

HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT v. GAUTREAUX ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74-1047. Argued January 20, 1976—Decided April 20, 1976

Respondents, Negro tenants in or applicants for public housing in Chicago, brought separate class actions against the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD), alleging that CHA had deliberately selected family public housing sites in Chicago to "avoid the placement of Negro families in white neighborhoods" in violation of federal statutes and the Fourteenth Amendment, and that HUD had assisted in that policy by providing financial assistance and other support for CHA's discriminatory housing projects. The District Court on the basis of the evidence entered summary judgment against CHA, which was ordered to take remedial action. The court then granted a motion to dismiss the HUD action, which meanwhile had been held in abeyance. The Court of Appeals reversed, having found that HUD had committed constitutional and statutory violations by sanctioning and assisting CHA's discriminatory program. The District Court thereafter consolidated the CHA and HUD cases and, having rejected respondents' motion to consider metropolitan area relief, adopted petitioner's proposed order for corrective action in Chicago. The Court of Appeals reversed and remanded the case "for additional evidence and for further consideration of the issue of metropolitan area relief." *Held*: A metropolitan area remedy in this case is not impermissible as a matter of law. *Milliken v. Bradley*, 418 U. S. 717, distinguished. Pp. 296-306.

(a) A remedial order against HUD affecting its conduct in the area beyond Chicago's geographic boundaries but within the housing market relevant to the respondents' housing options is warranted here because HUD, in contrast to the suburban school districts in *Milliken*, committed violations of the Constitution and federal statutes. *Milliken* imposes no *per se* rule that federal courts lack authority to order corrective action beyond the municipal boundaries where the violations occurred. Pp. 297-300.

(b) The order affecting HUD's conduct beyond Chicago's boundaries would not impermissibly interfere with local governments and suburban housing authorities that were not implicated in HUD's unconstitutional conduct. Under the § 8 Lower-Income Housing Assistance program of the Housing and Community Development Act of 1974 HUD may contract directly with private owners and developers to make leased housing units available to eligible lower income persons, with local governmental units retaining the right to comment on specific proposals, to reject certain programs that are inconsistent with their approved housing assistance plans, and to require that zoning and other land use restrictions be observed by builders. Pp. 300-306.

503 F. 2d 930, affirmed.

STEWART, J., delivered the opinion of the Court in which all Members joined, except STEVENS, J., who took no part in the consideration or decision of the case. MARSHALL, J., filed a concurring statement, in which BRENNAN and WHITE, JJ., joined, *post*, p. 306.

Solicitor General Bork argued the cause for petitioner. With him on the brief were *Assistant Attorney General Lee*, *Deputy Solicitor General Jones*, *Harriet S. Shapiro*, *William Kanter*, and *Anthony J. Steinmeyer*.

Alexander Polikoff argued the cause for respondents. With him on the brief were *Milton I. Shadur*, *Bernard Weisberg*, *Merrill A. Freed*, and *Robert J. Vollen*.*

*James M. P. D'Amico filed a brief for the city of Joliet, Ill., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Martin E. Sloane* and *Arthur D. Wolf* for the National Committee Against Discrimination in Housing, Inc.; and by *Howard A. Glickstein*, *William L. Taylor*, and *Richard F. Bellman* for the Notre Dame Center for Civil Rights et al.

Briefs of *amici curiae* were filed by *J. Harold Flannery*, *Paul R. Dimond*, *William E. Caldwell*, *Norman J. Chachkin*, and *Nathaniel R. Jones* for the Lawyers' Committee for Civil Rights Under Law et al.; and by *Stephen J. Pollak*, *Richard M. Sharp*, and *David Rubin* for the National Education Association.

MR. JUSTICE STEWART delivered the opinion of the Court.

The United States Department of Housing and Urban Development (HUD) has been judicially found to have violated the Fifth Amendment and the Civil Rights Act of 1964 in connection with the selection of sites for public housing in the city of Chicago. The issue before us is whether the remedial order of the federal trial court may extend beyond Chicago's territorial boundaries.

I

This extended litigation began in 1966 when the respondents, six Negro tenants in or applicants for public housing in Chicago, brought separate actions on behalf of themselves and all other Negro tenants and applicants similarly situated against the Chicago Housing Authority (CHA) and HUD.¹ The complaint filed against CHA in the United States District Court for the Northern District of Illinois alleged that between 1950 and 1965 substantially all of the sites for family public housing selected by CHA and approved by the Chicago City Council were "at the time of such selection, and are now," located "within the areas known as the Negro Ghetto." The respondents further alleged that CHA deliberately selected the sites to "avoid the placement of Negro families in white neighborhoods" in violation of federal statutes and the Fourteenth Amendment. In a companion suit against HUD the respondents claimed that it had "assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago" by providing

¹ The original complaint named the Housing Assistance Administration, then a corporate agency of HUD, as the defendant. Although the petitioner in this case is the current Secretary of HUD, this opinion uses the terms "petitioner" and "HUD" interchangeably.

financial assistance and other support for CHA's discriminatory housing projects.²

The District Court stayed the action against HUD pending resolution of the CHA suit.³ In February 1969, the court entered summary judgment against CHA on the ground that it had violated the respondents' constitutional rights by selecting public housing sites and assigning tenants on the basis of race.⁴ *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907. Uncon-

² The complaint sought to enjoin HUD from providing funds for 17 projects that had been proposed by CHA in 1965 and 1966 and from making available to CHA any other financial assistance to be used in connection with the racially discriminatory aspects of the Chicago public housing system. In addition, the respondents requested that they be granted "such other and further relief as the Court may deem just and equitable."

³ Before the stay of the action against HUD, the District Court had certified the plaintiff class in the CHA action and had rejected CHA's motion to dismiss or for summary judgment on the counts of the complaint alleging that CHA had intentionally selected public housing sites to avoid desegregating housing patterns. 265 F. Supp. 582.

⁴ CHA admitted that it had followed a policy of informally clearing proposed family public housing sites with the alderman in whose ward the proposed site was located and of eliminating each site opposed by the alderman. 296 F. Supp. 907, 910, 913. This procedure had resulted in the rejection of 99½% of the units proposed for sites in white areas which had been initially selected as suitable for public housing by CHA. *Id.*, at 912.

With regard to tenant assignments, the court found that CHA had established a racial quota to restrict the number of Negro families residing in the four CHA family public housing projects located in white areas in Chicago. The projects, all built prior to 1944, had Negro tenant populations of 7%, 6%, 4%, and 1% despite the fact that Negroes composed about 90% of the tenants of CHA family housing units and a similar percentage of the waiting list. A CHA official testified that until 1968 the four projects located in white areas were listed on the Authority's tenant-selection form as suitable for white families only. *Id.*, at 909.

tradicted evidence submitted to the District Court established that the public housing system operated by CHA was racially segregated, with four overwhelmingly white projects located in white neighborhoods and with 99½% of the remaining family units located in Negro neighborhoods and 99% of those units occupied by Negro tenants. *Id.*, at 910.⁵ In order to prohibit future violations and to remedy the effects of past unconstitutional practices, the court directed CHA to build its next 700 family units in predominantly white areas of Chicago and thereafter to locate at least 75% of its new family public housing in predominantly white areas inside Chicago or in Cook County. *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736, 738-739.⁶ In addition, CHA was ordered to modify its tenant-assignment and site-selection procedures and to use its best efforts to increase the supply of dwelling units as rapidly as possible in conformity with the judgment. *Id.*, at 739-741.

⁵ In July 1968, CHA had in operation or development 54 family housing projects with a total of 30,848 units. Statistics submitted to the District Court, established that, aside from the four overwhelmingly white projects discussed in n. 4, *supra*, 92% of all of CHA's family housing units were located in neighborhoods that were at least 75% Negro and that two-thirds of the units were situated in areas with more than 95% Negro residents. *Id.*, at 910.

⁶ The District Court's remedial decree divided Cook County into a "General Public Housing Area" and a "Limited Public Housing Area." The "Limited Public Housing Area" consisted of the area within census tracts having a 30% or more nonwhite population or within one mile of the boundary of any such census tract. The remainder of Cook County was included in the "General Public Housing Area." 304 F. Supp., at 737. Following the commencement of construction of at least 700 family units in the General Public Housing Area of the city of Chicago, CHA was permitted by the terms of the order to locate up to one-third of its General Public Housing Area units in the portion of Cook County outside of Chicago. See *id.*, at 738-739.

The District Court then turned to the action against HUD. In September 1970, it granted HUD's motion to dismiss the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. The United States Court of Appeals for the Seventh Circuit reversed and ordered the District Court to enter summary judgment for the respondents, holding that HUD had violated both the Fifth Amendment and § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, by knowingly sanctioning and assisting CHA's racially discriminatory public housing program. *Gautreaux v. Romney*, 448 F. 2d 731, 739-740.⁷

On remand, the trial court addressed the difficult problem of providing an effective remedy for the racially segregated public housing system that had been created by the unconstitutional conduct of CHA and HUD.⁸

⁷ The Court of Appeals found that "HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority" and that the Secretary had exercised those powers "in a manner which perpetuated a racially discriminatory housing system in Chicago." 448 F. 2d, at 739. Although the appellate court stated that it was "fully sympathetic" with the "very real 'dilemma'" presented by the need for public housing in Chicago, it ruled that the demand for housing did not justify "the Secretary's past actions [which] constituted racially discriminatory conduct in their own right." *Ibid.*

⁸ The court's July 1969 order directing CHA to use its best efforts to increase public housing opportunities in white areas as rapidly as possible had not resulted in the submission of a single housing site to the Chicago City Council. A subsequent order directing the submission of sites for 1,500 units by September 20, 1970, had eventually prompted CHA to submit proposed sites in the spring of 1971, but inaction by the City Council had held up the approval of the sites required for their development. See *Gautreaux v. Romney*, 332 F. Supp. 366, 368.

The District Court subsequently took additional measures in an

The court granted the respondents' motion to consolidate the CHA and HUD cases and ordered the parties to formulate "a comprehensive plan to remedy the past effects of unconstitutional site selection procedures." The order directed the parties to "provide the Court with as broad a range of alternatives as seem . . . feasible" including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago." After consideration of the plans submitted by the parties and the evidence adduced in their support, the court denied the respondents' motion to consider metropolitan area relief and adopted the petitioner's

attempt to implement the remedial orders entered against CHA. In May 1971, the city of Chicago and HUD agreed to a letter of intent that provided that the city would process sites suitable for use by CHA to permit the Authority to commence acquisition of sites for 1,700 units in accordance with a specified timetable. HUD then released certain Model Cities funds on the condition that the City Council and CHA continue to show progress toward meeting the goals set forth in the May letter. After the city fell far behind schedule, the District Court granted the respondents' request for an injunction directing HUD to withhold \$26 million in Model Cities funds until the city remedied its existing deficit under the timetable. See *id.*, at 368-370. The Court of Appeals reversed the injunction, holding that the District Court had abused its discretion in ordering funding cut off. 457 F. 2d 124.

Between July 1971 and April 1972, the City Council failed to conduct any hearings with respect to acquisition of property for housing sites and did not approve land acquisition for any sites. *Gautreaux v. Chicago Housing Authority*, 342 F. Supp. 827, 829. Following the filing of a supplemental complaint naming the mayor and the members of the City Council as defendants, the District Court found that their inaction had prevented CHA from providing relief in conformity with the court's prior orders. In a further effort to effectuate relief, the court ruled that the provision of Illinois law requiring City Council approval of land acquisition by CHA "shall not be applicable to CHA's actions . . . taken for the purpose of providing Dwelling Units." *Id.*, at 830. The Court of Appeals upheld this decision. *Gautreaux v. City of Chicago*, 480 F. 2d 210.

proposed order requiring HUD to use its best efforts to assist CHA in increasing the supply of dwelling units and enjoining HUD from funding family public housing programs in Chicago that were inconsistent with the previous judgment entered against CHA. The court found that metropolitan area relief was unwarranted because "the wrongs were committed within the limits of Chicago and solely against residents of the City" and there were no allegations that "CHA and HUD discriminated or fostered racial discrimination in the suburbs."

On appeal, the Court of Appeals for the Seventh Circuit, with one judge dissenting, reversed and remanded the case for "the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago . . . but will increase the supply of dwelling units as rapidly as possible." 503 F. 2d 930, 939. Shortly before the Court of Appeals announced its decision, this Court in *Milliken v. Bradley*, 418 U. S. 717, had reversed a judgment of the Court of Appeals for the Sixth Circuit that had approved a plan requiring the consolidation of 54 school districts in the Detroit metropolitan area to remedy racial discrimination in the operation of the Detroit public schools. Understanding *Milliken* "to hold that the relief sought there would be an impractical and unreasonable overresponse to a violation limited to one school district," the Court of Appeals concluded that the *Milliken* decision did not bar a remedy extending beyond the limits of Chicago in the present case because of the equitable and administrative distinctions between a metropolitan public housing plan and the consolidation of numerous local school districts. 503 F. 2d, at 935-936. In addition, the appellate court found that, in contrast to *Milliken*, there was evidence of suburban discrimination and

of the likelihood that there had been an "extra-city impact" of the petitioner's "intra-city discrimination." *Id.*, at 936-937, 939-940. The appellate court's determination that a remedy extending beyond the city limits was both "necessary and equitable" rested in part on the agreement of the parties and the expert witnesses that "the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work." *Id.*, at 936-937. HUD subsequently sought review in this Court of the permissibility in light of *Milliken* of "inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation."⁹ We granted certiorari to consider this important question. 421 U. S. 962.

II

In *Milliken v. Bradley*, *supra*, this Court considered the proper scope of a federal court's equity decree in the context of a school desegregation case. The respondents in that case had brought an action alleging that the Detroit public school system was segregated on the basis of race as the result of official conduct and sought an order establishing "a unitary, nonracial school system." 418 U. S., at 723. After finding that constitutional violations committed by the Detroit School Board and state officials had contributed to racial segregation in the Detroit schools, the trial court had proceeded to the formulation of a remedy. Although there had been neither proof of unconstitutional actions on the part of neighboring school districts nor a demonstration that the Detroit violations had produced significant segregative effects in those districts, the court established

⁹ Although CHA participated in the proceeding before the Court of Appeals, it did not seek review of that court's decision and has not participated in the proceedings in this Court.

a desegregation panel and ordered it to prepare a remedial plan consolidating the Detroit school system and 53 independent suburban school districts. *Id.*, at 733-734.¹⁰ The Court of Appeals for the Sixth Circuit affirmed the desegregation order on the ground that, in view of the racial composition of the Detroit school system, the only feasible remedy required "the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts." 484 F. 2d 215, 249. This Court reversed the Court of Appeals, holding that the multidistrict remedy contemplated by the desegregation order was an erroneous exercise of the equitable authority of the federal courts.

Although the *Milliken* opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial decree, the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That power is not plenary. It "may be exercised 'only on the basis of a constitutional violation.'" 418 U. S., at 738; quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16. See *Rizzo v. Goode*, 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to

¹⁰ Although the trial court's desegregation order in *Milliken* did not direct the adoption of a specific metropolitan area plan, it did contain detailed guidelines for the panel appointed to draft the desegregation plan. 345 F. Supp. 914 (ED Mich.). The framework for the plan called for the division of the designated 54-school-district desegregation area into 15 clusters, each containing a part of the Detroit school system and two or more suburban districts. Within this framework, the court charged the panel with the responsibility for devising a plan that would produce the maximum actual desegregation. *Id.*, at 918, 928-929. See 418 U. S., at 733-734.

tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." 418 U.S., at 744; *Swann, supra*, at 16. In *Milliken*, there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs. See 418 U.S., at 745, 748. The desegregation order in *Milliken* requiring the consolidation of local school districts in the Detroit metropolitan area thus constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct. Under these circumstances, the Court held that the interdistrict decree was impermissible because it was not commensurate with the constitutional violation to be repaired.

Since the *Milliken* decision was based on basic limitations on the exercise of the equity power of the federal courts and not on a balancing of particular considerations presented by school desegregation cases, it is apparent that the Court of Appeals erred in finding *Milliken* inapplicable on that ground to this public housing case.¹¹

¹¹ The Court of Appeals interpreted the *Milliken* opinion as limited to a determination that, in view of the administrative complexities of school district consolidation and the deeply rooted tradition of local control of public schools, the balance of equitable factors weighed against metropolitan area school desegregation remedies. See 503 F. 2d, at 935-936. But the Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context. See 418 U.S., at 744.

In addition, the Court of Appeals surmised that either an interdistrict violation or an interdistrict segregative effect may have been present in this case. There is no support provided for either con-

The school desegregation context of the *Milliken* case is nonetheless important to an understanding of its discussion of the limitations on the exercise of federal judicial power. As the Court noted, school district lines cannot be "casually ignored or treated as a mere administrative convenience" because they separate independent governmental entities responsible for the operation of autono-

clusion. The sole basis of the appellate court's discussion of alleged suburban discrimination was the respondents' Exhibit 11 illustrating the location of 12 public housing projects within the portion of the Chicago Urbanized Area outside the city limits of Chicago. That exhibit showed that 11 of the 12 projects were located in areas that, at the time of the hearing in November 1972, were within one mile of the boundary of a census tract with less than a 70% white population. The exhibit was offered to illustrate the scarcity of integrated public housing opportunities for the plaintiff class and for lower income white families and to indicate why the respondents did not "expect cooperation from the suburban areas" in providing housing alternatives in predominately white areas. In discussing the data underlying the exhibit, counsel for the respondents in the trial court expressly attempted to avoid the "possible misconception" that he was then asserting that the suburban municipalities and housing authorities were "guilty of any discrimination or wrongdoing." In view of the purpose for which the exhibit was offered and the District Court's determination that "the wrongs were committed within the limits of Chicago," it is apparent that the Court of Appeals was mistaken in supposing that the exhibit constitutes evidence of suburban discrimination justifying metropolitan area relief.

In its brief opinion on rehearing, the Court of Appeals asserted that "it is reasonable to conclude from the record" that the intracity violation "may well have fostered racial paranoia and encouraged the 'white flight' phenomenon which has exacerbated the problems of achieving integration." 503 F. 2d, at 939-940. The Court of Appeals' speculation about the effects of the discriminatory site selection in Chicago is contrary both to expert testimony in the record and the conclusions of the District Court. Such unsupported speculation falls far short of the demonstration of a "significant segregative effect in another district" discussed in the *Milliken* opinion. See 418 U.S., at 745.

mous public school systems. 418 U. S., at 741-743. The Court's holding that there had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts.¹² The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

III

The question presented in this case concerns only the authority of the District Court to order HUD to take remedial action outside the city limits of Chicago. HUD does not dispute the Court of Appeals' determination that it violated the Fifth Amendment and § 601 of the Civil Rights Act of 1964 by knowingly funding CHA's racially discriminatory family public housing program, nor does it question the appropriateness of a remedial order designed to alleviate the effects of past segregative practices by requiring that public housing be developed in areas that will afford respondents an opportunity to reside in desegregated neighborhoods. But HUD contends that the *Milliken* decision bars a remedy affecting

¹² The Court in *Milliken* required either a showing of an interdistrict violation or a significant segregative effect "[b]efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes." *Id.*, at 744. In its *amicus* memorandum in *Milliken*, the United States argued that an interdistrict remedy in that case would require "the restructuring of state or local government entities" and result in "judicial interference with state prerogatives concerning the organization of local governments."

its conduct beyond the boundaries of Chicago for two reasons. First, it asserts that such a remedial order would constitute the grant of relief incommensurate with the constitutional violation to be repaired. And, second, it claims that a decree regulating HUD's conduct beyond Chicago's boundaries would inevitably have the effect of "consolidat[ing] for remedial purposes" governmental units not implicated in HUD's and CHA's violations. We address each of these arguments in turn.

A

We reject the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD that will affect its conduct in the greater metropolitan area. The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief. See 418 U. S., at 744. Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy," *North Carolina State Board of Education v. Swann*, 402 U. S. 43, 46, and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis v. School Comm'rs of Mobile County*, 402 U. S. 33, 37. As the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education*: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U. S., at 15.

Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.¹³ As we noted in Part II, *supra*, the District Court's proposed remedy in *Milliken* was impermissible because of the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct. Here, unlike the desegregation remedy found erroneous in *Milliken*, a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail coercion of uninvolved governmental units, because both CHA and HUD have the authority to operate outside the Chicago city limits.¹⁴

¹³ Although the State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 U. S., at 734-735, n. 16, the Court in *Milliken* concluded that the interdistrict order was a wrongful exercise of judicial power because prior cases had established that such violations are to be dealt with in terms of "an established geographic and administrative school system," *id.*, at 746, and because the State's educational structure vested substantial independent control over school affairs in the local school districts. See *id.*, at 742-744. In *Milliken*, a consolidation order directed against the State would of necessity have abrogated the rights and powers of the suburban school districts under Michigan law. See *id.*, at 742 n. 20. Here, by contrast, a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law. See Part III-B, *infra*.

¹⁴ Illinois statutes permit a city housing authority to exercise its powers within an "area of operation" defined to include the territorial boundary of the city and all of the area within three miles beyond the city boundary that is not located within the boundaries of another city, village, or incorporated town. In addition, the housing authority may act outside its area of operation by contract with another housing authority or with a state public body

In this case, it is entirely appropriate and consistent with *Milliken* to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs. Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits. That HUD recognizes this reality is evident in its administration of federal housing assistance programs through "housing market areas" encompassing "the geographic area 'within which all dwelling units . . . are in competition with one another as alternatives for the users of housing.'" Department of Housing and Urban Development, *FHA Techniques of Housing Market Analysis* 8 (Jan. 1970), quoting the Institute for Urban Land Use and Housing Studies, *Housing Market Analysis: A Study of Theory and Methods*, c. 2 (1953). The housing market area "usually extends beyond the city limits" and in the larger markets "may extend into several adjoining counties." *FHA Techniques of Housing Market Analysis*, *supra*, at 12.¹⁵ An order against HUD and CHA regulating their conduct in the greater metropolitan area will

not within the area of operation of another housing authority. Ill. Rev. Stat. c. 67½, §§ 17 (b), 27c (1973).

Although the state officials in *Milliken* had the authority to operate across school district lines, the exercise of that authority to effectuate the court's desegregation order would have eliminated numerous independent school districts or at least have displaced important powers granted those uninvolved governmental entities under state law. See n. 13, *supra*.

¹⁵ In principal markets such as Chicago, the Standard Metropolitan Statistical Area is coterminous with the housing market area. See Department of Housing and Urban Development, *FHA Techniques of Housing Market Analysis* 13 (Jan. 1970); Department of Housing and Urban Development, *Urban Housing Market Analysis* 5 (1966).

do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with the "nature and extent of the constitutional violation." 418 U. S., at 744. To foreclose such relief solely because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken's* principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct.

B

The more substantial question under *Milliken* is whether an order against HUD affecting its conduct beyond Chicago's boundaries would impermissibly interfere with local governments and suburban housing authorities that have not been implicated in HUD's unconstitutional conduct. In examining this issue, it is important to note that the Court of Appeals' decision did not endorse or even discuss "any specific metropolitan plan" but instead left the formulation of the remedial plan to the District Court on remand. 503 F. 2d, at 936. On rehearing, the Court of Appeals characterized its remand order as one calling "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in *Milliken v. Bradley*." *Id.*, at 940. In the current posture of the case, HUD's contention that any remand for consideration of a metropolitan area order would be impermissible as a matter of law must necessarily be based on its claim at oral argument "that court-ordered metropolitan relief in this case, no matter how gently it's gone about, no matter how it's framed, is bound to require HUD to ignore the safeguards of local autonomy and local political processes" and therefore to violate the limitations on federal judicial power

established in *Milliken*. In addressing this contention we are not called upon, in other words, to evaluate the validity of any specific order, since no such order has yet been formulated.

HUD's position, we think, underestimates the ability of a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without overstepping the limits of judicial power established in the *Milliken* case. HUD's discretion regarding the selection of housing proposals to assist with funding as well as its authority under a recent statute to contract for low-income housing directly with private owners and developers can clearly be directed toward providing relief to the respondents in the greater Chicago metropolitan area without preempting the power of local governments by undercutting the role of those governments in the federal housing assistance scheme.

An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy.¹⁶ Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in federally assisted programs including, of course, public housing programs.¹⁷ Based upon this statutory prohibition, HUD in 1967 issued site-approval rules for low-rent

¹⁶ In the District Court, HUD filed an appendix detailing the various federal programs designed to secure better housing opportunities for low-income families and represented that "the Department will continue to use its best efforts in review and approval of housing programs for Chicago which address the needs of low income families."

¹⁷ It was this statutory prohibition that HUD was held to have violated by its funding of CHA's housing projects. See 448 F. 2d, at 740.

housing designed to avoid racial segregation and expand the opportunities of minority group members "to locate outside areas of [minority] concentration." Department of Housing and Urban Development, Low-Rent Housing Manual, § 205.1, ¶ 4g (Feb. 1967 rev.). Title VIII of the Civil Rights Act of 1968 expressly directed the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the Act's fair housing policy. 82 Stat. 85, 42 U. S. C. § 3608 (d)(5).

Among the steps taken by HUD to discharge its statutory duty to promote fair housing was the adoption of project-selection criteria for use in "eliminating clearly unacceptable proposals and assigning priorities in funding to assure that the best proposals are funded first." HUD Evaluation of Rent Supplement Projects and Low-Rent Housing Assistance Applications, 37 Fed. Reg. 203 (1972). In structuring the minority housing opportunity component of the project-selection criteria, HUD attempted "to assure that building in minority areas goes forward only after there truly exist housing opportunities for minorities elsewhere" in the housing market and to avoid encouraging projects located in substantially racially mixed areas. *Id.*, at 204. See 24 CFR § 200.710 (1975). See generally Maxwell, HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness"?, 48 Notre Dame Law. 92 (1972).¹⁸ More recently, in

¹⁸ A HUD study of the implementation of the project-selection criteria revealed that the actual operation of the minority housing opportunity criterion depends on the definition of "area of minority concentration" and "racially mixed" area employed by each field office. The meaning of those terms, which are not defined in the applicable regulations, 24 CFR § 200.710 (1975), varied among field offices and within the jurisdiction of particular field offices. Department of Housing and Urban Development, Implementation of HUD Project Selection Criteria for Subsidized Housing: An Evaluation 116-117 (Dec. 1972).

the Housing and Community Development Act of 1974, Congress emphasized the importance of locating housing so as to promote greater choice of housing opportunities and to avoid undue concentrations of lower income persons. See 88 Stat. 633, 42 U. S. C. §§ 5301 (c)(6), 5304 (a)(4)(A), (C)(ii) (1970 ed., Supp. IV); H. R. Rep. No. 93-1114, p. 8 (1974).

A remedial plan designed to insure that HUD will utilize its funding and administrative powers in a manner consistent with affording relief to the respondents need not abrogate the role of local governmental units in the federal housing-assistance programs. Under the major housing programs in existence at the time the District Court entered its remedial order pertaining to HUD, local housing authorities and municipal governments had to make application for funds or approve the use of funds in the locality before HUD could make housing-assistance money available. See 42 U. S. C. §§ 1415 (7)(b), 1421b (a)(2). An order directed solely to HUD would not force unwilling localities to apply for assistance under these programs but would merely reinforce the regulations guiding HUD's determination of which of the locally authorized projects to assist with federal funds.

The Housing and Community Development Act of 1974, amending the United States Housing Act of 1937, 88 Stat. 653, 42 U. S. C. § 1437 *et seq.* (1970 ed., Supp. IV), significantly enlarged HUD's role in the creation of housing opportunities. Under the § 8 Lower-Income Housing Assistance program, which has largely replaced the older federal low-income housing programs,¹⁹ HUD

¹⁹ In fiscal year 1975, new contract commitments under the § 8 program were approximately \$10.7 billion, as compared to total estimated new contract commitments of approximately \$13.35 billion for all federally subsidized housing programs. The comparable figures for fiscal year 1976 indicate that \$22.725 billion of a total

may contract directly with private owners to make leased housing units available to eligible lower income persons.²⁰ As HUD has acknowledged in this case, "local governmental approval is no longer explicitly required as a condition of the program's applicability to a locality." Brief for Petitioner 33-34. Regulations governing the § 8 program permit HUD to select "the geographic area or areas in which the housing is to be constructed," 24 CFR § 880.203 (b) (1975), and direct that sites be chosen to "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons." §§ 880.112 (d), 883.209 (a) (3). See §§ 880.112 (b), (c), 883.209 (a) (2), (b) (2). In most cases the Act grants the unit of local government in which the assistance is to be provided the right to comment on the application and, in certain specified circumstances, to preclude the Secretary of HUD from approving the application. See 42 U. S. C. §§ 1439 (a)-(c) (1970 ed., Supp. IV).²¹

of \$24.8 billion in new contract commitments are to be made under the § 8 program. See Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1976, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess., pt. 5, pp. 85-86 (1975). See also *id.*, at 119 (testimony of HUD Secretary Hills).

²⁰ Under the § 8 program, HUD contracts to make payments to local public housing agencies or to private owners of housing units to make up the difference between a fair market rent for the area and the amount contributed by the low-income tenant. The eligible tenant family pays between 15% and 25% of its gross income for rent. See 42 U. S. C. § 1437f (1970 ed., Supp. IV).

²¹ If the local unit of government in which the proposed assistance is to be provided does not have an approved housing-assistance plan, the Secretary of HUD is directed by statute to give the local governmental entity 30 days to comment on the proposal, after which time the Secretary may approve the project unless he determines that there is not a need for the assistance. 42 U. S. C. § 1439 (c) (1970 ed., Supp. IV). In areas covered by an approved

Use of the § 8 program to expand low-income housing opportunities outside areas of minority concentration would not have a coercive effect on suburban municipalities. For under the program, the local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to require that zoning and other land-use restrictions be adhered to by builders.

In sum, there is no basis for the petitioner's claim that court-ordered metropolitan area relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan area relief order directed to HUD would not consolidate or in any way restructure local

plan, the local governmental entity is afforded a 30-day period in which to object to the project on the ground that it is inconsistent with the municipality's approved housing-assistance plan. If such an objection is filed, the Secretary may nonetheless approve the application if he determines that the proposal is consistent with the housing-assistance plan. § 1439 (a). The local comment and objection procedures do not apply to applications for assistance involving 12 or fewer units in a single project or development. § 1439 (b).

The ability of local governments to block proposed § 8 projects thus depends on the size of the proposed project and the provisions of the approved housing-assistance plans. Under the 1974 Act, the housing-assistance plan must assess the needs of lower income persons residing in or expected to reside in the community and must indicate the general locations of proposed housing for lower income persons selected in accordance with the statutory objective of "promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons." 42 U. S. C. §§ 5304 (a) (4) (A), (C) (ii) (1970 ed., Supp. IV). See H. R. Rep. No. 93-1114, p. 8 (1974). See also *City of Hartford v. Hills*, 408 F. Supp. 889 (Conn. 1976). In view of these requirements of the Act, the location of subsidized housing in predominantly white areas of suburban municipalities may well be consistent with the communities' housing-assistance plans.

governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.

Since we conclude that a metropolitan area remedy in this case is not impermissible as a matter of law, we affirm the judgment of the Court of Appeals remanding the case to the District Court "for additional evidence and for further consideration of the issue of metropolitan area relief." 503 F. 2d, at 940. Our determination that the District Court has the authority to direct HUD to engage in remedial efforts in the metropolitan area outside the city limits of Chicago should not be interpreted as requiring a metropolitan area order. The nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion, after affording the parties an opportunity to present their views.

The judgment of the Court of Appeals remanding this case to the District Court is affirmed, but further proceedings in the District Court are to be consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, concurring.

I dissented in *Milliken v. Bradley*, 418 U. S. 717

(1974), and I continue to believe that the Court's decision in that case unduly limited the federal courts' broad equitable power to provide effective remedies for official segregation. In this case the Court distinguishes *Milliken* and paves the way for a remedial decree directing the Department of Housing and Urban Development to utilize its full statutory power to foster housing projects in white areas of the greater Chicago metropolitan area. I join the Court's opinion except insofar as it appears to reaffirm the decision in *Milliken*.

Before KOELSCH, DUNIWAY and WRIGHT, Circuit Judges.

PER CURIAM:

The district court, following a hearing, dismissed this action for plaintiff's failure to comply with several orders of the court relating to pretrial matters. These orders were based upon various of the Federal Rules of Civil Procedure and local court rules. Plaintiff did not appeal nor pursue any procedure to reinstate the cause until some five months after the dismissal when he filed a motion, ostensibly under Rule 60(b) (6) Fed.R.Civ.P., to be relieved of the judgment. The district court denied him relief, hence this appeal.

[1] In order to bring himself within the limited area of Rule 60(b) (6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal. Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 266 (1949); Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 207 (1950). Plaintiff made no such showing.

Does the record reveal facts, or facts, which would tend to show that plaintiff's failure to seek review was "excusable neglect," a ground for relief under Rule 60(b) (1). To the contrary, it discloses plaintiff's entire lack of diligence and attention to the

[2] 60(b) motions are addressed to the sound discretion of the district court (Title v. United States, 263 F.2d 101, 10 Cir. 1959). As indicated above, the granting of plaintiff's motion was well within that court's discretion. The result is therefore affirmed.

Dorothy GAUTREAUX et al., Plaintiffs-Appellants,

v.

George W. ROMNEY, Secretary of the Department of Housing and Urban Development, Defendant-Appellee.

No. 71-1073.

United States Court of Appeals,
Seventh Circuit.

Sept. 10, 1971.

Suit by Negro tenants or applicants for public housing in the City of Chicago, against the Secretary of the Department of Housing and Urban Development, for declaratory and injunctive relief with respect to racially discriminatory aspects of the Chicago public housing system. The United States District Court for the Northern District of Illinois, Richard B. Austin, J., dismissed the complaint, and the tenants and applicants appealed. The Court of Appeals, Duffy, Senior Circuit Judge, held that the case was not moot notwithstanding the outcome of a companion case, and that under evidence which showed the significant role played by the Department of Housing and Urban Development in construction of the segregated public housing system, the Department's knowing acquiescence in the municipal agency's admittedly discriminatory housing program violated the due process clause of the Fifth Amendment and the Civil Rights Act of 1964.

Remanded.

1. Federal Civil Procedure $\S$ 2533

Where supporting affidavits and other documents had been submitted by both parties, dismissal of count for failure to state claim upon which relief could be granted was to be treated as grant of motion for summary judgment. Fed. Rules Civ.Proc. rules 12(b), 56, 28 U.S.C.A.

2. Courts $\S$ 406.9(9)

Determination of just what type of equitable remedy might be appropriate in

case involving alleged discrimination in federal housing program was question best left initially to sound discretion of district court.

3. Courts $\S$ 282.2(11)

Federal District Court had jurisdiction of suit in equity challenging alleged racial discrimination which was said to have violated Fifth Amendment. 28 U.S.C.A. $\S$ 1331, 1343(4); U.S.C.A. Const. Amend. 5.

4. United States $\S$ 125(24)

Doctrine of sovereign immunity did not bar suit challenging alleged unconstitutional and unauthorized conduct by federal officer. 28 U.S.C.A. $\S$ 1331; U.S.C.A. Const. Amends. 5, 14.

5. Declaratory Judgment $\S$ 203

Voluntary promise by defendant Secretary of Department of Housing and Urban Development to abide by decision in companion case and to stop any further racially discriminatory acts on its part was not sufficient ground for dismissal for mootness.

6. Declaratory Judgment $\S$ 203

Where both declaratory and injunctive relief against construction of specific projects was originally sought in suit challenging alleged racial discrimination, but decree utilizing certain programs of the defendant Department of Housing and Urban Development still remained possible form of relief not already available through companion case, controversy was not moot.

7. Declaratory Judgment $\S$ 203

Where determination whether past conduct of defendant Secretary of Housing and Urban Development had violated constitution or applicable federal statute remained open question, and entry of declaratory judgment would have significant consequences in determining extent of any further relief deemed necessary in event that practices found to be discriminatory were resumed, and decree in companion case was not binding against Department or its Secretary, issues remaining were capable of repetition yet evading review and case was not

moot. U.S.C.A.Const. Amends. 5, 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

8. Civil Rights ⇨3

Housing and Urban Development Department's approval and funding of segregated municipal housing agency's housing sites in violation of Civil Rights Act and Fifth Amendment could not be excused as attempted accommodation of admittedly urgent need for housing with realty of community and municipal council resistance. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; U.S.C.A. Const. Amend. 5.

9. Civil Rights ⇨1

That it was federal agency or officer charged with act of racial discrimination in violation of Civil Rights Act and Fifth Amendment did not alter pertinent standards. U.S.C.A.Const. Amend. 5; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

10. Civil Rights ⇨3

Constitutional Law ⇨254

Under evidence which showed significant role played by Department of Housing and Urban Development in construction of segregated public housing system in Chicago, Department's knowing acquiescence in municipal agency's admittedly discriminatory housing program violated due process clause of Fifth Amendment and Civil Rights Act of 1964. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; U.S.C.A.Const. Amend. 5.

Alexander Polikoff, Bernard Weisberg, Merrill A. Freed, Charles R. Markels, Milton I. Shadur, Stuart R. Cohn, Cecil

C. Butler, Chicago, Ill., for plaintiffs-appellants.

Alan S. Rosenthal, Anthony J. Steinmeyer, Dept. of Justice, Washington, D. C., William J. Bauer, U. S. Atty., L. Patrick Gray, III, Asst. Atty. Gen., Chicago, Ill., for defendant-appellee.

Before SWYGERT, Chief Judge, DUFFY, Senior Circuit Judge, and FAIRCHILD, Circuit Judge.

DUFFY, Senior Circuit Judge.

This suit is brought against the Secretary of the Department of Housing and Urban Development (HUD). Plaintiffs are all Negro tenants or applicants for public housing in the City of Chicago. They seek, on behalf of themselves and all other Negroes similarly situated, a declaration that the Secretary has "assisted in the carrying on * * * of a racially discriminatory public housing system, within the City of Chicago, Illinois." Plaintiffs further seek to enjoin the Secretary from making available to the Chicago Housing Authority any federal financial assets to be used in connection with or in support of the racially discriminatory aspects of the Chicago public housing system. "Such other and further relief as the Court may deem just and equitable" is also requested.

Stated another way, the complaint herein challenges the role played by HUD¹ and its Secretary in the funding and construction of certain public housing in the City of Chicago. The role played by the Chicago Housing Authority (CHA), which is not a party to this suit, in the construction of the same public housing already has been held to have been racially discriminatory (*Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D.Ill., 1969)).² Further con-

1. The Department of Housing and Urban Development was created by Public Law #89-174, enacted on September 9, 1965. All duties of the Public Housing Administration and other predecessor agencies were transferred to the authority of HUD by that law. We shall refer to HUD as both the predecessor and present agency.

2. Because of the racial distinctions expressly found to be present in the tenant assignment and site selection practices involved in the public housing sites at issue in the CHA case and in this present suit, we do not deal with a situation such as confronted the Supreme Court in its recent decision of *James v. Valtierra*, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).

Cite as 448 F.2d 731 (1971)

struction of public housing by CHA on a segregated site selection basis has been permanently enjoined. (304 F.Supp. 736). A good many of the facts pertaining to this present controversy are reported at 296 F.Supp. 907; 304 F.Supp. 736 and in this Court's decision at 436 F.2d 306 (7 Cir., 1970), cert. den. 402 U.S. 922, 91 S.Ct. 1378, 28 L.Ed.2d 661 (1971). We shall avoid unnecessary repetition where possible.

The complaint in this case was filed simultaneously with the complaint in the Gautreaux v. CHA case, an order of the District Court stayed all proceedings in this suit until disposition of the companion CHA case. Defendants moved to dismiss the complaint herein and filed certain affidavits and documents in support of said motion. On October 31, 1969, plaintiff moved for summary judgment under Rule 56 (F.R.Civ.P.) asserting that no dispute as to any material fact existed.

On September 1, 1970, the District Court entered its memorandum opinion dismissing all four counts of this complaint. Count I had been brought under the general federal question statute (28 U.S.C. § 1331) and the Fifth Amendment to the United States Constitution. It alleged that the Secretary, through his action in funding and approving CHA's racially discriminatory programs, had violated the Due Process Clause of that amendment. The Court first found that plaintiffs had standing to bring suit under all counts and that the requisite jurisdictional amount was present. The Court then concluded that "the Fifth Amendment under the circumstances here alleged [did] not authorize this suit." This ruling was a holding that there was a lack of jurisdiction to bring Count I.

[1] Jurisdiction as to Count II was grounded on 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4). Count II alleged that the Secretary's acts had violated 42 U.S.C. § 2000d (Section 601 of the Civil Rights

Act of 1964). The District Court dismissed Count II for failure to state a claim upon which relief could be granted.³ The Court's dismissal was based upon the finding that HUD's financial assistance to CHA was insufficient to make it a "joint participant" in CHA's racially discriminatory conduct.

Counts III and IV were identical with Counts I and II respectively, except that deliberate discriminatory conduct on the part of CHA had not been alleged. The District Court dismissed these counts for failure to allege such deliberate CHA action.

Finally, the Court expressed the view that the doctrine of sovereign immunity was, in part, applicable to bar this suit.

This appeal followed. The Government has abandoned both the lack of jurisdiction as to Count I and sovereign immunity as possible grounds for affirmance. Plaintiffs have not strongly contested the dismissal of Counts III and IV of the complaint. Thus, the central question presented for review reduces to whether summary judgment in favor of either party is proper on Counts I or II of the complaint. The Government argues that the District Court's grant of summary judgment in its favor is proper and advances as an additional ground for affirmance the contention that the case is now moot.

The Government's position on appeal is that this present suit is somewhat superfluous inasmuch as full and complete equitable relief has been made available to these same plaintiffs through the Gautreaux v. Chicago Housing Authority case. See: 296 F.Supp. 907; 304 F.Supp. 736. The Government is said to be in complete agreement with the "aims and objectives" of that case and that proposition is not strongly contested by the plaintiffs here.

We understand this contention by the Secretary to bear upon only two issues: mootness, and the scope of any equita-

3. Since supporting affidavits and other documents had been submitted by both parties, this should actually be treated

as the grant of a motion for summary judgment. Rule 12(b), Rule 56 F.R. Civ.P.

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ble relief which might be deemed necessary by the District Court. The second issue, the extent of possible equitable relief is extremely important, but is not before this Court on this present appeal. We deal here only with whether summary judgment in favor of either party is proper on the issue of the Secretary's alleged *liability* for events which occurred in prior years. Liability for past conduct is totally separate from the question of appropriate future relief. In deciding the liability issue, it would thus not be appropriate for us to consider the effect which the decree entered in the companion case (304 F.Supp. 736) might have in minimizing the need for an extensive decree in this suit.

[2] Similarly, a determination of just what type of equitable remedy might be appropriate in cases of this sort is a question best left initially to the sound discretion of the District Court. *Brown v. Board of Education* (Brown II), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). Even though to the writer of this opinion it might appear that extensive relief would not be necessary, we do not, in any way, wish to anticipate the District Court on an issue properly for its decision.

Thus, the only issue presently before us which might be affected by the entry of the *Gautreaux v. CHA* injunction is mootness. We shall consider the effect of the prior injunction as it bears on that issue.

Before turning to the issues, however, this Court wishes to state its strong support for the actions of the District Judge throughout the course of this entire litigation. The District Judge who decided the *Gautreaux v. CHA* case and who has supervised the decree entered there-

to, is the same District Judge who dismissed this present suit. The administration of the decree in the former case has unquestionably been a difficult and time-consuming task, presenting unique problems for resolution,⁴ and generating enormous public interest. This Court would be extremely reluctant to interfere with the exercise of that District Judge's sound discretion in matters pertaining to this controversy, and no statement in this opinion should be so construed. Nevertheless, since important issues of law are presented by this appeal and since the basis of the District Court's dismissal of this present suit below seems to have been a feeling that "the putative limits [of the Court's] powers" had been "effectively circumscribed," rather than a feeling that discretion dictated the dismissal of a suit thought to be unnecessary, it is apparent that review by this Court is compelled.

JURISDICTION AS TO COUNT I.

[3] Since courts always are free to review jurisdiction, we shall examine this point briefly even though not contested by defendant on appeal. We find jurisdiction under 28 U.S.C. § 1331 and the Fifth Amendment to be present in this case. The jurisdictional statute, speaks in alternative terms with respect to the "Constitution, laws, or treaties of the United States * * *."⁵ Thus, a plain reading would seem to encompass a suit of this present type which directly challenges conduct alleged to have violated the Fifth Amendment. That such a reading is correct was settled by the Supreme Court in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) where the Court held that: "* * * where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court * * * must entertain the suit."

4. For an account of at least one set of unique problems confronting the District Judge see this Court's opinion in *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306.

5. The statute reads in full: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."

Cite as 448 F.2d 731 (1971)

327 U.S. 681-682, 66 S.Ct. 776. See also: *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Hicks v. Weaver*, 302 F.Supp. 619 (D.La., 1969). Jurisdiction would still exist even though we were of the opinion that no cause of action under Count I had been stated. *Bell v. Hood*, *supra*, 327 U.S. at 682, 66 S.Ct. 773. Since all other requirements under 28 U.S.C. § 1331 have been met, we find that jurisdiction is present under Count I to bring a suit in equity challenging alleged racial discrimination which is said to have violated the Fifth Amendment.⁶

SOVEREIGN IMMUNITY.

[4] Since the defendant has chosen to abandon any claim of sovereign immunity on appeal, we do not think that that point merits an extended discussion on our part. In any case, the doctrine does not bar a suit such as this which is challenging alleged unconstitutional and unauthorized conduct by a federal officer. *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *Bolling v. Sharpe*, *supra*; *Shannon v. HUD*, 436 F.2d 809 (3 Cir., 1970). See also: *Powelton Civic Home Owners Association v. HUD*, 284 F.Supp. 809 (E.D.Pa., 1968); *Hicks v. Weaver*, *supra*.

MOOTNESS:

As noted previously, this appeal follows the entry of an extensive Judgment Order in *Gautreaux v. Chicago Housing Authority*, 304 F.Supp. 736, as modified in 436 F.2d 306. The decree provides in part that CHA shall not "* * * seek any approval or request or accept any assistance from any government agency with respect thereto * * *" unless the plan for such assistance complies with other provisions of the Court's decree. The Secretary contends that HUD's stated full agreement with the aims and objectives of the Judgment Or-

der, along with the issuance of an injunction against the exact practices now before us, make this present controversy moot.⁷

[5] To some extent, the Secretary's argument is that its own voluntary promise to abide by the decision in the companion case and to stop any further racially discriminatory acts on its part is a viable ground for this Court to dismiss for mootness. We have no doubt that such assertions are offered in good faith, but we do not think that they are sufficient for us to hold this appeal moot. It long has been held that "* * * voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

[6] A more persuasive argument is that the injunction entered in *Gautreaux v. CHA* renders this controversy moot since CHA is now prohibited from "accept[ing] any assistance from [HUD]" unless CHA's programs strictly comply with the specifications of the decree in that case. Thus, it is argued, a ruling here would be merely "advisory," lacking "concrete legal issues, presented in actual cases * * *." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947), quoted in *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

We conclude, however, that the entry of the companion decree does not make this suit moot. The fact that some of the injunctive relief originally requested is no longer possible does not affect the issues presently before us. "Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still consid-

6. We agree with the District Court that the requisite jurisdictional amount has been stated.

7. Had the cases been consolidated and decided together, the possibility of moot-

ness would not, of course, have arisen. Thus, in *Hicks v. Weaver*, *supra*, the Court entered an injunction against both the local housing authority and the Secretary of HUD.

ered the remaining requests." *Powell v. McCormack*, 395 U.S. 486, 496, n. 8, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). In this suit, both declaratory and injunctive relief against construction of specific projects was originally sought. Since some of those projects now have been completed, it is obvious that full injunctive relief in favor of plaintiffs cannot now be given. But that fact does not, of itself, make this case moot. *Shannon v. HUD*, *supra*, 436 F.2d at 822.⁸ At the present time, a declaratory judgment as well as such "other and further relief as the court may deem just and equitable" is requested.

Plaintiffs have contended that such "other and further relief" might include a more vigorous utilization of the several different types of housing programs which HUD administers in the form of a decree aimed at " * * * remedying the continuing effects of the discrimination of the past."⁹ Such a decree arguably would represent an equitable remedy going beyond the scope of relief made available through the companion case and, it is contended, might facilitate the overall desired goal of desegregating the public housing sites around Chicago metropolitan area. We express no view on whether such requested relief is either necessary or appropriate. However, as long as a decree utilizing certain HUD programs still remains a possible form of relief not already available through the other case, this Court cannot deem the controversy moot. *Powell v. McCormack*, *supra*.

8. The *Shannon* court stated: "The defendants suggest that because the project has been completed and occupied by rent supplement tenants there is no longer any relief which may feasibly be given. The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the Article III sense. Relief can be given in some form."

9. For example, we are advised that "Section 230 Housing" is a low income hous-

[7] Moreover, even if only the declaratory judgment were demonstrated to be appropriate at this time, this Court would not necessarily be compelled to dismiss for mootness as long as the requisite "case" or "controversy" exists. "A court may grant a declaratory relief even though it chooses not to issue an injunction or mandamus. * * * A declaratory judgment can then be used as a predicate to further relief, including an injunction." *Powell v. McCormack*, *supra*, 395 U.S. at 499, 89 S.Ct. at 1952.

Contrary to the Secretary's arguments, we do not think that the controversy here has been rendered "abstract" by the injunction against CHA's further use of federal funds in a manner not in compliance with the *Gautreaux v. CHA* plan. A determination of whether or not the Secretary's own past conduct violated the Constitution or applicable federal statute remains very much of an open question. The entry of a declaratory judgment here would have significant consequences in determining the extent of any "further relief" deemed necessary, in the event that practices found to be discriminatory were resumed. Most important of all, the decree in the *CHA* case, thorough though it may be, is not binding against HUD or its Secretary.¹⁰ Thus, at the present time, plaintiffs are in the anomalous position of having the full force of the federal judicial power at their command to enforce proven rights against CHA, yet having to rely solely on the voluntary promises of a party whose role is equally important, whose

ing program designed to increase the flow of such housing by favorable interest assistance payments to the mortgage lender. Unlike the public housing programs now before us, local governmental approval is not required for such housing to be constructed. See also: "Section 235" and "Section 231" housing programs.

10. Thus this suit is unlike *Watkins v. CHA*, 406 F.2d 1234, 7 Cir., 1969) where reinstatement of previously evicted named plaintiffs rendered the cause moot, as between the original parties to that same case.

decisions pertaining to this matter may prove to be among the best means of insuring full compliance with the "aims and objectives" of the CHA decree,¹¹ but who never has been a party to that case or bound by its terms.

Under such circumstances, we must conclude that the issues before us are "capable of repetition yet evading review" and that the case is not moot. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911), quoted in *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969). Viewed another way, we are confronted here with " * * * a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, *supra*, 394 U.S. at 108, 89 S.Ct. at 959.

WHETHER A CLAIM IS STATED UNDER THE FIFTH AMENDMENT OR SECTION 601 OF THE 1964 CIVIL RIGHTS ACT

We turn then to the merits. The Government admits that HUD approved and funded CHA-chosen regular family housing sites between 1950 and 1969, knowing that such sites were not "optimal" and that the reason for their exclusive location in black areas of Chicago was that "sites other than in the south or west side, if proposed for regular family housing, invariably encounter[ed] sufficient opposition in the [Chicago City] Council to preclude Council

approval." (Letter from a Public Housing Administration Official to the Chairman of the West Side Federation, October 14, 1965).

Nevertheless, the District Court found that HUD had followed this course only after having made "numerous and consistent efforts * * * to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods." That finding is not directly challenged on appeal. Moreover, given the acknowledged desperate need for public housing in Chicago,¹² HUD's decision was that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of that city.

On review of the District Court's action, we shall treat all of the above facts as true. The question then becomes whether or not, even granting that "numerous and consistent efforts" were made, HUD's knowing acquiescence in CHA's admitted discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964.¹³ Given a previous court finding of liability against CHA (296 F.Supp. 907), the pertinent case-law compels the conclusion that both of these provisions were violated.

[8] HUD's approval and funding of segregated CHA housing sites cannot be excused as an attempted accommodation of an admittedly urgent need for housing with the reality of community and City Council resistance. This question was

11. Favorable HUD action, for example, might have been a factor in the district court's decision to modify the "best efforts" clause of the original Judgment Order in that case so as to order submission of approximately 1500 sites to the City Council in accordance with a specific timetable. See: 436 F.2d 306, 310.

12. The Government's brief points to affidavits submitted by many of the present plaintiffs which starkly illustrate that fact. Plaintiff Gautreaux has accepted public housing in Negro areas only because she had been living in a one bed-

room apartment with a family of six. Plaintiff Odell Jones had moved to segregated public housing with his wife and three children to escape their two rooms in which "the rats had begun to run over the house at will."

13. "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.

* HUD v. ROMNEY
Enjoined - Spirit Mountain / Gold

argued and settled in the companion case as to these exact housing sites and the same City Council. The District Judge there well stated the applicable rule:

"It is also undeniable that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued." (296 F. Supp. at 914).

This court applied much the same rule in affirming a modification of the Judgment Order in the companion decision and in ordering submission of 1500 HUD approved sites to the City Council in accordance with a specific timetable. In rejecting a plea for delay, we pointed to several cases holding " * * * that 'abstention' is inappropriate in constitutional cases of this sort and that community hostility is no reason to delay enforcement of proven constitutional rights." (436 F.2d at 312.)

[9] Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools. *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907; *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108 (2 Cir., 1970), cert. den. 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971). Moreover, the fact that it is a federal agency or officer charged with an act of racial discrimination does not alter the pertinent standards, since " * * * it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, *supra*, 347 U.S. at 500, 74 S.Ct. at 695. See also: *Green v. Kennedy*, 309 F.Supp. 1127, 1136 (D.C. D.C.1970), appeal dismissed 398 U.S. 956, 90 S.Ct. 2169, 26 L.Ed.2d 539 (1970). The reason for courts' near uniform refusal to examine purported good faith motives behind alleged discriminatory

acts was, perhaps, most succinctly put by the Supreme Court in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1963): "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

The fact that a governmental agency might have made "numerous and consistent efforts" toward desegregation has not yet been held to negate liability for an otherwise segregated result. Thus, for example, in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) the local school board admittedly had been "going forward with its preparation for desegregating the Little Rock [Arkansas] school system" (358 U.S. at 8, 78 S.Ct. at 1405), but was still held liable when it abandoned those plans in the face of stiff community and state governmental resistance. See also: *Watson v. City of Memphis*, 373 U.S. 526, 535, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963); *Green v. Kennedy*, *supra*, 309 F.Supp. at 1136.

With the foregoing considerations in mind, then, it is apparent that the "dilemma" with which the Secretary no doubt was faced and with which we are fully sympathetic, nevertheless cannot bear upon the question before us. For example, we have been advised that any further HUD pressure on CHA would have meant cutting off funds and thus stopping the flow of new housing altogether. Taking this assertion as true, still the basis of the "dilemma" boils down to community and local governmental resistance to " * * * the only constitutionally permissible state policy * * *." *Green v. Kennedy*, *supra*, at 1137, a factor which, as discussed above, has not yet been accepted as a viable excuse for a segregated result. So, even though we fully understand the Secretary's position and do not, in any way, wish to limit the exercise of his discretion in housing related matters, still we do not feel free to carve out a wholly new exception to a firmly established general rule which, for at least the last sixteen years, has governed the stand-

ards of assessing liability for discrimination on the basis of race.¹⁴

[10] Turning to the facts now before us, there can be no question that the role played by HUD in the construction of the public housing system in Chicago was significant. The great amount of funds for such construction came from HUD. Between 1950 and 1966 alone HUD spend nearly \$350,000,000 on CHA projects. The Secretary's trial brief acknowledged that "in practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." We find no basis in the record with which to disagree with that conclusion. Moreover, within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's "Annual Contributions Contract" contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone.

It also is not seriously disputed on appeal that the Secretary exercised the above described powers in a manner which perpetuated a racially discriminatory housing system in Chicago, and that the Secretary and other HUD officials were aware of that fact. The actual aspects of that segregated system are fully described at 296 F.Supp. 907 and we shall not recount them here. The fact that HUD knew of such circumstances is

borne out by the District Court's specific finding in this suit that HUD tried to block "the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take." This finding is supported by, among other record items, the HUD letter to the West Side Federation previously referred to (page 737) and by the affidavit of HUD official Bergeron recalling his unsuccessful attempts in the early 1950s "to enlist [Mayor Kennelly's] assistance in having project sites located in white neighborhoods."

On such facts, and given the inapplicability of HUD's "good faith" arguments, we are unable to avoid the conclusion that the Secretary's past actions constituted racially discriminatory conduct in their own right.¹⁵ The fact that the Secretary's exercise of his powers may have more often reflected CHA's own racially discriminatory choices than it did any ill will on HUD's part, does not alter the question now before us.

We are fully sympathetic to the arguments advanced by the Government on appeal, especially, as mentioned above, to the very real "dilemma" which the Secretary faced during these years. On the other hand, against such considerations are not only the principles of law discussed heretofore, but also two recent decisions which hold against this same defendant (or predecessor) and which deal with similar facts. *Shannon v. HUD*, *supra*; *Hicks v. Weaver*, *supra*. We do not think we should ignore those cases.

14. " * * * it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education* (Brown II), *supra*, 349 U.S. at 300, 75 S.Ct. 753 at 756.

15. Our holding thus is not based on the "joint participation" doctrine set forth in *Burton v. Wilmington Parking Authority*, *supra*, and relied upon in the District Court litigation below. We need not discuss the applicability of that doctrine, for it is concerned with a different

inquiry, namely, "upon identifying the requisite 'state action'". (*Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 1796, 29 L.Ed.2d 338) sufficient to render admitted discrimination actionable under the Fourteenth Amendment. In any event, contrary to the Government's assertions on appeal, "joint participation" already has been "extended" to federal government operations. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4 Cir., 1963), cert. den. 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659; *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4 Cir., 1966).

In holding the Secretary liable on nearly identical facts as are now before us, the *Hicks* court reasoned as follows:

"As noted above, HUD was not only aware of the situation in Bogalusa [Louisiana] but it effectively directed and controlled each and every step in the program. * * * HUD thus sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. § 2000d." (302 F.Supp. at 623).

Likewise, in *Shannon* the Third Circuit recently enjoined further action on a HUD decision to change a proposed housing project in Philadelphia from the originally contemplated owner occupied buildings to a 100% rent supplement assistance program (which was found to be the "functional equivalent of a low rent public housing project.") (436 F.2d at 819). The *Shannon* court acknowledged that HUD was vested with broad discretion to supervise its various programs, but held, nevertheless, that " * * * that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing * * * and in favor of fair housing. * * * " (436 F.2d at 819.)

We can find no viable basis for distinguishing the *Hicks* and *Shannon* decisions. The Secretary contends that the relief requested in those two cases differed from that which is sought here. The Government's argument is entirely correct, but has no bearing on the issue of actual liability which, as mentioned previously (page 136) is the only issue now before this Court. The Government's further contention, advanced at oral argument, that *Shannon* should be distinguished as involving only a more stable integrated neighborhood trying to stave off additional public housing, is also factually correct, but legally insignificant. Such a factor might arguably af-

fect the standing of individual plaintiffs to bring suit, but it does not alter the pertinent standard for answering the question of whether or not racial discrimination in the funding and approval of particular programs has occurred.

Finally, we emphasize, as did the *Shannon* court, that " * * * there will be instances where a pressing case may be made for the rebuilding of a racial ghetto." (436 F.2d at 822.) However, the situation before us now *already* has been held not to constitute such a pressing case, and such is the determinative factor. Where the Court in the companion decision previously has held that CHA's "deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued" (296 F.Supp. at 914), it is not possible with consistency to apply a lesser standard against HUD in assessing whether it too is liable for its role on the same identical facts.

So, even while we are fully sympathetic to the arguments advanced by the Secretary on appeal, we must conclude that the great weight of the caselaw favors plaintiffs' position. Since there exist no controverted issues of material fact, we conclude that summary judgment should be granted in plaintiffs' favor on both Counts I and II of the complaint. We hold that HUD, through its Secretary, violated the Due Process Clause of the Fifth Amendment (*Bolling v. Sharpe, supra*; *Hicks v. Weaver, supra*) and also has violated Section 601 of the Civil Rights Act of 1964 (*Shannon v. HUD, supra*; *Hicks v. Weaver, supra*).

In so holding we state *only* that the Secretary must be adjudged liable on these particular facts and again point out that our holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency. It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be nec-

essary to remedy the wrongs which have been found to have been committed.

Such considerations, however, are not the subject for present decision, and we defer to the District Court for their resolution.

Remanded.



**UNITED STATES ex rel. William
IRVING, Petitioner-Appellant,**

v.

**J. Leland CASSCLES, Warden, Sing Sing
Prison, Ossining, New York,
Respondent-Appellee.**

No. 920, Docket 35393.

United States Court of Appeals,
Second Circuit.

Argued June 22, 1971.

Decided Sept. 3, 1971.

Petition by state prisoner for federal habeas corpus. The United States District Court for the Southern District of New York, 332 F.Supp. 1083, Edward, Weinfeld, J., dismissed petition, and petitioner appealed. The Court of Appeals held that where, on appeal from state conviction and in petition for federal habeas corpus, state prisoner claimed that he should have been permitted to withdraw guilty plea, that confession to fellow inmate should have been held inadmissible and that trial court should not have permitted perpetuation of testimony of fellow inmate on ground that he was about to be deported, and appeal from denial of petition for writ of error coram nobis, claiming that petitioner had been coerced into pleading guilty, that promises were made to induce his plea, and that perjured testimony was present-

ed on Huntley hearing, was pending in state courts, federal habeas corpus was denied for failure to exhaust state remedies, since claims presented in coram nobis application were closely related to issues involved on appeal from conviction.

Affirmed.

1. Habeas Corpus —45.3(9)

Where, on appeal from state conviction and in petition for federal habeas corpus, state prisoner claimed that he should have been permitted to withdraw guilty plea, that confession to fellow inmate should have been held inadmissible and that trial court should not have permitted perpetuation of testimony of fellow inmate on ground that he was about to be deported, and appeal from denial of petition for writ of error coram nobis, claiming that petitioner had been coerced into pleading guilty, that promises were made to induce his plea and that perjured testimony was presented on Huntley hearing, was pending in state courts, federal application was denied for failure to exhaust state remedies, since claims presented in coram nobis application were closely related to issues involved on appeal from conviction.

2. Habeas Corpus —45.3(9)

Where, although state remedies as to certain issues have been exhausted, they are closely related issues as to what state remedies have not been exhausted, application for federal habeas corpus should be denied. 28 U.S.C.A. § 2254(b).

H. Howard Friedman, New York City,
for appellant.

Amy Juviler, Asst. Atty. Gen. of State
of New York (Samuel A. Hirshowitz,
First Asst. Atty. Gen., Louis J. Lefkowitz,
Atty. Gen. of the State of New
York, on the brief), for appellee.

Before SMITH and HAYS, Circuit
Judges, and POLLACK, District Judge.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

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as an analogy, as a velop a principle, is a from the decision on of facts which an- en the court has that before it, unless there lling reason, it is ex- the former decision. urther and endeavors iple, *stare decisis* does first tentative grop- e, what is said in the nt of the principle by ial inclusion and ex- g authority.⁹

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SYSTEM

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NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED PEOPLE, Puerto Rican Civil Rights League, Inc., Older Americans Coalition, Wilmington United Neighborhoods, Brandywine Trinity United Methodist Church, On behalf of their members and others similarly situated, and Sarah Bratcher, Raymond W. Brown, Maria Galindez, for herself and as parent and guardian for her minor children, Reynaldo Galindez, and Pedro Galindez, Milagro Quinones, Denise Smokes, Maria Miran, On behalf of themselves and others similarly situated, City of Wilmington, Appellants,

v.

The MEDICAL CENTER, INC., David Mathews, U.S. Secretary of Health, Education, and Welfare, Amos Burke, Director of the Bureau of Comprehensive Health Planning, William C. Gordon, Director of the Health Planning Council, Inc., Appellees.

Nos. 78-1616, 78-1943.

United States Court of Appeals,
Third Circuit.

Argued Jan. 10, 1979.

Decided June 4, 1979.

Organizations and individuals representing minority and handicapped persons residing in Wilmington, Delaware, brought suit against medical center and government officials claiming that federal statutes were violated by planned relocation of the medical facility from an inner city to an outlying suburban location. The United States District Court for the District of Delaware, James L. Latchum, Chief Judge, ruled that plaintiffs did not have a private cause of action under certain federal statutes, and they appealed. The Court of Appeals, James Hunter, III, Circuit Judge, held that private causes of action for the benefit of classes protected by them were created in provisions of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 forbidding discrimination in federal programs

based on race, color, national origin or handicapped status.

Remanded.

Civil Rights §9.5

Private causes of action for benefit of classes protected by them were created by enactment of provisions in Civil Rights Act of 1964 and Rehabilitation Act of 1973 forbidding discrimination in federally funded programs against persons on basis of race, color, national origin or handicapped status; organizations of such persons were therefore entitled to trial on merits of their suit contending that unlawful discrimination would result from planned relocation of medical facility from existing inner city divisions to outlying suburban locations. Civil Rights Act of 1964, §§ 201 et seq., 601 et seq., 701 et seq., 42 U.S.C.A. §§ 2000a et seq., 2000d et seq., 2000e et seq.; rehabilitation Act of 1973, § 504 as amended 29 U.S.C.A. § 794; Fed. Rules Civ. Proc. rule 23(b)(2), 28 U.S.C.A.; Social Security Act, § 1122, 42 U.S.C.A. § 1320a-1; 5 U.S.C.A. § 706(2)(A, F); U.S.C.A. Const. Amendments. 5, 14; Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; 42 U.S.C.A. § 1988; Emergency School Aid Act, § 718, 20 U.S.C.A. § 1617; Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

Marilyn G. Rose (argued), Herbert Semmel, Washington, D. C., Douglas Shachtman, Jeffrey S. Goddess, Wilmington, Del., for appellants.

Rodney M. Layton (argued), William J. Wade, Richards, Layton & Finger, Wilmington, Del., for appellee The Wilmington Medical Center, Inc.

Rebecca L. Ross (argued), Barbara Allen Babcock, William G. Kanter, Barbara O'Malley, Washington, D. C., for appellee Joseph A. Califano, Jr., Secretary of the Department of Health, Education and Welfare.

William L. Taylor, Roger S. Kuhn, Washington, D. C., for amici curiae, League of Women Voters of the United States, National Urban League, Puerto Rican Legal Defense and Education Fund, Inc., and Women's Legal Defense Fund.

Before HUNTER and GARTH, Circuit Judges, and BROTMAN,* District Judge.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

Appellants brought this action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), contending that a proposed health facility relocation would have a discriminatory impact. The district court directed appellants to pursue the administrative remedy provided by section 602 of Title VI. The court subsequently found that Title VI and section 504 do not create private rights of action to seek declaratory and injunctive relief for violations of the stat-

* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

1. As appellants seek only declaratory and injunctive relief, we need not consider whether a private cause of action for damages is available.
2. This action has already been the object of extensive and protracted discovery. At oral argument counsel committed themselves to expediting the remaining discovery and to compressing the time required to try the merits of appellants' claims. In light of what has already been accomplished by way of discovery, and in reliance on the representations of counsel, we are confident that there will be no delays in bringing this case to an early final decision. These observations are in no way intended to control the district court's discretion in structuring or limiting discovery or other pretrial procedures.
3. The district court granted class certification pursuant to Rule 23(b)(2), Fed.R.Civ.P., and the class was designated as follows:
 1. All black and Puerto Rican residents of Wilmington and other areas of New Castle County who are better served by the existing locations of the Wilmington Medical Center Incorporated ("Medical Center");

utes, found that the administrative remedy was the sole remedy available to appellants, and then affirmed HEW's administrative decision that the proposed relocation would not have a discriminatory impact. Because we find that Title VI and section 504 create private rights of action for plaintiffs who seek relief other than funding termination,¹ we reverse and remand the case to the district court for a trial on the merits.²

I.

Appellants are five organizations and six individuals representing minority and handicapped persons who reside in Wilmington, Delaware.³ Defendants are the Wilmington Medical Center ("WMC"), the Secretary of the United States Department of Health, Education, and Welfare ("HEW"), the Director of the Bureau of Comprehensive Health Planning of Delaware ("BCHP"), and the Chairman of the Health Planning Council, Inc. ("HPC").⁴

This case arises from the controversy surrounding the decision of the Wilmington Medical Center to relocate major tertiary

2. All handicapped residents of Wilmington and other areas of New Castle County who are better served by the existing locations of the Medical Center.
453 F.Supp. 280, 284 (D.Del.1978).

4. WMC is the recipient of federal support which accounts for approximately 35% of its total budget. WMC is sued because it chose an allegedly discriminatory relocation site. The other defendants are all participants in the review process established by § 1122 of the Social Security Act. 42 U.S.C. § 1320a-1 (1976), which is intended to screen capital expenditure proposals for unnecessary expansion. They are charged with violating Title VI and section 504 because they allegedly officially sanctioned a discriminatory proposal by approving it during the course of the section 1122 review. The inclusion of BCHP and HPC raises the issue of whether the rights guaranteed by Title VI and section 504 can be violated by state agencies, even those which are supported in part by federal money, that are simply engaged in the review contemplated by section 1122. The district court, in its opinion on the motion to dismiss, reserved this question. (426 F.Supp. 919, 924). The issue was mooted by the district court's eventual disposition of the case, but may have to be reopened on remand.

care components of its medical system from existing inner-city divisions to an outlying suburban location. Plaintiffs contend that the relocation (pursuant to a proposal denominated "Plan Omega") will cause disparities in the accessibility and quality of medical care available to urban and suburban residents.⁵ This action was commenced on September 10, 1976, in the United States District Court for the District of Delaware. Plaintiffs contended that Title VI and section 504 created private causes of action to seek enforcement in federal court of the rights guaranteed by those statutes. They sought: 1) a judgment declaring that the proposed relocation would subject plaintiffs to discrimination in violation of Title VI and section 504 of the Rehabilitation Act; and 2) an injunction against construction of the proposed suburban facilities pending a review by HEW of the compliance of Plan Omega with Title VI and section 504.

On November 3, 1976, HEW filed alternative motions to dismiss or for summary judgment. HEW argued that the Complaint should be dismissed because of plaintiffs' failure to exhaust the administrative remedy provided by section 602 of Title VI. Plaintiffs responded that resort to agency procedures would be futile, alleging that HEW had insufficient resources available to conduct an adequate compliance review.⁶

5. Under Plan Omega, two of WMC's three inner-city divisions would be closed, and the third would be scaled down. Presently, WMC maintains 1,104 beds, which constitute nearly 75% of the acute care beds available in Wilmington and its metropolitan area. As a result of the proposed closing of city divisions under Plan Omega, WMC's inner-city bed capacity would fall from 1,104 beds to 250 beds. A new facility, consisting of 800 beds, would be constructed at a suburban site located about 8 miles southwest of the City.

Plaintiffs assert, *inter alia*, that WMC's remaining inner-city division will become a "ghetto" hospital, that transferred acute care services will be virtually inaccessible, that a segregated dual hospital system will be created, and that the staffing of the inner-city division will suffer qualitatively.

6. HEW does not generally conduct Title VI and section 504 compliance reviews of health facility relocations. It is engaged in several such reviews at present, all under court order. HEW has candidly admitted its inexperience

On January 19, 1977, the district court denied HEW's motion to dismiss plaintiffs' action. Rather, the court directed HEW to treat the plaintiffs' Complaint as "information" sufficient to require HEW to initiate the compliance investigation and review mandated by section 602.⁷ In its Opinion of April 7, 1978, affirming HEW's ultimate determination, the district court reviewed its January 19 Order and explained:

The decision to instruct the Secretary to develop the factual record on plaintiffs' complaint and to exercise his discretion in reviewing Plan Omega, reflected the Court's view that such a process would 'carry out the Congressional expectation that Title VI be administered by the appropriate agency and that judicial review of the agency's decision follow traditional paths.'

453 F.Supp. 280, 290 (D.Del.1978), quoting 426 F.Supp. 919, 925 (D.Del.1977).

HEW conducted the ordered compliance review. On July 5, 1977, in a Letter of Findings from its Office of Civil Rights, HEW determined that the relocation proposed by Plan Omega as then formulated would violate Title VI and section 504. The letter also enumerated 12 areas in which the Plan would have to be modified in order to be in compliance with those statutes and with the Secretary's regulations. Subse-

and inadequate staffing in this area. Whether HEW has the resources necessary to engage in compliance review is not critical to this appeal, however, since the plaintiffs now claim, and we agree (*see n. 10 infra*), that recourse to the administrative remedy is not in any event a prerequisite to the assertion of the plaintiffs' private cause of action. *See Cannon v. University of Chicago*, — U.S. —, — n. 41, 99 S.Ct. 1946, 1962, 60 L.Ed.2d 560 (1979).

7. The district court observed that failure to exhaust administrative remedies normally requires dismissal of the suit. However, HEW regulations call for a Title VI investigation "whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply" 45 C.F.R. § 80.7(c) (1978). Since the Complaint served by the plaintiffs was sufficient "information" to require a Title VI investigation, the court directed HEW to initiate a compliance review. 426 F.Supp. 919, 924 (D.Del.1977).

quently, the Secretary engaged in informal, voluntary efforts to secure the compliance of WMC. After more than three months of discussion HEW and WMC entered into a binding agreement on November 1, 1977, in which WMC agreed to cure those aspects of its proposal which, in HEW's opinion, constituted Title VI and section 504 violations. With this agreement executed, the Secretary concluded that Plan Omega, as modified, was in compliance with the statutes and regulations. Plaintiffs disagreed with the Secretary's conclusion, contending, *inter alia*, that the modified plan was based on erroneous and inadequate findings and was not based on a consideration of the relevant factors. The case was presented to the district court on cross-motions for partial summary judgment filed by the plaintiffs and by HEW, and upon a motion for summary judgment filed by defendant WMC. The court concluded that the cross-motions called for what was essentially judicial review of the Secretary's informal administrative determination that the modified Plan Omega complied with Title VI and section 504.

The court also had before it a motion by plaintiffs to modify its Order of November 4, 1977, in which the court had determined that the scope of its review was to be governed by the arbitrary and capricious standard defined in the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (1976). By their motion, Plaintiffs sought judicial review under the trial *de novo* stan-

dard of the APA, 5 U.S.C. § 706(2)(F), contending that HEW's determination was "adjudicatory in nature." The court denied this motion. Accordingly, the court applied the arbitrary and capricious standard, and affirmed the Secretary's determination. In the course of its decision, the court found that the administrative remedy provided under section 602 was exclusive, and that, as a result, plaintiffs did not have a private cause of action under Title VI or section 504. Additionally, the court denied plaintiffs' motion to supplement the administrative record under review, and rejected plaintiffs' claim of a due process right to an evidentiary hearing before the agency.⁸

On appeal, plaintiffs first contend that Title VI and section 504 create private causes of action, and that as a result the district court's initial referral of their complaint for administrative action was error.⁹ Second, plaintiffs renew their contentions as to the appropriateness of the *de novo* review standard, the right to supplement the administrative record on review, and the right to a due process evidentiary hearing before the agency. Finally, they seek review of the district court's decision to affirm HEW's finding that Plan Omega is in compliance with Title VI and section 504.¹⁰

II.

Our analysis of Title VI begins with the language of the statute. Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), declares:

agency procedures would be in the absence of such a private action, (i. e., whether there is a right to a due process evidentiary hearing, whether there is a right to supplement the administrative record on review, and what the standard of review of agency action is).

Further, appellants may be aggrieved persons who have the right to seek judicial review of HEW's determination that Plan Omega complies with Title VI and section 504. We do not foreclose that right. However, since we are remanding the issue of Plan Omega's compliance for a full trial on the merits, we will not review HEW's approval of the Plan, or the district court's affirmance of that approval, at this time. Nor must we now decide whether appellants are aggrieved persons within the meaning of section 603 of Title VI.

8. The decision on the due process claim is separately reported at 453 F.Supp. 330 (D.Del. 1978).

9. In *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977) we discussed, but were not compelled to decide, the question of whether a private cause of action exists under section 504 and Title VI. Judge Rosenn has collected the authorities which hold that such a cause of action does exist under section 504. *Doe v. Colautti*, 592 F.2d 704 at 708 n. 8 (3d Cir. 1979), *amended* (Feb. 23, 1979). The question is now squarely before us.

10. Since we hold that there exists a private cause of action under section 601 of Title VI which may be asserted without preliminary recourse to agency remedial procedures, we need not reach the issue of what the appropriate

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.

The right established by section 601 is unequivocal, broad, and remedial in nature; in this respect it is quite similar to the later enacted Voting Rights Act, 42 U.S.C. § 1973 *et seq.* (1976) from which the Supreme Court has inferred a private right of action. *Allen v. Board of Elections*, 393 U.S. 544, 556, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).¹¹

Section 602 of Title VI,¹² 42 U.S.C. § 2000d-1, directs federal grant making agencies to effectuate the provisions of section 601, provides the administrative mechanism by which government agencies are to take funding termination action, and requires that as a prerequisite to funding

termination an agency determine that voluntary compliance cannot be secured. Finally, section 603 of Title VI, 42 U.S.C. § 2000d-2,¹³ is a limit on the enforcement mechanism provided by section 602. It provides for judicial review of agency action taken pursuant to section 602.

The principles enunciated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), guide the determination of whether a private remedy is implicit in a statute not expressly providing such a remedy. The relevant factors are:

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?

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

13. Section 603 provides:

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

11. As noted in *Regents of University of California v. Bakke*, 438 U.S. 265; 420-421 n. 28, 98 S.Ct. 2733, 2815 n. 28, 57 L.Ed.2d 750 (1978) (Opinion of Justice Stevens, joined by Justices Burger, Stewart and Rehnquist):

[T]he principle embodied in § 601 involves *personal* Federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 79 Stat. 437, is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See *Allen v. State Board of Elections*, 393 U.S. 544, 556, 89 S.Ct. 817, 826, 22 L.Ed.2d 1. In *Allen*, of course, [the Supreme] Court implied a private right of action under the Voting Rights Act. (emphasis in original).

12. Section 602 provides, in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

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 (citations omitted).

The first and fourth factors are not in dispute. Plaintiffs are members of the class for whose benefit the statutes were enacted.¹⁴ Being beneficiaries of government supported programs and facilities, plaintiffs are clearly "persons" for whose "especial benefit" Title VI and section 504 were enacted. It is the right not to be "excluded from participation in [or to be] denied the benefits of . . . any program or activity receiving Federal financial assistance", "on the ground of race, color, national origin" or handicap, which is the essence of Title VI and section 504, and which plaintiffs are in a position to assert. The fourth question asked in *Cort*—whether the cause of action is one traditionally relegated to state law—is also readily answered. The right of participants in federally funded programs to be free from

unlawful discrimination on account of race or handicap, is preeminently the province of federal, not state, law. The parties below have conceded these issues, the lower court has so concluded, and we concur. The second and third factors present more difficult issues, and upon these factors our decision turns.

Under *Cort*, an explicit statement of congressional intent to deny a private cause of action would preclude our implying such an action. However there is no explicit indication of legislative intent either to create or to deny a private cause of action in the legislative history of Title VI. At best, it may be said that the legislative references to a private cause of action are inconclusive. WMC has directed our attention to statements made on the floor during debate by Congressman Gill¹⁵ and Senators Kuchel¹⁶ and Keating.¹⁷ These statements constitute the clearest evidence of explicit intent that can be adduced.

However, Congressman Gill's comments were apparently directed toward the question of who may go to court to challenge funding termination decisions. Senator Kuchel's comments were directed toward the availability of judicial review for terminated funding recipients. Only Senator Keating was speaking to the issue when he noted in passing that an explicit right to

14. For example, Representative Celler observed during the congressional debate on Title VI:

The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. . . . It would, in short, assure the existing right to equal treatment in the enjoyment of federal funds.

110 Cong.Rec. 1519 (1964).

15. "Further, Title VI provides very clearly that the person or the agency which is denied the money, if it desires, can go to the courts . . . and that court can determine whether or not the cutoff is in accord with law and whether or not it was properly done under this statute. 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) (remarks of Rep. Gill).

16. "[T]he agency aggrieved, which would usually be a state or local government authority which had been recipient of Federal assistance, could secure judicial review of the action taken by the Federal administrator in discontinuing or withholding financial assistance. . . . [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 (remarks of Sen. Kuchel).

17. "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 (remarks of Sen. Keating).

sue was considered but not included in the bill. This comment on the failure to include an explicit provision for a private action, without more, is not enough to make out a controlling legislative intent to deny a private right. See *e. g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Stronger evidence of a purposeful rejection of a private cause of action is required for the court to refuse to consider whether such an action may be implied.¹⁸

Since we do not find an explicit congressional intent to create or deny a private cause of action, we must proceed to determine if an implicit intent to create or deny such an action can be found in the legislative history of Title VI. The district court canvassed that history and concluded that the implicit intent was to deny a private cause of action. The court arrived at this conclusion after determining that section 602 and section 603 of Title VI are primarily administrative, that section 602 does not allow a private right of action to seek funding termination, and that section 603 provides for only limited judicial review of

agency funding decisions. Whether or not these three determinations are correct, they do not necessarily compel or even support the district court's conclusion that section 601 does not create a private cause of action.

Section 601 was probably the least controversial of these three sections of Title VI.¹⁹ There was little dispute over the correctness of the moral principles embodied in the section, and no dispute over the validity and vitality of the fundamental principles of substantive law which it proclaimed.²⁰ The debate in Congress turned initially on the appropriateness of using the power of the federal purse as a means of effectuating compliance with the otherwise undisputed direction of section 601.²¹ Having determined to use funding termination as an enforcement tool, the controversy then moved to how the funding sanction was to be imposed. Many Congressmen feared an overbroad intrusion by government into the manner in which states and localities could administer programs which were supported in part by federal funds.²²

18. WMC has also argued that congressional intent to deny a cause of action is demonstrated by the fact that Congress did create such rights under Titles II and VII. According to WMC, the failure to do so under Title VI would at least create a "presumption" that no private action was intended for violations of Title VI. However, under both Title II and Title VII Congress provided for rights of action so that the exercise of those rights could be expressly conditioned by certain procedural limitations. The explicit creation of a cause of action so that it may be tied to procedural prerequisites is entirely consistent with the absence of an express provision for a cause of action under Title VI, and does not give rise to any "presumption" that such an action was denied.

19. As Senator Ribicoff observed: "The principle of nondiscrimination is so undeniably sound that to my knowledge there has not been one word said in opposition to this principle during the debate on this bill." 110 Cong.Rec. 7064 (1964).

20. Members of the House Committee which considered Title VI concluded that, "The policy underlying the enactment of Title VI is so fundamentally correct that there is little need for an additional statement in its behalf. Section 601 concisely announces this policy." H.R.Rep.No. 914, 88th Cong., 2d Sess., reprint-

ed in 2 U.S.Code Cong. & Admin.News, pp. 2355, 2391, 2510 (1964). In this regard, Senator Case observed, "I am very frank to state that Section 601, which is a statement of substantive right—[repeating the statute]—means exactly what it is. It does not provide a method of enforcement, by itself; but I suggest that it is complete." 110 Cong.Rec. 5255 (1964).

Similarly, in a colloquy between Senators Humphrey and Talmadge, the undisputed nature of the underlying right was made clear:

Sen. Humphrey: The Constitution requires that citizens of the United States be treated as citizens of the United States.

Sen. Talmadge: That right is enforceable in every court of the land, and the Senator from Minnesota knows it.

Sen. Humphrey: That is correct. The existing law of the land is stated in Section 601. *Id.* at 5254.

21. 110 Cong.Rec. 2463 (1964) (remarks of Rep. Whitener); *Id.* at 2464 (remarks of Rep. Poff); *Id.* at 2468 (remarks of Rep. Rodino); *Id.* at 2492 (remarks of Rep. Celler).

22. 110 Cong.Rec. 2498 (1964) (remarks of Rep. Selden); *Id.* at 2464 (remarks of Rep. Poff); *Id.* at 2466 (remarks of Rep. Elliott); *Id.* at 2471 (remarks of Rep. Colmer); *Id.* at 2479 (remarks of Rep. Flynt); *Id.* at 6052 (remarks of Sen. Johnston).

Others feared that wholesale funding terminations might follow isolated instances of discriminatory administration.²³ Some felt that funding termination served merely to harm the beneficiaries of the terminated programs, and that, as a result, section 602's enforcement thrust was misguided.²⁴ There was widespread discomfort with the prospect of arbitrary and capricious determinations emanating from Washington, especially if those orders could be backed by the threat of funding termination. Further, out of a desire to provide procedural fairness to funding recipients whose conduct might be challenged,²⁵ there was strong sentiment in favor of limiting the role of third parties in the funding termination process by denying them a private cause of action to seek funding termination.

These considerations led to the enactment of sections 602 and 603. Congress was concerned with limiting the power of federal agencies to bring about compliance with

section 601, not with limiting private rights under section 601. That sections 602 and 603 are limits on agencies, and not on rights, is repeatedly made clear in the legislative proceedings.²⁶

To imply a private cause of action, we must find that such a cause would be consistent with the underlying purposes of the legislative scheme. A private cause of action under Title VI to seek declaratory and injunctive relief is entirely consistent with the legislative scheme. We find it impossible to square the plaintiffs' peripheral role in the section 602 and 603 process with their critical status as protected beneficiaries under section 601, unless section 601 is read to include a right of action distinct from the limitations of sections 602 and 603.²⁷ The very fact that private parties are normally precluded from advancing their section 601 rights before the administrative agency makes more compelling the implication of a

23. 2 U.S.Code Cong. & Admin.News 2391, 2474 (1964); 110 Cong.Rec. 6562 (1964) (remarks of Rep. Kuchel); *Id.* at 2463 (remarks of Rep. Whitener); *Id.* 2481 (remarks of Rep. Ryan); *Id.* 5251 (remarks of Sen. Long); *Id.* 5254 (remarks of Sen. Talmadge); *Id.* 6545 (remarks of Sen. Humphrey); *Id.* 7058 (remarks of Sen. Pastore); *Id.* 7067 (remarks of Sen. Ribicoff).

24. 110 Cong.Rec. 2490 (1964) (remarks of Rep. Boggs); *Id.* at 2498 (remarks of Rep. Willis).

25. See 110 Cong.Rec. 2503 (1964) (remarks of Rep. Celler); *Id.* at 12320 (remarks of Sen. Byrd).

26. As Senator Case emphatically stated, "I wish to make clear that the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602." 110 Cong.Rec. 5254 (1964). See *Id.* at 6562 (remarks of Senator Kuchel); *Id.* at 5254 (remarks of Senator Humphrey).

There were two concerns embodied in section 601—that discrimination existed and that such discrimination was being funded by the United States government. (See, e. g., 110 Cong.Rec. 2468 (1964) (remarks of Rep. Rodino)). That congressional debate focused on the second issue should not obscure the fact that, while not incidental, the funding issue was subordinate to the broader principle being established.

27. Within the legislative scheme, a beneficiary may trigger an agency investigation under section 602, and may, under appropriate circum-

stances, petition for review of an agency determination. See *Cannon v. University of Chicago*, — U.S. —, — n. 41, 99 S.Ct. 1946, 1962, 60 L.Ed.2d 560 (1979). But a beneficiary may not otherwise sue an agency under section 601 to compel termination of funds. Additionally, we now hold that a beneficiary may sue a recipient of federal funding under section 601 for a judicial declaration that the recipient's conduct is in violation of section 601. Such an action would allow the beneficiary to vindicate his section 601 rights without invoking the executive's power to terminate funds. (If the trial court finds that the recipient is violating section 601, it may order the recipient to cease the discriminatory practice. Alternatively, the recipient may decline federal funding and escape Title VI's jurisdictional predicate.)

It follows that the beneficiary may not sue the administrative agency under section 601. If the beneficiary were allowed to do so, it would be able to circumvent the limitations of sections 602 and 603, and would be in a position to, in essence, compel funding termination—which is an impermissible result. This conclusion is in harmony with our analysis of the legislative scheme. It does no harm to beneficiaries' rights, as complete relief can be awarded without the agency being a party to the private suit, and complete discovery can be undertaken, since the agency has no more relevant information to impart than does the funding recipient, who is a party.

private remedy under Title VI. As the Supreme Court has noted, when there is a legal right without a legal remedy, the right has little meaning. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *Jones v. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

The question arises why Congress would explicitly provide for a funding termination sanction, yet leave the remainder of the enforcement scheme to inference. The answer appears to be that at the time of the passage of Title VI, the power of the executive to terminate funding, and the principles which served to limit that power, were subject to intense dispute.²⁸ Having established a principle of non-discrimination based on the jurisdictional predicate of government funding, Congress was compelled to make explicit how federal power to terminate funding could and should be exercised.²⁹ That Congress would feel the need to define explicitly the outlines of funding termination does not support the

conclusion that funding termination was somehow intended to be an exclusive remedy. The notion that a private action for injunctive or declaratory relief is inconsistent with a federal statute that authorizes termination of funds has been rejected by the Supreme Court.³⁰ See *Rosado v. Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

It is also persuasive evidence of intent that Congress has repeatedly enacted attorneys' fee legislation implicitly predicated on the fact that Title VI may be enforced in a private action.³¹ While this legislation does not amount to a conclusive demonstration that a private cause of action exists, the fact that Congress has explicitly provided for attorneys' fees under Title VI, coupled with the fact that Congress has had the opportunity to foreclose a private action but has not done so,³² supports our interpretation of legislative intent and our construction of the legislative scheme envisaged by the enacting Congress.³³

28. Much of the dispute turned on whether President Kennedy had actually favored or opposed Congress granting the President wide discretion to order funding termination. See 110 Cong.Rec. 2463 (1964) (remarks of Rep. Whitener); *Id.* at 2464 (remarks of Rep. Poff); *Id.* 5253 (remarks of Sen. Humphrey); *Id.* 6048 (remarks of Sen. Talmadge); *Id.* at 5090 (remarks of Sen. Robertson).

29. 110 Cong.Rec. 2468 (1964) (Rep. Celler, identifying the need to "clarify and confirm" the executive power); *Id.* at 7067-68 (remarks of Sen. Pastore).

30. The application of this principle to Title VI was addressed by four members of the Supreme Court in *Bakke*. Justice Stevens (joined by Justices Burger, Stewart and Rehnquist) quoted with approval the *amicus* brief submitted by the government, in which the government argued:

"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by section 602. A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602."

Supplemental Brief at 30 n.25, quoted in, *Regents of University of California v. Bakke*, 438 U.S. 265, 288 n. 26, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978).

31. See, e. g., Civil Rights Attorneys' Fee Award Act of 1976, 42 U.S.C. § 1988 (1976) (explicitly including actions under Title VI); Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1978) (explicitly including actions under Title VI as they pertain to elementary and secondary education, where the legal proceeding is "necessary to bring about compliance").

32. The Civil Rights Attorneys' Fee Award Act of 1976 was enacted after several reported decisions (*Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967)) had held or assumed that Title VI provided a private cause of action. While the Attorneys' Fee Act was not intended to create any new causes of action, it is unlikely that Congress would have explicitly included Title VI unless it approved such actions.

33. The executive agencies have also adopted the position that Title VI creates a private cause of action. In the *amicus* brief in *Bakke*; in recent oral argument before the Supreme Court in *Cannon v. University of Chicago*, No. 77-926, January 9, 1979, reported in 47 U.S.

Our analysis of Title VI is supported by prior judicial interpretation. "To date the courts, including [the Supreme Court], have unanimously concluded or assumed that a private action may be maintained under Title VI." *Regents of University of California v. Bakke*, 438 U.S. 265, 419; 98 S.Ct. 2733, 2814, 57 L.Ed.2d 750 (1978) (Justice Stevens, joined by Justices Burger, Stewart and Rehnquist) (footnote omitted). In *Lau v. Nichols* the Supreme Court held that failure to provide language instruction to non-English speaking children of Chinese ancestry was a violation of Title VI. In the case now before us, the district court, recognizing that *Lau* was brought under § 1983, distinguished *Lau* as merely assuming, but not actually deciding, that Title VI created a private cause of action. This overlooks the fact that, in finding that the plaintiffs' "right to participate" had been violated, the Court firmly based its decision on Section 601.³⁴ Further, this case has been read consistently by the courts as authority for the proposition that Title VI creates a private cause of action. See *Lloyd v. Regional Transport Authority*, 548 F.2d 1277 (7th Cir. 1977); *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977) (dicta).

In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967), the panel expressly found that Title VI created a private cause of action. While *Lau* had emphasized the contractual agreement between a federal agency and a federal funding recipient as the basis for importing section 601's proscription to the funding recipient, the court in *Bossier* found a Title VI cause of action distinct from any "con-

L.W. 3471 (January 16, 1979); and in the HEW brief before this Court, the argument has been consistently advanced that Title VI provides a private cause of action for enforcement of statutory rights. We attach importance to this position because it indicates that a private cause is consistent in practice with an administrative remedy, and, hence, with the legislative scheme.

34. The Court stated: "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on Section 601

tract" action which might arise. Merely by accepting federal support the School Board became "bound" by section 601 and "obligated to provide [benefits] without racial discrimination." 370 F.2d at 851 (emphasis in the original). The court concluded:

The defendants argue that this section [601] is a mere statement of policy, and that section 602's administrative remedies are the only means by which it may be enforced. Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. But it also states the law as laid down in hundreds of decisions, independent of the statute. In this sense, the section is a prohibition, not an admonition. In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts. 370 F.2d at 852.

The most recent Supreme Court consideration of Title VI supports our conclusion. Immediately prior to the filing of this opinion, the Supreme Court announced its decision in *Cannon v. University of Chicago*, — U.S. —, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). In *Cannon*, the Supreme Court was not called upon to decide whether a private cause of action could be implied under Title VI, but rather whether such an action could be implied under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 et seq. Since Title IX was expressly intended by Congress to track the previously enacted Title VI,³⁵ it was neces-

to reverse the Court of Appeals. 414 U.S. at 566, 94 S.Ct. at 788. (emphasis added)

35. The Supreme Court noted that:

Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

sary for the Court to determine what remedies Congress thought Title VI provided before it could decide what remedies Congress intended under Title IX. Accordingly, in *Cannon*, the Court did not consider whether Title VI actually created a private cause of action, but rather whether Congress thought that this was so, eight years later, when it modeled Title IX's remedies on those available under Title VI.³⁶

Developments subsequent to the enactment of Title VI which the Supreme Court thought might have influenced or impressed Congress at the time of Title IX's enactment were: the numerous decisions of the federal courts after 1964 explicitly finding a private cause of action under Title VI;³⁷ the decisions of the Supreme Court which implicitly recognized the existence of such actions;³⁸ the inclusion of Title VI in such attorneys' fees acts as § 718 of the Emergency School Aid Act of 1972;³⁹ the debates on § 718, Title IX, and the other Titles of the Educational Amendments of 1972;⁴⁰ the "Executive Branch's apparent understanding of Title VI at the time" of Title IX's passage;⁴¹ and Congress' appar-

ent "acquiescence" in and "affirm[ation]" of the assumption that a private cause of action existed.⁴²

The Supreme Court, in *Cannon*, concluded that in 1972 Congress believed that it had created a private right of action under Title VI.⁴³ We have concluded that Congress intended that there be a private right of action when it enacted Title VI in 1964. The reasoning of the Supreme Court supports our conclusion, for the post-enactment treatment of Title VI by Congress is persuasive evidence of what the Congressional intent was at the time of that Title's passage. The unusual manner in which the Supreme Court was called upon to discuss Title VI barred it from making any explicit determination as to whether that Title actually created a private cause of action. However, the Court's discussion of Title VI indicates to us that were this question before it, the answer would be in the affirmative.⁴⁴ In the same vein, in *Bakke* four Justices expressed the opinion that there is a private cause of action under Title VI, 438 U.S. at 418, 98 S.Ct. at 2814, while four

Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." — U.S. —, 99 S.Ct. at 1961 (footnotes omitted).

— U.S. —, 99 S.Ct. 1956 (footnotes omitted).

36. "Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Id.* (footnotes omitted).

37. — U.S. —, 99 S.Ct. 1946. *E. g. Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967).

38. 47 U.S.L.W. 4554. *E. g., Allen v. Board of Elections*, 393 U.S. 544, 556, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

39. — U.S. at —, 99 S.Ct. 1946 n. 25, 26, 27.

40. — U.S. at —, 99 S.Ct. 1946.

41. — U.S. at —, 99 S.Ct. 1946.

42. — U.S. at —, 99 S.Ct. 1946.

43. "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood

44. This is especially so because of the manner in which the respondents in *Cannon* cast their argument. Proceeding from the premise that Title IX and Title VI should receive the same construction, they challenged the construction of Title VI by which a private right of action is implied. While the Supreme Court noted that this argument did not address the question of what Congress believed Title VI to mean, (which was the controlling issue), the Court went on to discuss the respondent's challenges on the merits. 47 U.S.L.W. at 4557. The Court concluded that the express provision for private actions under Titles II and VII of the Civil Rights Act of 1964 did not preclude the inference that such an action was intended under Title VI as well. *Id.* Further, the Court rejected the argument that comments of Representative Gill, and Senators Kuchel and Keating, during Congressional debate, indicated an explicit Congressional intent to deny a private right of action. *Id.* at 4558, 4559. Thus, the Supreme Court has rejected two contentions which were central to WMC's argument on appeal.

other Justices assumed that there was a private cause of action without deciding the question, 438 U.S. at 341, 98 S.Ct. at 2745 and 438 U.S. at 327, 98 S.Ct. at 2768.⁴⁵

III.

Our holding that there is a private cause of action under Title VI compels a similar holding in respect to section 504 of the Rehabilitation Act of 1973.⁴⁶ 29 U.S.C. § 794 (1976). Section 504 is virtually identical to Title VI and was consciously intended by Congress to track that statute.⁴⁷ More than in the case of Title VI, the legislative history of the Rehabilitation Act Amendments of 1974, Pub.L. 93-516, 88 Stat. 1617, evidences an explicit Congressional intent to create a private cause of action.⁴⁸ As stated in the Committee Report to the Senate, the legislature anticipated that a private right of action would be available as a means of enforcing section 504:

45. Justice White, the sole Justice in *Bakke* to deny the existence of a private right of action, questioned the practical effect of finding such a cause:

If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds and thereby escaping from the statute's jurisdictional predicate. This is precisely the same choice which would confront recipients if suit was brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

46 U.S.L.W. at 4927 (footnote omitted). However, the administrative process provided in section 602 was not intended to insulate a federal funding recipient from making hard choices as to whether it would accept funding termination as a cost of continuing to discriminate. Rather, the section 602 limit was intended to protect the recipient from making such choices at the insistence of an unfettered federal grant making agency. If under the threat of a private suit, a recipient were to decide to decline federal money (or more likely to cease discriminatory practices) the rights established by section 601 would be vindicated without the exercise of federal executive power, and the concern which prompted Congress to enact sections 602 and 603 would not arise.

46. Section 504 provides:

This approach to implementation of Section 504, which closely follows [Title VI], would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. (Emphasis supplied).

S.Rep.No. 93-1297, 93 Cong., 2d Sess. 39-40, reprinted in 4 U.S.Code Cong. & Admin. News, pp. 6373, 6391 (1974).

We agree with the *Cort* analysis of section 504 undertaken in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-86 (7th Cir. 1977), in which the court found an explicit congressional intent to create a private action and concluded that such an action was consistent with the underlying purposes of the legislative scheme. This Court relied on *Lloyd* in *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977), when it supported, in dicta, the holding we make

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) 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.

47. As the Senate Labor and Public Welfare Committee noted, "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 [of Title VI]."

The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." S.Rep.No. 93-1297, 93 Cong., 2d Sess. 39-40, reprinted in 4 U.S.Code Cong. & Admin. News, pp. 6373, 6390 (1974).

48. The 1974 Amendments were enacted to clarify the 1973 Act, and should be accorded great weight when interpreting Congressional intent. See *Red Lion Broadcasting Co. v. FTC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

It should be noted that the fact that Congress intentionally modelled Section 504 after Title VI and the fact that its history shows an explicit intent to include a private cause of action strengthens our conclusion that a private cause of action was contemplated as a natural part of Title VI as well.

today, and reached the same conclusion, without discussion, in *Doe v. Colautti*, 592 F.2d 704 at 708 n. 8 (3d Cir. 1979), *amended* (Feb. 23, 1979).

IV.

We hold that under the principles enunciated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), a private cause of action is implicit in section 601 of Title VI and section 504 of the Rehabilitation Act of 1973 for plaintiffs who seek declaratory and injunctive relief. Because we find that both statutes do create private causes of action for the benefit of the classes protected by the respective statutes, and because we find that these plaintiffs have not had an opportunity to try their cause in federal court, we remand the case to the district court for a trial on the merits of plaintiffs' section 601 and section 504 claims against WMC.⁴⁹



CURTISS-WRIGHT CORPORATION

v.

GENERAL ELECTRIC COMPANY,
Appellant.

Nos. 78-2179, 78-2293.

United States Court of Appeals,
Third Circuit.

June 4, 1979.

Isaac N. Groner (argued), Walter H. Fleischer, Alfred F. Belcuore, Cole & Gron-

er, P.C., Washington, D.C., Albert G. Besser, Hannoeh, Weisman, Stern & Besser, P.A., Newark, N.J., for appellant; Jamie H. Gearon, General Electric Co., Schenectady, N.Y., of counsel.

Ralph N. DelDeo (argued), Richard S. Zackin, Gerard C. Sims, Jr., Crummy, DelDeo, Dolan & Purcell, Newark, N.J., for appellee.

Before SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and HIGGINBOTHAM, Circuit Judges.*

SUR PETITION FOR REHEARING

The petition for rehearing of 597 F.2d 35 filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

For the reasons pointed out by Judges Rosenn and Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

GIBBONS, Circuit Judge, dissenting:

I dissent. In a casual *per curiam* opinion¹ the panel majority, without analysis or explanation, has established a virtual *per se* barrier to Rule 54(b) certification in civil

* Judges Hunter and Garth did not participate in the consideration of this matter.

1. Internal Operating Procedure V.B.1. specifies that *per curiam* opinions are to be reserved for "those cases where the law is relatively clear and does not necessitate a signed opinion." With deference, I suggest that Judge Rosenn's opinion persuasively demonstrates that this is not a proper case for a *per curiam* disposition.

49. As noted in footnote 27, HEW cannot be a defendant in the suit on the private cause of action. To the extent that it has been named as a defendant and treated as a defendant for the purposes of the private suit, the action against it should be dismissed. HEW remains a party to the petition for judicial review, but that action will, under our disposition (see fn. 10), be reserved pending the outcome of the trial on the merits on remand.

TEXAS EDUCATION AGENCY,
Appellant,

v.

Chris STAMOS, on Behalf of the CLASS
of ALL PUBLIC SCHOOL CHILDREN in
the STATE
of TEXAS, Appellees.

No. 01-86-00939-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

Sept. 19, 1991.

Suit was brought on behalf of several students, seeking to enjoin enforcement of "no pass, no play" statute, requiring student to meet academic standards to be eligible to participate in extracurricular activities. The 334th District Court, Harris County, Marsha Anthony, J., issued order holding statute unconstitutional and enjoining its enforcement, and Attorney General brought direct appeal. The Supreme Court, 695 S.W.2d 556, reversed. Plaintiffs subsequently amended their petition to assert rule violated federal law as applied to handicapped persons and discriminated against minority persons. The District Court, denied equitable relief, and appeal was taken. The Court of Appeals, Sam Bass, J., held that: (1) challenge concerning schools' administrative action taken under statute was not moot; (2) plaintiffs were required to exhaust administrative remedies under Education of the Handicapped Act before they could challenge statute in state court; (3) statute did not violate equal protection or substantive due process guarantees of Texas Constitution; and (4) statute did not discriminate against minorities in violation of Title VI.

Affirmed.

[1] SCHOOLS ⇌ 155.5(2.1)
345k155.5(2.1)

Formerly 345k155.5(2)

Action challenging "no pass no play" statute, prohibiting students with grade average of less than 70 from participating in

extracurricular activities, was moot to extent it challenged exclusion of handicapped students from extracurricular activities through enforcement of statute's original version, which did not take into account impact of student's handicap on academic performance; statute had been amended to provide that suspension of handicapped students whose handicap significantly interferes with student's ability to meet regular academic standards be based on student's failure to meet requirements of individual education plan. V.T.C.A., Education Code § 21.920.

[2] SCHOOLS ⇌ 155.5(2.1)

345k155.5(2.1)

Formerly 345k155.5(2)

"Capable of repetition yet evading review" exception to mootness doctrine applied to action challenging application of "no pass no play" statute, under which students who failed to meet academic requirements were ineligible for extracurricular activities; act complained of, exclusion of handicapped student from extracurricular activities, was act by governmental entity challenged on constitutional grounds, and was for such short duration that student could not get review before issue became moot. V.T.C.A., Education Code § 21.920; U.S.C.A. Const. Amend. 14; Vernon's Ann. Texas Const. Art. 1, §§ 3, 3a, 19.

[3] ADMINISTRATIVE LAW AND
PROCEDURE ⇌ 229

15Ak229

Parents of handicapped child who was denied opportunity to participate in extracurricular activities because he did not pass special education class were required to exhaust administrative remedies under Education of the Handicapped Act before they could bring action challenging Texas "no pass no play" statute, prohibiting students who failed to meet academic standards from participating in extracurricular activities, on grounds statute violated Education of the Handicapped Act, Rehabilitation Act, or United States Constitution. Individuals with Disabilities Education Act, § 615(b)(1)(E), (b)(2), (c), as

amended, 20 U.S.C.A. § 1415(b)(1)(E), (b)(2), (c); V.T.C.A., Education Code § 21.920(c).

[3] SCHOOLS ⇌ 155.5(3)

345k155.5(3)

Parents of handicapped child who was denied opportunity to participate in extracurricular activities because he did not pass special education class were required to exhaust administrative remedies under Education of the Handicapped Act before they could bring action challenging Texas "no pass no play" statute, prohibiting students who failed to meet academic standards from participating in extracurricular activities, on grounds statute violated Education of the Handicapped Act, Rehabilitation Act, or United States Constitution. Individuals with Disabilities Education Act, § 615(b)(1)(E), (b)(2), (c), as amended, 20 U.S.C.A. § 1415(b)(1)(E), (b)(2), (c); V.T.C.A., Education Code § 21.920(c).

[4] CONSTITUTIONAL LAW ⇌ 242.2(5.1)

92k242.2(5.1)

Formerly 92k242.2(5)

Provision of "no pass no play" statute prohibiting handicapped students from participating in extracurricular activities if they fail to meet requirements of their individual education program did not violate due process or equal protection clauses of Texas Constitution; statute did not burden suspect class, and classification was rationally related to state's legitimate interest in providing quality education to public school students. V.T.C.A., Education Code § 21.920(c); Vernon's Ann.Texas Const. Art. 1, §§ 3, 3a.

[4] CONSTITUTIONAL LAW ⇌ 278.5(5.1)

92k278.5(5.1)

Formerly 92k278.5(5)

Provision of "no pass no play" statute prohibiting handicapped students from participating in extracurricular activities if they fail to meet requirements of their individual education program did not violate due process or equal protection clauses of Texas Constitution; statute did not burden suspect class, and classification was rationally related to state's legitimate interest in providing quality education to public school

students. V.T.C.A., Education Code § 21.920(c); Vernon's Ann.Texas Const. Art. 1, §§ 3, 3a.

[4] SCHOOLS ⇌ 148(2.1)

345k148(2.1)

Formerly 345k148(2)

Provision of "no pass no play" statute prohibiting handicapped students from participating in extracurricular activities if they fail to meet requirements of their individual education program did not violate due process or equal protection clauses of Texas Constitution; statute did not burden suspect class, and classification was rationally related to state's legitimate interest in providing quality education to public school students. V.T.C.A., Education Code § 21.920(c); Vernon's Ann.Texas Const. Art. 1, §§ 3, 3a.

[5] APPEAL AND ERROR ⇌ 1008.1(2)

30k1008.1(2)

In reviewing legal or factual sufficiency of evidence to support trial court's findings of fact, Court of Appeals applies same standard as is applied by court reviewing legal or factual sufficiency of the evidence supporting jury's answer to jury question.

[6] APPEAL AND ERROR ⇌ 989

30k989

In reviewing insufficiency of the evidence point, Court of Appeals considers and weighs all evidence in case and, if it finds that finding is so against great weight and preponderance of the evidence as to be manifestly unjust, sets aside judgment and remands case for new trial.

[6] APPEAL AND ERROR ⇌ 1012.1(5)

30k1012.1(5)

In reviewing insufficiency of the evidence point, Court of Appeals considers and weighs all evidence in case and, if it finds that finding is so against great weight and preponderance of the evidence as to be manifestly unjust, sets aside judgment and remands case for new trial.

[7] APPEAL AND ERROR ⇌ 1008.1(3)

30k1008.1(3)

Because trier of fact is sole judge of credibility of witnesses and weight to be given their testimony, Court of Appeals may not substitute its opinion for that of trier of fact merely because it might have reached different fact conclusion.

[8] CIVIL RIGHTS ⇌ 242(2)

78k242(2)

Evidence in Title VI action challenging Texas "no pass no play" statute, prohibiting students who failed to meet academic standards from participating in extracurricular activities, supported findings that statute was passed for legitimate purposes and was not racially motivated, despite evidence that black and Mexican American students had higher failure rates than whites. V.T.C.A., Education Code § 21.920; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[9] CIVIL RIGHTS ⇌ 242(1)

78k242(1)

When plaintiff in Title VI action has made prima facie case of discrimination based on disparate impact, it may be rebutted by entity making exclusionary decision by producing some evidence that it had legitimate, nondiscriminatory reason for decision; if defendant meets this burden of production, plaintiffs must prove by preponderance of all evidence that legitimate reasons offered by defendant were pretext for discrimination. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[10] CIVIL RIGHTS ⇌ 267

78k267

Parties who challenged Texas "no pass no play" statute, requiring students to meet academic standards in order to participate in extracurricular activities, were not entitled to injunctive relief under Title VI, absent showing that legislature's concern about proving quality of education through statute was pretext for discriminating against minority and learning disabled students. V.T.C.A., Education Code § 21.920; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[11] APPEAL AND ERROR ⇌ 181

30k181

To preserve complaint for appellate review, complaining party must make known to trial judge his or her objection and grounds for objection, and get ruling thereon.

[11] APPEAL AND ERROR ⇌ 242(1)

30k242(1)

To preserve complaint for appellate review, complaining party must make known to trial judge his or her objection and grounds for objection, and get ruling thereon.

[12] APPEAL AND ERROR ⇌ 198

30k198

Party's objection that attorney ad litem had not submitted affidavit showing good cause for continuance at time attorney ad litem moved for appointment of special master did not preserve for review issue of whether there was good cause for appointment of special master. Vernon's Ann.Texas Rules Civ.Proc., Rule 215; Rules App.Proc., Rule 52(a).

*380 Kevin T. O'Hanlon, Leslie L. McCullom, Asst. Atty. Gen., Jeffrey J. Horner, Houston, Lucius D. Bunton, Austin, for appellant.

Connie Ode, Austin, T. Gerald Treece, Robert Brown, Jeffrey A. Davis, Jonathan Hantke, and Anthony Shepard, Houston, for appellees.

Before SAM BASS, DUNN and HUGHES, JJ.

OPINION ON MOTION FOR REHEARING

SAM BASS, Justice.

Appellant, Lela A. (Mrs. A), individually and as next friend of Nolan A. and the members of the class consisting of all learning disabled (handicapped) public school children, moves the Court for rehearing of this appeal. We deny the motion. We withdraw our previous opinion dated August 8, 1991, and substitute the following in its place.

The master in the trial court below, Gerald Treece, also moves the Court for rehearing of

this appeal. Our modification of our opinion renders the master's motion for rehearing moot. Accordingly, we dismiss his motion for rehearing.

Appellant, the Texas Education Agency (TEA), appeals the trial court's judgment assessing against the State of Texas, as costs, the fees and expenses (\$23,500) of the court-appointed master in chancery. Cross-appellants (plaintiffs) bring four cross-points of error, complaining of the trial court's judgment rendered against them, which challenged, on federal and state law grounds, TEX.EDUC.CODE ANN. § 21.920 (Vernon 1987) and the related Tex.Educ.Agency, 19 TEX.ADMIN.CODE § 97.113, (West Sept. 15, 1988) (Student Absence for Extracurricular or Other Activities), popularly known as the "no pass, no play rule."

We affirm the trial court's judgment.

The legislature enacted the original version of the statute on July 13, 1984, and made it effective commencing with the 1984-85 school year. The statute requires students to maintain a "70 average" in their course work to be eligible to participate in extracurricular activities. As originally enacted, it applied to all students except the mentally retarded.

On April 25, 1985, plaintiffs filed suit against various defendant school districts asserting the statute was unconstitutional in that it violated equal protection and due process guarantees. The TEA intervened, and the University Interscholastic League (UIL) was brought in by one of the school districts as a third party defendant. The district court held that the statute was unconstitutional and issued a temporary injunction, enjoining its enforcement by defendants. The TEA appealed to the Texas Supreme Court. The supreme court stayed the temporary injunction and set the case for oral argument. On July 10, 1985, the supreme court dissolved the temporary injunction, holding that under the Texas Constitution, a student does not have a fundamental right to participate in extracurricular activities and that the statute did not violate the equal protection or due

process protections of the Texas Constitution. See generally, Spring Branch Indep. School Dist. v. Stamos, 695 S.W.2d 556 (Tex.1985).

Between the time the supreme court stayed the temporary injunction and the time it issued its opinion, the following occurred: (1) Nolan A., a third grade, learning disabled (dyslexic) student, entered the suit as a party plaintiff, complaining of the Houston Independent School District (HISD)'s enforcement of the statute in the spring of 1985 to exclude him from receiving a trip to Astroworld for perfect school attendance; (2) the legislature amended the statute with a new section "(c)," effective September 1, 1985, which reads as follows:

(c) Suspension of a handicapped student whose handicap significantly interferes with the student's ability to meet regular academic standards shall be based on the student's failure to meet the requirements of the student's individual education *381 plan. The determination of whether a handicap significantly interferes with a student's ability to meet regular academic standards shall be made by the student's admission, review, and dismissal committee....

TEX.EDUC.CODE ANN. § 21.920; and (3) plaintiffs amended their petition in the trial court and before the supreme court to assert the rule violated federal law applying to handicapped persons. Plaintiffs alleged that the statute, as amended, discriminated against plaintiff Nolan A., and the sub-class of handicapped students he represented, by violating 20 U.S.C.A. § 1401 (West 1990 & Supp.1991), Education of Handicapped Act (EHA); 34 C.F.R. 300.306 (1990) and 34 C.F.R. 300.553 (1990) (administrative regulations promulgated pursuant to the EHA); 29 U.S.C.A. § 794 (West Supp.1991), the Rehabilitation Act; 42 U.S.C.A. § 1983 (West 1981); the equal protection and due process clauses of the fourteenth amendment of the U.S. Constitution; and the equal protection and due process clauses of the Texas Constitution. Plaintiffs also alleged the statute and rule discriminated against minority students by violating 42 U.S.C. § 2000d et seq. (West 1981), Title VI Civil

Rights Act of 1964.

Plaintiffs sought: (1) to have defendants enjoined from enforcing TEX.EDUC.CODE ANN. § 21.920; (2) an order allowing Nolan A. "to compete for said prize in the future without enforcement of the challenged statute;" and (3) the permanent mandatory relief of "a full trip to Astroworld for Nolan A. and the members of the class he represents, i.e. handicapped children, who had a perfect attendance record as of the end of Spring, 1985, but who were denied said prize as a result of the enforcement of Section 21.920, Tex.Educ.Code and 19 TAC 97.113."

In its opinion, the supreme court refused to consider plaintiffs' assertion that the rule discriminated against the "suspect" class of students with learning disabilities, because the person on whose behalf the claim was made (Nolan A.) was not a party to the suit when the trial judge signed the temporary injunction order or at the time the supreme court stayed the injunction and set the matter for argument. It held that the matter was not properly before it. *Stamos*, 695 S.W.2d at 559. It noted, however, that the legislature had amended the statute addressing the situation of learning disabled and all handicapped students. *Id.* at n. 1. Plaintiffs appealed to the United States Supreme Court.

On October 23, 1985, the trial court certified plaintiffs as representatives for a class consisting of all public school children in the State of Texas and defendants as representatives of a class consisting of all the school districts in Texas.

On December 11, 1985, the trial court appointed a master to collect data from Texas school districts on the impact of the statute on handicapped and minority students' participation in extracurricular activities.

The Supreme Court, on February 24, 1986, in a per curiam opinion, denied plaintiffs' application for writ of certiorari, stating there was no substantial federal question. *Stamos v. Spring Branch Independent School Dist.*, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed.2d 290

(1986).

Dr. Kirby, the Texas Commissioner of Education, testified he had been extensively involved in events leading up to the educational reforms passed by the legislature, including the no pass, no play statute. The legislature created a Select Committee on Education to make recommendations to improve education in Texas. The committee presented the legislature with a plan that resulted in the educational reform legislation. Most of the testimony in opposition to the no pass, no play concept concerned the length of time the student should be suspended from participation. Dr. Kirby gave his professional opinion that the no pass, no play concept was sound educational policy. He testified that weakening the no pass, no play policy would impair the students' ability to pass the competency test that they would be required to take in English, writing, and math to get a high school diploma. He also testified about the requirement that school districts make tutorial time available to *382 failing students. Dr. Kirby testified that he felt the concept was a strong incentive for the students and their teachers to work harder to see that the students passed so they could participate in extracurricular activities.

Lela A. (Mrs. A.), Nolan's mother, testified that an admissions, review, and dismissal (ARD) committee, composed of the principal, a classroom teacher, resource room teacher, other school district personnel, and a parent, develops an individual education plan (IEP) for each learning disabled student. It contains instructional objectives for the student to meet to assist him in overcoming his learning disabilities.

Following the passage of the amendment to the statute, in the fall semester of 1985, the principal at the HISD school Nolan was attending informed Mrs. A. that failure of a special education subject would not exclude a student from extracurricular activities, but failure of a regular education subject would. In the first six weeks of the 1985 fall semester, Nolan failed language and spelling. Language was a special education subject for

Nolan, but spelling was a regular education subject. Mrs. A. was told that because Nolan made below a 70 in spelling, he was excluded from extracurricular activities. She further testified that as a member of the ARD committee, she was unaware of any way grade goals for each six weeks for any subject could be established in the IEP. The ARD committee had not been provided with any criteria to make an objective analysis. At the November 1985 ARD committee meeting, she was given a booklet, "Parent and Student Rights to a Special Education," which is published by the TEA. This booklet tells the parent that decisions regarding the educational program and placement of handicapped students is made by the ARD committee, and that they are part of the committee. As part of the committee, they have a right to be actively involved in its deliberations, to vote on the decisions concerning their child's placement, as well as utilize mediation, to request a due process hearing, and to present a written complaint to the TEA if they disagree with the decisions of the ARD committee or have a complaint about the provision of special education services to the student. The booklet describes the due process hearing procedures for hearings about grievances involving the education of handicapped students. Mrs. A. testified she was aware there were administrative procedures. She testified she had not exhausted them or even commenced them.

When Mrs. A. was recalled to testify in July 1986, she testified that Nolan had maintained another year of perfect attendance, and that through the grace of the school principal, Nolan had gone on the Astroworld trip. Plaintiffs put on no testimony indicating Mrs. A. or any other plaintiff availed themselves of the administrative remedies provided by the EHA.

Mrs. Orr, who holds a Master of Education degree, testified on behalf of plaintiffs. During 1979-80, she was the building chairman for special services at Ed White Elementary, and in that capacity, she wrote and reviewed IEP's and served as a school representative of the ARD committees. She

testified that the state and local school districts have not established any written criteria for use by the ARD committees in making their rulings, and that each ARD committee in Texas had almost wholly unfettered discretion in administering the no pass, no play statute. Mrs. Orr testified each ARD committee met only once or twice a year for each handicapped student, and close monitoring of them was impossible because there were so many of them. During the time period of the study conducted by the master, 60% per cent of the handicapped children in the HISD failed one or more subjects, which kills their incentive to participate in extracurricular activities.

Mrs. Orr testified it has been common knowledge that black and Mexican American students have a higher failure rate than whites. Any Texas law or rule utilizing solely earned grades as a prerequisite for entry into and continued participation in beneficial educational endeavors, will disproportionately impact these minority students and increase their drop-out rate. She testified that because of the seasonal nature *383 of many extracurricular activities, the six-week length of the suspension would mean complete exclusion from the extracurricular activity for the student, and, therefore, the rule would be counter-productive to its intended purpose. Mrs. Orr authenticated governmental reports introduced as exhibits, and agreed with conclusions contained in them that minorities should be encouraged to participate in extracurricular activities as a means to improve grade performance and reduce their drop-out rate.

On September 30, 1986, the trial court issued its judgment, which did not grant plaintiffs the permanent injunctive relief; however, it assessed the costs of the master against the State of Texas.

The court made findings of fact and conclusions of law. Concerning the assessment of the cost of the master's fees, the court found "the costs were aggravated by the recalcitrant attitudes of some educators who did not recognize the importance of the

information sought and the necessity of their contribution to its validity." The court found that the statute had a "disproportionate impact" on minority and learning disabled students, but that "under the evidence the legislature had a legitimate purpose for the passage of the statute." The court concluded it was for the legislature to remedy the inequities [the disproportionate impact on minority and handicapped students] created by the statute. With respect to Nolan A. and the class of handicapped students he represented, the court found and concluded that the issue was moot. The court further found and concluded: "The equitable relief requested would be inappropriate as the Plaintiffs had adequate relief available and elected not to pursue it."

In plaintiffs' second cross-point of error, they contend that the trial court erred in its finding and conclusion that Nolan A. and the class consisting of the certified learning disabled public students were not entitled to injunctive relief, as such finding and conclusion was contrary to the relevant law and against "the great weight and preponderance of the evidence," as well as against the stipulations [FN1] and admissions [FN2] of the State of Texas and defendant school districts in the state.

FN1. Plaintiffs contend, in their brief, that the TEA and the UIL stipulated that the enforcement of the statute would have a negative effect on plaintiffs and that there is no adequate legal remedy available to plaintiffs. An examination of the "Agreed Stipulation of Facts," however, shows that the TEA and the UIL did not agree those statements were true, but rather that if plaintiffs' witnesses testified, the substance of their testimony would be to that effect. One may agree that witnesses would testify a certain way without agreeing their testimony is true. Thus, the stipulation does not have the binding effect on the TEA that plaintiffs contend.

FN2. The admissions plaintiffs refer to are the forms collected by the master from

Texas school districts showing the statute's disproportionate impact on minority and handicapped students.

[1] The TEA argues this point is moot. The TEA's argument is that the legislature eliminated the possibility of the illegal exclusion of handicapped students from extracurricular activities by amending the statute to provide that suspension of a handicapped students whose handicap significantly interferes with the student's ability to meet regular academic standards, be based on the student's failure to meet the requirements of the student's individual education plan.

We agree that the amendment of the statute has rendered moot one of plaintiffs' complaints: exclusion of handicapped students from extracurricular activities through enforcement of the original version of the statute, which did not take into account the impact of a student's handicap on his academic performance. Since the relief requested by plaintiffs of a trip to Astroworld for Nolan A. and the other handicapped students excluded in the spring of 1985 was based on the enforcement of the original statute, we agree that the moot status of that issue now renders such relief inappropriate.

We do not agree that the amendment of the statute has rendered moot the issues concerning the application of the amended statute to plaintiffs.

*384 Texas recognizes an exception to the mootness doctrine referred to as the "capable of repetition yet evading review exception." *General Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex.1990). It has been applied where the act complained of is one by the government, is challenged on constitutional grounds, is capable of repetition, and is of such short duration that the appellant cannot get review before the issue becomes moot. *Id.*

[2] We hold this exception to the mootness doctrine applies to plaintiffs' complaints concerning the schools' administrative action

taken under the statute as amended. Here the act complained of, exclusion of a handicapped student from extracurricular activities, is an act by a governmental entity, that is challenged on constitutional grounds, and is for such short duration [usually six weeks] that the student cannot get review before the issue becomes moot. That such exclusion of handicapped students from extracurricular activities is capable of repetition, even after amendment of the statute, is demonstrated in the record by Mrs. A.'s testimony that she was told in the fall of 1985 that Nolan was excluded from extracurricular activities for failing spelling, that Nolan was only permitted to take the Astroworld trip in May 1986 through the grace of Nolan's principal, and that, at that time, she was told by the principal that other learning disabled children in the HISD with perfect attendance [and presumably failing grades] were not allowed to go to Astroworld. We thus conclude the action of which plaintiffs complain is capable of repetition. Therefore, the issue is not moot.

[3] We must, however, address another threshold issue--whether this Court has jurisdiction to review the trial court's judgment on plaintiffs' application for injunctive relief, since plaintiffs did not exhaust their administrative remedies.

In its judgment, the trial court concluded, with reference to Nolan A. and the sub-class of handicapped students he represented, that: "The equitable relief requested would be inappropriate as the Plaintiffs had adequate relief available and elected not to pursue it." Since the plaintiffs were not seeking monetary damages, and at trial TEA did not contend that plaintiffs could be adequately compensated by monetary damages, we are confident the "adequate relief" to which the trial court was referring was the administrative remedies and safeguards established by the EHA. Thus, we view the trial court's conclusion that plaintiffs had adequate legal relief as a determination that it did not have jurisdiction to decide whether plaintiffs were entitled to the injunctive relief they were seeking because plaintiffs did not exhaust their administrative remedies. See

Christopher v. Portsmouth School Committee, 877 F.2d 1089, 1093, 1099 (1st Cir.1989).

Section 1415(b)(1)(E) of the United States Code provides that state and local education agencies receiving assistance under the EHA shall establish and maintain procedures to assure that handicapped students and their parents are guaranteed: "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C.A. § 1415(b)(1)(E) (West 1990). The EHA provides that parents who have such a complaint shall have an opportunity for an impartial due process hearing conducted by the state educational agency or by a local education agency as determined by the state. 20 U.S.C.A. § 1415(b)(2). If such a hearing was conducted by a local education agency, a party who feels aggrieved by the agency's decision may appeal the decision to the state education agency. 20 U.S.C.A. § 1415(c) (West 1990). If parents still feel aggrieved after the hearing at the state education agency level, they may then appeal the decision to state or federal court. 20 U.S.C.A. § 1415(e)(2) (West 1990).

The United States Supreme Court in emphasizing the importance of the administrative remedy provided in the EHA said:

When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions *385 contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

Board of Education of the Hendrick Hudson Cen. School Dist., Westchester County v.

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Rowley, 458 U.S. 176, 205-206, 102 S.Ct. 3034, 3050-51, 73 L.Ed.2d 690 (1982); see also *Tatro v. Texas*, 516 F.Supp. 968, 983 (N.D.Tex.1981), *aff'd*, 703 F.2d 823 (5th Cir.1983), *aff'd*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

However, the Supreme Court has noted that parents may bypass the administrative process where exhaustion would be futile or inadequate. *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 606, 98 L.Ed.2d 686 (1988). The party seeking to evade the administrative process though, has the burden to show the futility or inadequacy of administrative review. *Id.* The Court, referenced cases in *Smith v. Robinson*, 468 U.S. 992, 1014, 104 S.Ct. 3457, 3469, 82 L.Ed.2d 746 (1984) as situations where courts have held that plaintiffs did not have to exhaust their administrative remedies. In *Monahan v. Nebraska*, 491 F.Supp. 1074, 1086 (D.C.Neb.1980), *aff'd in part and vacated in part*, 645 F.2d 592 (8th Cir.1981), the court held exhaustion of the administrative remedy would be futile in that case because one of the plaintiffs' complaints was that the state administrative remedy itself was at variance with the EHA in that it gave the state commissioner of education the power to review the decision made in the due process hearing, whereas the EHA requires the officer conducting the hearing make an independent decision after his review, 20 U.S.C.A. § 1415(c), and that his decision be final. 20 U.S.C.A. § 1415(e). In this case, plaintiffs did not complain about the lack of independence of the HISD's or the TEA's hearing examiners or the lack of finality of decisions rendered by the HISD's or the TEA's administrative remedy systems. They just did not use these available and statutorily prescribed administrative remedies.

Another case the Supreme Court referenced, as one where exhaustion of the EHA prescribed remedies was held to be futile or inadequate, was *Howard S. v. Friendswood Independent School District*, 454 F.Supp. 634 (S.D.Tex.1978). In *Howard S.*, when the school district took the action of which the plaintiff's parents, Mr. and Mrs. S.,

complained (dropping from the school district their minimally brain damaged and learning disabled son, Douglas, during his hospitalization for attempted suicide), Mrs. S. communicated in person and in writing with the Fisd's superintendent, assistant principal, and head of special education to advise them she was seeking a suitable educational program for him in the light of his handicaps, and that she wished to participate in an ARD committee meeting to determine if a suitable program could be developed for her son in the Fisd. *Id.* at 636. The ARD committee meeting occurred three days later and Mrs. S. was not given an opportunity to be present. *Id.* The ARD committee confirmed the "dismissal" of Douglas. *Id.* A few months later, plaintiffs obtained counsel and requested a due process hearing. The Fisd responded by holding a meeting on July 6, 1977, chaired by its retained counsel, in which the designated decision maker was the school superintendent. *Id.* at 636-37. The meeting had none of the indicia of a hearing, such as the formal introduction of evidence, formal presentation of arguments, notice of issues to be decided at the meeting, no impartial hearing examiner, no findings of fact or conclusions of law, and no real decision of any kind rendered at or after the meeting. *Id.* at 637. The court noted plaintiffs had written numerous letters to the TEA to no avail. *Id.* at 638. The court concluded it would have been futile for plaintiffs to take an appeal from the meeting of July 6, 1977, to the Fisd Board of Trustees, pointing to the fact that the Fisd's counsel was fully aware of and *386 an active participant in the July 6, 1977, meeting, that the school superintendent and director of special education participated actively in the events after January 1977, and that the Board of Trustees ratified the actions of the school administrators at the time of and after Douglas' expulsion from the Fisd. *Id.* In its findings of fact and conclusions of law, the court also stated that at the pertinent times no adequate mechanisms existed to afford the plaintiffs a full administrative hearing. *Id.* at 639.

In this case, Mrs. A. put on no evidence that the HISD board of trustees or any hearing

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examiner the HISD would provide to hear her complaints had or would ratify the ARD committee's decision to place Nolan in fourth grade, regular education spelling, or the decision of Nolan's principal to exclude Nolan from extracurricular activities during the fall of 1985. Further, in contrast to what the Howard S. court found and concluded with respect to lack of an administrative hearing process to afford parents an impartial due process hearing on their complaint, the TEA and the HISD have, since the time of that decision, put in place such a mechanism. See Tex.Educ.Agency, 6 Tex.Reg. 4266 (1981). Thus, at the time Mrs. A. had her complaint about Nolan's post-amendment exclusion from extracurricular activities and the lack of objectivity in the ARD committee's determination, administrative remedies were available through the HISD and the TEA, which Mrs. A. did not exercise.

In this case, plaintiffs introduced no evidence to show that if Mrs. A. had gone to the ARD committee, a hearing examiner provided by the HISD, or a hearing examiner provided by the TEA, that such bodies would have, ipso facto, failed to change Nolan's placement for fourth grade spelling from regular to special education or refused to order measures responsive to her complaint of lack of objective criteria for determination of whether Nolan was failing to meet the requirements of his IEP. Plaintiffs put on no evidence that had other handicapped plaintiffs participated in hearings with their local ARD committees, hearings with a hearing examiner provided by their local school district, or hearings before an examiner provided by the TEA, that those bodies would fail to adopt measures concerning objective criteria, tailored to the unique educational needs of each handicapped student, to determine if they were failing to meet the requirements of their respective IEPs, so as to be excluded from participation in extracurricular activities during a grade reporting period following such failure.

The record indicates that Nolan A.'s exclusion from extracurricular activities in the fall of 1985 was because he made below a 70

in regular education spelling. Mrs. A.'s testimony indicates she feels Nolan's dyslexia handicap in reading affects his spelling performance. When asked in November 1985 on cross-examination why she allowed Nolan to be placed in fourth grade regular education spelling, she indicated that she thought his spelling was handled in his special education room, and that she intended to ask the school more questions about it. It is possible that had Mrs. A. called an ARD committee meeting and/or requested the HISD to provide her with a due process hearing to put on evidence to show that Nolan should have been in fourth grade special education spelling instead of fourth grade regular education spelling, the HISD would have agreed with her, effected a change in his placement for that subject, and revoked its suspension of Nolan from extracurricular activities based on an incorrect placement.

Similarly, had Mrs. A. gone through the ARD committee and/or a due process hearing with her complaint about the lack of objective basis for the ARD committee's determination of what subjects a student takes as regular education subjects versus special education subjects, and her complaint about the lack of an objective basis for determining if a student is meeting the requirements of his IEP, it is possible she would have convinced them of the wisdom of her position, and that they would have adopted or modified criteria for making those determinations in Nolan's case that would satisfy her concerns.

*387 In a supplemental brief, plaintiffs assert, under TEX.R.CIV.P. 54, that since they alleged in their petition, on which they went to trial, that all conditions precedent to their cause of action were satisfied, and since the TEA did not specifically deny that pleading, that they were relieved from proving that they had exhausted their administrative remedies. However, when the defense counsel elicited testimony from Mrs. A. that she was aware of the existence of administrative remedies and had not commenced them, plaintiffs' counsel did not object that such line of inquiry or testimony was not supported by the pleadings. These questions constituted

issues, the answers to which were important for the trial court's judgment. Where such is the case, the issues will be treated as raised by the pleadings without necessity of amendment, trial having been to the bench alone. *Jacobini v. Zimmerman*, 487 S.W.2d 249, 250 (Tex.Civ.App.--Fort Worth 1972, no writ); TEX.R.CIV.P. 67. Thus, while the state of the pleadings relieved plaintiffs of putting on proof of their exhaustion of administrative remedies as an element of their cause of action, it did not prevent unobjected to evidence on the issue serving as a basis for the trial court's judgment.

Because plaintiffs did not exhaust their administrative remedies as provided under the EHA, we lack jurisdiction, see *Christopher*, 877 F.2d at 1093, 1099, to consider the portion of plaintiffs' appeal based on the ground of violation of the EHA or any of the administrative rules based on the EHA. Likewise, because of plaintiffs' failure to exercise their administrative remedies, we hold we do not have jurisdiction to consider the portion of plaintiffs' appeal based on the fourteenth amendment of the U.S. Constitution or violation of the Rehabilitation Act. See *Smith*, 468 U.S. at 1013, 1019, 104 S.Ct. at 3472.

[4] However, as it relates to plaintiffs' claim on behalf of the handicapped, we are still left with the portion of their appeal based on their assertion that the statute, as amended, violates the equal protection and due process provisions of the Texas Constitution. The first determination we must make in equal protection analysis is the appropriate standard of review. *Stamos*, 695 S.W.2d at 559. "When the classification created by a state regulatory scheme neither infringes upon fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest." *Id.* The amendment to the no pass, no play statute addressing the handicapped, TEX.EDUC.CODE ANN. § 21.920(c), classifies handicapped students based on their achievement of the requirements in their IEP. We hold that those handicapped students who

do not meet the requirements of their IEP do not constitute the type of discrete, insular minority necessary to constitute a "suspect class." See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938). Therefore, the statute does not burden a suspect class. The Texas Supreme Court has already held that participation in extracurricular activities is not a fundamental right. *Stamos*, 695 S.W.2d at 560. Accordingly, we hold the amendment is not subject to "strict" scrutiny. See *id.* Thus, the proper standard of review is whether the classification is rationally related to a legitimate state interest. We hold that the classification of handicapped students into those who meet the requirements of their IEP and those who do not, for the purpose of determining whether to allow them to participate in extracurricular activities is rationally related to the state's legitimate state interest in providing a quality education to Texas' public school students. The Texas Supreme Court's holding in *Stamos*, that there is not a constitutional right to participate in extracurricular activities, likewise defeats plaintiffs' claim based on violation of substantive due process. See *Stamos* 695 S.W.2d at 556.

Thus, because of plaintiffs' failure to exhaust their administrative remedies, for want of jurisdiction, we do not reach, and, consequently, dismiss the portions of plaintiffs' appeal, contained within point of error two, that are based on the grounds of violation of the EHA and the rules based *388 thereon, section 504 and the fourteenth amendment of the U.S. Constitution. With respect to the portions of plaintiffs' appeal contained within point of error two that are based on the grounds of violation of the equal protection and due process clauses of the Texas Constitution, we overrule such parts of point of error two.

Next, we consider plaintiffs' third point of error in which they contend the trial court erred in its finding and conclusion that plaintiffs and the class were not entitled to injunctive relief under the protective terms of Title VI of the Civil Rights Act of 1964, 42

U.S.C.A. § 2000d, et seq. (West 1981) as such finding and conclusion was contrary to the relevant law and was against the great weight of the evidence, as well as against the stipulations and admissions of the State of Texas and the defendant school districts.

The trial court found that the exclusionary provision of the statute had a "disproportionate impact" on minority and learning disabled students. However, the court also found that "under the evidence the legislature had a legitimate purpose for the passage of the statute," and that the "legislature did not give any thought toward race in considering and enacting the statute."

[5][6][7] In reviewing the legal or factual sufficiency of evidence to support a trial court's findings of fact, we apply the same standard as is applied by a court reviewing the legal or factual sufficiency of the evidence supporting a jury's answer to a jury question. *Okon v. Levy*, 612 S.W.2d 938, 941 (Tex.Civ.App.--Dallas 1981, writ ref'd n.r.e.). In reviewing an insufficiency of the evidence point, we consider and weigh all the evidence in the case and, if we find that the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust, we set aside the judgment and remand the case for a new trial. *Id.* Because the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, *Rego Co. v. Brannon*, 682 S.W.2d 677, 680 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), the court of appeals may not substitute its opinion for that of the trier of fact merely because it might have reached a different fact conclusion. *Herbert v. Herbert*, 754 S.W.2d 141, 143-44 (Tex.1988).

[8] The only evidence plaintiffs put on that would contradict the court's finding and conclusion that the legislature enacted the no pass, no play statute for a legitimate purpose and with no thought given to race, was the testimony of Mrs. Orr that it has been common knowledge in the local and state educational systems that black and Mexican American students had higher failure rates than whites. Plaintiffs put on no evidence of

minutes of legislative meetings or statements or reports by legislators concerning the passage of the statute, nor did they make an attempt to impeach the veracity of Dr. Kirby's testimony concerning the legislature's motives for passing the statute. Bearing in mind Dr. Kirby's testimony, and that the finder of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, *Rego Co.* at 680, we cannot say that the trial court's findings that: (1) the legislature had a legitimate purpose for passing the no pass, no play statute; and (2) that it did so giving no thought to race, are so against the great weight and preponderance of the evidence as to be manifestly unjust.

We next examine the implication of these fact findings on the validity of the trial court's conclusion of law that plaintiffs were not entitled to injunctive relief under Title VI of the Civil Rights Act of 1964.

[9] As a matter of law, the disparate impact analysis applied in a Title VI action is applied in the same way as it is in a Title VII action. *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir.1986). Where the plaintiff has made a prima facie case of discrimination based on disparate impact, it may be rebutted by the entity making the exclusionary decisions by producing some evidence that it had a legitimate, nondiscriminatory reason for the decision. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). If the defendant *389 meets this burden of production, plaintiffs must prove by a preponderance of all the evidence that the legitimate reasons offered by defendant were a pretext for discrimination. Plaintiffs "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the [excluding entity], or indirectly by showing that the [excluding entity's] proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. at 1095.

[10] Dr. Kirby's testimony about (1) the no pass, no play statute growing out of concerns that extracurricular activities interfered with students' focus on the regular curriculum, and

(2) the legislature's concerns about improving the quality of education as a matter of law, had the effect of rebutting plaintiffs' prima facie case of discrimination and putting the burden of persuasion on plaintiffs to prove by a preponderance of the evidence that the legislature's concern for improving the quality of education by giving students an incentive to work harder to pass, was, in reality, a pretext to discriminate against minority and learning disabled students. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. As we have already seen, the only evidence plaintiffs put on that would contribute to accomplishing plaintiffs' burden of proving "pretext" was Mrs. Orr's testimony about the local and state educational systems' knowledge that blacks and Mexican Americans had a higher failure rate than whites. We have already held that in weighing this evidence against all the other evidence, the trial court's finding that the legislature passed the no pass, no play statute for a legitimate purpose was not so against the great weight of the evidence as to be manifestly unjust. Thus, we hold, as a matter of law, because plaintiffs did not carry their burden of showing that the legislature's concern about improving the quality of education through the no pass, no play statute was a pretext for discriminating against minority and learning disabled students, the court did not err in its conclusion of law that plaintiffs were not entitled to injunctive relief under Title VI of the Civil Rights Act of 1964.

Plaintiffs' third cross-point of error is overruled.

In plaintiffs' first cross-point of error, they contend the trial court erred in ruling "it is for the legislature to remedy the inequities created by the statute ...", thus holding that the challenged statutes and rules created solely a "political" problem for the legislature.

Under this cross-point, citing *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex.1989), plaintiffs argue that if the legislature enacts a discriminatory statute, it is the Court's duty to say that the legislature has failed to do its constitutional duty and not pass the problem off as a

"political" one to avoid deciding the issue. However, we have found under plaintiffs' third cross-point of error that the trial court did not err in holding that plaintiffs failed to prove discrimination. Plaintiffs having failed to establish that the legislature discriminated through the no pass, no play statute, we have no duty to declare the statute unconstitutional.

Plaintiffs' first cross-point of error is overruled.

Plaintiffs contend in their fourth cross-point of error that the trial court erred in not awarding them attorney's fees and expenses because they would be the prevailing parties on appeal. Since we have ruled against plaintiffs, they are not the prevailing parties in this appeal and, therefore, are not entitled to attorney's fees. See *Texas State Teachers Association v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989).

The TEA asserts in its sole point of error, that the trial court erred by abusing its discretion in taxing the master's fees as a court cost against the State of Texas where all defendants timely objected to appointment of the master, the case was not exceptional, there was no good cause for such appointment, and the state parties were the prevailing parties.

[11][12] To preserve a complaint for appellate review, the complaining party must make known to the trial judge his objection and the grounds for the objection, and get *390 a ruling thereon. *Guzman v. Solis*, 748 S.W.2d 108, 111 (Tex.App.--San Antonio 1988, writ denied). At the time the attorney ad litem moved for the appointment of a master, TEA objected that the attorney ad litem had not submitted an affidavit showing good cause for a continuance under TEX.R.CIV.P. 215. This is not the same as the ground of error TEA now brings before this Court that the case was not an exceptional one and that there was no good cause shown for the appointment of the master. Thus, we hold TEA failed to preserve its point of error for review. TEX.R.APP.P. 52(a).

Accordingly, TEA's sole point of error is overruled.

The judgment is affirmed.

END OF DOCUMENT

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"The Commission recommends that such authority should be given to the President and that the power of the President to prepare and transmit plans of reorganization to the Congress should not be restricted by limitations or exemptions. Once the limiting and exempting process is begun it will end the possibility of achieving really substantial results. But, in saying this, the Commission should not be understood as giving sweeping endorsement to any and all reorganization plans. It does believe that the safeguard against unwise reorganization plans lies both in a sound exercise of the President's discretion and in the reserved power in the Congress by concurrent resolution to disapprove any proposed plan. Limitations or exemptions upon this power to reorganize should not be imposed other than that of congressional disapproval."

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For text of Act see p. 287

Senate Report (Judiciary Committee) No. 872,

Feb. 10, 1964 [To accompany S. 1732]

House Report (Judiciary Committee) No. 914,

Nov. 20, 1963 [To accompany H.R. 7152]

Cong. Record Vol. 110 (1964)

DATES OF CONSIDERATION AND PASSAGE

House Feb. 10, 1964; July 2, 1964

Senate June 19, 1964

The House bill was passed in lieu of the Senate bill. The Senate Report and the House Report are set out. S. 1732 and Senate Report No. 872 to accompany it are concerned solely with Title II of the Act.

Senate Report No. 872

THE Committee on Commerce, to whom was referred the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

BRIEF SUMMARY

The purpose of S. 1732 is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.

Motels, hotels, restaurants, places of amusement, and retail and service establishments substantially affecting interstate commerce individually or cumulatively would be covered by the bill, as would labor unions or business associations affecting interstate commerce.

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The bill would guarantee all persons freedom from a refusal by an included establishment or organization to deal with them on account of race, color, religion, or national origin. Any person refused service by a public establishment on the above-mentioned grounds would have the right to seek a court order against the offending establishment or individual after 30 days' written notice to a State agency or instrumentality authorized to deal with such disputes. In the absence of such a body, 30 days' notice prior to suit would have to be given the Attorney General. This condition precedent of 30 days' notice before instituting suit does not apply to a person aggrieved by a refusal of membership in a labor union, or professional, business, or trade association because of his race, color, religion, or national origin.

As an alternative to private suit, a complaint may be filed with the Attorney General. Upon receiving a complaint in a case sufficiently important to warrant his conclusion that a suit would materially further the purposes of the act, the Attorney General would have to first refer the case for voluntary settlement to an appropriate agency or permit State and local laws to be utilized, unless he should find that the aggrieved party is unable to undertake or maintain suit on his own for financial reasons or because of fear of economic or other injury. If referral to an appropriate agency or application of State law would be unsuccessful, the Attorney General may initiate suit for compliance.

In brief, the measure speaks on the problem solving level with primary reliance placed on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play. In addition, the sanctions provided in the bill are limited to injunctive relief so that there would be a judicial interpretation and warning of coverage before any penalties attached for violation of a court order.

SECTION-BY-SECTION ANALYSIS OF S. 1732

Section 2

The bill as introduced contained specific findings in section 2. The bill as reported deletes these findings and substitutes a declaration of policy explaining the goals of Congress and the purposes of this bill. The declaration of policy does not limit in any way the constitutional bases upon which this bill may be sustained in a court of law.

Section 3

Subsection 3(a).—This section would grant to all persons a right to be free from discrimination or segregation on account of race, color, religion, or national origin in the enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the public establishments described in paragraphs 1, 2, and 3 of subsection 3(a). These three paragraphs detail three mutually exclusive groups of public establishments.

"Person," as that term is used in subsection 3(a) and other sections of the bill, may include other than natural persons, as in the case where a business entity is refused the right to purchase, use, rent, or hire goods, services, or facilities on account of the race, color, religion, or national origin of its owner or operator.

Subsection 3(a) (1).—There is a change from the bill as introduced. That bill applied the provisions of section 3(a) to all public places engaged

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in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce. The reported bill would exclude from coverage " * * * an establishment which (A) is located within the building which the proprietor actually occupies as a home and (B) contains not more than five rooms for rent"; but includes all other places furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce. It is not necessary that most of the transient guests, or any of them, be from other States or traveling in interstate commerce. So long as the establishment furnishes lodging to transient guests, it would be subject to the terms of this act unless satisfying the terms of the exception set out above.

Only public establishments furnishing lodging to transients would be within this subsection. Establishments furnishing lodging to guests of a permanent duration, or to guests of an indefinite duration having no fixed intent to leave, as in the case of a boardinghouse, would not be included. But, an apartment house or boardinghouse that in fact held rooms out for transients would be covered by subsection 3(a) (1). This would be so even if not all the rooms of the establishment were for the use of transients.

The exception contained in the bill would apply only when the "proprietor" actually occupies the building in which the establishment is located as a home. A person may have only one "home" as that term is used here. If a person has more than one place of residence or abode, his home would be that place which he uses as his principal residence.

Subsection 3(a) (2).—There is no change from the bill as introduced. This is the second of three mutually exclusive groups of public establishments that are covered by the bill. This subsection would include all public places of amusement or entertainment which customarily present motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce. These public establishments would be within the provisions of the bill even though at any particular time the source of entertainment being provided had not moved in interstate commerce. It is sufficient if the establishment "customarily" presents entertainment that has moved in interstate commerce. If this test is met then the establishment would be subject to the bill at all times, even if current entertainment had not moved in interstate commerce.

Subsection 3(a) (3).—This is the third of three mutually exclusive groups of public establishments that are subject to the provisions of this bill. There is no change from the introduced bill in the terms of subsection 3(a) (3), except for a change in the test stated in subsection 3(a) (3) (ii).

Subsection 3(a) (3) deals with retail establishments or any other public place that keeps goods for sale to the public, including a public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, if any one of the four tests set out in subsections 3(a) (3) (i) through 3(a) (3) (iv) are satisfied. As establishments within subsection 3(a) (3) are mutually exclusive from those in subsections 3(a) (1) and 3(a) (2), an apartment house not renting to transients (and thus not within subsection 3(a) (1))

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would not be within the scope of this subsection even though it offers facilities or accommodations to the public for use, rent, or hire. Only subsection 3(a) (1) would apply to establishments furnishing lodging. Also, any public establishment offering entertainment or amusements, but not subject to the provisions of the bill under subsection 3(a) (2), would not be subject to the bill by reason of subsection 3(a) (3).

In order for any establishment to be subject to the terms of the bill by reason of subsection 3(a) (3), one of the following four tests must be met:

Subsection 3(a) (3) (i).—Under this subsection, an establishment would be within the terms of subsection 3(a) (3) if the goods, services, facilities, privileges, advantages, or accommodations are provided to a substantial degree to interstate travelers. A substantial degree is something more than a minimal amount, but would not require a majority of the customers of the establishment to be interstate travelers.

Subsection 3(a) (3) (ii).—The test set forth in this subsection has been considerably changed from that in the bill as introduced. The latter provided that if a substantial portion of any goods held for sale, use, rent, or hire had moved in interstate commerce, then the establishment would be within subsection 3(a) (3). The test as now set forth requires that a substantial portion of the goods held out to the public by an establishment engaged primarily in the sale, rent, or hire of goods have moved in interstate commerce. Thus, a substantial portion of the total goods of the establishment must have so moved, rather than a substantial portion of any one kind of goods, and the establishment must be engaged primarily in the sale, rent, or hire of these goods to the public. This test would not include a place engaged primarily in offering goods for use by the public. Also, requiring that the establishment be engaged primarily in the sale, and so forth, of these goods, the test would not cover businesses that deal primarily in services, although as an incident to that service goods are held out for sale. Thus, this test would not include a barbershop or beauty parlor. Such an establishment may, though, be within the tests set out in subsection 3(a) (3) (i) and 3(a) (3) (iv).

Subsection 3(a) (3) (iii).—The third test for determining whether an establishment is within the general terms of subsection 3(a) (3) is whether the activities or operations of the establishment substantially affect interstate travel or the interstate movement of goods in commerce. There is no change from the test set forth in this subsection in the bill as introduced.

Subsection 3(a) (3) (iv).—The final test for determining whether an establishment is within subsection 3(a) (3) is unchanged from the introduced bill. This test is met if the establishment is an integral part of an establishment included in subsection 3(a). The term "integral part" is defined following the statement of this test as meaning physically located on the premises of an establishment subject to subsection 3(a), or located contiguous to such premises and owned, operated, or controlled, directly or indirectly, by or for the benefit of, or leased from the persons or business entities which own, operate, or control an establishment subject to subsection 3(a). Thus, in all instances, to be an integral part, the establishment would have to be physically located on the premises of an included establishment or located contiguous to such an establishment. A hotel barbershop or

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beauty parlor would be an integral part of the hotel, even though operated by some independent person or entity.

Subsection 3(b).—This subsection would exclude from the coverage of the act a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such club or establishment are made available to the customers or patrons of an establishment within the scope of subsection 3(a). There is no substantive change from the bill as introduced.

Section 4

Subsection 4(a).—Section 4 of the bill is entirely new. It would confer a right to be free from discrimination with respect to membership in labor unions and professional, business, or trade associations. Section 4(a) states that no person shall be denied membership in a labor organization, or denied benefits of membership therein, on account of race, color, religion, or national origin.

Subsection 4(b).—Subsection 4(b) states that no person shall be denied membership in a professional, business, or trade association or organization on account of race, color, religion, or national origin where membership would affect the ability of such person to engage in activities affecting interstate commerce.

Subsection 4(c).—This subsection defines "labor organization" for purposes of subsection 4(a). Any organization in which employees participate and which exists for the purpose of dealing with employers in an industry affecting commerce, concerning grievances, labor disputes, wages, rates of pay, hours, or conditions of work would be within the definition. The employers with whom the organization deals need not be engaged in interstate commerce. It is sufficient that the industry in which the employer is engaged affects interstate commerce.

Section 5

Section 5 would prohibit the withholding, denying, interfering, or depriving of rights and privileges granted by sections 3 and 4, or attempts to do so, or the intimidating, threatening, or coercing of any person with a purpose of interfering with those rights or privileges, or the punishing or attempts to punish any person for exercising or attempting to exercise those rights or privileges, or the inciting or aiding or abetting of any person to do any of the foregoing.

Section 5 is the same as section 4 in the introduced bill, except that it would extend its prohibition to the denial or interference with the right to nondiscrimination conferred by the new section 4, as well as to denials or interferences with rights conferred by section 3. Section 5 applies its prohibition to all persons, whether acting under color of law or otherwise. Thus, any person or entity, even though not the owner, operator, or employee of a public establishment within the terms of section 3(a) would be prohibited from interfering with rights or privileges therein conferred. Any person, although lacking affiliation or association with a labor organization, or with a professional, business, or trade association would be prohibited from interfering with rights and privileges secured by section 4 of the amended bill.

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Section 6

Subsection 6(a).—This subsection is the same as subsection 5(a) in the bill as introduced. It would confer a civil action for preventive relief whenever any person has engaged, or there are reasonable grounds to believe that any person is about to engage, in any act or practice prohibited by section 5 of the reported bill. An action for a permanent or temporary injunction, restraining order, or other order, could be instituted by either the person aggrieved, or by the Attorney General. The latter may institute an action in the name of the United States if he certifies that he has received a written complaint from the person aggrieved, and that in his judgment the person aggrieved is unable to initiate and maintain appropriate legal proceedings and such action will materially further the purposes of this act. The bringing of an action by the Attorney General under this subsection would be discretionary.

Subsection 5(b) of the introduced bill providing attorney fees for the person aggrieved, if he prevails, is omitted from this bill. Nor could attorney fees be awarded as costs, for attorney fees are not costs as that term is used in rule 54(d) of the Federal Rules of Civil Procedure. Thus, no attorney fees could be allowed either party under this bill as part of the costs.

Subsection 6(b).—This subsection is identical to subsection 5(c) in the bill as introduced. This subsection states when a person would be deemed unable to initiate and maintain appropriate legal proceedings within the meaning of subsection 6(a). If the aggrieved person is unable, either directly or through other interested persons or organizations, to bear the expense of the litigation, or to obtain effective legal representation; or when there is reason to believe that the institution of such litigation by him would jeopardize the employment or economic standing of, or might result in injury or economic damage to, such person, his family, or his property, then he would be deemed unable to institute and maintain appropriate legal proceedings.

Subsection 6(c).—The provisions of this subsection were not contained in the bill as introduced. This subsection would create a condition precedent to the institution of an action by the aggrieved person under 6(a) involving rights or privileges secured by section 3. Actions involving rights or privileges secured by section 4 (dealing with membership in labor organizations, or professional, business, or trade associations) would not be affected by this subsection.

As a condition precedent to the aggrieved person instituting an action involving section 3 rights or privileges, a written notice of the alleged violation would need to be given at least 30 days prior to the date of instituting suit to any State or local agency, located in the State or locality where the alleged violation occurred, and authorized by State or local law or ordinance to provide assistance in resolving disputes relating to denial of section 3 rights or privileges. If no such State or local agency exists within the State or locality wherein the alleged violation occurred, then written notice would have to be given the Attorney General at least 30 days prior to instituting the action.

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Subsection 6(d).—This subsection is the same as subsection 5(d) in the bill as introduced, except that it would include complaints involving violations of section 4 rights and privileges as well as section 3 rights and privileges. Also, the word "ineffective" replaces the word "fruitless" in the last sentence of the subsection.

This subsection would provide that in the case of any complaint received by the Attorney General alleging a violation of section 5 in any jurisdiction where State or local laws or ordinances appear to the Attorney General to forbid the act or practice involved, he shall notify the appropriate State and local officials. If said officials request a reasonable time to act under such State or local laws before the Attorney General institutes suit, then he shall afford them a reasonable time. If, though, the Attorney General files with the court a certificate stating that the delay would adversely affect the interests of the United States, or that action by the State or local officials would be ineffective, then he would not have to comply with this subsection, even though there did appear to be a violation of State or local law.

Subsection 6(e).—This subsection would authorize the Attorney General, before instituting an action, to utilize the services of any Federal, State, or local agency or instrumentality, or of any private organization which may be available, to secure compliance with section 5 by voluntary procedures if, in his judgment, such procedures are likely to be effective in the circumstances.

The introduced bill provided for utilization of the services of only Federal agencies or instrumentalities.

Subsection 6(f).—This new subsection would provide that the United States be liable for costs the same as a private person in any action instituted under subsection 6(a). This addition was necessary to make the United States liable for costs, for rule 54(d) of the Federal Rules of Civil Procedure provides that—

* * * costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law.

Rule 54(d) also provides that costs shall be awarded the prevailing party unless the court otherwise directs. Thus, costs in actions instituted under this act could be awarded to either party in the discretion of the court.

Section 7

Subsection 7(a).—This subsection is identical to subsection 6(a) in the bill as introduced. It would grant to the district courts of the United States jurisdiction of proceedings instituted pursuant to this act, and would provide further that such jurisdiction be exercised whether or not the aggrieved party had exhausted any administrative or other remedies provided by law. Therefore, in those States having public accommodation laws, the aggrieved party would not have to pursue remedies thereby granted, but could seek his remedy initially and/or solely under this act.

Subsection 7(b).—This subsection is identical to subsection 6(b) in the bill as introduced. It would provide that this act not preclude any individual or State or local agency from pursuing any remedy available under any other Federal or State law requiring nondiscrimination in public establishments. This is an expression of intent to not occupy the field of public ac-

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commodation legislation in such a manner as to preempt State or local laws or regulations in this area. The intent expressed is to preserve the right of the States, and political subdivisions thereof, to enact and enforce legislation of this type.

Section 8

Subsection 8(a).—Section 8 of the bill is entirely new. Subsection 8(a) would provide that in all cases of criminal contempt arising under any order of any court issued pursuant to the provisions of this act, the accused, upon conviction, be fined or imprisoned, or both. For criminal contempt the fine could not exceed \$1,000 and the imprisonment could not exceed the term of 60 days.

Subsection 8(b).—This subsection would provide that in all cases of criminal contempt arising under any court order issued pursuant to this act, the accused, on demand, be entitled to a trial by jury. This would be subject to the exclusion in subsection 8(c).

Subsection 8(c).—This subsection would exclude from jury trial contempts committed in the presence of the court, or so near thereto as to interfere directly with the administration of justice, and contempts arising from the disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Subsection 8(d).—This subsection states that the act shall not be construed so as to deprive courts of their power to secure compliance with or prevent obstruction of the lawful orders and decrees of the court by civil contempt proceedings without a jury trial. Thus, the right to a jury trial would be given only in case of criminal contempt outside the scope of the exclusion in subsection 8(c). Likewise, as the limitation on fine and imprisonment contained in subsection 8(a) would apply only to criminal contempt cases, detention under civil contempt proceedings would not be limited.

BACKGROUND OF THE LEGISLATION

Civil rights progress is the articulated goal of both major national political parties. Each in 1960 committed itself to a platform and a program of equal opportunity and elimination of racial discrimination.

In a nation dedicated to the proposition that all men are created equal—racial discrimination has no place. * * * As to those matters within reach of political action and leadership, we pledge ourselves unreservedly to its eradication. * * * We recognize that civil rights is a responsibility not only of States and localities; it is a national problem and a national responsibility. * * * We pledge the full use of the power, resources, and leadership of the Federal Government to eliminate discrimination based on race, color, religion, or national origin * * * (“Building a Better American,” Republican platform, 1960).

The peaceful demonstrations for first-class citizenship which have recently taken place in many parts of this country are a signal to all of us to make good at long last the guarantees of our Constitution. * * * The time has come to assure equal access for all Americans

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to all areas of community life * * *. ("The Rights of Man," Democratic platform, 1960)

But it was not until the spring and summer of this year—a time period that has become known as the beginning of the Negro revolution of 1963 when the victims of discrimination and their brothers took to the streets—that this country and its Government recognized again the urgent obligation to remove a daily insult to our fellow citizens. The demonstrators took what Prof. Paul Freund of the Harvard Law School has described as—

a grave and heroic course by which persons of sensitive conscience put themselves under the penalty of disobedience in order to sear the conscience of their fellow men.

On June 19, 1963, the late President, in a message to Congress, said in part:

Events of recent weeks have again underlined how deeply our Negro citizens resent the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public. That is a daily insult which has no place in a country proud of its heritage—the heritage of the melting pot, of equal rights, of one nation and one people. No one has been barred on account of his race from fighting or dying for America—there are no "white" or "colored" signs on the foxholes or graveyards of battle. Surely, in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.

This theme was stated another way by Secretary of State Dean Rusk in his appearance before the committee:

* * * we have reached a point now where the progress itself demands the next step; the essential element of personal dignity is the primary missing piece, and we ought to put that piece into place.

Despite the currency of the demonstrations, the introduction of S. 1732, and the committee consideration; the requirement that public accommodations and facilities serving the general public do so without racial or religious discrimination is neither new nor novel. It is now well established and equally accepted that no public conveyance such as a bus, railroad, airline, or the facilities adjacent thereto may discriminate against or segregate its patrons. The doctrines that to a large extent sustain this result are deeply rooted in English common law but by no means limited to common carriers. In the 17th century, Lord Chief Justice Hale expressed the authority that the public, through its Government, can exert over commercial enterprises dealing with the public:

Property does become clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. (1 Harg.Law Tracts 78,

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cited with approval by Mr. Chief Justice Waite in *Munn v. Illinois*, 94 U.S. 113, 126 (1877))

This potential for regulation of businesses established to serve the public evolved into the actual obligations of such establishments to serve all members of the public equally:

Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him * * * If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If the innkeeper refuse to entertain a guest, when his house is not full, an action will lie against him; and so against a carrier, if his horses be not loaded, and he refuses to take a packet proper to be sent by a carrier. (Lord Chief Justice Holt in *Lane v. Cotton*, 12 Mod. 472, 484 (1701))

The common law rule as to the obligation of an innkeeper was clearly set forth in another early English decision:

An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, "You shall come to my inn," and to another, "You shall not," as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servant, they having in return a kind of privilege of entertaining travelers and supplying them with what they want. (Mr. Justice Coleridge in *Rex v. Ivens*, 7 Carrington & Payne 213 (1835))

The English rule that, because an innkeeper is engaged in a business in which the public has an interest and enjoys certain privileges not given the public generally, he cannot discriminate for or against any class or pick and choose his guests also became the American rule. In fact the presence of this rule, either by express statute or adoption of the common law duties, was significant to the Supreme Court that held unconstitutional the 1875 statute which guaranteed full and equal enjoyment of public accommodations and facilities. Mr. Justice Bradley wrote in the majority opinion:

Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them. (The Civil Rights cases, 109 P.S. 3, 25 (1883))

It should be noted that this decision of the Supreme Court was handed down 10 years before the adoption of State laws, statutes, or ordinances requiring segregation. There is historical evidence to indicate that in 1885 a Negro could use railroad, dining, and saloon facilities without discrimination in the Carolinas, Virginia, and Georgia. As late as 1954, Louisiana re-

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pealed a statute requiring places of business and public resorts to serve all persons "without distinction or discrimination on account of race or color." And in 1959 Alabama repealed that part of its code which incorporated the common law duties of innkeepers and hotelkeepers.

Immediately after World War II, in 1946, President Truman appointed a Special Committee To Review Civil Rights. The task force found that progress in this field fell far short of the requirements of the Nation's conscience, the possible achievements under the Constitution, and the rightful demands of the victims of discrimination. Their report in 1947 pointed out that segregation is economically wasteful and quoted the late Eric Johnston who, as president of the U. S. Chamber of Commerce said: "Intolerance is a species of boycott and any business or job boycott is a cancer in the economic body of the Nation." The report further recommended the enactment by the States of laws guaranteeing equal access to places of public accommodation, broadly defined, for persons of all races, colors, creeds, and national origins. At that time 18 States had enacted statutes in the field of public accommodations; to date, only 14 other States, for a total of 32, now protect against discrimination and segregation in public accommodations and facilities.

This bill, then, is the second attempt to achieve Federal legislation and the third time equal access to public accommodations has been recommended as a national goal. It is not possible to measure with mathematical certainty the costs of discrimination; and even if it were, these figures would never reveal the highest cost of all: that to national unity and self-respect. All citizens and all regions can agree that the pattern of race relations that has developed in recent months—boycotts and counterboycotts, economic retaliations, demonstrations—must be terminated. Of equal certainty is the fact that the systematic denials of service directed at certain of our citizens in facilities otherwise available to the public are a powerful force behind this unrest.

In the absence of affirmative action now there can be little doubt that there will be repercussions in the near future, repercussions that may affect the Nation's economy, welfare, and international prestige. On this issue the Nation has a common and an immediate interest.

COMMITTEE ACTION

The public accommodations civil rights bill was transmitted to the Senate by the President on June 19, 1963. On July 1, the committee began a series of hearings that culminated on August 2. There were 23 separate sessions in which statements from 40 witnesses were received. In addition, comments were requested from law school professors and deans throughout the country and from the Governors of each of the States. And, as is usual in issues of this kind that are so deeply felt, many interested individuals and organizations sent in prepared views that made a valuable contribution to the committee's consideration.

It would be too facile to describe the issue confronting the committee as simply a question of the kind of world in which we want to live. There were necessarily involved profound legal, constitutional, and policy questions. These questions were pursued in hearings free of partisanship and by witnesses not limited by region or point of view. The witnesses from the administration, uniformly supporting the bill and its purposes, included the

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following: Attorney General Robert Kennedy, Secretary of State Dean Rusk, Secretary of Labor Willard Wirtz, Under Secretary of Commerce Franklin Roosevelt, Jr., and Assistant Attorney General for Civil Rights, Burke Marshall. Also invited to appear were those whose positions or experience provided insights into the issues at hand. These included: Erwin N. Griswold, a member of the U. S. Civil Rights Commission and dean of the Harvard Law School; Hon. Frank Morris, mayor of Salisbury, Md., accompanied by John W. T. Webb and the Reverend Charles Mack, chairman and member, respectively, of the Salisbury-Wicomico Biracial Commission; Dr. Eugene Carson Blake, National Council of Churches; Father John F. Cronin, National Catholic Welfare Conference; Rabbi Irwin Blank, Synagogue Council of America; Peter Rozelle, commissioner, National Football League; Ford Frick, commissioner of baseball; Hon. Joe Foss, commissioner, American Football League; Roy Wilkins, executive secretary, National Association for the Advancement of Colored People; Hon. Ivan Allen, Jr., mayor of Atlanta, Ga.; and Bruce Bromley, attorney.

In addition, Senator Thurmond, of South Carolina, was authorized to invite witnesses. Nineteen appeared at his request, including the Governors of South Carolina, Georgia, Florida, Alabama, and Mississippi; and also the attorneys general of Arkansas, Mississippi, and South Carolina. Furthermore, statements were received for the record from the attorneys general of Georgia and North Carolina.

In this way a full record was developed; a record that seeks as completely as possible to explore the legality, wisdom, and need for a Federal statute securing for all persons the right of equal access to places of business held open to the public.

Does Congress have the authority to end discrimination in places of public accommodation?

At the outset a formidable obstacle to a favorable determination on S. 1732 appeared to be an 1883 decision by the U. S. Supreme Court holding unconstitutional an 1875 statute providing criminal penalties for denials of service by public facilities or accommodations on account of race, color, or religion. This 1875 law was expressly based on the 14th amendment, but the Supreme Court could not find the requisite "State action" in denials of service by privately owned establishments. There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished. That question, however, was not before the committee, for the instant measure is based on the commerce clause (art. 1, sec. 8, clause 3) of the Constitution. The majority opinion of the Court in the 1883 decision carefully stated that they were not foreclosing a statute based on the broad powers of Congress such as are found in the commerce clause. Mr. Justice Bradley wrote:

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, and among the several States and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the

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declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. (109 U.S. 3, 18 (1883))

Attached as an appendix to this report is a brief prepared at the request of the committee by Prof. Paul Freund of the Harvard Law School, a noted authority on the Constitution. In this document Professor Freund concludes that the law proposed by S. 1732 is consistent with the Constitution and the decisions thereunder by the Supreme Court. In the judgment of the committee it would be upheld on review. Similar conclusions were reached by almost all legal scholars or practitioners consulted by the committee or inquired of by witnesses appearing before the committee. Professor Freund wrote: "The commerce power is clearly adequate and appropriate. No impropriety need be felt in using the commerce clause as a response to a deep moral concern." Where social injustices occur in commercial activities the commerce clause has been used to prevent discrimination; it has been used to prohibit racial discrimination; and it has been used to reach intrastate activities if they have a substantial effect (individually or cumulatively) upon commerce. The committee concludes that there is sufficient authority in the Constitution to uphold S. 1732.

Congress, in the exercise of its plenary power over interstate commerce, may regulate commerce or that which affects it for other than purely economic goals.

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. (Mr. Justice Stone in *United States v. Darby*, 312 U.S. 100, 115 (1941))

The fact that S. 1732 would accomplish socially oriented objectives by aid of the commerce clause powers would not detract from its validity. There are many instances in which Congress has discouraged practices which it deems evil, dangerous, or unwise by a regulation of interstate commerce. Examples of this are found in Federal legislation keeping the channels of commerce free from the transportation of tickets used in lottery schemes, sustained in *Champion v. Ames*, 188 U.S. 321 (1903); the Pure Food and Drug Act, sustained in *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); the "White Slave Traffic Act," upheld in *Hoke v. United States*, 227 U.S. 308 (1913); strict regulation of the transportation of intoxicating liquors, sustained in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917); and the Fair Labor Standards Act, imposing wages and hours requirements, sustained in *United States v. Darby*, 312 U.S. 100 (1941).

As broad and as deep as are the powers of Congress, there is presented the more difficult problem of how those powers should be utilized. Gov. Farris Bryant of Florida, speaking in opposition to the bill said: "My position is purely and simply that while I believe that the Federal Government has the power to do, I do not believe it has the right to do what it is suggesting be done here." The chairman of the committee, Senator Mag-

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nuson, in the initial stages of the public hearings, stated the issue in another way. He observed:

This is a question of public policy and how far Congress wants to go under the authority of the commerce provision of the Constitution. The commerce power has served as the basis for Federal action on such national policies as the regulation of agricultural production; requirement of collective bargaining; prohibition of industrial monopolies and unfair trade practices; regulation of the sale of stocks, bonds, and other securities; establishment of hydroelectric, flood control and navigation projects; and an attack upon such crimes as white slavery, kidnaping, trade in narcotics, theft of automobiles, and shipments of gambling devices and lottery tickets. Should it now be used to prohibit denials of service in public facilities when the exclusive reason for the denial is the race, religion, or national origin of the would-be patron?

Determinations of appropriate public policy are rarely susceptible to scientific, clinical measurement. More often than not these judgments involve an evaluation of competing, sometimes conflicting, considerations. In the case at hand, the first finding that had to be made by the committee was the need for Federal legislation.

THE NEED FOR FEDERAL LEGISLATION

Race discrimination hampers our economic growth by preventing the maximum development of our manpower, by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the cost of public welfare, crime, delinquency, and disorder. Above all, it is wrong. (President John F. Kennedy, Feb. 28, 1963)

State law

As noted earlier in this report, the Supreme Court in 1883 believed that all States had in effect laws guaranteeing "proper accommodations to all unobjectionable persons who in good faith apply for them." Yet by 1947 the Truman Commission report, noting that 18 States did have public accommodations laws, recommended a renewed effort at the State level to eliminate such discrimination by legislation. It is now 80 years after the Supreme Court decision and 16 years after the Truman Commission report and only 14 additional States have made discrimination in public accommodations and facilities a prohibited act.

Many of these 32 States have adopted statutes more comprehensive in coverage and severe in penalty than what is contemplated by S. 1732. These State laws would be specifically preserved and relied on for effective enforcement of the proposed Federal statute. Wherever a remedy is available at the State level, for example, S. 1732 provides that such remedy would be pursued before injunctive relief under this bill is sought.

Despite the action in 32 States attempting to secure equal access to public accommodations, there is obviously a broad statutory gap that has fueled and fired racial and religious tensions. This fact was neither contested nor controverted during the course of the committee hearings. And the conclusion has been inescapable: the problem is one national in scope requiring Federal legislation. The time has now passed when discrimination was susceptible to local treatment alone without a residual right of enforcement.

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As John W. T. Webb, chairman of the Salisbury (Md.) Biracial Commission noted:

We started working with the restaurants in the fall of 1960 and at that time tempers were not as short, lines were not as drawn, and the situation was enormously easier than it is today in communities that have this problem of discriminatory service.

His fellow commission member, the Reverend Charles Mack, made a similar observation:

But for God's sake, have some bill, something to fall back on in the case where everything is stopped, where people are sitting around not doing anything about the situation at all.

And finally the mayor of Atlanta, Ga., Ivan Allen, Jr., summed up the possible futility of past progress if Congress fails to enact this bill:

Surely the Congress realizes that after having failed to take any definite action on this subject in the last 10 years, to fail to pass this bill would amount to an endorsement of private business setting up an entirely new status of discrimination throughout the Nation. Cities like Atlanta might slip backward.

Hotels and restaurants that have already taken this issue upon themselves and opened their doors might find it convenient to go back to the old status. Failure by Congress to take definite action at this time is by inference an endorsement of the right of private business to practice racial discrimination and, in my opinion, would start the same old round of squabbles and demonstrations that we have had in the past.

Human dignity

Americans do not adjust to segregated living; nor should they.

Several witnesses before the committee described the nature of the affront; the effects of the systematic and arbitrary exclusion of an individual from public facilities for no reason other than the color of his skin. Roy Wilkins, executive secretary of the National Association for the Advancement of Colored People, commented as follows:

The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.

It must be remembered that while we talk here today, while we talked last week, and while the Congress will be debating in the next weeks, Negro Americans throughout our country will be bruised in nearly every waking hour by differential treatment in, or exclusion from, public accommodations of every description. From the time they leave their homes in the morning, en route to school or to work, to shopping, or to visiting, until they return home at night, humiliation stalks them. Public transportation, eating establishments, hotels, lodginghouses, theaters, motels, arenas, stadiums, retail stores, markets, and various other places and services catering to the general public offer them either differentiated service or none at all.

For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite

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the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S.C., or from Jacksonville, Fla., to Tyler, Tex.

How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?

Later in the same hearing, Mr. Wilkins added:

You just live uncomfortably, from day to day. It must be remembered that the players in this drama of frustration and indignity are not commas or semicolons in a legislative thesis; they are people, human beings, citizens of the United States of America. This is their country. They were born here, as were their fathers and grandfathers before them, and their great-grandfathers. They have done everything for their country that has been asked of them, even to standing back and waiting patiently, under pressure and persecution, for that which they should have had at the very beginning of their citizenship.

The Reverend Eugene Carson Blake, appearing on behalf of the National Council of Churches, gave the committee a specific example during the testimony. He recounted the following experience:

I traveled with a distinguished Negro pastor for three night stands. We were speaking on "international peace" in 1948, I believe it was, and we were traveling through the Pacific Northwest.

No bad incident happened as far as the race of my companion was concerned during that half a week that we spent together. But, I never was the same again, because I, for the first time in my life, realized what it would be to be a Negro traveling, because he didn't know each time as to whether he would be received. There was just this edginess which no human being ought to be subjected to.

The primary purpose of S. 1732, then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

On this point, Mayor Allen of Atlanta comments as follows:

* * * the elimination of segregation, which is slavery's stepchild, is a challenge to all of us to make every American free in fact as well as in theory—and again to establish our Nation as the true champion of the free world.

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Economic aspects

As discussed earlier, the fundamental purpose of S. 1732 is directed at meeting a problem of human dignity; and such an objective has been and can be readily achieved by congressional action based on the commerce power of the Constitution. In addition, though, the committee is convinced that the measure is a sound approach to the economic burdens created by discrimination in public establishments.

Dean Griswold, addressing himself to the question of whether or not there was a valid connection between discrimination and interstate commerce, made the following statement:

In the United States of 1963, it does not require any fiction to see the relationship of places of public accommodation to interstate commerce. In 1961, commercial airlines flew more than 18 billion revenue passenger-miles in the Nation during the first half of the year. More than 350 million passengers traveled on the 218,000 miles of railroad routes in 1958. Intercity buslines in 1959 carried 170 million passengers over 208,000 miles of route. The 41,000-mile Interstate Highway System, which reaches into every corner of the land, crosses the boundaries of 673 cities and passes close to many hundreds of others.

With the growth of metropolitan complexes, many thousands of citizens travel across State lines for business or pleasure, not periodically but on a daily basis. And at the same time, a great volume of the goods and appliances used by businesses which serve the public move in interstate commerce.

Public establishments presently discriminating or segregating on account of race, color, religion, or national origin are enjoying the benefits of access to and participation in commerce. The business of such establishments is fostered and made more profitable because of the advantages afforded them by utilizing these various channels of commerce. However, when the discriminatory practices employed by such establishments lead to demonstrations or boycotts in addition to the humiliation of those subject to discrimination, the economy of our Nation suffers.

For example, such practices have a stifling effect on the business of providing accommodations for conventions. Mr. Ray Bennison, convention manager of the Dallas (Tex.) Chamber of Commerce was quoted in the Wall Street Journal, July 15, 1963, as stating:

This year we've probably added \$8 to \$10 million of future bookings because we're integrated.

Within 1 day after 14 Atlanta hotels recently announced they would accept Negro convention guests, the Atlanta Convention Bureau had received commitments from three organizations including 3,000 delegates that would not have otherwise visited Atlanta, according to the same source.

The adverse economic effect of discrimination by public accommodations is not limited to the convention business. Discrimination or segregation by establishments dealing with the interstate traveler subjects members of minority groups to hardship and inconvenience as well as humiliation, and in that way seriously decreases all forms of travel by those subject to such discrimination. Surely a family is not encouraged to travel along a route or into an area where, because of the color of their

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skin, they will be denied suitable lodging or other facilities. According to Mrs. Marion Jackson, publisher of Go-Guide to Pleasant Motoring, a Negro traveling by car from Washington, D. C., to New Orleans must travel an average of 174 miles between establishments that will provide him with suitable lodging. Many of these establishments are small and there is often no vacancy for the traveler who seeks accommodations in the latter part of the day. Not only is this an affront to human dignity; it is also a detriment to the economy of this Nation.

The reluctance of industry to locate in areas where such discrimination occurs is another manifestation of the burden on our economy resulting from discriminatory practices. Employees do not wish to work in an environment where they will be subject to such humiliation. There is a lack of local skilled labor available in such areas because many workers, rather than be subject to discriminatory practices, have relocated in other regions.

The Honorable Franklin D. Roosevelt, Jr., Under Secretary of Commerce, in his statement before the committee, pointed out that—

In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled \$248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth \$3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State as a whole dropped to \$190 million from \$248 million of the 2 years before desegregation.

Mr. Glenn E. Taylor, Birmingham (Ala.) Chamber of Commerce official, was quoted in the Wall Street Journal, September 19, 1963, as saying shortly after the bomb blast in that city killing four Negro children:

We haven't had a commitment for a new industry all summer, but we had hopes that things were going to improve. I was planning to take a trip next week to contact some prospects. But what's the use now?

Not only is industry discouraged from locating where discrimination is practiced, but physicians, lawyers, and other professional persons are deterred from engaging in their professions where the advantages of membership in local professional associations, or other benefits, will be refused them because of the color of their skin. Included in the statement of the Under Secretary of Commerce, before the committee, was this quotation from a statement by the provost for medical affairs of the University of Arkansas:

The university medical center, being within the community of Little Rock, could not help but be affected by the disturbance. I think it would be only fair to say that because of this complicating social change, the medical center has had its faculty recruitment program brought to a virtual standstill.

Discriminatory practices in places of amusement and retail establishments often leads to the withholding of patronage by those affected, and in that way the normal demand for goods or entertainment is restricted.

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Other patrons, even though not themselves subject to discrimination, also avoid establishments employing such practices when picketing or boycotting occurs because of fear of possible violence. In his statement before the committee, the Under Secretary of Commerce said:

Retail sales in Birmingham were reported off 30 percent or more during the protest riots in the spring of 1963. That is just retail sales, gentlemen. One local businessman said several retailers had told him their books had shown a net loss for the first time in a generation. Another businessman of 35 years experience said there were more stores for rent in Birmingham last fall than there had been during the depression.

The Federal Reserve bank in Atlanta reported that in the 4-week period ended May 18, 1963, department store sales in Birmingham were down 15 percent below the same period in 1962. Since January 1, 1963, the city's department store sales dropped 5 percent from 1962. During the same 4½ months, department store sales were up 7 percent in Atlanta, up 10 percent in New Orleans, and up 15 percent in Jacksonville, Fla.

The Honorable Frank Morris, mayor of the city of Salisbury, Md., appearing before the committee, commented on the effect of recent demonstrations in Cambridge on its economy. Mr. Morris said:

I am engaged in the wholesale plumbing, heating, and supply business in Salisbury, a family-owned business. We have a branch store—we have seven of them, and one is in Cambridge. Our own particular business is there, we sell to the plumbing and heating contractors. We do not sell to the retail public. Our business there has dropped very substantially, as much as 80 percent off from when it was on its peak, as far as the demonstration.

Also, our council in Salisbury has the district manager of the Acme Stores. Their food business in Cambridge dropped as much as 30 to 40 percent during the peak of the demonstrations.

I have been told by a shoestore manager, a national chain shoestore manager, that he was working on his quota, and he worked on a quota basis—I had one conversation with the gentleman, so I am going secondhand with it, so to speak—anyway, he was going on a quota basis, and on his quota, he was 165 percent ahead of his quota for the first 4 months. And then the freedom riders came into town, and his business dropped and within the next 3 months he was down to less than 40 percent of his quota. He had gone from 165 down to 40 percent on a yearly quota.

Definitely the demonstrations have a real effect. Certainly when demonstrations are at their peak, you are not going to take your family, normally speaking, down on the street to see what is going on. You are going to leave your children home. You want your wife to stay home. If you have to go some place, buy something, or do something, you do only the necessities. And if you can avoid the area that is troubled, you are going to avoid it. It very definitely has an effect.

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The Under Secretary of Commerce told the committee that discriminatory practices in places of entertainment or amusement not only artificially restrict the demand for entertainment, but also that—

Where segregation is practiced in theaters and auditoriums, the entire community, both white and Negro, is denied access to a variety of cultural and entertainment activities. The Metropolitan Opera Co. canceled its annual season in Birmingham because municipal authorities failed to desegregate theater facilities. Although they had formerly had very successful seasons in Birmingham, there are no plans for resumption in the immediate future.

Actors' Equity adopted a rule about a year ago, written into every contract, that performers need not perform in theaters where discrimination is practiced either against performers or patrons.

Entertainers in the American Guild of Variety Artists have also been refusing to book where either the stage or the audience is segregated. The guild's resolution is fairly recent, but many of the booking agencies have insisted upon this clause for a long time.

Ford Frick, commissioner of baseball, directed the attention of the committee to the contrast between the disbanding of the Southern Association largely due to segregation in the cities holding franchises and the experience in 1962 on the reopening of a professional baseball team in Little Rock, Ark. It was determined by the board of directors of the new club that there should be integration on the playing field as well as in the stands. Commissioner Frick inserted in the hearing record a report from the general manager of the new team that said in part:

The Southern Association of which Little Rock was a member for many years never did integrate at any time. We did considerable groundwork and study before applying for a franchise in the International League. We were assured by the four larger hotels in the city that they would take care of all visiting Negro players in the rooms, coffeeshops, and dining rooms exactly as they would provide for the white players. We selected the Hotel Marion because of its all-night coffeeshop.

The local NAACP field secretary requested what we integrate the park. We answered them that we would sell tickets to the general public. When the board of directors of the club met, it decided to integrate the park on opening night, April 16. No public mention of this decision was made although local TV and radio sports announcers and newspaper sportswriters were aware that the decision had been made.

The park was quietly integrated on opening night with 6,966 paid admissions of which several hundred were Negro patrons. There was no trouble, no commotion, and no complaint, except one lone man with a sign who moved up and down in front of the park. No one paid any attention to him. He tried it again the second night for a short time and then gave up.

Negro players on the home team and visiting teams have been applauded from the start, and sometimes louder than the white

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players. Visiting managers report better treatment here in hotels and coffeeshops than elsewhere. One visiting team has as many as six Negro players.

Our Negro players are popular with our fans. They came here in fear, but a large group of white fans met the team on their arrival here from spring training and took them on tour in private cars over the city. They are much at home now.

We sold \$114,330 worth of preseason tickets early in the spring. Tickets were sold in 90 cities and towns in Arkansas outside of Little Rock. Enthusiasm and support have been steady and general throughout the State.

Integration in Little Rock has been smooth. It came about naturally and is a normal part of Arkansas baseball now.

This is an indication that progress has been made. But there are other cities and other areas where resistance is stronger. Gov. George Wallace of Alabama, for example, after noting that segregation in his State is a matter of "custom and usage," made the following reply to a question about the likelihood of voluntary desegregation of public establishments in Alabama:

No, sir; they can integrate. Let them go ahead and integrate. One or two have talked about integrating in Birmingham, Ala. They have had Negro boycotts, now they have white boycotts.

Mayor Allen of Atlanta similarly cast doubt on reliance on voluntary action to achieve effective desegregation. He prophesied a return to "the old turmoil of riots, strife, demonstrations, boycotts, and picketing" if S. 1732 failed of enactment.

It is, moreover, clear that where desegregation in public establishments has been achieved either by community biracial efforts or legislation or ordinance, it has been done without the adverse economic results that had been forecast by its opponents. Richard Marshall, an attorney of El Paso, Tex., advised the committee by letter of the actual experience in his city with a public accommodations statute similar to S. 1732. He wrote as follows:

Although such legislation, on a State and local basis, is nothing new but has existed for over 75 years, it was noteworthy that El Paso, Tex., adopted such an ordinance last year since this was the first such enactment in any of the 11 traditional Southern States.

Our experience has been gratifying. Our four aldermen were all in favor of it, but the mayor vetoed it and the ordinance was passed over his veto. There was no violence, there were no demonstrations, and there was acceptance of the ordinance by the hotels, theaters, and restaurants of El Paso. Many of the theaters and restaurants welcomed with relief the passage of the ordinance, since they had the force of law behind their natural desire to serve all patrons without causing arguments on their business premises.

I do not think that even the most fervent 1962 opponents of the ordinance among the restaurants and hotel people would today be able to state that this legislation had either harmed

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their business, taken any of their property or profits from them, deprived them of any of their liberties, or created any super police power in the community.

CONCLUSION

Much of the dialog about public accommodations legislation has involved the assertion that such a law would infringe upon traditional private property rights. Because of the importance of our private property system, and its traditional role in the American concept of individual freedom, such an argument has strong emotional appeal. However, emotion is not to be the guide in determining the desirability of or need for public accommodations legislation. The question is far too serious and of far too great a magnitude to be determined without recourse to reason and reflection upon the meaning and purpose of private property.

Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? As noted previously, the English common law answered this question in the negative. It reasoned that one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain. It is to be remembered that the right of the private property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner.

But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations legislation. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life.

Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty? Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. In fact, in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.

There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accommodations legislation. Zoning laws tell the owner of private property to what type of business his property may be devoted, what structures he

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may erect upon that property, and even whether he may devote his private property to any business purpose whatsoever. Such laws and regulations restricting private property are necessary so that human beings may develop their communities in a reasonable and peaceful manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.

Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices. The committee concurs in the analysis of Secretary of State Rusk who made the following response to the question of whether this law would restrict property rights:

Well, I could not agree, sir, that such a law would diminish freedom. The purpose of law in a free society is to enlarge freedom by letting each know what kind of conduct to expect from the other. And it is through our laws that personal freedom is not only protected but constantly enlarged, so we can pursue our respective orbits with a minimum of collisions.

I am thinking also of the private rights of those who seek normal public services and accommodations, and are denied them for reasons which I cannot see, for reasons which I don't believe our Constitution can recognize.

In addition, much of the questioning concerned the nature, type, and extent of the precedent established by favorable action on S. 1732. When Dean Griswold was asked if this measure could serve as the forerunner for legislation requiring the sale of kosher foods or fish on Friday, he replied:

I think I would like to add, with respect to these other things, too, Senator, that I don't think that we have to defend against every conceivable bill that Congress might some time have to consider. One of the reasons we have the Congress is to make decisions. And I assume that Congress will not pass bills which are foolish or improper or go too far.

Later in the same hearing this line of inquiry was pursued further with respect to equal public accommodations for dogs or children. Dean Griswold, in the following answer, observed:

I don't think we need to be absolute, that we need to be utterly comprehensive in everything we do. There isn't a major national problem with respect to age and dogs and various other things. There is a major national problem with respect to race. There is a problem which is on the doorstep of this Congress and which must be faced and resolved by this Congress with respect to race.

In view of the committee this is the heart of the matter; Congress should not be so fearful of its future judgment that it fails to meet present responsibilities. Brave men, woman, and children have forced this Nation and the world to recognize an intolerable condition. The resolution of this condition is a major, immediate, and critical matter.

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AGENCY REPORTS.

The reports of the agencies and departments follow:

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of June 26, 1963, in which you asked for our comments on S. 1732.

S. 1732, introduced as part of the President's civil rights program, aims at preventing racial and religious discrimination in public accommodations in or affecting interstate commerce. The bill authorizes civil actions for preventive relief by the aggrieved parties, or by the Attorney General in the name of the United States, and also, prior to the institution of such actions, provides for procedures to seek voluntary compliance with the nondiscrimination prohibitions of section IV.

S. 1732, if enacted, would not directly affect the functions and operations of the General Accounting Office and we have no objection to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U. S. Senate.

DEAR MR. CHAIRMAN: In your letter of June 27, 1963, you asked for our comment on the amendments to S. 1732 (in the nature of a substitute), introduced by Senator Dirksen on June 26, 1963. The proposed amendments would substitute for the public accommodations bill contained in S. 1732 as originally introduced provisions relating to and establishing a Community Relations Service similar to that proposed in title IV of S. 1731, the administration's package bill on civil rights.

This proposal would not directly affect the functions and operations of our office, and we have no objection to its favorable consideration by your committee. We suggest that there be considered the inclusion of the words "subject to civil service and classification laws" after the word "appoint" at the end of line 8, page 4 of the bill.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U. S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of July 17, 1963, in which you asked for our comment on the amendment to S. 1732 introduced by Senator Goldwater on July 16, 1963.

This proposal represents that part of the President's civil rights program relating to discrimination in places of public accommodations. Senator Goldwater's amendment would permit injunctive relief against a labor union which engages in or is about to engage in violation of the rights guaranteed in section 101 of the Labor-Management Reporting and

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Disclosure Act of 1959 (29 U.S.C. 411). The amendment would also add a new section 7 to S. 1732 whose effect would be to deny exclusive bargaining power to a labor union which maintains exclusionary membership policies.

These amendments, if enacted, would not affect the functions and operations of our office, and we have no objection to their favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate.*

DEAR MR. CHAIRMAN: In your letter of July 23, 1963, you requested our comment on an amendment (No. 134) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would add a new section 5 prohibiting the publishing, circulation, display, or mailing of notices, advertisements, or communications representing that certain goods, services, facilities, privileges, advantages, or accommodations offered or held out to the public for sale, use, rent, or hire, shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin by any person acting under color of any law, statute, ordinance, regulation, custom, or usage. The bill would further prohibit any person so acting from committing certain specified acts in denial of such goods, services, or facilities to any customers on account of their race, color, religion, or national origin.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate.*

DEAR MR. CHAIRMAN: In your letter of July 23, 1963, you requested our comment on an amendment (No. 135) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would insert in section 4 of S. 1732 a provision which would prohibit the direct or indirect publishing, circulation, or display of any notice, advertisement, or written or printed communication to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment to which the provisions of section 3 of the bill apply shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

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COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate.*

DEAR MR. CHAIRMAN: In your letter of July 25, 1963, you requested our comment on an amendment (No. 136) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would add to section 3 of S. 1732 a new subsection (c) which would make it clear that the enumeration of any public establishment in subsection (a) of section 3 shall not be construed to exclude its application to other similar establishments not listed.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, October 11, 1963.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate.*

DEAR MR. CHAIRMAN: In your letter of October 4, 1963, you asked for our comments on an amendment (No. 212) to S. 1732, intended to be proposed by Senator Cooper and Senator Dodd.

The proposed amendment would add to S. 1732, between line 24 on page 4, and line 1 on page 5, a new section 3(a) and would provide for the renumbering of the remaining sections of the bill. The new section would guarantee the right to nondiscrimination in public establishments operated under State authority.

The proposed amendment, if enacted, would not affect the functions and operations of the General Accounting Office and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D. C., July 10, 1963.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense with respect to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

Executive Order 9981, issued by President Truman on July 26, 1948, declared it to be a policy of the President that there should be equality of treatment and opportunity for all persons in the armed services without regard of race, color, religion, or national origin. The Department of Defense took steps to assure compliance with Executive Order 9981, and it is the policy of the Department of Defense to provide equality of treatment and opportunity for all members of the Armed Forces. In furtherance of efforts in this area, the Department is currently studying means for adopting recommendations of the President's Committee on Equal Opportunity in the Armed Forces. While the military departments have es-

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established a fine record over the past 15 years, these recommendations are designed to further improve existing programs. One of the major items included in the report of this committee concerns problems encountered as a result of off-base discrimination.

Off-base discrimination against minority groups within the Armed Forces generates a serious morale problem for the military. In consideration of the purpose and the mission of the Military Establishment, it is neither feasible, expedient, nor justifiable to assign personnel to duty stations on the basis of race, color, or national origin. Consequently, servicemen belonging to minority groups have been forced to accept a set of standards, and have been denied privileges enjoyed by other military personnel in those areas where local custom supports discriminatory practices.

It is understood that the establishments covered by S. 1732 are those which serve the general public, including hotels, motels, restaurants, lunch counters, theaters and other places of amusement, department and other retail stores, drugstores, gasoline stations and the like. Military personnel, like other members of the American public, must rely upon the availability of public accommodations when traveling to new duty stations, when living in a civilian community adjacent to their duty station, or when on temporary duty in connection with military maneuvers. Unlike most civilians, military personnel are required to move their families upon completion of a 3- to 4-year tour of duty. As a matter of military necessity, the serviceman moves when and where ordered. When servicemen, who are members of a minority group, encounter discriminatory practices in the course of a move, or upon arrival at their new duty station, they are required to assume additional problems which constitute an unnecessary and unjustifiable burden. The morale and discipline problems caused by such inequities can only have an adverse effect on military operations.

The Department of Defense fully concurs in the purposes of S. 1732 and supports its enactment as a needed supplement to its own existing policies. This legislation would assure minority groups within the Armed Forces the same equality of treatment during periods of travel, and during off-duty time that is now being afforded on-base.

The Bureau of the Budget advises that there is no objection to the presentation of this report for the consideration of the committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely,

JOHN T. McNAUGHTON.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
August 9, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR MR. CHAIRMAN: This letter is in response to your recent requests for reports on S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce and a proposed amendment, in the nature of a substitute, by Senator Dirksen together with S. 1217 and S. 1622 dealing with the same topic.

Thoughtful persons are aware that the patterns of racial discrimination imposed upon the colored tenth of our population have had debilitating effects upon those who have endured them. Many have been caught in the cycle of poverty and hopelessness reflected in the often-quoted statistics on school dropouts, welfare rolls, health standards, juvenile delinquency, and unemployment.

The President, with the wholehearted support of myself and the Department of Health, Education, and Welfare, seeks now to dedicate the Nation to the elimination of the more flagrant forms of discrimination practiced against the Negro. At the same time the President has urged

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substantial increases in funds for basic adult education, welfare work training, vocational education, youth and manpower training to assist all of our citizens with limited educational and cultural attainments to break out of the round of inadequate skills, unemployment, and indifference. The Department of Health, Education, and Welfare will assume major responsibility for this enhanced educational effort under legislation now pending before this Congress. We welcome the challenge which these programs will create for us.

For the Negro who takes advantage of fresh opportunities to augment his education and skills to meet the requirements of today's industry, the knowledge that racial barriers are being removed from public accommodations, education, employment, housing and in numerous other areas of our daily life will provide him with strong motivation for success. Full opportunity will spark ambition. An earnest ongoing effort to eliminate all forms of racial discrimination by both public and private action is an inseparable part of the proposed program to combat the illiteracy and inadequate skills of a substantial fraction of our populace. If we can do these things simultaneously, the momentum of our efforts will be rewarded by a more secure America where every man will be measured by his own worth.

For these reasons, therefore, the Department of Health, Education, and Welfare urges enactment of S. 1732. This bill is a part of the omnibus civil rights program proposed by the President and places the enforcement powers of the Federal Government squarely behind the eradication of discrimination in public accommodations. The suggested amendment of Senator Dirksen would be a substitute for the administration's bill and we do not support it. S. 1217, proposed by Senator Javits and S. 1622, by Senator Hart, lack numerous significant features of S. 1732. We defer to the views of the Department of Labor on the amendment to S. 1732, introduced by Senator Goldwater.

We are advised by the Bureau of the Budget that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of S. 1732 would be in accord with the President's program.

Sincerely,

ANTHONY J. CELEBREZZE, *Secretary.*

U. S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., August 21, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on the amendments to S. 1732 offered by Senator Goldwater on July 16, 1963.

The first amendment would extend the enforcement provisions of S. 1732 to cover actions to redress violations of section 101 of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act). Section 101 affords to union members equal rights to participate in union affairs, freedom of speech and assembly, safeguards against unjust dues and assessments, protection of the right to sue, testify, or petition and safeguards against improper disciplinary action. The effect of the proposed amendment would be to permit the Attorney General to bring suit for violations of section 101, where heretofore such suits only could be brought by individuals.

The second amendment proposed by Senator Goldwater would amend the National Labor Relations Act to preclude the NLRB from certifying as an exclusive bargaining agent any union "which does not admit to membership all of the employees it seeks to represent in a unit appropriate

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for that purpose, on the same terms and conditions generally and uniformly applicable to and with the same rights and privileges generally and uniformly accorded to all members thereof. * * *

We do not believe it is advisable to attempt to deal with labor union practices as part of legislation directed at places of public accommodations. Legislation affecting our basic labor law should evolve from an investigation of the particular problems in that area, and should be adopted only in response to a demonstrable need.

There has been no indication that the proposed amendments are needed. Indeed, insofar as the second proposed amendment is concerned, the NLRB already has the authority which the amendment would confer upon it, as the Department of Justice pointed out in an amicus curiae brief filed with the Board in a case involving the Hughes Tool Co., of Houston, Tex., and the Independent Metal Workers Union.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

U. S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, August 7, 1963.

Hon. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in further response to your request for our views on amendments intended to be proposed by Mr. Goldwater to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce.

The first of the proposed amendments would, in our opinion, constitute an irrelevant addition to S. 1732. It, in effect, amends section 101 of the Labor-Management Reporting and Disclosure Act of 1959, and deals with matters which are inappropriate for inclusion in this public accommodations proposal, as well as legally incongruous with its stated purpose.

S. 1732 concerns the right of access to public accommodations particularly as they relate to interstate travel and commerce. On the other hand, section 101 of the Labor-Management Reporting and Disclosure Act pertains to the internal affairs of labor unions. Section 101 does establish certain rights for union members, and it also prohibits certain discriminations in disciplinary and other matters. However, none of these rights and safeguards under section 101 are germane in any way to the right of being served in public establishments.

The proposed amendment seeks to revive an approach which the Congress considered but rejected when it enacted the Labor-Management Reporting and Disclosure Act in 1959. As originally proposed in the Senate, the Secretary of Labor was empowered to enforce the provisions of title I. As the bill was finally passed, however, private actions were substituted to remedy all violations of this title, with several exceptions. Approximately 275 private actions have been instituted under the title in the less than 4 years the Labor-Management Reporting and Disclosure Act has been in existence, thus indicating the extent to which union members have exercised their rights.

Another point for consideration is that many title I rights under the act are also title IV duties on labor organizations and are protected through civil actions of the Secretary of Labor. Since the enactment of the act, the Secretary has initiated 95 actions to enforce these rights. Taking into account this close relationship between title I and title IV,

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we believe that a further division of responsibility in civil litigation between the Departments of Labor and Justice would lead to confusion in the act's administration and be detrimental to its basic objectives.

We are in basic agreement with the objective of the proposed new section to S. 1732 entitled "Bargaining Rights of Labor Organizations With Exclusionary Membership Policies." However, a recent ruling by an NLRB hearing examiner (Hughes Tool Co. (Case No. 23-CB-429)) indicates that this amendment may simply be declaratory of existing law.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Yours sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

DEPARTMENT OF STATE,
Washington, July 12, 1963.

Hon. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate.*

DEAR MR. CHAIRMAN: Your letters of June 26 and June 27, 1963, enclosed for the comment of the Department of State a copy of the bill, S. 1732, the Interstate Public Accommodations Act of 1963, and a copy of the amendments in the nature of a substitute intended to be proposed by Senator Dirksen to S. 1732.

The Department's views on this matter were presented by the Secretary of State during his testimony before your committee on July 10 and we have no further comments on the foreign policy implications of this legislation and the reasons why we must attack the problems of discrimination. The Department of State defers to the views of other agencies primarily concerned with respect to the detailed questions of this legislation and its enforcement; we are, as the Secretary pointed out, concerned with the underlying purpose of the proposals and the adverse effects of the present situation.

The Bureau of the Budget advises that there is no objection to the submission of this report and that enactment of S. 1732 would be in accord with the administration's program.

Sincerely yours,

FREDERICK G. DUTTON,
Assistant Secretary.

FEDERAL AVIATION AGENCY,
Washington, D. C., July 19, 1963.

Hon. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in reply to your request of June 27, 1963, for the views of this Agency with respect to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

You also asked for our views on S. 1217 and S. 1622, other public accommodations bills. This report constitutes our response to all three requests.

I am obviously aware of the fundamental issues which prompted the introduction of S. 1732. Both as a member of this administration and as an American citizen I am greatly concerned that all our fellow citizens, and particularly those who travel in interstate commerce, will be treated with dignity in selecting public accommodations.

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However, I assume that your request for my comments relates specifically to my responsibilities under the Federal Aviation Act of 1958, to encourage and foster the development of air commerce. Pursuant to that responsibility, I strongly recommend enactment of S. 1732.

The movement of the air traveler from point to point provides only one of the services he needs as he moves in air commerce. Additionally, and at the very least, he needs food and lodging. He usually has a variety of other needs. For most travelers those needs are met in a fashion designed to afford comfort and convenience. But if restaurants and hotels are not available to the air traveler, if they are available only at an inconvenience, or if they are unattractive or otherwise undesirable, he is not getting the services he needs and should be able to expect. The natural consequence is that he is reluctant to travel and does so only when necessity outweighs the inconvenience and other unpleasantness involved. So that this reluctance may be overcome, the same facilities which are already available to most air travelers must be made available to all of them. The same high-quality, convenient, and pleasant accommodations that most of us insist on in the usual course of traveling must be made available to all who would travel. This is essential if air commerce is to reach its fullest development.

In sum, it is my belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.

The Bureau of the Budget has advised that there is no objection to the submission of this report and enactment of S. 1732 would be in accord with the program of the President.

Sincerely,

N. E. HALABY, *Administrator.*

FEDERAL AVIATION AGENCY,
Washington, D. C., August 20, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate,
Washington, D. C.

DEAR MR. CHAIRMAN: This is in reply to your request of July 17, 1963, for the views of this Agency with respect to the amendments proposed by Senator Goldwater to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

The substance of these amendments is not within the area of this Agency's expertise, and we therefore offer no comment on them. I continue, as I indicated in my report of July 19, 1963, on S. 1732, to favor the bill in the form proposed by the President.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. HALABY, *Administrator.*

GENERAL SERVICES ADMINISTRATION,
Washington, D. C., July 26, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR MR. CHAIRMAN: Your letter of June 26, 1963, requested the views of the General Services Administration on S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

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The purpose of the proposed legislation is stated in the title of the bill. It would, with respect to all persons traveling interstate, prohibit discrimination or segregation based on race, color, religion, or national origin in certain public establishments.

We wish to point out in this connection that, in fiscal year 1964, it is estimated the civilian agencies of the Federal Government will spend approximately \$348,231,710 for passenger travel within the continental United States. It is our firm conviction that all Federal employees traveling interstate on Government business should be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of certain public establishments, as would be provided by the proposed legislation.

The General Services Administration strongly endorses the objective of S. 1732 and urges early enactment of the bill.

The enactment of the proposed legislation would not affect the budgetary requirements of this agency.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, *Administrator.*

GENERAL SERVICES ADMINISTRATION,
Washington, D. C., August 16, 1963.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: Your letter of June 27, 1963, requested the views of the General Services Administration on certain amendments in the nature of a substitute for S. 1732 which amendments would amend all after the enacting clause of the bill and amend its title to read "A bill to establish a Community Relations Service to assist in securing full access by all persons without regard to race, color, religion, or national origin, to the public services and accommodations provided by private establishments, and to provide conciliation assistance to communities in resolving certain disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, religion, or national origin."

For the reasons stated in our letter to you of July 26, 1963, commenting on S. 1732, as introduced, the General Services Administration strongly endorses the objective of this bill.

We believe that S. 1732 is better designed to achieve its objective of eliminating discrimination based on race, color, religion, or national origin in public accommodations affecting interstate commerce than are these amendments proposed as substitute therefor and, consequently, urge early enactment of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

LAWSON B. KNOTT, Jr.,
Acting Administrator.

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GENERAL SERVICES ADMINISTRATION,
Washington, D. C., August 27, 1963.

MR. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR MR. CHAIRMAN: Your letter of July 17, 1963, requested the views of the General Services Administration on certain proposed amendments (designated No. 127) to S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce. For the reason stated in our letter to you of July 26, 1963, commenting on S. 1732, as introduced, the General Services Administration strongly endorses the objectives of this bill and urges its early enactment. The first of these proposed amendments to the bill would amend section 5(a) thereof so as to extend civil action for preventive relief under that section to members of labor organizations who are denied by such organizations those rights and privileges guaranteed by section 101 of the Labor-Management Act of 1959. The second of these proposed amendments would amend section 9(a) of the National Labor Relations Act, as amended, so as to provide that a labor organization which does not admit to membership, on an equal basis with all other members, all the employees it seeks to represent shall not be the exclusive representative of such employees for the purpose of collective bargaining within the meaning of that section. Since these proposed amendments to S. 1732 are outside the scope of GSA's responsibilities and functions and are of more direct concern to the Department of Labor, we would defer to the views of that Department with respect to the relevancy of and the necessity for such amendments. The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, Administrator.

GENERAL SERVICES ADMINISTRATION,
Washington, D. C., September 4, 1963.

MR. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR MR. CHAIRMAN: Your letter of July 25, 1963, requested the views of the General Services Administration on proposed amendment No. 127 to S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce. For the reasons stated in our letter to you of July 26, 1963, commenting on S. 1732 as introduced, the General Services Administration strongly endorses the objectives of this bill and urges its early enactment. This proposed amendment (designated No. 136) would add a subsection to section 3 of S. 1732 so as to expand the construction of the term "public establishments" as enumerated in subsection (a) of that section to include any other public establishment not listed therein, but which is similar to an enumerated establishment. In our opinion such an amendment to S. 1732 is unnecessary in view of the fact that S. 1732 in enumerating the places of public accommodation which would be covered by the proposed legislation uses the phrase "other public place" in each of the categories. The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, Administrator.

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INTERSTATE COMMERCE COMMISSION,
COMMITTEE ON LEGISLATION,
Washington, D. C., July 9, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR CHAIRMAN MAGNUSON: Your letter of June 27, 1963, addressed to the Chairman of the Commission, and requesting comments on a bill, S. 1732, introduced by Senator Mansfield (for himself and 45 other Senators), to eliminate discrimination in public accommodations affecting interstate commerce, and on amendments (in the nature of a substitute) to S. 1732 intended to be proposed by Senator Dirksen, has been referred to our Committee on Legislation. After consideration by that committee, I am authorized to submit the following comments in its behalf:

I

S. 1732, as introduced, would establish the right of all persons, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of public establishments serving interstate travelers or substantially affecting interstate travel or the interstate movement of goods in commerce. While the term "public establishments" is not fully defined, among the establishments explicitly covered by the bill are hotels, motels, restaurants, theaters, and other places of amusement; retail and department stores, drugstores, lunchrooms, lunch counters, gasoline stations, and the like. Bona fide private clubs are not included.

Any deprivation of or interference with the right to use the public facilities covered by the proposed measure is specifically prohibited, and aggrieved persons are granted the right to sue for an injunction or other preventive relief. In addition, the bill would authorize the Attorney General to bring a civil suit for preventive relief when, in his judgment, the person aggrieved is unable to initiate and maintain appropriate legal proceedings and the purposes of the bill will be materially furthered by the filing of such an action.

The term "public establishments" as used in the bill as introduced is broad in scope, and it is not clear to what extent S. 1732 is intended to apply to common carriers and other persons subject to the Interstate Commerce Act and related statutes administered by this Commission. Insofar as the proposed measure may be construed to apply to such carriers and other persons, it should be noted that it is now unlawful under section 3(1) of the act

for any common carrier subject to this part [part I] * * *
to make, give, or cause any undue or unreasonable preference or
advantage to any particular person * * * or to subject
any particular person * * * to any undue or unreasonable
prejudice or disadvantage in any respect whatsoever.

While this provision relates to rail carriers, there are similar provisions in the other parts of the act applicable to motor or water common carriers. These provisions have been interpreted in a series of decisions by the Federal courts and this Commission as prohibiting the segregation by such carriers of passengers traveling on interstate trains or buses, or using related terminal facilities. *Mitchell v. United States*, 313 U.S. 80 (1941); *Henderson v. United States*, 339 U.S. 816 (1950); *Boynton v. Virginia*, 364 U.S. 454 (1960); *United States v. Lassiter*, 203 F.Supp. 20, aff'd per curiam, 371 U.S. 10 (1962); *Lewis v. The Greyhound Corp.*, 199 F.Supp. 210 (1961); *National Assn. for A.O.C.P. v. St. Louis-S. F. Ry. Co.*, 297 I.C.C. 335 (1955); *Keys v. Carolina Coach Co.*, 64 M.C.C. 769 (1955); and *Discrimination—Interstate M. Carriers of Passengers*, 86 M.C.C. 743 (1961).

In the last cited proceeding, this Commission, upon petition of the Attorney General of the United States, promulgated a number of general

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regulations designed to implement further the provisions of section 216 (d) of the act with respect to the nonsegregated use of motorbuses and related facilities operated and utilized in the interstate common carrier transportation of passengers. The lawfulness of the regulations thus issued was upheld by the courts in the *State of Georgia v. United States*, 201 F.Supp. 813, aff'd per curiam, 371 U.S. 9 (1962); and the Attorney General has since reported that all railroad stations and bus terminals have been desegregated. In view of these decisions, the racial segregation of passengers using interstate transportation or terminal facilities by common carriers subject to the Interstate Commerce Act is clearly established as a violation of that act. In the words of the Supreme Court: "The question is no longer open; it is foreclosed as a litigable issue." *Bally v. Patterson*, 369 U.S. 31, 33.

To the extent, therefore, that S. 1732 might be construed as prohibiting discrimination or segregation by common carriers subject to the Interstate Commerce Act, its enactment would permit the accomplishment of the same substantive result as that reached by this Commission and the courts in the aforementioned cases. Insofar as its prohibitions would apply to persons other than common carriers subject to our jurisdiction under the Interstate Commerce Act and related statutes, its enactment would not appear to affect directly the jurisdiction or functions of this Commission or to impair our administration of the laws entrusted to us. In either case, however, the bill's passage into law, under the circumstances here disclosed, is, in our view, a matter of broad congressional policy. Accordingly, we make no recommendation either for or against S. 1732 as introduced.

II

The amendments (in the nature of a substitute) to S. 1732 intended to be introduced by Senator Dirksen would declare "legal and consonant with the right of private property, but nevertheless * * * not in keeping with the concept and spirit of equality * * *" the denial to any person, because of race, color, religion, or national origin, of free and full access to the public services and accommodations provided by private establishments, except public utilities and common carriers, when done within the discretion of the owners and operators thereof and not under compulsion of State and local laws. The substitute proposal would create a Community Relations Service to assist in securing the full and nondiscriminatory access by all persons to the public services and accommodations of private establishments, and to provide conciliation assistance to communities in resolving certain disputes, disagreements, or difficulties based on race, color, or national origin.

As the proposed amendments are expressly made inapplicable to the services and accommodations provided by public utilities and common carriers, their passage into law would not affect the prohibitions now embraced in the Interstate Commerce Act relating to racial discrimination or segregation by common carriers subject to the jurisdiction of this Commission. Accordingly, their enactment also is, in our view, a matter which the Congress must decide on the basis of broad policy considerations.

Respectfully submitted.

ABE MCGREGOR GOFF,
Acting Chairman.
RUPERT L. MURPHY.

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INTERSTATE COMMERCE COMMISSION,
COMMITTEE ON LEGISLATION,
Washington, D. C., July 31, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate,
Washington, D. C.

DEAR CHAIRMAN MAGNUSON: Your letters of July 23 and July 25, 1963, addressed to the Chairman of the Commission, and requesting comments on amendments Nos. 134, 135, and 136, intended to be proposed by Senator Keating to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, have been referred to our Committee on Legislation. After consideration by that Committee, I am authorized to submit the following comments in its behalf:

The amendments intended to be introduced by Senator Keating would prohibit the direct or indirect publication, circulation, issuance, display, or mailing of any notice, advertisement, or written or printed communication, to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment subject to section 3 of S. 1732 shall be refused to or withheld from any person on account of race, color, religion, or national origin. In addition, such amendments would in substance preclude all persons from engaging in the discriminatory practices otherwise forbidden by S. 1732, as so amended, under color of any law, statute, ordinance, regulation, custom, or usage.

In our previous comments upon S. 1732 and certain amendments thereto intended to be introduced by Senators Dirksen and Goldwater, we expressed the view that enactment of that legislation with or without such amendments, would not affect the substantial functions or jurisdiction of this Commission and represents a matter which Congress itself must decide on the basis of broad policy considerations. The amendments intended to be proposed by Senator Keating, likewise, would have no material effect upon the provisions of the Interstate Commerce Act relative to racial discrimination or segregation by common carriers subject to our jurisdiction, discussed in our prior letters, and we therefore take no position for or against their passage into law.

Respectfully submitted,

LAURENCE K. WALRATH,
Chairman.
ABE MCGREGOR GOFF.
RUPERT L. MURPHY.

INTERSTATE COMMERCE COMMISSION,
COMMITTEE ON LEGISLATION,
Washington, D. C., July 24, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

DEAR CHAIRMAN MAGNUSON: Your letter of July 17, 1963, addressed to the Chairman of the Commission, and requesting comments on amendments intended to be proposed by Senator Goldwater, to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, has been referred to our Committee on Legislation. After consideration by that committee, I am authorized to submit the following comments in its behalf:

In our letter of July 9, 1963, concerning S. 1732 and certain amendments (in the nature of a substitute) intended to be introduced by Senator Dirksen, we expressed the view that enactment of either the original or the proposed substitute bill would not directly affect the substantial functions or jurisdiction of this Commission and constitutes a matter which Congress itself must decide on the basis of broad policy considerations.

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the amendments intended to be proposed by Senator Goldwater relate exclusively to labor organizations and have as their fundamental purpose the extension of such organizations of full and equal membership rights and privileges to all of the employees they seek to represent in a unit appropriate for that purpose. Such amendments would not modify or affect the provisions of the Interstate Commerce Act, discussed in our prior letter, relating to racial discrimination or segregation by common carriers subject to the jurisdiction of this Commission, and their passage into law also is, in our view, a matter of broad congressional policy in respect of which we take no position.

Respectfully submitted.

LAURENCE K. WALRATH,

Chairman.

ABE MCGREGOR GOFF.

RUFERT L. MURPHY.

House Report No. 914

THE Committee on the Judiciary, to whom was referred the bill (H.R. 52) to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in education, to establish a Community Relations Service, to extend for 4 years the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

PURPOSE AND CONTENT OF THE LEGISLATION

The bill, as amended, is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States. In furtherance of these objectives the bill: (1) provides for the appointment of a three-judge district court in voting suits and for the expeditious determination of such suits, and also provides against the discriminatory use of literacy tests in Federal elections; (2) prohibits discrimination in enumerated public establishments; (3) authorizes the Attorney General to initiate suits to desegregate public facilities, other than public schools, and to intervene in suits charging deprivation of equal protection of the laws; (4) authorizes the Attorney General to initiate suits to desegregate public schools; (5) makes the Civil Rights Commission a permanent agency; (6) prohibits discrimination in any Federal financial assistance program; (7) establishes a Federal Equal Employment Commission designed to eliminate discriminatory employment practices by business, labor unions, or employment agencies; (8) provides for the compilation of registration and voting statistics by race, color, and national origin; (9) makes a remand of a civil rights case from a Federal court back to a State court reviewable on appeal.

HISTORY OF THE LEGISLATION

Early in the 88th Congress a substantial number of broad civil rights bills were introduced by members of both political parties. On February 28, 1963, the President of the United States transmitted to the Congress a message of recommendations pertaining to civil rights (H.

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Doc. 75, 88th Cong., 1st sess.). Subsequently, on June 19, 1963, the President of the United States transmitted to the Congress a second message containing recommendations pertaining to civil rights (H.Doc. 124, 88th Cong., 1st sess.).

A judiciary subcommittee conducted hearings on 172 bills which had been referred to it. These proposals related to almost every aspect and facet of civil rights including such topics as voting; public accommodations; school desegregation; prohibition of discrimination in Federal financial assistance programs; equal protection of laws; antilynching; fair employment practices; the Civil Rights Commission; establishment of a Community Relations Service; voting and registration statistics according to race, color, and national origin; and authorization for the Attorney General to institute civil actions to protect and enforce civil rights.

Hearings were held on May 8, 9, 15, 16, 23, 24, 28; June 13, 26, 27; July 10, 11, 12, 17, 18, 19, 24, 25, 26, 31; and August 1, 2, 1963 (civil rights hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st sess., serial No. 4).

During the course of these hearings, the testimony related to all the subjects of the legislative proposals. The witnesses included the congressional authors of the proposals; other Members of both Houses of Congress; the Attorney General; the Secretaries of Labor and of Health, Education, and Welfare; representatives of the Civil Rights Commission; and of the President's Committee on Equal Employment Opportunity, State and local officials, private citizens, as well as representatives of various organizations specifically concerned with this legislation. The subcommittee afforded to all who were interested a reasonable opportunity to present their views on the proposals. Those who did not appear personally were given an opportunity to submit any relevant matter for the record.

Upon conclusion of the hearings, the subcommittee met in executive session a total of 17 days to consider the legislation. Thereafter the subcommittee struck out of H.R. 7152, as amended, all after the enacting clause and inserted in lieu thereof an amendment in the nature of a substitute. The amended version was recommended to the full Judiciary Committee.

The substitute version of the legislation before the full Judiciary Committee contained 11 titles. Briefly, these were:

- (I) Voting rights;
- (II) Injunctive relief against discrimination in public accommodations;
- (III) Authorization to the Attorney General to institute civil proceedings to protect against the deprivation of rights;
- (IV) Desegregation of public education and other public facilities;
- (V) Establishment of a Community Relations Service;
- (VI) Permanent extension of the Civil Rights Commission;
- (VII) Nondiscrimination in federally assisted programs;
- (VIII) Creation of a Federal Equal Employment Opportunity Commission;
- (IX) Provision for the compilation of registration and voting statistics according to race, color, and national origin;
- (X) Provision for review of an order remanding a civil rights case from a Federal court back to a State court; and

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(XI) A general separability provision and a general appropriations authorization.

The full Judiciary Committee in its deliberation and consideration of the bill, H.R. 7152, adopted an amendment in the nature of a substitute. This substitute retained amended titles on voting rights; public accommodations; authorization to the Attorney General to intervene in or initiate certain civil rights suits; desegregation of public education; permanent extension of the Civil Rights Commission; nondiscrimination in federally assisted programs; creation of a Federal Equal Employment Opportunity Commission; compilation of registration and voting statistics according to race, color, and national origin; a separability provision; and general appropriation authorization. The substitute deleted the title establishing a Community Relations Service and retained intact the title providing for review of an order remanding a civil rights case from a Federal court back to a State court.

GENERAL STATEMENT

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

Considerable progress has been made in eliminating discrimination in many areas because of local initiative either in the form of State laws and local ordinances or as the result of voluntary action. Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means "to secure these rights," and H.R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve in a number of related areas. It would reduce discriminatory obstacles to the exercise of the right to vote and provide means of expediting the vindication of that right. It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities osten-

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sibly open to the general public. It would guarantee that there will be no discrimination among recipients of Federal financial assistance. It would prohibit discrimination in employment, and provide means to expedite termination of discrimination in public education. It would open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities.

H.R. 7152, as amended, is a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination. It is a reasonable and responsible bill whose provisions are designed effectively to meet an urgent and most serious national problem.

SECTIONAL ANALYSIS

TITLE I—VOTING

General

Title I is designed to meet problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960, by which the Congress took steps to guarantee to all citizens the right to vote without discrimination as to race or color.

To help meet the problem of lengthy and often unwarranted delays which have occurred in the course of judicial proceedings under the prior acts, title I would require the courts to give priority to voting cases brought by the United States or the Attorney General and would authorize and direct the appointment of a three-judge court, upon request by the Attorney General, in cases brought under the 1957 and 1960 acts.

Discriminatory use of literacy tests and other devices by registration officials is dealt with by the requirements in title I that such officials apply uniform standards and by the prohibition against their disqualifying an applicant for immaterial errors or omissions in papers requisite to voting in Federal elections. In addition, title I would require that, with respect to Federal elections, literacy tests be in writing (unless the applicant requests and State law authorizes a nonwritten test) and would create a rebuttable presumption that an individual who has completed the sixth grade possesses sufficient literacy to vote in Federal elections.

Section 101(a) is designed to insure nondiscriminatory practices in the registration of voters for Federal elections. It would amend existing law (42 U.S.C. 1971(a)) by requiring the application of uniform standards, practices, and procedures to all persons seeking to vote in Federal elections and by prohibiting the disqualification of an individual because of immaterial errors or omissions in papers or acts relating to such voting. It would also require in Federal elections (1) that any literacy test be administered in writing except where an individual requests and State law authorizes a nonwritten test and (2) that a copy of both the test and the answers thereto (whether they are written or oral) be maintained and given to the applicant, if requested. These provisions would provide specific protections to the right to vote and would reduce opportunities for discriminatory application of voting standards without in any way lessening or limiting the broad prohibitions against voting discrimination already contained in existing law (42 U.S.C. 1971(a)).

LEGISLATIVE HISTORY

Section 501 would effect minor amendments to section 102 of the Civil Rights Act of 1957 (42 U.S.C. 1975a), which sets forth rules of procedure for hearings held by the Civil Rights Commission. The witness fees and allowances authorized by subsection (j) would be modified in accordance with increased amounts generally allowed to witnesses in other proceedings. Subsection (k) would be amended to allow the Commission to subpoena a witness to testify within the State in which he has appointed an agent for service of process and to testify outside the State if the hearing is to be held within 50 miles of the place in which he is found, resides or is domiciled, does business, or has appointed an agent for service of process.

Section 502 amends section 103(a) of the 1957 act. It would increase the compensation of members of the Commission not otherwise in Government service from \$50 to \$75 for each day of service and provide for payment of their travel expenses and per diem in lieu of subsistence expenses in accordance with section 5 of the Administrative Expenses Act of 1946.

Section 503 amends section 103(b) of the 1957 act. It provides for payment of travel expenses and per diem in lieu of subsistence expenses to Government members of the Commission in accordance with the Travel Expenses Act of 1949.

Section 504(a) amends section 104(a) of the 1957 act by adding to the duties of the Commission by providing (1) that it serve as a national clearinghouse for information in respect of the equal protection of the laws, and (2) that it investigate written and sworn allegations of patterns of practices of voting frauds or discrimination in Federal elections.

Section 504(b) repeals section 104(c) of the 1957 act to make the Commission a permanent body.

Section 505 amends section 105(a) of the 1957 act to increase from \$50 to \$75 a day the maximum amount of compensation payable by the Commission to temporary or intermittent consultants.

Section 506 would amend section 105(g) of the 1957 act by authorizing Federal district courts to order compliance with Commission subpoenas by persons domiciled within the jurisdiction of the court or who have appointed an agent for service of process within the jurisdiction.

Section 507 would enact an express grant of rulemaking power to the Commission.

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

General

This title declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy. This title is not intended to apply to foreign assistance programs.

CIVIL RIGHTS ACT OF 1964

Section 601.—This section states the general principle that no person in the United States shall be excluded from participation in or otherwise discriminated against on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance.

Section 602 directs each Federal agency administering a program of Federal financial assistance by way of grant, contract, or loan to take action pursuant to rule, regulation, or order of general applicability to effectuate the principle of section 601 in a manner consistent with the achievement of the objectives of the statute authorizing the assistance. In seeking to effect compliance with its requirements imposed under this section, an agency is authorized to terminate or to refuse to grant or to continue assistance under a program to any recipient as to whom there has been an express finding pursuant to a hearing of a failure to comply with the requirements under that program, and it may also employ any other means authorized by law. However, each agency is directed first to seek compliance with its requirements by voluntary means.

Section 603 provides that any agency action taken pursuant to section 602 shall be subject to such judicial review as would be available for similar actions by that agency on other grounds. Where the agency action consists of terminating or refusing to grant or to continue financial assistance because of a finding of a failure of the recipient to comply with the agency's requirements imposed under section 602, and the agency action would not otherwise be subject to judicial review under existing law, judicial review shall nevertheless be available to any person aggrieved as provided in section 10 of the Administrative Procedure Act (5 U.S.C. 1009). The section also states explicitly that in the latter situation such agency action shall not be deemed committed to unreviewable agency discretion within the meaning of section 10. The purpose of this provision is to obviate the possible argument that although section 603 provides for review in accordance with section 10, section 10 itself has an exception for action "committed to agency discretion," which might otherwise be carried over into section 603. It is not the purpose of this provision of section 603, however, otherwise to alter the scope of judicial review as presently provided in section 10(e) of the Administrative Procedure Act.

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY BACKGROUND AND PURPOSE

General

The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.

Section 701(a) sets forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination.

CHAPTER ELEVEN

RIGHT TO BE FREE FROM DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS UNDER TITLE VI

(42 USCS § 2000d)

- § 311. Generally
- § 312. Discrimination Prohibited
- § 312A. Administrative Enforcement of Title VI [New]
- § 313. Plaintiffs
- § 314. Relevance of Title IV of the Civil Rights Act of 1964
- § 315. Defendants
- § 315A. Pleading and Proof [New]
- § 316. Defense of Governmental Immunity
- § 316A. Other Defenses [New]
- § 316B. —Statutes of Limitation [New]
- § 317. Relief Available

§ 311. Generally

State agencies empowered by state law to supervise local school districts are required by Title VI to comply with the federal statutes insofar as equal educational opportunities are concerned. *Idaho Migrant Council v Board of Education* (1981, CA9 Idaho) 647 F2d 69.

Title VI was amended by the Civil Rights Restoration Act of 1987, P.L. 100-259, 102 Stat. 28, to restore the law to the broad, institution-wide application which characterized coverage of Title VI from the time of its initial passage until the Supreme Court's decision in *Grove City College v Bell* (1984) 465 US 555, 79 L Ed 2d 516, 104 S Ct 1211, 33 CCH EPD ¶ 34158. The amendment adds a section defining the phrase "program or activity" and "program" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives federal funds.

The type of remedy sought in an action brought under Title VI is not relevant to the issue of whether the regulations promulgated under the statute should be applied in a program-specific manner. *David K. v Lane* (1988, CA7 Ill) 839 F2d 1265.

Title VI was enacted to halt federal funding of entities that violate a

prohibition of racial discrimination. *Neighborhood Action Coalition v Canton* (1989, CA6 Ohio) 882 F2d 1012.

Although an implied private remedy exists under Title VI against federal fund recipients, plaintiffs may not maintain a broad-gauged right of action against the federal government officers charged with monitoring and enforcing funding recipients' compliance with discrimination proscriptions. *Women's Equity Action League v Cavazos* (1990) 285 App DC 48, 906 F2d 742, 54 CCH EPD ¶ 40054.

§ 312. Discrimination Prohibited

The Court of Appeals for the Tenth Circuit has held that § 2000d is a broad statute prohibiting discrimination, but that it does not prohibit preferential employment of tribal members by an Indian tribe. *Wardle v Ute Indian Tribe* (1980, CA10 Utah) 623 F2d 670.

Where the defendants discriminated in renting by imposing a strict racial quota for occupants, the court found Title VI was violated and enjoined the defendant's practice. *Williamsburg Fair Housing Committee v New York City Housing Authority* (1980, SD NY) 493 F Supp 1225.

Although § 2000d-3 does not expressly limit agency enforcement of Title VI to situations where employment is the primary objective of the federal assistance, protection under Title VI is only extended to intended beneficiaries of the assistance and thus in Title VI suits charging employment discrimination, one of the purposes of the financial assistance must be to provide employment. *Valentine v Smith* (1981, CA8 Ark) 654 F2d 503, cert den (US) 71 L Ed 2d 111, 102 S Ct 972; *Carmi v Metropolitan St. Louis Sewer Dist.* (1980, CA8 Mo) 620 F2d 672, cert den (US) 66 L Ed 2d 117, 101 S Ct 249.

Where an employer is a recipient of federal funds, Title VI applies only to employees hired under the federal program. Title VI may apply to employees who are not beneficiaries of the federal funds only if discrimination against them has a discriminatory effect on actual beneficiaries. *Equal Employment Opportunity Com. v Southwestern Baptist Theological Seminary* (1980, ND Tex) 485 F Supp 255.

Legislative history supports the conclusion that Title VI protection is only extended to an intended beneficiary of federal financial assistance. *Simpson v Reynolds Metals Co.* (1980, CA7 Ill) 629 F2d 1226.

The Second Circuit Court of Appeals has ruled that Title VI does not apply to direct benefit programs such as Titles II and XVI of the Social Security Act. *Soberal-Perez v Heckler* (1983, CA2 NY) 717 F2d 36, cert den (US) 80 L Ed 2d 186, 104 S Ct 1713.

Where a city had a long history of and reputation for discriminating in Fire Department employment, failure to actively recruit minorities for the entrance

test was a violation of Title VI. *Association against Discrimination in Employment, Inc. v Bridgeport* (1979, DC Conn) 479 F Supp 101, *affd in part and vacated in part on other grounds* (CA2 Conn) 647 F2d 256.

Where suit was brought under Title VI to enjoin the closing of a municipal hospital which serviced 98% minorities, the Court of Appeals for the Second Circuit held that despite the disproportionate racial impact of the closing, the decision was rationally related to efficient management of the hospital system and that the city did not have to use a least burdensome alternatives approach to select a hospital for closing. *Bryan v Koch* (1980, CA2 NY) 627 F2d 612.

Where it was alleged that limiting the busing remedy interfered with the government's Title VI obligation not to support segregated schools, the Court of Appeals for the District of Columbia Circuit held that no such interference was present because Congress did not intend to force financial support for segregated schools. *Brown v Califano* (1980) 201 App DC 235, 427 F2d 1221.

An order from administrative enforcers of Title VI requiring desegregation of a school faculty is not barred by § 2000d-3 when faculty integration is essential to student integration and where discrimination in hiring teachers had discriminatory effects on students. *Caulfield v Board of Education* (1980, CA2 NY) 632 F2d 999, *cert den* (US) 68 L Ed 2d 225, 101 S Ct 1739.

Errata: In the text at (d) of this section, the final phrase should read "race, color or national origin" not "race, color or religion."

The Court of Appeals for the Fifth Circuit has ruled that physician staff privileges are protected from discriminatory actions by a hospital receiving federal funds. The court noted that three prior cases addressing the same issue had held that such staff privileges are not covered by Title VI. *U.S. v Harris Methodist Fort Worth* (1992, CA5 Tex) 970 F2d 94, 38 Soc Sec Rep Serv 207, 59 CCH EPD ¶ 41728.

Title VI applies to require the state of Alabama as a recipient of federal funds to eliminate all vestiges of racial discrimination at its public colleges and universities. *Knight v State of Ala.* (1991, ND Ala) 787 F Supp 1030, later proceeding (ND Ala) 801 F Supp 577, costs/fees proceeding (ND Ala) 1993 US Dist LEXIS 8365.

Title VI prohibits a state board of education from using a policy of denying admission into teacher-education programs to students who have failed to achieve a minimum ACT test score where the policy had a racially disparate impact. *Groves v Alabama State Bd. of Educ.* (1991, MD Ala) 776 F Supp 1518.

Title VI does not prohibit the termination of an Hispanic public housing tenant by giving notice and the hearing officer's decision in English and not providing a Spanish translation. *Vialez v New York City Housing Authority* (1991, SD NY) 783 F Supp 109.

§ 312A. Administrative Enforcement of Title VI [New]

Title VI prohibits discrimination in federally funded programs and places a duty upon federal officers to enforce its terms.

A federal agency may threaten to terminate funding to induce compliance with Title VI, but must seek voluntary compliance prior to resorting to termination. *Caulfield v Board of Education* (1980, CA2 NY) 632 F2d 999, cert den (US) 68 L Ed 2d 225, 101 S Ct 1739.

The Ninth Circuit Court of Appeals has held that a faculty desegregation plan, agreement to which was induced by threatened termination of federal funds was voluntary when it was adopted by vote and other alternatives such as seeking an injunction and requesting a hearing were rejected. *Zaslowsky v Board of Education* (1979, CA9 Cal) 610 F2d 661.

Voluntary measures adopted to remedy discrimination are in fulfillment of a constitutional obligation to eliminate discrimination, so when a race-conscious remedy is voluntarily implemented, it is not a violation of Title VI because Title VI bars only unconstitutional discrimination. *Detroit Police Officers' Asso. v Young* (1979, CA6 Mich) 608 F2d 671.

When Congress statutorily limited the distance a student could be bused in a desegregation plan, the District of Columbia Circuit Court of Appeals held that all that was restrained was the use of fund termination authority to induce busing beyond the limits. The authority to terminate funding could still be used to induce other remedies deemed necessary for Title VI compliance. Also not limited was authority to negotiate busing plans or to refer the case to the Department of Justice for legal action. *Brown v Califano* (1980) 201 App DC 235, 627 F2d 1221.

When the rules and methods used by federal agencies to enforce Title VI are challenged and the plaintiff has raised substantial questions concerning them, a federal court has held that the agency is entitled to administrative review and a chance to adjust its procedures if the plaintiff is convincing. *North Carolina v Department of Health, Education & Welfare* (1979, ED NC) 480 F Supp 929.

Federal officials are limited in their authority to terminate funds. The Fifth Circuit Court of Appeals held that the Department of Health, Education and Welfare could not terminate funding to a school system operating under a court ordered desegregation plan, although the Department had determined that the remedy was not working, because to do so would impinge on the power of the courts. *Robinson v Vollert* (1980, CA5 Tex) 609 F2d 1177.

§ 313. Plaintiffs

In 1979, the Supreme Court based its holding that Title IX created a private cause of action on an express finding that Title VI included an implied

private cause of action. *Cannon v University of Chicago* (1979) 441 US 677, 60 L Ed 2d 560, 99 S Ct 1946, on remand (CA7) 605 F2d 560, later app (CA7 Ill) 648 F2d 1104.

Another seriously divided Supreme Court appears to have ruled that Title VI authorizes a private cause of action, at least insofar as prospective relief is concerned. *Guardians Asso. v Civil Service Com.* (1983, US) 51 USLW 5105.

The Court of Appeals for the Fifth Circuit has ruled that plaintiffs have a private cause of action under Title VI. *Montgomery Improv. Asso. v United States Dept. of Housing & Urban Development* (1981, CA5) 645 F2d 291; accord, *Yakin v University of Illinois, Chicago Circle Campus* (1981, ND Ill) 508 F Supp 848.

Another court has ruled that no private right of action for damages exists under Title VI. *Nabke v U.S. Dept of Housing & Urban Development* (1981, WD Mich) 520 F Supp 5.

While recognizing authority in the Fifth Circuit supporting a private cause of action under Title VI, the Court of Appeals for the Fifth Circuit states that the issue is not significant where an equal protection challenge is brought with the Title VI action. The court reasoned that Title VI merely proscribes the same classifications based upon race as does the Equal Protection Clause. *Castaneda v Pickard* (1981, CA5 Tex) 648 F2d 989.

In an action brought alleging discrimination by an Indian tribe and various tribal officials and invoking various civil rights statutes including § 2000d, the Court of Appeals for the Tenth Circuit held that no cause of action was provided by the broad statutes and that the statutes do not specifically prohibit preferential employment of tribal members by Indian tribes. *Wardle v Ute Indian Tribe* (1980, CA10 Utah) 623 F2d 670.

Plaintiffs bringing a class action on behalf of "all black Protestant children in need of child-care services" against public officials and various voluntary child-care agencies had standing to assert that a violation of Title VI occurred by the creation of an overall child-care system which discriminated on the basis of race and religion. *Wilder v Bernstein* (1980, SD NY) 499 F Supp 980.

Black students properly placed in special classes for the educable mentally retarded were permitted to challenge the use of I.Q. tests for placement in those classes, when such use resulted in a disproportionate racial representation in the classes. *P. v Riles* (1979, ND Cal) 495 F Supp 926.

Where plaintiffs could show that a particular city project receiving federal funds would be discriminatory, the fact that they lacked standing to challenge the city's basic eligibility for the funds did not prevent them from seeking appropriate relief to ensure that a government agency carried out its responsibilities with regard to the project. *NAACP, Boston Chapter v Harris* (1979, CA1 Mass) 607 F2d 514.

The United States has the authority to sue to enforce its contractual assurances—including compliance with Title VI. *United States v. Marion County School Dist.* (1980, CA5 Fla) 625 F2d 607, reh den (CA5 Fla) 629 F2d 1350 and cert den (US) 68 L Ed 2d 298, 101 S Ct 1980.

The Attorney General had standing under § 2000d to bring suit against a city police department for discrimination in federally funded programs. *United States v. Philadelphia* (1979, ED Pa) 482 F Supp 1248, affd (CA3 Pa) 644 F2d 187.

Special legislation singling out tribal American Indians does not create a racial classification for purposes of Title VI. *Queets Band of Indians v. Washington* (1985, CA9 Wash) 765 F2d 1399, vacated, op withdrawn (CA9) 783 F2d 154.

Where a plaintiff does not allege that she is an intended beneficiary of a federal program, her Title VI claim will be dismissed. *Doe on behalf of Doe v. St. Joseph's Hospital* (1986, CA7 Ind) 788 F2d 411, on remand (ND Ind) 113 FRD 677 and later proceeding (ND Ind) 42 CCH EPD ¶ 36973.

The Court of Appeals for the Eleventh Circuit has concluded that a state instrumentality is not a "person" under Title VI and thus has no right to sue under the statute. *United States v. Alabama* (1986, CA11 Ala) 791 F2d 1450, reh den, en banc (CA11 Ala) 796 F2d 1478 and cert den (US) 94 L Ed 2d 144, 107 S Ct 1287.

Intended beneficiaries of Title VI have standing to sue under the statute. *Women's Equity Action League v. Cavazos* (1989) 279 App DC 34, 879 F2d 880.

Also supporting the proposition that a private right of action exists under Title VI is *Baker v. Board of Regents* (1989, DC Kan) 721 F Supp 270.

A black home buyer who alleged racial discrimination in appraisal and lending policies did not have standing to bring a claim under Title VI. The mere fact that the lender participated in certain federal programs was not sufficient to confer standing. *Stephoe v. Savings of America* (1992, ND Ohio) 800 F Supp 1542.

§ 314. Relevance of Title IV of the Civil Rights Act of 1964

As in the *Kinloch* case, where school segregation was interdistrict in nature and district lines were not neutrally drawn, the interdistrict remedy was appropriate. *Morrilton School Dist. v. United States* (1979, CA8 Ark) 606 F2d 222, cert dismd 444 US 1050, 62 L Ed 2d 737, 100 S Ct 992 and cert den 444 US 1071, 62 L Ed 2d 753, 100 S Ct 1015.

In fashioning a remedy for school desegregation, the court should consider: the nature and scope of the constitutional violation; restoring the victims of discrimination to the positions they would have occupied absent such conduct;

FEDERALLY FUNDED PROGRAMS—TITLE VI § 315A

and the interest of state and local authorities in managing their own affairs, consistent with the Constitution. *Morrilton School Dist. v United States* (1979, CA8 Ark) 606 F2d 222, cert dismd 444 US 1050, 62 L Ed 2d 737, 100 S Ct 992 and cert den 444 US 1071, 62 L Ed 2d 753, 100 S Ct 1015.

The proviso of § 2000c which prohibits the seeking of racial balance through transportation of students from one school or school district to another applies only to federal officials and primarily to the Attorney General and his staff, not to local officials. *National Asso. for Neighborhood Schools, Inc. v Board of Public Education* (1980, WD Pa) 497 F Supp 471.

§ 315. Defendants

The Court of Appeals for the Eleventh Circuit has ruled that a Title VI action could not be maintained against an entire state system of higher education. *United States v Alabama* (1987, CA11 Ala) 828 F2d 1532, 44 CCH EPD ¶ 37507, cert den (US) 101 L Ed 2d 894, 108 S Ct 2857.

The Court of Appeals for the First Circuit has noted that the doctrine of respondeat superior may apply to claims brought under § 2000d. *Springer v Seaman* (1987, CA1 Me) 821 F2d 871, 43 CCH EPD ¶ 37162.

Schools accepting federal financial assistance are subject to suit under Title VI. *Radcliff v Landau* (1989, CA9 Cal) 883 F2d 1481, clarified (CA9) 892 F2d 51.

A funding agency is not a proper defendant in an action brought under Title VI; rather, use of Title VI's administrative scheme for terminating the distribution of funds to an alleged discriminator is available. *Abramson v Bennett* (1989, DC Dist Col) 707 F Supp 13, affd without op (App DC) 889 F2d 291.

An Indian tribe is not a proper § 2000d defendant where the claim would affect the tribe's right to self-governance in a purely internal matter. *Nero v Cherokee Nation of Oklahoma* (1989, CA10 Okla) 892 F2d 1457.

Title VI does not permit plaintiffs to sue the federal funding agency that funds that allegedly discriminatory program or entity. *Grimes, by and through Grimes v Cavazos* (1992, SD NY) 786 F Supp 1184.

§ 315A. Pleading and Proof [New]

A majority of the Supreme Court has ruled that Title VI does not require a showing of discriminatory intent. However, unless discriminatory animus is proved, only declaratory and limited injunctive relief is available to private Title VI plaintiffs. *Guardians Asso. v Civil Service Com.* (1983, US) 51 USLW 5105. *Georgia State Conference of Branches of NAACP v Georgia* (1985, CA11 Ga) 775 F2d 1403.

In cases under § 2000d, the plaintiff has the burden of establishing a prima

facie case of discrimination. When a prima facie case is established, the burden shifts to the defendant to present evidence rebutting the inference of discrimination. *New York State Assn. for Retarded Children, Inc. v Carey* (1979, CA2 NY) 612 F2d 644; *NAACP v Medical Center, Inc.* (1981, CA3) 657 F2d 1322.

In establishing a case of discrimination under Title VI, no showing of intentional discrimination is necessary before a remedy, even a race-conscious remedy, may be fashioned. *Caulfield v Board of Education* (1980, CA2 NY) 632 F2d 999, cert den (US) 68 L Ed 2d 225, 101 S Ct 1739.

Discriminatory intent is not required under Title VI, rather proof of disparate impact or effects is sufficient. *NAACP v Medical Center, Inc.* (1981, CA3) 657 F2d 1322. See also *Butts v National Collegiate Athletic Assn.* (1984, CA3 Pa) 751 F2d 609.

The elements of a disparate impact Title VI claim may be gleaned by reference to cases decided under Title VII. *Georgia State Conference of Branches of NAACP v Georgia* (1985, CA11 Ga) 775 F2d 1403.

The Second Circuit Court of Appeals has held that even if a showing of discriminatory intent were necessary before federal funds could be terminated under Title VI, it does not follow that such a showing is necessary in a private litigant's suit seeking an injunction to prevent future discrimination. *Bryan v Koch* (1980, CA2 NY) 627 F2d 612.

When a plaintiff has established a prima facie case of discrimination, the Second Circuit Court of Appeals has held that if the defendant is a state agency, deference to the agency's fact finding is inappropriate. *New York State Assn. for Retarded Children, Inc. v Carey* (1979, CA2 NY) 612 F2d 644.

To be entitled to relief under Title VI, a plaintiff must show more than just discrimination and that the defendant is a recipient of federal funds. The record should also disclose how much funding was received and how it was spent. *Tayyari v New Mexico State University* (1980, DC NM) 495 F Supp 1365.

To be able to sustain a Title VI action for relief from employment discrimination, the Ninth Circuit Court of Appeals has held that it must be alleged that the plaintiff's application for employment was completed. *Tagupa v Board of Directors* (1980, CA9 Hawaii) 633 F2d 1309.

Statistical disparities may be insufficient to prove a prima facie case of discrimination under Title VI. *Latinos Unidos de Chelsea En Accion (LUCHA) v Secretary of Housing & Urban Dev.* (1986, CA1 Mass) 799 F2d 774.

Although discriminatory intent must be alleged under a Title VI statutory claim, a claim under the regulations promulgated pursuant to Title VI will survive a Rule 12(b)(6) challenge so long as discriminatory impact is alleged.

Gomez v Illinois State Bd. of Education (1987, CA7 Ill) 811 F2d 1030, 8 FR Serv 3d 973.

In the Eighth Circuit, intent to discriminate is required under Title VI, rather than mere proof of disparate impact or effects. *Williams v Sioux Falls* (1988, CA8 SD) 846 F2d 509, 46 CCH EPD ¶ 37981; *Tinsley v Kemp* (1990, WD Mo) 750 F Supp 1001.

Another court has ruled that proof of discriminatory intent is not a prerequisite to equitable relief in an action brought under Title VI. Redress is available for facially neutral actions that have a disparate impact on minorities. *Groves v Alabama State Bd. of Educ.* (1991, MD Ala) 776 F Supp 1518.

A court has stated: "In order to make out a prima facie case of discrimination under Title VI, it is necessary to analyze the proof elements of Title VII." *Love v Duke University* (1991, MD NC) 776 F Supp 1070, *affd* (CA4 NC) 959 F2d 231, reported in full (CA4 SC) 1992 US App LEXIS 5802.

§ 316. Defense of Governmental Immunity

The doctrine of sovereign immunity prevents a court from ordering payment of funds which are no longer in existence in an action against a federal officer. *Bakersfield City School Dist. v Boyer* (1979, CA9 Cal) 610 F2d 621.

§ 316A. Other Defenses [New]

Title VI does not require exhaustion of administrative remedies. *Cannon v University of Chicago* (1979) 441 US 677, 60 L Ed 2d 560, 99 S Ct 1946, on remand (CA7) 605 F2d 560, later *app* (CA7 Ill) 648 F2d 1104; *Chowdhury v Reading Hospital & Medical Center* (1982, CA3 Pa) 677 F2d 317, cert den (US) 51 USLW 3938; *Concerned Tenants Asso. of Indian Trails Apartments v Indian Trails Apartments* (1980, ND Ill) 496 F Supp 522.

The defense of qualified official immunity may be available to federal defendants subject to suits brought under Title VI. *National Black Police Asso. v Velde* (1983) 229 App DC 255, 712 F2d 569, cert den (US) 80 L Ed 2d 562, 104 S Ct 2180.

The Sixth Circuit holds that Title VI plaintiffs need not exhaust their administrative remedies before pursuing their cause of action in federal court. *Neighborhood Action Coalition v Canton* (1989, CA6 Ohio) 882 F2d 1012.

§ 316B. —Statutes of Limitation [New]

Because there is no federal statute of limitations for actions brought under Title VI, a state's statute will be borrowed. *Baker v Board of Regents* (1989, DC Kan) 721 F Supp 270.

§ 317. Relief Available

The Supreme Court has ruled that compensatory relief may only be

awarded to a private Title VI plaintiff upon a showing of discriminatory intent. If only a discriminatory effect is shown, then relief is limited to declaratory and injunctive remedies. *Guardians Asso. v Civil Service Com.* (1983) 463 US 582, 77 L Ed 2d 866, 103 S Ct 3221, citing *Antieau, Federal Civil Rights Acts*.

Although § 2000d gives the Attorney General the authority to sue when he believes federally funded programs are being administered discriminatorily, the relief available in such a suit must not reach beyond the parameters of the Act. *United States v Philadelphia* (1979, ED Pa) 482 F Supp 1248, *affd* (CA3 Pa) 644 F2d 187.

When a city had engaged in a "clear-cut pattern of long-continued and egregious racial discrimination" in hiring for its Fire Department in violation of Title VI, a race conscious hiring order was particularly appropriate relief. *Association against Discrimination in Employment, Inc. v Bridgeport* (1979, DC Conn) 479 F Supp 101, *affd in part and vacated in part on other grounds* (CA2 Conn) 647 F2d 256.

A school district's bilingual education program was inadequate and violated statutory rights to equal educational opportunity under Title VI when it was geared toward teaching English as a second language without affirmative steps to keep language deficient students in the program until they attained sufficient proficiency to be instructed along with English speaking students. *Rios v Read* (1978, ED NY) 480 F Supp 14.

Where the busing remedy had been limited with regard to HEW's authority to invoke it, the United States could still ask the courts to invoke a more wide-ranging busing remedy than HEW was permitted to order. *United States v Marion County School Dist.* (1980, CA5 Fla) 625 F2d 607, *reh den* (CA5 Fla) 629 F2d 1350 and *cert den* (US) 68 L Ed 2d 298, 101 S Ct 1980.

The Supreme Court has ruled that a plaintiff who prevailed on a Title VI claim at the administrative level could not recover attorneys' fees under § 1988 in an independent action in federal court where the action was not brought to enforce Title VI. *North Carolina Dept. of Transp. v Crest Street Community Council* (1986, US) 93 L Ed 2d 188, 107 S Ct 336.

The Court of Appeals for the Seventh Circuit has ruled that the granting of compensatory relief under § 2000d requires proof of discriminatory intent. *Craft v Board of Trustees* (1986, CA7 Ill) 793 F2d 140, *cert den* (US) 93 L Ed 2d 59, 107 S Ct 110.

Although equitable relief is clearly available under Title VI, it is not clear whether the Act allows for the recovery of monetary damages. *Neighborhood Action Coalition v Canton* (1989, CA6 Ohio) 882 F2d 1012.

and other representatives of State and local organizations, as it deems advisable.

from conflict-of-interest statutes

Commission, and members of advisory committee pursuant to subsection (c) of this section, shall of sections 203, 205, 207, 208, and 209

ation with Federal agencies

ies shall cooperate fully with the Commission may effectively carry out its functions and

ings; issuance of subpoenas

or on the authorization of the Commission or more members, at least one of whom political party, may, for the purpose of carrying this chapter, hold such hearings and act at the Commission or such authorized subcommittee. Subpenas for the attendance and the production of written or other matter in accordance with the rules of the Commission as a(j) and (k) of this title, over the signature of the Commission or of such subcommittee, any person designated by such Chairman. by the Commission, or the appointment of a hearing pursuant to this subsection, must be of the Commission, or by a majority of the meeting at which at least a quorum of four

urts in enforcing subpoenas

cy or refusal to obey a subpoena, any district court of the United States or the District Court of the United States, within the jurisdiction of which the individual, within the jurisdiction of which said person is found or resides or is domiciled, or has appointed an agent for receipt of application by the Attorney General of the jurisdiction to issue to such person an order to appear before the Commission or a subpoena to produce pertinent, relevant and non-privileged information; and any failure to obey such order is punished by said court as a contempt there-

Oaths and affirmations

(h) Without limiting the generality of the foregoing, each member of the Commission shall have the power and authority to administer oaths or take statements of witnesses under affirmation.

Rules and regulations

(i) The Commission shall have the power to make such rules and regulations as are necessary to carry out the purposes of this chapter.

Pub.L. 85-315, Pt. I, § 105, Sept. 9, 1957, 71 Stat. 636; Pub.L. 86-449, Title IV, § 401, May 6, 1960, 74 Stat. 89; Pub.L. 88-352, Title V, §§ 505-507, July 2, 1964, 78 Stat. 251, 252; Pub.L. 91-521, § 2, Nov. 25, 1970, 84 Stat. 1356; Pub.L. 92-496, § 5, Oct. 14, 1972, 86 Stat. 814; Pub.L. 95-444, §§ 4-6, Oct. 10, 1978, 92 Stat. 1067, 1068.

Historical Note

References in Text. The civil-service laws, referred to in subsec. (a), are classified generally to Title 5, Government Organization and Employees. See particularly section 3301 et seq. of that title.

The classification laws, referred to in subsec. (a), are classified generally to chapter 51 (section 5101 et seq.) and subchapter III (section 5331 et seq.) of chapter 53 of Title 5.

This chapter, referred to in subsecs. (f) and (i), in the original read "this Act", meaning Pub.L. 85-315, Sept. 9, 1957, 71 Stat. 634, which enacted this chapter, section 1995 of this title, and section 295-1 of former Title 5, Executive Departments and Government Officers and Employees, amended section 1971 of this title and sections 1343 and 1861 of Title 28, Judiciary and Judicial Procedure, repealed section 1993 of this title, and enacted provisions set out as a note under section 1975 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1975 of this title and Tables volume.

1978 Amendment. Subsec. (a). Pub.L. 95-444, § 4, struck out "and who shall receive compensation at a rate, to be fixed by the President, not in excess of \$22,500 a year" following "consent of the Senate".

Subsec. (c). Pub.L. 95-444, § 5, added "as it deems advisable, but the Commission shall constitute at least one advisory committee within each State" following "within States", and substituted "The Commission may consult" for "and may consult".

Subsec. (d). Pub.L. 95-444, § 6, substituted "sections 203, 205, 207, 208, and 209 of Title 18" for "sections 281, 283, 284, 434, and 1914 of Title 18, and section 190 of the Revised Statutes".

1972 Amendment. Subsec. (a). Pub.L. 92-496 substituted provisions requiring services to be procured according to section 3109 of Title 5, Government Organization and Employees, at rates for individuals not in excess of the daily equivalent payable for positions at the maximum rate for GS-15 of the General Schedule under section 5332 of Title 5, for provisions requiring services to be procured according to section 15 of Act of August 2, 1946, at rates for individuals not exceeding \$100 per diem.

1970 Amendment. Subsec. (a). Pub.L. 91-521 increased the compensation for services of experts and consultants from \$75 to \$100 per diem.

1964 Amendment. Subsec. (a). Pub.L. 88-352, § 505, increased the compensation for services of experts and consultants from \$50 to \$75 per diem.

Subsec. (f). Pub.L. 88-352, § 506, provided for approval of Commission or subcommittee hearings by a majority of the Commission or by a majority of the members present at a meeting having a quorum of four members present.

Subsec. (g). Pub.L. 88-352, § 506, authorized Federal district courts to order compliance with Commission subpoenas by persons domiciled within the jurisdiction of the court or who have appointed an agent for service of process within the jurisdiction and substituted provision for

production of "pertinent, relevant and nonprivileged evidence" for production of "evidence."

Subsec. (i). Pub.L. 88-352, § 507, added subsec. (i).

1960 Amendment. Subsec. (h). Pub.L. 86-449 added subsec. (h).

Termination of Advisory Committees. Advisory Committees in existence on Jan. 5, 1973, to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory Committees established after Jan. 5, 1973, to terminate not later than the expiration of the two-year period be-

ginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. See section 14 of Pub.L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

Legislative History. For legislative history and purpose of Pub.L. 85-315, see 1957 U.S.Code Cong. and Adm.News, p. 1906. See, also, Pub.L. 86-449, 1960 U.S. Code Cong. and Adm.News, p. 1925; Pub.L. 88-352, 1964 U.S.Code Cong. and Adm.News, p. 2355; Pub.L. 91-521, 1970 U.S.Code Cong. and Adm.News, p. 4772; Pub.L. 92-496, 1972 U.S.Code Cong. and Adm.News, p. 3621; Pub.L. 95-444, 1978 U.S.Code Cong. and Adm.News, p. 2639.

Library References

Civil Rights ☞ 124.

C.J.S. Civil Rights § 88.

West's Federal Forms

Administrative subpoenas, enforcement of, see § 6004 et seq.

Contempt proceedings, see § 5651 et seq.

Subpoenas, see § 3981 et seq.

Supreme Court, statement of jurisdiction, see §§ 143, 146, 258.

Code of Federal Regulations

Conduct and responsibilities of employees, see 45 CFR 706.1 et seq.

Rules on hearings and reports, see 45 CFR 702.1 et seq.

Staff organization, see 45 CFR 701.12.

State advisory committees, functions, see 45 CFR 703.1 et seq.

Notes of Decisions

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Subpena 1

1. Subpena

Registrar of voters was not entitled to stay the effectiveness of subpoenas duces tecum served by Commission upon him on theory that compliance with subpoena would require violation of L.S.A.-R.S. 18:189, 18:236, forbidding registrars to remove records except on order of a competent court, since under this section registrar of voters served with subpoenas duces tecum by Commission could refuse to produce records without incurring any penalty and since Commission would then have to request Attorney General to apply for court order requiring production

of records, which order would constitute the order of a competent court within meaning of the Louisiana statute. *Larche v. Hannah*, D.C.La.1959, 176 F. Supp. 791.

Where Commission sought to inspect voting and registration records of county pursuant to complaints of deprivation of voting rights but was refused permission by registrars, and members of the Board of Registrars of various counties refused to give testimony and to produce records pursuant to subpoenas, Commission, acting pursuant to this section, had authority to issue subpoenas and to see records and enforcement thereof did not constitute illegal invasion of sovereignty of Alabama and district court, upon application of the Attorney General of the United States, had jurisdiction to enforce

contained in section 1975a(j) and (k) of this title, over the signature of the Chairperson of the Commission or of such subcommittee, and may be served by any person designated by such Chairperson. The holding of hearings by the Commission, or the appointment of a subcommittee to hold hearings pursuant to this subparagraph, must be approved by a majority of the Commission, or by a majority of the members present at a meeting at which at least a quorum of five members is present.

(g) Contumacy or refusal to obey subpoena

In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce pertinent, relevant and nonprivileged evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(h) Administration of oaths or taking statements of witnesses

Without limiting the application of any other provision of this chapter each member of the Commission shall have the power and authority to administer oaths or take statements of witnesses under affirmation.

(i) Rules and regulations; transfer of files, records and balances of appropriations

(1) The Commission shall have the power to make such rules and regulations as are necessary to carry out the purposes of this chapter.

(2) To the extent not inconsistent with the provisions of this chapter, the Commission established by section 1975(a) of this title, shall be bound by all rules issued by the Civil Rights Commission established by the Civil Rights Act of 1957 which were in effect on September 30, 1983, until modified by the Commission in accordance with applicable law.

(3) The Commission shall make arrangements for the transfer of all files, records, and balances of appropriations of the Commission on Civil Rights as established by the Civil Rights Act of 1957 to the Commission established by this chapter.

(Pub.L. 98-183, § 6, Nov. 30, 1983, 97 Stat. 1305; Pub.L. 102-167, § 5, Nov. 26, 1991, 105 Stat. 1101.)

HISTORICAL AND STATUTORY NOTES

References in Text

The date of enactment of this Act, referred to in subsec. (a)(2)(A), is the date of the enactment of Pub.L. 98-183, which was approved Nov. 30, 1983.

The Civil Rights Act of 1957, referred to in subsecs. (a)(2)(B), and (C)(ii), and (i)(2) and (3), is Pub.L. 85-315, Pt. I, Sept. 9, 1957, 71 Stat. 634, as amended, which was classified principally to this chapter prior to expiration of such chapter and termination of Commission established pursuant to chapter sixty days after submission of final report not later than the last day of the fiscal year ending September 30, 1983.

The civil service laws, referred to in subsec. (a)(3), are set out in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of that title.

The classification laws, referred to in subsec. (a)(3), are classified generally to chapter 51 (section 5301 et seq.) and subchapter III (section 5331 et seq.) of chapter 53 of Title 5.

Prior Provisions

A prior section 1975d, Pub.L. 85-315, Pt. I, § 105, Sept. 9, 1957, 71 Stat. 636; Pub.L. 86-449, Title IV, § 401, May 6, 1960, 74 Stat. 89; Pub.L. 88-352, Title V, §§ 505-507, July 2, 1964, 78 Stat. 251, 252; Pub.L. 91-521, § 2, Nov. 25, 1970, 84 Stat. 1356; Pub.L. 92-496, § 5, Oct. 14, 1972, 86 Stat. 814; Pub.L. 95-444, §§ 4-6, Oct. 10, 1978, 92 Stat. 1067, 1068, which set forth provisions relating to powers of the Commission, expired on termination of this chapter and Commission established pursuant to such chapter sixty days after submission of final report not later than last day of the fiscal year ending Sept. 30, 1983.

1991 Amendment

Subsec. (f). Pub.L. 102-167 substituted reference to Chairperson for reference to Chairman wherever appearing.

Legislative History

For legislative history and purpose of Pub.L. 98-183, see 1983 U.S. Code Cong. and Adm. News, p. 1989.

75a(j) and (k) of this title, over the signature of the Chairperson of such subcommittee, and may be served by any person airperson. The holding of hearings by the Commission, or the mmittee to hold hearings pursuant to this subparagraph, must be of the Commission, or by a majority of the members present at a quorum of five members is present.

to obey subpoena

or refusal to obey a subpoena, any district court of the United States court of any territory or possession, or the District Court of the District of Columbia, within the jurisdiction of which the person within the jurisdiction of which said person guilty of contumacy found or resides or is domiciled or transacts business, or has receipt of service of process, upon application by the Attorney States shall have jurisdiction to issue to such person an order to appear before the Commission or a subcommittee thereof, relevant and nonprivileged evidence if so ordered, or there to the matter under investigation; and any failure to obey such by be punished by said court as a contempt thereof.

oaths or taking statements of witnesses

application of any other provision of this chapter each member of shall have the power and authority to administer oaths or take statements under affirmation.

transfer of files, records and balances of appropriations

shall have the power to make such rules and regulations as are necessary for the purposes of this chapter.

not inconsistent with the provisions of this chapter, the Commission 1975(a) of this title, shall be bound by all rules issued by the Civil Rights Act of 1957 which were in effect on the date of the enactment of this title as modified by the Commission in accordance with applicable law.

shall make arrangements for the transfer of all files, records, and balances of appropriations of the Commission on Civil Rights as established by the Civil Rights Act of 1957 to the Commission established by this chapter.

30, 1983, 97 Stat. 1305; Pub.L. 102-167, § 5, Nov. 26, 1991, 105 Stat. 1101.)

HISTORICAL AND STATUTORY NOTES

Prior Provisions

of this Act, referred to in section 105, Sept. 9, 1957, 71 Stat. 636; Pub.L. 86-449, Title IV, § 401, May 6, 1960, 74 Stat. 89; Pub.L. 88-352, Title V, §§ 505-507, July 2, 1964, 78 Stat. 251, 252; Pub.L. 91-521, § 2, Nov. 25, 1970, 84 Stat. 1356; Pub.L. 92-496, § 5, Oct. 14, 1972, 86 Stat. 814; Pub.L. 95-444, §§ 4-6, Oct. 10, 1978, 92 Stat. 1067, 1068, which set forth provisions relating to powers of the Commission, expired on termination of this chapter and Commission established pursuant to such chapter sixty days after submission of final report not later than last day of the fiscal year ending Sept. 30, 1983.

1991 Amendment

Subsec. (f). Pub.L. 102-167 substituted reference to Chairperson for reference to Chairman wherever appearing.

Legislative History

For legislative history and purpose of Pub.L. 98-183, see 1983 U.S.Code Cong. and Adm. News, p. 1989.

WEST'S FEDERAL FORMS

Administrative subpoenas, enforcement of, see § 5901 et seq.
Contempt proceedings, see § 5651 et seq.

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Subpoenas, see § 3981 et seq.

LIBRARY REFERENCES

C.J.S. Civil Rights §§ 223, 224.

§ 1975e. Authorization of appropriations

There are authorized to be appropriated to carry out this chapter, \$7,159,000 for fiscal year 1992, and an additional \$1,200,000 for fiscal year 1992 to relocate the headquarters office. There are authorized to be appropriated to carry out this chapter \$7,422,014 for fiscal year 1993, and an additional \$850,000 for fiscal year 1993 to relocate the headquarters office. None of the sums authorized to be appropriated for fiscal year 1993 may be used to create additional regional offices.

(Pub.L. 98-183, § 7, Nov. 30, 1983, 97 Stat. 1307; Pub.L. 101-180, § 2(1), Nov. 28, 1989, 103 Stat. 1325; Pub.L. 102-167, § 3, Nov. 26, 1991, 105 Stat. 1101; Pub.L. 102-400, § 2, Oct. 7, 1992, 106 Stat. 1955.)

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 1975e, Pub.L. 85-315, Pt. 1, § 106, Sept. 9, 1957, 71 Stat. 636; Pub.L. 90-198, § 2, Dec. 14, 1967, 81 Stat. 582; Pub.L. 91-521, § 3, Nov. 25, 1970, 84 Stat. 1356; Pub.L. 92-64, Aug. 4, 1971, 85 Stat. 166; Pub.L. 92-496, § 6, Oct. 14, 1972, 86 Stat. 814; Pub.L. 94-292, § 2, May 27, 1976, 90 Stat. 524; Pub.L. 95-132, § 2, Oct. 13, 1977, 91 Stat. 1157; Pub.L. 95-444, § 7, Oct. 10, 1978, 92 Stat. 1068; Pub.L. 96-81, § 3, Oct. 6, 1979, 93 Stat. 642; Pub.L. 96-447, § 2, Oct. 13, 1980, 94 Stat. 1894, set forth authorization of appropriations for this chapter, expired on termination of this chapter and Commission established pursuant to such chapter sixty days after submission of final report not later than last day of the fiscal year ending Sept. 30, 1983.

1992 Amendments

Pub.L. 102-400, § 2, inserted provision authorizing appropriations of \$7,422,014 for fiscal year

1993, and an additional \$850,000 for fiscal year 1993 to relocate the headquarters office, but prohibiting sums authorized to be appropriated for fiscal year 1993 to be used to create additional regional offices.

1991 Amendment

Pub.L. 102-167 substituted appropriations of \$7,159,000 plus an additional \$1,200,000 for fiscal year 1992, for appropriations of \$12,180,000 for fiscal year 1984 and such sums as necessary for each year ending prior to Oct. 1, 1991.

1989 Amendment

Pub.L. 101-180 substituted "October 1, 1991" for "October 1, 1989".

Legislative History

For legislative history and purpose of Pub.L. 98-183, see 1983 U.S.Code Cong. and Adm. News, p. 1989.

§ 1975f. Termination

The provisions of this chapter shall terminate on September 30, 1994.

(Pub.L. 98-183, § 8, Nov. 30, 1983, 97 Stat. 1307; Pub.L. 101-180, § 2(2), Nov. 28, 1989, 103 Stat. 1325; Pub.L. 102-167, § 4, Nov. 26, 1991, 105 Stat. 1101.)

HISTORICAL AND STATUTORY NOTES

1991 Amendment

Pub.L. 102-167 extended expiration of chapter from Sept. 30, 1991 to Sept. 30, 1994.

1989 Amendment

Pub.L. 101-180 substituted "terminate on September 30, 1991" for "terminate six years after November 30, 1983".

Legislative History

For legislative history and purpose of Pub.L. 98-183, see 1983 U.S.Code Cong. and Adm. News, p. 1989.

CHAPTER 21—CIVIL RIGHTS

SUBCHAPTER I—GENERALLY

Sec. 1981. Equal rights under the law.
(a) Statement of equal rights.

Sec. 1981. Equal rights under the law.
(b) Definition.
(c) Protection against impairment.

an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head, and the time for filing motions for reconsideration under § 79.38 has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 79.3 is final and is not subject to judicial review.

§ 79.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 79.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 79.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 79.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 79.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 79.42 or § 79.43, or any amount agreed upon in a compromise or settlement under § 79.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

Department of Health and Human Services.

§ 79.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 79.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 79.42 or during the pendency of any action to collect penalties and assessments under § 79.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 79.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 79.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 79.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 79.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 80—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH AND HUMAN SERVICES EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.

- 80.1 Purpose.
- 80.2 Application of this regulation.
- 80.3 Discrimination prohibited.
- 80.4 Assurances required.
- 80.5 Illustrative application.
- 80.6 Compliance information.
- 80.7 Conduct of investigations.
- 80.8 Procedure for effecting compliance.
- 80.9 Hearings.
- 80.10 Decisions and notices.
- 80.11 Judicial review.
- 80.12 Effect on other regulations; forms and instructions.
- 80.13 Definitions.

APPENDIX A TO PART 80—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

APPENDIX B TO PART 80—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d-1.

§ 80.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that 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 otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health and Human Services.

(Sec. 601, Civil Rights Act of 1964, 78 Stat. 252 (42 U.S.C. 2000d))
[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17982, July 5, 1973]

§ 80.2 Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Fed-

denied 102 S.Ct. 656, 454 U.S. 1091, 70 L.Ed.2d 629.

§ 2000c-9. Classification and assignment

HISTORICAL AND STATUTORY NOTES

Exclusion From Coverage

Enactment of section 2000d-4a of this title not to be construed to extend the application of the Civil Rights Act of 1964 [section 2000a et seq. of

this title] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see Pub.L. 100-259, § 7, Mar. 22, 1987, 102 Stat. 31, set out as a note under section 1687 of Title 20, Education.

WEST'S FEDERAL PRACTICE MANUAL

Sexual discrimination, see § 12565.

LIBRARY REFERENCES

C.J.S. Civil Rights § 102 et seq.

SUBCHAPTER V—FEDERALLY ASSISTED PROGRAMS

CROSS REFERENCES

Employees of local educational agencies, exercise of rights under Family and Medical Leave Act, see 29 USCA § 2618.

Federal financial assistance, nondiscrimination.

National and community service, see 42 USCA § 12635.

Volunteer service programs, see 42 USCA § 5057.

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

HISTORICAL AND STATUTORY NOTES

Exclusion From Coverage

Enactment of section 2000d-4a of this title not to be construed to extend the application of the Civil Rights Act of 1964 [section 2000a et seq. of

this title] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see Pub.L. 100-259, § 7, Mar. 22, 1988, 102 Stat. 31, set out as a note under section 1687 of Title 20, Education.

CROSS REFERENCES

Family violence prevention and services program, nondiscrimination provisions relating to, see section 10406(a) of this title.

States not immune under Eleventh Amendment for violation of this section, see section

2000d-7 of Title 42, The Public Health and Welfare.

WEST'S FEDERAL FORMS

Complaint for relief against racially discriminatory public housing, see § 1719.

WEST'S FEDERAL PRACTICE MANUAL

Class actions, see § 12667.

English language and ethnic groups, see §§ 13146, 13267.

Fund cutoffs and sanctions, see § 15157.

Regulation and enforcement, see §§ 12200 et seq., 15240 et seq.

Segregated private schools, tax status, see § 13343.

Sexual discrimination, see § 12565.

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LIBRARY REFERENCES

C.J.S. Civil Rights § 46 et seq.

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Waiver 25a

2a. Construction with other laws

Title VI claims of black students for allegedly being misclassified in special education program for educable mentally retarded students were not barred by Education for All Handicapped Children Act insofar as the Act did not provide a remedy for those claims of racial discrimination. S-1 By and Through P-1 v. Turlington, S.D.Fla. 1986, 646 F.Supp. 1179.

4. Discrimination

State Board of Education requirement of minimum score on ACT examination for admission to teacher education programs had adverse impact on black students for purposes of disparate impact claim under Title VI, even though statistical proof was inconsistent, where significantly more blacks than whites failed to attain required minimum score and did not pursue career in education. Groves v. Alabama State Bd. of Educ., M.D.Ala.1991, 776 F.Supp. 1518.

4a. Consideration of race

In absence of prior discrimination by university, consideration of race as one factor among many by university admissions process is constitutional only so far as it seeks to procure for the university the educational benefits which flow from having diverse student body. Davis v. Halpern, E.D.N.Y.1991, 768 F.Supp. 968.

4b. Remedial measure

Fact that law school's admissions department may eschew quotas and adhere assiduously to plan under which school considers race along with other criteria for admission and deems it simply a "plus" in applicant's favor does not shield it from constitutional prerequisites to remedial consideration of race; while it is a perfectly appropriate, and legal, means to achieve diversity, as a remedial measure it must be justified by proper showing of discrimination. Davis v. Halpern, E.D.N.Y.1991, 768 F.Supp. 968.

4c. Reverse discrimination—Generally

Implementation plan adopted by school board prohibiting assignment of principals on basis of race was superseded by desegregation plan subsequently developed by school system as part of consent decree entered in Title VI action brought by United States, and could not form basis of reverse discrimination claims of principal who was allegedly discharged because of his race. Keenan v. Board of Educ. of City of Chicago, N.D.Ill.1992, 812 F.Supp. 780.

Unsuccessful white law school applicant established prima facie case of discrimination with respect to race and ethnicity, in view of evidence demonstrating that these factors were considered in admissions decisions, and although prima facie case was rebutted by existence of affirmative action plan, there was fact question as to whether plan used suspect criteria for impermissible purposes. Davis v. Halpern, E.D.N.Y. 1991, 768 F.Supp. 968.

4d. — Quotas

Fact that white law school applicant's admissions test scores were better than many blacks or hispanics admitted to law school was not circumstantial evidence that quota was in use; neither was evidence that admissions committee was regularly apprised of racial, demographic, and sexual composition of applicants, acceptees, and enrollees or fact that percentage of minorities enrolled at school was higher than that at most schools. Davis v. Halpern, E.D.N.Y.1991, 768 F.Supp. 968.

5. Receipt of federal assistance
Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary,

485 F.Supp. 255 [main volume] affirmed in part, reversed in part on other grounds 651 F.2d 277, rehearing denied 659 F.2d 1075, certiorari denied 102 S.Ct. 1749, 456 U.S. 905, 72 L.Ed.2d 161.

Requirement that there be nexus between federal fund recipient's allegedly discriminatory conduct, and specific program to which federal funds are directed, in order to find violation of federal antidiscrimination rule, is applicable whether remedy requested for violation of rule is termination of funding or injunctive relief. *David K. v. Lane*, C.A.7 (Ill.) 1988, 839 F.2d 1265.

Title VI was meant to cover only those situations where federal funding is given a nonfederal entity which, in turn, provides financial assistance to ultimate beneficiary. *Soberal-Perez v. Heckler*, C.A.2 (N.Y.) 1983, 717 F.2d 36, certiorari denied 104 S.Ct. 1713, 466 U.S. 929, 80 L.Ed.2d 186.

Monies provided by Federal Election Commission (FEC) to political parties qualify as "federal financial assistance" within the meaning of Title VI of the Civil Rights Act. *Freedom Republicans, Inc. v. Federal Election Com'n*, D.D.C.1992, 788 F.Supp. 600.

Title VI, prohibiting discrimination in programs or activities receiving federal financial assistance, does not create private right to sue federal agency to terminate funding of allegedly discriminatory entity or program. *Grimes By and Through Grimes v. Cavazos*, S.D.N.Y.1992, 786 F.Supp. 1184.

The Education and the Social Services Block Grants created by the Omnibus Budget Reconciliation Act of 1981, falling within the definition of Federal financial assistance, are subject to the nondiscrimination provisions of this section. 1982 (Counsel-Inf.Op.) 6 O.L.C. 83.

8. Affirmative action

Affirmative action program proposed by ordinance violated this subchapter and equal protection clause of U.S.C.A. Const. Amend. 14 because city council was not competent body to identify and address past constitutional or statutory violations; even if council were competent body, council had not compiled necessary record to demonstrate need for affirmative action program; and even if necessary record had been compiled, remedy imposed was not carefully tailored to rectify continuing effects of past illegal discrimination. *Arrington v. Associated General Contractors of America*, Ala.1981, 403 So.2d 893.

9. Elements of cause of action—Generally

This subchapter does not embody the requisite finding of past discrimination needed to support a racially preferential federal assistance project. *M. C. West, Inc. v. Lewis*, D.C.Tenn. 1981, 522 F.Supp. 338.

10. — Intent

Black and Hispanic members of city police department who brought Title VI suit challenging city police department's "last-hired, first-fired" policy were not entitled to compensatory relief, or other relief based on past violations of conditions attached to use of federal funds, in absence of showing of intentional discrimination.

Guardians Ass'n v. Civil Service Com'n. of City of New York, N.Y.1983, 103 S.Ct. 3221, 463 U.S. 582, 77 L.Ed.2d 866, certiorari denied 103 S.Ct. 3568, 463 U.S. 1228, 77 L.Ed.2d 1410.

Claim by nonnative English-speaking students for inadequate implementation of program for identifying and placing students with limited English proficiency did not state claims under the Fourteenth Amendment and Title VI absent allegations of discriminatory intent. *Gomez v. Illinois State Bd. of Educ.*, C.A.7 (Ill.) 1987, 811 F.2d 1030, on remand 117 F.R.D. 394.

A private right of action under this subchapter for damages for a school district's refusal to provide reasonable accommodations for a handicapped student requires intentional discrimination by district. *Skolnik v. State of Tex.*, C.A.Tex.1984, 723 F.2d 432.

Under this subchapter, plaintiffs need not establish intent to discriminate, but, rather, disparate impacts of a neutral policy may be adequate to establish unlawful discrimination. *National Ass'n For Advancement of Colored People v. Medical Center, Inc.*, C.A.Del.1981, 657 F.2d 1322.

In order to establish a violation of U.S.C.A. Const. Amend. 14 or of this subchapter, it is necessary to prove intentional discrimination. *Bronson v. Board of Educ. of City School Dist. of Cincinnati*, D.C.Ohio 1982, 550 F.Supp. 941.

11. Private right of action

Yakin v. University of Illinois, Chicago Circle Campus, 508 F.Supp. 848 [main volume] affirmed 760 F.2d 270.

Federal statute prohibiting discrimination in any program that receives federal financial assistance gave highway construction contractors implied private right of action against Florida Department of Transportation (FDOT) and its Secretary to receive declaratory and injunctive relief against allegedly discriminatory set-aside and minority business participation program of FDOT. *Cone Corp. v. Florida Dept. of Transp.*, C.A.11 (Fla.) 1991, 921 F.2d 1190, certiorari denied 111 S.Ct. 2238, 114 L.Ed.2d 479.

Department of Housing and Urban Development's alleged failure to comply with section of Civil Rights Act of 1968 directing HUD to "affirmatively" further purposes of the statute could be challenged only in action under Administrative Procedure Act; statute did not create private right of action. *Latinos Unidos De Chelsea En Accion (Lucha) v. Secretary of Housing and Urban Development*, C.A.1 (Mass.) 1986, 799 F.2d 774.

Assuming a valid *Singleton* order to give preference to school staff members displaced or demoted as result of desegregation under the Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq., proper vehicle to redress violations of that order would be a private cause of action under Title VI or, perhaps, an action under 42 U.S.C.A. § 1983, rather than an action under the Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. *Lujan v. Franklin County Bd. of Educ.*, C.A.6 (Tenn.) 1985, 766 F.2d 917.

Private suits provide appropriate and effective mechanism for judicial consideration of compliance with this section. *Adams v. Bell*, 1983, 711 U.S. 161, 228 U.S.App.D.C. 375, certiorari denied 104 S.Ct. 1272, 465 U.S. 1021, 79 L.Ed.2d 106.

This section does not establish broad right of action for persons, who are aggrieved by failure of some federal program, to seek redress in federal courts; for those deficiencies, resort to state courts must be had to some other federal legislation authorizing private enforcement or general statutory and common law of states. *Sumpter v. Harper*, C.A.S.C.1982, 683 F.2d 106.

Discriminatory impact, even absent proof of discriminatory intent, will suffice to support a private cause of action under Title VI. *Seelsa v. City University of New York*, S.D.N.Y.1992, 806 F.Supp. 1126.

Deprivation of substantive right to equal treatment, in contravention of this section may be redressed by private civil action against the federal funding agency. *Young v. Pierce*, D.C.Tex.1982, 544 F.Supp. 1010.

Private actions can proceed under this subchapter if primary objective of the federal program is to provide employment, or employment discrimination necessarily causes discrimination against primary beneficiaries of the federal programs. *Murphy v. Middletown Enlarged City School Dist.*, D.C.N.Y.1981, 525 F.Supp. 678.

11a. Retaliation

There was fact question as to whether law school retaliated against unsuccessful white male applicant for his having brought several lawsuits, precluding summary judgment on Title VI claim; applicant demonstrated law school had treated him in ways not entirely consistent with its usual admissions procedure, and there was evidence demonstrating retaliatory animus, including delays and unexplained statements. *Davis v. Halpern*, E.D.N.Y.1991, 768 F.Supp. 968.

12. Exhaustion of administrative remedies

Title VI litigants need not exhaust their administrative remedies before pursuing their private cause of action in federal court. *Neighborhood Action Coalition v. City of Canton, Ohio*, C.A.6 (Ohio) 1989, 882 F.2d 1012.

Administrative exhaustion and primary jurisdiction do not apply as such to claims for declaratory and injunctive relief under this section, and thus could not support stay order entered by the district court. *Cheyney State College Faculty v. Hufstetler*, C.A.Pa.1983, 703 F.2d 732.

Where many of components of wholly adequate administrative grievance procedure were not present, where it appeared that grievance procedures would be futile gesture on part of civil rights claimant, and where claimant alleged immediate threatened discrimination coupled with irrevocable harm, it was not necessary for claimant to further exhaust existing administrative grievance procedures in order to pursue its request for preliminary injunction. *Jones v. Niagara Frontier Transp. Authority*, D.C.N.Y. 1981, 524 F.Supp. 233.

13. Jurisdiction

If district court lacked jurisdiction to sit as three-judge court, it necessarily had jurisdiction to sit as one-judge court to adjudicate United States' claim that Louisiana, in practice, was violating Title VI of Civil Rights Act and Fourteenth Amendment. *U.S. v. State of La.*, E.D.La.1990, 751 F.Supp. 621.

13a. Case or controversy

Action in which plaintiffs, on behalf of all limited or non-English-speaking Hispanic persons, alleged that city and state failed to provide bilingual services in administration of city's public assistance program did not present live case or controversy where city's plan to provide bilingual services to clients of limited English-speaking ability was approved by federal government after plaintiffs experienced their alleged difficulties in obtaining benefits. *Mendoza v. Blum*, D.C.N.Y.1981, 91 F.R.D. 91.

17. Persons entitled to maintain action

State university lacked standing to sue or to seek to enjoin State Board of Education under Title VI, absent any indication of congressional intent to grant rights under such statute to nonprivate state subdivisions against state itself. *U.S. v. State of Ala.*, C.A.11 (Ala.) 1986, 791 F.2d 1450, rehearing denied 796 F.2d 1478, certiorari denied 107 S.Ct. 1287, 479 U.S. 1085, 94 L.Ed.2d 144.

Low-income minority individuals lacked standing under the Housing Act, federal civil rights legislation and the United States Constitution in suit alleging that the metropolitan housing authority, as owner and operator of public housing, engaged in discrimination by placing public housing in predominantly minority areas, as far as their allegations related to plaintiffs' desire to move to, or live in, a particular suburb of city where no public housing presently existed; however, there was standing as to claim of racial segregation of existing housing projects and their location in areas of racial concentration. *Jaimes v. Toledo Metropolitan Housing Authority*, C.A.6 (Ohio) 1985, 758 F.2d 1086.

Not-for-profit, tax-exempt corporation which produced theatrical and artistic production that sought to particularly reach and involve the Black and Hispanic communities had standing to maintain civil rights action against county and county officials in which corporation alleged that its application for funds under the Comprehensive Employment and Training Act, section 801 et seq. of Title 29, was denied for racial reasons, in that corporation met constitutional test of standing, and it was in a better position than anyone else to challenge discriminatory practices leading to cutting grant funds, and thus prudential considerations could not prohibit standing by corporation. *Hudson Valley Freedom Theater, Inc. v. Heimbach*, C.A.N.Y.1982, 671 F.2d 702, certiorari denied 103 S.Ct. 127, 459 U.S. 857, 74 L.Ed.2d 110.

Anesthesiologist was not within range of persons protected by Title VI and thus her § 1985(3) claim arising out of termination of staff privileges could not be supported by that statute; although defendant hospital received federal funds, there was no claim that hospital

staff members were intended beneficiaries of those funds. *Vakharia v. Swedish Covenant Hosp.*, N.D.Ill.1993, 824 F.Supp. 769.

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. *Seelsa v. City University of New York*, S.D.N.Y.1992, 806 F.Supp. 1126.

Hispanic college student had standing to challenge scholarship program open only to black students; student was denied opportunity to compete for scholarship solely because of his race, and could seek judicial mandate withdrawing scholarships from those who received them even if it was inappropriate for court to order that one be granted to him. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

Fact that area agency on aging, which administered funds distributed by Florida to two counties under Older Americans Act, was not a traditional voluntary membership organization, did not preclude it from having standing to bring action challenging validity of intrastate funding formula by which Florida distributed federal funds appropriated under Act among 11 planning and service areas. *Meek v. Martinez*, S.D.Fla.1987, 724 F.Supp. 888.

Even if federal tax exemptions for bonds sold by stadium authority to finance new stadium and payment of city's department of planning personnel salaries by federal community development law grant program constituted "federal assistance" within meaning of statute prohibiting discrimination on basis of race by any program receiving federal financial assistance, residents in neighborhood selected for new major league baseball stadium were not intended beneficiaries of those benefits, and thus, residents lacked standing under statute to challenge selection of new baseball stadium site on grounds of racial discrimination. *Laramore v. Illinois Sports Facilities Authority*, N.D.Ill.1989, 722 F.Supp. 443.

Corporation alleging racial discrimination by concentration of site selection and placement practices with respect to shelters for homeless in minority communities lacked standing to maintain action under statute prohibiting exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin; plaintiff corporation was not intended beneficiary of federal homeless shelter program, nor would any discriminatory impact on plaintiff corporation as result of shelter program's administration harm shelter residents. *Coalition of Bedford-Stuyvesant Block Ass'n, Inc. v. Cuomo*, E.D.N.Y.1987, 651 F.Supp. 1202.

Where there was no showing or proof that hospital employees were intended beneficiaries of any federal funds to hospital, that hospital received federal funds, the primary objective of which was to provide employment, or that any employment discrimination complained of by hospital had harmed intended beneficiary of federal funds, employees asserting racial discrimination in employment did not have standing to raise any employment discrimination issues un-

der this subchapter. *Mosley v. Clarksville Memorial Hosp.*, D.C.Tenn.1983, 574 F.Supp. 224.

Charges by black members of electric power cooperative that black consumers had been discouraged from obtaining cooperative memberships in their own names were not sufficiently related to cooperative's receipt of federal Rural Electrification Administration construction and operation funds to confer standing under this subchapter. *Givens v. Delta Elec. Power Ass'n*, D.C.Miss.1983, 572 F.Supp. 555.

Where organization had stated, albeit in conclusory fashion, that alleged discriminatory administration of housing funds caused injury in fact to its members, and organization represented interests of city's black people, against whom alleged discrimination was directed, organization had standing to bring action for injunctive and declaratory relief with respect to alleged discriminatory administration of housing funds. *NAACP v. Harris*, D.C.Mass.1983, 567 F.Supp. 637.

Appalachians and low-income persons are not included within this subchapter. *Bronson v. Board of Educ. of City School Dist. of Cincinnati*, D.C.Ohio 1982, 550 F.Supp. 941.

For plaintiffs to have had standing, through their status as federal taxpayers, to challenge N.C.G.S. § 116-6 providing for election and terms of members of Board of Governors of University of North Carolina on theory that N.C.G.S. § 116-6 violated this subchapter, plaintiffs would have had to allege unconstitutionality of the exercise of congressional power under taxing and spending clause, U.S.C.A.Const. Art. 1, § 8, cl. 1, and to have shown that statute exceeded specific constitutional limitations imposed on exercise of congressional taxing and spending power; plaintiffs failed to meet either prong of the test. *Poovey v. Edmisten*, D.C.N.C.1981, 526 F.Supp. 759.

Black female teacher, who alleged that school district's decisions not to promote her were illegally motivated upon basis of her race and/or sex, lacked standing to bring claim under this subchapter against school district, which received national assistance under Title I of Elementary and Secondary Education Act of 1965, section 2701 et seq. of Title 20, Bilingual Education Act, section 3221 et seq. of Title 20, Gifted and Talented Children Education Act of 1978, section 3311 et seq. of Title 20, and the head-start program. *Murphy v. Middletown Enlarged City School Dist.*, D.C.N.Y.1981, 525 F.Supp. 678.

21. Complaint

White college student editors of off-campus newspaper claiming they were wrongfully suspended from college based upon violent reaction of black professor to critical article written in student publication were not entitled to relief under Title VI; facts alleged by students failed to permit inference of discrimination based on their race. *Dartmouth Review v. Dartmouth College*, C.A.1 (N.H.) 1989, 889 F.2d 13.

Physician who made no allegations in her complaint about her patients' race, color, or national origin did not adequately allege that hospital's denial of staff privileges to her, allegedly because of her race, resulted in discrimina-

tion against patients on impermissible grounds in violation of Title VI. *Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne*, C.A.7 (Ind.) 1986, 788 F.2d 411, on remand 113 F.R.D. 677.

Law school applicants alleging that university had no right to short-circuit grievance procedures in violation of their own promulgated rules which were established under color of state law, in compliance with federal guidelines for securing federal tax funds under Title VI, failed to state cause of action thereunder, absent evidence that substantial group was being deprived of meaningful education. *PHELPS v. Washburn University of Topeka*, D.Kan.1986, 632 F.Supp. 455.

Absent allegation that Seminole Indian Tribe discriminatorily distributed federal funds to which plaintiff had claim of right, plaintiff stated no claim under this section for tribe's termination of her position as education director for tribal education department. *Stroud v. Seminole Tribe of Florida*, D.C.Fla.1983, 574 F.Supp. 1043.

Civil rights complaint brought by minority correction officers of New York Department of Correctional Services which merely alleged that Department and officers of Department violated this section by reason of their use of federal financial assistance in connection with their employment policies and procedures, but which failed to state that primary objective of federal financial assistance received by Department was to provide employment, failed to state claim under this section. *Richards v. New York State Dept. of Correctional Services*, D.C.N.Y.1983, 572 F.Supp. 1168.

Threshold requirement for maintaining action under this section providing that no person shall, on ground of race, color or national origin be excluded from participation in any program or activity receiving federal financial assistance is that defendant actually be recipient of the federal financial assistance used in discriminatory manner, and, for such reason, complaint failed to state claim for relief against defendant under this section. *West Zion Highlands v. City of Zion*, D.C.Ill.1982, 549 F.Supp. 673.

24. — Laches

Civil rights claims under § 2000d against person or institution receiving federal funds are governed by same state limitations period applicable to claims brought under § 1983, which is California's one-year statute of limitations for personal injury actions. *Taylor v. Regents of University of California*, C.A.9 (Cal.) 1993, 993 F.2d 710.

25. — Sovereign immunity

Applicability of Federal Civil Rights Act to state mental hospital did not result in waiver of state immunity so as to permit mental patient to recover monetary benefits from state. *Murphy v. State*, Mont.1991, 809 P.2d 16, 248 Mont. 82.

25a. Waiver

Suburban school districts that voluntarily participated in efforts to integrate city schools will not, by such participation, admit liability or waive any right that they may presently have to be excluded from plan of mandatory interdistrict

segregation. *Liddell v. Board of Ed. of City St. Louis*, C.A.Mo.1982, 677 F.2d 626, certiorari denied 103 S.Ct. 172, 459 U.S. 877, 74 L.Ed. 142, on remand 567 F.Supp. 1037.

26. Dismissal

State, state university, and college of health sciences and hospital, defendants in civil right action brought by black male due to alleged failure to hire him as a hospital administrator or assistant hospital administrator were not entitled to dismissal of claim under this subchapter on grounds that plaintiff had failed to plead that he was an intended beneficiary of federally funded program the defendants were alleged to have participated in, in that there is no requirement for such a pleading, even though plaintiff eventually must prove this fact. *Wrenn v. State of Kan.*, D.C.Kan.1983, 561 F.Supp. 1216.

27. Summary judgment

Issue of material fact as to whether landlord's articulated reasons were either true reason or motivating reason for landlord's actions precluded summary judgment dismissing tenants' Title VI claim alleging discrimination. *Alloqali v. National Housing Corp.*, N.D.Ohio 1990, 743 F.Supp. 1264.

28a. Compromise or settlement of actions

Proposed settlement of action challenging New York's statutory scheme for provision of child care services did not provide for "race-conscious relief," so that plaintiffs did not have to make prima facie showing of validity of race discrimination claims, where settlement proposed to place children in foster care homes on "first-come, first-served" basis and settlement authorized no differential treatment of children on basis of race or religion. *Wilder v. Bernstein*, S.D.N.Y.1986, 645 F.Supp. 1292.

30. Burden of proof

Black and Hispanic members of city police department who challenged department's "last-hired, first-fired" policy as discriminatory had only to show that the department's actions and policies produced discriminatory effects in order to prove a violation of regulations promulgated pursuant to Title VI of this subchapter. *Guardians Ass'n v. Civil Service Com'n of City of New York*, N.Y.1983, 103 S.Ct. 3221, 463 U.S. 582, 77 L.Ed.2d 866.

Ultimate burden of persuasion on issue of illegal discrimination always remains with the plaintiff. *National Ass'n For Advancement of Colored People v. Medical Center, Inc.*, C.A.Del. 1981, 657 F.2d 1322.

In reverse discrimination case, plaintiff bears burden of stating prima facie case that race or sex has been taken into account in selection process; burden then shifts to decision maker to articulate nondiscriminatory rationale for the decision; if affirmative action plan is articulated as basis for decision, burden then shifts back to plaintiff to demonstrate that rationale was pretextual and plan is invalid. *Davis v. Halpern*, E.D.N.Y.1991, 768 F.Supp. 968.

If plaintiffs bringing Title VI action meet initial burden of establishing that proposed federally-aided administrative action involves indefinite, measurable disparate impact, defendants

must present justification for their actions with ultimate burden of proving illegal discrimination on plaintiffs. *Coalition of Concerned Citizens Against I-670 v. Damian*, D.C. Ohio 1984, 608 F.Supp. 110.

When plaintiff in Title VI action has made prima facie case of discrimination based on disparate impact, it may be rebutted by entity making exclusionary decision by producing some evidence that it had legitimate, nondiscriminatory reason for decision; if defendant meets this burden of production, plaintiffs must prove by preponderance of all evidence that legitimate reasons offered by defendant were pretext for discrimination. *Texas Educ. Agency v. Stamos on Behalf of Class of All Public School Children in State of Tex.*, Tex.App.-Hous. (1 Dist.) 1991, 817 S.W.2d 378.

35. Remedies—Generally

Remedy for past violations of the right to equal protection, if acceptable when measured by requirements under the equal protection clause of U.S.C.A. Const. Amend. 14, cannot be held invalid under either this section or section 1981 of this title. *Ohio Contractors Ass'n v. Keip*, C.A. Ohio 1983, 713 F.2d 167.

Given sweeping language of this section and complexity of educational assistance to which it applies, departments of education and states have available to them many ways of implementing this section's goals of preventing discrimination in federally aided education. *Adams v. Bell*, 1983, 711 F.2d 161, 228 U.S.App.D.C. 375, certiorari denied 104 S.Ct. 1272, 465 U.S. 1021, 79 L.Ed.2d 678.

Under Title VI, prospective relief is available to private plaintiffs in appropriate cases. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

When individual plaintiff seeks relief from purported discrimination by recipient of federal grant money in violation of this section, appropriate avenue is a suit against recipient. *Young v. Pierce*, D.C. Tex. 1982, 544 F.Supp. 1010.

Only under the most extraordinary circumstances would a district court consider compulsory student or faculty assignment in the context of higher education, although such remedies are used in the context of primary and secondary education desegregation cases. *U. S. v. State of La.*, D.C. La. 1981, 527 F.Supp. 509.

35a. — Damages

Generally, compensatory equitable relief may be awarded to private plaintiffs under Title VI. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

Title VI does not make monetary damages available to individuals who have suffered discriminatory treatment under federally funded program. *Davis v. Spanish Coalition for Jobs, Inc.*, N.D. Ill. 1988, 676 F.Supp. 171.

36. — Injunctions

Cypress v. Newport News General and Non-sectarian Hospital Ass'n 375 F.2d 648 [main volume] certiorari denied 88 S.Ct. 857, 390 U.S. 921, 19 L.Ed.2d 982.

District court did not abuse its discretion in refusing to grant preliminary injunction against enforcement of athletic association rule provid-

ing that student athlete's participation in organized sport after age 20 and prior to college would count as one year of varsity competition in sport for purposes of four-year college eligibility limitation, even in light of showing that rule might have racially disparate impact, since rule furthered legitimate, nondiscriminatory purposes of promoting equality of competition and discouraging high school students from delaying their entrance into college. *Butts v. National Collegiate Athletic Ass'n*, C.A. Pa. 1984, 751 F.2d 609.

Even if scholarship program for black college student violated Title VI, appropriate remedy in action challenging program brought by Hispanic student whose application for scholarship was denied was to enjoin program's continued existence, rather than granting Hispanic student any compensatory equitable relief. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

Anti-Injunction Act precluded injunction barring university from prosecuting a state court defamation action against one of its professors in connection with professor's affidavit which was used to support a charge of discrimination by a Hispanic graduate student, notwithstanding claim that suit was a form of retaliation barred by Title VI. *Paisey v. Vitale*, In and For Broward County, Fla., S.D. Fla. 1986, 634 F.Supp. 741, affirmed 807 F.2d 889.

Parties who challenged Texas "no pass no play" statute, requiring students to meet academic standards in order to participate in extra-curricular activities, were not entitled to injunctive relief under Title VI, absent showing that legislature's concern about proving quality of education through statute was pretext for discriminating against minority and learning disabled students. *Texas Educ. Agency v. Stamos on Behalf of Class of All Public School Children in State of Tex.*, Tex.App.-Hous. (1 Dist.) 1991, 817 S.W.2d 378.

41. Search and seizure

Search of hospital to determine compliance with Title VI prohibition against discrimination under any program or activity receiving federal funds was unreasonable under Fourth Amendment; search could not be conducted without chilling peer review process, breaching confidentiality, and intrusively second-guessing medical judgments embodied in staff privilege and peer review decisions, and region director of Department of Health and Human Services (HHS) acted arbitrarily and without administrative plan containing neutral criteria in selecting hospital as target. *U.S. v. Harris Methodist Fort Worth*, C.A.5 (Tex.) 1992, 970 F.2d 94.

42. Agency violation

To extent a plaintiff asserts that federal agency is violating terms of a federal statute by abdicating affirmative duty to eliminate discrimination, action is properly brought against the agency; in such circumstance, agency is a partner in discrimination, and may be held responsible for such complicity. *Young v. Pierce*, D.C. Tex. 1982, 544 F.Supp. 1010.

II. PARTICULAR PROGRAMS AND ACTIVITIES

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64. Hospitals

Nonemployee physician staff privileges are protected from discriminatory actions by hospital receiving federal funds; however, Department of Health and Human Services (HHS) should not supervise or control medical practice or hospital operations in oversight of nondiscrimination law. *U.S. v. Harris Methodist Fort Worth*, C.A.5 (Tex.) 1992, 970 F.2d 94.

Tennessee's limited bed certification policy, under which only portion of beds in Medicaid participating nursing homes were certified to be available for Medicaid patients, violated civil rights statute prohibiting discrimination in federally funded programs; policy had disparate impact on black Medicaid recipients by displacing them from or denying them admission to nursing homes. *Linton v. Arnold v. Carney* by Kimble, M.D. Tenn. 1990, 779 F.Supp. 925.

Allegations that hospital and medical personnel ultimately performed surgery against patient's will and denied patient access to medical records could not provide basis for federal civil rights claim against hospital and personnel; patient failed to allege that she was intended beneficiary of or participant in federally funded program from which hospital received funds. *Griggs v. Lexington Police Dept.*, D. Mass. 1987, 672 F.Supp. 36.

Complaint alleging that defendants conspired to deny physician hospital staff privileges because he was of Serbian-Yugoslavian origin did not state claim under this subchapter, since physician was not intended beneficiary of medicare/medicaid payments to hospital and complaint was devoid of any other allegations which indicated that hospital participated in federally funded program which was intended, primarily or otherwise, to benefit employment of physicians. *Vucicevic v. MacNeal Memorial Hosp.*, D.C. Ill. 1983, 572 F.Supp. 1424.

65. Housing

Resident Advisory Bd. v. Rizzo, 425 F.Supp. 987 [main volume] modified on other grounds 503 F.Supp. 383.

Housing Authority's failure to provide documents in Spanish to non-English speaking public housing tenant concerning its termination of her tenancy did not implicate protected class, i.e., Hispanics, but rather, merely reflected preference for English over all other languages; thus, such failure did not violate Title VI. *Vialez v. New York City Housing Authority*, S.D. N.Y. 1991, 783 F.Supp. 109.

The Department of Housing and Urban Development's (HUD) approval of siting of housing replacing demolished housing project, even if lawful, would not shield city housing authority

from liability for any violation of the Fair Housing Act, the Civil Rights Act, and equal protection and due process clauses if it unlawfully discriminated in selecting scattered sites for placement housing. *Project B.A.S.I.C. v. Kem* D.R.I. 1991, 776 F.Supp. 637.

Department of Housing and Urban Development's funding, regulation, and assistance to local public housing authorities was unconstitutional support of segregation, where HUD allowed local public housing authorities to construct segregated housing projects and selectively enforced its regulations in way calculated to ensure projects remained segregated, abdicated its duty to enforce fair housing plan regulations which theoretically made new construction housing available to minorities, did nothing to monitor or review initial occupancy process of new homes, and HUD's own findings, made before filing of action, revealed that at least 20 of public housing authorities in class action counties were operating in violation of Title VI which prohibits discrimination in federal programs. *Young v. Pierce*, E.D. Tex. 1985, 628 F.Supp. 1037.

Department of Housing and Urban Development did not violate its obligations under this subchapter and section 3601 et seq. of this title, nor did it violate rights under U.S.C.A. Const. Amend. 5 of plaintiffs who alleged that racially discriminatory acts of Department led to perpetuation of city school segregation, when Department continued to fund city redevelopment authority after it knew that authority was following racially discriminatory practices in relocation, where Department entered into cooperative agreement under which city assumed responsibility for relocation and where cutting off funds to authority would have penalized those most in need of housing. *Jenkins v. State of Mo.*, D.C. Mo. 1984, 593 F.Supp. 1485.

Department of Housing and Urban Development is not barred by equal protection clause of U.S.C.A. Const. Amend. 14 or this subchapter from providing Department program funds to programs approved under Minnesota Urban Indian Housing Act, M.S.A. § 462A.07. *St. Paul Intertribal Housing Bd. v. Reynolds*, D.C. Minn. 1983, 564 F.Supp. 1408.

Home repair loan applicant had no implied damage remedy under this subchapter for alleged discrimination and misuse of federal funds by 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. *Nabke v. U.S. Dept. of Housing and Urban Development*, D.C. Mich. 1981, 520 F.Supp. 5.

Note 65a

65a. Older Americans provisions

Factor in intrastate funding formula by which Florida distributed federal funds appropriated under Older Americans Act among 11 planning and service areas, which considered number of persons age 65 and over who lived alone, had substantial disparate impact on districts with higher percentage of minority elderly residents in violation of Civil Rights Act. *Meek v. Martinez*, S.D.Fla.1987, 724 F.Supp. 888.

67. Schools

Where state had dual university system for blacks and whites, state has affirmative duty to dismantle system and does not discharge its constitutional obligations until it eradicates policies and practices traceable to the prior de jure dual system that continue to foster segregation; court must consider whether existing racial identifiability of universities is attributable to state and whether state has perpetuated its formerly de jure segregation in any facet of its institutional system. *U.S. v. Fordice*, U.S.Miss. 1992, 112 S.Ct. 2727.

Formerly segregated school district's limited form of achievement grouping did not discriminate against black students on the basis of race; there was evidence that achievement grouping system used was educationally sound both in theory and practice, that students were not locked into place or tracked in grouping system, and that there was an "impressive" degree of movement among achievement levels by black as well as white students. *Quarles v. Oxford Mun. Separate School Dist.*, C.A.5 (Miss.) 1989, 868 F.2d 750.

Achievement grouping practices used by school districts to place students in classes bore manifest demonstrable relationship to classroom education and, thus, did not violate Title VI of Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq., in that achievement grouping per se was educationally desirable, and methods used by school districts to assign students to achievement groups adequately measured student's true abilities in each particular class. *Georgia State Conference of Branches of NAACP v. State of Ga.*, C.A.11 (Ga.) 1985, 775 F.2d 1403.

District court was not clearly erroneous in finding that disproportionate failure of blacks on competency examination high school seniors were required to pass in order to receive high school diploma was not caused by present effects of past intentional segregation, and that, even assuming there was a causal link between vestiges and disparate impact, use of test as diploma sanction would remedy vestiges of past intentional segregation, thereby supporting conclusion that test was not unconstitutional as discriminating against blacks. *Debra P. by Irene P. v. Turlington*, C.A.Fla.1984, 730 F.2d 1405.

Notwithstanding great autonomy given to Alabama institutions of higher learning, system of higher education existed, members of that system received federal financial aid and each of the institutions may be liable under the Civil Rights Restoration Act to overcome effects of prior discrimination, notwithstanding failure of the Government or of the plaintiffs in desegre-

gation suit to point with particularity to any one program. *Knight v. State of Ala.*, N.D.Ala.1991, 787 F.Supp. 1030.

Use of minimum ACT test score as admission requirement for teacher-education programs was not educationally justified, for purposes of disparate impact claim under Title VI, where there was no evidence that particular cutoff score was valid measure of minimal ability necessary to become competent teacher. *Groves v. Alabama State Bd. of Educ.*, M.D.Ala.1991, 776 F.Supp. 1518.

Court would not interfere with academic autonomy of university absent evidence of arbitrary or capricious behavior by university in dismissing graduate student for failure to comply with academic program guidelines. *Love v. Duke University*, M.D.N.C.1991, 776 F.Supp. 1070.

State Attorney General's response to proposed order to remedy racially segregated university system, that proposed new plan was unnecessary and that prior remedial orders were appealable as final judgment, would be rejected as nonresponsive to court's request for revisions. *U.S. v. State of La.*, E.D.La.1990, 751 F.Supp. 621.

This section and section 1703(f) of Title 20 mandate remedial assistance to students with English language deficits, regardless of their number, as long as there is at least one person arguably denied equal educational opportunity. *Heavy Runner v. Bremner*, D.C.Mont.1981, 522 F.Supp. 162.

Diploma requirement that each student graduating from high school perform at ninth grade level in mathematics and reading portions of achievement test was violative of this subchapter, in view of fact that some students had attended classes under dual system. *Anderson v. Banks*, D.C.Ga.1981, 520 F.Supp. 472.

67a. Scholarships—Generally

University scholarship program that was only open to black students satisfied equal protection standards and did not violate Title VI; program served compelling goal of remedying effects of past discrimination at university, and was narrowly tailored to serve that interest. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

67b. — Racially neutral merit awards

University's scholarship program which offered racially neutral merit-based full-support scholarship did not violate Title VI on grounds it allegedly discriminated against Hispanic student who failed to qualify for program. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

67c. — Historical evidence

Historical evidence was sufficient to establish there was history of past discrimination at university, for purposes of determining whether university's scholarship program for black students served goal of remedying effects of past discrimination; historical record included administrative findings, protracted litigation, and continuing administrative review of university's efforts. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

67d. — Current evidence

Evidence that university had exceeded its goal for recruiting black freshman, came close to meeting its goal for retention of black undergraduates and no longer discriminated against blacks in admission or financial aid for many years was insufficient to establish that its scholarship program for black students no longer served compelling state interest of remedying effects of past discrimination, in view of evidence that scholarship recipients played active role in recruiting and retaining other black students. *Podberesky v. Kirwan*, D.Md.1991, 764 F.Supp. 364.

71. Miscellaneous programs and activities

Residents who alleged city received federal funds, that their area of the city had received inferior municipal services as a result of discriminatory animus, and that, as a result, they had experienced little or no police response to their calls, deterioration of their neighborhood and property values, and existence in the neighborhood of a business that openly sold alcohol to minors had standing to sue under Title VI in their own right. *Neighborhood Action Coalition v. City of Canton, Ohio*, C.A.6 (Ohio) 1989, 882 F.2d 1012.

State of Washington's refusal to grant vehicle licensing reciprocity to vehicles owned and licensed by Indian tribes was not in violation of Title VI of the 1964 Civil Rights Act [42 U.S.C.A. § 2000d], which prohibits racial discrimination in allocation of benefits from programs receiving federal aid. *Queets Band of Indians v. State of Wash.*, C.A.9 (Wash.) 1985, 755 F.2d 1399.

Mortgage lender whose conduct with respect to appraisal of property had racially discriminatory effect was not subject to liability to prospective purchasers under statute making it unlawful to exclude from participation in, deny benefits of, or discriminate under any program or activity receiving financial assistance from federal government, even though lender was bound by certain federal statutes or participated in certain federal programs; there was no proof that lender received any federal funding which it in turn provided to potential mortgagors. *Step-toe v. Savings of America*, N.D. Ohio 1992, 800 F.Supp. 1542.

One hundred percent set-aside by Army Corps of Engineers of all eleven available small-business contracts in one geographic area for exclusive minority contractor bidding under Small Business Administration (SBA) § 8(a) program was improper exercise of statutory and regulatory authority and resulted in statutorily

prohibited discrimination against nonminor competing contractors; set-aside was overinclusive and did not effectuate limited and proper tailored plan to remedy past discrimination. *Fordice Const. Co. v. Marsh*, S.D.Miss.1990, 7 F.Supp. 867.

Factor in intrastate-funding formula by which Florida distributed federal funds appropriate under Older Americans Act among 11 planning and service areas, which considered number of persons age 65 and over, had disparate impact on minorities in violation of Civil Rights Act, as it excluded minorities who become frail at earlier ages and because of shorter life expectancy of minorities. *Meek v. Martinez*, S.D.Fla.1987, 724 F.Supp. 888.

Female Merchant Marine Academy cadet who claimed that she was denied a commission in the United States Naval Reserve because of gender did not have a claim under this subchapter, as it does not deal with gender-based discrimination and deals with activities receiving federal financial assistance rather than agencies of the government itself such as the Naval Reserve or the Merchant Marine Academy. *Cobb v. U.S. Merchant Marine Academy*, D.C.N.Y.1984, 592 F.Supp. 640.

Intent of Congress with respect to Secretary of Interior's application of provisions of this section, requiring applicant for federal financial assistance to give assurance of nondiscrimination to payments made under section 715s of Title 16 was that such application be consistent with and in harmony with objectives of section 715s of Title 16. *Cameron Parish Police Jury v. Hickel*, D.C.La.1969, 302 F.Supp. 689.

72. Preemption

A.R.S. § 38-431.03, subd. B., providing that minutes of executive sessions shall be kept confidential except from members of public body which met in executive session is preempted to extent it frustrates congressionally mandated duty to investigate whether public programs receiving federal funds, such as school districts, comply with provisions of this subchapter. *U.S. v. Phoenix Union High School Dist.*, C.A.Ariz. 1982, 681 F.2d 1235, certiorari denied 103 S.Ct. 1169, 459 U.S. 1191, 75 L.Ed.2d 422.

73. Social security programs

This section is not applicable to direct federal payment programs such as disability insurance and supplemental security income programs. *Soberal-Perez v. Schweiker*, D.C.N.Y.1982, 549 F.Supp. 1164, affirmed 717 F.2d 36, certiorari denied 104 S.Ct. 1713, 466 U.S. 929, 80 L.Ed.2d 186.

§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

HISTORICAL AND STATUTORY NOTES

Exclusion From Coverage

Enactment of section 2000d-4a of this title not to be construed to extend the application of the

Civil Rights Act of 1964 [section 2000a et seq. of this title] to ultimate beneficiaries of Federal

Historical Note

1972 Amendment. Pub.L. 92-318 inserted "sex" following "religion".
 1964 U.S.Code Cong. and Adm.News, p. 2355. See, also, Pub.L. 92-318, 1972 U.S. Code Cong. and Adm.News, p. 2462.

Legislative History. For legislative history and purpose of Pub.L. 88-352, see

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C.J.S. Civil Rights §§ 5, 12 to 14, 16, 17.

SUBCHAPTER V—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

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.

Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Historical Note

Coordination of Implementation and Enforcement of provisions. For provisions relating to the coordination of implementation and enforcement of the provisions of this subchapter by the Attorney General, see section 1-201 of Ex.Ord. No.12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of this title.

Legislative History. For legislative history and purpose of Pub.L. 88-352, see 1964 U.S.Code Cong. and Adm.News, p. 2355.

Cross References

Age discrimination in employment, see section 621 et seq. of Title 29, Labor.

Age discrimination in federally assisted programs, see section 6101 et seq. of this title.

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I. GENERALLY

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1. Construction

This subchapter must be construed to avoid the conclusion that its provisions interfere with the operation of the federal Constitution. *Detroit Police Officers' Ass'n v. Young*, C.A.Mich.1979, 608 F.2d 671.

In order to effectuate remedial purpose of this subchapter, the subchapter should be liberally construed. *U. S. v. El Camino Community College Dist.*, D.C.Cal.1978, 454 F.Supp. 825, affirmed 600 F.2d 1258, certiorari denied 100 S.Ct. 661, 444 U.S. 1013, 62 L.Ed.2d 642.

In absence of statutory language or legislative history which would clearly exclude coverage of Veterans' Administration educational programs under this

Note 1

subchapter, broad language of this subchapter should be interpreted in remedial context in which this subchapter was presented to Congress and narrow readings of this subchapter coverage would be inappropriate. *Bob Jones University v. Johnson*, D.C.S.C.1974, 396 F.Supp. 597, affirmed 529 F.2d 514.

2. Construction with constitutional provisions

This subchapter prescribes only those racial classifications which would violate the equal protection clause of U.S.C.A. Const. Amend. 14 or Amend. 5. *Regents of University of California v. Bakke*, Cal.1978, 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed.2d 750.

If a medical school's admission, program does not violate U.S.C.A. Const. Amend. 14, it does not violate this section. *McDonald v. Hogness*, 1979, 598 P.2d 707, 92 Wash. 431, certiorari denied 100 S.Ct. 1650.

3. Purpose

Purpose of this subchapter is the halting of federal funding of entities which violate a prohibition of racial discrimination similar to that of the Constitution. *Regents of University of California v. Bakke*, Cal.1978, 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed.2d 750.

In interpreting this subchapter, it is presumed that Congress did not intend to prohibit state and local governments from performing their constitutional duty to eliminate discrimination and its effects and, therefore, while this subchapter may prohibit acts of discrimination, it cannot be read to forbid unavoidably race-conscious remedies which are constitutionally required. *Detroit Police Officers' Ass'n v. Young*, C.A.Mich.1979, 608 F.2d 671.

Purpose of this section is to protect a person's right to be free of invidious discrimination in federally assisted programs. *Joy v. Daniels*, C.A.S.C.1973, 479 F.2d 1236.

Concern and aim of this subchapter is the prohibition of various forms of discrimination in federally funded programs and to limited extent recognized by judicial decision. *Rendon v. Utah State Dept. of Employment Sec. Job Service*, D.C.Utah 1978, 454 F.Supp. 534.

This section prohibiting racial discrimination in any federally funded program intends that federal agency involved in allocation of funds attempt at outset to secure compliance by voluntary means, if

such method is reasonably possible. *Santiago v. City of Philadelphia*, D.C.Pa.1977, 435 F.Supp. 136.

Purpose of statutory proscription against discrimination on account of race, color, or national origin under programs receiving federal financial assistance is to root out discrimination by cutting off federal funds to those activities which continue to discriminate contrary to the statutory mandate. *Brown v. Weinberger*, D.C.D.C.1976, 417 F.Supp. 1215.

Objective of this section is not the compulsory mixing of races but freedom from discrimination, and while some compulsory association of races is necessary for purpose of desegregating schools, it is limited to such as is appropriate for eliminating dual structure of separate schools for students of different races and removing every vestige of local discrimination. *Alabama NAACP State Conference of Branches v. Wallace*, D.C.Ala. 1967, 269 F.Supp. 346.

This section was intended to prohibit discrimination against recipients of federal funds. *Green St. Ass'n v. Daley*, D.C.Ill.1968, 250 F.Supp. 139, affirmed 373 F.2d 1, certiorari denied 87 S.Ct. 2054, 387 U.S. 932, 18 L.Ed.2d 985.

4. Discrimination

A case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. *Detroit Police Officers' Ass'n v. Young*, C.A.Mich.1979, 608 F.2d 671.

Even if this section prohibiting discrimination in federally assisted programs implied private cause of action, discrimination must be actual cause of the actions under scrutiny. *Coates v. Illinois State Bd. of Ed.*, C.A.Ill.1977, 559 F.2d 445.

Facts that entrance level examination employed by city police department was general intelligence test which rewarded verbal skills and that in addition to this test 30 percent of applicant's total score was derived from completely unstructured and totally subjective interview, when considered with statistical imbalance of minority representation on police force, fully supported district court's determination that racial discrimination existed in police hiring practices. *Afro Am. Patromen's League v. Duck*, C.A.Ohio 1974, 503 F.2d 294.

That it was federal agency or officer charged with act of racial discrimination in violation of this section and U.S.C.A.

Const. Amend. 5 did not alter per standards. *Gautreaux v. Romney*, C.A.Ill.1971, 448 F.2d 731.

Racial discrimination against beneficiaries of federal assistance is unlawful. *U. S. v. Jefferson County Bd. of Ed.*, C.A.Ala. & La.1966, 372 F.2d 838, decree corrected 390 F.2d 385, certiorari denied 88 S.Ct. 77, 389 U.S. 840, 19 L.Ed.2d 104.

This subchapter barring discrimination in programs or activities receiving federal financial assistance is no guaranty against adversity but, rather, protects against discrimination. *Bryan v. Koch*, D.C.N.Y.1980, 492 F.Supp. 212.

Discrimination on the grounds of race, color, national origin or handicap against the ultimate beneficiaries of federal financial assistance is unlawful. *National Ass'n for Advancement of Colored People in Wilmington Medical Center, Inc.*, D.C.Del.1978, 453 F.Supp. 330.

Federal government may not extend funds to an agency that practices racial discrimination. *Robinson v. Vollert*, D.C.Tex.1976, 411 F.Supp. 461, reversed on other grounds 602 F.2d 87, rehearing denied 609 F.2d 1179.

Where plaintiff was in fact earning established maximum salary for her occupation and maximum was otherwise neutral and nondiscriminatory in effect then defendants were not guilty of discrimination. *Gilliam v. City of Omaha*, D.C.Neb.1975, 388 F.Supp. 842.

Essentially, the same showing is required to establish a violation of this section prohibiting discrimination under federally assisted programs on ground of race, color, or national origin as is required to make out a racial discrimination violation of the equal protection clause of U.S.C.A. Const. Amend. 14. *Goodwin v. Wyman*, D.C.N.Y.1971, 330 F.Supp. 1038, affirmed 92 S.Ct. 2420, 406 U.S. 964, 32 L.Ed.2d 664.

In determining whether regulation discriminates against blacks, court must look beyond terms of regulation since that which is fair on its face may nevertheless discriminate. *Stanley v. Brown*, D.C.Va.1970, 313 F.Supp. 749.

5. Receipt of federal assistance

For claimant to recover under this subchapter against an employer for discriminatory employment practices, a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment. *Association Against Discrimination in Employment*,

Inc. v. City of Bridgeport, C.A.Conn.1981, 647 F.2d 256.

Stipulation that state university was a recipient of federal funds was not enough to support a finding of violation of this subchapter, mandating that national origin cannot be the basis for excluding anyone from participation in a federally funded program, in connection with exclusion of Iranian students, in absence of any indication in the record of the amount of federal funds received or how federal funds were spent. *Tayyari v. New Mexico State University*, D.C.N.M. 1980, 495 F.Supp. 1365.

A university at which veterans receiving federal educational benefits are enrolled is a "recipient of federal funds" for purposes of this subchapter. *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*, D.C.Tex.1980, 485 F.Supp. 255.

As a recipient of federal financial assistance through the Department of Health, Education, and Welfare, community college was subject to this subchapter. *U. S. v. El Camino Community College Dist.*, D.C.Cal.1978, 454 F.Supp. 825, affirmed 600 F.2d 1258, certiorari denied 100 S.Ct. 661, 444 U.S. 1013, 82 L.Ed.2d 642.

University, which had student body that included 221 students who during academic year received benefits of approximately \$397,800 under federal assistance programs for veterans, was a recipient of federal assistance within meaning of this section, notwithstanding argument that federal cash payments went directly to the veteran and that it was the veteran who was beneficiary of the Veterans' Administration programs, not the university. *Bob Jones University v. Johnson*, D.C.S.C.1974, 396 F.Supp. 597, affirmed 529 F.2d 514.

6. Separate treatment, justification for

Where administrative procedure is permeated with social and cultural factors, separate treatment for "minorities" may be justified in order to insure that all persons are judged in racially neutral fashion. *Flanagan v. President and Directors of Georgetown College*, D.C.D.C. 1976, 417 F.Supp. 377.

7. Investigation of complaints

Where there was no evidence that State Department was aware of plaintiff's dispute with educational center before he filed his third amended complaint joining federal defendants, the State Department had no duty to investigate his complaint

Note 7

of discrimination and to ensure educational center's compliance with this subchapter. *Tagupa v. East-West Center, Inc.*, C.A.Hawaii 1981, 642 F.2d 1127.

Where objective of investigation conducted by the Office of Civil Rights of the Department of Health, Education and Welfare was to alleviate discrimination against minority children resulting from the allegedly discriminatory assignment and selection of schoolteachers, such investigation fell within parameters of this section providing that no persons on the ground of race, color, or national origin shall be subjected to discrimination under any program or activity receiving federal financial assistance, and in context of such investigation, the collection of racial and ethnic data of schoolteachers was authorized by this subchapter. *Caulfield v. Board of Ed. of City of New York*, C.A.N.Y.1978, 583 F.2d 605.

Substantial delays of from one and one-half to eight years on part of defendants, and officials of the Department of Health, Education and Welfare, in bringing to conclusion investigations of school districts in respect to whether they were in compliance with this subchapter constituted a violation of this subchapter and regulations promulgated pursuant thereto. *Brown v. Weinberger*, D.C.D.C.1976, 417 F.Supp. 1215.

8. Affirmative action

Affirmative action may be justified, provided that it does not violate nondiscrimination provision of this section and is administered on racially neutral basis. *Flanagan v. President and Directors of Georgetown College*, D.C.D.C.1976, 417 F.Supp. 377.

9. Elements of cause of action—Generally

In order to be entitled to relief under this subchapter and the Revenue Sharing Act, section 1242 of Title 31, black residents of community were required to show that the city was a recipient of federal financial aid and had used criteria or methods of administration which resulted in discrimination against blacks. *Dowdell v. City of Apopka, Fla.*, 511 F.Supp. 1375.

Elements for establishing cause of action pursuant to this subchapter banning discrimination in any program or activity receiving federal financial assistance are: (1) that the entity involved is engaging in racial or national origin discrimination and (2) entity involved is receiving federal financial assistance; discriminatory

effect alone is sufficient to satisfy the first element inasmuch as intent to discriminate need not be proven. *Jackson v. Conway*, D.C.Mo.1979, 476 F.Supp. 896, affirmed 620 F.2d 680.

Violation of this subchapter will be found if it can be shown that conduct has racially discriminatory effect and no intent to discriminate need be demonstrated. *Lora v. Board of Ed. of City of New York*, D.C.N.Y.1978, 456 F.Supp. 1211, vacated on other grounds 623 F.2d 248.

To establish relief under this subchapter prohibiting racial discrimination in any federally funded program, in a municipal services disparity case, it must be proven that a municipality is a recipient of federal financial assistance and that municipality has used criteria or methods of administration or has selected sites for facilities that have resulted in discrimination in a program or activity supported by federal financial assistance. *Johnson v. City of Arcadia, Fla.*, D.C.Fla.1978, 450 F.Supp. 1363.

10. — Intent

In order to assert a claim based upon unconstitutional racial discrimination a party must not only allege and prove that the challenged conduct had a differential or disparate impact on persons of different races but also assert and prove that the governmental actor, in adopting or employing challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on basis of race; thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employer under this subchapter or sections 1981 and 1983 of this title. *Castaneda v. Pickard*, C.A.Tex.1981, 648 F.2d 989.

Board of education is not guilty of violation of equal protection or this subchapter unless its actions are undertaken with discriminatory intent. *Lora v. Board of Ed. of City of New York*, C.A.N.Y.1980, 623 F.2d 248.

Assuming that there is private cause of action under this subchapter, and that exhaustion of administrative remedies is not required, plaintiffs had to prove intent as essential element of claim under this subchapter in their class action against various city, state and federal officials seeking declaratory and injunctive relief from employment practices of city public works department. *Harris v. White*, D.C.Mass.1979, 479 F.Supp. 996.

In school desegregation case, claim based upon violation of this subchapter

and its implementing regulations did not require proof of segregative intent. *Soria v. Oxnard School Dist. Bd. of Trustees*, D.C.Cal.1974, 386 F.Supp. 639.

11. Private right of action

Private right of action allowed under this section encompasses no more than an attempt to have any discriminatory activity cease and does not include right to recovery of back pay or other losses. *Drayden v. Needville Independent School Dist.*, C.A.Tex.1981, 642 F.2d 129.

In order to maintain a private action under this section prohibiting discrimination based on race by recipients of federal assistance, a plaintiff must be the intended beneficiary of, an applicant for, or a participant in a federally funded program. *Simpson v. Reynolds Metals Co., Inc.*, C.A.Ill.1980, 629 F.2d 1226.

Private right of action could be implied under this subchapter which prohibits discrimination on basis of race, color, or national origin by recipient of federal funds against participants in or beneficiaries of any program or activity receiving federal financial assistance conducted by recipient. *Yakin v. University of Illinois, Chicago Circle Campus*, D.C.Ill.1981, 508 F.Supp. 848.

Private right of action exists under this subchapter, which prohibits discrimination in federally funded programs, and all forms of equitable relief are available to private plaintiffs suing under this subchapter, but not monetary damages. *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, D.C.Ill.1980, 496 F.Supp. 522.

Private plaintiffs have standing to enforce provisions of this subchapter mandating that national origin, among other things, cannot be basis for excluding anyone from participation in federally funded programs. *Tayyari v. New Mexico State University*, D.C.N.M.1980, 495 F.Supp. 1365.

Private right of action exists to enforce claims under this subchapter, under section 794 of Title 29, and under section 1415 of Title 20. *Larry P. v. Riles*, D.C.Cal.1979, 495 F.Supp. 926.

There is no private right of action under this subchapter. *Clark v. Louisa County School Bd.*, D.C.Va.1979, 472 F.Supp. 321.

Private right of action exists under unequivocal prohibition of discrimination provisions of this subchapter in federally funded programs. *Guardians Ass'n of New York City Police Dept., Inc. v. Civil*

Service Commission of City of New York, D.C.N.Y.1979, 496 F.Supp. 1273.

12. Exhaustion of administrative remedies

Plaintiffs, who asserted that there was racial discrimination in placement of juveniles at youth study center, that youth study center was partially financed by federal funds and that such segregation violated this section prohibiting racial discrimination in any federally funded program, but who apparently had not contacted federal agency involved and had not sufficiently alleged facts to justify exception to exhaustion requirement, had duty to exhaust their administrative remedies or plead sufficient facts to support contention that such exhaustion would be ineffective or futile. *Santiago v. City of Philadelphia*, D.C.Pa.1977, 435 F.Supp. 136.

13. Jurisdiction

Although progress was being made by state education officials in many areas challenged by lawsuit involving placement of children in classes for the educable mentally retarded, that progress did not prevent the court from exercising its jurisdiction to declare violations of constitutional and statutory rights. *Larry P. v. Riles*, D.C.Cal.1979, 495 F.Supp. 926.

Department of Health, Education and Welfare had jurisdiction to investigate, through office of civil rights, whether or not city education board's employment practices were in compliance with this subchapter and, upon Department's concluding that there was not compliance, to seek enforcement, whether through voluntary compliance or otherwise. *Caulfield v. Board of Ed. of City of New York*, D.C.N.Y.1979, 496 F.Supp. 862, affirmed 632 F.2d 996.

In action by black citizens of city alleging deprivation of equal municipal services, jurisdiction of plaintiffs' claim against individually named defendants for violation of this subchapter prohibiting racial discrimination in any federally funded program and Revenue Sharing Act, section 1242 of Title 31, was conferred by section 1343 of Title 28 which gives district court original jurisdiction of civil action commenced to redress deprivation, under color of state law, of constitutional rights, or to recover damages or to secure equitable or other relief under any act of Congress providing for protection of civil rights. *Johnson v. City of Arcadia, Fla.*, D.C.Fla.1978, 450 F.Supp. 1363.

Jurisdiction of "reverse discrimination" class action brought by Caucasians who

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allegedly were unlawfully admitted to city college's biomedical program could not be founded on this section prohibiting the exclusion of any person, on grounds of race, from participating in the benefits of any program receiving federal financial assistance, since the biomedical program was not funded by federal monies until after the discrimination had occurred. *Hupart v. Board of Higher Ed. of City of New York*, D.C.N.Y. 1976, 420 F.Supp. 1087.

A charge by union of an unfair labor practice against employer in discriminating against male employee by promoting a less qualified, less senior female employee pursuant to affirmative action plan embodied in consent decree was within the exclusive jurisdiction of the National Labor Relations Board. *McAler v. American Tel. & Tel. Co.*, D.C.D.C. 1976, 416 F.Supp. 435.

Federal district court had subject matter jurisdiction over action seeking monetary damages for alleged employment discrimination brought under this subchapter. *Gilliam v. City of Omaha*, D.C.Neb. 1975, 388 F.Supp. 842.

Because neither section 1961 of this title, guaranteeing all persons rights afforded "white citizens" nor this section outlawing exclusion of persons on ground of race, color, or national origin from participation in programs receiving federal financial assistance apply to sex discrimination, such provisions did not provide foundation for federal jurisdiction over action by local chapter of nationwide nonprofit organization against its national office to enjoin latter from cancelling its charter because it admitted women to membership. *New York City Jaycees, Inc. v. U. S., Jaycees, Inc.*, D.C.N.Y. 1974, 377 F.Supp. 481, reversed on other grounds 512 F.2d 856.

Fact that out of total of over \$3,000,000 budgeted and spent by college in its four-year existence, approximately \$53,000 came from governmental source was insufficient to confer jurisdiction upon district court of action against college under this subchapter where there was no showing or claim that federal programs under which money had been received, e.g., college work study program, had in any way been discriminatorily administered. *McLeod v. College of Artesia*, D.C.N.M. 1970, 312 F.Supp. 498.

14. Abstention

Where students challenging their placement in classes for the educable mentally retarded had consistently pressed their

claim under West's Ann. Cal. Const. art. 1, § 7, and where case law was well settled in California on the question of *de facto* as opposed to *de jure* segregation, there was no reason for federal court to abstain from deciding question of whether placement of students in classes for the educable mentally retarded in a manner resulting in a disproportionate number of black children being placed in such classes violated the state equal protection guarantee. *Larry P. v. Riles*, D.C. Cal. 1979, 495 F.Supp. 926.

15. Removal of actions

Action by parents, as next friends of their respective minor children, to enjoin school district from implementing desegregation agreement between Board of Education and Department of Health, Education and Welfare was properly removed from state court to federal court under terms of section 1443 of Title 28 providing for removal of any civil action for any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. *Linker v. Unified School Dist. No. 259, Wichita, Kan.*, D.C. Kan. 1972, 344 F.Supp. 1187.

Although this section is a law providing to equal civil rights stated in terms of racial equality, any right that black defendant (who was charged with aggravated battery in connection with confrontation between black and white students and who sought removal to federal court) had under this section did not encompass the right to engage in violent conduct; thus, defendant failed to satisfy requirement of section 1443 of Title 28 that there be reliance upon a right under any law providing for equal civil rights. *State of La. v. London*, D.C. La. 1971, 335 F.Supp. 585.

State defendant charged with inciting to riot stemming from his activities during public demonstration to secure equal employment opportunities was not entitled to remove state criminal prosecution to federal court on ground that he was engaging in activity protected by this section prohibiting discrimination in federally assisted programs, where defendant was not at time of arrest seeking employment or participating in a federally assisted training or apprenticeship program. *Com. of Pa. v. Leonard*, D.C. Pa. 1970, 315 F.Supp. 215.

Marching activity of petitioners, at time of their arrest for inciting to riot, albeit for purpose of expressing publicly their support for workers seeking equal

employment opportunities in construction industry, was not in itself an activity protected by federal laws, so as to afford a basis for removal of state criminal prosecutions to federal court. *Com. of Pa. v. Hill*, D.C. Pa. 1970, 313 F.Supp. 1159, affirmed 439 F.2d 1016, certiorari denied 92 S.Ct. 443, 404 U.S. 985, 30 L.Ed.2d 370.

16. Stay of actions

Suit seeking injunctive and declaratory relief from alleged *de jure* system of segregated public higher education would be stayed under doctrine of primary jurisdiction where pending administrative proceedings were begun by United States Department of Education prior to institution of suit to insure compliance of state's system of higher education with this subchapter, any relief fashioned by court for specific area with which suit was concerned ran risk of upsetting state-wide scheme parties to administrative process might formulate, and expertise of administrative agency in search for optimum solution would be beneficial to all parties. *Knight v. James*, D.C. Ala. 1981, 514 F.Supp. 567.

17. Persons entitled to maintain action

Plaintiffs, an organization of low and moderate income black residents of the city of Montgomery and four individual low income black city residents who alleged that neither the city's applications nor its implementations of 1975, 1976 and 1977 plans of improvement were in compliance with the Housing and Community Development Act of 1974, section 5301 et seq. of Title 42, had a private cause of action under both the Community Act and this subchapter, in view of the clear guidelines laid down by the Bossier, Cort, and Cannon decisions. *Montgomery Improvement Ass'n, Inc. v. U. S. Dept. of Housing and Urban Development*, C.A. Ala. 1981, 645 F.2d 291.

For purposes of standing, in cases such as where discharged black teachers sued under this section, students, if not teachers, are beneficiaries of federal assistance to public schools. *Drayden v. Needville Independent School Dist.*, C.A. Tex. 1981, 642 F.2d 129.

Not-for-profit corporation having as its membership black police officers had standing to maintain action charging federal agencies and officials with unlawfully failing to terminate federal funding of state and local law enforcement agencies that used the funds to discriminate on grounds of race since it alleged harm to itself and its members as result of the challenged action. *National Black Police Ass'n v. Velde*, C.A.D.C. 1980, 631 F.2d 784.

Plaintiff Mexican-American school children solely because they did not argue that there was segregation in school district and lost their claim that they were entitled to bilingual-bicultural curriculum did not lose standing to challenge the alleged discriminatory hiring practices of school districts with regard to Mexican-American teachers and supporting personnel. *U.S.C.A. Const. Amend. 14. Otero v. Mesa County Valley School Dist. No. 51*, C.A. Colo. 1977, 568 F.2d 1312, on remand 470 F.Supp. 326.

Minority residents of innercity area, who alleged that federal agencies allocated funds for sewers and recreational developments to suburban area without assessing impact of such allocations on racial housing patterns thereby perpetuating minority residents' ghettoized living patterns, did not have standing to sue under provisions of this subchapter and the Civil Rights Act of 1968, section 3601 et seq. of this title, imposing on federal agencies affirmative duty to encourage fair housing, where they did not claim that they unsuccessfully sought housing in suburban area, or that suburban area arbitrarily rejected housing proposals of benefit to them, but claimed only that, had grants not been approved, monies could conceivably have gone to some other, as yet totally imaginary project which might have had result of making more housing available to them. *Evans v. Lynn*, C.A.N.Y. 1975, 537 F.2d 571, certiorari denied 97 S.Ct. 797, 429 U.S. 1066, 50 L.Ed.2d 784.

Where taxes which plaintiffs were obliged to pay were used to fund highway projects subject to "freeze order," plaintiffs were "aggrieved persons," within meaning of this subchapter, and had standing to challenge legality of suspension of federal funding. *Schlaflly v. Volpe*, C.A. Ill. 1974, 495 F.2d 273.

Parents of school children were without standing to seek judicial interference with school board's abandonment of "freedom of choice" plan and its adoption of zoning and pairing plan to achieve desegregation, notwithstanding that board's action may have been motivated by threat of termination of federal funds. *Taylor v. Cohen*, C.A.S.C. 1968, 405 F.2d 277.

Provision of this section did not give nonprofit corporation organized to protect property interests in area designated for urban renewal or its members standing to sue to enjoin urban renewal project in predominately Negro neighborhood. *Green St. Ass'n v. Daley*, C.A. Ill.

1967, 373 F.2d 1, certiorari denied 87 S.Ct. 2054, 387 U.S. 932, 18 L.Ed.2d 995.

Not-for-profit, tax-exempt organization, which produced theatrical and artistic productions which were characterized as particularly reaching and involving the black and Hispanic communities, did not have standing to seek compensatory and punitive damages under this section or sections 1981, 1983 or 1985 of this title, or the Due Process or Equal Protection clauses of U.S.C.A.Const. Amendments 5 and 14, or to enjoin termination of funding under the Comprehensive Training and Employment Act of 1973, section 801 et seq. of Title 29, on basis of racial discrimination, in that corporation had no racial identity and could not have been target of racial discrimination. *Hudson Valley Freedom Theatre, Inc. v. Heimbach*, D.C.N.Y.1981, 513 F.Supp. 250.

Association, comprised only of tenants who had suffered injuries complained of, could complain of damage or injury as victim of discrimination, violations alleged in complaint being continuing ones, and association having been in existence when actions complained of occurred. *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, D.C.Ill.1980, 496 F.Supp. 522.

Where, even if minority admissions program of law school was dismantled and all of the seats reserved for minorities were made available for all applicants, plaintiff's academic standing would not have qualified him for admission as the additional seats available would have been offered to and filled by others with higher academic records, plaintiff did not have standing to challenge the legality of the minority admissions program. *Doherty v. Rutgers School of Law-Newark*, D.C.N.J.1980, 487 F.Supp. 1291.

Plaintiffs who were local school board officials, school boards, supervisors, teachers and parents and who had suffered some threatened or actual injury resulting from putatively illegal action of city board of education and office of civil rights in entering into agreement obligating city board to alter certain teacher and supervisor employment and assignment practices and to remedy discriminatory effect of those practices on phased basis, and whose grievance was not shared in substantially equal measure by all or large class of citizens but who would personally benefit in tangible way from court's intervention had standing to contest validity of agreement, in view also of policy considerations in that it had been determined judicially that they had no right to be heard in process

which led to promulgation of agreement. *Caulfield v. Board of Ed. of City of New York*, D.C.N.Y.1979, 486 F.Supp. 862, affirmed 632 F.2d 999.

As to their claims under this subchapter, plaintiffs had no standing, since neither the United States nor any recipient of medicare or medicaid assistance was complaining, but only persons who, as former employees of defendant hospital, asserted that they were subjected to racially discriminatory employment practices resulting in their termination. *Flora v. Moore*, D.C.Miss.1978, 461 F.Supp. 1104.

Plaintiff, who challenged private hospital's proposed relocation of the bulk of its urban services to a suburban location, and who challenged administrative regulations promulgated in implementation of statutes intended to eliminate the financial participation of the federal government in illegal discrimination, did not have a conventional "property" or "liberty" interest within the meaning of the due process clause; on the other hand, it is clear that there are interests besides the traditional ones that deserve protection from deprivation of arbitrary government action. *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, D.C.Del.1978, 453 F.Supp. 330.

The rights of minority, elderly, and handicapped persons residing primarily in the city of Wilmington, Delaware, to have medical care available for the urban community arguably fell within the zone of interests protected by this subchapter and by the Rehabilitation Act, section 701 et seq., of Title 29, so that, if they were entitled either to be free of discrimination under the federally assisted activities conducted by the hospital or were entitled simply to have equal access to services and benefits provided by the hospital, their allegations that change in location of the major medical center in the city would impact disproportionately upon them set forth sufficient claims of injury or harm in fact to satisfy the concept of standing. *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, D.C.Del.1978, 453 F.Supp. 280.

Teachers, supervisors and administrators had standing to challenge memorandum of understanding which was entered into by city board of education and Office of Civil Rights pursuant to this subchapter and which required assignment of teachers on basis of race. *Caulfield v. Board of Ed. of City of New York*, D.C.N.Y.1978, 449 F.Supp. 1203, reversed in part on other grounds 583 F.2d 605.

Plaintiffs claiming that child-care institutions operated by religious organizations and to which State Department of Pensions and Security referred neglected children had long-standing policies of racial exclusion alleged sufficient injury in fact to have standing to challenge the institutions' practices even though only one of the named plaintiffs had been referred to and considered for admission by any of the institutions. *Player v. State of Ala. Dept. of Pensions and Sec.*, D.C.Ala.1975, 400 F.Supp. 249, affirmed 536 F.2d 1385.

Where plaintiff in employment discrimination case was not among class of persons intended to be benefited by Economic Opportunity Act of 1964, former section 2701 et seq. of this title, and was not otherwise a third-party beneficiary of city's contract with community action organization, she had no standing to seek enforcement of city's contract with such organization. *Gilliam v. City of Omaha*, D.C.Neb.1975, 388 F.Supp. 842.

National nonprofit organization which seeks enforcement of laws relating to equal employment opportunity for women had only ideological interest in outcome of class action by woman who was denied employment with city police department seeking order requiring federal agency to determine whether police department was complying with federal equal employment requirements and to order federal agency to suspend its financial support of police department if department was not so complying and lacked personal stake necessary to establish standing to maintain action. *Hardy v. Leonard*, D.C.Cal.1974, 377 F.Supp. 831.

This subchapter evinces a congressional intention to define standing to sue as broadly as is permitted by the Constitution. *Evans v. Lynn*, D.C.N.Y.1974, 376 F.Supp. 327, reversed on other grounds 537 F.2d 571, certiorari denied 97 S.Ct. 797, 429 U.S. 1066, 50 L.Ed.2d 784.

Residents organization and other persons, in their individual capacities and as representatives of all Mexican-American and Negro residents of city who were eligible for admission to public housing project administered by housing authority of city, had standing to bring action to halt further planning or construction of a public housing project that would allegedly perpetuate racially segregated system of public housing. *Blackshear Residents Organization v. Housing Authority of City of Austin*, D.C.Tex.1972, 347 F.Supp. 1138.

Negro school children in Mississippi and parents of such children on behalf of themselves and all persons similarly situated had standing, without showing capacity as taxpayers, to attack constitutionality of statutory provisions allegedly providing unconstitutional system and benefits and matching grants which fostered and supported segregated private school system as alternative available to white students seeking to avoid desegregated public schools. *Green v. Kennedy*, D.C.D.C.1970, 309 F.Supp. 1127, appeal dismissed 90 S.Ct. 2189, 398 U.S. 956, 26 L.Ed.2d 539, appeal dismissed 91 S.Ct. 460, 400 U.S. 986, 27 L.Ed.2d 435.

Negro who owned his own home and earned too much money to be eligible for low rent public housing lacked standing to maintain class actions for declaratory and injunctive relief against location of public housing projects in racially segregated neighborhoods; however, Negro who was eligible for low rent public housing had standing to maintain actions, and this was so even though he had been offered a vacancy in low rent housing unit located in all-white area and had refused it. *Hicks v. Weaver*, D.C.La.1969, 302 F.Supp. 619.

United States has standing to seek judicial enforcement of terms and conditions of grants of federal property. *U. S. by Clark v. Frazer*, D.C.Ala.1968, 297 F.Supp. 319. See, also, *U. S. v. Tatum Independent School Dist.*, D.C.Tex.1969, 306 F.Supp. 235.

United States had standing to seek enforcement of terms and conditions of grants of federal funds in amount of \$150,000,000 to the State of Alabama so as to eliminate racial discrimination in the employment of persons administering the grants. *U. S. by Clark v. Frazer*, D.C.Ala.1968, 297 F.Supp. 319.

Although plaintiffs, who were patients at several mental institutions, did not have standing as potential employees to challenge employment practices of Alabama Mental Health Board, they did nevertheless, have standing to bring the action because of the secondary effect on plaintiffs as patients of the discrimination against staff personnel. *Marable v. Alabama Mental Health Bd.*, D.C.Ala.1969, 297 F.Supp. 291.

18. Parties

In action challenging school board's plan for racial integration of high school, plaintiffs' motion to add as party defendants nine bordering school districts and their school board members would be denied, in view of fact that motion was

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made after the close of all evidence, and addition of such defendants would require trying again by issues that had been tried with great care, would inevitably delay the case further, and could not have a sufficiently lively prospect of success in reaching a metropolitan remedy with finality to justify surrender of the alternative of turning to the school board for a local remedy. *Parent Ass'n. of Andrew Jackson School v. Ambach*, D.C.N.Y. 1978, 451 F.Supp. 1056, affirmed in part, reversed in part on other grounds 598 F.2d 705.

Secretary of Health, Education and Welfare was essential party and was properly joined as party defendant to action by parents, as next friends of their minor children, to enjoin school district from operating under terms of desegregation agreement between the Board of Education and Department of Health, Education and Welfare. *Linker v. Unified School Dist. No. 259, Wichita, Kan.*, D.C.Kan.1972, 344 F.Supp. 1187.

19. Intervention

Two policemen's organizations who claimed to have "joint exclusive" right to represent city patrolmen in bargaining with city on matters concerning wages, conditions of employment, "and otherwise" did not qualify for intervention as matter of right in civil rights class action brought by black patrolmen to establish that discriminatory elements were present in practices followed by city police department in promoting to command positions. *Afro Am. Patrolmen's League v. Duck*, C.A.Ohio 1974, 503 F.2d 294.

Where three former teachers of consolidated school district sought relief against alleged unconstitutional discriminatory practices by district which was operating pursuant to injunction theretofore issued by court in active school desegregation case, wherein court had reserved right to enter such further orders as might appear proper, former teachers should not be heard in separate proceedings but should be required to intervene in the existing desegregation action. *Givhan v. Board of Ed. of Western Line Consolidated School Dist.*, D.C.Miss.1973, 363 F.Supp. 714.

20. Class actions

Trial court properly ruled that action under this section to establish that dis-

crimatory elements were present in practices followed by city police department in promoting to command positions could be brought as class action on behalf of all present and future minority members of city police department who had thus been discriminated against. *Afro Am. Patrolmen's League v. Duck*, C.A.Ohio 1974, 503 F.2d 294.

Spanish surnamed students were proper parties to maintain class action against school district for alleged constitutional and statutory violations based on alleged discrimination against Spanish surnamed students in operation of school system. *Serna v. Portales Municipal Schools*, C.A.N.M.1974, 499 F.2d 1147.

Action by Negro physician for injunction against racially discriminatory policies and practices of publicly supported hospital was properly brought on behalf of not only two individual Negroes who had been denied staff privileges but as class action on behalf of all the 18 Negro physicians practicing medicine in area and those Negroes who would desire to practice medicine in area if racial bars were removed. *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, C.A.Va.1967, 375 F.2d 648.

Where school board received and accepted federal school funds after the passage of this subchapter and gave assurances to the United States that children of personnel stationed at local Air Force base would be admitted to schools on same terms as resident children, Negro children of base personnel were entitled to bring class action representing all Negroes residing in local parish either under provision of this section expressly prohibiting racial discrimination in any program receiving federal financial assistance or under contractual assurances by which school board was estopped to deny them same rights to attend desegregated schools as were possessed by children of Negro residents of the parish. *Boastier Parish School Bd. v. Lemon*, C.A.La.1967, 370 F.2d 847, certiorari denied 87 S.Ct. 2116, 388 U.S. 911, 18 L.Ed.2d 1350.

Even if plaintiff black children challenging method by which they were placed in classes for the educable mentally retarded were in fact mentally retarded, they were adequate representatives of the class of black children who had been or would in the future be wrongfully placed and maintained in special classes for the educable mentally retarded where

named plaintiffs were assigned to class greatly overrepresented by black children and were assigned based on racially and culturally biased criteria. *Larry P. v. Riles*, D.C.Cal.1979, 495 F.Supp. 926.

Action wherein plaintiffs, who were students attending public schools currently receiving federal financial assistance, sought declaratory and injunctive relief against defendants for allegedly ignoring their affirmative statutory duty to enforce equal rights in area of public school education was, given presence of statutory prerequisites, subject to being maintained as a class action on behalf of plaintiffs and others similarly situated. *Brown v. Weinberger*, D.C.D.C.1976, 417 F.Supp. 1215.

Class claims of alleged discrimination by child-care institutions to which referrals were made in child neglect proceedings could properly be determined whether or not the named plaintiffs prevail on their individual claims, given that action was maintainable as a class action and that the named plaintiffs were proper class representatives. *Player v. State of Ala. Dept. of Pensions and Sec.*, D.C.Ala. 1975, 400 F.Supp. 249, affirmed 536 F.2d 1385.

Action, which was brought on behalf of some 4,000 nonminority certificated administrative employees and teachers employed by defendant school district challenging minority group employment and promotion practices as violating equal protection, was maintainable as class action. *Anderson v. San Francisco Unified School Dist.*, D.C.Cal.1973, 357 F.Supp. 248.

Minors of Spanish surnamed heritage, claiming that they had been discriminated against by school district which failed to provide adequate learning opportunities for their educational and social needs, met qualifications of rule 23, Federal Rules of Civil Procedure, Title 28, and could represent class of Spanish surnamed children attending the schools of district. *Serna v. Portales Municipal Schools*, D.C.N.M.1972, 351 F.Supp. 1279, affirmed 499 F.2d 1147.

Where views of residents of school district varied from total acceptance of desegregation plan to total rejection, plaintiffs' claims were not typical of those of all the taxpayers and parents who resid-

ed in the district and action to enjoin school district from implementing the desegregation plan could not be properly maintained as class action. *Linker v. Unified School Dist. No. 259, Wichita, Kan.*, D.C.Kan.1972, 344 F.Supp. 1187.

Mexican-American or Spanish surnamed Americans, are a separate and distinct national origin group under terms of this subchapter and within the meaning of U.S.C.A.Const. Amend. 14, § 1, as well as within rule 23, Federal Rules of Civil Procedure, Title 28, relating to class actions. *U. S. v. State of Tex.*, D.C.Tex. 1971, 342 F.Supp. 24, affirmed 466 F.2d 518.

It was not necessary for plaintiffs to be confined in every facility administered by Alabama Mental Health Board in order for them to bring a class action for an injunction against racial discrimination in operation of mental health facilities. *Marable v. Alabama Mental Health Bd.*, D.C.Ala.1969, 297 F.Supp. 291.

In class action brought by three black residents and citizens of county for injunctive relief to restrain defendants from operating county hospital in a racially discriminatory manner, plaintiffs had standing to prosecute action on their own behalf and on behalf of all other black residents and citizens of the area served by the hospital and had standing to attack employment policies and practices of the hospital. *Coleman v. Humphreys County Memorial Hospital D.C. Miss.* 1972, 55 F.R.D. 507.

21. Complaint

School desegregation complaint did not state cause of action under this section prohibiting discrimination in federally assisted programs, despite allegation of segregation, in absence of recitation of how specific prior actions caused specified discriminatory effects. *Coates v. Illinois State Bd. of Ed.*, C.A.Ill.1977, 559 F.2d 445.

Complaint for declaratory judgment alleging that Department of Health, Education and Welfare policy of denying financial assistance to state hospitals if they continue to classify blood according to race of donor violated plaintiffs' rights under U.S.C.A.Const. Amend. 1 because her religious convictions did not permit her to accept a transfusion of

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blood from person of another race did not involve a controversy and did not provide proper foundation for constitutional adjudication. *Galliot v. U. S. Dept. of Health, Ed. and Welfare, C.A. La. 1972, 484 F.2d 598, certiorari denied 93 S.Ct. 559, 409 U.S. 1060, 34 L.Ed.2d 512.*

Parents' complaint filed on behalf of themselves and their children and all other children and parents in independent school district stated cause of action against district on basis that there was racial and ethnic discrimination in school system in violation of U.S.C.A.Const. Amend. 14 and this subchapter. *Alvarado v. El Paso Independent School Dist., C.A.Tex.1971, 445 F.2d 1011, on remand 426 F.Supp. 575.*

In civil suit under this subchapter which prohibits discrimination in federally funded programs, no allegation that defendant acted under "color of law" is necessary. *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments, D.C.Ill.1980, 496 F.Supp. 522.*

Where plaintiffs nowhere alleged that any of challenged practices or policies were either racially discriminatory on their face or were employed by state defendants as "pretext" for racial discrimination, and no allegations suggested that state defendants adopted employment policy or practice at least in part because of its adverse effect on minorities, plaintiffs failed to state claims based on U.S.C.A.Const. Amendments. 13 and 14, sections 1981 and 1983 of this title, or this subchapter in their class action seeking declaratory and injunctive relief from employment practices of city public works department. *Harris v. White, D.C.Mass. 1979, 479 F.Supp. 996.*

In absence of any allegation that 50 private corporations who were named defendants in civil rights action had received federal financial assistance in connection with their employment activities, complaint alleging employment discrimination on the basis of race did not state a claim for relief under this subchapter. *Foreman v. General Motors Corp., D.C.Mich.1979, 473 F.Supp. 166.*

Complaint failed to allege cause of action under this subchapter, in view of plaintiff's failure to allege that defendant public school system was a "program or activity receiving federal financing assistance" or that the primary objective of

federal financial assistance was to provide employment, and in view of plaintiff's failure to allege administrative exhaustion. *Clark v. Louisiana County School Bd., D.C.Va.1979, 472 F.Supp. 321.*

Nature and scope of an office for civil rights investigation of a recipient of federal financial assistance to determine whether recipient is in compliance with this subchapter may be determined by a complaint filed with the office, but the office is not limited to an investigation of the allegations in the complaint. *U. S. v. El Camino Community College Dist., D.C.Cal.1978, 454 F.Supp. 825, affirmed 600 F.2d 1258, certiorari denied 100 S.Ct. 661, 444 U.S. 1013, 62 L.Ed.2d 642.*

Allegation that poor children were being denied benefits because there were too few economically disadvantaged students at school did not allege violation of this subchapter. *Martin Luther King Jr. Elementary School Children v. Michigan Bd. of Ed., D.C.Mich.1978, 451 F.Supp. 1324.*

In action challenging school board's plan for racial integration of high school, plaintiffs' motion to amend their complaint to include provisions of this subchapter, which motion was principally related to burden of proof rather than to substantive principle, would be granted. *Parent Ass'n of Andrew Jackson School v. Ambach, D.C.N.Y.1978, 451 F.Supp. 1056, affirmed in part, reversed in part on other grounds 588 F.2d 705.*

Complaint which alleged that various private and public foster care agencies systematically treated nonwhite children in their care and custody differently than white children in that they evaluated nonwhite children as unadoptable more often than they did white children, applied more arbitrary and irrelevant screening standards and procedures to nonwhite potential adoptive parents, and refused to refer nonwhite children to white adoptive parents even where appropriate stated claim for relief under the equal protection clause of U.S.C.A.Const. Amend. 14. *Child v. Beame, D.C.N.Y.1978, 412 F.Supp. 563.*

Complaint filed by class plaintiff against officials of State of New York and State Department of Labor, alleging that Hispanic, non-English speaking minorities receive fewer benefits than English-speaking majority from unemployment

ment benefits program, stated claim of discrimination upon which relief could be granted under Department of Labor regulations promulgated to effectuate provisions of this subchapter. *Pabon v. Levine, D.C.N.Y.1976, 70 F.R.D. 674.*

22. Answer

If public schools in state, whose Constitution provided for distribution of state funds to local boards in manner which was in no way dependent on maintenance of segregated school system, were being operated on a segregated basis, contrary to existing federal law, the local school boards must answer charge. *LeBeauf v. State Bd. of Ed. of La., D.C.La. 1965, 244 F.Supp. 256.*

23. Defenses—Generally

That corporation operating certain recreational facilities accepted financial assistance from federal government under mistaken belief that by so doing it would not be within purview of this section was no defense to action by Negroes who claimed that corporation engaged in discriminatory membership practices. *Hawthorne v. Kenbridge Recreation Ass'n, Inc., D.C.Va.1972, 341 F.Supp. 1382.*

24. — Laches

Delay of less than four months in black patrolmen's bringing of class action under this section to establish that city police department's practices in promoting to command position were discriminatory did not justify dismissal of suit on basis of doctrine of laches. *Afro Am. Patrolmen's League v. Duck, C.A. Ohio 1974, 503 F.2d 294.*

Negro who brought class actions for declaratory and injunctive relief against location of public housing projects in racially segregated neighborhoods was not guilty of laches, where Negro community did not surmise until after July 7, 1965 that sites might be located in Negro neighborhoods, formal complaint was lodged with public housing administration in November 1965 and was renewed in July 1966 and officials assured community that complaint was under consideration, newspaper article of April 23, 1966 announced official approval of sites, suits were filed on May 15, 1968, and financial prejudice to local housing authority and contractor would be de minimis. *Hicks v. Weaver, D.C.La.1969, 302 F.Supp. 619.*

25. — Sovereign Immunity

Neither United States nor Department of Health and Human Services is amenable to suit if judgment sought would expend itself on public treasury or domain, unless sovereign immunity has been waived by statute, and there has been no statutory waiver of sovereign immunity in statutes under which no person is to be excluded, on ground of race, color or national origin, from participation in, denied benefits of, or subjected to discrimination under, any program or activity receiving federal financial assistance. *Drayden v. Needville Independent School Dist., C.A.Tex.1981, 642 F.2d 129.*

In civil rights action against state agricultural extension service and against United States Department of Agriculture, asserting discrimination in service's employment practices and provision of services, Department of Agriculture defendants should not have been absolved from any liability merely by virtue of Attorney General's intervention in case on side of plaintiffs. *Wade v. Mississippi Co-op. Extension Service, C.A.Miss.1976, 528 F.2d 508, on remand 424 F.Supp. 1242.*

Even though suit challenging legality of suspension of federal funding applicable to certain highway construction projects, on ground that "freeze order" was issued without complying with this subchapter, purported to assert claim against federal officials, and not directly against United States, it involved suit against sovereign, where relief sought contemplated that funds allegedly diverted as result of "freeze order" be restored and made available for construction of highway projects previously approved by Secretary of Transportation. *Schlatky v. Volpe, C.A.Ill.1974, 495 F.2d 273.*

Where plaintiff in employment discrimination case was seeking only monetary damages, federal district court had no jurisdiction over defendant city; as instrumentality of state, city was cloaked in sovereign immunity. *Gilliam v. City of Omaha, D.C.Neb.1975, 388 F.Supp. 842.*

Doctrine of sovereign immunity had no application where complaint merely requested that Secretary of Health, Education, and Welfare and Commissioner of Education be ordered to cease allegedly unlawful interference with flow of federal funds to which plaintiff school district was already otherwise legally entitled. *Dermott Special School Dist. of Chicot County v. Gardner, D.C.Ark.1968, 278 F.Supp. 687.*

Where black police patrolmen did not rely solely on fact that promotion examination was allegedly non-job related in

26. Dismissal

Where black police patrolmen did not rely solely on fact that promotion examination was allegedly non-job related in

contending that police department's promotion practices were discriminatory, but also specifically attacked five-year service requirement and rule providing additional credit for mere seniority, district court's finding that most recent examination was job-related did not require dismissal of complaint. *Afro Am. Patrolmen's League v. Duck*, C.A.Ohio 1974, 503 F.2d 294.

Whether alleged unlawful action by federal officials in issuing freeze order without complying with conditions set forth in this subchapter resulted in loss of highway construction funds and whether construction projects involved had actually been resumed without any attendant loss of funds were factual issues required to be disposed of in determining whether plaintiffs' claims were mooted by cancellation of "freeze order," and defendants' claim that issues presented had been mooted could not be sustained on motion to dismiss. *Schlaefly v. Volpe*, C.A.Ill.1974, 495 F.2d 273.

Complaint alleging that university received federal financial assistance and that university and/or its agents had violated rights secured by this subchapter could not be dismissed on ground that neither university department charged with discrimination, particular program charged with discrimination, or plaintiff himself received federal financial assistance directly. *Yakin v. University of Illinois, Chicago Circle Campus*, D.C.Ill. 1981, 508 F.Supp. 848.

Fact that federal agency which gave financial assistance to city police department was engaged in efforts to secure department's voluntary compliance with this subchapter, although a possible defense to claim by woman that federal agency failed to investigate her complaint charging police department with discriminatory employment practices, does not justify dismissal of woman's action for an order requiring agency to determine whether department was complying with equal opportunities requirements and to suspend its financial support of department if it was not so complying for failure to exhaust administrative remedies, in light of fact that agency's negotiations to produce voluntary compliance could not go on indefinitely. *Hardy v. Leonard*, D.C.Cal.1974, 377 F.Supp. 831.

27. Summary Judgment

Fact that it was admittedly difficult for the district court and the counsel for both sides to keep pace with the changes that might occur in each individual school district of the 58 cited by the

plaintiffs as an issue in suit to enforce equal rights in the area of public school education was not of itself sufficient to preclude issuance of partial summary judgment in favor of plaintiffs. *Brown v. Weinberger*, D.C.D.C.1976, 417 F.Supp. 1215.

In action under this subchapter, based on alleged discriminatory policies and practices within fire departments of four municipalities, issues of fact precluding summary judgment existed as to authority and responsibilities of individual defendants, whether defendants received federal financial assistance, and the discriminatory effect of examinations given. *Vulcan Society of Westchester County v. City of White Plains*, D.C.N.Y.1979, 82 F.R.D. 379.

28. Hearing

Hearing was required to determine extent and nature of participation by United States Department of Agriculture and administrator of federal extension service, which upon intervention of United States Attorney General in action to end racial segregation and employment discrimination in operation of state agricultural extension service had been realigned as parties plaintiff but which were in position to have brought about early cessation of discriminatory practices and had positive duty to do so, in countenancing or approving discriminatory employment practices in order to determine whether they were properly realigned or should remain subject to proportionate measure of liability on back pay and attorney fee awards. *Wade v. Mississippi Co-op. Extension Service*, D.C.Miss.1976, 424 F.Supp. 1242.

29. Inferences

In order to find that board of education was guilty of racial discrimination in its programs for the education of emotionally handicapped children, district judge was required to make findings from objective evidence of presence of discriminatory purpose; inferences from evidence of discriminatory impact did not substitute sufficiently for finding of actual motivation. *Lora v. Board of Ed. of City of New York*, C.A.N.Y.1980, 623 F.2d 248.

30. Burden of proof

Assuming that disproportionate impact was a sufficient showing to prove that decision to close a hospital was a violation of this subchapter, showing that the population served by the hospital was 96% minority whereas only 66% of the

patients served by the entire hospital system were a minority was a sufficient showing of a disproportionate racial impact to require justification by city. *Bryan v. Koch*, C.A.N.Y.1980, 627 F.2d 612.

In employment discrimination action, once plaintiffs established prima facie case, either on basis of statistical data by itself or by use of statistical data and analyses supported by other evidence, burden fell on defendants to rebut plaintiffs' case and defendants could not meet this burden by stating in general terms that no one was denied promotion or comparable salary solely because of his or her race. *Wade v. Mississippi Co-op. Extension Service*, C.A.Miss.1976, 528 F.2d 598, on remand 424 F.Supp. 1242.

Nontenured school principal alleging that refusal of board of education to rehire him was grounded on his unpopular enforcement of court-ordered desegregation had burden of showing that conduct of school authorities was unconstitutional. *Callahan v. Price*, C.A.Miss.1974, 505 F.2d 83, rehearing denied 513 F.2d 51, certiorari denied 96 S.Ct. 273, 423 U.S. 927, 46 L.Ed.2d 254.

School officials had the burden of showing validation of I.Q. tests with respect to characteristics consistent with educable mentally retarded status and placement in classes for such persons before they could use those tests for such placement, especially where it was shown that use of the tests resulted in an overwhelmingly disproportionate number of black children being placed in classes for the educable mentally retarded. *Larry P. v. Riles*, D.C.Cal.1979, 495 F.Supp. 926.

To subject federal agencies responsible for monitoring federal expenditures to the same procedural standards applicable to private litigants would undermine utility of this subchapter as a ban on discrimination in administration of federally funded programs; however, monitoring agency should be allowed to impose burden of justification on a recipient where there is evidence of a disparate impact probative of discriminatory motive and although such would not justify a finding of discrimination under equal protection test it would enable the agency to examine justifications advanced to ascertain whether evidence for such a finding has been developed. *Bryan v. Koch*, D.C.N.Y.1980, 492 F.Supp. 212.

Under impact test for determining whether a prima facie case of a violation of this subchapter 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 nondiscriminatory justification for the challenged actions. *National Ass'n for the Advancement of Colored People v. Wilmington Medical Center, Inc.*, D.C.Del.1980, 491 F.Supp. 290.

In order for student to prevail, in his suit alleging racial discrimination on part of university in awarding financial aid to students of federally funded law center, he was not required to show that, but for university's discriminatory policy, he would have received greater financial aid. *Flanagan v. President and Directors of Georgetown College*, D.C.D.C.1976, 417 F.Supp. 377.

31. Admissibility of evidence

In action under this section brought against city and others by black female who had been employed as a Neighborhood Youth Corporation counselor and who alleged that defendants racially and sexually discriminated against her, plaintiff was not prejudiced by the trial court's failure to admit the prior testimony of a coworker of plaintiff as substantive evidence, since the record indicated that the prior testimony of the coworker in a proceeding before the Nebraska Equal Opportunity Commission, relative to the question of whether blacks were subjected to more abusive treatment from the program director than other employees, consisted of conclusory allegations supported by little or no foundation or clarification. *Gilliam v. City of Omaha*, C.A.Neb.1975, 524 F.2d 1013.

Where, in civil rights action attacking alleged discriminatory promotion practices of city police department, trial court based its findings of discrimination on effect of total promotional system, not on results of promotion examinations, trial court did not err in refusing to admit evidence to show that poor performance of minority candidates on promotion examinations resulted from factors other than discriminatory promotion practices. *Afro Am. Patrolmen's League v. Duck*, C.A.Ohio 1974, 503 F.2d 294.

32. Weight and sufficiency of evidence

Statistical evidence that only three black patrolmen had ever advanced to command positions in Toledo police department was sufficient to warrant district court's conclusion that entire seniority and promotion system had effect of keeping alive results of past discrimination in hiring. *Afro Am. Patrolmen's*

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League v. Duck, C.A.Ohio 1974, 503 F.2d 294.

In the absence of showing that use of I.Q. tests for placing children in classes for the educable mentally retarded had been validated for black children or that the disproportionate enrollment of black children in such classes actually reflected a greater incidence of mild retardation in the black population, evidence of overwhelmingly disproportionate placement of black children in such classes showed a violation of this subchapter. Larry P. v. Riles, D.C.Cal.1979, 495 F.Supp. 926.

Evidence touching on the size or ethnic composition of the total pool of job applicants is required to show employment discrimination on the basis of statistics. Otero v. Mesa County Valley School Dist. No. 51, D.C.Colo.1979, 470 F.Supp. 326, affirmed 628 F.2d 1271.

Evidence that complainant was Caucasian student of university's federally funded legal center, that university had discriminatory financial aid policy granting priority in grants of financial aid to students having "minority" racial and ethnic classification, and that complainant received less financial aid than students who were members of "minority" ethnic backgrounds even though he made showing of greater financial need, was sufficient to show university's liability for violation of this section, but was insufficient to show damages to which student was entitled, and thus subsequent hearing on damages would be held. Flanagan v. President and Directors of Georgetown College, D.C.D.C.1976, 417 F.Supp. 377.

Evidence in class action on behalf of black children challenging the alleged failure of State Department of Pensions and Security to provide child-placement services to neglected black children equal to that provided white children was inadequate to support claim that the correlation between black neglect proceedings and black population demonstrated a lower quality of service to blacks in that the need for intervention is greater among blacks than among whites. Player v. State of Ala. Dept. of Pensions and Sec., D.C.Ala.1975, 400 F.Supp. 249, affirmed 536 F.2d 1385.

Evidence in suit under this subchapter by tenants of federally funded apartment project seeking damages and injunctive relief established that the Department of Housing and Urban Development, as mortgagee, and the owners, who as racial composition of project changed increased their spending on maintenance and re-

pairs at a rate faster than the increase in cost of living, had not failed, for racially discriminatory reasons, to maintain the apartments and property. Jones v. U.S. Dept. of Housing and Urban Development (HUD), D.C.La.1975, 390 F.Supp. 579.

33. Moot questions

Where Department of Health, Education and Welfare [now Dept. of Health and Human Services] had decided that school district was not in compliance with this section, and Department had also reached voluntary settlement with school district, any declaratory or injunctive relief granted by district court regarding cessation of discriminatory practices against plaintiffs would be moot, as well as redundant and superfluous. Drayden v. Needville Independent School Dist., C.A.Tex.1981, 642 F.2d 129.

Where both declaratory and injunctive relief against construction of specific projects was originally sought in suit challenging alleged racial discrimination, but decree utilizing certain programs of the defendant Department of Housing and Urban Development still remained possible form of relief not already available through companion case, controversy was not moot. Gautreaux v. Romney, C.A.Ill.1971, 448 F.2d 731.

Where existing threat of eviction to tenants who sued housing authority had been lifted but issue had been raised by post-argument action of housing authority in rescinding old rule and adopting new one relative to ground for eligibility for admission or continued occupancy in any authority project and there remained allegations in complaint entitled to be heard, case was not moot. Lewis v. Housing Authority of City of Talladega, Ala., C.A.Ala.1968, 397 F.2d 178.

Fact that student had graduated prior to determination of his civil rights suit under this section alleging racially discriminatory allocation of scholarship/financial aid funds did not render suit moot where student sought money damages in addition to injunctive relief. Flanagan v. President and Directors of Georgetown College, D.C.D.C.1976, 417 F.Supp. 377.

Class action by woman who was denied employment with city police department for order requiring federal agency which gave department financial assistance to perform its statutory obligations by determining whether department was complying with federal equal employment requirements and by terminating its fi-

financial assistance to department if it were not so complying was moot, where federal agency had engaged in compliance discussions with department, recommended changes in department's employment policies and enforced department's compliance with recommendations and thus performed duties requested and department was complying with agency's guidelines. Hardy v. Leonard, D.C.Cal. 1974, 377 F.Supp. 831.

34. Findings

District court's ruling that city was liable under this subchapter for discriminatory employment practices in its fire department was not supported by findings that the city had received federal funds which were expended in the fire department; failure to find that such federal funds were aimed primarily at providing employment precluded such liability. Association Against Discrimination in Employment, Inc. v. City of Bridgeport, C.A.Conn.1981, 647 F.2d 258.

In suit to enjoin city police department from continuing operation of affirmative action program, district court's finding that statistical evidence presented by the department to establish that it had engaged in prior discrimination against blacks was "susceptible to a multitude of conclusions" was clearly erroneous where the court also found that there was a "significant" disparity between white and black police employment and that pre-1973 entry level examinations "may have constituted a source of discrimination against blacks" and where a number of black officers testified to the existence of a pattern of specific discriminatory practices which they had experienced and observed and the record contained no explanation for underrepresentation of black officers and sergeants apart from systematic exclusion. Detroit Police Officers' Ass'n v. Young, C.A.Mich.1979, 608 F.2d 671.

In employment discrimination action against state agricultural extension service, district court's finding that service had engaged in pattern of discriminatory employment practices was not clearly erroneous. Wade v. Mississippi Co-op. Extension Service, C.A.Miss.1976, 528 F.2d 508, on remand 424 F.Supp. 1242.

District court's findings that school district's school construction decisions were not motivated by segregative intent, and failure to find improper the school board's decision to retain the concept of neighborhood school system in meeting needs of growing population, were not clearly erroneous. Higgins v. Board of

Ed. of City of Grand Rapids, C.A.Mich. 1974, 508 F.2d 779.

District court was correct in concluding that five-year service prerequisite to promotion and rule providing additional credit for mere seniority tended to perpetuate racial imbalance in city police department existing among officers above rank of patrolmen. Afro Am. Patrolmen's League v. Duck, C.A.Ohio 1974, 503 F.2d 294.

Determination that education officials had not discriminated against migratory children of migratory workers in violation of equal protection clause, U.S.C.A. Const. Amend. 14, § 1 precluded finding that the officials had impermissibly discriminated against the children under this section providing that no person shall, on ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. Valadez v. Graham, D.C.Fla.1979, 474 F.Supp. 149.

35. Remedies—Generally

This subchapter does not preclude a public entity which receives federal funds from establishing any race-conscious preference program to remedy past discrimination. Detroit Police Officers' Ass'n v. Young, C.A.Mich.1979, 608 F.2d 671.

Elementary school district was not required under this subchapter to provide non-English speaking students with a bilingual-bicultural education program staffed with bilingual instructors, where non-English speaking students were provided with remedial instruction in English. Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3, C.A.Ariz.1978, 587 F.2d 1022.

In class civil rights action brought on behalf of black police patrolmen, in which trial court concluded that police department's promotion practices were discriminatory, court did not abuse its discretion in requiring city to pay for and accept input of expert chosen by plaintiffs in constructing new promotion examinations or in enjoining all promotions pending completion of new eligibility lists, former lists being based in part on practices which had been held to violate plaintiffs' rights. Afro Am. Patrolmen's League v. Duck, C.A.Ohio 1974, 503 F.2d 294.

Determination of just what type of equitable remedy might be appropriate in case involving alleged discrimination in federal housing program was question

beat left initially to sound discretion of district court. *Gautreaux v. Romney*, C.A.III.1971, 448 F.2d 731.

Upon showing that disproportionate number of black children had been placed in classes for the educable mentally retarded, state school officials would be ordered to monitor and eliminate disproportionate placement of black children in such classes by obtaining annual reports from each school district concerning children enrolled in such classes, by filing appropriate reports with the court, and by bringing imbalances to the attention of the court. *Larry P. v. Riles*, D.C.Cal.1979, 493 F.Supp. 926.

Similar kinds of remedies should apply under this subchapter as apply under section 2000e et seq. of this title unless they would conflict with some purpose peculiar to this subchapter. *Guardians Ass'n of New York City Police Dept., Inc. v. Civil Service Commission of City of New York*, D.C.N.Y.1979, 466 F.Supp. 1273.

Congress intended, consistent with the provisions of this subchapter, that persons aggrieved by being discriminated against by a federally funded project because of a physical handicap were to have a judicial remedy in the form of judicial review of administrative action rather than an independent or original cause of action in the district courts. *N.A.A.A.C.P. v. Wilmington Medical Center, Inc.*, D.C.Del.1978, 453 F.Supp. 280.

Where, since 1973 order of court for communication with 85 school districts having one or more schools substantially disproportionate in racial composition, putting such districts on notice to rebut or explain, Department of Health, Education and Welfare had done so but 39 districts remained unresolved more than 25 months after order and Department of Health, Education and Welfare had not initiated enforcement proceedings against any of them, Secretary of Health, Education and Welfare and other defendants were required and enjoined within 60 days from date of supplemental order to commence enforcement proceedings. *Adams v. Weinberger*, D.C.D.C.1975, 391 F.Supp. 269.

Though provisions of this subchapter are couched in declaratory terms and provide no explicit method of enforcement, federal courts are not powerless to act. *Ranjel v. City of Lansing*, D.C.Mich.1969, 293 F.Supp. 301, reversed on other grounds 417 F.2d 321, certiorari denied 90 S.Ct. 1105, 397 U.S. 980, 25 L.Ed. 2d 390, rehearing denied 90 S.Ct. 1352, 397 U.S. 1059, 25 L.Ed.2d 680.

36. — Injunctions

Party suing under this subchapter need not await an administrative inquiry and is not entitled to an injunction to maintain the status quo pending completion of administrative investigation. *Bryan v. Koch*, C.A.N.Y.1980, 627 F.2d 612.

In action for declaratory and injunctive relief in connection with a portion of the Red Mountain expressway in Birmingham, Alabama, district court acted properly in dismissing causes of action predicated on alleged violations of section 200d of this title, section 1906 of Title 49 and section 1401 et seq. of this title, and would be directed to dismiss remaining causes of action without prejudice to plaintiffs to refile if state and federal defendants should not comply with applicable federal and state laws with respect to extension of expressway. *Alabama State Tenants Organization v. Bass*, C.A.Ala. 1977, 549 F.2d 961.

Where district court found that statistical evidence of racial imbalance in police department's command staffing and department's employment of five-year service requirement and rule providing additional credit for mere seniority evidenced racial discrimination in promotion practices, fact that court also found promotion examination to be job-related did not deprive it of power to enjoin further use of examination and seniority lists based upon it, since procedures or tests neutral on their face may operate to "freeze" status quo of prior discriminatory employment practices. *Afro Am. Patrolmen's League v. Duck*, C.A.Ohio 1974, 503 F.2d 294.

Closing of municipal hospital would not be enjoined until Department of Health and Human Services completed its investigation as to city's compliance with this subchapter where Department of Health, Education and Welfare had not initiated enforcement proceedings against any of them, Secretary of Health, Education and Welfare and other defendants were required and enjoined within 60 days from date of supplemental order to commence enforcement proceedings. *Adams v. Weinberger*, D.C.D.C.1975, 391 F.Supp. 269.

Parties alleging that closure of hospital services and consolidation of those services at another city hospital was violative of Federal Constitution, Rehabilitation Act, section 704 of Title 29, and this subchapter governing federal financial assistance to programs and activities were not entitled to a preliminary injunction compelling Secretary of Health, Education and Welfare to make an investigation.

tion, and Welfare to make an investigation which was condition precedent for termination of federal financial assistance, particularly in light of facts that plaintiffs had submitted their complaints to Secretary in past 30 days and that no abuse of discretion by the Secretary in carrying out her duties was shown. *Jackson v. Conway*, D.C.Mo.1979, 476 F.Supp. 896, affirmed 620 F.2d 680.

Where West's F.S.A. § 232.246 requiring passage of functional literacy examination as a condition to receiving high school diploma unconstitutionally discriminated against black students due to history of past discrimination in Florida public schools, state would be enjoined from requiring passage of examination as a requirement for graduation for period of four years but would be allowed to utilize examination as a requirement for graduation in the school term 1982-1983; in the interim, the examination could be administered and directed by state to assist in the identification and remediation of examination's skill objectives and scores could be retained in a fashion consistent with manner in which state retained other achievement test scores. *Debra P. v. Turlington*, D.C.Fla.1979, 474 F.Supp. 244.

Assertions that referendum on "spot" zoning ordinance which rezoned 20-acre site in white neighborhood from one-family residential district to community unit plan which would consist of low rent townhouse units and a low rent apartment building was motivated by racial factors did not justify order enjoining referendum. *Ranjel v. City of Lansing*, C.A.Mich.1969, 417 F.2d 321, certiorari denied 90 S.Ct. 1105, 397 U.S. 980, 25 L.Ed.2d 390, rehearing denied 90 S.Ct. 1352, 397 U.S. 1059, 25 L.Ed.2d 680.

Refusal to grant temporary injunction enjoining state officials from constructing interstate highway along proposed route on ground that selection of proposed route constituted alleged racial discrimination was not abuse of discretion, where record failed to show any intent or purpose of racial discrimination in selection of proposed route. *Nashville I-40 Steering Committee v. Ellington*, C.A.Tenn.1967, 387 F.2d 179.

Where Negro physician's application for admission to membership on staff of publicly supported hospital was denied and class action was brought for injunction against racially discriminatory policies and practices of hospital, fact that application had been approved did not, in view of continuing failure of hospital to take any action with respect to another

Negro applicant and absence of further action to remove segregation bars against Negro patients and to renounce racial policy to which hospital had long adhered, render injunctive relief unnecessary. *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, C.A.Va.1967, 375 F.2d 648.

Where urban renewal program would be powerless to enforce relocation of area residents on basis of racial integration, nonprofit corporation and its members would not be entitled to injunction enjoining local officials of urban renewal project from proceeding with project because relocation might result in continuation of racial segregation residential pattern in city. *Green St. Ass'n v. Daley*, C.A.III.1967, 373 F.2d 1, certiorari denied 87 S.Ct. 2054, 387 U.S. 932, 18 L.Ed.2d 995.

In view of need for immediate relief if colored children were to receive benefit of Office of Education's 1967 target date for total public school desegregation, motion of children's parents for injunctive relief pending appeal should be granted with directions that district court order school district to submit promptly a plan of desegregation extending to at least four grades for 1965-1966 school year. *Singleton v. Jackson Municipal Separate School Dist.*, C.A.Miss.1965, 348 F.2d 729.

State school officials would be enjoined from utilizing, permitting use of, or approving the use of any standardized intelligence tests for identification of black children to be placed in classes for the educable mentally retarded without prior approval by the court in view of evidence that use of such tests had resulted in overwhelming disproportionate number of black children being placed in such classes; court approval could be obtained only upon written request showing that it had been determined that the tests were not racially or culturally discriminatory, would be administered in a non-discriminatory manner, and had been validated. *Larry P. v. Riles*, D.C.Cal.1979, 493 F.Supp. 926.

In action in which plumbing contractors claimed that requirement that only joint ventures comprised of at least one minority and one majority contractor could bid on heating, ventilating and air-conditioning contract for hospital construction project violated their rights to be free of racial discrimination under this section and due process and equal protection clauses of U.S.C.A.Const. Amend. 14, plaintiffs failed to sustain their burden of demonstrating likelihood of success on merits, and preliminary in-

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junction against letting of contract with such joint venture requirement therefore would not issue. *Metropolitan Detroit Plumbing and Mechanical Contractors Ass'n v. Dept. of Health, Ed. and Welfare*, D.C.Mich.1978, 418 F.Supp. 585.

Fact that Department of Housing and Urban Development, in indicating its approval of demolition of federally subsidized low income housing projects and sale of land to private developer for development as mixed shopping and upper income residential development, had not fulfilled its responsibilities under this section and section 3601 et seq. of this title and the National Environmental Policies Act, section 4321 et seq. of this title, did not automatically require that closing of the project be enjoined; although the court had authority to enjoin the Department from approving further demolition and sale, it would not do so where neither the court nor the parties investigated the full scope of the legal proprieties of various actions that might be taken. *Jones v. U. S. Dept. of Housing and Urban Development (HUD)*, D.C.La.1974, 390 F.Supp. 579.

Although housing authority had pursued a policy of segregating public housing tenants by race and up until recently had been in flagrant violation of both its own published "freedom of choice" plan and guidelines of Department of Housing and Urban Development, in view of facts that the authority presently was assigning its tenants on a nondiscriminatory communitywide basis and that the authority had officially resolved to locate future projects on scattered sites outside area in which overwhelming majority of Negroes and Mexican-Americans resided housing authority would not be ordered to submit to court a comprehensive desegregation plan, but would be enjoined from departing in slightest from tenant assignment procedures it had published pursuant to Department of Housing and Urban Development regulations. *Black-shear Residents Organization v. Housing Authority of City of Austin*, D.C.Tex.1972, 347 F.Supp. 1138.

In class action by Negro students and parents to enjoin Secretary of Treasury from granting tax exempt status to private schools discriminating against Negroes in admissions, preliminary injunction to preserve status quo was called for where there was grave and substantial issue on merits, reasonable probability of success, and threat of irreparable injury, and such little if any permanent injury as might be done to others would be outweighed by considerations calling for

temporary injunction, and where public interest was served by temporary injunction. *Green v. Kennedy*, D.C.D.C.1970, 309 F.Supp. 1127, appeal dismissed 90 M.Ct. 2169, 398 U.S. 958, 28 L.Ed.2d 539, appeal dismissed 91 S.Ct. 400, 400 U.S. 986, 27 L.Ed.2d 435.

United States was entitled to injunctive relief against school district's continued violation of its obligation to convert to unitary system in which racial discrimination would be eliminated. *U. S. v. Tatum Independent School Dist.*, D.C.Tex. 1969, 306 F.Supp. 285.

Failure of city housing authority to present a substantial or even a speculative indication that racial criteria were not used in the face of statistics to the contrary entitled plaintiffs, Negro tenants in or applicants for public housing who charged that the housing authority intentionally chose sites and adopted tenant assignment procedures for purpose of maintaining existing patterns of residential separation of the races and who later, sought a permanent injunction against racially discriminatory aspects of the public housing system, to judgment as a matter of law. *Gautreaux v. Chicago Housing Authority*, D.C.Ill.1969, 296 F.Supp. 907.

Evidence in desegregation case failed to establish that school construction would in and of itself, perpetuate desegregation, thus warranting denial of injunction restraining school board from proceeding with construction. *Betts v. County School Bd. of Halifax County, Va.*, D.C.Va.1967, 269 F.Supp. 588.

Federal statutes providing for implementation of this section forbidding discrimination in any program receiving federal financial assistance in no way granted right to enjoin state from distributing funds to local school boards, a method of distribution which was in no way dependent upon maintenance of segregated system, although local boards might be operating segregated schools. *LeBeauf v. State Bd. of Ed. of La.*, D.C.La.1965, 244 F.Supp. 256.

In class action for injunctive relief to restrain defendants from operating county hospital in a racially discriminatory manner, where defendants contended that subsequent to filing of action they had remedied conditions of which plaintiffs complained but it was reasonable to assume that personnel of both subject boards would change from time to time and in view of the long and steadfast resistance of hospital and county authorities to the change in the policies and practices of the hospital, justice and eq-

uity required granting of injunction to plaintiffs. *Coleman v. Humphreys County Memorial Hospital*, D.C.Miss.1972, 35 F.R.D. 507.

Fact that area surrounding site for city housing authority's low cost housing project was the only middle income Negro community in county did not entitle Negro residents and property owners within such community, under this subchapter to an order enjoining construction of such project at such site. *El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority*, 1969, 457 P.2d 294, 10 Ariz.App. 132.

37. Stay pending appeal

Where district court order which directed state commissioner of education and state education agency to withhold funds and accreditation from school districts which failed to eliminate remaining vestiges of dual school system did no more than endeavor to realize directive of U.S.C.A.Const. Amend. 14 that racial discrimination in public schools must be eliminated root and branch and stay would mean inordinate delay and would unjustifiably postpone termination of dual school systems, stay of judgment of the court of appeals which affirmed the district court order pending action by Supreme Court on unfilled petition for certiorari would be denied. *U. S. v. Edgar*, Tex.1971, 92 S.Ct. 8, 404 U.S. 1206, 30 L.Ed.2d 10.

38. Review

Certiorari was granted to review determination that school district's failure to provide English language instruction to students of Chinese ancestry who do not speak English did not deny equal protection or violate this subchapter, because of public importance of question presented. *Lau v. Nichols*, Cal.1974, 94 S.Ct. 788, 414 U.S. 563, 39 L.Ed.2d 1.

District court's dismissal of plaintiff's claims that federal defendants failed to carry out their duty to investigate his complaint of discrimination and to ensure educational center's compliance with this subchapter was appealable, although the district court's order adjudicated the rights of fewer than all the parties and the district court did not certify the entry of final judgment, in view of the fact that, if plaintiff had been successful, the district court could properly have issued a mandatory injunction to compel the federal defendants to carry out their duties. *Tagupa v. East-West Center, Inc.*, C.A.Hawaii 1981, 642 F.2d 1127.

Although, in action under this section brought against city and others by black

male who was a former counselor in Neighborhood Youth Corporation program and who alleged that defendants racially and sexually discriminated against her, the trial court erred in dismissing the city on the ground that it was immune from suit under U.S.C.A. Const. Amend. 11, the error was harmless, since, the court having found that no act of any defendant was discriminatory, the final result for the city would not have been altered by its inclusion in the action. *Gilliam v. City of Omaha*, C.A.Neb.1975, 524 F.2d 1013.

On appeal from judgment denying relief to nontenured school principal who asserted that nonrenewal of his contract violated his constitutional rights, review was limited to examining the record to ascertain whether there was substantial evidence to support the finding of the board of education and the district court that the nonrenewal was due to substantial community opposition which was unrelated to principal's efforts to comply with court-ordered desegregation. *Callahan v. Price*, C.A.Miss.1974, 505 F.2d 83, rehearing denied 513 F.2d 51, certiorari denied 96 S.Ct. 273, 423 U.S. 927, 46 L.Ed. 2d 254.

Where purpose of suit was to end city's alleged racial and sexual employment discrimination and to obtain a decree requiring city to negotiate with union, city was primary defendant against whom relief, including preliminary injunctive relief, was sought, federal defendants were in nature of ancillary parties defendant rather than primary defendants, recovery by plaintiffs against city was a condition precedent to any effort to obtain relief as against federal defendants and there was no certificate so as to make possible an interlocutory appeal, order dismissing four federal defendants was not appealable. *Local Union 1889 of Am. Federation of State, County and Municipal Emp., AFL-CIO v. City of Jackson, Miss.*, C.A.Miss.1973, 473 F.2d 1028.

Where district court entered order issuing injunction and following issuance of mandate of court of appeals district court issued another injunction incorporating the entirety of the requirements and guidelines of prior order following issuance of mandate, appeal from earlier order was dismissed as moot. *Gautreaux v. Romney*, C.A.Ill.1972, 457 F.2d 124.

Means of enforcement of this subchapter is outside the agency discretion exception to judicial review. *Caulfield v. Board of Ed. of City of New York*, D.C.N.Y.1978, 449 F.Supp. 1203, reversed in part on other grounds 583 F.2d 605.

Note 39

39. **Amus**
Even if federal defendants had in some way abused their discretion or misapplied the law in failing to investigate plaintiff's complaint of discrimination and to insure educational center's compliance with this subchapter, mandamus relief would be unavailable because neither executive order nor regulations plainly prescribed any ministerial duties owed to plaintiff. *Tagupa v. East-West Center, Inc., C.A.Hawaii 1981, 642 F.2d 1127.*

40. Contempt

In contempt proceeding against city school board and chancellor, who had been ordered in previous consent decree to implement program of bilingual education in city public school system in order to comply with this section, defendants, in order to establish defense of inability to comply with previous order, had burden to show such inability categorically and in detail. *Aspira of New York, Inc. v. Board of Ed. of City of New York, D.C.N.Y.1976, 423 F.Supp. 647.*

II. PARTICULAR PROGRAMS AND ACTIVITIES

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61. Aid to Families with Dependent Children

Evidence that blacks constituted majority of Aid to Families with Dependent Children recipients while whites constituted majority of recipients under other aid programs was insufficient to establish that ceiling placed on benefits under Aid to Families with Dependent Children program violated this section. *Stanley v. Brown, D.C.Va.1970, 313 F.Supp. 749.*

62. Banking

Under this section, building and loan association which was member of Federal Home Loan Bank Board system was prohibited from redlining areas in community in which minority of families were concentrated and refusing to make loans

in those areas. *Laufman v. Oakley Bldg. & Loan Co., D.C. Ohio 1976, 408 F.Supp. 489.*

63. Employment practices

While trial court was correct in concluding that five-year requirement for promotion from police patrolman to sergeant was not shown to have any relationship to requirements of sergeant's job and that this in-service requirement and two-year requirement for promotions above rank of sergeant were arbitrarily established, record did not support court's order that in-service requirements for all promotions be reduced to one year. *Afro Am. Patrolmen's League v. Duck, C.A. Ohio 1974, 503 F.2d 294.*

Activities protected by provisions of section 2000e-2 of this title governing unlawful employment practices and this section governing discrimination in federally assisted programs did not include activities of petitioners who at time of their arrests were not seeking employment or participating in training or apprenticeship program but rather were encouraging others to enforce such rights. *Hill v. Com. of Pa., C.A.Pa.1971, 439 F.2d 1016, certiorari denied 92 S.Ct. 445, 404 U.S. 985, 30 L.Ed.2d 370.*

Discrimination by race in hiring and assignment of teachers or supervisors, as matter of law and fact, constitutes discrimination against students. *Caulfield v. Board of Ed. of City of New York, D.C.N.Y.1979, 486 F.Supp. 862, affirmed 632 F.2d 999.*

This subchapter, which prohibits discrimination in any program or activity receiving federal financial assistance, creates a private right of action, and the remedies that are available under section 2000e et seq. of this title, relating to equal employment opportunities, are also available under this subchapter. *Association Against Discrimination in Employment, Inc. v. City of Bridgeport, D.C.Conn.1979, 479 F.Supp. 101.*

This subchapter does not cover any employment practice of any employer except where a primary objective of federal financial assistance is to provide employment. *Otero v. Mesa County Valley School Dist. No. 51, D.C.Colo.1979, 470 F.Supp. 326, affirmed 628 F.2d 1271.*

Authority of the office for civil rights to investigate community college's compliance with this subchapter was not limited to investigating federally assisted programs or activities of college. *U. S. v. El Camino Community College Dist., D.C.Cal.1978, 454 F.Supp. 825, affirmed*

600 F.2d 1; certiorari denied 100 S.Ct. 661, 444 U.S. 1013, 62 L.Ed.2d 642.

Plaintiff in employment discrimination case failed to establish denial of employment benefit by refusal of assignment to certain duties. *Gilliam v. City of Omaha, D.C.Neb.1975, 388 F.Supp. 842.*

Evidence in action brought by farm workers and organizations against Department of Labor, including report by special review staff of manpower administration, established that the defendants had subjected minority farm workers to racial, national origin, sex and age discrimination and had denied minority farm workers the employment services to which they were entitled under the federally financed and supervised state rural manpower services and employment services. *NAACP, Western Region v. Brennan, D.C.D.C.1973, 380 F.Supp. 1006.*

Activity of state defendant in demonstrating upon public streets in support of principle of equal employment opportunities was not in itself protected by this section prohibiting discrimination in federally assisted programs. *Com. of Pa. v. Leonard, D.C.Pa.1970, 315 F.Supp. 215.*

Policy of racial discrimination against Negroes in selection and appointment of employees in Alabama agency which received and administered \$150,000,000 in federal funds annually would, if proved, constitute violation of merit standards of federal law. *U. S. by Clark v. Fraser, D.C.Ala.1968, 297 F.Supp. 319.*

64. Hospitals

City, in determining to close a hospital for financial reasons, was not required by this subchapter to consider alternatives to avoid a disparate racial impact other than to assess all of the municipal hospitals in order to select one or more for closing. *Bryan v. Koch, C.A.N.Y.1980, 627 F.2d 612.*

Private causes of action for benefit of classes protected by them were created by enactment of provisions in this subchapter and Rehabilitation Act of 1973, section 794 of Title 29, forbidding discrimination in federally funded programs against persons on basis of race, color, national origin or handicapped status; organizations of such persons were therefore entitled to trial on merits of their suit contending that unlawful discrimination would result from planned relocation of medical facility from existing inner city divisions to outlying suburban locations. *National Ass'n for the Advancement of Colored People v. Medical Center, Inc., C.A.Del.1979, 599 F.2d 1247.*

Health care programs were clearly among those to which statutory ban on discrimination under any program or activities, including federal financial assistance was intended to apply. *Bryan v. Koch, D.C.N.Y.1980, 492 F.Supp. 212.*

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 this subchapter, Rehabilitation Act, section 701 et seq. of Title 29 or Age Discrimination Act, section 6101 et seq. of this title. *National Ass'n for the Advancement of Colored People v. Wilmington Medical Center, Inc., D.C. Del.1980, 491 F.Supp. 290.*

Decree regarding segregation and discrimination based on race practiced by Alabama officials in operation of state's mental health system did not preclude responsible officials from making, in good faith and in particularized circumstances, medical discriminations which took racial factors, such as patients' fears and delusions, into account. *Marable v. Alabama Mental Health Bd., D.C. Ala.1969, 297 F.Supp. 291.*

65. Housing

Prohibition under this section on racial discrimination in federally assisted programs includes public housing programs. *Hills v. Gautreaux, Ill.1976, 96 S.Ct. 1538, 425 U.S. 284, 47 L.Ed.2d 792.*

Where officials of the Department of Housing and Urban Development were aware that city's urban renewal program resulted in removal of substantial portion of city's Negro population but approved urban renewal housing project which displaced Negro residents and knew of nonexistence of relocation programs for such residents, the Department violated this section prohibiting discrimination under federally assisted programs and section 3608 of this title requiring federal programs to be administered in a manner affirmatively to further policies of section 3601 et seq. of this title. *Garrett v. City of Hamtramck, C.A.Mich.1974, 503 F.2d 1236.*

Housing and Urban Development Department's approval and funding of seg-

Note 65

regulated municipal housing a /s housing sites in violation of this section and U.S.C.A.Const. Amend. 5 could not be excused as attempted accommodation of admittedly urgent need for housing with reality of community and municipal council resistance. *Gautreaux v. Romney, C.A.III.1971, 448 F.2d 731.*

City, which had historic pattern of racial segregation in both public and private housing, which was chargeable with knowledge of fact that cancellation of proposed federally funded low-income public housing project in predominantly white neighborhood of city had obvious disparate effect on black community, and some of whose officials were aware of existence of racially motivated opposition to such project, violated rights of low-income black residents of its public housing system under U.S.C.A.Const. Amendments 13 and 14, sections 1981, 1982, 601 et seq. and 801 et seq. of this title, and this section, by taking actions at halting construction of project. *Resident Advisory Bd. v. Rizzo, D.C.Pa.1976, 425 F.Supp. 987, modified on other grounds 564 F.2d 126, certiorari denied 98 S.Ct. 1457, 435 U.S. 906, 55 L.Ed.2d 499.*

Even if tenants in federally subsidized apartment project, which was slated to be demolished, had an interest in continuing to occupy government subsidized housing the court would not reach such issue in tenants' suit under this section and section 1982 of this title, seeking, among other things, a hearing before the project was closed, where the tenants had failed to demonstrate that the phasing-out and closing of the project would seriously jeopardize their ability to find government subsidized accommodations. *Jones v. U. S. Dept. of Housing and Urban Development (HUD), D.C.La.1974, 390 F.Supp. 579.*

Evidence established that procedures employed by city housing authority and by the United States Department of Housing and Urban Development in respectively selecting and approving site for public housing project were grossly inadequate to insure that national policy of equal opportunity in housing expressed in this subchapter and sections 3601 and 3608(d)(5) of this title was considered and implemented in their decisions. *Blackshear Residents Organization v. Housing Authority of City of Austin, D.C.Tex.1972, 347 F.Supp. 1138.*

Action of local housing authority in giving preference in occupancy of low-cost federally assisted public housing to members of the Jewish faith because of

nearness of a desirable synagogue violated U.S.C.A.Const. Art. 6, cl. 2, as offending this subchapter banning racial discrimination in federally assisted programs, and the equal protection clause of U.S.C.A.Const. Amend 14 and was forbidden by establishment of religion clause of U.S.C.A.Const. Amend. 1. *Otero v. New York City Housing Authority, D.C.N.Y.1972, 344 F.Supp. 737.*

Where dominant factor in selecting sites for location of public housing was racial concentration of neighborhoods, and purpose was to perpetuate segregation of races in public housing, and present location of sites in all-Negro neighborhoods would most likely perpetuate segregation, this was rank discrimination forbidden by equal protection clause of U.S.C.A.Const. Amend. 14 and this subchapter, and Department of Housing and Urban Development which was not only aware of the situation but effectively directed and controlled each step in the program was guilty of discriminatory conduct which was violative of this subchapter. *Hicks v. Weaver, D.C.La.1969, 302 F.Supp. 619.*

Negro tenants in or applicants for public housing were entitled to appropriate relief against city housing authority's policy of denying applications to certain family housing projects on the basis of racial quotas. *Gautreaux v. Chicago Housing Authority, D.C.III.1969, 296 F.Supp. 907.*

City housing authority could not automatically exclude or evict from low rent housing facilities a low income family on sole ground that member of family had an illegitimate child or children, but authority could consider, under appropriate criteria, whether a given unwed mother and her family should be admitted to the facilities. *Thomas v. Housing Authority of City of Little Rock, D.C.Ark.1967, 282 F.Supp. 575.*

Suit by Negro tenants in or applicants for public housing against housing authority, which allegedly had selected sites for public housing projects almost exclusively within neighborhoods, the racial composition of which was all or substantially all Negro, stated claim under this section prohibiting persons from being discriminated against under federally assisted programs on ground of race. *Gautreaux v. Chicago Housing Authority, D.C.III.1967, 265 F.Supp. 582.*

Mere fact that city housing authority was federally assisted did not exempt it from the provisions of 43 P.S. § 961 et seq. which bar housing discrimination. *Chester Housing Authority v. Pennsylv.*

ania Human Relations Commission, Pa. Cmwlth. 1973, 305 A.2d 751, 9 Pa.Cmwlth. 327 A.2d 335, 458 Pa. 67, certiorari ad 95 S.Ct. 420 U.S. 974, 43 L.Ed.2d 654.

Where a dominant factor in selecting a site for a housing project is the racial concentration of the neighborhood, and the site is selected with the purpose of perpetuating racial segregation, such action by a housing authority violates the equal protection provisions of U.S.C.A. Const. Amend. 14 as well as this subchapter. *Rowe v. Pittsgrove Tp., 1977, 379 A.2d 497, 153 N.J.Super. 274, reversed on other grounds 411 A.2d 720, 172 N.J.Super. 309.*

6. Recreational facilities

Corporation which operated recreational facilities in rural area and which had obtained loan guaranteed by federal government to construct facilities was required to accept for membership rural residents without regard to race, color or national origin. *Hawthorne v. Kenbridge Recreation Ass'n, Inc., D.C.Va.1972, 341 F.Supp. 1382.*

6. Schools

School system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied them meaningful opportunity to participate in public educational program in violation of this subchapter; equality is not provided by providing the same facilities, text books, teachers, and curriculum. *Lau v. Nichols, Cal.1974, 94 S.Ct. 788, 414 U.S. 563, 39 L.Ed.2d 1.*

Bilingual education and language remediation programs offered by school district did not violate this subchapter. *Castaneda v. Pickard, C.A.Tex.1981, 648 F.2d 969.*

If Florida state student assessment test, which was designed to measure functional literacy, was a fair test of what was taught in the public schools, its use as a graduation requirement, i. e., condition for diploma, would not violate this subchapter i. e., prohibition against exclusion from participation in or discrimination under federally assisted programs on ground of race, etc. *Debra P. v. Turlington, C.A.Fla.1981, 644 F.2d 397.*

Fact that 1976 statute, Pub.L. 94-206, § 209, Jan. 28, 1976, 90 Stat. 22 restricting federal methods for assuring nondiscrimination in public schools receiving federal support made no classification along impermissible lines did not preclude equal protection challenge. *Brown v. Califano, 1980, 627 F.2d 1221, 201 U.S.App.D.C. 235.*

T.42 U.S.C.A. §§ 1985-2000d-8-19

State university student government regulation providing that legislative branch must include at least two members of minority race within student body and, if election does not satisfy that contingency, then president of student body shall make appointments from students generally to fulfill this requirement, denied equal protection and violated civil rights laws because of its exclusive reliance on racial criterion. *Uzzell v. Friday, C.A.N.C.1979, 501 F.2d 997.*

Where Office of Civil Rights of the Department of Health, Education and Welfare sought, by voluntary means, to achieve school board's compliance with this section providing that no person on the ground of race, color or national origin shall be subjected to discrimination under any project receiving federal financial assistance, and no fund termination was sought, Department was not required to afford public participation or a hearing before entering into memorandum of agreement with school board. *Caulfield v. Board of Ed. of City of New York, C.A.N.Y.1978, 583 F.2d 605.*

When, under state-imposed standards, federal and state money is spent on equality of treatment by providing students with same facilities, textbooks, teachers and curriculum, ancillary fact of racial imbalance does not violate this section prohibiting discrimination in federally assisted programs. *Coates v. Illinois State Bd. of Ed., C.A.III.1977, 559 F.2d 445.*

Substantial evidence supported finding that decision not to rehire nontenured school principal was grounded on community opposition resulting from principal's disagreements with football coach and that nonrenewal was due to substantial community opposition which was unrelated to principal's efforts to comply with court-ordered desegregation. *Callahan v. Price, C.A.Miss.1974, 505 F.2d 83, rehearing denied 513 F.2d 51, certiorari denied 98 S.Ct. 273, 423 U.S. 927, 46 L.Ed.2d 254.*

Only when a substantial number of students are being deprived of meaningful education is there a violation of this section prohibiting exclusion from participation in, denial of benefits of and discrimination under federally assisted programs on ground of race, color, or national origin. *Serna v. Portales Municipal Schools, C.A.N.M.1974, 499 F.2d 1147.*

Schools and programs are not condemned by this subchapter en masse but only if they would utilize federal money for unconstitutional ends. *Board of Pub.*

Note 67

Instruction of Taylor County, Fla. v. Finch, C.A.Fla.1969, 414 F.2d 1

Parish school board and superintendent of schools, in accepting federal funds for maintenance and operation of their schools under sections 631 to 645 of Title 20 after passage of this section, became bound by provision in this section prohibiting discrimination in program receiving federal financial assistance and were obligated to provide education without racial discrimination. *Bossier Parish School Bd. v. Lemon*, C.A.La.1967, 370 F.2d 847, certiorari denied 87 S.Ct. 2116, 388 U.S. 911, 18 L.Ed.2d 1350.

If school officials could have shown that the disproportionate enrollment of blacks in classes for the educable mentally retarded reflected and tapped a greater incidence of mild retardation in the black children population and did not reflect cultural bias, such placement process could have survived civil rights challenge. *Larry P. v. Riles*, D.C.Cal.1979, 495 F.Supp. 926.

Evidence demonstrated that white applicant for law school was not precluded from competing for seats set aside for the minority admissions program because of his race as the concept of minority in the challenged program included economically disadvantaged whites. *Doherty v. Rutgers School of Law-Newark*, D.C.N.J. 1980, 487 F.Supp. 1291.

Even if it were assumed that there was discrimination based on race, color or national origin in policy of education official toward migratory workers' children who entered school after it had commenced, since during the past four years, on the average, only about 32 migrant students had entered school after the first four weeks of class, school could not be required to provide special instruction to those students under this subchapter. *Valadez v. Graham*, D.C.Fla.1979, 474 F.Supp. 149.

Elementary school bilingual education plan must contain specific methods for identifying children deficient in the English language and monitoring their progress, should have training program for bilingual teachers and aides, must be both bilingual and bicultural, must provide for transferring students out of program when necessary level of English proficiency is reached, and it should encourage contact between non-English and English speaking children in all but subject-matter instruction. *Cintron v. Brentwood Union Free School Dist.*, D.C.N.Y.1978, 455 F.Supp. 57.

As the public higher education desegregation plans submitted by various state systems of higher education, and accepted by the Department of Health, Education, and Welfare in June of 1974, failed to meet the requirements earlier specified by the Department of Health, Education, and Welfare and its office of civil rights, those federal defendants were continuing, in violation of this subchapter, to grant federal aid to public higher education systems which had not achieved desegregation or submitted acceptable and adequate desegregation plans. *Adams v. Califano*, D.C.D.C.1977, 430 F.Supp. 118.

This subchapter is applicable to school desegregation cases. *Soria v. Oxnard School Dist. Bd. of Trustees*, D.C.Cal.1974, 386 F.Supp. 539.

Fact that plaintiffs as participants in federally funded inner city library service institute, were required to take their instruction as a group and that certain basic course titles were duplicated in "traditional" and in special graduate programs was unpersuasive as indicia of alleged presence of a racially discriminatory educational program. *Bergeron v. Board of Regents of University of Wisconsin System*, D.C.Wis.1973, 363 F.Supp. 346, affirmed 497 F.2d 927.

Promulgation and institution of program by school district and ignoring the specialized needs of Spanish surnamed students constituted state action authorizing legal redress. *Serna v. Portales Municipal Schools*, D.C.N.M.1972, 351 F.Supp. 1279, affirmed 499 F.2d 1147.

In class action by Negro school children and their parents to enjoin granting of tax exempt status to private schools in Mississippi which discriminated against Negroes in admissions, evidence on motion for preliminary injunction established that segregated private schools were established in Mississippi to avoid result of unitary, nonracial public school system required by federal court decisions and in attempt to maintain school pattern of racial segregation in school system. *Green v. Kennedy*, D.C.D.C.1970, 309 F.Supp. 1127, appeal dismissed 90 S.Ct. 2169, 398 U.S. 956, 26 L.Ed.2d 539, appeal dismissed 91 S.Ct. 460, 400 U.S. 986, 27 L.Ed.2d 435.

68. Taxation

Assistance provided through tax system is within scope of this subchapter. *McGlotten v. Connally*, D.C.D.C.1972, 338 F.Supp. 448.

69. Welfare

Discrimination prohibited by this section with respect to state administration of federally assisted welfare programs includes practice of providing service to Negroes and whites on a separate but equal basis solely on account of race. *Gardner v. State of Ala.* for and in Behalf of Dept. of Pensions and Sec., C.A.Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.

State could not condition welfare benefits either on beneficiary's possession of United States citizenship or on alien beneficiary's residence in this country for certain number of years. *Zarate v. State Dept. of Health and Rehabilitative Services*, D.C.Fla.1971, 347 F.Supp. 1004, affirmed 92 S.Ct. 2462, 407 U.S. 921, 32 L.Ed.2d 803, rehearing denied 93 S.Ct. 107, 409 U.S. 903, 34 L.Ed.2d 166.

Pennsylvania Public Welfare Code, 62 P.S. § 432(2), prohibiting law's applicability to residents, who were not United States citizens, denied equal protection and was thus invalid. *Leger v. Sailer*, D.C.Pa.1970, 321 F.Supp. 250, affirmed 91 S.Ct. 1848, 403 U.S. 365, 29 L.Ed.2d 534.

70. Zoning

Referendum on a "spot" zoning ordinance which rezoned a 20-acre site in a white neighborhood from a one-family residential district to a community unit plan which would consist of low rent townhouse units and a low rent apartment building was not subject to attack on theory that there was conflict with federal law. *Ranjel v. City of Lansing*, C.A.Mich.1969, 417 F.2d 321, certiorari denied 90 S.Ct. 1105, 397 U.S. 980, 25 L.Ed.2d 390, rehearing denied 90 S.Ct. 1352, 397 U.S. 1059, 25 L.Ed.2d 680.

Inasmuch as there was no issue concerning racial discrimination as to any program or activity receiving federal assistance in suit for relief enabling plaintiff to build housing project in single-family zone, this section providing that no person shall, on grounds of race, color or national origin, be excluded from participation in or be subjected to discrimination under a program or activity receiving federal financial assistance was not applicable. *Southern Alameda Spanish Speaking Organization v. City of Union City*, D.C.Cal.1970, 314 F.Supp. 967, affirmed 424 F.2d 291.

Evidence, in civil rights action by Negro persons displaced by urban renewal housing project and association composed of Negro residents of area scheduled for renewal alleging that city's urban renewal program denied them due process and equal protection, supported trial court's finding that city in its urban renewal program which resulted in displacement of substantial portion of city's Negro population intentionally discriminated against Negroes in violation of their constitutional and statutory rights. *Garrett v. City of Hamtramck*, C.A.Mich.1974, 503 F.2d 1236.

Requirement that Public Health Service grants be administered in conformance with this subchapter does not by itself make the federal government a partner or a joint venturer in a federally-supported private research project. *Wahaba v. New York University*, C.A.N.Y.1974, 492 F.2d 96, certiorari denied 95 S.Ct. 135, 419 U.S. 874, 42 L.Ed.2d 113.

The state, having undertaken to refer neglected children to child-care homes and to provide case work services and summaries, cannot administer the referral program in such a manner that black children are deprived of equal opportunities and benefits. *Player v. State of Ala.* Dept. of Pensions and Sec., D.C.Ala.1975, 400 F.Supp. 249, affirmed 538 F.2d 1385.

Where worker, after his employment was terminated in New Jersey, where unemployment rate was 6.8% returned to his home in Puerto Rico, where unemployment rate was 19% or more, denial of unemployment compensation benefits as result of application of "Twelve Percent Rule," under which unemployment compensation benefits are denied to any interstate claimant who moves to or near major labor market area designated by United States Department of Labor as area of persistent unemployment which has had unemployment rate of 12% or more for three consecutive months, did not result in violation of claimant's constitutional or civil rights. *Bonzalez v. Bell Laboratories*, 1975, 333 A.2d 562, 132 N.J.Super. 330.

CHAPTER ELEVEN
RIGHT TO BE FREE FROM DISCRIMINATION IN
FEDERALLY FUNDED PROGRAMS UNDER
TITLE VI
(42 USCS § 2000d)

- § 311. Generally
- § 312. Discrimination Prohibited
- § 313. Plaintiffs
- § 314. Relevance of Title IV of the Civil Rights Act of 1964
- § 315. Defendants
- § 316. Defense of Governmental Immunity
- § 317. Relief Available
- § 318. Form of Complaint

§ 311. Generally

Title VI of the Civil Rights Act of 1964 (42 USCS § 2000d) provides that 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, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *what does it do?*

Title VI, creating rights to be free from discrimination in federally financed programs can be accepted as constitutional under both the grant of the spending power to Congress¹ and under the implementing clause of the Fourteenth Amendment. In application to Black persons, the constitutionality of Title VI is further supported by the implementing clause of the Thirteenth Amendment.² *why legitimate*

1. U.S. Const., Art. I, § 8.

2. United States v Jefferson County Board of Education (1966, CA5 Ala)

372 F2d 836, op corrected (CA5 La)
380 F2d 385, cert den 389 US 840,

§ 312. Discrimination Prohibited

A recipient of Federal financial assistance is in violation of § 2000d when:

- it denies an individual service, aid or benefits because of his race, color, or national origin;
- it provides only inferior or discriminatory service, aid or benefits because of the individual's race, color or national origin;
- it subjects an individual to segregation or different treatment in relation to aid, service or benefits because of race, color or national origin;
- it restricts or discourages individuals in their enjoyment of facilities because of their race, color or religion;
- it treats an individual differently because of his race, color or national origin in regard to eligibility for programs or services;
- it uses any criteria which would impair accomplishment of the Act's objectives or which would subject individuals to discrimination because of their race, color or national origin;
- it discriminates against an individual in any program or activity which is conducted in a facility constructed even partly with federal funds; or
- subjects an individual to discriminatory employment practices under any Federal program intended to provide employment.

Discrimination in educational opportunities by defendants subject to the act is outlawed.³ Discrimination in housing and

19 L Ed 2d 103, 88 S Ct 67 and cert den 389 US 840, 19 L Ed 2d 103, 88 S Ct 72, reh den 389 US 965, 19 L Ed 2d 382, 88 S Ct 324 and cert den 389 US 840, 19 L Ed 2d 104, 88 S Ct 77.

563, 39 L Ed 2d 1, 94 S Ct 786; United States v Texas (1971, ED Tex) 342 F Supp 24, affd (CA5 Tex) 466 F2d 518; Serna v Portales Municipal Schools (1974, CA10) 499 F2d 1147.

3. Lau v Nichols (1974) 414 US

redevelopment by defendants subject to the act is illegal.⁴ Discrimination in employment opportunities by defendants subject to the act is forbidden.⁵ Discrimination in recreational facilities by defendants receiving federal funds is barred.⁶

Title VI and the Fifth Amendment impose upon Federal officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by state or local agencies funded by them.⁷

§ 313. Plaintiffs

In 1978 four justices of the Supreme Court held that Title VI authorized a private cause of action; four others assumed it did; only Justice White believed it did not.⁸

Black persons who have suffered any form of discrimination forbidden by Title VI are, of course, proper plaintiffs under this section.⁹

Students of Chinese ancestry and their parents have been held by the Supreme Court to be proper plaintiffs under § 2000d when

4. Hills v Gautreaux (1976) 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538; Metropolitan Housing Development Corp. v Arlington Heights (1977, CA7) 558 F2d 1283, cert den 434 US 1025, 54 L Ed 2d 772, 98 S Ct 752; Garrett v Hamtramck (1974, CA6 Mich) 503 F2d 1236, on remand (ED Mich) 394 F Supp 1151.

6. Hawthorne v Kenbridge Recreation Asso. (1972, ED Va) 341 F Supp 1382.

7. NAACP, Western Region v Brennan (1973, DC Dist Col) 360 F Supp 1006.

8. Regents of University of Cal. v Bakke (1978) 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733.

9. NAACP, Western Region v Brennan (1973, DC Dist Col) 360 F Supp 1006.

(Andrew Friendly) has Air Force 1 photos
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they were denied by their local public schools a meaningful opportunity to participate in the educational program.¹⁰

Students of Spanish and Mexican ancestry, and their parents, are proper plaintiffs under Title VI when they have been denied equal educational opportunities.¹¹ Under § 2000d, parents of Mexican-American children in public schools had standing to attack discrimination in the hiring of Mexican-American teachers when this had an effect upon the learning possibilities of the children.¹²

A federal court has ruled that the Equal Educational Opportunities Act of 1974, barring educational barriers because of language, protects children who speak "Black English." It ruled, however, that a school system did not violate the constitutional or statutory rights of children by failing to provide them special education where their unsatisfactory academic performance was allegedly caused by cultural, social or economic backgrounds, although the local school system provided help to others with disadvantages and learning handicaps.¹³

The Court of Appeals for the Second Circuit, sitting en banc, has held that minority residents of a county, living in a racially concentrated low-income neighborhood, did not have standing to contest federal grants to a town for sewer and recreational purposes, when the town was 98.7% white, when the plaintiffs did not reside in the town, and there was no probability that enjoining the grants in question would alleviate their injury in the form of ghetto living conditions.¹⁴

Persons discriminated against in federally funded programs

10. *Lau v Nichols* (1974) 414 US 563, 39 L Ed 2d 1, 94 S Ct 786.

11. *Serna v Portales Municipal Schools* (1974, CA10) 499 F2d 1147.

12. *Otero v Mesa County Valley School Dist.* (1977, CA10 Colo) 568 F2d 1312.

13. *Martin Luther King Junior Elementary School Children etc. v Michigan Board of Education* (1978, ED Mich) 451 F Supp 1324.

14. *Evans v Lynn* (1975, CA2 NY) 537 F2d 571, cert den 429 US 1066, 50 L Ed 2d 784, 97 S Ct 797.

may maintain class actions under the usual rules governing such litigation in the federal courts.¹⁵

§ 314. Relevance of Title IV of the Civil Rights Act of 1964

Title IV of the Civil Rights Act of 1964 (42 USCS §§ 2000c et seq.) authorizes suit by the Attorney General of the United States to desegregate schools and colleges, upon complaints of parents or children that they have been denied the equal protection of the laws. In an action under Title IV, the Court of Appeals for the Eighth Circuit has sustained a district court order that two school districts be annexed to a third, when the Court concluded that one of the former had "been established and maintained by state action in violation of the equal protection clause." Kinloch was a small, all-black school district adjoining Berkeley and Ferguson School Districts. A proposal to consolidate the three in 1949 had been defeated at referendum. The District Court had said: "This is an instance where the failure to act or resistance for discriminatory reasons to actions tending to correct segregation amounted to a constitutional wrong," and the Court of Appeals agreed. The district court had found that Kinloch was in effect maintained by the other districts for racially discriminatory reasons from 1937 until the present, and the Court of Appeals agreed that an inter-district remedy was justified.¹⁶

The United States Supreme Court has held that Title IV does *not* restrict the judicial authority of federal courts in giving relief to private parties who have been deprived of equal protection of the laws in education.¹⁷ 42 USCS § 2000c-8 provides: "Nothing in

15. *Martin Luther King Junior Elementary School Children etc. v Michigan Board of Education* (1978, ED Mich) 451 F Supp 1324.

16. *United States v Missouri* (1975, CA8) 515 F2d 1365, later app (CA8 Mo) 523 F2d 885 and cert den 423

US 951, 46 L Ed 2d 288, 96 S Ct 374.

17. *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 1, 28 L Ed 2d 554, 91 S Ct 1267, reh den 403 US 912, 29 L Ed 2d 689, 91 S Ct 2200 and reh den 403 US 912, 29 L Ed 2d 689, 91 S Ct 2201.

this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education."

An occasional court has accepted a private party suit apparently brought under this Title.¹⁸ However, private party suits to eliminate the denial of equal protection in education can more properly be brought under one of the other sections, such as §§ 1983 or 2000d.¹⁹

§ 315. Defendants

Both governmental and private institutions receiving federal funds are subject to suit under Title VI. Thus, a school district receiving federal funds cannot discriminate under this section.²⁰ Housing and redevelopment authorities are subject to Title VI actions.²¹ Cities and other local governmental entities are suable under Title VI.²² Community colleges receiving federal funds are subject to § 2000d actions.²³ A state co-operative extension service receiving federal funds has been subject to action under Title VI.²⁴

18. *Spangler v Pasadena City Board of Education* (1970, CD Cal) 311 F Supp 501.

19. *School Board v State Board of Education* (1973) 412 US 92, 36 L Ed 2d 771, 93 S Ct 1952, reh den 414 US 884, 38 L Ed 2d 132, 94 S Ct 31 and reh den 414 US 884, 38 L Ed 2d 132, 94 S Ct 31; *Lemon v Bossier Parish School Board* (1965, WD La) 240 F Supp 709, reh den (WD La) 240 F Supp 743 and affd (CA5 La) 370 F2d 847, cert den 388 US 911, 18 L Ed 2d 1350, 87 S Ct 2116.

20. *Lau v Nichols* (1974) 414 US 563, 39 L Ed 2d 1, 94 S Ct 786; *Serna v Portales Municipal Schools* (1974, CA10) 499 F2d 1147.

21. *Hills v Gautreaux* (1976) 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538; *Garrett v Hamtramck* (1974, CA6 Mich) 503 F2d 1236, on remand (ED Mich) 394 F Supp 1151.

22. *Gilliam v Omaha* (1975, DC Neb) 388 F Supp 842, affd (CA8 Neb) 524 F2d 1013.

23. *United States v El Camino Community College Dist.* (1978, CD Cal) 454 F Supp 825.

24. *Wade v Mississippi Cooperative Extension Service* (1974, ND Miss) 372 F Supp 126, supp op (ND Miss) 378 F Supp 1251, vacated on other grounds (CA5 Miss) 528 F2d 508, on remand (ND Miss) 424 F Supp 1242

Federal agencies and officials are suable under Title VI to enforce their duty to see that there is no prohibited discrimination in agencies funded by them.²⁵

A private university has been held subject to Title VI upon proof that its students received Veterans Administration assistance and also participated in the National Defense Student Loan program, administered by the federal Department of Health, Education and Welfare.²⁶ However, in holding that the presence of federal loans to students at a law school did not alone make the institution subject to Title VI, a federal court remarked: "The plaintiff must show that the Federal financial assistance received by the Law School constitutes more than a de minimis portion of its annual revenues and that there is some material connection between said assistance and the minority admissions policy challenged."²⁷

Where a building and loan association was a member of the Federal Home Loan Bank system, it was held subject to suit under Title VI and violative of the act in "redlining" certain areas in a community with the consequent refusal to make loans on properties there located.²⁸

A private recreation association that had received a direct loan of \$65,000 from the United States Farmers' Home Administration, was suable under Title VI, and in violation of the act in denying membership to persons solely because they were Black.²⁹

and (disapproved *Washington v Davis* 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040).

(1974, DC SC) 396 F Supp 597, affd without op (CA4 SC) 529 F2d 514.

27. *Stewart v New York University* (1976, SD NY) 430 F Supp 1305.

25. *Hills v Gautreaux* (1976) 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538; *NAACP, Western Region v Brennan* (1973, DC Dist Col) 360 F Supp 1006.

28. *Laufman v Oakley Bldg. & Loan Co.* (1976, SD Ohio) 408 F Supp 489.

26. *Bob Jones University v Johnson*

29. *Hawthorne v Kenbridge Recreation Asso.* (1972, ED Va) 341 F Supp 1382.

§ 316. Defense of Governmental Immunity

The Supreme Court has indicated generally in suits against federal official will fail "if the relief . . . will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."³⁰ In 1963 it announced that as a "general rule" a suit is deemed to be one against the sovereign "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration . . . or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act."³¹

The Supreme Court acknowledges at least two exceptions to the applicability of the doctrine of governmental immunity. First, "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are ultra vires his authority and therefore may be made the object of specific relief." The Court added: "A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional."³²

The defense of governmental or sovereign immunity is inapplicable where the sovereign has consented to be sued in the federal courts.³³

It is suggested that the Supreme Court was ill-advised in dismissing suits brought by citizens on a governmental immunity theory, solely because some affirmative governmental action was sought. There are very well-reasoned decisions, both prior and subsequent to the Dugan case, in which federal courts have held

30. *Larson v Domestic & Foreign Commerce Corp.* (1949) 337 US 682, 93 L Ed 1628, 69 S Ct 1457, reh den 338 US 840, 94 L Ed 514, 70 S Ct 31.

31. *Dugan v Rank* (1963) 372 US 609, 10 L Ed 2d 15, 83 S Ct 999.

32. *Larson v Domestic & Foreign Commerce Corp.* (1949) 337 US 682, 93 L Ed 1628, 69 S Ct 1457, reh den 338 US 840, 94 L Ed 514, 70 S Ct 31.

33. *Schlaflly v Volpe* (1974, CA7 Ill) 495 F2d 273.

such suits were to be heard even though the injured plaintiff requested some affirmative governmental action.³⁴ Reference can be made to the following section for a number of such instances.

§ 317. Relief Available

Private party plaintiffs have been able to enjoin school districts receiving federal funds from continuing unconstitutional racial discrimination.³⁵

Declaratory relief is also available to a proper private party plaintiff in an action brought under Title VI.³⁶

Courts have shown a willingness to give prevailing plaintiffs in Title VI actions orders requiring federal agencies and officials to act affirmatively. Thus, the Supreme Court has sustained a lower court decree ordering the Department of Housing and Urban Development to adopt a comprehensive housing plan for the metropolitan Chicago area so as to disestablish the segregated housing system and to increase available housing.³⁷

Private parties have secured declaratory and injunctive relief against the secretary of the Department of Health, Education and Welfare, in effect compelling him to take further action to see that schools receiving federal funds terminate segregation.³⁸ The same Department has been ordered by a federal court to require states receiving federal funds to prepare within 60 days plans for the desegregation of all public colleges and universities within the state. The agency was told to consider "the unique importance of

34. *Schlaflly v Volpe* (1974, CA7 Ill) 495 F2d 273, citing cases.

36. *Adams v Richardson* (1972, DC Dist Col) 351 F Supp 636.

35. *Lemon v Bossier Parish School Board* (1965, WD La) 240 F Supp 709, reh den (WD La) 240 F Supp 743 and affd (CA5 La) 370 F2d 847, cert den 388 US 911, 18 L Ed 2d 1350, 87 S Ct 2116.

37. *Hills v Gautreaux* (1976) 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538.

38. *Adams v Richardson* (1972, DC Dist Col) 351 F Supp 636; *Adams v Weinberger* (1975, DC Dist Col) 391 F Supp 269.

Black colleges and at the same time comply with the Congressional mandate."³⁹

The Court of Appeals for the Ninth Circuit has held that if Mexican-American and Yaqui Indian children were provided with remedial instruction in English, § 2000D did not require them to be provided additionally with bilingual teachers.⁴⁰

Section 718 of the Emergency School Aid Act of 1972 authorizes a federal court to award attorneys' fees to the prevailing party upon the entry of an award or order against a governmental entity for having violated Title VI of the Civil Rights Act or the Fourteenth Amendment.⁴¹

§ 318. Form of Complaint

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF _____

Plaintiffs,
v

Defendants

No. _____

COMPLAINT

COUNT I

1. Jurisdiction of this Court is invoked pursuant to Title 28, USCS § 1343. This is an action in equity seeking relief under Title 42, USCS § 1983, and Title 28, USCS §§ 2201 and 2202. The rights sought to be secured in this action are rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by Title 42, USCS §§ 1981 and 1983.

2. This is a proceeding for a declaration that Defendants have

³⁹. *Adams v Califano* (1977, DC Tempe Elementary School Dist. Dist Col) 430 F Supp 118. (1978, CA9 Ariz) 587 F2d 1022.

⁴⁰. *Guadalupe Organization, Inc. v* ⁴¹. 20 USCS § 1617.

carried on and are continuing to carry on a racially discriminatory public housing system within the City of _____, State of _____, for a permanent injunction enjoining Defendants from carrying on the racially discriminatory aspects of such public housing system in the future, and for other appropriate relief.

3. Plaintiffs are all Negro citizens of the United States who presently reside in the City of _____, State of _____ and are tenants in non-elderly public housing projects (i.e., projects for persons other than the elderly) operated by the Defendant, The _____ Housing Authority (the "Authority"), or have filed or are eligible to file, on forms provided by the Authority, written applications for and are eligible to be housed in, and have a right in accordance with Authority Rules to be housed in, such projects.

4. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their behalf and on behalf of all other Negro tenants and applicants or potential applicants similarly situated. The members of the class on whose behalf this suit is brought are so numerous that joinder of all members is impracticable. There are questions of law and fact involved common to the class, the claims of the Plaintiffs as representative parties are typical of the claims of the class, and the Plaintiffs as representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants, and (b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Defendants have acted, in all respects stated herein, on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

5. Defendants are the Authority, a municipal corporation organized and existing under the laws of the State of _____ and its Executive Director. The principal office of the Authority is located in the City of _____, State of _____. The public housing facilities in the City of _____ are under the jurisdiction, management and control of the Defendants.

6. Under the laws of the State of _____ the Authority has the

power and the duty to engage in low-rent housing projects, which activity is declared by such laws to be a governmental function essential to the public interest.

7. Under the laws of the State of ¹⁵ the Authority has the power and the duty to select and acquire real property as sites for regular family public housing projects in the City of ¹⁶, but such sites, when selected by the Authority, may not be acquired by it until the Authority has advised the City Council of the City of ¹⁷ of the description of the sites proposed to be acquired and the City Council has approved the acquisition thereof by the Authority. The statute of the State of ¹⁸ which requires such approval by the City Council (*cite statute*) was enacted and became effective in 19...¹⁹...

8. During the period from 19...²⁰ to the present, the applicants for and tenants of regular family public housing projects of the Authority have been predominantly Negro. At present, approximately ²¹% of the applicants for regular family public housing projects whose names appear on the Authority's waiting list therefor are Negro, and approximately ²²% of the tenants in such projects are Negro.

9. With respect to residence the City of ²³ is, and continuously since 19...²⁴ has been, highly segregated along racial lines. At the time of the filing of this Complaint, Negroes numbering approximately ²⁵ persons constituted over ²⁶% of the total population of the City of ²⁷. At such time over ²⁸% of all Negroes living in the City of ²⁹ resided in neighborhoods the racial composition of which was all Negro or substantially all Negro (hereinafter "Negro neighborhoods"). During the entire period from 19...³⁰ to the present, over ³¹% of all Negroes living in the City of ³² resided in Negro neighborhoods. Such Negro neighborhoods were and are predominantly large and contiguous, and not small and scattered, and they constitute compact, segregated areas of Negro residence the bulk of which is known as the Negro Ghetto.

10. Such large scale residential segregation of Negroes within the Negro Ghetto in the City of ³³ has had and will continue to have highly detrimental effects upon Negroes living therein, including the following:

- (a) Physical isolation from and lack of social contact with the larger predominantly white community within which the Negro Ghetto is located generate, among Negro residents thereof, feelings of inferiority as to their status in the community that affect their

hearts and minds in a way unlikely ever to be undone. The separation of the races is usually interpreted as denoting the inferiority of the Negro group, and the sense of inferiority thus imparted to residents of the Negro Ghetto detrimentally affects their motivation and their ability to become useful members of the society at large, and has a tendency to retard their educational, social and political development. Such feelings of inferiority and other detrimental effects have been and are produced by the Negro Ghetto in the City of ³⁴.....

- (b) Physical isolation from and lack of social contact with the larger predominantly white community within which the Negro Ghetto is located results, and has resulted in the City of ³⁵....., in a pervasive life pattern of pathology marked by ignorance, fear, racial misunderstanding, broken homes, illegitimacy, delinquency, drug addiction, hatred and violence, all of which cripples and destroys great numbers of persons living within the Negro Ghetto.
- (c) Segregation in education invariably occurs where Negroes are residentially segregated and such educational segregation has occurred in the City of ³⁶..... and has followed the geographic pattern of the residential segregation hereinabove referred to. At the time of the filing of this Complaint approximately ³⁷% of the Negroes attending elementary schools and approximately ³⁸% of the Negroes attending high schools in the City of ³⁹..... attended segregated Negro schools—i.e., schools which were all Negro or substantially all Negro. Such educational segregation is harmful to children attending such schools, generates feelings of inferiority as to their status in the community that affects their hearts and minds in a way unlikely ever to be undone, results in inferior education for such children, and detrimentally affects their motivations and their ability to become useful adult members of the society at large.
- (d) As is stated in Executive Order No. 11063 of the President of the United States, "discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their inalienable rights to life, liberty, and the pursuit of happiness." The Negro Ghetto in the City of ⁴⁰..... is one such segregated pattern, has produced and continues now to produce such other forms of discrimination and segregation and has caused and

continues now to cause such deprivation of opportunity to the residents thereof.

11. Since 19...⁴¹ and prior to ...⁴²..., 19...⁴³..., numerous sites were selected by the Authority, approved by the City Council, and acquired by the Authority for the purpose of erecting regular family public housing projects thereon. Following such acquisition the Authority erected regular family public housing projects on such sites consisting of hundreds of dwelling units and housing thousands of tenants, and the Authority presently maintains and operates the same.

12. Substantially all of said numerous sites selected for regular family public housing projects by the Authority and approved by the City Council since 19...⁴⁴ and prior to ...⁴⁵..., 19...⁴⁶..., were in neighborhoods which were at the time of such selection, and are now, Negro neighborhoods, and were and are within the areas known as the Negro Ghetto.

13. Prior to ...⁴⁷..., 19...⁴⁸..., the Authority selected, and on or shortly prior to ...⁴⁹..., 19...⁵⁰..., the City Council approved sites for the following described proposed regular family public housing projects (state facts). Each of the sites for the proposed projects is in a neighborhood which was at the time of selection and is now a Negro neighborhood, and was and is within the areas known as the Negro Ghetto.

14. The proposed projects are large scale public housing projects designed and intended to provide in the aggregate approximately ...⁵¹... new dwelling units for the housing of thousands of public housing tenants. Construction of the Five Proposed Projects has not yet begun.

15. Since 19...⁵²... substantially all of the sites selected by the Authority for regular family public housing projects have been in Negro neighborhoods and within the areas known as the Negro Ghetto because the Authority has deliberately chosen sites for such projects which would avoid the placement of Negro families in white neighborhoods. After 19...⁵³... the Authority sold and did not build regular family public housing projects upon sites previously acquired by it in white neighborhoods, because the Authority deliberately determined not to submit any sites for City Council approval of regular family public housing projects which would result in the placement of Negro families in white neighborhoods.

16. The Authority deliberately chose Negro neighborhoods for each of the sites for the Five Proposed Projects and for the Twelve Proposed

Projects to avoid the placement of Negro families in white neighborhoods.

17. The effect of the selection of sites by the Authority in Negro neighborhoods upon Negro applicants for and tenants of regular family public housing projects has been and continues to be that:

- (a) Such applicants and tenants, if they choose to live in Defendant's public housing facilities at all, have been and are forced to reside within the Negro Ghetto in the City of ...⁵⁴..., and have been and are denied the opportunity to reside in public housing facilities in white neighborhoods;
- (b) Existing patterns of Negro residential and school segregation in the City of ...⁵⁵... have been and are continued and strengthened and the detrimental effects and evil consequences of such segregation, all as alleged in paragraph 10 hereof, are enlarged and imposed upon such applicants and tenants; and
- (c) The impact of such detrimental effects and evil consequences, as alleged in paragraph 10 hereof, upon such applicants and tenants, is the greater because, by reason of the site selection policies hereinabove described, such impact appears to have the force and sanction of law.

18. By reason of the facts hereinabove alleged, construction of the Five Proposed Projects and of the Twelve Proposed Projects on the sites selected therefor, and perpetuation thereby of Defendants' racially discriminatory public housing system, (a) will force Plaintiffs and the class they represent to live exclusively in Negro neighborhoods within the Negro Ghetto if they choose to live in Defendants' public housing facilities at all, (b) will preclude Plaintiffs and the class they represent from having the opportunity to reside in public housing facilities in white neighborhoods, and (c) will continue and strengthen existing patterns of residential and school segregation in the City of ...⁵⁶... and impose the evil consequences thereof, all as alleged in paragraph 10 hereof, upon Plaintiffs and the class they represent.

19. By reason of the facts hereinabove alleged the rights of Plaintiffs and the class they represent under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and under Title 42, USCS §§ 1981 and 1983, have been and are being violated by Defendants, and Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances set forth.

WHEREFORE, Plaintiffs pray:

(1) That after a full hearing this Court declare that Defendants have been and are carrying on a racially discriminatory public housing system within the City of ⁵⁷....., State of ⁵⁸....., that such system is in violation of the rights of Plaintiffs and the class they represent under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and under Title 42, USCS §§ 1981 and 1983, and that Plaintiffs and the class they represent have the right under said Amendment and Title to have sites for regular family housing projects in the City of ⁵⁹..... selected in such locations as will alleviate and mitigate, not continue and strengthen, existing patterns of Negro residential and school segregation in the City of ⁶⁰.....

(2) That after a full hearing this Court permanently enjoin Defendants from carrying on and perpetuating the racially discriminatory aspects of their public housing system within the City of ⁶¹....., and from constructing the proposed projects on any sites which have been selected in a racially discriminatory manner, or which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of ⁶².....;

(3) That after a full hearing this Court order Defendants to submit for the approval of this Court a comprehensive plan for the selection of future sites in Defendants' public housing system which would eliminate the discriminatory aspects of such system, and retain jurisdiction until the same is effectively carried out and completed; and

(4) That Plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT II

1. Jurisdiction of this Court is invoked pursuant to Title 28, USCS § 1343. This is an action in equity seeking relief under Title 42, USCS § 1983 and Title 28, USCS §§ 2201 and 2202. The rights sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to wit, Title 42, USCS § 2000d (Section 601 of Title VI of the Civil Rights Act of 1964).

2. This is a proceeding for a declaration that Defendants have carried on and are continuing to carry on a racially discriminatory public housing system within the City of ⁶³....., State of

.....⁶⁴....., in violation of Title 42, USCS 2000d, for a permanent injunction enjoining Defendants from carrying on the racially discriminatory aspects of such public housing system in the future, and for other appropriate relief.

3-18. The allegations of paragraphs 3 through 18 of Count I of this Complaint are incorporated herein by reference as paragraphs 3 through 18 of this Count II.

19. Defendants have applied for, have received and have employed Federal financial assistance in the construction of and otherwise in support of the numerous regular family public housing projects referred to in paragraph 11 hereof. Defendants have applied for and either have received or shortly will receive and will continue to receive Federal financial assistance for the proposed construction of and otherwise in support of the proposed projects. Defendants propose to use such assistance in the construction of and otherwise in support of the proposed projects.

20. By reason of the facts hereinabove alleged, and particularly by reason of the use of Federal financial assistance by Defendants in connection with and in support of their racially discriminatory public housing system and their proposed use of such assistance for the proposed construction of and otherwise in support of the proposed projects on the sites presently selected therefor, the rights of Plaintiffs and the class they represent, under Title 42, USCS § 2000d, have been and will continue to be violated, and Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances herein set forth.

WHEREFORE, Plaintiffs pray:

(1) That after a full hearing this Court declare that Defendants have been and are carrying on a racially discriminatory public housing system within the City of ⁶⁵....., State of ⁶⁶....., and that Plaintiffs and the class they represent have the right under Title 42, USCS § 2000d to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin Defendants from employing Federal financial assistance in carrying on and perpetuating the racially discriminatory aspects of their public housing system within the City of ⁶⁷..... and from employing Federal financial assistance in constructing or otherwise in support of the

proposed projects on any sites which have been selected in a racially discriminatory manner, or which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of _____; and

(3) That Plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT III

1-14. The allegations of paragraphs 1 through 14 of Count I of this Complaint are incorporated herein by reference as paragraphs 1 through 14 of this Count III.

15. Since 19____ substantially all of the sites selected by the Authority for regular family public housing projects have been in Negro neighborhoods and within the areas known as the Negro Ghetto. After 19____ the Authority sold and did not build regular family public housing projects upon sites previously acquired by it in white neighborhoods.

16. Each of the sites for the proposed projects is in a Negro neighborhood, and within the areas known as the Negro Ghetto.

17-19. The allegations of paragraphs 17 through 19 of Count I of this Complaint are incorporated herein by reference as paragraphs 17 through 19 of Count III.

WHEREFORE, Plaintiffs pray:

(1) That after a full hearing this Court declare that Defendants have been and are carrying on a racially discriminatory public housing system within the City of _____, State of _____, that such system is in violation of the rights of Plaintiffs and the class they represent under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and under Title 42 USCS §§ 1981 and 1983, and that Plaintiffs and the class they represent have the right under said Amendment and Title to have sites for regular family housing projects in the City of _____ selected in such locations as will alleviate and mitigate, not continue and strengthen, existing patterns of Negro residential and school segregation in the City of _____;

(2) That after a full hearing this Court permanently enjoin Defendants from carrying on and perpetuating the racially discriminatory aspects of their public housing system within the City of _____;

and from constructing the proposed projects on any sites which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of _____;

(3) That after a full hearing this Court order Defendants to submit for the approval of this Court a comprehensive plan for the selection of future sites of Defendants' public housing system which would eliminate the discriminatory aspects of such system, and retain jurisdiction until the same is effectively carried out and completed; and

(4) That Plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT IV

1-2. The allegations of paragraphs 1 and 2 of Count II of this Complaint are incorporated herein by reference as paragraphs 1 and 2 of this Count IV.

3-14. The allegations of paragraphs 3 through 14 of Count I of this Complaint are incorporated herein by reference as paragraphs 3 through 14 of this Count IV.

15-16. The allegations of paragraphs 15 and 16 of Count III of this Complaint are incorporated herein by reference as paragraphs 15 and 16 of this Count IV.

17-20. The allegations of paragraphs 17 through 20 of Count II of this Complaint are incorporated herein by reference as paragraphs 17 through 20 of this Count IV.

WHEREFORE, Plaintiffs pray:

(1) That after a full hearing this Court declare that Defendants have been and are carrying on a racially discriminatory public housing system within the City of _____, State of _____, and that plaintiffs and the class they represent have the right under Title 42, USCS § 2000d to end the employment of Federal financial assistance in connection with and in support of the discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin Defendants from employing Federal financial assistance in carrying on and perpetuating the racially discriminatory aspects of their public housing system within the City of _____ and from employing Federal financial assistance in constructing or otherwise in support of the Five Proposed Projects and the Twelve Proposed Projects on any sites which will have the effect of continuing and strengthening existing

patterns of Negro residential and school segregation in the City of
.....⁸⁰.....; and

(3) That Plaintiffs and the class they represent be given such other
and further relief as the Court may deem just and equitable.

.....⁸¹.....
Attorneys for Plaintiffs
By.....⁸².....

This form of complaint was adapted from the pleadings in the case
of Dorothy Gautreaux et al. v The Chicago Housing Authority, filed in
the United States District Court for the Northern District of Illinois.

The pleadings were graciously made available to the author through
the courtesy of Alexander Polikoff, Esq., counsel for the plaintiffs.

CHAPTER TWELVE

RIGHT TO BE FREE FROM DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS UNDER TITLE IX; THE REHABILITATION ACT OF 1973 AND THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974

- § 319. Actions Under 20 USCS § 1681
- § 320. Form of Complaint for Suits Under 20 USCS § 1681
- § 321. Actions Under 20 USCS § 1684
- § 322. Form of Complaint for Suits Under 20 USCS § 1684
- § 323. Actions Under Rehabilitation Act of 1973
- § 324. Form of Complaint for Suits Under the Rehabilitation Act
- § 325. Actions Under Equal Educational Opportunities Act of 1974
- § 326. Form of Complaint for Suits Under Equal Educational Opportunities
Act

§ 319. Actions Under 20 USCS § 1681

Public Law 92-318, Title IX, enacted June 23, 1972, provides
that "(a) No person in the United States shall, on the basis of
sex, be excluded from participation in, be denied the benefits of,
or be subjected to discrimination under any educational program
or activity receiving Federal financial assistance. . . ." It adds,
by way of exception that "This section shall not apply to an
educational institution which is controlled by a religious organi-
zation of the application of this subsection would not be consist-
ent with the religious tenets of such organization."² It further
adds that the section is not applicable to fraternities and sorori-

1. 20 USCS § 1681.

2. 20 USCS § 1681(3).