U. S. Department of Justice

Civil Rights Division

*Office of the Assistant Attorney General* *Washington, D.C. 20530*

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**MEMORANDUM**

TO: Executive Agency Civil Rights Directors

FROM: Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

SUBJECT: Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs

Title VI of the 1964 Civil Rights Act[1/] was enacted at a time when Federal grant programs were primarily programs of categorical or discretionary assistance. The Federal agency administering the grant program decided which entity would receive a grant. Beginning in the 1970's, there has been an increasing trend to replace categorical and discretionary grant programs with block grants and grants to continuing State programs. Under this approach, the recipients are usually States or political entities within a State. These entities in turn subgrant the assistance to other entities within the State.

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[1] This document was drafted specifically with reference to enforcement of Title VI, 42 U.S.C. § 2000d, et seq., which prohibits discrimination on the basis of race, color, and national origin in all Federal programs receiving Federal financial assistance. However, the principles set forth are equally applicable to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., which prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance; the federally assisted aspects of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in both federally assisted and federally conducted programs; and various fund-granting statutes that contain prohibitions against discrimination.

## I. THE NEED FOR GUIDANCE

Continuing State programs, and often block grants, are awarded on a continuing basis, usually in accordance with a statutory allocation formula. The primary recipient[2/] has significant authority as to how the program is administered. As a result, it is often very difficult for the Federal agency administering the program to obtain information about subrecipients, or even to know who the subrecipients are. In addition, many of the block grant statutes contain program-specific nondiscrimination provisions, which prohibit discrimination on identified bases that could be more inclusive than the cross-cutting statutes (e.g., religion might be included) and which apply to all programs funded under the statute. Many of these statutes provide the Attorney General with independent authority to seek judicial remedies against recipients who engage in a pattern or practice of discrimination.

In its June 1996 Report, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, the U.S. Commission on Civil Rights recognized that block grant programs alter the relationship between the State agencies administering the program and the Federal agency granting the funds. As the Report states:

> the relationship between Federal agencies and their State and local government recipients requires different enforcement procedures than those designed for ensuring Title VI compliance in programs operated by nongovernmental recipients of categorical grants.

Id. at 149.

The report further noted that:

> Under block grants and other continuing State

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[2] For purposes of this guidance, the terms "primary recipient," "primary block grant recipient," "State," and "State recipient" all refer to the entity that is awarded a block grant or State program grant directly from the Federal Government, and which then subgrants funds to subrecipients. Moreover, although this guidance specifically addresses block grants and continuing assistance programs, the principles are also applicable to any State-administered assistance programs.

> programs, States, in effect, assume the same civil rights responsibilities over their subrecipients that the Federal agencies have over State recipient agencies. . . . Although ultimately the Federal agencies remain accountable for Title VI compliance activities of their recipients and subrecipients, the State's broad discretion to redistribute Federal funds to subrecipients has prevented the Federal agencies from tracking the Federal dollars and retaining control over their program recipients and subrecipients.

Id. at 155.

The Commission, as well as many members of the Executive Order 12250 Advisory Group, have recommended that the Civil Rights Division issue procedural guidance as to how to enforce civil rights provisions in block grant and continuing State assistance programs. This Policy Guidance Document is being issued in response to these suggestions. We appreciate the valuable input that we received from the agencies in the Advisory Group as we developed this document.

## II. RESPONSIBILITIES OF FEDERAL AGENCIES ADMINISTERING CONTINUING STATE AND BLOCK GRANT PROGRAMS

It is important to remember that Federal agencies are responsible for enforcing the nondiscrimination requirements that apply to recipients of assistance under their programs, regardless of the type of program. It is clear that the cross-cutting civil rights statutes, i.e., Title VI, Title IX, Section 504, and the Age Discrimination Act, apply to continuing assistance programs and block grants, unless Congress clearly intended otherwise. As the Department's Office of Legal Counsel (OLC) explained in a January 18, 1982, legal opinion, "Applicability of Certain Cross-Cutting Statutes To Block Grants Under the Omnibus Budget Reconciliation Act of 1981":

> The [crosscutting] nondiscrimination statutes were intended to be statements of national policy applicable to all programs or activities receiving federal financial assistance, freeing Congress from the need to give subsequent consideration to their applicability on a program-by-program basis. Block grant funding falls within the literal terms of those statutes, and the nondiscrimination statutes should therefore be applied . . . unless Congress actually intended otherwise, or unless

> the block grants and the nondiscrimination statutes cannot be reconciled so as to give effect at all.
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> In light of the fundamental expression of congressional intent underlying the nondiscrimination statutes, it should be presumed that Congress would have debated or made specific its intent to change their applicability.

6 Op. Off. Legal Counsel 83, 113 (1982).

OLC summed up its 1982 opinion by stating: "in the absence of a clear expression of congressional intent to exempt a particular program from the obligations imposed by the four cross-cutting laws, those laws will be presumed to apply in full force." Id. at 83.

To the extent that program-specific nondiscrimination provisions are included in block grant legislation, they usually either add additional prohibited bases for discrimination, i.e., sex[3/] or religion; add coverage of employment discrimination, which is limited under Title VI; or provide for a more detailed enforcement scheme than that set forth in Title VI, should noncompliance be found. Federal agencies are responsible for the enforcement of both the cross-cutting statutes and the program-specific nondiscrimination provisions in the programs that they fund. As the Justice Department "Guidelines for the enforcement of Title VI, Civil Rights Act of 1964" ("Title VI Guidelines") state:

> Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance.

28 C.F.R. § 50.3(b).

Determining whether Title VI has been complied with is a responsibility of the Federal Government, not the recipient. A Federal agency is free to utilize all the resources at its disposal and to seek creative ways to gather necessary information to make preliminary compliance decisions. For

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[3] Title IX's prohibition against sex discrimination is limited to education programs and activities. The program-specific provisions have no such limitation.

example, Federal agencies may rely on States to issue findings, as long as those findings are subject to de novo review by the Federal agency. The final determination as to whether there is a violation remains the responsibility of the Federal agency. See Department of Justice regulations, "Coordination of Enforcement of Non-discrimination in Federally Assisted Programs," ("Coordination Regulations"), which state: "Where a federal agency requires or permits recipients to process Title VI complaints, the agency . . . shall retain a review responsibility over the investigation and disposition of each complaint." 28 C.F.R. § 42.408(c). The Federal agency must retain this responsibility because it is the Federal agency, and not the State recipient, that is authorized to commence an action to administratively enforce Title VI and ultimately suspend funds. Moreover, Federal agencies may only utilize States in this manner if States are willing to accept the responsibility.

Since enactment of the Civil Rights Restoration Act (CRRA), it has been a relatively straightforward task to determine the scope of this Federal agency responsibility. The CRRA defines the covered "program" as including all the operations of:

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; . . . any part of which is extended Federal financial assistance.

See 42 U.S.C. § 2000d-4a. Thus, when a Federal agency provides assistance to a State under a block grant to be used for correctional facilities, for example, Title VI will cover all the operations of the State department of corrections, not just the particular prison or part of the department of corrections that actually may be utilizing the Federal assistance.[4/]

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[4] Also covered is that part of the State that receives the assistance and distributes it to the entity that utilizes it. See 42 U.S.C. § 2000d-4a. Thus, in the example above, if a State has a formal grants administration office that is separate from the department of corrections, the activities of both that grants office and of the department of corrections are covered by Title VI.

The Coordination Regulations require that:

> Each state agency administering a continuing program which receives federal financial assistance shall be required to establish a Title VI compliance program for itself and other recipients which obtain federal assistance through it. The federal agencies shall require that such state compliance programs provide for the assignment of Title VI responsibilities to designated state personnel and comply with the minimum standards established in this subpart for federal agencies, including the maintenance of records necessary to permit federal officials to determine the Title VI compliance of the state agencies and the sub-recipient.

28 C.F.R. § 42.410

These basic principles for continuing State programs apply also to block grant programs. Using the above regulation as a framework, this Guidance Document provides Federal agencies with specific advice as to how to establish a compliance program under a block grant statute, including acceptable methods of utilizing primary recipients to ensure compliance by subrecipients. These methods assume that a primary recipient is willing to voluntarily undertake the responsibilities set forth. This Document makes a distinction between those responsibilities for assuring subrecipient compliance that may be delegated to a primary recipient that voluntarily agrees to the delegations as opposed to responsibilities that a Federal agency mandatorily imposes on all recipients, including primary recipients.

This Document provides guidance on how to ensure nondiscrimination in block grant-type programs. As a general matter, however, it is important to remember that block grant statutes give primary recipients a great deal of discretion as to how and to whom funds are subgranted. If a particular block grant statute prohibits imposition of any of the suggestions in this Document or if it specifies a particular method of enforcing nondiscrimination requirements, the particular provisions in the block grant statute would, of course, control. This Document provides guidance as to what ideally should be done to implement nondiscrimination requirements, assuming that the particular statute allows for such procedures and primary block grant recipients are willing to implement them. Agencies should attempt to implement as many of the suggestions as are feasible

considering their particular block grant or block grant-type statute.

## III. DEPARTMENT OF JUSTICE RECOMMENDATIONS

The Coordination Regulations require that State agencies administering continuing assistance programs establish a Title VI compliance program that includes assignment of Title VI responsibilities to designated State personnel and compliance with the minimum standards set forth in the Coordination Regulations, including the maintenance of records. See 28 C.F.R. § 42.410. Using these requirements as a foundation, and based on the discussion above, we recommend that Federal agencies take the following seven steps to ensure Title VI compliance in their block grant programs:

1. Federal agencies must obtain assurances of compliance from their primary recipients, and either the Federal agencies or their primary recipients must obtain assurances from their subrecipients. The assurances should state that they are provided as a condition for the receipt of Federal funds; that the recipient or subrecipient agrees to maintain records and submit reports on its programs; that all subrecipients, subcontractors, or subgrantees of the recipient or subrecipient will comply with Title VI; and that the assurance provides a right to judicial enforcement.

2. Federal agencies must require primary recipients to maintain the records necessary to permit Federal officials to determine the Title VI compliance of subrecipients, and primary recipients should require this information from subrecipients.

3. Where feasible, primary recipients should display prominently in reasonable numbers and places posters, which state that they operate programs subject to the nondiscrimination requirements of Title VI, summarize the requirements, note the availability of Title VI information from the recipient and the Federal agencies, and explain the procedures for filing complaints. Where appropriate, recipients shall ensure that materials and services are provided in languages other than English. Primary recipients should require subrecipients to likewise comply with these requirements.

4. Primary recipients should be encouraged to identify a

State employee as a Civil Rights Coordinator to be responsible for compliance with Title VI, which includes ensuring State and subrecipient compliance, responding to inquiries by subrecipients, serving as a contact person for complainants and with the Federal agency, etc. Depending on the size of the recipient (and number of beneficiaries served), this may be authorized as a collateral duty of an individual already designated pursuant to one of the other civil rights statutes;[5/]

5. Federal agencies may either:

(a) Ensure that primary recipients will forward any complaints that they receive to the Federal funding agency for processing,

or

(b) Allow a willing State recipient to establish a system to investigate and resolve complaints, upon the Federal agency's approval of a plan for such action. This system could involve referral of complaints to a State Human Rights or other State agency. However, the Federal agency must retain (i) the authority to supplement the investigation or investigate de novo, (ii) approval authority over any proposed resolution, and (iii) the ability to initiate formal enforcement action. Moreover, if this alternative is chosen, complainants still must be given the option of filing their complaints with the Federal agency .[6/]

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[5] Many primary recipients already have coordinators designated for other civil rights statutes because such designation is required under Title IX, Section 504, and the Americans with Disabilities Act (ADA). See, e.g., Department of Justice ADA Title II regulations at 28 C.F.R. § 35.107(a). Absent statutory or regulatory authority, a Federal agency cannot require a primary recipient to have a Title VI coordinator, but an agency should stress the value of having a liaison with whom to communicate in order to transmit information, informally resolve problems, and provide a point of contact knowledgeable about Title VI issues.

[6] In deciding whether to exercise alternative (b) with a willing primary block grant recipient, the Federal agency should consider whether the recipient staff who will be implementing these programs have the experience, knowledge, and skills to

6. Each primary recipient that wishes to enter into these delegations must submit a plan or method of administration (MOA) to the Federal agency specifying how it will implement the above responsibilities, i.e., who will be named the Civil Rights Coordinator, what the complaint procedures will be, etc. Whether the plan should be submitted annually or on some other schedule will depend on the nature of the program. Compliance with an approved plan could be made a special condition of the block grant, if the block grant statute allows it.

7. Federal agencies must establish a procedure for reviewing these State plans or MOA's to determine that they adequately set out a procedure for carrying out the delegated responsibilities. The Federal agency is responsible not only for overseeing the compliance of the primary recipient but, when it delegates responsibilities for subrecipient compliance, it also must oversee the primary recipient's procedures for ensuring compliance by those subrecipients.

## IV. BASIS FOR GUIDANCE

This guidance sets forth a comprehensive framework for carrying out the functions necessary to enforce effectively nondiscrimination requirements in federally assisted programs and activities. What follows is an explanation of the purpose of each function and a delineation of what can and cannot be delegated to non-Federal entities pursuant to this guidance document.

### A. Data Collection

Collection of data is essential to carrying out Title VI enforcement responsibilities. The Coordination Regulations at 28 C.F.R. § 42.406(a) require that:

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competently conduct a Title VI investigation and, if not, whether sufficient training can be provided to the State personnel. Despite Federal downsizing, many Federal agency civil rights offices may have more staff who are knowledgeable and capable of performing Title VI investigations than do State recipients. This is an assessment that has to be made program-by-program and perhaps primary recipient-by-primary recipient. It must be emphasized that, if alternative (b) is chosen, the primary recipient must to be willing to accept the delegation.

> Except as determined to be inappropriate . . . federal agencies . . . shall in regard to each assisted program provide for the collection of data and information from applicants for and recipients of federal assistance to permit effective enforcement of Title VI.

The Coordination Regulations then give various examples of the type of data that generally should be required, including data on the manner in which services will be provided by the program; the racial and ethnic composition of the eligible population; data concerning employment in the program, including the use of bilingual employees where necessary to service limited-English-proficient applicants and recipients; the racial and ethnic impact of the location of the program and any relocation involved in the program; and the racial and ethnic composition of planning or advisory bodies that are an integral part of the program. The Coordination Regulations also allow for the collection of additional data, such as demographic maps, to the extent that it is readily available or can be compiled with reasonable effort. 28 C.F.R. § 42.406(b).

Consistent with these Coordination Regulations, all agency Title VI regulations specifically require that recipients collect and provide access to information that is necessary to determine compliance. See, e.g., Department of Justice Title VI regulations, 28 C.F.R. § 42.106 (Compliance information).

We recognize that collection of data is often very difficult in block grant programs because of the vast discretion given to primary recipients and the inability or difficulty Federal agencies face in attempting to track Federal funds as they are redistributed to subrecipients. To the extent possible, Federal agencies are urged to establish procedures that will enable them to ascertain who receives funds that are distributed by State recipients. States should be required to keep data as to who their subrecipients are, and this information should be readily available to both the primary State recipient and to the Federal agency.

Where Federal agencies involve primary recipients in the collection of data, it may prove useful initially to discuss with those recipients what and how data should be collected. Consultation with primary recipients and even subrecipients may result in new and innovative ways to collect data, and Federal agencies should be open to such consultation. However, it is the responsibility of the Federal agency to make the final call as to what is useful and what is not as a result of this consultation

process. Where Federal agencies significantly deviate from the kinds of data collection requirements contemplated by the Coordination Regulations, the reasons for the deviation should be set forth in writing and made available for public inspection. See 28 C.F.R. § 42.406(f). By following this procedure, public accountability is built into the process, resulting in better, and more efficient data collection.

**B. Pre-award Reviews**

**1. Assurances**

Federal agencies, absent clear statutory command to the contrary, are responsible for ensuring that block grant recipients and subrecipients enter into contractually enforceable assurances of compliance for the life of the program. Agency Title VI regulations generally contain a provision with respect to the assurances that are required in continuing State programs. See, e.g., Department of Justice Title VI regulations at 28 C.F.R. § 42.105(d):

> (d) Continuing State programs. Any State or State agency administering a program which receives continuing Federal financial assistance subject to this regulation shall as a condition for the extension of such assistance:
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> > (1) Provide a statement that the program is (or, in the case of a new program, will be) conducted in compliance with this regulation, and
> >
> > (2) Provide for such methods of administration as are found by the responsible Department official to give reasonable assurance that the primary recipient and all other recipients of Federal financial assistance under such program will comply with this regulation.

Assurances are critical as they provide an additional basis to secure compliance. As explained by the Title VI Guidelines:

> Compliance with the nondiscrimination mandate of title VI may often be obtained more promptly by appropriate court action than by hearings and termination of assistance. Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of

assurance. . ."

28 C.F.R. § 50.3(I)(B)(1) (emphasis added).

The Fifth Circuit explained the importance of assurances in United States v. Marion County School District, 625 F.2d 607, 609 (5th Cir. 1980):

> As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court.

It is a Federal agency responsibility to provide the wording of any assurance of compliance and to determine how often assurances need to be collected. At a minimum, the assurance form should state clearly that the assurance is provided as a condition for the receipt of Federal funds; that the applicant or recipient agrees to maintain records and submit reports on its programs as required by the Federal agency; that the applicant or recipient will require subrecipients, subcontractors, or subgrantees to comply with Title VI; and that the assurance provides a basis for judicial enforcement.

In block grant programs, it may be difficult and/or impossible for Federal agencies to collect assurances from subrecipients. In such instances, the Federal agencies should require that their primary grant recipients collect assurances from subrecipients. However, the Federal agency should take steps to ensure that the primary grant recipient is actually carrying out the responsibility. This could be done in a number of ways. For example, the assurance signed by the primary recipient could include within it a statement that the primary recipient is responsible for collecting assurances from its subrecipients, and the Federal agency could condition the granting of funds on the primary recipient's carrying out that responsibility, unless a provision in a particular block grant statute would prohibit such a condition. The point to be emphasized is that if a Federal agency elects to involve primary recipients in the collection of assurances, the agency must ensure that the assurances are actually being collected.

### 2. Pre-Award Review Purpose

The pre-award review provides the Federal agency with a unique, and often overlooked, opportunity to voluntarily resolve

compliance problems. Although seldom followed in their entirety, often because of insufficient time to gather extensive information before grants are required statutorily to be awarded, section 42.407(b) of the Coordination Regulations sets forth steps that should be taken before Federal funds are granted:

> Prior to approval of federal financial assistance, the federal agency should make written determination as to whether the applicant is in compliance with Title VI . . . The basis for such a determination . . . shall be submission of an assurance of compliance and a review of the data submitted by the applicant.

Section 42.406(d) of the Coordination Regulations lists the types of data that should be submitted to and reviewed by Federal agencies prior to granting funds. In addition to submitting an assurance that it will compile and maintain records as required, an applicant should provide: (1) notice of all civil rights lawsuits (and, for recipients, complaints) filed against it; (2) a description of assistance applications that it has pending in other agencies and of other Federal assistance being provided; (3) a description of any civil rights compliance reviews of it during the preceding two years; and (4) a statement as to whether the applicant has been found in noncompliance with any relevant civil rights requirements.[7/]

The Coordination Regulations at § 42.407(b) further provide that where a determination cannot be made from the submitted data, the agency shall require the submission of additional information and take other steps necessary for making a compliance determination, which could include communicating with local government officials or minority group organizations and/or conducting field reviews. The purpose of reviewing this data is to determine if the recipient is in noncompliance with the substantive requirements of Title VI and, therefore, should not be awarded a grant, absent correction action. For example, a potential recipient's refusal to comply with a court order requiring corrective action in a discrimination case would be

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[7] The Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq., generally requires an agency to obtain approval (and a control number) from the Office of Management and Budget before information collection requests can be made. Agencies should check with their Paperwork Reduction liaisons to determine how to obtain control numbers. This Division's Coordination and Review Section will provide agencies with assistance, if necessary, in obtaining control numbers necessary to abide by this Guidance Document.

grounds for a refusal to award a grant.[8] However, the more likely situation is that an applicant will be a defendant in a discrimination lawsuit. In such a situation, one of the alternatives to fund termination discussed below, such as special conditioning of a grant's drawdown upon compliance with applicable court orders, may be the appropriate way to proceed. Similarly, if a review of data shows racial disparities between the eligible service population and the population actually served, it would be appropriate in the pre-award review to determine the reasons for this and to propose corrective action, if appropriate, as a special condition to the grant.

### 3. Alternatives to Fund Termination

Often a pre-award review will reveal a problem, which may or may not rise to the level of a violation. Agencies often ask what they should do when a problem is found. Should they or must they deny the grant? Title VI clearly states that there can be no "refusal to grant" or "refusal to continue assistance" to any recipient until there has been "an express finding on the record after an opportunity for hearing, that there is a failure of compliance." Even then, no funds can be terminated or denied until a determination is made that voluntary compliance cannot be achieved. 42 U.S.C. § 2000d-1.[9] However, there are many alternatives to consider before initiating a fund termination proceeding. As the Civil Rights Commission Report stated, too little attention has been paid to these alternatives. See Commission Report at 148. These alternatives are set forth below and should be considered in appropriate cases.[10]

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[8] If an agency decides to refuse a grant award for noncompliance with Title VI, the normal Title VI enforcement procedures apply. The agency must make a finding of noncompliance, make a determination that voluntary compliance cannot be achieved, and prevail at an administrative hearing. See 42 U.S.C. § 2000d-1. However if the block program statute involved has specialized procedures for the termination or denial of assistance, those procedures would control.

[9] In addition, no funds may be terminated or denied until 30 days after the head of the Federal agency files a full report with the House and Senate committees having jurisdiction over the program involved explaining the circumstances for the proposed action. 42 U.S.C. § 2000d-1.

[10] Although included here under "Pre-Award Reviews," these alternatives should be considered whenever problems are found, whether during a pre-award review, post-award review, or

### a. Alternative Dispute Resolution (ADR)

Agencies are strongly encouraged to make use of alternative dispute resolution (ADR), whenever appropriate. Both the President and the Attorney General have encouraged the use of alternative dispute resolution in matters that are the subject of civil litigation. See Executive Order 12988 and Attorney General Order OBD 1160.1. The Administrative Dispute Resolution Act of 1996, Pub. L. 104-320 (codified in relevant part at 5 U.S.C. § 571 et seq.), authorizes the use of ADR to resolve administrative disputes.

ADR involves the use of a neutral third party or mediator to resolve a matter. Each agency should consult with its ADR office for additional information as to how ADR is applied by that agency. For general information about ADR and who your agency ADR contact is, you may contact the Department of Justice's ADR office at (202) 616-9471.

### b. Cautionary Language

In the Justice Department, we recently developed language that our funding components have inserted in grant award letters when we have a civil rights concern (which, based on the evidence available at the time of the award, does not rise to the level of an actual violation), and the applicant is cooperating with an ongoing civil rights investigation or is attempting to resolve the concern. The insert reads:

> In reviewing an application for funding, we consider whether the applicant is in compliance with federal civil rights laws. A determination of noncompliance could lead to a denial of assistance or an award conditioned on remedial action being taken. We are aware that the Department's Civil Rights Division is conducting an investigation involving possible civil rights violations. The Civil Rights Division has advised us that your agency is cooperating with its investigation, and we have taken that into account in deciding to approve your grant application.

This type of language puts the applicant on notice that there may be a potential problem and that the funding arm is

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complaint investigation.

aware of what the civil rights arm is doing. It also warns that a failure to cooperate could lead to a denial of funds in the future. The language also may encourage the applicant to enter into voluntary compliance negotiations and engage in alternative dispute resolution, in appropriate cases, to resolve the alleged discrimination at issue without a formal finding or the completion of an investigation. A major advantage of this approach is that it avoids the due process concerns raised when deferral or special conditioning is utilized because, in this case, the funds are being awarded, i.e., there is no "refusal to grant," which would trigger the right to an administrative hearing.

Whether this alternative can be utilized fruitfully in a block grant context, however, will depend again on the nature of the block grant program. If block grants or subgrants are allocated by statutory formula and there is little or no Federal agency discretion in whether they are awarded, its utility may be diminished. Thus, in the case of a subrecipient that is notorious for civil rights violations, formal enforcement procedures may be necessary before funds can be denied.

### c. Special Conditions

Federal agencies may obtain voluntary compliance in a pre-award context by entering into an agreement with the applicant in which the applicant agrees to certain conditions in exchange for being awarded the funds. The terms of the agreement become effective once the assistance is granted and are attached as a special condition to the assistance agreement. A pre-award special condition may, for example, grant provisional relief, require that certain aspects of the recipient's program be monitored, and/or require that the recipient provide additional information relating to the discrimination allegations.

It is important to remember, however, that if an applicant refuses to agree to a proposed special condition, the agency either has to negotiate a different condition, award the grant without the condition, seek to obtain compliance "by any other means authorized by law," (which usually means referral of a violation finding to the Department of Justice for litigation, see p. 17), or institute an administrative proceeding to refuse to grant assistance. A Federal agency cannot summarily refuse to grant assistance because the applicant does not agree to the special condition proposed by the agency. Federal agency authority to do that effectively would bypass the requirement that, prior to refusing to grant the funds, the agency must provide an opportunity for an administrative hearing.

Utilizing special conditions in a block grant context where subrecipients are involved will require the cooperation of the primary block grant recipient. This is because the timing of the subgrant probably will be under the control of the primary recipient. For this procedure to work, negotiations concerning a special condition must take place prior to a subgrant award. Normally, once a subgrant is awarded, i.e., once the contract is entered into, it is too late to enter into a special condition.

A complicating factor in the use of the special condition procedure in a block grant program involves the mechanism for allocating the block grants and subgrants. If the funds are allocated by a statutory formula, there may be no basis for entering into a special condition because the grant or subgrant is, in effect, awarded automatically by statute. However, if the block grant recipient has discretion as to who will receive a subgrant, the special condition procedure can be utilized as described.

Again, primary block grant recipients may have valuable information that can help in determining what would be appropriate to include in a special condition involving a subrecipient. Thus, consultation by the Federal agency with the primary block grant recipient can be useful. However, ultimately it remains the responsibility of the Federal agency to determine if the special condition remedies any noncompliance.

### d. Other Nonlitigation Alternatives

The Title VI Guidelines at § 50.3(I)(B)(2) list four other approaches, short of litigation or fund termination, that may be available when civil rights concerns are discovered. The possibilities listed include:

> (1) consulting with or seeking assistance from other Federal agencies . . . having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries.

Agencies are urged to consider all of these, as appropriate.

### e. Deferral of Action on an Application

If a Federal agency has reason to believe that an applicant for assistance is in noncompliance with Title VI, the agency may defer action on the application pending completion of its pre-award review. In such situations, it should notify the applicant and attempt to secure voluntary compliance. If this proves unsuccessful, the Federal agency must decide whether it will make a formal finding of noncompliance and initiate a proceeding to refuse to grant assistance, i.e., give the applicant an opportunity for hearing. See Title VI Guidelines, 28 C.F.R. § 50.3(II)(A). It is important to recognize that the Federal agency cannot defer action on an application indefinitely, thereby letting a deferral become a de facto denial of assistance, which denies an applicant an opportunity for hearing.

It should be pointed out that deferral may not be possible in continuing State programs and block grant programs. The Title VI Guidelines provisions on continuing assistance programs recognize that once an award has been made for a specific or indefinite period of time, "no funds due and payable pursuant to that grant, loan, or application may be deferred or withheld without first completing" formal Title VI enforcement procedures. Whether deferral is possible will depend upon the particular block grant program and how the funding mechanism operates in that program.

### f. Referral to the Department of Justice for Litigation

In lieu of initiating formal fund termination proceedings, all Federal agencies' Title VI regulations contain a provision that allows them to refer violations to the Department of Justice to effect compliance "by any other means authorized by law," which generally means that the Department of Justice will initiate litigation to enforce compliance. This approach is consistent with principles underlying Title VI: the goal is to stop discrimination, not to withhold funds from ultimate beneficiaries.

It is important to note that, prior to referral to the Justice Department, a Federal agency must advise the recipient or applicant of its failure to comply and of the agency's determination that voluntary compliance cannot be achieved. 42 U.S.C. § 2000d-1. Referrals for enforcement of violation findings should be directed to the Civil Rights Division. Federal agencies are strongly encouraged to discuss the facts of particular cases with Division officials prior to referring those cases for enforcement.

### C. Post-Award Reviews

Federal agencies are required to maintain an effective program of post-award compliance reviews. See Coordination Regulations, 28 C.F.R. § 42.407(c). Federal agency Title VI regulations reiterate this requirement. See, e.g., Department of Justice Title VI Regulations, 28 C.F.R. § 42.107(a).

Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews. Compliance reviews may be targeted when there is (1) specific evidence of an existing violation, (2) a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]," or (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria." See United States v. Harris Methodist Fort Worth, 970 F.2d 94 at 101 (5th Cir. 1992)[11/]

Agencies are cautioned that they should not select targets randomly for compliance reviews but, rather, they should base their decisions on neutral criteria or evidence of a violation.

#### 1. Utilization of Block Grant Recipients in the Compliance Review Process

Federal agencies have discretion to utilize primary block grant recipients in targeting and conducting subrecipient compliance reviews, and we encourage agencies to use their primary recipients in this way, assuming the available primary recipient staff are adequately trained in Title VI and the primary recipient is willing to undertake the duties. Utilizing primary recipients in this process can be a useful method for increasing the resources devoted to ensuring Title VI compliance. Primary recipients may be able to provide valuable insights into identifying targets for compliance reviews, actually conducting desk audits or on-site reviews of subrecipients, interpreting data received from subrecipients, making preliminary

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[11] However, this discretion is not unfettered. In Harris the Fifth Circuit found that a Title VI compliance review involves an administrative search and, therefore, Fourth Amendment requirements for reasonableness of a search are applied. The Court looked at: (1) whether the proposed search is authorized by statute; (2) whether the proposed search is properly limited in scope; and (3) how the administrative agency designated the target of the search. Id. at 101.

recommendations as to compliance or noncompliance, and attempting to achieve voluntary compliance (although any voluntary compliance agreement resolving a violation finding would have to be approved by the Federal agency).[12/]

Furthermore, Federal agencies should not assume that only primary recipients can carry out these responsibilities. There may be situations in which, for example, the recipient is a State welfare office but the Title VI responsibilities for that program can be delegated to the State's civil rights enforcement agency. Federal agencies should explore whether there are State civil rights offices available, because those offices may have staff already trained in civil rights enforcement who can be utilized to assist primary recipients in ensuring Title VI compliance. State agencies may also be able to delegate responsibilities to each other as Federal agencies have done in certain circumstances (e.g., the Department of Education (ED) has delegation agreements with several smaller agencies whereby those smaller agencies delegate to ED responsibilities for ensuring Title VI compliance in educational facilities funded by both entities). Federal agencies will have to exercise creativity in encouraging State agencies to undertake these responsibilities voluntarily because there is little legal authority for requiring States to undertake them as a condition of funding.

### 2. Federal Role After Delegating Responsibilities

As mentioned, a Federal agency should not delegate responsibilities to a primary recipient unless it ensures that the primary recipient is trained in how to carry out those responsibilities. The Federal agency may need to provide extensive technical assistance and training to its primary recipients. This Division's Coordination and Review Section can be of assistance in providing Title VI training to your primary recipients, although our abilities are limited by the small size of the Section's staff. In addition, we have published a Title VI Legal Manual, available on the Internet at: “http://www.usdoj.gov/crt/grants_statutes/indexpg.htm” as well as an Investigation Procedures Manual, which also is available at the same address.

Having delegated responsibilities to primary block grant recipients, a Federal agency must exercise oversight to ensure that those responsibilities are being carried out in an effective

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[12] Indeed, many of the program-specific nondiscrimination provisions mandate the involvement of the Governor in achieving voluntary compliance.

manner. For example, if a Federal agency delegates to a primary recipient the responsibility for conducting compliance reviews, the Federal agency must ensure that the compliance reviews are actually being conducted and are being conducted in an effective manner.

If it becomes clear that a primary recipient is not performing delegated responsibilities, the Federal agency should rescind any delegations. In such a situation, the Federal agency is responsible for ensuring that the rescinded responsibilities are carried out.

## D. Complaints

### 1. Federal Agency Responsibilities

Federal agencies are responsible for processing complaints of discrimination filed with them over which they have jurisdiction. Just as with compliance reviews, the Federal agency always retains the responsibility for determining whether a particular set of facts constitutes noncompliance with Title VI, whether voluntary compliance can be achieved, whether a proposed settlement constitutes satisfactory compliance with the statute, and whether enforcement action should be commenced. See Coordination Regulations at 28 C.F.R. § 42.408, and individual agency Title VI regulations, e.g., Department of Justice Title VI regulations at 28 C.F.R. §§ 42.107(b), (c), and (d) and § 42.108.

### 2. Responsibilities that may be delegated

Federal agencies may delegate certain complaint responsibilities to primary recipients (assuming primary recipient willingness to accept the responsibilities), including:

1. investigative authority to gather facts involving complaints against subrecipients or against themselves;[13/]

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[13] Section 504 and Title IX regulations require recipients to establish grievance procedures for processing complaints filed against themselves. See, e.g., Department of Justice Section 504 regulations at 28 C.F.R. § 42.505(e) and Department of Education Title IX regulations at 34 C.F.R. § 106.8(b). Grievance procedures have proven to be an effective way to resolve concerns without Federal involvement. Recipients are encouraged to establish this type of mechanism under Title VI, as well.

2. authority to make preliminary findings; and

3. authority to attempt voluntary resolution.

Agencies are encouraged to delegate such responsibilities as they believe their recipients can effectively carry out, considering the abilities of the primary recipient staff and the willingness of the primary recipient to undertake the responsibilities. As with compliance reviews, Federal agencies may wish to explore whether some complaint responsibilities can be delegated to a State human rights agency or other State entity.

**3. <u>Responsibilities that may not be delegated</u>**

Federal agencies, if they choose to delegate complaint processing responsibilities, always retain review authority over any actions by primary recipients concerning complaint processing. This means that Federal agencies always retain authority:

1. to conduct supplementary or <u>de novo</u> investigations;

2. to approve, modify, or reject recommended findings;

3. to approve, modify, or reject proposed voluntary resolutions; and

4. to initiate formal enforcement action.

Because complaints involve individuals who believe they have been discriminated against, it is important that the Federal agency ensure that program beneficiaries and the general public have faith in the integrity of the complaint process. More than in any other area, Federal agencies need to be vigilant in ensuring that the general public has faith in the complaint process. Therefore, § 42.408(c) of the Coordination Regulations provides that "where a federal agency requires or permits recipient[s] to process Title VI complaints, the agency shall ascertain whether the recipients' procedures for processing complaints are adequate." If it is discovered that the procedures are not adequate, the delegations should be rescinded. Section 42.208(c) further provides that "[t]he federal agency shall obtain a written report of each such complaint and investigation and shall retain a review responsibility over the investigation and disposition of each complaint."

### 4. Basic Recipient Responsibilities

It is important that program beneficiaries and the general public be made aware of the Federal agency's continuing responsibilities in the area of complaints. Recipients that have been delegated responsibilities involving processing of complaints must inform complainants of the continuing role of the Federal agency. In addition, regardless of whether primary recipients have been delegated complaint responsibilities, all recipients shall, where feasible:

> . . . display prominently in reasonable numbers and places posters which state that the recipients operate programs subject to the nondiscrimination requirements of Title VI, summarize those requirements, note the availability of Title VI information from recipients and the federal agencies, and explain briefly the procedures for filing complaints.

28 C.F.R. § 42.405(c)

In addition, § 42.405(d) provides that materials should be provided in languages other than English where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program needs service or information in a language other than English in order effectively to be informed of or to participate in the program. Services likewise should be provided in other languages when necessary to prevent exclusion from a program by a group that constitutes a significant number or proportion of the population served.

## V. MODEL FOR UTILIZATION OF PRIMARY BLOCK GRANT RECIPIENTS TO CARRY OUT CIVIL RIGHTS RESPONSIBILITIES

Given the diversity of block grant and continuing assistance programs, we doubt that a "one-size-fits-all" model can be developed that will be useful for all Federal agencies. What this guidance sets forth is where Federal agencies have discretion and where they do not; what the Federal agency may delegate (assuming willingness of a primary recipient to accept a delegation), and what it may not. It is meant to encourage exploration for what works best while ensuring that Title VI is enforced.

Experience will show where additional guidance is necessary.

However, some Federal agencies already have had experience with involving States in the administration of Title VI and program-specific nondiscrimination provisions under continuing State assistance programs, and those programs have provided us with valuable ideas that we considered in developing this guidance. In particular, we have examined the extensive obligations imposed on States and recipients by the Department of Labor (DOL) under the Job Partnership Training Act (JPTA). JPTA encompasses several programs that provide funds for job training and placement for the economically disadvantaged, youth, dislocated workers, migrant and seasonal farmworkers, Native Americans, and other workers facing difficulties in gaining employment. Generally, JPTA funds are distributed by means of formula grants through States to service delivery areas across the country and then to various providers of training. It is significant to note that DOL established these procedures solely on the authority of Title VI, and not based on any specific authority with JPTA. See 29 U.S.C. § 1577.[14/]

Under the JPTA scheme, both recipients and DOL have the authority and responsibility to investigate complaints of discrimination, and complainants have the discretion to file a complaint with either the recipient or DOL. 29 C.F.R. §§ 34.42, 34.43(b). If a complaint is filed with a recipient and processing is not completed within 60 days, or the complainant is dissatisfied with the recipient's proposed resolution, the complainant may submit the complaint for a de novo investigation by DOL. 29 C.F.R. § 34.43(f). If DOL finds a violation in a program operated below the State-office level, the governor, upon notification of such a violation, is directed to begin negotiations with the recipient to secure compliance. 29 C.F.R. § 34.45(a)(2). If compliance cannot be achieved to DOL's satisfaction, DOL may pursue its traditional enforcement methods.

JPTA regulations also require that each recipient (other than a small recipient that serves or employs fewer that 15 people or a service provider) identify an Equal Opportunity Officer to implement and ensure compliance with the nondiscrimination and equal opportunity provisions of JPTA. 29 C.F.R. § 34.22. States also are required to submit to DOL methods of administration (MOA's) that address how they intend to

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[14] 29 U.S.C. § 1577, the nondiscrimination provision applicable to the JPTA program, states that Title VI, other nondiscrimination laws, and other nondiscrimination prohibitions (political affiliation or belief) apply to the JPTA programs, and specifies several enforcement mechanisms that are similar to Title VI.

fulfill each affirmative responsibility under Title VI, including complaint processing procedures, a monitoring system to ensure compliance by recipients, and training for personnel responsible for implementing the nondiscrimination provisions. 29 C.F.R. § 34.33.[15/] DOL reviews the MOA's for compliance with its requirements and, where deficiencies are found, it recommends corrective action.

## VI. Conclusion

A Federal agency that incorporates the seven components set forth in Justice Department recommendations into its civil rights processes will have in place the means to ensure compliance in its block grant programs and to leverage its compliance resources by involving willing block grant recipients in its compliance program. I hope this Policy Guidance Document will assist Federal agencies in responding to the challenges of enforcing Title VI in block grant programs and help define the roles and responsibilities of the Federal grant agency and the primary block grant recipient. We look forward to a continuing dialogue on these issues and welcome your comments and feedback.

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[15] The MOA's address how the State will execute the necessary assurances, equitably distribute services among the eligible populations, designate an Equal Opportunity Officer, disseminate nondiscrimination policy statements in written materials and oral announcements, conduct data collection and record keeping, establish procedures to ensure corrective action, and ensure accessibility for individuals with disabilities. 29 C.F.R. § 34.33.