REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES

Disapproval Of Seattle, Washington, School District Applications For Emergency School Aid Funds

Department of Health, Education, and Welfare

MWD-76-106

APRIL 7, 1976

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-164031(1)

The Honorable Joel Pritchard
House of Representatives

Dear Mr. Pritchard:

Your July 22, 1975, letter requested us to investigate the procedures, guidelines, and regulations on the administration of the Emergency School Aid Act (20 U.S.C. 1601) by the Office of Education, Department of Health, Education, and Welfare. A prime concern was the denial of fiscal year 1975 funds to the Seattle, Washington, school district.

In your letter and the accompanying attachments, several questions and issues were raised about the propriety of denying funds. Most issues pertained to the Department's criteria and procedures used in determining the district ineligible to receive program funds. You expressed particular concern about the Department's Office for Civil Rights determination that the district failed to meet certain nondiscrimination requirements.

Shortly after we received your letter, the district, on August 15, 1975, filed suit in the U.S. District Court for the Western District of Washington claiming that the Department's determination of the district's ineligibility was illegal. From our discussions with representatives of the school district and the Department's Office of the General Counsel, it seems that most of the issues discussed in your request, specifically those pertaining to the Department's procedures and criteria for determining program eligibility, will be brought before the court in the district's suit.

More recently, on February 25, 1976, the Department notified the district that under authority of title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), it was beginning proceedings to terminate all Federal assistance to the district for elementary and secondary education. As reasons for the action, the Department cited the practices which had resulted in the earlier determination that the district was ineligible for emergency school aid funds, and the district's failure to voluntarily comply with nondiscrimination requirements. A hearing has been tentatively scheduled for early April.

As agreed with your office, we do not plan to do any additional work at this time. We did agree, however, to provide you with a summary of information obtained from a review

of pertinent laws, regulations, and records and from discussions with officials of the school district; the Department's Seattle regional office; and the Department's Office of Education, Office for Civil Rights, and Office of the General Counsel in Washington, D.C. The summary, attached as an appendix, outlines the major concerns pertaining to denial of emergency school aid funds to the district and the Department's response to these concerns. It does not address the Departments's more recent action under title VI of the Civil Rights Act.

We discussed the summary with Department officials and considered their comments. Copies of this letter and the summary will be available to the Department and to the public upon request.

We trust the information will help to clarify the issues and satisfy your needs.

Sincerely yours,

Comptroller General
of the United States

SUMMARY OF INFORMATION OBTAINED CONCERNING DENIAL OF FISCAL YEAR 1975 EMERGENCY SCHOOL AID FUNDS TO SEATTLE, WASHINGTON, SCHOOL DISTRICT

BACKGROUND

The Office of Education (OE), Department of Health, Education, and Welfare (HEW) administers the Emergency School Aid Act (20 U.S.C. 1601). The act authorizes OE to provide financial assistance to local school districts and to public and private nonprofit organizations to meet special needs incident to the desegregation of elementary and secondary schools. Assistance is available for instructional services, human relations efforts, and certain other activities related to eliminating, reducing, and preventing minority group isolation or the operation of an integrated school.

To be eligible for most categories of assistance, activities must support an approved desegregation plan. Several categories of assistance are available, including basic grants to school districts and grants for pilot projects, nonprofit organizations, and special types of programs, such as educational television and bilingual-bicultural programs. Funds for basic, pilot, and nonprofit organization grants are allotted to States, by category, according to formulas in the act. School districts and nonprofit organizations compete for funds allotted for their respective States.

AVAILABILITY OF FUNDS

The Congress appropriated $215 million for program activities in fiscal year 1975, of which $185,588,000 was designated for basic grants to school districts, pilot projects, and nonprofit organizations. Under the allotment formula, the State of Washington initially received $1,194,935. However, any part of a State's allotment not awarded by OE is reallotted, by category, to States in which available funds had been exhausted before all applications meeting minimum program requirements were funded. As a result of the reallotment, Washington's allotment was reduced by $217,168. Funds made available to Washington through allotment and later changes through reallotment for school year 1975-76 totaled $977,767 as summarized below.

	Basic grants to school districts	Grants for pilot projects	Grants to nonprofit organizations	Total
Initial allotment	$859,797	$218,579	$116,559	$1,194,935
Reallotment	-2,196	-218,579	3,607	-217,168
Total	$857,601	$ 0	$120,166	$ 977,767

Total funds available were awarded to six grantees--three school districts which received basic grants and three nonprofit organizations. No eligible applicant whose application met minimum program requirements was denied funds in the State. There was, however, one nonprofit organization which did not receive the total amount of its approved application because of insufficient funds for the category. Two additional school districts, one of which was Seattle, were denied funds because OE found them to be ineligible.

APPLICATION REVIEW PROCESS FOR BASIC AND PILOT GRANTS

To receive a basic or pilot grant, a school district must prove its eligibility by presenting as part of its application (1) evidence which shows that the district is implementing an acceptable desegregation plan and (2) assurances that certain administrative and nondiscrimination requirements are being met. Also the school district must submit a proposal meeting minimum programmatic and educational criteria.

Applications are processed in HEW regional offices and are reviewed by representatives of OE and the Office for Civil Rights (OCR) and by a contracting officer and a non-Federal review panel. Recommendations for approval are forwarded to OE headquarters for final action.

Regulations governing the program are set forth in 45 C.F.R. 185. Amendments to these regulations were published in the "Federal Register" as a notice of proposed rulemaking on March 28, 1975, and were republished in final form without substantive changes on June 12, 1975.

If an application is rejected because of poor educational and programmatic content, the district is allowed to modify and resubmit its application. If a district is found to be ineligible to receive program funds, it can request an informal meeting to show why the ineligibility finding should be rescinded. At the meeting, if the district can produce

corrected or supplemental evidence showing the ineligibility finding to be invalid, the decision is revoked. This procedure was established in the June 12, 1975, regulations (45 C.F.R. 185.46). An HEW lawyer told us that, before June 12 if the district requested, there could have been informal meetings to discuss the issues. However, this was not formally required and ineligible districts had no formally established recourse other than to sue HEW or, if ineligibility was based on discriminatory practices, apply to the Secretary of HEW for a "waiver of ineligibility." The act provides that, if a district found to be ineligible because of discriminatory practices corrects them and satisfactorily assures that they will not recur, the Secretary will grant a waiver of ineligibility.

Review of applicant eligibility

As the first step in the application review process, an OCR representative in the HEW regional office determines whether the desegregation plan, which the proposal is designed to support, meets the regulation requirements (45 C.F.R. 185.11). Basically, the school district must be implementing (1) a desegregation plan ordered by a court or other agency with proper authority or (2) a voluntary plan to eliminate, reduce, or prevent minority group isolation in one or more of its schools. If OCR determines that the desegregation plan does not meet these requirements, the application is processed no further. The applicant is told why his application was disapproved and is given an opportunity for an informal meeting.

The act also contains certain administrative requirements which are outlined in the regulations (45 C.F.R. 185.13) and deal, in part, with financial prerequisites and the use of funds. For example, an applicant's total local fiscal effort and per pupil expenditure from local funds cannot be lower in the year for which program assistance is sought than for certain prior years specified in the act and the regulations.

During the application review, a regional office contracting officer checks to see that the required financial assurances are given. If data required in the application show that these assurances have not been met, the applicant is notified that it is ineligible to receive a grant and is given an opportunity for an informal meeting.

Applicants also are ineligible for funds if they have, after June 23, 1972, participated in discriminatory practices prohibited by the act. The regulations (45 C.F.R. 185.43) prohibit such things as discriminatory staffing assignments

and discrimination against national origin minority children by denying equal educational opportunity on the basis of language or cultural background.

As part of the application processing procedures, a regional office OCR representative reviews, for OE, the applicant's compliance with these nondiscrimination requirements. This review is based primarily on data required to be submitted as part of the application. However, according to HEW officials, any additional information about a district which may be available to OCR is also used, such as data from other HEW forms or information collected in other civil rights reviews of the district. If OCR determines an applicant to be ineligible because of noncompliance with discrimination prohibitions, it notifies OE which then notifies the applicant.

A district found to be ineligible because of failure to meet nondiscrimination assurances can request an informal meeting. If its ineligibility is not revoked after the meeting, the district can apply for a waiver of ineligibility. It can also apply for a waiver without requesting a meeting. To be granted a waiver, the district must provide evidence that the disqualifying practice has been eliminated and will not recur. The regulations provide "remedies" for each disqualifying practice which the district must agree to implement before a waiver can be granted. For example, remedies for discriminatory staffing and denial of equal educational opportunity to national origin minorities require, respectively, that

--teachers be reassigned so that the proportion of minority group, full-time classroom teachers at each school is between 75 and 125 percent of the proportion of such minority group faculty in the district as a whole and

--an adequate comprehensive education plan be submitted to meet the special educational needs of all national origin minority group children for whose education the district is responsible.

Review of proposal

Applications for basic and pilot grant categories are given two separate point scores, according to rating scales published in the regulations and manuals provided to potential applicants. OE officials assign a statistical score based on the number and percentage of minority students enrolled in the district's schools and the amount of the

reduction or prevention of minority group isolation accomplished by the district's desegregation plan. A quality score is given based on the educational and programmatic quality of the activities for which program funds are being requested. The quality score is determined by a non-Federal review panel, consisting primarily of professional educators.

Minimum quality point scores and minimum composite (quality plus statistical) point scores are established for each grant category. Any application not meeting the minimum number of points is rejected. For each grant category within each State, all applications receiving at least the minimum number of points and determined to be eligible are funded in rank order according to their composite scores until available funds for that category and State are awarded.

Section 710(d)(2) of the act (20 U.S.C. 1609(d)(2)) prohibits OE from finally disapproving any application for funds without both notifying the applicant of why it was disapproved and giving it an opportunity to modify its application. OE, therefore, allows applicants whose applications were not funded because they either did not meet minimum point requirements or were not reached in rank order to modify and resubmit their applications for a second cycle of awards. To make this option meaningful, OE reserved 20 percent of each State's allotment in fiscal year 1975 to fund applications in the second cycle.

DISAPPROVAL OF SEATTLE SCHOOL DISTRICT'S APPLICATIONS FOR PROGRAM FUNDS

The Seattle school district submitted two applications for program funds for school year 1975-76--one for a basic grant of $554,051 and one for a pilot project grant of $281,557. However, neither application received an adequate quality point score to meet minimum point requirements and both were rejected.

By letters dated June 6, 1975, the district was notified of the deficient areas in each application and of its opportunity to revise and resubmit them for the second cycle of awards. The district modified and resubmitted both applications and one, the pilot project grant application, received acceptable quality and composite scores. OE approved the project's budget at $201,000. However, as discussed below, the district was found to be ineligible for funding and the $201,000 was held in reserve to give the district an opportunity to establish eligibility or apply for a waiver of ineligibility.

During their first cycle review of the applications, OE and OCR found the district ineligible to receive funds because of its

--failure to maintain local fiscal effort,

--discriminatory staffing assignments, and

--denial of equal educational opportunity to national origin minority children.

By letter dated June 12, 1975, OE notified the district of these issues and told the district that

--it had until June 17 to request a meeting on the ineligibility determinations;

--if it could submit maintenance of effort assurances before all funding decisions were made, its applications could still be considered; and

--it could apply for a waiver of ineligibility on the two discrimination issues, but such an application would have to be received by June 19, 1975.

OE officials said they knew they were allowing the district only a short time to prepare its response, but that all districts were under the same time constraints. They explained that the entire award process was conducted under an extremely tight time frame because the program's fiscal year 1975 appropriation was not approved until June 12, 1975. Because of the uncertainty about funding, OE postponed the start of the application process until the end of March 1975. In contrast, the fiscal year 1974 process began in September 1973--about 6 months earlier in the cycle.

At the time the June 6 and June 12 letters were signed, OE was operating under the premise that moneys had to be awarded by June 30, 1975. However, the appropriation act extended the deadline for awarding funds to September 30, 1975. This extension allowed more flexibility, and OE extended the district's deadline for applying for a waiver of ineligibility to August 15, 1975.

On June 23, 1975, district and HEW officials met informally in Washington, D.C., to discuss the district's case. The meeting was continued on July 10 and 11. HEW officials were not convinced at the meeting that the evidence presented was adequate to rescind the ineligibility determinations. District officials were told that to receive program funds

the district would have to (1) apply and be approved for a waiver of ineligibility and (2) resolve the maintenance of effort problem.

The district was eventually able to provide the maintenance of effort assurances, but it disagreed with the ineligibility determinations based on discriminatory practices and chose not to apply for a waiver of ineligibility, but to file suit against HEW.

DISTRICT SUIT AGAINST HEW

On August 15, 1975, the district filed suit against HEW 1/ asking that HEW be stopped from reallocating to other applicants the $201,000 reserved for the district's pilot project application. The court rejected the motion, noting, in part, that it would only prevent use of the funds by other eligible applicants as well as Seattle until resolution of Seattle's suit. The court stated this would not be in the overall public interest. The court also said that it believed Government representatives who said that, if the court ultimately decides that HEW wrongfully withheld funds from the district, the Government would be able to fund the district's project. After this court decision, OE reallocated the moneys. An OE official said that if the court should settle the suit in Seattle's favor, funds made available to the district would have to be deducted from the fiscal year 1976 appropriation.

The district's complaint also sought judgment declaring (1) HEW's actions in determining the district ineligible for a pilot grant illegal and (2) that the district had met program eligibility requirments. According to a lawyer representing the district, it is challenging or will challenge the legality of HEW's procedures on several grounds, including the reasonableness of criteria used, failure to properly promulgate adequate criteria, and failure to establish investigative procedures as the act required. The district also claims it should have been allowed to voluntarily comply with nondiscrimination requirements before being declared ineligible for program funds. As of March 23, 1976, the case was still pending.

1/Seattle School District No. 1, et al., v. Mathews, et al., Civil No. C-75-591V (W. D. Wash., filed August 15, 1975).

ISSUES SURROUNDING THE DISTRICT'S APPLICATIONS

Congressman Pritchard's July 22, 1975, letter questioned HEW's procedures in processing the district's applications. We obtained information on HEW's method of determining noncompliance for the district's failure to maintain fiscal effort. We also obtained information on whether

- --standards for compliance with nondiscriminatory staffing policies had been properly promulgated and applied;
- --standards for meeting the educational needs of national origin minority children had been reasonable and properly promulgated and applied;
- --procedures followed in denying the district funds because of discriminatory practices met the requirements of applicable laws;
- --interpretation of the statute or regulations had been changed because the district had received program funds in previous years and no major changes relative to the discrimination clauses had occurred in the district; and
- --the district requested and was refused technical assistance in modifying its applications for resubmission and, if so, did this violate OE procedures.

Each of these issues is discussed below. The district intends to challenge the adequacy of HEW's procedures and published standards in its suit, and therefore it appears that most of the issues listed above will be before the court. Because resolution of these issues is pending before the court, we are not drawing any conclusions on them.

Maintenance of fiscal effort

Section 710(a)(13) of the act (20 U.S.C. 1609(a)(13)) requires an assurance that, for the fiscal year for which program funds are sought, the applicant has not reduced

- --fiscal effort for free public education to less than that of the second preceding fiscal year or
- --current per pupil expenditures from local revenue below (1) the fiscal year preceding implementation of the desegregation plan or (2) the third fiscal year before the fiscal year for which program assistance is given, whichever is later.

The act also specifies what expenses are to be included for determining per pupil expenditures. The regulations require that the applicant furnish a statement of total local revenues available and per pupil expenditures for the appropriate years. The regulations state, however, that a district would not be disqualified under section 710(a)(13) of the act if local expenditures were reduced as part of a State-wide reorganization of education financing and if the effect of such a reorganization were to maintain or increase combined State and local fiscal effort and per pupil expenditures.

OE found the district was not meeting the maintenance of fiscal effort requirements. The district did not disagree with HEW's finding of ineligibility on this point, and, in fact, had notified HEW of problems in this regard before submitting its applications. By letter dated April 16, 1975, the district told HEW that because of the failure of a special tax levy and legal prohibitions concerning raising local revenues, local expenditures would be reduced below limits set in the act and the regulations. The district asked if there was a way that it could be funded anyway. HEW's response, dated May 16, stated that the law did not allow the requirement to be waived. The district was notified, however, that if it was able to increase local funding to the necessary levels before OE awarded all funds, its applications would be considered for approval.

At the time first-round funding decisions were being made, the district had not been able to supply the necessary assurances. Therefore, as previously discussed, OE notified the district that it was ineligible for program funds because it had failed to maintain fiscal effort. However, as a result of action by the Washington State legislature, the district was later able to assure maintenance of fiscal effort. By letter dated August 14, 1975, OE notified the district that

> "* * * the 'comprehensive State plan' approach, based upon the State legislature's actions of August 9, 1975 [including a levy relief appropriation] * * * will meet both the aggregate and per pupil comparisons required under the maintenance of effort provisions of ESAA [Emergency School Aid Act]. This issue is now resolved in favor of the Seattle School District."

Discriminatory staffing

On the basis of information contained in the district's applications, a yearly ethnic survey used by OCR, and other school district material, OCR found that the district was violating prohibitions against discriminatory staffing assignment and therefore was ineligible.

The regulations under which this determination was made (45 C.F.R. 185.43(b)(2)) state that a district is not eligible if, after June 23, 1972, it had in effect policies, practices, or procedures resulting in discrimination on the basis of race, color, or national origin in assigning any of its employees, "including the assignment of full-time classroom teachers to the schools [of such district] in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin."

OE's June 12, 1975, letter notified the district that the percentage of both minority staff and minority students at 11 of its schools was greater than twice the percentage of minority staff and students, respectively, in the district as a whole, and that

> "the fact that minority identifiable faculties and student bodies exist together in 11 schools indicates that the district is assigning faculty in a discriminatory manner."

The letter reflected an internal guideline which OCR uses in reviewing school staffing policies. OE and OCR officials told us that under this guideline or "double-double" rule of thumb, a school is generally considered to be racially identifiable if the percentage of both minority faculty and minority students is more than double the percentage of minority faculty and students, respectively, in the district as a whole.

OCR officials said that experience had shown this guideline to be an effective tool for identifying discriminatory staffing policies. One OCR official said it would be almost impossible for a school district to have both disproportionate staffing and student enrollment--to the extent of being greater than twice the districtwide ratio--by accident.

Promulgation of compliance standards

A major concern raised by Mr. Pritchard's letter was that the district had been held in violation of the double-double rule of thumb and that this standard constituted

criteria which did not exist in law or regulation. District officials said they believe OE is legally bound to publish such criteria and that in the absence of publication, the district cannot be held accountable to it. We discussed this matter at length with OE and OCR officials as well as with lawyers in HEW's Office of the General Counsel. Their position is summarized below.

They emphasized that the district had not been found in violation of the double-double guideline but to have had discriminatory staffing policies as evidenced by disproportionate minority staff and student assignments. They said the guideline is only a screening tool used to help identify disproportionate assignments. An HEW lawyer said the letter of ineligibility sent to the district was perhaps not sufficiently clear and was worded so that it could be interpreted that the double-double guideline itself was the standard which had not been met. Although he considered this unfortunate, he said it did not alter the finding.

The double-double guideline is not published in any regulations, manuals, etc., available to school districts. HEW officials said that it is only an internal administrative guideline; meeting it does not automatically establish eligibility and not meeting it does not establish ineligibility. For this reason, they believe the rule is not included under legal provisions requiring publication.

In further explaining their position, HEW officials cited the following examples of cases in which the guideline would not apply. In each case, judgment enters into the decision of whether the guideline applies.

1. The guideline probably would not apply in districts with extremely small proportions of minority staff. For example, in a district with only 2-percent minority staff, having 4-percent minority teachers at one school (even with a high minority student population) would not necessarily cause that school to be "racially identifiable" (calling for a finding of discrimination) or necessitate staff reassignment.

2. Districts not meeting the guideline may be able to show valid educational reasons for their staffing patterns. This may be especially true in districts with non-English-speaking students where students and teachers might be grouped together for bilingual instruction. In this case, not meeting the guideline would not necessarily indicate illegal discrimination.

3. Districts may be within the double-double guideline, yet still have disproportionate staffing. For example, a district with 45-percent minority faculty could assign staff at schools with high minority enrollments so that minority staff percentages are 85 percent at those schools. This is within the guideline which allows up to 90 percent, twice the districtwide ratio, but probably would be considered discriminatory by OCR if accompanied by disproportionate student assignments.

Some HEW officials said that there is necessarily some element of subjectivity which must be applied in identifying discriminatory practices. They said that guidelines such as the double-double rule of thumb were established only as benchmarks, not as specific criteria to be met by districts.

The officials also said that, regardless of whether the district was aware of the double-double guideline, all districts are responsible for knowing the laws and case law (court tests of laws) relating to discrimination. They pointed out that in January 1971 HEW sent a memorandum to chief State school officers and school superintendents notifying them of legal requirements regarding staffing. The memorandum stated that:

> "School districts that have in the past had a dual school system are required by current law to assign staff so that the ratio of minority group to majority group teachers in each school is substantially the same as the ratio throughout the school district. This is the so-called Singleton rule, enunciated by the Court of Appeals for the Fifth Circuit in January 1970. The same rule applies to non-teaching staff who work with children."

The memorandum also stated that the rule also applied to districts which had not operated "official dual systems." HEW officials stressed that if the district was in compliance with this rule, it would have no problem proving program eligibility as far as staffing policies are concerned.

Interpreting district data

According to the information Mr. Pritchard gave us, the district disagrees with OCR's interpretation of the staffing data it provided to OE. The district noted that the regulation refers to a school's identifiability as being for a particular race, color, or national origin. One district document provided us contained a listing of student

enrollment and faculty assignment by minority at each of the 11 schools OCR cited as being "racially identifiable." The document questioned the validity of HEW's determinations of "identifiability," noting that OCR's list of 11 schools contained

> "* * * five schools in which at least half of the minority faculty members are non-black minorities, and yet in each case the largest ethnic group in the enrollment is black."

In other words, the district believes that because the disproportionate number of teachers or students are not always of the same minority, those schools cannot be identified as being for a particular race and, therefore, are not violating the guideline.

HEW lawyers and OCR officials emphasized that the statute and regulations prohibit discrimination and said that although many cases of discrimination concern only one minority, where appropriate, HEW has consistently enforced provisions of nondiscrimination on the basis of all minorities as a group. They noted that in America, discrimination historically has been whites versus "other" and although, as the district points out, the regulation does speak to a particular race, it does so only as an example and discrimination is not limited to that example. They said that the question of whether enforcement should be on the basis of one minority or all minorities has never been litigated and therefore may legally be considered an open question, but they do not anticipate changing their interpretation.

An HEW lawyer told us that even if the district's interpretation was used, it would be ineligible. Upon reviewing the data further, OCR found that the district had 13 schools in which the percentages of black students and black certified staff were greater than twice the percentage of black students and staff, respectively, districtwide.

Other HEW comments

HEW officials said district representatives told them that the district had, in fact, consciously assigned minority staff to schools with high minority concentrations and that this policy had received community support. HEW officials pointed out, however, that the reasons the district cited, such as the need of minority children for "role models" of the same minority, had been specifically rejected in recent

court decisions. In one decision 1/ the court said that such a policy could logically be extended to having totally segregated schools; e.g., only blacks teach blacks and only whites teach whites. HEW officials believe that this admitted policy confirms that the district's staffing assignments were discriminatory.

Discrimination against national origin minority children

In addition to its finding on discriminatory staffing, OCR found the district to be discriminating against national origin minority students by failing to meet the educational needs of all such children enrolled in the district. The regulation under which this determination was made (45 C.F.R. 185.43(d)(2)) states that an applicant is not eligible if, after June 23, 1972, it had any policy, procedures, or practices resulting in discrimination on the basis of race, color, or national origin, including denying equality of educational opportunity on the basis of language or cultural background.

The ineligibility determination was based on information the district provided on a form sent by OCR to selected school districts in the first quarter of 1975, before the program application process started. This form, "Compliance Report on Instructional Services for Students Whose Primary or Home Language Is Other Than English" (Lau form), was sent to collect data for use in determining school districts' compliance status regarding education of national origin minority children under the U.S. Supreme Court decision in the case of Lau v. Nichols, 414 U.S. 563 (1974). The decision, based on section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d), held that a school system receiving Federal funds unlawfully discriminates against limited English-speaking children if it fails to cope with their language problems. Under such circumstances, children are denied an equal opportunity to participate in the educational program.

On the basis of information on the district's Lau form, submitted April 14, 1975, OCR noted the district was not serving all of its national origin minority children. OCR noted especially that there were no specialized programs for 1,035 of the 1,495 students who spoke little or no English.

1/United States v. School District of Omaha, 521 F. 2d 530 (8th Cir. 1975).

OE's June 12, 1975, letter notified the district that failure to take adequate affirmative steps to meet the educational needs of these students constituted discrimination against national origin minority children on the basis of language background, and, therefore, the district was ineligible to receive program funds.

The district submitted a revised Lau form on July 11, 1975. OCR officials told us that the revised data, however, did not call for revoking the ineligibility decision. A discussion of the district's ineligibility determination under Lau requirements follows. Some of the numbers included on the district's form were:

--A total of 5,306 national origin minority students have a primary or home language other than English. Of these, 681 are being served by special programs.

--Of the 5,306, 1,212 speak little or no English. Of these, 416 are being served by special programs.

--Of the 5,306, 927 are 1 or more years behind in grade placement for their chronological age. Of the 1,212 speaking little or no English, 342 are also behind.

Reasonableness and promulgation of compliance standards

Mr. Pritchard's July 22 letter questioned the reasonableness of standards for meeting the needs of students with limited English-speaking ability and whether HEW had properly promulgated such standards.

Program regulations state that a district is not eligible to receive funds if it has a practice, policy, or procedure which denies equality of educational opportunity on the basis of language or cultural background. According to HEW officials, the standards require that the educational needs of every national origin minority child with limited English-speaking ability be met. The officials believe the Lau decision clearly requires a standard of 100-percent compliance.

District officials told us they believe the regulations do not clearly require a standard of 100-percent compliance. Further, they believe it is unreasonable to require 100-percent compliance and unfair to say a district is discriminating if only a few children are not being served. They disagree with HEW that the Lau decision requires 100-percent compliance and the district intends to challenge this interpretation in its suit.

According to district officials, over 40 languages are represented in the district's student enrollment and meeting the needs of each child is truly a monumental task. To illustrate, they pointed out that of the 342 students who speak little or no English and are 1 or more years behind in grade placement for their chronological age, they have identified about 197 who are not now being served by a specialized program. Although the district is trying to develop programs to meet these children's needs, it is difficult because they speak 18 different languages and attend 65 different schools.

OCR officials recognize that this standard is stringent and that many districts will have difficulty in meeting it. They said they have been trying to be lenient in allowing districts enough time to develop adequate programs to meet these students needs. Also they said nine regional centers have been established to assist districts, if requested, in developing acceptable programs.

Regarding promulgation, HEW officials told us that districts are responsible for keeping informed about legal decisions, such as the Lau decision. Beyond this, they said that even before the Lau decision, HEW policy had required that all national origin minority children be served to reduce language impediments and that this policy had been promulgated. A May 1970 OCR memorandum was sent to districts with high concentrations of national origin minority students and was published in the "Federal Register" in July 1970 to notify all districts of HEW's interpretation of legal requirements. The memorandum stated:

> "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

Interpretation of data on the Lau form

In discussions with us, district officials raised several arguments against OCR's interpretation of the data the district had reported on its Lau form. Two of these are summarized below. However, the district told us that it was not serving about 197 children. Therefore if OCR's interpretation that every child must be served is upheld, the district would be ineligible.

A district official said he believes OCR's analysis of the information on the Lau form did not adequately consider all possible reasons for some of the district's national origin minority students being behind in grade placement. OCR's September 8, 1975, letter notified the district that, on the basis of the revised data, only 416 of the 1,212 students identified as speaking little or no English were being served by specialized programs, and that failure to serve the remaining 796 students constitutes discrimination on the basis of language.

District officials told us, however, they believe the analysis should not center on only those students who speak little or no English but should concentrate on the academic achievement of the entire national origin minority population relative to the entire district. They pointed out that only 927 of the district's 5,306 national origin minority students are 1 or more years behind in grade placement for their chronological age. This constitutes only 17.5 percent of the district's national origin minority student enrollment. The comparable percentage for all students in the district is 14.5 percent. District officials told us they believe the closeness of these percentages shows that, just as with English-speaking students, some national origin minority students may be behind in grade placement for reasons other than language impediments. They said they believe OCR did not adequately consider this possibility when, on the basis of statistics alone, it found the district to be discriminating.

An HEW Seattle regional office official said the district had given no other reasons for some of the national origin minority students not progressing at the achievement level expected of nonminority students. OCR's September 8 letter to the district noted that, according to information the district supplied, 342, or 28.2 percent, of the 1,212 students speaking little or no English were behind their chronological grade level, and that this is nearly twice the districtwide percentage of 14.5. One OCR official said any information showing other reasons for this group being behind in grade placement would be questionable because it is unlikely that children speaking little or no English could progress adequately in the regular English-oriented curriculum.

Further, according to OCR officials, statistics on grade placement or comparisons with districtwide ratios are not really pertinent. They contend that the real issue is whether students are being held behind in any subject, not just overall grade placement, because of language barriers. They said grade placement does not show achievement level; for example, a child in the sixth grade may be reading at a third-grade

level. Also comparisons with the district as a whole are not meaningful because other children do not have the language barrier.

District officials told us that much of the data required on the Lau form was not readily available and that some of the information was estimated. They included these qualifications on the information originally reported to OCR. Because of these qualifications, they questioned HEW's fairness in using the Lau data in determining the district's eligibility for emergency school aid.

One district official told us that, because of reliance on teacher estimates of language ability and on newly developed testing instruments, the revised Lau data submitted by the district still represents about a 25-percent overestimate of student learning difficulty due to language.

An OCR official involved in processing the district's applications said he believes the district's data was sufficiently accurate to justify using it to determine program eligibility. He said that even if the data is greatly overstated, the district is still not serving all students and, therefore, is ineligible.

In its September 8, 1975, letter, OCR notified the district that it was failing to adequately (1) identify the primary or home language of children and (2) assess the degree of linguistic function or ability of these students. The letter noted that this also violated Lau requirements because, to meet the students language needs, a district must have an adequate method for identifying those needs.

The letter stated that the substantial revision made in the Lau data indicates that the district cannot adequately identify these children. For example, the students reported as having a primary or home language other than English were changed from 6,755 to 5,306. The letter also stated that information submitted by the district and obtained through discussions with district personnel shows that most students were assessed as to degree of ability in both English and the other language by monolingual English-speaking personnel and that this method of identification does not meet the Lau requirements as interpreted by OCR.

Use of data on the Lau form in determining program eligibility

Mr. Pritchard's letter questioned HEW's fairness in using data from Lau forms in determining program eligibility. It pointed out that districts which had not completed their Lau forms were not being penalized, while districts, such as Seattle, which had filed completed forms were subject to having the information used to their detriment.

Lau forms were sent to 334 districts which had previously reported to HEW that many national origin minority children were enrolled in their schools and that less than 10 percent were receiving special educational services. Of these, 76 were districts that applied for program funds. According to OCR, before the deadline for processing applications, all 76 districts had not been evaluated for Lau compliance either because their completed forms had not been received or they had not been adequately reviewed. Forms for only 11 of the 76 districts had been adequately reviewed to determine compliance. Including Seattle, 10 were in noncompliance and 1 in compliance. All 10, except Seattle, applied for a waiver of ineligibility; 7 of the 9 districts applying were granted a waiver, 1 application is still pending, and 1 was denied.

An OCR official told us that analysis of the Lau forms is very complex, often requiring contact with the district several times for additional information. He pointed out that the time frame for processing school year 1975-76 applications for emergency school aid grants was extremely tight and, in most cases, did not allow time for recontacting districts. OCR policy was to review Lau forms for applicant districts to the extent time and staff resources permitted and, if the data was adequate to determine program eligibility, it was used.

The time HEW regional office staffs had to review the forms apparently varied greatly. For example, HEW Seattle regional office officials said that only two districts applying for program funds were required to submit Lau forms. The Lau forms for both of these districts had been reviewed before determining program eligibility, but data was adequate to make a determination on only one--Seattle. In contrast, information available at OCR headquarters showed that as late as September 1975, one HEW regional office had not reviewed any of the forms. According to HEW officials, this region was under court order to emphasize other areas of civil rights enforcement and did not have adequate staff to review Lau forms in addition to the work mandated by the court.

OCR officials said they realize OCR's policy might seem unfair, especially since districts that had not provided complete data were not denied grants. They said the other alternatives, however, would have been even less desirable.

One alternative would have been to deny program funding to all districts that had not submitted completed Lau forms or to those districts whose forms OCR had not adequately reviewed. However, according to an HEW lawyer, any denial of funds on this basis may have been legally unsound because no factual basis for the ineligibility determination would have been established. Further, this policy could have resulted in a significant reduction in program size and in the number of school districts awarded grants. As previously stated, at the time of the deadline for processing applications, OCR had adequately reviewed Lau forms of only 11 of the 76 districts applying for funding.

The other alternative would have been to ignore all evidence because comparable data was not available for all districts. HEW officials said they could not disregard evidence of noncompliance. They said that inevitably more information is available for some districts than for others and that they always try to use whatever information is available.

They also said that as other Lau forms are fully analyzed, additional districts which received program funds might be found ineligible, and that, if this occurs, proceedings to terminate the grants will be started. Although OCR was able to determine compliance for 11 of the applicant districts in the short time frame in which program applications were processed, since June OCR apparently has made little progress in reviewing all Lau compliance forms, including those of program grantees. As of January 28, 1976, OCR showed that final determinations on compliance with Lau requirements had not been made for any of the districts which had received a program grant without having their Lau forms reviewed. According to an OCR official and an HEW lawyer, since completion of the fiscal year 1975 grant award process, the staffing resources of OCR have been strained by work required by mandate of the courts and other priorities. Consequently, further review of eligibility of program recipients, including additional review of Lau forms, has been impeded.

HEW's adherence to prescribed procedures

Mr. Pritchard's letter questioned whether HEW had followed prescribed procedures in making its investigation and notifying the district of the results. Generally, district officials told us they believe that OCR should be governed by requirements of title VI of the Civil Rights Act of 1964 and implementing regulations. The current regulations (45 C.F.R. 80) specify certain requirements and time frames for enforcement procedures. HEW is also considering proposed regulations (45 C.F.R. 81), which set out in more detail procedures and time frames governing investigations, notification of findings, and due process accorded districts.

In addition to its investigation and enforcement responsibilities under the Civil Rights Act, OCR is responsible for determining an applicant's eligibility for emergency school aid grants in terms of acceptability of its desegregation plan and its nondiscrimination assurances. OCR officials told us that although failure to meet nondiscrimination requirements of the Emergency School Aid Act generally constitutes a violation under the Civil Rights Act, enforcement procedures under the two acts are different. They said that when making eligibility determinations for emergency school aid funds, OCR is governed by requirements of the Emergency School Aid Act and implementing regulations and not the Civil Rights Act.

The officials pointed out that neither part 80 of the regulations (45 C.F.R. 80), which implements title VI of the Civil Rights Act, nor the proposed part 81 (45 C.F.R. 81), which sets forth specific enforcement procedures under several acts, covers the Emergency School Aid Act. They also pointed out that although part 81 has been proposed through publication in the "Federal Register," it has not been finalized and thus does not yet constitute required procedure under the Civil Rights Act.

In addition, the officials said that section 706(d)(5) of the Emergency School Aid Act (20 U.S.C. 1605(d)(5)) states that determinations of program eligibility under nondiscrimination requirements are to be made according to criteria and procedures established for the program. Procedures established include requiring applicants to provide evidence of compliance with discrimination prohibitions and OCR to review the acceptability of that evidence. The regulations set forth the nondiscrimination and data requirements. OE's manual for applicants states that OCR is responsible for certifying that applicants meet nondiscrimination requirements.

Program regulations (45 C.F.R. 185.46) allow an ineligible applicant to request an informal meeting with the Assistant Secretary of Education to show why the ineligibility decision should be revoked. If the decision is not revoked, the only other recourse provided in the regulations and the act is to apply to the Secretary of HEW for a waiver of ineligibility.

District representatives met informally several times with OE and OCR officials. However, district officials believe they did not receive a fair hearing and that OE and OCR officials did not adequately consider the district's arguments.

HEW officials told us that the meetings are designed to allow districts to challenge the facts on which determinations are based. They said the district was not disputing the facts, but rather HEW's interpretation of them. The officials did not agree to revoke the ineligibility decision, and, as stated before, the district did not apply for a waiver, but took the issue to court.

One of the district's chief complaints concerning OCR's procedures is that the district was not given an opportunity to voluntarily comply with nondiscrimination requirements before a final ineligibility determination was made. District officials said that OCR is required to give them such an opportunity under section 602 of the Civil Rights Act which requires, in part, that no agency terminate or refuse a grant because of discriminatory practices of the grantee without first trying to obtain voluntary compliance with nondiscrimination requirements. They also said that in failing to grant such an opportunity, OE violated section 710(d)(2) of the Emergency School Aid Act, which prohibits OE from finally disapproving an application without allowing the applicant appropriate opportunity to modify its application.

HEW officials told us that provisions for voluntary compliance contained in the Civil Rights Act do not apply to the emergency school aid program and that the Emergency School Aid Act does not include such provisions. The act states only that, once found ineligible, an applicant can apply for a waiver. If the problem is corrected and the waiver is granted, program funds can still be obtained.

HEW lawyers said that section 710(d)(2) of the Emergency School Aid Act pertains only to the quality of the applicant's proposal, not to conditions of applicant eligibility, and that the district was allowed to modify its applications to try to improve the quality of its proposals. They also noted

that, unlike the Civil Rights Act, the Emergency School Aid Act authorizes a funded program, operated under a fiscal year appropriation, and funds must be obligated by a specific date. Any provision requiring negotiations for allowing voluntary compliance--especially where the district disagrees with the finding of ineligibility--could hamper the program's effective operation by delaying or even preventing obligation of all appropriated funds.

Possible change in HEW policies

Mr. Pritchard's letter questioned whether there had been any major changes in HEW's policies on the requirements for staffing and meeting the needs of national origin minority students since the district had been determined eligible for program funds in previous years and had not significantly altered its policies in these areas for school year 1975-76.

According to HEW officials, the basic policies in these areas were stated as early as January 1971 (see p. 12, memorandum on staffing) and May 1970 (see p. 16, memorandum on meeting needs of national origin minorities) and have not changed.

Concerning staffing, OCR officials said that they had been in error in previous years; the district should have been ineligible. HEW lawyers told us that as of March 18, 1976, no decision had been made as to whether proceedings to reclaim previous years program moneys from the district would be started.

Regarding the national origin minority issue, OCR officials said that although the policy had existed for many years, the January 1974 Lau decision provided an impetus to enforcement. OCR sent out the Lau forms to obtain more detailed information than was previously available. The program application cycle for school year 1975-76 was the first for which any of this information was available and could be used.

Assistance in modifying applications

OE's manual containing instructions for school districts applying for program funds states that HEW regional office personnel should assist applicants upon request in preparing both original and resubmitted applications. According to information provided with Mr. Pritchard's letter, HEW regional office personnel did provide technical assistance to district officials in drafting the original applications. However, district officials said HEW did not provide any assistance when they were modifying them for resubmission.

The administrative manual used by program personnel states that technical assistance should be offered to all applicants who are advised to resubmit applications and that program officers should give the applicant "whatever help is needed, to the extent that such help is available." The manual also provides that State educational agency staff and general assistance center personnel may assist program managers in giving technical assistance to applicants. Under title IV of the Civil Rights Act, OE funds technical assistance units at State educational agencies and general assistanc centers at institutions of higher learning. Their primary purpose is to assist districts in preparing, adopting, and implementing desegregation plans. According to OE officials, they frequently assist districts in applying for emergency school aid funds to help desegregation efforts.

The HEW regional office program officer responsible for providing technical assistance to the district told us that because of the extremely tight time frame under which they were operating, regional office staff was not adequate to both process applications and give personal assistance to all districts seeking help. Because of this, he referred the district to the State educational agency and the general assistance center for help. The district was given copies of the comments of HEW regional office's educational quality review panel and received assistance from the State educational agency.

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