U.S. Department of Justice
Civil Rights Division

CIVIL RIGHTS FORUM

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Ralph Boyd takes helm as Assistant Attorney General for Civil Rights

Ralph Boyd is congratulated by U.S. District Court Judge Joseph H. Young after being sworn in as Assistant Attorney General for Civil Rights.

Ralph F. Boyd, Jr. assumed his new position as Assistant Attorney General for Civil Rights on July 30, 2001, following his unanimous consent confirmation by the Senate. Mr. Boyd was nominated by President George W. Bush in March 2001 to head the Department of Justice's Civil Rights Division.

Attorney General John Ashcroft, in a statement announcing Mr. Boyd's confirmation, said that "Ralph Boyd will play a key role in our duty to protect the rights of all Americans." The Attorney General continued: "Under his leadership, the Civil Rights Division will be guided by the principle that no one should feel outside the protection of the law. We will all benefit from his years of experience and his dedication to the pursuit of justice. I am pleased to welcome him to the Department, and I look forward to working with him."

Mr. Boyd returns to the Department of Justice from the law firm of Goodwin Procter in Boston, where he was a partner in the trial department. From 1991 to 1997, Mr. Boyd served as an Assistant United States Attorney in the major crimes unit of the United States Attorney's office in Boston, where he investigated and prosecuted bank fraud, firearms, homicide, narcotics trafficking, and gang violence cases. Boston Police

Continued on page 2

In This Issue . . .

Ralph Boyd takes helm

Continued from page 1

Commissioner Paul Evans credited Mr. Boyd for the dramatic drop in deadly street violence in Boston through Mr. Boyd's work with a Boston police task force of state and federal prosecutors, police officers, streetworkers, and probation officers.

The son of the founder of the Schenectady Chapter of the NAACP in New York, Mr. Boyd has been recognized for his efforts as a strong advocate for civil rights and life in urban America. He served on the Governor's Diversity Advisory Board, the Governor's Judicial Nominating Committee, and the Diversity Committee of the Boston Bar Association. Mr. Boyd represented low-income tenants in a Boston dispute over unsafe and substandard housing, and was given a *Pro Bono* Award by the Massachusetts Tenants Association in 1990. He also received the Greater Boston Federal Executive Board African American Achievement Award in 1996.

Mr. Boyd is a graduate of Haverford College and Harvard Law School, where he edited the *Civil Rights -- Civil Liberties Law Review*. He also interned with the Southern Poverty Law Center and clerked for U.S. District Court Judge Joseph H. Young. From 1986-1990, Mr. Boyd was a litigation associate at the Boston law firm of Ropes and Gray.

"The Civil Rights Division's interagency coordination activities under Executive Order 12250 provide a vehicle for increasing the effectiveness of the federal government's overall civil rights enforcement in the administration of federally assisted programs," Mr. Boyd said. " I look forward to strengthening our partnership with other agencies, and to providing whatever assistance we can to help them in their own enforcement efforts." ✥

Civil Rights Division combats "backlash" discrimination in the wake of terrorist attacks

Coordination and Review Section attorney Selin Cherian-Rivers provides an overview of federal agencies' actions at a November 1 interagency meeting. Panelists Assistant Attorney General Ralph Boyd; Special Counsel on the Post-9/11 Discriminatory Backlash, Joseph Zogby; and Equal Employment Opportunity Commission attorney John Schmelzer look on.

Since the terrorist attacks of September 11, 2001, over 200 discriminatory, retaliatory acts have allegedly been directed against Arab Americans, Muslim Americans, Sikh Americans, and South Asian Americans, and others perceived to be of Middle Eastern descent. The Civil Rights Division responded immediately to reports of these actions by investigating these allegations of national origin and religion-based discrimination, including murders, assaults, arson, vandalism, and threats.

To ensure that these and other allegations of violence or discrimination are addressed promptly and effectively, Assistant Attorney General Ralph F. Boyd, Jr. directed the Civil Rights Division's National Origin Working Group (NOWG) to help combat the post-September 11 discriminatory backlash by referring allegations of discrimination to the appropriate authorities and by conducting outreach to vulnerable communities to provide information about government services.

Outreach to the affected communities dealing with post-September 11th backlash discrimination has been a major tool in combating such discrimination. On October 9, 2001, the Division's Coordination and Review Section, in conjunction with the NOWG, organized a community forum in the Chicago area to address the concerns of that area's sizeable Arab, Muslim, Sikh, and South Asian American communities. Similar forums were held in Dearborn, Michigan on November 20 and in Arlington, Virginia on January 16, 2002.

Civil rights representatives of several federal agencies including the Department of Transportation, the Equal

Continued on page 3

Civil Rights Division combats "backlash" discrimination in the wake of terrorist attacks

Continued from page 2

Employment Opportunity Commission, the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, the U.S. Attorney's Office for the Northern District of Illinois, and the Department of Justice's Community Relations Service, participated in a panel presentation of their agencies' jurisdiction and a Question and Answer session with the audience on national origin and religious discrimination.

The coordination of federal agency efforts to combat backlash discrimination also has been a major focus of the Division. On November 1, 2001, the Coordination and Review Section met with civil rights officials from 32 federal agencies and other components of the Justice Department at an Executive Order 12250 interagency meeting. A major agenda item at that meeting was a discussion of activities that agencies have undertaken to address retaliatory discrimination since September 11th.

For updated information on the Division's activities in response to backlash discrimination, refer to the National Origin Working Group's website at: *http://www.usdoj.gov/crt/nordwg.html*. The website also provides access to other agency websites and further information on their activities in addressing retaliatory discrimination.

Assistant Attorney General Boyd issues clarifying memorandum concerning access to programs for limited English proficient individuals

On August 11, 2000, former President Clinton signed Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency." The Executive Order requires each agency that provides federal financial assistance to publish guidance clarifying and explaining Title VI obligations toward limited English proficient (LEP) persons. The Civil Rights Division must approve these documents before publication.

The legal basis for Executive Order 13166 is explained in policy guidance published by the Department of Justice on the same day entitled "Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination Against Persons With Limited English Proficiency." This "DOJ LEP Guidance" was referenced in and issued concurrently with the Executive Order.

As the DOJ LEP Guidance details, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Department of Justice regulations enacted to effectuate this prohibition bar recipients of federal financial assistance from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination" because of their race, color, or national origin. As applied, the regulations have been interpreted to require foreign language assistance in certain circumstances.

On October 26, 2001, Assistant Attorney General Ralph Boyd issued a clarifying memorandum to all federal departments and agencies stressing the Administration's commitment to the goals of Executive Order 13166 and re-affirming the earlier DOJ LEP Guidance on the factors to consider when addressing the needs of LEP individuals under Title VI of the Civil Rights Act of 1964. The memorandum notes that the Supreme Court case, Alexander v. Sandoval, 121 S. Ct. 1511 (2001), did not invalidate Title VI's disparate impact regulations, nor did it invalidate Executive Order 13166. That case simply held that there is no private right of action to enforce the regulations. In that same memorandum, Mr. Boyd emphasized the Administration's desire that the public be afforded an opportunity to comment on proposed agency LEP guidance and directed that each agency determine whether notice and comment under the Administrative Procedure Act and formal regulatory impact review is appropriate.

"As evidenced by my action clarifying my resolve on this issue, the letter and spirit of Executive Order 13166 remains," stated Mr. Boyd in connection with the issuance of his October 26 memorandum. "The flexible, four-factor LEP analysis continues to be our recommended approach to identifying and addressing the needs of LEP individuals; and our commitment to effective and meaningful access to all federally conducted and federally assisted programs and activities has not lessened."

Prior to Mr. Boyd's memorandum, several agencies had published guidance to their recipients on how to ensure meaningful access to programs and activities for LEP persons in compliance with the disparate impact regulations of Title VI of the Civil Rights Act of 1964. Many other agencies were poised to publish similar guidance but held off in expectation of the Assistant Attorney General's action. In accordance with this memorandum, all agencies, including those which previously published guidance, will be required to solicit additional public comment on their proposed LEP guidance.

Continued on page 4

Assistant Attorney General Boyd issues clarifying memorandum

Continued from page 3

"Effective and long-lasting implementation demands two goals: (1) LEP measures which meaningfully bridge the language divide encountered by LEP individuals, and (2) LEP measures which are practically possible and fiscally achievable by program managers seeking to bridge that divide," declared Mr. Boyd. "The August 11, 2000 DOJ LEP Guidance, further clarified by my October 26 memorandum, is intended to, and I believe, does, ensure that both these important goals have their place in addressing the needs of limited English proficient individuals."

Mr. Boyd subsequently issued another memorandum to all federal funding agencies. In that January 11, 2002 memorandum, he urged the agencies to expedite publication of their LEP recipient guidance documents.

In addition to requiring further guidance to assist recipients in addressing the needs of LEP beneficiaries, Executive Order 13166 went a step further -- it also required that each federal agency create and implement a plan that ensures similar meaningful access to LEP persons for the agency's federally conducted programs and activities. Thus, the Executive Order applies the same standards for LEP access to the federal government that it applies to recipients of federal assistance. In response, over forty agencies had submitted final or preliminary plans (called "federally conducted plans" or "LEP implementation plans") prior to Mr. Boyd's October 26 action. Links to some of these plans appear on COR's website at: *http://www.usdoj.gov/crt/cor/13166.htm*.

"This was an important step," said Merrily Friedlander, Chief of the Coordination and Review Section, which is charged with ensuring the effective implementation of Executive Order 13166. She continued: "While many agencies, such as the Social Security Administration, the Federal Emergency Management Agency, and others already were taking steps toward ensuring meaningful access to persons who are LEP, the legal requirements of Title VI itself do not apply to federal agencies. With the Executive Order's requirement for all agencies to provide such access, recipients can see that we are only holding them to the same standards we apply to ourselves."

"While we cannot declare victory simply by virtue of having guidance documents and plans in place, the government has moved closer to defeating national origin discrimination in this country over the last year," said Ms. Friedlander. "We expect Assistant Attorney General Boyd's action to accelerate these efforts with our partners in federal civil rights offices and with recipients across the nation."

Civil Rights Division produces award-winning Title VI video

Jim Vance, a Washington, D.C. television news anchor, explains the historical significance of Title VI of the Civil Rights Act of 1964 in a new video produced by the Civil Rights Division's Coordination and Review Section.

A video produced by the Civil Rights Division's Coordination and Review Section (COR), entitled "Understanding and Abiding by Title VI of the Civil Rights Act," has won the Bronze Summit Creative Award for COR contractor, SRB Productions, Inc., of Washington, D.C., in an international competition among more than 3,000 entries.

The 23-minute video familiarizes applicants, recipients, and beneficiaries of federally assisted programs, federal funding agencies, and the general public about what Title VI and its regulations require, how they apply to federally assisted programs, how they are enforced, and how voluntary compliance with their requirements can be achieved. Title VI is the landmark civil rights statute that prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance.

Continued on page 5

Civil Rights Division produces award-winning Title VI video

Continued from page 4

Jim Vance, a local television news anchor in Washington, D.C., narrates the video.

The close-captioned video briefly introduces Title VI and explains its significance – a historical reminder, perhaps, for Baby Boomers and their parents but, increasingly, a necessity for the generation or more that has come of age, or to this country, since the enactment of Title VI in 1964.

Using professional actors, the video employs several vignettes based on real-life situations to illustrate examples of intentional discrimination and retaliation and policies that result in unjustified disparate effects. The video also illustrates national origin discrimination that may result from a failure to provide services in languages other than English for individuals who are limited English proficient. Each vignette concludes by demonstrating how potentially unlawful discriminatory actions could have been avoided.

In one of the video's vignettes, "Mr. Burley" wonders whether he is being discriminated against, as his attempts to obtain referrals from a federally funded employment services agency don't seem to pan out.

The employment services agency's "Joanna" doesn't react well to Mr. Burley's announcement that he is filing a discrimination complaint. She may be retaliating against him in violation of Title VI.

Early viewer feedback has been very positive. Audiences have commented favorably on the use of realistic, program-based scenarios to illustrate and buttress the video's straightforward discussions of legal requirements and theories of discrimination. Other viewers liked the video's emphasis on practical solutions to everyday situations and challenges, which promote voluntary compliance with the nondiscrimination requirements of Title VI and its regulations.

The Title VI video is one component of COR's technical assistance and outreach initiatives under Executive Order 12250, which assigns responsibility to the Department of Justice for coordinating the governmentwide enforcement of Title VI and related statutes. COR has distributed the video to federal funding agencies and to public entities and private organizations that previously expressed interest in receiving Title VI training and outreach materials. Close-captioned versions of the video are available in Spanish, Korean, Vietnamese, and Chinese.

Organizations interested in receiving a copy of the Title VI video should write to:

Video Request
Coordination and Review Section
Civil Rights Division,
Department of Justice,
P.O. Box 66560
Washington, D.C. 20035-6560

or e-mail COR at:
www.corcrt@usdoj.gov. ❖

Civil Rights Division publishes *Title IX Legal Manual* and revised *Title VI Legal Manual*

The Civil Rights Division's Coordination and Review Section published on January 11, 2001 a *Title IX Legal Manual,* which provides an overview of the legal principles of Title IX of the Education Amendments of 1972 and its regulations. The *Manual*, which is available on the COR website at *www.usdoj.gov/ crt/cor/coord/ ixlegal.html,* provides guidance to federal agencies concerning a wide variety of federally assisted education and training programs and activities covered by Title IX that are operated by recipients *other than* "traditional" education institutions, such as colleges, universities, or elementary and secondary schools.

"Nontraditional" recipients that administer educational and training programs, such as libraries, museums, arts organizations, and law enforcement training academies, have been covered by Title IX since its enactment in 1972. However, many of them became subject to Title IX regulations for the first time when the Title IX common rule was published by 21 federal agencies on August 20, 2000. Therefore, the *Manual* was developed to provide a general guide for these recipients by focusing on court cases, regulations, and issues related to Title IX compliance. The *Manual* contains specific sections on the scope of Title IX's coverage of educational and training programs and activities; employment discrimination; sexual harassment; and the various specific Title IX prohibitions.

Traditional education institutions have been subject to Department of Education regulations and guidance since 1975. For more specific information on Title IX issues in the context of these traditional educational institutions, readers should contact the Department of Education's Office for Civil Rights or review the materials on their website at: *www.ed.gov/offices/OCR/ocrprod .html.*

On January 11, COR also published a revised version of its *Title VI Legal Manual*, first published in 1998, which reflects developments in the law relating to the enforcement of Title VI of the Civil Rights Act of 1964 and its regulations. This *Manual* also is available on the COR website at *www.usdoj.gov/crt/cor/ coord/vimanual.html.* The revised *Manual* is more user-friendly and contains an Index and a Table of Authorities.

Aside from issues unique to each statute, both *Manuals* address various topics applicable both to Title VI and Title IX, and their regulations, including: federal financial assistance; recipients; disparate treatment and disparate impact theories of discrimination; retaliation; agency methods to evaluate compliance and enforce compliance; private right of action and individual relief through agency action; and the Department of Justice's role in enforcing each statute. ❖

Federal Highway Administration responds favorably to recommendations of Civil Rights Division's Title VI Technical Assistance Review

The Federal Highway Administration (FHWA) has adopted, in whole or in part, virtually all of the 21 recommendations resulting from the Civil Rights Division's Technical Assistance Review of Title VI enforcement in the Federal Aid Highway Program. This review was undertaken with the full cooperation and support of FHWA.

In a letter to the Coordination and Review Section, FHWA's Executive Director stated that "[i]mplementing the supportive recommendations contained in the [Technical Assistance Review] report can be expected to move the Federal Highway Administration's programs and activities closer to constitutional ideals of fair and equitable treatment."

The review made findings and recommendations to enhance Title VI planning, technical assistance, and training to recipients; to improve the organization, staffing, and coordination necessary to implement a comprehensive Title VI enforcement program in a large, complex, block grant-type program such as the Federal Aid Highway Program; and to develop improved Title VI policies and procedures, including complaint investigation standards and procedures. The review endorsed

Continued on page 7

Federal Highway Administration responds favorably to recommendations

Continued from page 6

FHWA's proactive, systematic, and interdisciplinary "preventing discrimination" approach to Title VI compliance. This approach incorporates civil rights concerns into all aspects of program implementation, rather than relying primarily on formal legal enforcement to achieve compliance with Title VI.

The review also offered various recommendations regarding civil rights staff participation in FHWA's interdisciplinary teams, FHWA's assessment of recipient compliance in the intergovernmental partnership context of the highway program, and outreach to beneficiaries.

The review further encouraged and supported FHWA's efforts to develop "best practices," particularly for collecting and analyzing data to assess the impacts of transportation investment decisions on minority communities, and for increasing the meaningful participation and involvement of minority communities in transportation decisionmaking.

A Title VI Technical Assistance Review is a focused assessment of an agency's compliance and enforcement of Title VI in a selected federally assisted program. It is undertaken cooperatively with the funding agency to yield helpful and practical recommendations to strengthen and improve that agency's enforcement of Title VI.

The FHWA review was the Coordination and Review Section's second Title VI Technical Assistance Review. The first review, completed in 1999, focused on the General Services Administration's (GSA) Surplus Personal Property Donation Program. The recommendations of that review also were adopted and resulted in establishment of a new, formal Title VI enforcement program at GSA. A third review of Title VI enforcement in the Department of Labor's Unemployment Insurance Program currently is underway.

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Collecting federal data on race and ethnicity: toward a more accurate reflection of American diversity

Are you a "Caublinasian"? Several years ago, Tiger Woods caught the public's interest when he announced that he considered himself to be a Caublinasian -- a term he invented to describe his multi-racial identity. With Census 2000, the federal government gave people such as Woods 57 new categories to account for their diverse racial heritage.

The new categories provided in Census 2000 are a result of the federal government's decision in 1997 to revise the standards for collecting federal data on race and ethnicity. These standards require, among other things, that federal agencies offer individuals the opportunity to select one or more race categories for federal data collection purposes. The standards are the result of a lengthy review by the Office of Management and Budget (OMB), which began in 1993, and included active participation by the general public and over 30 federal agencies. Census 2000 is the first nationwide implementation of the revised standards.

According to OMB, all agency race tabulations should reflect a minimum of ten categories:

– the five single race categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or other Pacific Islander; and White);

– the four multiple race categories (American Indian or Alaska Native *and* White; Asian *and* White; Black or African American *and* White; American Indian or Alaska Native *and* Black or African American); and

– a "balance" category that comprises all additional multiple race combinations.

In addition, under the revised standards, the terms Hispanic and Latino are considered ethnic, rather than racial, categories.

To help agencies implement these standards, OMB published a document entitled *"Provisional Guidance on the Implementation of the 1997 Standards for the Collection of Federal Data on Race and Ethnicity" (Provisional Guidance).* This document, issued on December 15, 2000, updates earlier guidance by an OMB led interagency group. To view the *Provisional Guidance*, log on to the OMB website at *http://www.whitehouse.gov/omb/inforeg/statpol.html.* On January 16, 2001, OMB issued a notice in the *Federal Register* of the availability of the *Provisional Guidance* and requested that comments on the document be submitted to OMB by March 19, 2001. See 66 Fed. Reg. 3829 (January 16, 2001).

Continued on page 7

Collecting federal data on race and ethnicity: toward a more accurate reflection of American diversity

Continued from page 6

Early data from the 2000 Census indicate that many individuals availed themselves of the option of selecting more than one race. For example, 1.76 million people who identified themselves as Black also indicated a second racial designation. [*See Washington Post*, March 7, 2001, at A01; *see also www.census.gov*].

Legislative redistricting and equal employment opportunity monitoring are among the first statutory uses of the data collected on race and ethnicity using the revised standards.

OMB and the interagency group responsible for developing the *Provisional Guidance* will continue to review and refine it, and subsequently will issue a final version after all data from Census 2000 becomes available and the standards are implemented. All *new and revised* recordkeeping or reporting forms submitted to OMB for approval must conform to the 1997 standards. In addition, all *existing* record or reporting forms must be revised to conform to these standards no later than January 1, 2003.

Pursuant to Executive Order 12250, which addresses the consistent and effective governmentwide enforcement of Title VI of the Civil Rights Act of 1964 and related statutes, the Civil Rights Division notified the 28 federal funding agencies on January 11, 2001 of their obligation to conform to the revised standards. The Division's Coordination and Review Section is available to assist agencies with any questions on this matter.

Department of Justice issues *Guidance Document* addressing nondiscrimination in federally conducted education and training programs

The Department of Justice has provided guidance to assist federal agencies as they implement Executive Order 13160's prohibitions against discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in federally conducted education and training programs. This *Guidance Document*, entitled "Ensuring Equal Opportunity in Federally Conducted Education and Training Programs," was published in the *Federal Register* on January 18, 2001.

The premise of Executive Order 13160 (issued on June 23, 2000) is that the federal government should hold itself to at least the same principles of nondiscrimination that it applies to the educational programs of recipients of federal financial assistance. Toward that end, the Executive Order mandates that no individual shall be excluded from participation in, denied the benefits of, or subjected to discrimination on the basis of a protected characteristic in any federally conducted education or training program.

Federally conducted education and training programs and activities include all education programs or activities "conducted, operated, or undertaken by" an executive department or agency. The federal government operates many such programs, some of which are long-term formal academic institutions such as Department of Defense schools for the dependent children of military personnel and elementary and secondary schools operated by the Department of Interior's Bureau of Indian Affairs.

Other examples include the Graduate School operated by the Department of Agriculture and the Department of Justice's law enforcement training center in Quantico, Virginia. Executive Order 13160 also covers shorter-term training programs such as employment discrimination training conducted by the Equal Employment Opportunity Commission, crime prevention training offered to the public, and job training programs for federal employees.

The *Guidance Document* addresses a number of important issues, including the scope of covered programs, applicable legal principles, examples of discriminatory conduct, enforcement procedures, remedies, and agency reporting requirements. It also makes clear that the Civil Rights Division will provide advice and technical assistance to assist federal agencies in achieving full compliance with the requirements of the Executive Order.

Federal agencies (including the Department of Justice) are required by Executive Order 13160 to establish procedures for receiving and reviewing complaints within 90 days of the issuance of the *Guidance Document*. In addition, the *Guidance Document* directs federal agencies to develop outreach materials to advise individuals about their rights under the Executive Order and the appropriate procedures for filing complaints. Agencies also must provide to the Department of Justice reports of complaints received under Executive Order 13160. The first report is due March 31, 2002.

Publication of this *Guidance Document* and the development of agency enforcement procedures and outreach materials represent important first steps in achieving the mandate of Executive Order 13160: to ensure equal opportunity in all federally conducted education and training programs.

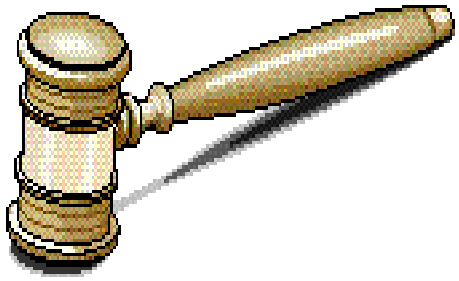
The *Guidance Document* can be accessed on the Coordination and Review Section's website at *www.usdoj.gov/crt/cor/13160.htm.*

So ordered . . . Court cases of note

Supreme Court addresses scope of private rights of action under Title VI regulations

On April 24, 2001, a closely divided Supreme Court issued its opinion in *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001), holding that a private right of action does not exist under Title VI of the Civil Rights Act of 1964 to enforce agency regulations forbidding funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." The Supreme Court determined that neither as originally enacted nor as later amended does Title VI display an intent to create a private right of action against recipients of federal financial assistance to enforce these disparate impact regulations.

This issue arose in a private suit for injunctive relief brought by Martha Sandoval, representing all otherwise qualified persons with limited English proficiency seeking Alabama driver's licenses, challenging the State of Alabama's decision to stop providing testing for driver's licenses in languages other than English. Prior to 1991, the Driver's License Division of the Alabama Department of Public Safety (DPS) administered written driver's license examinations in approximately 14 foreign languages. In 1991, following ratification of a state constitutional amendment declaring English the official language of Alabama, the DPS adopted an



"English-only" policy requiring that all portions of the driver's license examination process be administered only in English, and forbidding the use of interpreters, translation dictionaries, or other interpretive aids, even if privately provided.

Before the Supreme Court, DPS did not challenge the validity of the disparate impact regulations, nor did it challenge the district court's factual findings that it had violated the regulations. Instead, it argued that there was no private right of action for individuals to enforce the disparate impact regulations.

In its majority opinion, the Court reaffirmed its prior decisions that Congress had implicitly created a right of action under Title VI for individuals alleging *intentional* race and national origin discrimination. However, because discriminatory *effects* are prohibited only by the disparate impact regulations and not by Title VI itself, the Court held that no private cause of action exists to enforce the disparate impact regulations.

In a memorandum issued October 26, 2001 to all federal departments and agencies on services to limited English proficient persons, Assistant Attorney General Ralph Boyd addressed the impact of *Sandoval* on federal enforcement of Title VI. Mr. Boyd rejected the view that *Sandoval* impliedly invalidated Title VI's disparate impact regulations, noting that *Sandoval* "holds principally that there is no private right of action to enforce the Title VI disparate impact regulations ... [and] did not address the validity of those regulations." As a result, Mr. Boyd stressed, Executive Order 13166 regarding limited English proficient persons remains in force.

Courts continue to address same-sex, peer-on-peer sexual harassment issues

Recently, several courts have held that an individual who is harassed by a homosexual peer of the same sex may have a claim under Title IX. This usually occurs when a male student makes unwelcome sexual advances to another male. But what about when the harasser (who is heterosexual) is not asking for sexual favors but subjects the victim to a campaign of taunts and other hostile actions because that person is perceived to be gay? There has not always been a clear legal standard to address the situation where harassment occurs on the basis of sexual orientation. Two recent settlements shed light on this type of harassment based on sexual orientation.

In *Lovins and United States v. Pleasant Hill Public School District*, Case No. 99-0550-CV W-2 (W.D. Mo. 1999), Jeremy Lovins, a male student, alleged that from the eighth grade through the eleventh grade, he was subjected to harassment on the basis of sex (ostensibly because other students believed that he was gay); that Jeremy and his parents repeatedly informed school officials of the harassment but that the harassment continued; and that Jeremy was eventually subjected to an assault and forced to leave school because of the harassment.

On July 20, 2000, the Department of Justice filed a complaint-in-intervention brief in this same-sex peer

Continued on page 10

So ordered . . .

Continued from page 9

harassment case arguing that the school district violated Title IX and the Equal Protection Clause of the Fourteenth Amendment by failing to respond appropriately to the harassment of a student on the basis of sex. In other words, the school district was deliberately indifferent to the verbal and physical peer-on-peer harassment on the basis of sex committed by students under the school's direct disciplinary authority.

The Department argued that the district violated federal law when it failed to rectify the situation of which it had actual notice. The Department sought judicial relief to ensure that the school district will operate a school system that provides an educational environment that is free of sexual harassment for its students.

The district court entered a consent order on July 31, 2000. In addition to monetary relief for Jeremy Lovins, the school district agreed to injunctive relief, including: conducting a climate assessment of student-to-student and teacher-to-student relations within its schools; development of a comprehensive plan to identify, prevent, and remedy harassment and discrimination on the basis of sex and sexual orientation; educating and training teachers, staff, and students about the operation of the policy and procedures; maintaining written records of complaints and investigations; and filing implementation reports with the Justice Department and the district court.

The Department also filed an *amicus* brief in another same-sex peer harassment case, *Putman v. Board of Education of Somerset Independent School*, C.A. No. 00145 (E.D. Ky. 2000), in which Bradley Putman, a high school student, alleged that the school district discriminated against him on the basis of sex in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment by failing to take appropriate steps to end a campaign of sexual harassment – including taunts and conduct connoting homosexuality – by his male peers. The harassment included three written death threats; repeated, unwanted sexual contact; offensive and hostile verbal abuse; and sexual intimidation and humiliation.

The plaintiff contended that instead of taking prompt, reasonable, and effective action to end this harassment, the school officials told him, among other things, that "boys will be boys," and that even though Bradley was clearly experiencing sexual harassment, they were not sure what they could do for him because the school system's policy against sexual harassment did not cover same-sex sexual harassment.

In its July 28, 2000 brief, the Department argued that the nature and severity of the harassment – being repeatedly victimized by conduct of a sexual nature – could constitute harassment on the "basis of sex" and thus violate Title IX. Regardless of sexual orientation, all students are protected under Title IX from sexual harassment and the unsafe hostile environment that such harassment creates.

Following the *amicus* participation of the Department and mediation between the plaintiff and defendants, the case settled. In addition to monetary relief for the plaintiff, the school district modified its sexual harassment policies (applicable to both students and employees) to prohibit discrimination based on actual or perceived sexual orientation. The modified policies also describe the school district's responsibilities and the recourse available to victims.

Continued on page 11

Something to share? The *Forum* is looking for agency "happenings" and news of interest to other agencies and the civil rights community. Contact us at: (202) 307-2222 (voice); (202) 307-2678 (TDD), or write to:

Civil Rights Forum
Coordination and Review Section
Civil Rights Division
Department of Justice
P.O. Box 66560
Washington, D.C. 20035-6560

So ordered . . .

Continued from page 5

Supreme Court declines review of Ku Klux Klan matter

On March 5, 2001, the Supreme Court decided not to hear Missouri's appeal of a federal court's decision that permits the Knights of the Ku Klux Klan (the Klan) to participate in the state's Adopt-A-Highway Program. By refusing to grant *certiorari*, the Supreme Court let stand the Eighth Circuit Court of Appeals' decision declaring that the Missouri Highway and Transportation Commission (MHTC) could not exclude the Klan's application to participate in its Adopt-A-Highway Program solely on the basis of the Klan's viewpoint. *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000).

Under MHTC's program, organizations adopt a portion of a state highway by volunteering to remove litter from that portion. MHTC trains and equips the volunteer organizations, and then recognizes that group's efforts by erecting signs with the group's name at each end of the adopted portion of highway.

The Eighth Circuit repudiated several arguments given by MHTC for denying the Klan's application. The court concluded that the evidence indicated "that the State denied the Klan's application based on the Klan's beliefs and advocacy." DOJ's Civil Rights Division and the Civil Division filed an *amicus* brief in that proceeding, arguing that Missouri must deny the Klan's application in order not to violate Title VI. DOJ argued that MHTC receives federal financial assistance and that the Adopt-A-Highway Program is a "program or activity" subject to Title VI's prohibition against discrimination on the basis of race, color, or national origin.

The Solicitor General made these same arguments in an *amicus* brief of January 2, 2001, urging the Supreme Court to grant *certiorari* and reverse the Eighth Circuit. However, the Supreme Court issued its decision not to hear Missouri's appeal without a published dissent or explanation.

Although it granted the Klan's application, as mandated by the Supreme Court's action, the Missouri Department of Transportation subsequently terminated the Ku Klux Klan's participation in the program because it had failed to meet its obligation to clean up the litter along its "adopted" portion of a highway.

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.

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