U.S. Department of Justice
Civil Rights Division

CIVIL RIGHTS FORUM

Volume 14, No.2 **Spring 2000**

Department of Justice and Montgomery County, Maryland enter into voluntary agreement addressing police practices

Douglas Duncan, Montgomery County Executive, discusses the County's voluntary agreement regarding police services with the Department of Justice. Looking on (l to r) are: Walter Bader, President, Fraternal Order of Police Local 35; Charles Moose, Chief of Police; Bill Lee, Acting Assistant Attorney General for Civil Rights; Lynne Battaglia, U.S. Attorney for Maryland; and Linda Plummer, President, Montgomery County Chapter, NAACP.

On January 14, 2000, the Department of Justice (DOJ) entered into a Memorandum of Agreement with Montgomery County, Maryland, the Montgomery County Department of Police (MCPD), and the Fraternal Order of Police, Montgomery County Local 35 (FOP), resolving a discrimination complaint filed by the Montgomery County Chapter of the NAACP. This Agreement, negotiated under the authority of Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968, establishes new and enhanced procedures for managing the MCPD, including guidelines for traffic enforcement, documentation of traffic stops, public outreach and public reporting, complaint procedures, and supervision and training.

Title VI and the Safe Streets Act together prohibit discrimination on the basis of race, color, national origin, sex, or religion by law enforcement agencies that receive financial assistance from DOJ.

Continued on page 2

In This Issue . . .

Department of Justice and Montgomery County, Maryland enter into voluntary agreement addressing police practices

Continued from page 1

The Civil Rights Division's Coordination and Review Section began investigating this complaint in March 1997. The complaint alleged that MCPD officers engaged in racially discriminatory treatment of African Americans, including the use of excessive force; discourteous conduct; the discriminatory selection of persons for traffic stops, pedestrian stops, and searches; and failing to adequately receive, investigate, and monitor discrimination complaints filed by minority citizens. The NAACP forwarded to the Section more than 150 complaints from individuals who believed Montgomery County officers discriminated against them because of their race or national origin. These individuals also filed complaints with the MCPD's Office of Internal Affairs.

In October 1999, Bill Lann Lee, Acting Assistant Attorney General for Civil Rights; Lynne Battaglia, United States Attorney for the District of Maryland; Noel Brennan, Deputy Assistant Attorney General for the Office of Justice Programs; and other DOJ officials met with Montgomery County officials and the President of the FOP to summarize the Division's investigation and recommendations for compliance, and to offer an opportunity to engage in voluntary compliance negotiations as provided by Title VI and the Safe Streets Act. The County, the MCPD, and the FOP expressed an interest in entering into negotiations to resolve the complaint.

Acting AAG Lee with County Executive Duncan and U. S. Attorney Battaglia.

This Agreement is DOJ's first negotiated settlement resolving a police misconduct case that includes the FOP as a party.

Under the Agreement, MCPD officers will document all traffic stops (regardless of whether a citation is issued) by recording the driver's race, ethnic origin, and gender, as well as information about the reason for the stop and the nature of any post-stop action. MCPD will enter this data into a computer and analyze it to determine the need for appropriate nondisciplinary actions, including changes in policies and practices, additional training, counseling, or supervisory monitoring. The MCPD also is implementing a new computerized system for tracking all complaints and investigations, and it has changed the way complaints are accepted, investigated, and resolved to ensure timely, complete, and fair investigations.

Further, the MCPD will engage in community outreach to explain the duties of officers, dangers of the job, and methods for filing complaints or compliments. It will hire an expert to review and evaluate its training program, and will provide new and increased training for officers and supervisors. The MCPD will issue semiannual public reports providing traffic stop statistics by race as well as summary information on compliments and complaint investigations. Finally, the parties to the Agreement will select an independent consultant to monitor the MCPD's implementation of the Agreement. The consultant also will assist the MCPD with compliance efforts and issue periodic public reports.

The Agreement reflects the commitment of the County, the MCPD, and the FOP to provide nondiscriminatory law enforcement for Montgomery County. It illustrates how parties can work together to amicably resolve complaints without resort to contested litigation. It also illustrates how the administrative processes of Title VI and the Safe Streets Act can be used to ensure nondiscriminatory police services. These laws supplement the police misconduct provisions of the Violent Crime Control and Law Enforcement Act of 1994, which is enforced by the Civil Rights Division's Special Litigation Section. DOJ has entered into three consent decrees resulting from suits filed under this latter statute (Steubenville, Ohio; Pittsburgh, Pennsylvania; and the State of New Jersey, which also was filed under the Safe Streets Act). There is contested litigation under this statute in process involving Columbus, Ohio, and the Special Litigation Section also currently is conducting 13 "pattern or practice" police misconduct investigations.

A copy of the Memorandum of Agreement and the cover letter transmitting it can be found on the Coordination and Review Section's website at www.usdoj.gov/crt/cor. ❖

Federal agencies to revise Title VI, Section 504, and Age Discrimination Act regulations

Deputy Assistant Attorney General Anita Hodgkiss explains the purposes of the reg - ulatory revision project as COR Chief Merrily Friedlander and Deputy Chief Andy Strojny look on.

Department of Transportation participants Joseph Austin, Rosalind Knapp, and David Tochen (left to right) examine proposed regulatory changes.

Pursuant to Executive Order 12250, Acting Assistant Attorney General Bill Lann Lee recently requested Federal agencies that grant financial assistance to jointly issue amendments to their regulations implementing Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, to incorporate the broadened definitions of "program" and "program or activity" contained in the Civil Rights Restoration Act of 1987 (CRRA).

These statutes (and Title IX of the Education Amendments of 1972) apply to "programs" or "programs or activities" that receive Federal financial assistance. Prior to the CRRA, the statutes applied only in the particular portion of the entity that received the assistance. The CRRAbroadened the definitions of " program" and "program or activity," so that all the operations of an entity that receives assistance are covered, not just the particular part receiving the funds. For thirteen years it has been the government's position that the broadened definitions effectively amended any prior regulatory definitions, even if the regulations had not been amended to reflect the later statutory amendments. However, a recent Third Circuit decision in Cureton v. NCAA, 198 F.3d 107 (1999), held that, since the Title VI regulations of the Department of Health and Human Services (HHS) and the Department of Education (ED) do not incorporate the broad statutory definitions contained in the CRRA, the disparate effects standard contained in the agencies' Title VI regulations apply only to those programs that actually receive Federal financial assistance.

Continued on page 4

COR's Josh Mendelsohn deals with the specifics of revising the agencies' regulations, as Disability Rights Section Chief John Wodatch and COR's Elizabeth Keenan follow the presentation.

Federal agencies to revise Title VI, Section 504, and Age Discrimination Act regulations

Continued from page 3

Plaintiffs had sued on behalf of a class of African American student-athletes, claiming that NCAA minimum requirements for freshman students to compete in intercollegiate activities and to receive athletic scholarships, such as minimum SAT scores and a minimum grade point average, have a discriminatory impact on African Americans in violation of Title VI. Cureton reverses a district court decision that the NCAA is subject to Title VI because it is an indirect recipient of Federal funds through its member schools, and that requirements imposing minimum SAT scores did have a disparate impact and therefore were illegal. (See Cureton v. NCAA, 37 F. Supp. 687 (E.D. Pa. 1999)).

On appeal, the Third Circuit considered the issue of whether the NCAA is subject to the nondiscrimination requirements of Title VI, and whether there is a private right of action to enforce Federal agency Title VI regulations prohibiting practices that have the effect of discriminating. The Department of Justice argued in its amicus brief that the HHS and ED Title VI regulations prohibited grant recipients from discriminating "through contractual or other means" by utilizing criteria or methods of administration that have a racially disproportionate impact.

The Third Circuit observed in Cureton that the discriminatory effects test was created by regulation and not by Title VI itself. The court noted that the HHS and ED regulations implementing Title VI do not incorporate the broad statutory definitions of "program" and "program or activity" contained in the CRRA. Therefore, the court concluded that the disparate effects standard contained in the Title VI regulations applies only to those programs that actually receive Federal financial assistance. The Department of Justice filed an amicus brief in support of appellees' petition for rehearing en banc. In that brief, the Department argued that the broadened definitions contained in the CRRAshould be read into existing Title VI regulations, despite the fact that the regulations were never amended to incorporate those statutory changes. The petition for rehearing was denied on February 9, 2000.

Although Federal agencies continue to believe that the broadened statutory definitions of "program" and "program or activity" should be read into existing Title VI regulations, the Civil Rights Division is taking steps, in light of the Cureton decision, to amend all Title VI regulations to reflect the CRRA. Because Section 504 and the Age Discrimination Act also were amended by the CRRA, agencies are working to revise their regulations implementing those statutes as well. (The broadened definitions of "program" and "program or activity" already have been incorporated into the proposed common Title IX rule for 24 agencies. 64 Fed. Reg. 58568 (Oct. 29, 1999).) Although these modifications are considered to be technical in nature, the agencies are proceeding by notice and comment rulemaking as suggested by the Cureton court.

In light of the differences in regulatory text among the various agencies, the agencies are proposing to issue a "joint" rather than a "common" rule. In a joint rule, all agencies share the same preamble, but each agency has its own regulatory text. HHS and ED, the two agencies implicated in the Cureton decision, are proceeding individually, rather than as part of the joint rule. ED published its proposed regulation to amend its Title VI, Section 504, Age Discrimination Act, and Title IX regulations (since ED is not part of the Title IX common rule) on May 5, 2000. 65 Fed. Reg. 26464 (May 5, 2000).

The proposed joint rule would impose no new substantive or procedural obligations on entities receiving Federal financial assistance. Rather, it would simply preserve the interpretation of the regulations that existed prior to the Cureton decision. ✦

Civil Rights Division undertakes interagency housing and schools initiative

Since January 1999, the Department of Justice's Civil Rights Division has undertaken a collaborative effort between its Educational Opportunities Section and its Housing and Civil Enforcement Section to promote voluntary residential integration that will assist school systems in operating desegregated schools. This effort, entitled the Schools and Housing Opportunity Initiative, is designed to address continuing residential segregation, particularly in school districts that have been required to desegregate their schools. As part of the Initiative, an interagency working group composed of representatives from the Departments of Justice, Education, and Housing and Urban Development, meets quarterly to discuss schools and housing issues.

The primary objective of the initiative is to develop and implement housing remedies that expand housing opportunities for persons of all races, particularly in communities with school desegregation plans. These remedies may include housing counseling programs, marketing campaigns, subsidized housing mobility programs, home buyer and renter clinics, down payment assistance and mortgage credit programs, and other housing remedies that expand housing choice.

One example of the work being done through the Initiative is a recent Consent Order filed in United States v. Tunica County School District, a long-standing Mississippi school desegregation case. In 1999, the school district filed a motion with the Federal district court for approval to build a new elementary school and to modify elementary school attendance zone lines. This matter appeared ideal for a combined schools and housing initiative because new housing was being planned in the community. After several months of negotiations, the United States and the school district reached agreement upon a different location for the new school and modified attendance zone lines.

Additionally, in connection with the provisions of the Consent Order with the Tunica County School District, the county's Board of Supervisors has adopted a resolution to implement a county-wide affordable housing plan. Under that plan, the county will provide housing counseling services, home buyer seminars, and fair housing training. This plan includes working with the North Delta Planning Development District, a regional planning commission, to create developer incentives for construction of affordable housing in the county, and the Mississippi Home Corporation, a State housing finance agency, to provide funding for the county's counseling and education program and to develop affordable housing in the county. As part of the Order, the school district has agreed to market the services of the affordable housing plan to families with school age children, to make school facilities available for housing-related activities, and to use a State mortgage assistance program for teachers as a marketing tool to attract and keep teachers in the district.

The Educational Opportunities and Housing and Civil Enforcement Sections are identifying additional cases that may benefit from the development of creative housing choice remedies as a means to increase educational and housing opportunities, and to promote both school and housing integration. In addition to cases currently being handled by the Division, candidates for this initiative also may include matters under investigation by the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity Office, and the Department of Education's Office for Civil Rights.

The link between school and housing segregation is well known -- segregated neighborhoods lead to segregated neighborhood schools. The persistent existence of segregated neighborhoods also often reflects a history of intentional public and private discrimination, as well as current discrimination in the housing market. This Initiative reflects a cooperative effort by two Sections in the Division to work with other Federal agencies, State and local governments, and private organizations to develop creative approaches to promoting school and housing desegregation. ✦

So ordered . . . Court cases of note

Eleventh Circuit affirms that Alabama's English-only driver's license testing policy violates Title VI

The Eleventh Circuit Court of Appeals has affirmed a district court decision that Alabama's English-only driver's license testing policy discriminates against Alabama's residents with limited English proficiency. Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), affirmed, 197 F.3d 484, (11th Cir. 1999), rehearing and suggestion for rehearing *en banc* denied, 211 F.3d 133 (11th Cir. Feb. 29, 2000) (Table, No. 98-6598-II), petition for certiorari filed May 30, 2000 (No. 99-1908), concerns whether failure to provide federally assisted services to individuals with limited English proficiency violates Title VI of the Civil Rights Act of 1964, and clarifies the application of the Supreme Court's decision in Lau v. Nichols, 414 U.S. 563 (1974), in a noneducational context.

Neither the district court nor the Eleventh Circuit found it necessary to determine what the adverse impact was on any particular national origin group. As the district court stated:

"There is no dispute over the fact that persons who are not fluent in English are much more likely than those who are fluent to have been born in a foreign country. Whether persons who are fluent only in Spanish are natives of Spain, Mexico,

or Argentina . . . is irrelevant. Whatever foreign country they may be from, an English only rule would have a disparate impact on the basis of their national origin."

On this issue, the Court of Appeals pointed out that Alabama did not contest the district court's findings of fact " -- either as to the disparate impact of the policy on non-English speaking license applicants or the pretextual nature of the policy justifications offered by the State." (See the article in the Summer 1999 issue of the Civil Rights Forum for a complete discussion of the district court's decision.) Instead, the Court opined that Alabama challenged only the district court's conclusions of law, arguing that "an English language policy, even if exerting a disparate impact on the basis of national origin, cannot ever constitute national origin discrimination." The Eleventh Circuit stated, "We conclude otherwise."

The decision also addressed a number of Title VI issues that have been recently contested. The court held that the lawsuit was not barred under the Eleventh Amendment to the Constitution; that Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under Federal regulations prohibiting disparate impact discrimination against statutorily protected groups; and that the district court did not err in deciding, on the merits, that Alabama's English-only official policy constituted a disparate impact on the basis of national origin.

Eighth Circuit backs Ku Klux Klan's participation in Missouri Adopt-a-Highway Program

On March 31, 2000, the Eighth Circuit Court of Appeals issued a decision declaring that the Missouri Department of Transportation (MDOT) may not deny an application by the Knights of the Ku Klux Klan (the Klan) to participate in the State's Adopt-A-Highway program. Cuffey v. Mickes, 208 F.3d 702, Nos. 99-2334, 99-2501 (8th Cir. Mar. 31, 2000), petition for reh'g and reh'g en banc denied (May 22, 2000). The Klan had applied to pick up litter along a part of Missouri's interstate freeway system, as part of Missouri's Adopt-A-Highway program. Under the Adopt-A-Highway Program, organizations volunteer to pick up litter along a portion of the roadway and the State places signs that identify the volunteer organization.

In affirming the district court's grant of summary judgment for the Klan for injunctive and declaratory relief, the Eighth Circuit repudiated several rationales given by the MDOT for denying the Klan's application. In addition, the court declared that the "evidence leaves us with but one conclusion: that the State denied the Klan's application based on the Klan's beliefs and advocacy."

The State of Missouri had stated, as one of its rationales, that allowing the Klan to participate in the Adopt-A-Highway Program would violate Title VI of the Civil Rights Act of 1964 and could cause the State to lose Federal highway funding. Citing to the Supreme Court's decision in National Collegiate Athletic Ass'n v.

Continued on page 7

Eighth Circuit backs Ku Klux Klan's participation in Missouri Adopt-a-Highway Program

Continued from page 6

Smith, 525 U.S. 459, 468 (1999), the Eighth Circuit first determined that the Klan is not a direct recipient of Federal funds. The court then determined that, "[s]o long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI," and that the Klan, as a voluntary participant in the program, is free to determine its own membership.

In response to the State's next rationale -- that the Klan does not adhere to all State and Federal nondiscrimination laws -- the court stated that the direct application of any such specific law would violate the Klan's freedom of political association, require the Klan to censor its message, and inhibit its constitutionally protected conduct. The court then found to be pretextual another of the State's rationales -- a recent regulation prohibiting applicants with a history of unlawfully violent or criminal behavior from participating in the Adopt-A Highway Program. The regulation had became effective a year after the Klan filed its application, but the State had never asked an applicant other than the Klan about its criminal history.

The fourth rationale given by the State -- that the MDOT is prohibited under a State Executive Order from allowing discriminatory practices on State facilities and from contracting with an organization that discriminates -- also was found to be pretextual by the court. The court had discovered from the list of participants in the Adopt-A-Highway Program that many other adopters also have discriminatory membership criteria, and it used the Knights of Columbus (which limits its membership to Catholic men) as an example.

The Civil Rights Division and the Civil Division of the Department of Justice (DOJ) had filed an amicus brief with the Eighth Circuit in support of the MDOT. In its brief, DOJ argued that Missouri must deny the Klan's application in order to not violate Title VI, since the MDOT receives Federal funds and the Adopt-A-Highway is a "program or activity" subject to Title VI's prohibition on discrimination on the basis of race, color, and national origin. DOJ also argued that, if Missouri allowed the Klan to participate, the Klan's racially exclusionary membership practices would be incorporated into the MDOT's program. Accordingly, Missouri would be sanctioning unlawful conduct that denied individuals the opportunity to participate in its Adopt-A-Highway Program on the basis of race.

Further, DOJ argued that the district court incorrectly placed the burden of proof on Missouri to show that its regulations are reasonable and viewpoint neutral. Because the removal of litter does not constitute expressive activity, Missouri's regulations are not restrictions on "speech." As a result, DOJ argued, it is the Klan's burden to prove that a "substantial or sole motivating factor" behind Missouri's denial of the application was the Klan's exercise of its First Amendment rights. DOJ also argued that Missouri has greater leeway to regulate access to its Adopt-A-Highway Program because it involves an element of "government speech" -- a sign placed by the State to acknowledge participation. ✥

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Attorney General

Janet Reno
Attorney General

Eric H. Holder, Jr.
Deputy Attorney General

Daniel Marcus
Acting Associate Attorney General

Bill Lann Lee
Acting Assistant Attorney General

William Yeomans
Chief of Staff

Anita Hodgkiss
Stuart J. Ishimaru
Loretta King
Deputy Assistant Attorneys General

Merrily A. Friedlander
Section Chief

Theodore R. Nickens
Deputy Section Chief (Program)

Andrew M. Strojny
Deputy Section Chief (Legal)

Allen Payne
Editor

Contributing to this issue:
Pam Brewington, Mona Diaz, Diane Houk (Housing and Civil Enforcement Section), Elizabeth Keenan, Josh Mendelsohn, Allen Payne, Andrew Strojny

Secretarial support: Rita Craig

This newsletter is available in alternate formats. Contact the Coordination and Review Section at (202) 307-2222 (voice) or (202) 307-2678 (TDD)

Toll-free Title VI Information Line: 1-888-TITLE06