in *Bakke* through the statements of three legislators:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964) (Rep. Gill).

"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.* at 6562 (Sen. Kuchel).

"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." *Id.*, at 7065 (Sen. Keating).

438 U.S. at 385-6 n. 4, 98 S.Ct. at 2797 n. 4. Such an intent to deny a private remedy is controlling, *Cort v. Ash*, 422 U.S. at 82, 95 S.Ct. at 2090.

Third, while a private right of action might deter prohibited discrimination, such a right is inconsistent with the scheme of the act. Detailed administrative procedures, carefully drawn, are provided to deal with discrimination. To permit private plaintiffs to circumvent such procedures by implication of a remedy is inconsistent with the structure and intent of the Act.

Fourth, a federal discrimination claim is not one traditionally left to state law.

This case, unlike *Cannon*, does not present the "... atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present," *Cannon*, 441 U.S. at 717, 99 S.Ct. at 1968. The controlling factor, intent to deny a remedy, weighs heavily against a private remedy.

Finally, a damage remedy presents the weakest case, under the circumstances, for

an implied remedy. The courts which have implied remedies under § 2000d have done so with regard to declaratory and injunctive relief, which directly put an end to the discrimination, but never with respect to damages, which deter discrimination only indirectly. For the courts to imply such a remedy that only indirectly furthers the purposes of so broad an act, where Congress did not provide such a remedy, is not appropriate.

Accordingly, the plaintiff has no implied damage remedy under the Civil Rights Act of 1964, 42 U.S.C. § 2000d, against any of the four defendants.

ORDER

The motions to dismiss under Fed.R. Civ.P. 12(b)(6) for failure to state a claim on which relief can be granted by defendants United States Department of Housing and Urban Development, City of Grand Rapids, Legal Services Inc., and Legal Aid of Western Michigan, Inc., are granted, and the plaintiff's complaint is dismissed.

IT IS SO ORDERED.



**John F. WHITE, Emily D. Kornfeld,
Thomas C. Amory, individually and on
behalf of all others similarly situated,
Plaintiffs,**

v.

**Carol D. SHULL, as Acting Keeper of the
National Register, and as an employee
of the Heritage Conservation and Recreation
Service of the Department of Interior
of the United States of America,
Defendant.**

No. 80 Civ. 1889 (JMC).

United States District Court,
S. D. New York.

March 27, 1981.

Residents of Village of Tuxedo Park,
New York, brought action for declaratory

and injunctive relief to remove the village from the National Register. The Keeper of the Register moved to dismiss and plaintiffs moved for summary judgment. The District Court, Cannella, J., held that plaintiffs failed to exhaust administrative remedies for removing a listed property.

Plaintiffs' motion denied; defendant's motion granted.

1. Health and Environment ⇨ 25.5(8)

Exhaustion of administrative remedies was required before district court could entertain action for declaratory and injunctive relief to remove Village of Tuxedo Park, New York, from the National Register. National Historic Preservation Act of 1966, § 101(a)(1), 16 U.S.C.A. § 470a(a)(1).

2. Administrative Law and Procedure ⇨ 229

Absent exhaustion, a court lacks subject-matter jurisdiction to review an agency determination.

3. Administrative Law and Procedure ⇨ 229

Essentially three purposes underly the exhaustion doctrine: first, exhaustion offers an administrative agency the opportunity to correct its own error, if there was one; second, administrative review process may resolve the controversy or narrow the dispute, thus avoiding necessity of judicial review or at least delimiting it; and third, if the controversy remains unsolved, administrative review will likely result in a more fully developed record for judicial review.

4. Administrative Law and Procedure ⇨ 229

Exhaustion doctrine is subject to certain exceptions, the most important of which is when exhaustion would be futile, as when the administrative remedies do not include the remedy sought by claimant or when the agency has already ruled on the very issue raised before the court, with a

Defendant suggests that documents are not covered by the court need not resolve that the Secretary of Education is to enforce FERPA's provisions. In enacting FERPA, Congress created a private cause of action. *Clark*, 891 F.2d 102, 104 (5th Cir. 1990); *Fay v. South School Dist.*, 802 F.2d 21, 33 (7th Cir. 1986). Therefore, plaintiff's fourth claim is dismissed.

Claim V

Plaintiff argues that plaintiff's retaliation claim is based on his public statements concerning his public statements of discrimination at Emory is not covered by Title VII, 42 U.S.C. § 1985. Plaintiff concedes the claim is therefore dismissed. Plaintiff is to be given leave to amend his complaint to convert the retaliation claim to a First Amendment claim. Plaintiff has not yet filed a response. Plaintiff may amend his complaint at any time. See Fed. R. Civ. P. 15. However, the court would not grant plaintiff leave to bring a First Amendment claim against a private university.

Claim VII

Plaintiff alleges that Emory violated Title VII by discriminating against him on the basis of race and by retaliating against him for complaining. Rothman notes that plaintiff is acting in compliance with Title VII rules, but he does not show that he ever acted in any government or in conjunction with any government agency. Because § 1983's requirements are not met, claim VII is dismissed.

Claim VIII

Plaintiff also alleges that Stockwell and others at Emory conspired to violate § 1985. As Emory is in this circuit, established in *Clark v. Dowling*, 459 F.2d 102, 104 (5th Cir. 1972), is that decisions

reached collectively by agents of a corporation cannot constitute conspiracies under § 1985. See also *Cromley v. Board of Education of Lockport Township High School Dist. 205*, 699 F.Supp. 1283 (N.D.Ill.1988). A university cannot conspire with itself, and there is no allegation in the complaint that officials of the Illinois Board of Law Examiners—or anyone else—joined Emory in any part of its allegedly discriminatory scheme. Claim VIII also must be dismissed.

Libel and Invasion of Privacy Claims (Claims IX, X, XI and XII)

[15] Rothman's state law libel and invasion of privacy claims are based on Emory's correspondence with the Illinois Board of Law Examiners. Because the Board is a quasi-judicial body, those communications were absolutely privileged under Illinois law. *Kalish v. Illinois Education Ass'n*, 157 Ill. App.3d 969, 110 Ill.Dec. 72, 76-77, 510 N.E.2d 1103, 1107-08 (1987); *app. den.* 116 Ill.2d 559, 113 Ill.Dec. 300, 515 N.E.2d 109 (1987). Claims IX, X, XI and XII are therefore dismissed as well.

Negligent Supervision Claim (Claim XIII)

[16] Claim XIII charges Emory with negligent failure to prevent Stockwell and Hunter from committing the acts that form the basis of the other state law claims. In essence, claim XIII asserts nothing more than the proposition that Emory's liability on the state law claims may be imputed from the actions of its employees. Because the other state law claims have been dismissed, claim XIII must be dismissed as well.

Motion to Transfer Venue

[17] Emory moves pursuant to 28 U.S.C. § 1404(a) to transfer this case to the United States District Court for the Northern District of Georgia in Atlanta, where Emory is located. The court recognizes that the Emory officials implicated in this case live and work in Georgia, but it also takes note of the fact that other witnesses who may be called, including Rothman, live in Illinois. Rothman argues that his medical condition would make transfer of the case to Georgia particularly burdensome. Because the complaint

has now been whittled down to cover only a few claims involving only a few people, the court does not believe that keeping the case here would be especially inconvenient for Emory. Since plaintiff's choice of forum generally is accorded deference, *Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co.*, 592 F.2d 364, 368 (7th Cir.1979), *cert. den.*, 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1979), Emory's motion to transfer venue is denied.

CONCLUSION

Defendant's motion to dismiss is granted in part and denied in part. Claims IV, V, VII, VIII, IX, X, XI, XII and XIII are dismissed in their entirety and claim I is dismissed in part. Plaintiff may proceed for now with all of claims II, III and VI. Defendant's motion to transfer venue is denied.



Henry ALLEN, et al., Plaintiffs,

v.

CITY OF CHICAGO, A Municipal Corporation, City Council of Chicago, Richard M. Daley, Individually and as Mayor of the City of Chicago, Glenn E. Carr, Individually and as Commissioner, Department of Personnel, Defendants.

No. 92 C 4122.

United States District Court,
N.D. Illinois, E.D.

July 2, 1993.

Laid-off city employees brought claims of racial and age discrimination against city and city officials. The District Court, Aspen, J., held that: (1) laid-off employees were not entitled to class certification; (2) city council was improper party defendant; and (3) laid-off city employees adequately alleged custom or policy of discrimination based on race

necessary to support § 1981 claim against city and city officials.

Ordered accordingly.

1. Federal Civil Procedure ⇨172, 174

In evaluating motion for class certification, allegations made in support of certification are taken as true and court does not examine merits of case.

2. Federal Civil Procedure ⇨172

Burden of showing that requirements for class certification have been met rests with plaintiffs. Fed.Rules Civ.Proc.Rules 23, 23(a, b), (b)(2, 3), 28 U.S.C.A.

3. Federal Civil Procedure ⇨163

While plaintiffs may not rely on conclusory allegation that joinder is impracticable or on speculation regarding size of class, complaint seeking certification of class need not specify exact number of persons included in class; numerosity analysis does not entail thresholds of magic numbers. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

4. Federal Civil Procedure ⇨184.10, 184.20

Numerosity requirement for certification class was satisfied in complaint by former city employees claiming age and race discrimination by city where exhibit indicated that in one year city laid off over 500 black employees and over 100 hispanics; those numbers alone made joinder impracticable. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

5. Federal Civil Procedure ⇨165

To show commonality required for class certification, there must be common nucleus of operative fact even if there are some factual variations among members' grievances. Fed.Rules Civ.Proc.Rule 23(a), (a)(2), 28 U.S.C.A.

6. Federal Civil Procedure ⇨184.10

Person of given racial group may not represent other members of group merely because they were all subjected to same broad type of discrimination by common employer; in Title VII action, class certification is permitted only if all other requirements

for class certification are satisfied. Fed.Rules Civ.Proc.Rule 23(a), (a)(2), 28 U.S.C.A.

7. Federal Civil Procedure ⇨184.10, 184.20

Fact that each of challenged employment decisions took place in context of workplace reorganization did not in itself provide unifying force sufficient to meet commonality requirement for claimants bringing age and race discrimination action against employer to be certified as class. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

8. Federal Civil Procedure ⇨184.10, 184.20

Absent alleged discriminatory policy or practice of general application in employer's treatment of black and hispanic employees and treatment of older employees, employees failed to satisfy commonality requirement for certification as class. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

9. Federal Civil Procedure ⇨164

While factual differences between claims of putative class do not alone preclude certification, representative's claim must arise from same event or practice or course of conduct that gives rise to claims of other class members and must be based on same legal theory; claims, even based on same legal theory, must all contain common core of allegation. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

10. Federal Civil Procedure ⇨184.10, 184.20

Claims of minority and older employees who were laid off as part of government restructuring were insufficiently alike to give rise to typical class claims required for certification in light of differences in each employee's work history and qualifications and variations and qualifications in work history of white persons allegedly accorded preferential treatment. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

11. Federal Civil Procedure ⇨164

To meet adequacy of representation requirement for class certification, court must be satisfied that named counsel is qualified to pursue putative class action and members of advance class may not have antagonistic or

conflicting interests. Fed.Rules Civ.Proc. Rule 23(a)(4), 28 U.S.C.A.

ganization would not fulfill plaintiff's burden necessary for proper joining.

12. Federal Civil Procedure ⇨1772

Motion to dismiss should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of claims which would entitle him to relief.

13. Federal Courts ⇨418

Whether city council may be sued in federal court for alleged Title VII violations was question governed by state law. Civil Rights Act of 1964, § 601 et seq., as amended, 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983; Fed.Rules Civ.Proc.Rule 17(b), 28 U.S.C.A.

14. Federal Courts ⇨270

Under Illinois law, city council had no natural existence and, absent specific statutory authorization, could not be sued in federal court for alleged employment discrimination. Civil Rights Act of 1964, § 601 et seq., as amended, 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983; Fed.Rules Civ.Proc. Rule 17(b), 28 U.S.C.A.

15. Civil Rights ⇨362.1, 367

To maintain claim under Title VII, each plaintiff must file charge with Equal Employment Opportunity Commission (EEOC) within time allotted by statute and must receive right to sue letter issued by EEOC. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ⇨364

Under Title VII, plaintiffs who have not timely filed charge can rely on timely charge of another plaintiff in class action or in multiple plaintiff joint action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

17. Civil Rights ⇨364

Nonfiling employees may not piggyback onto charges of racial discrimination filed with Equal Employment Opportunity Commission (EEOC) where amended complaint stated only their ages and department with which employees were previously connected; assertion that city engaged in citywide discrimination in process of workplace or reor-

18. Civil Rights ⇨364

Ordinarily, party not named as respondent in Equal Employment Opportunity Commission (EEOC) charge may not be sued in Title VII action, although naming respondents is not jurisdictional prerequisite; requirement is comparable to statute of limitations and is subject to equitable modification. Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C.A. § 2000e-5(f)(1).

19. Civil Rights ⇨364

Mayor and city commissioner could not be sued in Title VII action when they were not named as respondents in Equal Employment Opportunity Commission (EEOC) charge even if they were aware of discriminatory impact stemming from reorganization which resulted in layoff, absent evidence that mayor or commissioner possessed knowledge of each individual employee's charge or had any notice of charges against them. Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C.A. § 2000e-5(f)(1).

20. Civil Rights ⇨363

Plaintiff is required to file age discrimination charge with Equal Employment Opportunity Commission (EEOC) so that defendants are adequately apprised of nature of charges and are afforded opportunity to participate in voluntary conciliation proceedings. Age Discrimination in Employment Act of 1967, § 7(d), as amended, 29 U.S.C.A. § 626(d); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

21. Civil Rights ⇨364, 367

Because age discrimination charges were limited to particular employee's allegations of individual discrimination, named plaintiffs and unnamed individuals who did not file age discrimination charges with EEOC and did not receive "right to sue" notices could not "piggyback" onto age discrimination claims. Age Discrimination in Employment Act of 1967, § 7(d), as amended, 29 U.S.C.A. § 626(d); Fed.Rules Civ. Proc.Rule 23, 28 U.S.C.A.

22. Administrative Law and Procedure

⇒229

Civil Rights ⇒442.1, 447

Under Illinois Human Rights Act (IHRA), plaintiff may institute civil rights action only by filing charge with Illinois Department of Human Rights; party may seek judicial review in state court after obtaining final order from department. 775 ILCS 5/1-101 et seq., 8-111.

23. Civil Rights ⇒235(3)

Laid-off city employees adequately alleged custom or policy of discrimination on basis of race to support § 1981 claim against city and city officials where complaint named ten individuals allegedly discriminated against on basis of race, and listed 52 others who purportedly were subjected to actions based on race. 42 U.S.C.A. § 1981.

24. Civil Rights ⇒194

Claims by laid-off employees of custom or policy discrimination on basis of race did not have to be dismissed for failure to exhaust contractual remedies, despite claim that resolution of § 1981 suit would require interpretation of various collective bargaining agreements, where employees did not seek to enforce contractual rights but rather endeavored to vindicate alleged civil rights violation; exhaustion of remedies was not necessary under § 1981. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a); 42 U.S.C.A. §§ 1981, 1983.

25. Civil Rights ⇒206(2.1)

Municipal liability under § 1981 may not rest on doctrine of superior's liability or doctrine of respondeat superior. 42 U.S.C.A. §§ 1981, 1983.

26. Civil Rights ⇒206(4)

Custom and usage by municipal employees and agents may be attributed to municipality for purposes of claim under § 1981 if duration and frequency of practices are sufficiently widespread so as to give rise to inference of actual or constructive knowledge on part of municipality. 42 U.S.C.A. § 1981.

27. Civil Rights ⇒235(3)

Laid-off city employees failed to state claim pursuant to § 1981 against city officials

in their individual capacities absent allegations that officials were aware of individual incidents of alleged discriminatory conduct. 42 U.S.C.A. §§ 1981, 1985(3); U.S.C.A. Const.Amend. 1.

28. Civil Rights ⇒195

Section 1983 provides cause of action against municipalities and municipal employees, and availability of statutory remedy precludes direct claims under Constitution. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 1.

29. Conspiracy ⇒18

In order to state claim pursuant to § 1985(3), plaintiffs must allege conspiracy for purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of laws or of equal protections and immunities under the laws and must allege act in furtherance of conspiracy by which person is either injured in his person or property or deprived right or privilege of citizen of United States. 42 U.S.C.A. § 1985(3); U.S.C.A. Const. Art. 4, § 2, cl. 1; Amends. 1, 14.

30. Conspiracy ⇒7.5(1)

Various city officials identified by city employees as participants in "conspiracy" in age and racial discrimination against city employees were not separate "people" capable of conspiring with each other for the purposes of a claim under § 1985(3). 42 U.S.C.A. §§ 1985, 1985(3).

31. Civil Rights ⇒199.1

In order to bring private action under Title VI, plaintiff must be intended beneficiary of, applicant for, or participant in federally funded program. 42 U.S.C.A. § 1985(3); Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d.

Nathaniel R. Howse, Howse & Howse, R. Eugene Pincham, Philander Scott Neville, Jr., Chicago, IL, for plaintiffs.

Kelly Raymond Welsh, [COR] Susan R. Lichtenstein, Anita K. Modak-Truran, Barbara Susan Smith, Terence J. Moran, City of Chicago, Law Dept. Corp. Counsel, Chicago, IL, for defendants.

William Franklin Marutzky, Chicago, IL,
for Robert Loverde.

Philander Scott Neville, Jr., Chicago, IL,
for Willie Reynolds and Reginald Johnson.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Plaintiffs, present and former employees of the City of Chicago, bring this putative class action against the City of Chicago, the Chicago City Counsel, Richard M. Daley (individually and as Mayor of the City of Chicago), and Glenn E. Carr (individually and as Commissioner of the Department of Personnel), alleging: (1) race discrimination in violation of Title VII of the Civil Rights Acts of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*; (2) age discrimination in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.*, and the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*; (3) impairment of the right to enforce contracts as guaranteed under the Civil Rights Act of 1866, 42 U.S.C. § 1981; (4) political discrimination in violation of the First Amendment right to free speech and association; and (5) discriminatory distribution of federal funds in violation of 42 U.S.C. § 2000d. Presently before the court are (i) plaintiffs' motion for class certification regarding claims of race discrimination, and (ii) defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. For the reasons set forth below, the motion for class certification is denied and defendants' motion to dismiss is granted in part and denied in part.

I. Background

Beginning in May of 1989, the City of Chicago (the "City") initiated a program designed to reorganize its work force. Pursuant to this plan, the City eliminated the Department of Economic Development, the Department of Planning, the Department of Public Works, and the Building Board of Appeals. As of October, 1991, these departments had employed approximately 1,045 city workers. In January of 1992, the City creat-

ed the Department of Fleet Management (462 employees), the Department of General Services Bureau of Public Engineering (607 employees), the Department of Environment (65 employees), the Department of Planning and Development (88 employees), and the Department of Transportation (340 employees). Additionally, the City entered into contracts with private companies and persons to perform jobs previously fulfilled by city employees. In the process of this restructuring, a large number of employees were laid off, demoted and discharged from city employment. At the same time, the City transferred employees to similar positions in other departments, promoted city employees and hired new workers. In all, the City's reorganization affected approximately 2,834 city employees.

As a group, plaintiffs claim that the City's reorganization had a disproportionate impact on black and hispanic employees, those over forty years of age, and those who were political opponents of Mayor Daley. In support of these allegations, plaintiffs assert: (1) 62% of those employees affected by the reorganization were either black or hispanic; (2) 52% of the city workers hired through the restructure were white, while whites comprise only 37.9% of the City's population; (3) a majority of the black and hispanic employees adversely affected by the reorganization were over 40 years of age, while white employees under the age of 40 were hired; and (4) a number of the employees affected by the restructure were supporters of the late Harold Washington and Eugene Sawyer, political opponents of Mayor Daley.

Of the 62 plaintiffs named in the first-amended complaint, only ten have filed charges of race discrimination with the Equal Employment Opportunity Commission ("EEOC") and have received notices of right to sue in the United States District Court. These ten individuals seek to act as representatives of the putative class regarding race discrimination, and their individual circumstances can be summarized as follows. Henry Allen, a 59 year old black man, was employed with the Department of Aviation from 1976 to June 30, 1991, at which time he was laid off because of a reduction of staff.

Allen claims that he was discriminated against in that it took him 5½ years to receive his first promotion and 4½ years to receive his second, while certain white employees were promoted at a more rapid pace. After Allen was laid off, a number of white employees were promoted within the department. Allen supported the campaigns of both Mayor Washington and Mayor Sawyer.

Julius Body, a 39 year old black man, began his employment with the Department of Aviation on November 2, 1987, as a Security Guard. On January 1, 1992, the City eliminated the position of Security Guard and created the position of Security Officer. Body applied for the position of Security Officer, subjecting himself to a written test, a urine test, and a psychological test. Body was not selected for the position and, on March 6, 1992, along with 39 other Security Guards (38 of which were black), he was laid off. While the City laid off 39 black Security Guards from the Department of Aviation, the City hired, promoted or retained certain white Security Officers. Body supported the campaigns of both Mayor Washington and Mayor Sawyer.

Jane Cole, a 59 year old black woman, began her employment with the Department of Housing on July 11, 1979. Over the years she has held the positions of Planning Intern, Senior Research Assistant, Loan Processing Officer Assistant, Loan Processing Officer and, most recently, Relocation Representative. Cole was laid off from her position as Relocation Representative on December 31, 1991. Cole alleges that race played a role in her termination as certain white employees with less seniority were not laid off. Specifically, she was not afforded an opportunity to move back to her previous position as a Loan Processing Officer, which was occupied by a white person with less seniority at the time Cole was laid off.

Eddie Ellen, a 43 year old black man, was laid off on December 31, 1991, after four years as the Coordinator of Energy Conservation in the Department of General Services. Many of Ellen's white co-employees were automatically transferred from the Department of General Services to the newly formed Department of Environment, which

assumed the responsibility for energy management. Despite a gratuitous interview during which Ellen was led to believe that he was going to receive a position with the new department, Ellen was not reemployed. Ellen supported the campaigns of both Mayor Washington and Mayor Sawyer.

Angel Jimenez, a 32 year old hispanic man, began his employment with the Department of Aviation in 1987, as a Security Guard. As previously indicated, on January 1, 1992, the City eliminated the position of Security Guard and created the position of Security Officer. Jimenez applied for the position of Security Officer in August, 1991, and February, 1992. Nonetheless, Jimenez was not selected for the position and, on March 6, 1992, he was laid off. While the City laid off 40 Security Guards (consisting of Jimenez and 39 black men) from the Department of Aviation, the City hired, promoted or retained certain white Security Officers.

John McMullin, a 55 year old black man, began his employment in the Department of Housing as a Relocation Representative in 1968, serving in that capacity for 24 years. He was laid off on November 26, 1991. McMullin alleges that race played a role in his termination as other white employees within the Department of Housing were not laid off despite possessing considerably less experience than McMullin. Although two white employees have resigned from the department since McMullin's lay off, leaving vacant positions, McMullin has not been called back to work. McMullin actively supported the campaign of Mayor Washington.

Janet Moore, a 50 year old black woman, began her employment in the Mayor's Office of Employment Security on September 28, 1981. Since the commencement of her employment she has served as an Eligibility Specialist, an Eligibility Review Specialist, and an Employability Review Specialist I. Moore had applied for the position of Employability Review Specialist II, but the position was given to a white female. Moore was laid off on December 31, 1991. On July 1, 1992, Moore was called back to work as a Clerk II in the Police Department. In this capacity she is currently receiving approximately \$10,000 less per year than she had

received while employed as an Employability Review Specialist I. Additionally, Moore claims she is currently being discriminated against on the basis of race as she and other black city employees were not permitted to bid on positions at the Police Department in the new IUU Unit, a unit which is currently comprised of all white employees. According to Moore, these white employees in the IUU Unit perform the same tasks as she and other black employees, but receive a higher wage. Moore supported the campaigns of both Mayor Washington and Mayor Sawyer.

Fredrick O'Neal, a 43 year old black man, was employed as a Principal Systems Engineer in June of 1988, in the Bureau of Telecommunications, Department of General Services. In August of 1991, O'Neal was transferred to the Department of Fleet Management. On January 1, 1991, O'Neal was demoted to the position of Senior Systems Engineer, resulting in an annual salary decrease of \$8,400. O'Neal claims that his demotion was related to race as other white employees transferred to Fleet Management were not demoted in job title or salary. O'Neal had applied for the position of Manager of Fleet Management, but was neither interviewed nor considered for the job. The position was eventually filled by a retired white police officer, who did not have an MBA degree as did O'Neal. O'Neal claims that he is treated differently than white professional city employees in that: (1) despite his MBA degree, he receives less pay than many white employees; (2) his telephone does not have access to long distance lines, while his former white subordinates have telephones with access to long distance lines; (3) he does not have an assigned parking space, while his former white subordinates have assigned parking spaces; and (4) he has been forced to move his work area to accommodate other employees, while his former white subordinates have not been required to move their offices or work space. O'Neal further states that Fleet Management has hired or promoted several white employees and that eighteen new service writer positions have been created and filled by relatives and friends of fleet employees. Finally, and particularly trou-

bling, O'Neal alleges that the Department of Fleet Management intentionally engages in discrimination as (i) its Commissioner, William T. Corbett, displays in his office a sign reading "PARKING FOR IRISH ONLY, ALL OTHER WILL BE TOWED AWAY", and (ii) swastikas are displayed throughout the department's office building. O'Neal supported the campaigns of both Mayor Washington and Mayor Sawyer.

Doris Thompson, a 54 year old black woman, commenced her employment in the Mayor's Office of Employment and Training in 1981, holding the positions of Employability Specialist I and Employee Review Specialist. Thompson was laid off on December 31, 1991, rehired, and then laid off a second time on September 16, 1992. She attributes this action to her race in that she and other black employees within her department were treated differently than white employees in other departments comprised of a majority of white persons. Thompson supported the candidacy of Mayor Washington.

Crystal White, a 41 year old black woman, commenced her employment with the City in August, 1976. Since then, she has occupied the following positions: student intern and cashier in the Department of Revenue; staff assistant in the Department of Human Services; and Senior Terminal Operator, Accounting Technician I and Accounting Technician II in the Department of Finance. White participated in the campaigns of both Mayor Washington and Mayor Sawyer, and worked in Mayor Sawyer's Office of Contract Compliance in 1989. In 1989, upon the election of Mayor Daley, White was laid off from her position in the Mayor's Office of Contract Compliance for a period of six months and was not permitted to return to her position as an Accounting Technician II in the Department of Finance. On December 31, 1991, White was laid off from city employment, while white employees with less seniority were not affected by the workplace reorganization.

II. Class Certification¹

Henry Allen, Julius Body, Jane Cole, Ed-die Ellen, Angel Jimenez, John McMullin,

pressly limited to the claims of race discrimina-

1. Plaintiffs' motion for class certification is ex-

Janet Moore, Fredrick O'Neal, Doris Thompson and Crystal White seek to represent a class of persons consisting of "all Black and Hispanic City of Chicago employees who were laid off, discharged, demoted, or were adversely affected (lost wages or lost benefits) as a result of the City's reorganization of its work force that began May 1, 1989 and continues." Plaintiffs' Motion to Certify Class at 2.

Rule 23 of the Federal Rules of Civil Procedure establishes a two-step procedure to determine if a class action is appropriate. The court must first inquire into whether the class meets the four preliminary requirements of Rule 23(a):

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Additionally, a class action that satisfies all four of the Rule 23(a) requirements must also qualify under one of the three subsections of Rule 23(b). In the instant case, plaintiffs seek certification of the class under Rule 23(b)(2), which provides that a class action is proper if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In the alternative, plaintiffs request certification under Rule 23(b)(3), which provides that a class action is proper if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[1, 2] In evaluating the motion for class certification, the allegations made in support of certification are taken as true, and we do

tion in Count I of their first-amended complaint. As such, it is apparent that plaintiffs will not seek class treatment respecting Counts III, IV or V. Count II purports to be a representative action

not examine the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974); *Spencer v. Central States, Southeast and Southwest Areas Pension Fund*, 778 F.Supp. 985, 989 (N.D.Ill.1991); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D.Ill. 1986). The burden of showing that the requirements for class certification have been met rests with the plaintiffs. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); *Trotter v. Klinecar*, 748 F.2d 1177, 1184 (7th Cir.1984); *Hardin v. Harshbarger*, 814 F.Supp. 703, 706 (N.D.Ill.1993); *Riordan*, 113 F.R.D. at 62.

A. Numerosity

[3] Rule 23(a)(1) requires that the proposed class be so numerous that joinder of all members is impracticable. While plaintiffs may not rely on conclusory allegations that joinder is impracticable or on speculation regarding the size of the class, *Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir.1976); *Kohn v. Mucia*, 776 F.Supp. 348, 352-53 (N.D.Ill.1991), the complaint need not specify the exact number of persons included in the class. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir.1989); *Retired Chicago Police Ass'n v. City of Chicago*, 141 F.R.D. 477, 484-85 (N.D.Ill.1992); *Patrykus v. Gomilla*, 121 F.R.D. 357, 360 (N.D.Ill.1988). Numerosity analysis does not entail thresholds of "magic numbers"; rather, the requisite finding may be supported by common sense assumptions. *Patrykus*, 121 F.R.D. at 360; *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 785 (N.D.Ill.1984).

[4] In order to approximate the size of the putative class, plaintiffs rely on a "city disc" provided by the City that sets forth all "off actions" between October, 1991 and May, 1992. Based on this information, plaintiffs claim that at least 1,800 employees qualify as class members. Although it appears that the "city disc" lists personnel actions beyond the scope of the putative class, including deaths,

brought under the ADEA and, hence, is not subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure.

layoffs where employees simply bumped into another position, and seasonal changes, we nevertheless are satisfied the class is so numerous that joinder would be impracticable. To be sure, Exhibit 2 of plaintiff's reply brief indicates that the City in 1991 laid off a total of 527 blacks and 107 hispanics. These numbers alone clearly make joinder impracticable and, as such, the numerosity requirement of Rule 23(a) is satisfied.

B. Commonality

[5] Rule 23(a)(2) requires plaintiffs to demonstrate that there is at least one question of law or fact common to the class. *In re VMS Sec. Litig.*, 136 F.R.D. 466, 473 (N.D.Ill.1991); *Patrykus*, 121 F.R.D. at 361. "Not all factual or legal questions raised in a lawsuit need be common so long as a single issue is common to all class members." *Riordan*, 113 F.R.D. at 63 (citing *Midwest Community Council, Inc. v. Chicago Park District*, 87 F.R.D. 457 (N.D.Ill.1980)). Thus, class certification cannot be defeated merely because there are some factual variations among the members' grievances. *Id.* (citing *Patterson v. General Motors Corp.*, 631 F.2d 476 (7th Cir.1980), cert. denied, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981)). Where a common question of law refers to standardized conduct by defendants toward members of the putative class, a common nucleus of operative fact is typically presented, and the commonality requirement is usually met. *Patrykus*, 121 F.R.D. at 361; *Franklin v. City of Chicago*, 102 F.R.D. 944, 949 (N.D.Ill.1984). In such cases, differences in individual cases regarding treatment or damages does not defeat commonality. *Patrykus*, 121 F.R.D. at 361; *Franklin*, 102 F.R.D. at 950.

[6] Allegations of race discrimination significantly complicate traditional class certification analysis, as "racial discrimination is by definition class discrimination." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982). Nonetheless, it is settled law that a person of a given racial group may not represent other members of the group merely because they were all subjected to the same broad type of discrimination

by a common employer. In *Falcon*, the Court confronted the following issue: "whether respondent Falcon, who complained that petitioner did not promote him because he is a Mexican-American, was properly permitted to maintain a class action on behalf of Mexican-American applicants for employment whom petitioner did not hire." *Id.* at 149, 102 S.Ct. at 2366. In rejecting the Fifth Circuit's across-the-board rule whereby persons complaining of one employment practice may represent others allegedly aggrieved by a different practice as long as the differing practices were motivated by the same policy, i.e., race discrimination, the Court stated:

allegation[s] that [racial] discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact.

Id. at 157, 102 S.Ct. at 2370. Rather, "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161, 102 S.Ct. at 2372. In holding that Falcon could not maintain the proposed class action, the Court distinguished the circumstance where an aggrieved private plaintiff happens to be of the same national origin as other persons allegedly discriminated against by a common employer, from cases where the plaintiff challenges a standardized employment practice:

If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an em-

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ployer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination.

Id. at 159 n. 15, 102 S.Ct. at 2371 n. 15 (emphasis in original).

Likewise, the Seventh Circuit in *Patterson v. General Motors Corp.*, 631 F.2d 476, 480 (7th Cir.1980), cert. denied, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981), rejected the contention that "a class action is appropriate 'in all instances [in which] the discrimination in employment was racial, even though the discrimination may have been manifested in a variety of practices affecting different class members in different ways at different times.'" *Patterson* alleged that its employer, General Motors, had discriminated against him by replacing him with a white worker of lesser seniority and experience, by failing to promote him, by maintaining essentially an all-white department, and by harassing him in retaliation for the filing of various complaints with state and federal agencies. *Id.* at 478-79. Against this backdrop of conduct directed toward *Patterson* as an individual, *Patterson* sought to represent a class of minority persons employed, or might be employed, at designated General Motors plants. *Id.* In finding that *Patterson* had failed to meet the commonality requirement of Rule 23(a)(2), the Seventh Circuit stated:

The issue of whether a particular job assignment or promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy, including relative seniority, qualifications, availability for work and desire to perform the job. Each disciplinary action would present a different set of facts for each employee. "In other words, the plaintiff's claims do not relate to general policies or practices which are allegedly discriminatory, but rather to individualized claims of discrimination which

could not possibly present common questions of law or fact sufficient to justify class action treatment."

Id. at 481 (citation omitted).

[7, 8] As framed by plaintiffs in the instant case, an overriding legal issue common to all class members is raised by the first-amended complaint: "did the city layoff and hire City workers on the basis of race [in the reorganization of the City's workforce]?" Reply Memorandum in Support of Class Certification at 7. This broad formulation represents an attempt to characterize the City's conduct as standardized, thus presenting a common nucleus of operative fact. However, contrary to plaintiffs' assertion, the mere fact that each of the challenged employment decisions took place in the context of a workplace reorganization does not in itself provide the unifying force sufficient to meet the commonality requirement. Rather, an examination of the circumstances set forth by the ten advanced class representatives reveals that their claims do not relate to general policies or practices which are allegedly discriminatory. As was the case in *Falcon* and *Patterson*, the facts as detailed in the amended complaint portray individualized claims of discrimination which do not present common questions of fact or law sufficient to justify class action treatment. Indeed, resolution of the merits of the instant dispute will require independent consideration of each plaintiff's qualifications for his or her position, their previous work performance and duties, as well as the qualifications and work history of the white employees allegedly granted preferential treatment. Moreover, each of these considerations must be viewed in light of the employment conditions within each city department, which individually determined which employees would be affected by the reorganization. See Amended Complaint ¶ 36, at 24-25 (detailing individual acts of various department heads). In the absence of an alleged discriminatory policy or practice of general application, such as a biased testing procedure, plaintiffs have not satisfied the commonality requirement of Rule 23(a)(2).

C. Typicality

[9] Likewise, plaintiffs have failed to establish that the claims or defenses of the representative parties are typical of the claims or defenses of the class. See Fed. R.Civ.P. 23(a)(3). The typicality requirement of Rule 23(a)(3) directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983); see also *Patrykus*, 121 F.R.D. at 361-62. While factual differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [be] based on the same legal theory." *De La Fuente*, 713 F.2d at 232; see also *Riordan*, 113 F.R.D. at 63. In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation." *Riordan*, 113 F.R.D. at 63 (citing *E. v. Lane*, 530 F.Supp. 930, 943 (N.D.Ill. 1981)); see also *Retired Chicago Police Ass'n*, 141 F.R.D. at 485 ("To meet the typicality requirement, the named representatives must establish the bulk of the elements of each class member's claims when they prove their own's").

[10] None of the named plaintiffs' claims share a common core of allegation with any of the other named plaintiffs, let alone the class at large. As discussed in the context of the commonality requirement, plaintiffs have not set forth facts alleging that they have suffered as a result of a single employment policy or practice of general application. To be sure, each plaintiff will prevail only upon an individualized showing of racial discrimination. For instance, to the extent that Henry Allen can establish that, as a result of his race, he was not promoted at a satisfactory rate and was eventually laid off, such a showing would not entitle any other plaintiff to the relief requested. The lack of repercussion from claim to claim derives from the diverse nature of the employment actions in controversy (ranging from transfers to lower paying jobs or less desirable positions, job openings for which a plaintiff was quali-

fied but not selected, job openings for which a plaintiff was not informed, and job loss), the differences in each plaintiff's work history and qualifications, and variations in the qualifications and work history of the white persons allegedly accorded preferential treatment. As each plaintiff's claims are personal and do not arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members," we cannot conclude that they are typical of the claims of the class.

D. Adequacy of Representation

[11] Rule 23(a)(4) requires that the named plaintiffs adequately and fairly represent the interests of the class as a whole. The determination of whether the representative parties will fairly and adequately protect the interests of the class entails a two-fold inquiry. First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir.1977); *Patrykus*, 121 F.R.D. at 362.

In the instant case, while we have no reason to believe that plaintiffs' counsel will not adequately pursue this matter, the potential of conflicting interests between class members appears too great to allow certification. As defendants poignantly observe, the expansive class definition makes it likely that members of the putative class may have competed with one or more of the representative parties for a single position or promotion. Although the class members and the named plaintiffs allegedly were denied the position or promotion on the basis of race, conflict arises in that multiple class members would request reinstatement to the same position. See *Patterson*, 631 F.2d at 481; *Johnson v. Bond*, 94 F.R.D. 125, 131 (N.D.Ill.1982). More significantly, the personalized nature of plaintiffs' grievances raises a serious question as to whether the representative parties could fairly and adequately protect the interests of the class. As the court in *Bond*

observed, "[s]eparate claims of denial of a promotion can present substantially different facts and plaintiffs' energies may end up being directed toward presenting and defending their individual claims at the expense of the class." *Born* 94 F.R.D. at 131. Consequently, we cannot conclude that the named plaintiffs will adequately and fairly represent the interests of the class at large as required by Rule 23(a)(4).

Although curiously neglected by all parties to this action, we observe that the instant plaintiffs are not the first group of former or current city employees seeking to certify a class of minority employees who were allegedly discriminated on the basis of race during the City's reorganization. In *Williams v. City of Chicago*, 1992 U.S. Dist. LEXIS 7650, at *3 (N.D.Ill. May 29, 1992), plaintiffs sought to certify the following class:

—Present and former African-American employees of the City of Chicago, Department of Housing, who were subject to racial discrimination in appointment, transfer, promotion, demotion or termination with respect to their employment;

—Present and former employees of the City of Chicago, Department of Housing, who were subjected to racially discriminatory action or retaliation for opposing racial discrimination;

—All career service employees of the City of Chicago, Department of Housing, who were subject to arbitrary assignment or transfer with respect to their job functions or titles, without notice or hearing in violation of law and the ordinances of the City of Chicago;

—All career service employees of the City of Chicago, Department of Housing, who were subjected to reduction of pay or grade by virtue of the application of invalid Personnel Rule XXVI;

—All career service employees of the City of Chicago, Department of Housing, who were adversely impacted by politically motivated hiring, promotion, transfer or termination in violation of the Shakman Decree to which the City is subject.

Although the class advanced in *Williams* is considerably narrower than the instant putative class, in a Report and Recommendation

dated May 29, 1992, Magistrate Judge Elaine Bucklo recommended that plaintiffs' motion for class certification be denied. Significantly, citing *Falcon*, Magistrate Judge Bucklo concluded that, as the complaint stated only that each person had been subjected to "arbitrary, discriminatory behavior," plaintiffs had not met the commonality and typicality requirements of Rule 23(a). Additionally, the Magistrate Judge expressed concern that the diversity of claims may create conflicting interests between class members, rendering the named plaintiffs unable to fairly and adequately represent the class as a whole. United States District Judge Wayne Anderson adopted the Report and Recommendation on March 8, 1993. As detailed above, we find Magistrate Judge Bucklo's analysis in *Williams* compelling and conclude that such reasoning mandates denial of class certification in the present case.

In sum, having failed to satisfy the requirements of Rule 23(a), we deny plaintiffs' motion for class certification respecting claims of race discrimination embodied in Count I of the amended complaint. Our resolution of the motion under Rule 23(a) obviates the need to consider additional arguments pursuant to Rules 23(b)(2) and (3). See *Spencer*, 778 F.Supp. at 991.

III. Motion to Dismiss

In support of the instant motion to dismiss, defendants maintain that: (1) the Chicago City Council is an improper party-defendant; (2) the allegations of race discrimination in Count I are beyond the scope of those asserted before the EEOC and, thus, not actionable under Title VII; (3) the allegations of age discrimination in Count II are beyond the scope of those asserted before the EEOC and, thus, not actionable under the ADEA; (4) plaintiffs' claims under the Illinois Human Rights Act are precluded due to their failure to exhaust their administrative remedies under that Act; (5) Count III fails to state a claim under 42 U.S.C. § 1981; (6) Count IV fails to state a claim under 42 U.S.C. § 1983 for deprivations of the constitutional right to free speech and free association; (7) plaintiffs lack standing to bring a claim under Title VI, 42 U.S.C. § 2000d, which governs the use of federal funds; and (8) plaintiffs

seek improper relief. We address each contention seriatim.

A. Standard of Review

[12] A motion to dismiss should not be granted unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also *Beam v. IPCO Corp.*, 838 F.2d 242, 244 (7th Cir.1988); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir.1985), cert. denied, 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986). We take the "well-pleaded allegations of the complaint as true and view them, as well as reasonable inferences therefrom, in the light most favorable to the plaintiff." *Balabanos v. North Am. Inv. Group, Ltd.*, 708 F.Supp. 1488, 1491 n. 1 (N.D.Ill.1988) (citing *Ellsworth*).

B. The Chicago City Council

[13,14] Whether the Chicago City Council is amenable to suit in federal court is a question governed by state law. Fed. R.Civ.P. 17(b); *Magnuson v. Cassarella*, 812 F.Supp. 824, 827 (N.D.Ill.1992). To be sued in Illinois, a defendant must have a legal existence, either natural or artificial. *Jackson v. Village of Rosemont*, 180 Ill.App.3d 932, 937-38, 129 Ill.Dec. 670, 673, 536 N.E.2d 720, 723 (1st Dist.1988). Of course, the Chicago City Council lacks a natural existence and, hence, may only be sued under the guise of specific statutory authorization. *Bonilla v. City Council of the City of Chicago*, 809 F.Supp. 590, 600 (N.D.Ill.1992) (Chicago City Council not a legal entity capable of being sued within the context of a redistricting challenge). As the court in *Bonilla* observed, the Chicago City Council is only amenable to suit under the express provisions of the Illinois Freedom of Information Act and the Illinois Open Meetings Act. *Id.* at 601 n. 9. "These express exceptions, which are of relatively narrow scope and impact, merely confirm that without such enactments, direct

suit is unauthorized and improper." *Id.* A review of Illinois law indicates that no case or statutory authority exists to support a direct action against the Chicago City Council in the present context and, as such, the motion to dismiss the Chicago City Council as a defendant is granted.

C. Race Discrimination (Count I)

As alleged in the amended complaint, only ten plaintiffs have filed charges of racial discrimination with the EEOC and have received right to sue notices. As such, defendants assert that the remaining plaintiffs who have not filed charges with the EEOC and received a right to sue notices may not pursue claims under Title VII. Additionally, defendants maintain that, since none of the ten plaintiffs who filed charges with the EEOC named either Mayor Daley or Commissioner Carr as respondents, these defendants must be dismissed from Count I of the amended complaint.²

1. Non-Filing Plaintiffs

[15] In order to successfully maintain a claim under Title VII, each plaintiff must (1) file a charge with the EEOC within the time allotted by statute, and (2) receive a right to sue letter issued by the EEOC. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110 (7th Cir.1992); *Schnellbaeher v. Baskin Clothing Co.*, 887 F.2d 124, 129 (7th Cir.1989). These administrative filing requirements serve a twofold purpose: (1) to notify the charged party of the alleged violation; and (2) to afford that party an opportunity to participate in conciliation and to comply voluntarily with Title VII. See *Schnellbaeher*, 887 F.2d at 126; *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 905 (7th Cir.1981), cert. denied, 455 U.S. 1017, 102 S.Ct. 1710, 72 L.Ed.2d 134 (1982).

2. Defendants also contend that the ten named plaintiffs who have exhausted their administrative remedies are nonetheless precluded from pursuing claims of class-wide discrimination as each of their claims filed with the EEOC are narrowly tailored to each of the plaintiff's indi-

vidual circumstances. In light of our ruling that class treatment is inappropriate under Rule 23 of the Federal Rules of Civil Procedure, however, the issue of whether the EEOC investigation reasonably afforded defendants notice of the potential of a class action is moot.

[16] Plaintiffs contend that the court should waive the above filing requirements for those 52 named plaintiffs who neither filed charges with the EEOC nor received a notice of right to sue. Indeed, it is well settled that, under Title VII, "plaintiffs who have not timely filed a charge can rely on the timely charge of another plaintiff in a class action or in a multiple plaintiff joint action." See *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1017-18 (7th Cir.1988) (emphasis in original) (collecting cases). This rule, however, presupposes that the claims of the non-filing plaintiffs arise out of a sufficiently similar discriminatory treatment as those claims brought before the EEOC, thus enabling the employer to receive adequate notice and an opportunity to participate in conciliation. See *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir.1986); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1011 (11th Cir.1982); *Crawford v. United States Steel Corp.*, 660 F.2d 663, 665 (5th Cir.1981).

[17] In the instant case, assuming that plaintiffs are properly joined in this multiple-plaintiff, non-class action, we hold that the 52 non-filing plaintiffs may not "piggyback" onto the charges of racial discrimination filed with the EEOC. As the parties requesting waiver of the above filing requirements, plaintiffs bear the burden of establishing that the claims of the non-filing plaintiffs arise out of a sufficiently similar discriminatory treatment. Respecting these 52 individuals, the amended complaint states only their age and the department with which they are, or were previously, employed. Significantly, it does not detail the discriminatory conduct to which each individual allegedly was subjected. Rather, to fulfill their burden, plaintiffs rely upon the assertion that the City engaged in class-wide discrimination in the process of its workplace reorganization. These non-filing plaintiffs would have the court believe that they were treated similarly to those plaintiffs who exhausted their administrative remedies merely because they allegedly were subjected to racial discrimination during the period of reorganization. For similar reasons to those specified above within the context of class certification, we reject this contention. Given the personalized nature of

each plaintiff's claim, we do not believe that the EEOC conciliation process would be so "wholly fruitless" as to warrant waiver of the administrative filing requirements. Cf. *Snell*, 782 F.2d at 1101 (concluding that additional filings before the EEOC would be "wholly fruitless" in that all of the claims arose from virtually identical circumstances); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir.1968) ("It would be wasteful, if not in vain, for numerous employees, all with same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful."). Consequently, we dismiss all Title VII claims of racial discrimination brought by all plaintiffs who have not filed charges with the EEOC and received notices of right to sue.

2. Mayor Daley and Commissioner Carr

[18, 19] Ordinarily, a party not named as a respondent in an EEOC charge may not be sued in a Title VII action. 42 U.S.C. § 2000e-5(f)(1); *Schnellbaeche*, 887 F.2d at 126; *Eggleston*, 657 F.2d at 905; *Le Beau v. Libby-Owens-Ford Co.*, 484 F.2d 798, 799 (7th Cir.1973); *Pommier v. James L. Edelstein Enterprises*, 816 F.Supp. 476, 480 (N.D.Ill.1993). As is the case with the above filing requirements, naming the party as a respondent in an EEOC charge prior to bringing suit under Title VII serves a two-fold purpose: (1) to notify the charged party of the alleged violation; and (2) to afford that party an opportunity to participate in conciliation and to comply voluntarily with Title VII. See *Schnellbaeche*, 887 F.2d at 126; *Eggleston*, 657 F.2d at 905; *Stephenson v. CNA Fin. Corp.*, 775 F.Supp. 238, 239 (N.D.Ill.1991). Nonetheless, it is not a jurisdictional prerequisite. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982); *Perkins v. Silverstein*, 939 F.2d 463, 469-70 (7th Cir. 1991). Rather, the requirement is comparable to a statute of limitations, and is subject to equitable modification. *Perkins*, 939 F.2d at 470. To be sure, courts consistently recognize an exception to the general rule where the unnamed party or parties had adequate

notice of the charge, and had an opportunity to participate in conciliation. *Schnellbaeche*, 887 F.2d at 126; *Eggleston*, 657 F.2d at 905; see also *Feng v. Sandrik*, 636 F.Supp. 77, 81 (N.D.Ill.1986). Additionally, courts consider whether strictly holding a plaintiff to the filing requirement could deprive her of redress of any legitimate grievances. *Eggleston*, 657 F.2d at 907 (citing *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir.1977)); *Stephenson*, 775 F.Supp. at 239; *Feng*, 636 F.Supp. at 81.

Conceding that neither Mayor Daley nor Commissioner Carr was named as a respondent in any of the ten EEOC charges, plaintiffs seek refuge in the *Schnellbaeche* exception, contending "[i]t is axiomatic that Mayor Daley, the Chief Executive Officer of the City of Chicago, and Glenn Carr, the Commissioner of the Department of Personnel, had actual or constructive notice of the plaintiffs' charges that the defendants engaged in racial . . . discrimination when the city reorganized the work force." Plaintiffs' Memorandum in Response at 16. Assuming, as we must, that Daley and Carr were aware of a discriminatory impact stemming from the reorganization, this fact standing alone is insufficient to meet the *Schnellbaeche* exception. First, there is no evidence, nor even an allegation, that Mayor Daley or Commissioner Carr possessed knowledge of each individual's charge. Second, even with such knowledge of individual charges, it is clear that neither Daley nor Carr had any notice of any charges against them. See *Schnellbaeche*, 887 F.2d at 127 ("We agree with defendants, however, that the district court properly dismissed the suit against HSSI. Although HSSI had notice of the charges against Baskin [HSSI's subsidiary], it did not thereby have any notice of any charges against it.") (emphasis in original). Third, plaintiffs do not claim that either Daley or Carr was given the opportunity to participate in conciliation proceedings aimed at voluntary compliance. Finally, assuming they ultimately prevail in their individual claims of racial discrimination, plaintiffs may still receive the full mea-

sure of available relief against the remaining defendant, the City. Accordingly, we dismiss Mayor Daley and Commissioner Carr as defendants from Count I of plaintiffs' amended complaint.

D. Age Discrimination (Count II)

[20] Count II of plaintiffs' first-amended complaint purports to be a representative action under the ADEA, with plaintiffs Jane Cole and Janet Moore serving as representatives. Fifty-seven named plaintiffs and 68 nonparties, all of which are 40 years of age or older, have "opted into" the representative action.³ None of the opt-in plaintiffs, and presumably none of those unnamed in the amended complaint yet seeking to opt-in to this action, have filed age discrimination charges with the EEOC. In general, an individual cannot commence an ADEA civil action "until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]," and only if the charge is filed within a certain time period. 29 U.S.C. § 626(d). As with the prerequisites to the successful maintenance of a Title VII claim, a plaintiff is required to file an age discrimination charge with the EEOC so that defendants are adequately appraised of the nature of the charges and are afforded an opportunity to participate in voluntary conciliation proceedings. *Levine v. Bryant*, 700 F.Supp. 949, 954 (N.D.Ill.1988).

Despite the charge requirement, the Seventh Circuit has held that under certain circumstances, a party who has not filed a timely charge of age discrimination with the EEOC may "piggyback" onto the suit of an individual who has filed such a charge. *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008 (7th Cir.1988). In *Anderson*, 39 former Montgomery Ward managers filed age discrimination charges with the EEOC and then later brought an ADEA suit against the retailer. Montgomery Ward moved for summary judgment against seven of the plaintiffs, alleging that their participation in the suit was barred because they filed their EEOC charges late. The Seventh Circuit

3. A plaintiff must opt into an ADEA representative suit. This procedure should be contrasted with that for class actions outlined in Rule 23 of the Federal Rules of Civil Procedure. Under

Rule 23, a plaintiff belonging to a class must opt out of a class action; otherwise, he or she will be bound by the judgment in the case.

barred. The court held that an individual need not file an EEOC charge to be able to join a representative suit under the ADEA, as long as the charge that was filed contained an allegation of class-wide discrimination. This notification is necessary so that "the defendant at least be appraised during the conciliation process of the possibility of a subsequent lawsuit with many plaintiffs." *Id.* at 1016. The court noted that at least 23 of the timely charges contained plain allegations of class-based discrimination, and that Montgomery Ward admitted knowing that it faced a class-wide ADEA suit. *Id.* at 1017. "Under these facts, we can only conclude that all the purposes for ADEA's charge-filing requirement have been satisfied." *Id.*

[21] Unlike the 23 charges in *Anderson*, the two EEOC charges filed in the instant case, those of Cole and Moore, cannot be read to give notice of a potential class-wide ADEA suit. Cole's EEOC charge states in total:

I. I was employed by the above Respondent [City of Chicago, Department of Housing] on July 11, 1979. My most recent position was Relocation Representative. I was laid off on December 31, 1991 and not given an opportunity to bump a less senior employee.

II. The Respondent offered no reason for not allowing me to bump the less senior employee.

III. I believe that I have been discriminated against because of my race, Black in violation of Title VII of the Civil Rights Act of 1964, as amended and because of my age, 58 (date of birth April 13, 1933) in violation of the Age Discrimination in Employment Act of 1967, as amended, in that I should have been afforded an opportunity to bump into a Loan Officer position which I had previously held which was currently occupied by a less senior Caucasian employee.

Similarly, Moore's EEOC charge reads as follows:

4. Additionally, for the reasons stated *supra* subsection IV(C)(2) of this opinion, we dismiss from Cole and Moore's individual claims of age dis-

crimination against the above named employer [City of Chicago, Mayor's Office of Employment Security] on September 28, 1981, most recently as an Employability Review Specialist I. On December 31, 1991, I was laid off.

II. Respondent's reason for my layoff was reduction-in-force.

III. I believe that I have been discriminated against because of my race (black) and age 51 (date of birth: January 25, 1941), in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, in that: Non-Protected Age Group employees with less seniority were retained.

Significantly, neither charge alleges that any other city employee was subjected to age discrimination, let alone a disparate impact or city-wide policy of discrimination. *Cf. Levine*, 700 F.Supp. at 956 (sufficient allegation of class-wide discrimination in EEOC charge: "Since the new management started many employees over 50 years old in managerial positions have been discharges throughout the Country. All have been replaced by younger employees in the age group 20's and 30's."). In that these charges are limited to Cole and Moore's particular allegations of individualized discrimination, the named plaintiffs and unnamed individuals who did not file charges of age discrimination with the EEOC and did not receive right to sue notices, may not "piggyback" onto the age discrimination claims of Cole and Moore. Accordingly, we dismiss all but the individual ADEA claims of Cole and Moore from Count II of plaintiffs' amended complaint.⁴

E. The Illinois Human Rights Act (Counts I and II)

[22] In addition to seeking relief under Title VII and the ADEA, plaintiffs assert that defendants' alleged discriminatory employment practices violated the Illinois Human Rights Act ("IHRA"), 775 ILCS 5/1-101 *et seq.* Defendants, in turn, move to dismiss these claims under the IHRA for failure to exhaust administrative remedies under that

crimination Mayor Daley and Commissioner Carr, neither of whom were named as respondents in the charges filed before the EEOC.

institute a civil rights action only by filing a charge with the Illinois Department of Human Rights ("IDHR"). *Suarez v. Illinois Valley Community College*, 688 F.Supp. 376, 384 (N.D.Ill.1988). The Act denies an aggrieved party direct access to the courts; instead, upon obtaining a final order from the IDHR, the party may seek judicial review in the state courts. 775 ILCS 5/8-111; *Peters v. Fansteel, Inc.*, 736 F.Supp. 198, 201 (N.D.Ill.1990). Although it is apparent that nine of the named plaintiffs in this case have filed charges with the IDHR, the amended complaint is devoid of an allegation that any plaintiff has obtained a final order from that administrative body. Without such an allegation, plaintiffs' amended complaint fails to state a cause of action under the IHRA and, consequently, we grant defendants' motion to dismiss that portion of Counts I and II which asserts claims under this Act. See *Peters*, 736 F.Supp. at 201; *Perera v. Flexonics, Inc.*, 727 F.Supp. 406, 409 (N.D.Ill.1989); *Mueller v. Mars, Inc.*, 714 F.Supp. 351, 354 (N.D.Ill.1989).

F. 42 U.S.C. § 1981 (Count III)

[23] In Count III of their amended complaint, plaintiffs⁵ contend that the City was prohibited under the terms of various collective bargaining agreements ("CBAs") from making employment decisions on the basis of race. As such, plaintiffs allege that the City violated § 1981 by making employment decisions during the reorganization on the basis of race in violation of the CBAs.⁶ In support of their motion to dismiss plaintiffs' claims under § 1981, defendants maintain: (1) plaintiffs' claims do not implicate the § 1981 right to make or enforce contracts; (2) plaintiffs

have failed to establish that contractual remedies, a prerequisite to bringing a claim under § 1981; (3) plaintiffs' claims against the City and defendants Daley and Carr in their official capacities must be dismissed for failure to allege a custom or policy of discrimination on the basis of race; and (4) plaintiffs' claims against defendants Daley and Carr in their individual capacities must be dismissed for failure to allege that those defendants intentionally discriminated against plaintiffs on the basis of race. As explained below, we reject each of these contentions, save the last regarding plaintiffs' claims against defendants Daley and Carr in their individual capacities.

1. The Scope of § 1981

Until the 1989 Supreme Court decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), the right to "make and enforce contracts" generally had been interpreted to protect individuals against race discrimination in employment, whether the discrimination occurred at the time the employment contract was made, during the course of the contractual relationship, or at the time the contract was terminated. In *Patterson*, however, the Court held that the right to "make" a contract referred only to contract formation (i.e., hiring and, in certain instances, promotion), and that the right to "enforce" contracts protected nothing more than equal access to legal process in contractual matters. *Id.* at 179-80, 109 S.Ct. at 2374. Under this narrow interpretation, § 1981 does not protect individuals against racial discrimination in the workplace or, for that matter, from termination or any other employment action affecting the terms and conditions of the

5. Count III of the amended complaint is explicitly confined to plaintiffs who were union members at the time of the alleged discriminatory conduct. See First-Amended Complaint ¶¶ 54-62, at 34-35. The following plaintiffs have been identified as union members: Julius Body, Jane Cole, Angel Jimenez, John McMullin, Janet Moore, Doris Thompson, and Crystal White. For the purposes of this subsection, the term "plaintiffs" refers only to these seven individuals, the only persons identified in the amended complaint as union members.

6. Additionally, plaintiffs contend that defendants violated § 1981 by making employment decisions on the basis of age in violation of the various CBAs. First-Amended Complaint ¶ 60, at 35. It is settled law, however, that § 1981 does not protect employees from adverse actions based upon age. *Kodish v. United Airlines, Inc.*, 628 F.2d 1301, 1303 (10th Cir.1980) (citing *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976)); see also *Rush*, 966 F.2d at 1119 ("some showing of differential treatment on the basis of race is a necessary element of a claim under [§ 1981]").

employment contract. As a result, *Patterson* dictated that any claim which (1) pertained to conduct arising after the formation of the contract, and (2) did not allege the creation of an impediment to judicial process was to be dismissed for failure to state a claim. See, e.g., *Bush v. Commonwealth Edison Co.*, 732 F.Supp. 895 (N.D.Ill.1990), *aff'd*, 990 F.2d 928 (7th Cir.1993).

Effective November 21, 1991, the Civil Rights Act of 1991 amended § 1981 to restore its scope to pre-*Patterson* days. *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 n. 2 (7th Cir.1993) (construing the 1991 Act to overrule *Patterson*.) Section 1981 now provides that the term "make and enforce" contracts includes:

the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1981(b). Although this amendment does not apply retroactively, see *Ludington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 229-30 (7th Cir.1992), *petition for cert. filed*, 61 U.S.L.W. 3446 (Dec. 3, 1992),⁷ each of the seven Count III plaintiffs set forth allegations of discharge, demotion and failure to promote occurring after November 21, 1991. These allegations certainly fall within the newly restored scope of § 1981 and, given the application of the amendment to this case, we will not dismiss plaintiffs' claims on the basis that they are not premised on an impediment to judicial process or that they involve conduct that took place after the creation of a contract with the City.

2. Exhaustion of Contractual Remedies

[24] Although plaintiffs' claims fall within the scope of § 1981 as amended by the Civil Rights Act of 1991, defendants assert that they nonetheless must be dismissed because plaintiffs have failed to exhaust their contractual remedies. Specifically, defendants contend that resolution of the instant § 1981 claims will necessitate the interpretation of the various CBAs. As such, defendants

maintain that plaintiffs' claims must proceed in accordance with § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) which, pursuant to the various contractual grievance procedures, requires arbitration of disputes over the interpretation of the CBAs. We disagree. The Seventh Circuit has addressed this very issue in *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir.1974), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976). In *Waters*, plaintiffs contended that its former employer's "last hired, first fired" seniority system violated § 1981, as did two amendatory agreements to the CBA which affected employee recall rights and seniority status. *Id.* at 1312-13. On appeal, the union contended that "plaintiffs should be barred from proceeding against the union under § 1981 because they failed to exhaust their contractual remedies under the collective bargaining agreement." *Id.* at 1316. Observing that the nature of the action "is that of a complaint against racial discrimination in employment and not a labor law action, asserting rights under a collective bargaining agreement," the Seventh Circuit held that § 1981 does not require exhaustion of contractual remedies under the CBA. *Id.* In describing the nature of the action, the *Waters* court noted that "the focus of this civil rights suit is an attack by plaintiffs on the contract itself as embodying racially discriminatory practices." *Id.* In order to distinguish *Waters*, defendants grasp upon this language, contending that, while exhaustion may not be required where § 1981 plaintiffs attack the contract itself, exhaustion is required where such plaintiffs seek to enforce the rights guaranteed under the contract. Defendants' distinction, however, is without substance. First, plaintiffs do not seek to enforce contractual rights via Count III; rather, they endeavor to vindicate alleged civil rights violations. Moreover, the court's determination that exhaustion of remedies is not necessary under § 1981, was derived from principles of law developed under Title

7. We observe that the Supreme Court has recently granted certiorari to determine whether the Civil Rights Act of 1991 applies to cases pending when the Act went into effect. *Landgraf v. USI Film Prods.*, — U.S. —, 113 S.Ct. 1250, 122

L.Ed.2d 649 (1993). Additionally, the issue is now before the entire Seventh Circuit. *Mojica v. Gannett Co.*, 986 F.2d 1158 (7th Cir.1993) (rehearing en banc granted before issuance of panel opinion).

VII and 42 U.S.C. § 1983, statutes which provide parallel or overlapping remedies against discrimination. As the court in *Waters* determined, neither Title VII nor any other civil rights act (including § 1983) require exhaustion of remedies under any circumstance. *Id.* Based upon this analysis, it follows that the rule announced in *Waters* cannot be confined to its particular facts, but instead applies to all § 1981 actions. See also *Doe on behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 426 (7th Cir.1986) ("In ... *Waters* we held that section 1981 did not require exhaustion of remedies."); *Donaldson v. Taylor Prods. Div. of Tecumseh Prods. Co.*, 620 F.2d 155, 158 (7th Cir.1980) ("We agree [with *Waters*] that there is no exhaustion [of remedies] requirement under either [Title VII or § 1981]."). We adhere to the principle set forth in *Waters*, and will not dismiss Count III based upon plaintiffs' failure to exhaust contractual remedies.

3. Municipal Liability under § 1981

[25] In *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), the Supreme Court held that:

the express "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," provides for the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. Thus to prevail on [a] claim for damages against [a state municipality, a plaintiff] must show that the violation of his "right to make [and enforce] contracts" protected by § 1981 was caused by a custom or policy within the meaning of *Monell* and subsequent cases.

Id. at 735, 109 S.Ct. at 2722; see also *East v. City of Chicago*, 719 F.Supp. 683, 688 (N.D.Ill.1989). Thus, as is the case under § 1983, municipal liability under § 1981 may not rest upon the doctrine of superiors' liability, *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1390 (7th Cir.1984), or the doctrine of respondeat superior. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Rather, government entities, such as the City, cannot

be held liable unless an official policy or custom caused the constitutional violation asserted in the complaint. *Id.*; *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir.1989), *cert. denied*, 495 U.S. 929, 110 S.Ct. 2167, 109 L.Ed.2d 496 (1990). Moreover, a suit against a state official in his official capacity is essentially an action against the state entity by which the officer is employed. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985); *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985); *Burmeister v. Stone*, 751 F.Supp. 759, 760 (N.D.Ill.1990), *aff'd*, 958 F.2d 1419 (7th Cir.1992).

The clearest case for municipal liability under § 1981 is the case like *Monell* itself, where an unconstitutional policy statement, ordinance, regulation or decision is formally adopted and promulgated by the governing body itself. See *Monell*, 436 U.S. at 661, 98 S.Ct. at 2020 (Department of Social Services and Board of Education officially adopted a policy requiring pregnant employees to take unpaid maternity leaves before medically necessary).

[26] In addition, *Monell* allows the imposition of municipal liability when the challenged conduct reflects "practices of state officials ... so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 691, 98 S.Ct. at 2036 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970)). "Custom and usage" by municipal employees and agents may be attributed to a municipality when the duration and frequency of the practices are sufficiently widespread so as to give rise to an inference of actual or constructive knowledge on the part of the municipality. *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988); *McLin v. City of Chicago*, 742 F.Supp. 994, 998 (N.D.Ill.1990). Thus, a single incident of unconstitutional conduct is insufficient to the requisite municipal policy. *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir.1985).

Finally, municipal liability under § 1981 may arise from the isolated decisions of officials who possess "final policymaking author-

ity" in the area in question. *Jett*, 491 U.S. at 737, 109 S.Ct. at 2723; *City of Saint Louis v. Praprotnik*, 485 U.S. 112, 124, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986). Although noting that the question of whether a particular municipal official possesses "final policymaking authority" is determined by reference to state law, the Court in *Praprotnik* set forth an elaborate definition of "final policymaking authority" for the purposes of municipal liability: "[T]he authority to make municipal policy is necessarily the authority to make final policy. [Citation omitted]. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnik*, 485 U.S. at 127, 108 S.Ct. at 926 (emphasis in original).

Under the principles set forth in *Monell* and its progeny, we conclude that the seven Count III plaintiffs have sufficiently alleged facts from which we may infer a "custom" of racial discrimination attributable to the City by virtue of its widespread reach. Rather than detailing a single incident of alleged racial discrimination, the amended complaint sets forth conduct directed against ten separate individuals allegedly attributable to race. First-Amended Complaint ¶¶ 2-11, at 3-13. Further, the amended complaint lists 52 additional persons who purportedly were subjected to employment actions based on race. *Id.* ¶ 12, at 14-17. Plaintiffs also allege conduct on the part of various city department heads from which, when taken at face value, we can infer racially discriminatory conduct widespread in both duration and frequency. *Id.* ¶ 36, at 24-25. That many of these alleged incidents occurred within different city departments and at the hands of different city officials—facts which played a substantial role in the denial of class certification—is insignificant in our determination that, when taken together, they establish a custom sufficient to establish the potential of municipal liability. As alleged, the challenged conduct reflects practices of city officials so permanent and well settled as to constitute a "custom" with the force of law. Accordingly, we will not dismiss Count III of plaintiffs'

amended complaint against the City or defendants Daley and Carr in their official capacities.

4. Individual Liability of Daley and Carr

[27] To state a claim under § 1981 against defendants Daley and Carr in their individual capacities, plaintiffs shoulder the burden of sufficiently alleging that these defendants possessed an intent to discriminate on the basis of race. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 n. 16, 104 S.Ct. 2576, 2590 n. 16, 81 L.Ed.2d 483 (1984); *Watson v. Pathway Fin.*, 702 F.Supp. 186, 187 (N.D.Ill.1988). Respecting the intent requirement, the Seventh Circuit has repeatedly cautioned that "conclusory allegations of generalized racial bias do not establish discriminatory intent." *Minority Police Officers Ass'n of South Bend v. City of South Bend*, 801 F.2d 964, 967 (7th Cir.1986).

The amended complaint presently before the court contains no direct allegations of intentional racial discrimination on the part of Defendants Daley and Carr. Rather, plaintiffs contend that Mayor Daley and Commissioner Carr

were aware of the City's reorganization; approved the plan to reorganize the City's work force and took no steps to prevent Black and Hispanic employees from being laid off, transferred, demoted, or to prevent the Black and Hispanic plaintiffs' jobs from being privatized and given to private white companies or people.

First-Amended Complaint ¶ 29, at 22. True, the failure to take reasonable steps to prevent a barrage of racist acts can render an employer or supervisor liable under § 1981 if that person knew, or in the exercise of reasonable care should have known, about the campaign of racial harassment. See *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir.1986). Nonetheless, an employer is under no legal duty to purge all racially offensive conduct from the workplace. *Id.* (citing *Howard v. National Cash Register Co.*, 388 F.Supp. 603, 606 (S.D.Ohio 1975) (An employer "is not charged by law with discharging all Archie Bunkers in its employ.")). Not only have plaintiffs failed to allege that defendants Daley and Carr were aware of

any of the individual incidents of alleged discriminatory conduct, but the amended complaint is devoid of the more general allegation that these defendants were aware of the racial impact of the City's reorganization effort. As such, plaintiffs have failed to state a claim pursuant to § 1981 against defendants Daley and Carr in their individual capacities. See *Williams v. City of Chicago*, 1993 U.S.Dist. LEXIS 4137, at *4 (N.D.Ill. Mar. 31, 1993) (Report and Recommendation of Magistrate Judge Bucklo).

G. Political Discrimination (Count IV)

The following plaintiffs have alleged that they were subjected to adverse employment actions based on their public support for political opponents of Mayor Daley: Henry Allen, Julius Body, Eddie Ellen, John McMullin, Janet Moore, Fredrick O'Neal, Doris Thompson, and Crystal White. Based on this conduct, in Count IV of their amended complaint, these eight plaintiffs assert (1) claims of political discrimination directly under the First Amendment of the United States Constitution, and (2) claims pursuant to 42 U.S.C. § 1985(3) that defendants conspired to deprive plaintiffs of their First Amendment rights.

[28] To the extent that Count IV seeks to assert claims directly under the First Amendment of the United States Constitution, they are dismissed. Section 1983 provides a cause of action against municipalities and municipal employees, and the availability of this statutory remedy precludes direct claims under the Constitution. *Flores v. City of Chicago*, 682 F.Supp. 950, 953 (N.D.Ill.1988); *Bieneman v. City of Chicago*, 662 F.Supp. 1297, 1299-1300 (N.D.Ill.1987). While we would normally construe these claims as brought pursuant to § 1983, plaintiffs have expressly disavowed reliance on this statute:

The plaintiffs would ask the District Court to examine the plaintiffs' first amended complaint and to note that nowhere in their amended complaint, including Counts I or IV of plaintiffs' first amended complaint, do the plaintiffs cite Section 1983. See First Amended Complaint. . . . Count 'V of the plaintiffs' first amended com-

plaint is predicated on the First Amendment of the United States Constitution and not on Section 1983 as the defendants contend in their memorandum. The plaintiffs maintain that Section 1983 is not cited in their amended complaint, therefore, that they are not bound by the pleading rules which apply to Section 1983 actions. Consequently, since Section 1983 is not relied on by the plaintiffs nor cited in the plaintiffs amended complaint, the District Court should ignore the arguments in the defendants' memorandum predicated on Section 1983.

Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss at 7. It is evident that plaintiffs' disavowal of § 1983, stems from the belief (right or wrong) that they could not satisfy the pleading requirements associated with an attempt to hold these municipal defendants liable under that statute. And, plaintiffs surely believed that they could circumvent these requirements by invoking the First Amendment directly. That this strategy has proved flawed does not compel that we now afford plaintiffs a shot at § 1983, at least under the amended complaint as drafted. As the Supreme Court has often repeated, "the party who brings a suit is master to decide what law he will rely upon." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22, 103 S.Ct. 2841, 2853, 77 L.Ed.2d 420 (1983) (quoting *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913)).

[29] In order to state a claim pursuant to § 1985(3), plaintiffs must allege the existence of four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived a right or privilege of a citizen of the United States. *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29, 103 S.Ct. 3352, 3356, 77 L.Ed.2d 1049 (1983); *Wilbert v. City of Chicago*, 768 F.Supp. 253, 255 (N.D.Ill.1991). Defendants

contend that the conspiracy in Count IV must be dismissed as: (i) § 1985(3) does not extend to conspiracies to deprive First Amendment rights; (ii) plaintiffs have failed to allege that the alleged conspirators agreed upon a common scheme or plan; and (iii) the intra-corporate conspiracy doctrine precludes plaintiff's conspiracy claims.

Respecting the scope of substantive rights protected through § 1985(3), the Seventh Circuit has explicitly held that conspiracy claims brought pursuant to this statute do not reach nonracial, political conspiracies. See *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir.1985); see also *Feng v. Sandrik*, 636 F.Supp. 77, 84 n. 7 (N.D.Ill.1986) ("[T]he scope of substantive rights protected through § 1985(3) actions does not include those contained in the First Amendment."). Nonetheless, the *Grimes* court was careful to note that its holding did not disturb "prior decisions in which we held that conspiracies animated by both racial and political motives were within the scope of § 1985(3)." *Grimes*, 776 F.2d at 1366 n. 12 (emphasis in original). In the present case, the amended complaint clearly alleges a conspiracy motivated by both race and politics and, as such, falls within the scope of § 1985(3). See First-Amended Complaint ¶¶ 66, 71, 75 & 78, at 37-40.

[30] To sustain a cause of action under § 1985(3), plaintiffs must allege and prove the existence of a conspiracy among "two or more persons." In the instant case, plaintiffs set forth the members of the conspiracy as including "Mayor Daley, Commissioner Carr, the City Council members who approved the annual appropriation ordinance, and executive and managerial persons whose actions and pronouncements are regarded as the policy of the City of Chicago." *Id.* ¶ 74, at 39. While we believe that plaintiffs have alleged facts indicating that these individuals came to a meeting of the minds concerning unconstitutional conduct, we agree with defendants that the "intra-corporate conspiracy" theory bars this claim. The Seventh Circuit has adopted the general rule in civil conspiracy cases that a corporation cannot

conspire with its own agents or employees. See *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 110-11 (7th Cir.1990), *cert. denied*, — U.S. —, 112 S.Ct. 60, 116 L.Ed.2d 36 (1991). Although the doctrine was first developed in the context of antitrust litigation, the court in *Travis* reiterated that "[i]ntra-corporate dealings under § 1985 ... should receive the same treatment as intra-corporate dealings under [the antitrust laws]." *Id.* at 110. In the instant case, plaintiffs do not contend that this doctrine does not apply within the context of § 1985. Rather, plaintiffs contend that the participants they have identified comprise at least two separate "persons." Specifically, plaintiffs attempt to separate Mayor Daley and Commissioner Carr as members of the executive branch of local government and the various city aldermen who voted for the annual appropriation ordinance as members of the legislative branch of local government. However, both defendants and the unnamed city aldermen are members of the same municipal corporation, i.e., the City of Chicago.⁸ Finding no reason to restrict the intra-corporate dealings doctrine to private entities, see *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 509-510 (6th Cir.) (employees and agents of school board are not separate "persons" to form a conspiracy), *cert. denied*, — U.S. —, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991), we hold that the various participants identified by plaintiffs are not separate "people" capable of conspiring with each other for the purposes of § 1985(3). Accordingly, we dismiss plaintiffs' Count IV conspiracy claims.

H. Title VI (Count V)

Section 601 of Title VI, 42 U.S.C. § 2000d, provides that "[n]o person ... shall, on the ground of race, color, or natural origin, be excluded from participation in, be denied the benefit of or be subjected to discrimination under any program or activity receiving Federal financial assistance." In Count V of their amended complaint, plaintiffs contend that the City, as a recipient of federal funds, made employment decisions based on race in

apart from the City of Chicago for the purposes of this lawsuit.

8. As discussed *supra* subsection IV(B), the City Council does not have a separate legal existence

violation of § 601 of Title VI. Defendants move to dismiss Count V on the ground that plaintiffs lack standing to challenge defendants' use of federal funds.

[31] In order to bring a private action under Title VI, "the plaintiff must be the intended beneficiary of, an applicant for, or a participant in a federally funded program." *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235 (7th Cir.1980); see also *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1252 (3d Cir.1979). Plaintiffs do not, and clearly cannot, make such allegations. We observe that the court in *Simpson* has recognized that "[t]his principle is somewhat broadened in that some administrative actions indicate that the antidiscrimination provision of Title VI is applicable also to employment practices of recipients of federal financial assistance in situations where employment discrimination against non-beneficiaries affects the beneficiaries of the assistance." *Id.* at 1235 n. 16. Although plaintiffs do not allege that they are the intended beneficiaries of the federal funds received by the City, they do allege that they "provide aid or assistance to some of the intended beneficiaries, while they were working, which will no longer be received now that they are unemployed." First-Amended Complaint ¶ 85, at 42. This presumptive allegation, however, is insufficient to withstand defendants' motion to dismiss. While defendants need not prove at this early stage of the proceedings the existence of a causal relationship between the City's alleged discriminatory conduct and an affect on the intended beneficiaries, in the absence of some specific allegations concerning which plaintiffs' jobs affected what type of intended beneficiary under which federally funded program, we can only conclude that plaintiffs lack standing to assert a claim under Title VI. Accordingly, we dismiss Count V of plaintiffs' first-amended complaint.

the City from entering into contracts with private companies and individuals under Counts I-III. As we have dismissed Counts IV and V, defendants' objections to the first two of the challenged prayers for relief are moot. Respecting the propriety of an injunction prohibiting the City from "privatizing" city jobs, we find plaintiffs' request overbroad and, thus, we strike it under Fed. R.Civ.P. 12(f).

IV. Conclusion

For the reasons set forth above, we take the following action: (1) plaintiffs' motion for class certification is denied; (2) the Chicago City Council is dismissed from this action as an improper party-defendant; (3) all Title VII claims of racial discrimination brought by all plaintiffs who have not filed charges with the EEOC and received notices of right to sue are dismissed; (4) Mayor Daley and Commissioner Carr are dismissed as defendants from Counts I and II of plaintiffs' amended complaint; (5) all but the individual ADEA claims of Cole and Moore are dismissed from Count II of plaintiffs' amended complaint; (6) defendants' motion to dismiss that portion of Counts I and II which assert claims under the IHRA is granted; (7) Count III of plaintiffs' amended complaint is dismissed only to the extent that it seeks to hold Mayor Daley and Commissioner Carr liable under § 1981 in their individual capacities; (8) Counts IV and V are dismissed in their entirety; and (9) plaintiffs' request for an injunction prohibiting the City from entering into contracts with private companies and individuals is stricken under Fed.R.Civ.P. 12(f) as overbroad. It is so ordered.



I. Propriety of the Relief Sought

Defendants request that the court strike plaintiffs' requests for (1) punitive damages under Count IV, (2) an injunction prohibiting the City from receiving federal funds under Count V, and (3) an injunction prohibiting