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ENFORCEMENT OF THE AGE DISCRIMINATION ACT OF 1975

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As has been amply documented elsewhere in this symposium, the Age Discrimination Act¹ proscribes conduct that is vaguely defined and subject to a number of exceptions.² It should not be surprising, therefore, that the statute presents major enforcement difficulties. This paper will focus on three issues that pertain to the Act's enforceability: the administrative difficulties that have stymied the publication of final regulations by the thirty or so federal departments and agencies that provide financial assistance to covered recipients, and the significance of the resulting delay; the experience to date with age discrimination complaints referred by five federal departments to the Federal Mediation and Conciliation Service; and the utility and wisdom of mediation as an enforcement mechanism.

FRAMEWORK FOR ENFORCEMENT

Introduction

As originally enacted, the Age Discrimination Act provided for two means of enforcement: federal agency action leading up to, and including, the termination or refusal to grant or continue federal financial assistance,³ and referral of matters by funding agencies to the Department of Justice to pursue enforcement "by any other means authorized by law."⁴ The Act was amended in 1978 so as to add a private right of action; aggrieved individuals now have the right to sue the funding recipient for injunctive relief, subject to having given notice and having exhausted administrative remedies.⁵ Judicial review of federal agency action was provided for in the original Act and was pre-

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1. 42 U.S.C. §§ 6101-6107 (1976 and Supp. III 1979) [hereinafter referred to as the ADA or the Act].

2. See, e.g., Alexander, *Shucking Off the Rights of the Aged: Congressional Ambivalence and the Exceptions to the Age Discrimination Act of 1975*, 57 CHI. KENT. L. REV. 1009 (1981); Eglit, *The Age Discrimination Act of 1975, as Amended: Genesis and Selected Problem Areas*, 57 CHI. KENT L. REV. 915 (1981).

3. 42 U.S.C. § 6104(a)(1) (1976).

4. *Id.* § 6104(a)(2) (1976).

5. *Id.* § 6104(e) (Supp. II 1978).

served when the Act was amended in 1978.⁶

The 1975 Act further called for the United States Commission on Civil Rights to conduct a study of federally assisted programs to determine the existence, nature, and scope of age discrimination in them.⁷ This study was made a predicate to the issuance of regulations implementing the statute.⁸ The Commission transmitted its findings to the President and the Congress in January, 1978,⁹ and it filed the documentation for the study twelve months later.¹⁰ Subsequently, the then Department of Health, Education and Welfare¹¹ published proposed regulations in December, 1978.¹² These were ultimately followed by final regulations which were promulgated on June 12, 1979.¹³

The HEW regulations were themselves made a predicate to the issuance of regulations by each federal funding agency.¹⁴ They were to serve as a model for the agency-specific regulations. By virtue of a 1978 amendment, the Secretary of Health, Education and Welfare was given authority to approve each agency's ADA regulations, so that the individual agency regulations could not be issued in final form until passed upon by the Secretary.¹⁵

In accordance with its mandate, on June 5, 1979, HEW designated the Federal Mediation and Conciliation Service as the agency to administer the mediation requirements¹⁶ set forth in the regulations.¹⁷

Compliance

The primary responsibility for compliance rests with each recipient of federal financial assistance. Recipients must ensure that their programs and activities are in accord with the ADA's requirements. Recipients are required to maintain records and afford access to them

6. *Id.* § 6105 (1976 & Supp. II 1978).

7. *Id.* § 6106(a) (1976).

8. *Id.* § 6103(a)(2)(A)(ii) (1976).

9. UNITED STATES COMM'N ON CIVIL RIGHTS, AGE DISCRIMINATION STUDY (1977).

10. UNITED STATES COMM'N ON CIVIL RIGHTS, AGE DISCRIMINATION STUDY (PART II) (1979).

11. In 1979 the Department of Health, Education and Welfare was disbanded and replaced by the Department of Health and Human Services and the Department of Education. Education Organization Act, Pub. L. No. 96-88, §§ 201, 301, 509, 93 Stat. 668 (1979). The Department of Health and Human Services has taken over the government-wide responsibilities regarding the ADA which previously had been vested by the ADA in its defunct predecessor.

12. 43 Fed. Reg. 56,428-56,446 (1978).

13. 45 C.F.R. § 90 (1980).

14. 42 U.S.C. § 6103(a)(3) (1976).

15. *Id.* § 6103(a)(4) (Supp. II 1978).

16. 44 Fed. Reg. 33,788 (1979). These requirements are discussed in notes 80-98 and accompanying text *infra*.

17. 45 C.F.R. § 90.43(c)(3) (1980).

to funding agencies, and they must provide additional information to demonstrate compliance.¹⁸

The funding agencies have the responsibility to ensure that recipients comply with the Act. The agencies are required to notify recipients of their responsibilities¹⁹ and to provide technical assistance and educational materials in order to further compliance efforts.²⁰ The agencies are to encourage voluntary compliance²¹ and, if that fails, to take appropriate enforcement action.²²

Within eighteen months of the effective date of an agency's promulgation of its final ADA regulations, its funding recipients are required to complete a self-evaluation. This will be discussed further below.²³

Complaints

A funding agency may initiate enforcement on its own.²⁴ In addition, enforcement proceedings may be commenced by the filing of a complaint with the funding agency by an aggrieved "individual, a class, or by an organization on behalf of its members or on behalf of other persons."²⁵ The agency must review the complaint to determine that it falls within the scope of the Act and that there is sufficient information to proceed.²⁶ The agency must notify complainants and funding recipients of their rights and duties,²⁷ and inform them that they may be represented by counsel.²⁸ It must attempt a speedy resolution of com-

18. *Id.* § 90.42(a) (1980).

19. *Id.* § 90.43(a) (1980). Recipients must inform sub-recipients that they too must be in compliance with the Act. *Id.*

20. *Id.*

21. *Id.* § 90.42(b) (1980).

22. *Id.*

23. See notes 58-79 and accompanying text *infra*.

24. It is not necessary that complaints be filed to trigger investigations of suspected violations. 45 C.F.R. § 90.44 authorizes each agency to provide for compliance reviews, pre-award and post-award reviews, and other procedures to investigate and correct violations. When a violation is determined, voluntary compliance must be attempted. 45 C.F.R. § 90.42(b) (1980). If that fails, enforcement remedies follow.

25. Comment Analysis to 45 C.F.R. § 90, 44 Fed. Reg. 33,780, at 33,785 (1979) [hereinafter cited as Comment Analysis].

26. *Id.* This screening process is the limit of permitted investigation prior to referral to mediation. 45 C.F.R. § 90.43(c)(3) (1980). HHS and the Department of Education routinely accept class complaints and include them in their mediation process. EEOC, which enforces Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979), and the Equal Pay Act, 29 U.S.C. § 206 (1976), on the other hand, will accept a class complaint but prefers not to try to conciliate it. Instead, a class complaint is given special attention and investigation.

27. 45 C.F.R. § 90.43(c)(1)(iii) (1980).

28. *Id.*

plaints,²⁹ and it must establish procedures which will require complainants and recipients to participate actively in achieving that objective.³⁰

Mediation

The agency screens complaints to assure their adequacy and to eliminate those considered beyond the scope of the ADA; the remaining complaints are referred to the Federal Mediation and Conciliation Service (FMCS) which must complete its efforts within sixty days of the time the complaint was received *by the agency*.³¹ Federal agencies are required to inform the complainant and the recipient that they must participate in the mediation process, although they are not obliged to meet with the mediator at the same time.³² If the mediation produces a mutually satisfactory resolution, the agreement must be put in writing, a copy of which is then sent by FMCS to the referring federal agency.³³ An agreement will terminate the complaint unless the agreement has been violated by either party.³⁴

Mediation is a confidential process. Mediators are provided immunity from having to give testimony in any adjudicative proceeding or from having to produce documents or information adduced by mediation.³⁵ This prevents the parties from being bound by admissions or concessions during mediation and is intended to encourage the parties to be forthcoming.³⁶ When mediation is terminated because the mediator has decided he cannot resolve the dispute, FMCS returns the complaint to the referring agency for investigation.³⁷

Investigation

When an unresolved complaint is returned by the FMCS, or when a resolved complaint is reopened because of a violation of the conciliation agreement, the agency conducts an informal initial investigation designed to produce a resolution.³⁸ If the informal fact-finding is unsuccessful, the agency is charged with completing a formal investigation.³⁹ If the agency determines there is a violation of the ADA, and

29. *Id.* § 90.43(c)(2) (1980).

30. *Id.*

31. *Id.* § 90.43(c)(3)(iii) (1980) (emphasis added).

32. *Id.* § 90.43(c)(3)(i) (1980).

33. *Id.* § 90.43(c)(3)(ii) (1980).

34. *Id.*

35. *Id.* § 90.43(c)(3)(iv) (1980).

36. Comment Analysis, *supra* note 25, at 33,786.

37. 45 C.F.R. § 90.43(c)(3)(iii) (1980).

38. *Id.* § 90.43(c)(4) (1980).

39. *Id.* § 90.43(c)(5) (1980).

the recipient will not correct the violation, enforcement action is required.⁴⁰

Enforcement

The regulations authorize four avenues to secure compliance with the ADA:

1. Fund termination, refusal, discontinuance, or deferral by the federal agency.
2. Agency referral for court or administrative action.
3. A law suit by the complainant.
4. Remedial action by the recipient.

Fund Termination, Refusal, Discontinuance or Deferral

If the agency investigation produces a finding of a violation of the ADA, the stage is set for administrative action which could produce either the termination of, or refusal to grant federal funding to a recipient. ADA requirements for funding cutoffs are nearly identical to those generally established to implement Title VI of the Civil Rights Act of 1964.⁴¹ Recipients must be given the opportunity for a hearing⁴² before an administrative law judge.⁴³ A funding termination must be limited to the particular program or activity, and particular recipient which receives financial assistance.⁴⁴ Before the cutoff may occur, the agency must attempt to secure voluntary compliance,⁴⁵ and if that is unsuccessful, must provide a report covering the circumstances to the congressional committees with legislative jurisdiction over the federal program or activity.⁴⁶ No action can be taken until thirty days following transmittal of the report to Congress.⁴⁷ When a fund termination proceeding has begun, the agency is authorized, provided that notice and the opportunity for a hearing is given, to defer new financial assistance to a recipient for a temporary period, pending final adjudication.⁴⁸

A unique feature of the ADA, not contained in any other civil rights statute, is the authority of a federal agency to take the funds hitherto granted to a recipient which is found in violation of the Act

40. *Id.* § 90.43(c)(5)(iii) (1980).

41. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

42. *Id.* § 6104(a)(1) (1976).

43. 45 C.F.R. § 90.47(a)(1) (1980).

44. 42 U.S.C. § 6104(b) (1976).

45. *Id.* § 6104(c) (1976).

46. *Id.* § 6104(d) (1976).

47. *Id.*

48. 45 C.F.R. § 90.47(d) (1980).

and deliver them to a substitute public or nonprofit private organization or agency.⁴⁹ The substitute agency must, of course, be in compliance with the Act and be capable of achieving the programmatic goals.⁵⁰

Judicial Action

The statute provides for enforcement by "any other means authorized by law."⁵¹ This includes referral to the Department of Justice, or to any federal, state or local government agency having the means to correct the violation.⁵² This authority thus reflects what is in any event inherent authority of the Attorney General to sue to recover federal moneys improperly used.⁵³

Private Right of Action

The 1978 amendments to the ADA authorized any interested person to bring suit in a federal district court to enjoin violations by recipients, provided notice by registered mail is given at least thirty days earlier to the recipient, the Attorney General and to the Secretary of the Department of Health, Education and Welfare (now the Department of Health and Human Services).⁵⁴ The notice must state the nature of the violation, the relief sought, the court in which the lawsuit will be filed, and whether attorney's fees are to be requested.⁵⁵

Another precondition to filing suit is exhaustion of administrative remedies. This condition is fulfilled if 180 days have elapsed since the complaint was filed and there has not been an agency decision, or the agency has found no violation by the recipient, whichever occurs first.⁵⁶ In either instance, the agency has the responsibility of notifying both the complainant and the recipient that the preconditions have been satisfied and the matter is ripe for judicial action.⁵⁷

49. 42 U.S.C. § 6104(b) (Supp. II 1978).

50. *Id.*

51. *Id.* § 6104(a)(2) (1976).

52. 45 C.F.R. § 90.47(a)(2) (1980).

53. *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279-85 (1888); *United States v. Marion County School Dist.*, 625 F.2d 607 (5th Cir. 1980).

54. 42 U.S.C. § 6104(e)(1) (Supp. II 1978). In addition, the head of the funding agency must also be notified. 45 C.F.R. § 90.47(c)(2) (1980).

55. 42 U.S.C. § 6104(e)(2) (Supp. II 1978).

56. *Id.* § 6104(f) (Supp. II 1978).

57. 45 C.F.R. § 90.50(b) (1980). Certain other time limits, normal to civil rights enforcement, are absent in the Act. There is no time limit, for example, following the alleged discrimination within which a complainant must file an administrative complaint, nor any time limit for initiation of agency compliance actions. HEW, in fact, in drafting the government-wide regulations, rejected such provisions as "a drastic step to take in advance of specific indications that there will

REGULATORY IMPLEMENTATION OF THE ADA

The Department of Health and Human Services (HHS) is the lead agency designated by the Congress to supervise and coordinate enforcement of the ADA. It supplants its predecessor, the Department of Health, Education and Welfare.⁵⁸ Accordingly, HEW promulgated final regulations on June 12, 1979.⁵⁹ The statute requires that each federal funding agency have issued its own proposed, agency-specific regulations within ninety days thereafter.⁶⁰ These regulations had to be consistent with the general regulations adopted by HEW and, by virtue of a 1978 amendment, had to be approved by the Secretary of HEW. By regulation, HEW supplemented this timetable to provide another 120 days for the submission to it of final agency-specific regulations.⁶¹

According to the schedule, the federal agencies should have published their proposed ADA regulations no later than September 12, 1979. None did so. Two were published before the end of the fiscal year, September 30.⁶² Another seventeen agencies complied subsequently.⁶³ Of these nineteen agency-proposed regulations, none have

be unusual problems of delay." Comment Analysis, *supra* note 25, at 33,785. Most of the proposed agency-specific regulations require the complaint to be filed within 180 days, although they vary as to whether the triggering event is the time the alleged discrimination occurred or when the complainant first had knowledge of it. It is questionable whether such a time limit can be established by an executive agency without statutory authority when the statutory scheme allows laymen, unassisted by lawyers, to initiate the process. See, e.g., *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).

58. See note 11, *supra*.

59. 44 Fed. Reg. 33,768-33,787 (1979) (codified at 45 C.F.R. § 90 (1980)).

60. 42 U.S.C. § 6103(a)(4) (1976).

61. 45 C.F.R. § 90.31 (b) (1980).

62. Proposed 14 C.F.R. pt. 378, 44 Fed. Reg. 55,383 (1979) (the proposed regulations of the Civil Aeronautics Board), and proposed 45 C.F.R. pt. 91, 44 Fed. Reg. 55,108 (1979) (proposed regulations of the Department of Health, Education and Welfare).

63. See, e.g., 22 C.F.R. pt. 218 (Agency for International Development) (while AID designates these as final, they in fact were promulgated without the approval of the Secretary of Health and Human Services, in contravention of 42 U.S.C. § 6103(a)(4)); proposed 45 C.F.R. Chapter X (Community Services Administration), appearing at 44 Fed. Reg. 60,764 (1979); proposed 7 C.F.R. pt. 15c (Department of Agriculture), appearing at 45 Fed. Reg. 61,309 (1980); proposed 15 C.F.R. § 8a.11(a) (Department of Commerce), appearing at 45 Fed. Reg. 46,347 (1980); proposed 24 C.F.R. pt. 146 (Department of Housing and Urban Development), appearing at 45 Fed. Reg. 73,454 (1980); proposed 28 C.F.R. pt. 42 (Department of Justice), appearing at 45 Fed. Reg. 32,170 (1980); 22 C.F.R. pt. 143 (Department of State) (while the Department designates these as final, they in fact were promulgated without the approval of the Secretary of Health and Human Services, in contravention of 42 U.S.C. § 6103(a)(4)); proposed 49 C.F.R. pt. 29 (Department of Transportation), appearing at 44 Fed. Reg. 60,946 (1979); proposed 45 C.F.R. pt. 7 (Environmental Protection Agency), appearing at 46 Fed. Reg. 2306 (1981); proposed 29 C.F.R. pt. 1616 (Equal Employment Opportunity Commission), appearing at 44 Fed. Reg. 59,914 (1979); proposed 14 C.F.R. § 1252.401 (National Aeronautics and Space Administration), appearing at 45 Fed. Reg. 40,994 (1980); proposed 45 C.F.R. pt. 1152 (National Endowment for the Arts), appearing at 44 Fed. Reg. 56,725 (1979); proposed 45 C.F.R. pt. 1172 (National Foundation on the Arts and the Humanities), appearing at 44 Fed. Reg. 57,130 (1979); proposed 45 C.F.R. pt.

become effective.⁶⁴ Nine agencies had not, as of July 15, 1981, published even proposed ADA regulations.⁶⁵

One explanation for this sorry record of failure by government agencies to comply with the Congressional mandate lies in an action taken by the Office of Management and Budget in February, 1980. In a memorandum from the OMB Assistant Director for Regulatory and Information Policy to the HEW Deputy General Counsel for Regulation Review, dated February 14, 1980,⁶⁶ OMB disapproved HEW's request for permission to require each recipient of financial assistance to prepare a self-evaluation. This self-evaluation requirement⁶⁷ requires each recipient with fifteen or more employees to file a written report that provides the identity of and justification for any age distinction imposed by the recipient. Recipients are required to complete the self-evaluation *within eighteen months of the effective date of the agency's regulations*. The general HEW regulations further provide that the self-evaluation be publicly available for three years⁶⁸ and that any age distinction that violates the ADA be remedied by the recipient.⁶⁹

OMB, which has authority to review and approve government regulations which impose recordkeeping requirements on the public,⁷⁰ refused clearance on the grounds that (1) HEW had failed to show the "practical utility of the requirements;" (2) HEW had not considered alternative methods; and (3) HEW failed to estimate the burden on

617 (National Science Foundation), appearing at 44 Fed. Reg. 57,127 (1979); proposed 13 C.F.R. pt. 117 (Small Business Administration), appearing at 44 Fed. Reg. 60,032 (1979); 18 C.F.R. pt. 1309 (Tennessee Valley Authority) (while the TVA designates these as final, they in fact were promulgated without the approval of the Secretary of Health and Human Services, in contravention of 42 U.S.C. § 6103(a)(4)); 22 C.F.R. pt. 143 (or Chapter II pt. 218) (United States International Communications Agency) (while these are designated as final regulations, they in fact were promulgated without the approval of the Secretary of Health and Human Services, in contravention of 42 U.S.C. § 6103(a)(4)).

64. Four agencies have published what they designate as final regulations, *see* note 63, *supra*, and nine more have submitted final regulations for review by the Secretary of Health and Human Services. The Act requires approval by the Secretary before any regulations become effective. 42 U.S.C. § 6103(a)(4) (Supp. II 1978). None have been approved.

65. *E.g.*, Action, Department of Defense, Department of Education, Department of Energy, General Services Administration, Department of Labor, Nuclear Regulatory Commission, Office of Personnel Management, and the Veterans Administration.

66. Memorandum from Jim Tozzi, Asst. Director for Regulatory and Information Policy, Office of Management and Budget to Terry Dowd, Office of General Counsel, Department of Health, Education and Welfare (Feb. 14, 1980) (Copy on file at office of Chicago Kent Law Review).

67. 45 C.F.R. § 90.43(b) (1980).

68. *Id.* § 90.43(b)(4) (1980).

69. *Id.* § 90.43(b)(3) (1980).

70. The Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980), prohibits federal agencies from imposing information collection or record-keeping requirements on ten or more members of the public without prior approval of the Director of OMB.

recipients.⁷¹ OMB suggested that age be added to the standard assurances as to non-discrimination on the bases of race, sex and national origin that federal grantees now complete.⁷² Finally, OMB agreed to reconsider its disapproval if HEW compliance reviews indicate that non-compliance with the ADA is a "serious problem."⁷³

On October 14, 1980, the General Counsel of HHS replied with an alternative proposal that would reduce the time for preparation of a self-evaluation from eight to sixteen hours to one hour, or a "burden reduction somewhere between 88 and 94 percent."⁷⁴ The substitute plan eliminated the need for recipients to justify the age distinctions they imposed, proposing instead only an obligation by recipients to identify them. Furthermore, recipients would be relieved of the obligation of identifying age distinctions not imposed solely by the recipients.⁷⁵ There would be no need, therefore, for any recipient to list age distinctions created by federal, state or local statutes.

This modified self-evaluation is needed, HHS stated, as a "consciousness raising mechanism" to promote compliance with the ADA and because ADA provides a "complicated scheme" for determining which age distinctions are permissible under the Act's exceptions.⁷⁶ Many recipients utilize age criteria in the administration of their programs, HHS stated, resulting in a need to reappraise existing practices to determine if any should be eliminated.

There the matter rests. HHS has concluded that no final regulations for any department or agency should be approved by the Secretary until the self-evaluation controversy has been resolved. The statutory commands of the ADA to achieve agency-specific regulations are in abeyance, although the statute is five and one-half years old and the beneficiary rights have been vested for nearly two years, since June 30, 1979, the statute's effective date.

One important effect of the lack of agency regulations is the absence of two documents that would be of substantial value to persons who suspect that funding recipients are engaging in conduct that violates the ADA, and to organizations that represent them.

First, the general regulations require that each agency publish an

71. Memorandum, note 66 *supra*.

72. *Id.*

73. *Id.*

74. Letter from Joan Bernstein, Gen. Counsel, Dep't of Health and Human Services to Jim Tozzi, Office of Management and Budget (Oct. 14, 1980) (Copy on file at office of Chicago Kent Law Review).

75. *Id.* The same relief is furnished to sub-recipients.

76. *Id.*

appendix to its final regulations containing a list of that agency's age distinctions in federal law or in regulations that affect financial assistance administered by the agency.⁷⁷ Second, within twelve months of issuance of its final regulations, each agency must review all age distinctions imposed on recipients by regulations, policy or administrative practices and publish for public comment the following:

1. The results of the review;
2. The age distinctions the agency intends to continue;
3. The justification for their continuation;
4. A list of age distinctions not presently in regulations that the agency intends to adopt under the Administrative Procedure Act;
5. A list of age distinctions the agency intends to terminate.⁷⁸

This information would be of great value to persons affected by the ADA. It would further require federal agency personnel to analyze the ADA and reach judgments as to whether they are fostering or forcing non-compliance. Thus, the development of this information would be an educational experience and an important one.

Furthermore, and perhaps more significantly, the delay in issuance of final agency-specific regulations has denigrated the importance of age discrimination for nearly every civil rights office in the federal government. It is not a "hot" or current item, and that is what civil rights personnel, frequently overburdened, pursue. Indeed, several federal officials have informed the author that they have concluded, from the absence of many complaints or pressures from child or senior citizen advocacy groups, that there must not be much age discrimination. The catch-22 effect is obvious.

The matter of the recipient self-evaluation is not trivial. Civil rights enforcement history, of which more will be said below, confirms the necessity of mandating that all agencies, public and private, with law enforcement duties be forced to continually engage in self-criticism and self-improvement.⁷⁹ Enforcing civil rights has never been a popular occupation on the local scene and seldom nationally. The original

77. 45 C.F.R. § 90.31(f) (1980).

78. *Id.* § 90.32(b) (1980).

79. The 1980 report of the Department of Health and Human Services to Congress, dated March 28, 1980, revealed that only two agencies (the Civil Aeronautics Board and the Department of Agriculture) had filed their reports with HEW by December 31, 1979. HEW reminded the other agencies their reports were overdue and requested each to provide information concerning the development and issuance of regulations, steps taken to inform their recipients of their responsibilities and action taken to train their staffs.

The 1981 report to Congress by HHS had not yet been publicly released at the time this paper was prepared.

self-evaluation requirements of the general regulations are not onerous, and certainly the revised standards create no burden.

COMPLAINTS REFERRED TO MEDIATION

On November 1, 1979, the Federal Mediation and Conciliation Service began accepting complaints of age discrimination referred by federal agencies. As of March 19, 1981, nearly seventeen months later, FMCS had received eighty-three complaints,⁸⁰ five of which were still "under mediation" and will, therefore, not be analyzed here.⁸¹ Complaints were received from five agencies, as follows:

a. Department of Education	44
b. Department of Health and Human Services	18
c. Department of Housing and Urban Development	12
d. Department of Agriculture	3
e. Department of Defense	<u>1</u>
	78

The 78 complaints were disposed of as follows:

- a. Agreement reached - 32 (41%)
- b. No agreement - 29 (37%)
- c. Mediation terminated - 11 (14%)
- d. Other (includes no jurisdiction) - 6 (8%)

The complaint disposition by agency referral was as follows:

	<u>DE</u>	<u>HHS</u>	<u>HUD</u>	<u>USDA</u>	<u>DOD</u>
Agreement	13	8	8	2	1
No Agreement	20	5	4		
Terminated	6	4		1	
Other	5	1			

In its report, attached as Appendix A, FMCS described but did not identify the recipient agency, provided only the essence of the complaint and supplied the basis for its disposition. The Departments of Health and Human Services, Education, and Agriculture have provided more details of selected complaints in order to assist this analysis.

Complaint Analysis

Education

Education-related complaints composed 56 percent of all complaints of age discrimination filed through late March, 1981, and nearly

80. Material furnished the author by letter of same date from Jerome T. Barrett, Associate Director, Office of Mediation Services, FMCS (copy on file at office of Chicago Kent Law Review).

81. Two of these complaints were referred by the Department of Education and three were referred by the Department of Health and Human Services.

three-quarters of them (32 out of 44) were allegations of denials of admission to schools. What is particularly notable is the lack of success in resolving complaints of discrimination in the admission cases. Only seven were resolved by mediation conducted by FMCS.⁸²

Admission complaints were filed against graduate schools (14), undergraduate schools (5), law schools (3), medical schools (3) and vocational training schools (2). Only two out of the fourteen graduate school complaints were resolved, two out of five for undergraduate, one vocational training, and none for either the law or medical schools.

A synopsis of the circumstances of some of the unsuccessfully resolved admission disputes indicates how complicated problems can become.

—Complainant alleged that he was denied entrance to medical school on the basis of age. He stated that he arranged an appointment with the Dean of Admissions who told him that many of the members of the Admissions Committee probably felt that since the complainant already had a promising career with his Ph.D., they should give the M.D. degree to someone younger who did not have this promising career. Case referred to FMCS. Mediation unsuccessful. Case referred to the Office of Civil Rights for investigation.

—Complainant (43 years old) alleged denial of admission to a doctoral program in the psychology department at a university on the basis of age. She stated that she had excellent references and academic background, and that her Master's thesis was presented at a conference and is slated for publication in a psychology journal. She said that the head of the department told her, when she asked the reason for rejection and for the qualifications by which the successful candidates were chosen, that he replied with vague statements like "subjective selection" and "risk factors in the selection of candidates."

—Complainant alleged denial of admission to medical school on the basis of age, national origin and race. He applied originally in the fall of 1979. He stated that he discussed his rejection with a member of the admissions committee. That member advised him that his grades and test scores were competitive with those of the applicants who had been admitted, and that he should apply the following year. The member further advised the complainant to drop out of an MBA program he had begun as an alternative, to take certain science courses, and to retake the MCAT. The complainant alleged that he followed this advice and did well in the courses and on the test. He was again rejected. Three of the complainant's professors who were also on the admissions committee were also disturbed by his rejection, and wrote to the member of the admissions committee who had advised the complainant. That member refused to discuss the mat-

82. Nine of the complaints had been received by HEW prior to May, 1980, when the Department of Education was created.

ter.⁸³

The admission disputes that were settled through mediation were often resolved quite inventively. A complainant who charged she was denied admission to a nursing program at a community college was accepted when she agreed to study certain courses; someone rejected as a university undergraduate agreed to reapply if she obtained an associate degree; and another age dispute was settled with an agreement that the student would have to have a "C" average to be awarded a degree.

Disputes involving finances, on the other hand, can become quite complex; for example, in one case the complainant

alleged denial of financial assistance for graduate school on the basis of age. He stated that the university falsely told him that all financial assistance was based on financial need. Further, officials refused to give him a financial assistance application for a long period of time, and his application was not processed in the normal manner when it was finally considered. He also stated that he believed that his financial aid record was falsified, for it contained erroneous data. He also stated that he was refused a review of his file and an explanation of budget calculations. Case referred to FMCS. Successfully mediated. Complainant was awarded a fellowship.⁸⁴

A complaint that a student was denied tuition credit because of age was resolved, but a complaint that student financial assistance was denied could not be settled. One complaint that campus housing was unavailable because of the student's age was resolved. One enterprising student alleged that he had been unjustly failed in a class, and that this resulted in dismissal from the university. Furthermore, he alleged the school then did not reimburse him for his football tickets. Mediation produced an agreement for his subsequent reentry and a refund.

83. Dep't of Education, *Allegations of Age Discrimination*, FY 1980 (undated report) (copy on file at office of Chicago Kent Law Review). Additional complaints included the following:

—Complainant noted that according to the admission requirements for the doctoral program at this university as published by the American Psychological Association in *Graduate Study in Psychology*, that in addition to the criteria of GPA and GRE scores, the importance of nonobjective criteria is listed in the following order: previous research activity (high), letters of reference (high). Complainant stated that the head of the department had made no mention of previous research as a relevant factor in the admissions procedure. Case referred to FMCS. No agreement was reached, so referred back to OCR for investigation.

—Complainant alleged denial of admission to five colleges' doctoral programs in clinical psychology on the basis of age (complainant "approaching 50"), despite good academic and professional references and credentials. He stated that he was told by a school official that in many cases the heads of the clinical programs would like to admit the complainant, but are unable to overcome the set procedures that caused the complainant's initial rejection by the selection committees. Further, he said the officials told him that they might welcome outside pressures or interventions that would justify deviating from these procedures. Case referred to FMCS. Complainant agreed to withdraw his complaint. Closed.

84. *Id.*

Two intractable cases were reported by the Department of Education:

—Complainant alleged that her academic record was not honestly reviewed because of her age. She sought to have her credentials honestly reviewed as soon as possible. Case referred to FMCS. Mediation unsuccessful. Complainant wishes to proceed with the case. What steps she plans to take are not known.

—Complainants alleged that a group of women were asked to withdraw from a nursing program because of age. One woman was eliminated from classes during the second week of the fourth semester of a two-year R.N. program. She had nearly a 4.0 GPA up to that point. At the beginning of the semester she was told that a professor wanted to "get rid of her." During the second week she was told to withdraw or take an "F." She was forcibly eliminated from school attendance and not allowed to sit in her classes. Normally, students are allowed to continue to the end of semester and either pass or fail. Cases referred to FMCS. Mediation unsuccessful. Referred to OCR for investigation.⁸⁵

Department of Health and Human Services

Of the eighteen complaints⁸⁶ received by the Department of Health and Human Services, eight were resolved by mediation, including six relating to age discrimination against children. Three were settled. Ten of the eighteen involved health services. One-half were resolved. Two of the nonhealth-related allegations were directed against area agencies on aging (both were resolved), two more related to rehabilitation programs (unresolved), and two were lodged against welfare departments, one involving a child (unresolved).

The cases affecting children are diverse. One complaint involved the denial of foster care to a 73 year old complainant who wished to have her incarcerated nephew placed in her custody. A social worker rejected the request on the grounds that long-term placement was required. This case was not resolved. Another rather similar complaint involved a petition to adopt two children which was filed by their foster parents. The adults alleged their request was denied because they were considered too old. Mediation produced a withdrawal of the complaint, although permission to adopt was not received.

An unsuccessful mediation involved the allegation that a state hospital was not providing effective treatment for adolescents. One successful mediation resolved a complaint that a nursing home was engaging in age discrimination through its policy of accepting only pa-

85. *Id.*

86. See Appendix A.

tients over the age of 65. A parent brought the complaint on behalf of a daughter. In mediation, the nursing home demonstrated that it did not offer appropriate care for the child, and she was placed in another facility.

Several complaints were made against hospitals. A complaint was filed on behalf of a 90 year old man alleging that a hospital denied him admission because he was "too old" and was unable to pay for his care. The complaint was resolved. The hospital agreed to review its policies and make any "appropriate changes." Another complaint alleged that an elderly man was denied emergency room treatment by a hospital. In the resolution of the complaint, the hospital agreed to conduct sensitivity training and prepare the staff to understand its responsibilities to the aged.

A male nursing student complained that he was harassed out of the program because of age (he was "over 40"). This complaint was returned by FMCS because the sixty day period for mediation had expired long before it was received. Other health-related complaints involved the denial of services by nursing homes and medical centers.

The complaints of discriminatory treatment by area agencies on aging involved the denial of access to a 65 year old person to a hot lunch program (resolved) and the failure to provide another older person with housekeeping services (resolved, services provided). Two complaints that rehabilitation benefits were denied did not produce agreements. One of them alleged that rehabilitation counseling was denied because of age (45), race, color, national origin, handicap and marital status (the complainant was single).

In a complaint against a state Department of Public Welfare, the issue was denial of food stamps and refusal to honor medical and dental eligibility. FMCS reported that the complaint was resolved and services were provided to the complainant; HHS reported the problem was administrative and did not involve age. Another welfare complaint, unresolved, was the alleged refusal by a Department of Social and Health Services to provide financial assistance, and the denial by some unidentified agency of light housekeeping services to a 57 year old handicapped person on the grounds that eligibility began at 60. Both complaints were resolved.

Housing and Urban Development

The twelve housing complaints⁸⁷ against agencies funded by HUD

87. *Id.*

appear to be brought against a variety of recipients, including public housing authorities, realty companies, apartment dwellings and housing corporations. The information provided by FMCS is too incomplete to accurately describe the recipients and HUD has been unable to recapture the complaints.

Ten of the twelve complaints alleged that housing was denied. Six complaints were resolved. One explanation for a resolution is that the complainant was "found to be eligible for housing under state law." In another, FMCS reports that the complainant was "advised to seek federally-subsidized housing because of limited income." In two other resolved complaints, the parties were placed on waiting lists for available units.

The remaining two complaints were brought against housing authorities. In one, the complainant alleged that the authority refused to repair the facilities. The complaint was resolved and FMCS reports that all the deficiencies are to be corrected. The other complaint alleged denial of a section 8 certificate. The agreement provided that the authority will again review the application on the basis of a family certificate, instead of on the basis of a single person certificate.

Department of Agriculture

FMCS reported three complaints, all involving the denial of food stamps. One case against a Department of Public Aid resulted in an agreement that the complainant was not "covered under the Food Stamp Act," and the complaint was withdrawn. A second complaint, where the recipient was a social services agency, produced agreement. FMCS reported the complainant qualified for stamps "at this time because of medical and other bills." The third complaint brought against a Board of Assistance was cancelled by letter when the complainant decided "to pursue it in court."

The Department of Agriculture (USDA) forwarded to the author a thorough summary of its ADA activities covering seven complaints received from August 30, 1979, to March 20, 1981,⁸⁸ all of which alleged age discrimination in the Food Stamp Program administered by the Food and Nutrition Service. USDA provided a general profile of the complainants. There were nine complainants (two cases involved husband and wife), five men and four women. One was aged 17; the others

88. Letter dated April 8, 1981, from Percy R. Luney, Chief, Office of Equal Opportunity, USDA (copy on file at office of Chicago Kent Law Review).

ranged from age 65 to 72. Although race generally was not indicated in the complaint, two had Spanish surnames and one was black.

There are some differences between FMCS and USDA in the way each reported the agency's history of mediation. The Department described four referrals, not three, and considered one case still open that FMCS denoted closed. Since all information concerning age discrimination complaints and the mediation process is useful in understanding the utility of mediation, and because the discrepancies are not substantially meaningful, the USDA complaint summaries and dispositions are included verbatim in Appendix B.

One point that should be made is the delay in processing complaints. Although USDA notified its funding agencies that all ADA complaints must be forwarded immediately for referral to FMCS, three complaints were received by the Department beyond the sixty day period allowed for FMCS services. When that occurred, the funding agencies conducted a preliminary investigation into the allegations.

Department of Defense

FMCS reports only one case of age discrimination, the denial of access to officer training by a National Guard unit, that was resolved. The application was accepted and the complaint withdrawn.

Analysis of Mediation

Established by Congress in 1947 as an independent federal agency, FMCS's statutory responsibility is the promotion of peaceful solutions to labor-management disputes through mediation. FMCS describes mediation as "the process in which a neutral person works with the parties in a dispute to try to help them reach a voluntary settlement of their own."⁸⁹ The assignment of exercising its talents to aid the resolution of age discrimination complaints is one of the few instances in which it has departed from its primary mission.⁹⁰

As one would expect, FMCS takes the art of mediation seriously. It engaged in a substantial amount of preparation in anticipation of processing ADA complaints. The agency regards its participation as an experiment inasmuch as the effectiveness of its program will be reviewed and evaluated, along with all other efforts to secure compliance,

89. Federal Mediations and Conciliation Service, *Mediation in Age Discrimination Disputes* (undated brochure).

90. FMCS trainers have assisted other organizations to develop mediation techniques to solve disputes in such diverse fields as housing, consumer affairs, equal opportunity and prison conditions. *Id.*

by December, 1981, in accordance with section 90.61 of the HEW regulations.⁹¹

FMCS is administratively divided into eight geographic regions and age discrimination complaints usually are assigned to mediators depending on the area where the complainant lives. Two types of mediators have been used: specially trained federal mediators (Regions 1, 4, 5 and 7), and private citizens trained to mediate ADA complaints on an ad hoc basis (Regions 2, 3, 6 and 8). The latter are termed "Community Conciliators."

Training to mediate ADA complaints was thorough. The community conciliators were trained in Washington in a five day workshop which included orientation to FMCS and the administrative requirements of ADA enforcement, as well as age discrimination and dispute settlements. The FMCS mediators were trained for two and one-half days on all matters covered in the community conciliators' training, except for dispute resolution. In order to test the effectiveness of the experiment, cases have been divided equally between the FMCS mediators and the citizen-mediators. FMCS is developing standards and criteria so that it can provide a qualitative analysis of its efforts at the time of the thirty month review.

One can and should assume that a professional and experienced agency such as FMCS is conscientiously exercising its mediation responsibilities with care and skill. The question to be faced, however, is whether mediation is a good idea for a new statute such as the ADA which imparts new rights and obligations throughout America.

Mediation is a relatively new tool for the resolution of civil rights complaints. Traditionally, before the advent of mediation, a complaint under analogous statutes, such as Title VI of the Civil Rights Act of 1964,⁹² would trigger a detailed investigation of the charges by the enforcement agency. The investigation would result in a formal agency determination of whether or not a violation of law had occurred. If a violation was found, the agency would attempt to negotiate with the violator to reach an agreement to remedy the situation according to the agency's legal standards. If the efforts to secure compliance were unsuccessful, further action would be taken, such as litigation or administrative sanctions.

Mediation has been used in civil rights disputes since the mid-1970s, principally because federal, state and local agencies developed

91. 45 C.F.R. § 90.61 (1980).

92. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

large backlogs of complaints. Delays became lengthy and commonplace because of multiple laws and regulations covering discrimination in such areas as employment, education, housing, public accommodations and services, and on the bases of race, sex, national origin, handicap and age.

Today, mediation has emerged as the most popular alternative for handling individual complaints of civil rights violations. Pioneered in 1975 by the New York City Commission on Human Rights, it was transferred to the federal scene when the director of the New York City agency, Eleanor Holmes Norton, was appointed in 1977 to chair the United States Equal Employment Opportunity Commission. Faced with a backlog of 130,000 complaints filed under Title VII of the Civil Rights Act of 1964,⁹³ Mrs. Norton instituted a "Rapid Charge Processing" system first in selected offices, and then nationwide in January, 1979.⁹⁴ Mediation is central to this approach.

In June, 1978, the Office of Civil Rights of HEW adopted its own mediation system, called "Early Complaint Resolution."⁹⁵ This process, which serves as the model for ADA mediation conducted by FMCS, differs from that of EEOC and other civil rights agencies in certain respects, namely:

1. OCR accepts class complaints and processes them in mediation. EEOC attempts to limit mediation to individual complaints, and if a complaint clearly involves a group or a company-wide practice, EEOC prefers to channel it into an Early Litigation Identification stream where it receives special attention and investigation.
2. OCR completely separates mediation from investigation and commences the latter only when the former fails. EEOC requests charging parties to come to the agency's office for an intake interview and then combines mediation with fact finding.
3. OCR does not sign an agreement between the parties reached through mediation. EEOC does, usually at the same time as the parties. OCR does not require the agreements to be in writing while EEOC and the ADA do.
4. OCR authorizes the mediator to use full discretion in handling the dispute and expects the mediator to be only a catalyst and resource. The parties may be brought together or not. At the EEOC, the parties are brought together and the agency staff in charge controls the discussion and prepares the parties for settle-

93. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

94. Project on Equal Education Rights, NOW Legal Defense and Education Fund, *An Analysis of Using Mediation to Resolve Civil Rights Complaints* 7 (Draft Final Report 1980) (prepared under HEW Contract 100-79-0164).

95. *Id.* at 1.

ment.⁹⁶

The introduction of mediation into civil rights complaint handling and enforcement machinery can have profound significance. As a recent study of mediation contracted by OCR pointed out, mediation "has the power over time to change the basic focus and objectives of civil rights agencies which use it as a standard procedure."⁹⁷ This excellent study suggests that the use of mediation can shift an agency's main focus from law enforcement to dispute resolution.

Such an emphasis at this stage of the evolution of the ADA might be destructive of the intent of Congress. It might prevent or severely retard the definition, interpretation and enunciation of the ADA's provisions by court decisions and agency rulings. It will, at a minimum, make more difficult a collection of guidelines for the use of complainants because all previous agreements are confidential. It is one thing to introduce mediation into Title VI and Title VII enforcement where the laws have been on the books since 1964 and have been interpreted over and over since then. By comparison the ADA is not only new; its provisions are vague and unsettled.

Mediation, as designed for ADA complaints, is also a strain on the charging party, who will nearly always be old, as well as unfamiliar with the process. The complainants must be their own advocates and do not have the protection or assistance of the agency to which they can turn. Thus, they often are at a disadvantage.

The mediation process for ADA complaints, furthermore, inevitably will tend to snuff out class complaints, even though they are admissible. The pressures on all interested parties—the complainant, the respondent, the mediator and the agency—will emphasize individual settlement. While it does not appear that a mediated agreement for a class complainant could legally bar any other class member from taking his or her complaint to court, the mediation process could be a disincentive to the promotion of class resolutions.

On the other hand, there are many advantages to mediation. Disputes can be resolved promptly, a particular advantage to elderly complainants. Mediation can provide benefits persons might not achieve through agency investigation and enforcement or their own litigation. The atmosphere is informal and can lead to compromise; communication, during mediation and for the future, is enhanced.

For the respondent agency, mediation is quick and inexpensive. It

96. *Id.* at 38-40.

97. *Id.* at 9.

permits resolution of a dispute in confidence, without publicity as to its discriminatory conduct. For the agency, mediated agreements save staff time, avoid backlogs and burdensome caseloads, and reduce potential politically difficult confrontations.

FMCS, in a fifteen month report on its ADA activities, dated February 18, 1981, while avoiding an opinion as to the wisdom of the mediation approach, stated that the fact that more than 40 percent of the cases that were closed during this period (45 percent in fiscal year 1980) were resolved, is "notable."⁹⁸ The agency contrasted this record with the prediction of a "critic of the legislation,"⁹⁹ Peter H. Schuck, who wrote in early 1979, "The brief time periods provided, however, may prevent mediation from diverting a large number of complaints away from the courts."¹⁰⁰

The fifteen month report stated:

Both mediators and community conciliators have been very creative in assisting settlement. Their roles have ranged from educating the parties to the ADA program and the mediation process and then using it to secure housing repairs, training grants, stipends, new procedures for treating elderly patients, reviews of applications, to finding alternative programs.¹⁰¹

A month later, FMCS was less cautious:

In summary, we are pleased with the ADA project, encouraged by its successes, and believe that mediation has proven to be an effective process for resolution of these complaints as well as a safeguard for individual rights. When mediation has succeeded, time and resources are saved since the investigations, hearings and litigation are not needed.¹⁰²

Admittedly, there is every reason to believe the agency has performed commendably and effectively. The larger issue of the advisability of mediation expressly for ADA complaints needs to be reviewed over the next months.

CONCLUSION

The enforcement of the Age Discrimination Act of 1975 is in its infancy. It is premature to judge whether this newest civil rights statute

98. 15-Month Report on the Mediation Experimental Program under the Age Discrimination Act (Feb. 18, 1981) (copy on file at office of Chicago Kent Law Review).

99. *Id.* at 2.

100. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 58 n.164 (1979).

101. 15-Month Report, *supra* note 98, at 2.

102. Letter from Jerome T. Barrett, Associate Director, Office of Mediation Services, Federal Mediation and Conciliation Service, to David Marlin (Mar. 19, 1981) (copy on file at office of Chicago Kent Law Review).

will serve as an effective instrument to eliminate unreasonable age distinctions from American society. There are, however, three troublesome areas to monitor carefully.

First, as discussed above, the Secretary of the Department of Health and Human Services has permitted a technicality, albeit not an unimportant one, to derail the momentum of thirty federal departments and agencies. The ADA, as has been emphasized by every analyst, is a confusing statute to apply and it requires a concerted effort by all federal authorities to publicize the message that for the first time there are legal sanctions against age discrimination.

The new Secretary of Health and Human Services and the new Director of the Office of Management and Budget should promptly resolve their technical differences, removing the barrier (if any really existed), to the adoption of agency regulations. Eighteen months later, each recipient will be expected to provide a self-evaluation, if that is still a requirement.

Secondly, there needs to be a thorough evaluation of both the mediation process and the enforcement process subsequent to mediation. The selection of the Federal Mediation and Conciliation Service as the mediator is sound, even inspired. FMCS is staffed by highly talented and professional people who have approached this assignment with diligence and integrity. It can be presumed the mediation process has been given every chance to succeed.

The questions to be faced concerning mediation, nonetheless, are whether unsuccessful mediations will lead to and result in agency enforcement actions that will publicly interpret the law and the rights of its beneficiaries, or whether mediation might so suppress this interpretive process that it should be postponed until the enforcement measures of the ADA have been more widely utilized. Additionally, it must be questioned whether the present system, in which mediation clearly helps many complainants solve their individual problems should continue.

With respect to post-mediation enforcement, at this writing there appear to be no ADA cases in litigation, nor is there any indication that any federal agency is even considering administrative sanctions or referral of a case to the Department of Justice for litigation. In fact, the author was unable to determine the status of any of the unresolved complaints returned by FMCS to the Departments of Education, Health and Human Services, or Housing and Urban Development, the three agencies with 95 percent of the complaints. Tracking and evalu-

ating the unresolved complaints, as well as analyzing the mediation agreements, should be the top priority for the thirty-month review.

Finally, the enforcement of the ADA must be seen in the larger context of the difficulties and doubts relating to the enforcement of Title VI of the Civil Rights Act of 1964¹⁰³ and its sister statutes, Title IX of the Education Amendments of 1972¹⁰⁴ and section 504 of the Rehabilitation Act of 1973.¹⁰⁵ A thorough analysis of those difficulties is beyond the scope of this paper, but the history of those statutes' enforcement is not irrelevant to a statute that needs legislative revision.

The problems of the enforcement of Title VI by federal agencies, including the actions taken by the Department of Justice, which has the responsibility to coordinate their actions, are discussed by a recent report from the General Accounting Office.¹⁰⁶ GAO sent 324 questionnaires to 266 components in fifteen executive departments and agencies and to fifty-eight independent agencies in order to gather data on the types of domestic assistance activities administered by federal agencies. One independent agency and eight executive department components did not respond. The 315 components and agencies that did respond said they administered 1,206 assistance activities, 763 (63 percent) of which were covered by Title VI.

A second questionnaire was mailed to thirty-two departments and agencies representing the 315 respondents with Title VI activities to determine how they perceived their Title VI responsibilities and how they obtained compliance. Additionally, GAO reviewed the Justice Department's coordination and technical assistance efforts; analyzed the implementation by HEW of two programs—foster child care and health planning—with Title VI coverage; and obtained information from the U.S. Commission on Civil Rights, OMB, the President's Task Force on Reorganization and several public interest groups.

On the basis of its study, GAO concluded the following:

- a. Many federal agencies are not certain which assistance activities and programs are subject to Title VI. Some agencies said many activities which GAO believes are subject to Title VI are exempt.
- b. The Department of Justice needs to clarify the general rules which specify the activities and programs subject to Title VI and pro-

103. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

104. 20 U.S.C. §§ 1681-1686 (1976).

105. 29 U.S.C. § 794 (1976).

106. Comptroller General's Report to the Congress, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance With Title VI* (April 15, 1980).

vide technical assistance to those agencies having difficulty applying the rules.

c. Some agencies do not know whether Title VI is being fully implemented. Agencies do not collect requisite racial and ethnic data, negotiate voluntary compliance, resolve complaints promptly or know the adequacy of state compliance systems.

d. The Department of Justice needs to improve its coordination and monitoring of federal agency compliance.

e. Agencies claimed they had difficulties enforcing Title VI because they lacked: 1) adequate policies, regulations and guidelines, 2) sufficient enforcement staff, 3) adequate Title VI knowledge or training for agency staff with Title VI responsibilities, and 4) sufficient enforcement funds.

f. OMB should require agencies to determine their personnel and training needs adequately to enforce Title VI and to decide whether additional staff and training are required.

It should be noted that enforcement of the ADA generally is assigned to the same agency personnel responsible for enforcing Title VI. The deficiencies found by the GAO report indicate, therefore, substantial questions as to the adequacy of ADA enforcement, present and future.

APPENDIX A
SUMMARY OF COMPLAINTS RECEIVED BY FEDERAL MEDIATION AND CONCILIATION SERVICE SINCE
NOV. 1, 1979

FUNDING AGENCY	RECIPIENT	COMPLAINT	BASIS FOR CLOSING
HEW	Area Agency on Aging	Failure to provide house-keeping services	Agreement (agreed to provide services)
HEW	University	Failure to admit	Mediation terminated (mediation unproductive)
HEW	Adult school	Failure to provide vocational training	Agreement (will provide training)
USDA	Dept. of Public Aid	Denied Food Stamp Program	Agreement (case withdrawn; complainant not covered under Food Stamp Act)
HEW	University	Denied admission into doctoral program	No agreement (parties unable to reach accord)
HEW	Polytechnic Institute	Denied housing	Agreement (complainant will get housing after application is received)
HEW	Dept. of Social and Health Services	Denied rehabilitation benefits	No agreement (expiration of regular time limit and two extensions)
HEW	College	Harassed about college loans	Agreement (considered repaid and/or cancelled any and all debts re complainant)
HEW	University	Denied financial aid	No agreement (complainant to pursue case further)
HEW	Children's Services	Denied adoption of two children	Settled—agreement (complaint withdrawn)
HEW	University Law School	Denied admission to law school	No agreement (complainant to pursue further)
HEW	Dept. of Rehabilitation	Denied rehabilitation counseling	Mediation terminated (mediation unproductive)
HEW	University Medical School	Denied admission	No agreement (parties unable to reach accord)

APPENDIX A-continued

FUNDING AGENCY	RECIPIENT	COMPLAINT	BASIS FOR CLOSING
HEW	Development Center	Denial of foster care of nephew	Mediation terminated (mediation unproductive; case closed)
HEW	Community Hospital	Hospital policy to turn away the elderly	Agreement (hospital agreed to investigate and change policy and procedures, if warranted)
USDA	Social Services	Denial of food stamps	Agreement (complainant qualifies for food stamps at this time because of medical and other bills)
HEW	University	Denied admission to physicians assistant program class	No agreement (parties unable to reach accord)
HEW	Maritime Academy	Denial of admission	Agreement (complaint withdrawn)
HUD	Apartments	Denial of housing	Agreement (complaint withdrawn)
HUD	Housing Authority	Refusal to correct or repair facilities	Agreement (correction of all deficiencies to be made)
HUD	Realty Company	Denial of apartment	No agreement (parties unable to reach accord)
DE	University	Alleges discrimination in undergraduate degree program	No agreement (parties unable to reach accord)
DE	University	Denied admission to law school	No agreement (complainant to pursue further)
DE	University	Alleges portfolio for academic credits toward getting degree not honestly reviewed	No agreement (to pursue further)
DE	University	Denial of admission to doctoral programs	No agreement (parties unable to reach accord)
DE	University	Denied admission to doctoral program	Agreement (complaint withdrawn)

APPENDIX A-continued

FUNDING AGENCY	RECIPIENT	COMPLAINT	BASIS FOR CLOSING
DE	University	Denied admission to doctoral program	No agreement (parties unable to reach accord)
DE	University	Denied admission to doctoral program	No agreement (parties unable to reach accord)
DE	University	Denied admission to doctoral program	No agreement (parties unable to reach accord)
DE	Vocational Rehabilitation Service	Denied vocational training	Mediation terminated
HHS	Hospital	Complainant's father denied emergency room treatment	Agreement (hospital procedures to be reviewed and changed to avoid such incidents in the future)
HHS	Hospital Corporation	Reduction of medical services	Mediation unproductive (litigation involved)
HHS	Nursing Center	Complainant's daughter denied admission	Agreement (daughter placed in another home)
HHS	Medicalodge	Complainant's daughter denied admission	Agreement (daughter placed in another facility)
HUD	Housing Authority	Denial of housing	Agreement (complainant received satisfactory housing)
DE	Community College	Denied admission to nursing program	Agreement (complainant agreed to a specific course of study to follow)
HUD	Housing Authority	Denied housing	Agreement (complainant was found to be eligible for housing under state law)
HUD	Apartments	Denied housing	No agreement
HUD	Realty Company	Denied rental of house	Agreement (complainant advised to seek federally subsidized housing because of limited income)
DE	University	Denied admission to law school	No agreement

APPENDIX A-continued

FUNDING AGENCY	RECIPIENT	COMPLAINT	BASIS FOR CLOSING
DE	University	Denied application for doctoral study	Mediation terminated (complainant to pursue further)
DE	University	Denied access to advanced degree	Mediation terminated
DE	University	Denied access to doctoral program	No agreement (parties unable to reach accord)
HUD	Housing Corp.	Denied apartment unit	No agreement (parties unable to reach agreement)
HUD	Housing Corp.	Denied rental unit	Agreement (parties will remain on a waiting list for available units)
HUD	Housing Corp.	Denial of rental unit	Agreement (will remain on waiting list for available unit)
HHS	Welfare Dept.	Denial of certain medical services and food stamps	Agreement (all services now being provided to complainant)
HHS	State Hospital	Alleges adolescents not being treated effectively	No agreement (parties unable to reach accord)
DE	Health Science Center	Denied admission to medical school	No agreement (complainant to seek court resolution)
DE	College	Denial of nursing program (group of women asked to withdraw)	Mediation terminated (to pursue further)
HHS	Medical Center	Denial of services to complainant's aunt	Agreement (center agreed to provide handout explaining procedure for making complaints re improper care)
DE	University	Denial of financial aid	Agreement (complainant received a fellowship for 1980-81 academic year)
DE	Engineering School	Denied admission	No jurisdiction (no federal funds involved)
DE	University	Denial of adequate financial assistance	No agreement (parties unable to reach agreement)
DE	Medical School	Denied admission	No agreement

APPENDIX A-continued

FUNDING AGENCY	RECIPIENT	COMPLAINT	BASIS FOR CLOSING
DE	Foundation	Denied access to fellowship program	Does not fall within ADA jurisdiction
DE	State University	Denied access to doctoral program	No agreement (mediation clarified the situation as to goals, etc.)
DE	University	Denied access to doctoral program	No agreement
DE	Institute	Denied access to doctoral program	No agreement
DE	University	Denied admission to graduate program	Agreement (university will allow complainant to proceed with doctoral program; complaint withdrawn)
HUD	Apartment	Denied access to apartment	No agreement
HHS	Agency on Aging	Denied access to luncheon program	Agreement (complaint withdrawn)
HHS	Institute	Harassed out of nursing program	No jurisdiction (complaint not timely filed; 60-day period was up)
DE	Dept. of Social & Health Services	Denied access to program	Agreement (health services resumed and complaint withdrawn)
DOD	National Guard	Denied access to officer training	Agreement (application accepted; complaint withdrawn)
DE	Adult Services training program	Denied services	No jurisdiction (not age)
DE	College	Denied educational opportunity	Mediation terminated (complainant agreed to other rehabilitation)
HHS	Nursing Home	Denial of admission	No agreement (case has been appealed to Medicaid for adjustment)
DE	University	Denied readmittance to B.A. program	Agreement (university agreed to re-enter complainant if she got an A.A.)

APPENDIX A-continued

FUNDING AGENCY	RECIPIENT	COMPLAINT	BASIS FOR CLOSING
DE	College	Denial of A.A. award	Agreement (college agreed Complainant could take courses and if her average is raised to 2.0, would be awarded degree)
DE	College	Denied readmittance to B.A. Program	Could not reach complainant. All letters returned.
HHS	Medical Center	Denied medical services	No agreement (parties unable to reach agreement)
HUD	Housing Authority	Denied Section 8 certificate	Agreement (housing authority will again review application for section 8 certificate as that of a family and not as a single person)
DE	University	Alleges failing unjustly in class which led to dismissal from school. School had not reimbursed him for football tickets	Agreement (complainant to be readmitted to school in '81 and will get refund of football tickets)
DE	University	Dismissed from student teaching program	Agreement (will be reinstated)
HHS	University	Denial of medical services	Currently being mediated
HHS	Public Welfare	Alleges welfare dept. refuses to represent complainant in child support case	Mediation terminated
DE	School District	Complainant's son denied school attendance during 1980-81 year	Complaint dropped

APPENDIX B

COMPLAINT SUMMARIES—U.S. DEPT OF AGRICULTURE

CASE	COMPLAINANT	BASIS OF COMPLAINT	DISPOSITION
I	Black female - age 65 (also diabetic)	Complainant submitted letter to Secretary August 30, 1979. Complainant stated she had been receiving food stamps along with Supplemental Security Income (SSI) payments. She received \$54.00 per month in food stamps. When the system of giving out stamps changed, her stamps were cut to \$21.00 per month. She does not know why her food stamps were cut but thinks other people had their food stamps reduced at same time. The complainant did not feel she was being discriminated against but wanted to know "if they are taking anything from me."	OEO requested funding agency to conduct a preliminary inquiry. No evidence of discrimination or improper procedures was determined. In December, 1979, the complainant's stamp allotment was increased to \$51.00 per month.
II	Female - age 17 (complaint filed by mother on behalf of daughter)	Complainant alleged she was denied food stamps on the basis of her age (17). Complainant has one child, lives with her mother and pays her mother \$47.00 per month rent. Consequently, county housing authority raised mother's rent to \$50.00 per month. Mother stated in complaint that she and her daughter do not purchase groceries together nor eat together; therefore, daughter should be eligible to receive her own food stamps, particularly in view of the fact that she does pay rent (to her mother).	Mediator held one joint meeting with parties. After presentation by Dept. of Public Welfare Administrator of excerpts from the State of Ill. Stamp Program Manual outlining the application of food stamps distribution under the Federal Food Stamp Act, and the mediator's explanation that the Age Discrimination Act does not cover age distinctions which are spelled out by any federal, state or local statute or ordinance, the complainant decided to withdraw her complaint. It should be noted that the Administrator explained to the complainant's mother that her daughter would attain the age of 18 years on December 29, 1979 and could apply for food stamps at that time and would qualify once more as head of household. Case closed December 28, 1979.
III	Male - Spanish Surname	Original complaint filed September 26, 1980, with Plan Health Rehabilitation Services. Complaint received by OEO December 18, 1980. (continued on next page)	OEO requested funding agency to conduct preliminary inquiry.

APPENDIX B-continued

CASE	COMPLAINANT	BASIS OF COMPLAINT	DISPOSITION
		Complainant indicates his age as 72; however, does not state he is being discriminated against due to age. Complainant reported to Hialeah, Florida food stamp office and was informed that he had to report to the Miami, Florida office. Complainant requested that new processing forms be processed at Hialeah office which is closer to his (new) home address.	
IV	Male	Original complaint filed with Personnel Office of Department of Health and Human Services. Complainant alleged he was denied food stamps based on age by his social service worker. Subsequent letter to complainant indicated food stamps were stopped because of address change (complainant moved from Petersburg, Va. to Hopewell, Va.)	Complaint forwarded to FMCS and returned to OEO because it was beyond the 60 day period for mediation. OEO requested funding agency to conduct preliminary inquiry.
V	Complainant filed as husband and wife (Spanish surname)-wife's age given as 72 - husband's age not indicated.	Husband filed complaint on behalf of wife. Stated in complaint that wife is age 72 and disabled. Based on income wife allotted \$10.00 per month of food stamps—felt that this was enough but that wife was being discriminated against.	OEO requested funding agency to conduct preliminary inquiry. Case pending.
VI	Husband and wife age 70 and 69	Complainants applied for food stamps at the county social service department. Complainants were told they were not eligible for food stamps. Complainants did not indicate reasons why they thought were eligible; however, did state in the complaint they have heavy medical expenses and other bills.	Case forwarded to FMCS for mediation April 2, 1980. Complainants told they could qualify for food stamps if they could substantiate their medical costs and other bills. Case closed May 8, 1980.
VII	Male - age not indicated	Letter sent February 9, 1981, to Secretary of Agriculture requesting appropriate information or forms for filing discrimination complaint based on handicap and age. Complainant later notified Department that he was withdrawing handicap portion of complaint and filing this portion of the complaint with the appellate court.	Age portion of complaint referred to FMCS and is still pending disposition.