

GAO

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WITHIN-SCHOOL DISCRIMINATION

Inadequate Title VI Enforcement by the Office for Civil Rights





United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division

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July 22, 1991

The Honorable William Ford
Chairman, Committee on
Education and Labor
House of Representatives

The Honorable Major Owens
Chairman, Subcommittee on
Select Education
Committee on Education and Labor
House of Representatives

In response to your request, this report presents the results of our review of the Department of Education's Office for Civil Rights' title VI enforcement activities.

Copies of this report are also being sent to appropriate House and Senate committees, the Secretary of Education, and other interested parties.

This report was prepared under the direction of Franklin Frazier, Director, Education and Employment Issues, who may be reached on 275-1793 if you or your staffs have any questions about it. Other major contributors are listed in appendix X.

A handwritten signature in cursive script that reads "Lawrence H. Thompson".

Lawrence H. Thompson
Assistant Comptroller General

Executive Summary

Purpose

A disproportionate number of minority students in our nation's public elementary and secondary schools are in lower-ability classes and special education programs. This has led to congressional concern about student resegregation resulting from discrimination within schools. Such within-school discrimination is often caused by the inappropriate use of student assignment practices, such as ability grouping or tracking.¹

The Chairmen of the House Committee on Education and Labor and its Subcommittee on Select Education asked GAO to assess (1) the extent of possible within-school discrimination and (2) the adequacy of federal enforcement activities in eliminating discrimination in elementary and secondary schools. GAO was asked to focus on enforcement activities relating to ability grouping and tracking.

Background

The Department of Education's Office for Civil Rights (OCR) is responsible for ensuring that educational institutions receiving federal funds comply with federal civil rights statutes, including title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, and national origin.

Title VI regulations require that OCR (1) investigate civil rights complaints from parents and other sources and (2) conduct self-initiated investigations, which are called compliance reviews. Investigators in OCR's 10 regional offices conduct both kinds of investigations. Title VI regulations require that OCR undertake compliance reviews when it has information about school districts' possible noncompliance.

If an investigation determines that a school district violated a civil rights statute or regulation, OCR attempts to obtain a voluntary settlement with the district, including the district's agreement on a corrective action plan. After a settlement agreement is reached, OCR must monitor the district until OCR (1) verifies that the corrective action plan has been fully implemented and (2) confirms that the implemented plan has corrected the violation(s). If no settlement can be reached, Education is authorized to withhold the district's federal assistance.

In deciding if a school district's practice of ability grouping violates title VI regulations, OCR first determines if the number of minority students in lower-ability classes is sufficiently disproportionate—in comparison,

¹ Ability grouping and tracking are related practices by which students are assigned to groups or classes on the basis of an assessment of academic ability or achievement level.

for example, to the racial composition of the school—to warrant further investigation. If so, OCR continues its investigation, assessing whether the ability grouping is educationally justified according to OCR criteria.

OCR investigators frequently use three criteria to determine if ability-grouping practices are educationally justified. These three criteria were included in Education's implementing regulations for the Emergency School Aid Act.² The criteria require that ability grouping be

- based on nondiscriminatory objective measures that are educationally relevant for the purpose of the grouping,
- determined by the nondiscriminatory application of the measures, and
- validated by test scores or other reliable objective evidence indicating the educational benefits of the grouping.

For example, under the first criterion for assessing educational justification, OCR has required that a student be assigned to ability-grouped classes on the basis of objective measures of the student's ability in each of the relevant subject areas (such as subject-specific tests). In contrast, OCR has found it is not educationally justified to assign a student to ability-grouped classes on the basis of (1) a single objective measure of ability across subject areas, such as a composite test score, or (2) subjective measures, such as teacher recommendations. Using the educationally justifiable approach of assigning students on the basis of objective measures relevant to specific subject areas, a given student would likely be regrouped with different classmates for different subjects.

To assess the adequacy of OCR's title VI enforcement activities, GAO analyzed OCR enforcement statistics, mailed questionnaires to OCR investigators and regional directors, reviewed case files for within-school discrimination investigations, and reviewed and analyzed existing research evidence. (See pp. 20-23.)

Results in Brief

Many of the nation's schools ability-group students in a possibly discriminatory manner. Research findings indicate that schools often assign students to ability-grouped classes for all academic subjects with no regrouping to reflect differential ability in various subjects. As a result, ability-grouped students remain with the same classmates

²The Emergency School Aid Act was repealed, and its implementing regulations removed, in 1981, when the Emergency School Aid program was consolidated with other categorical grant programs under the Education Consolidation and Improvement Act. This act consolidated 28 categorical grants into a single block grant known as Chapter 2.

throughout the day. OCR has found that ability grouping in this manner is discriminatory when it results in disproportionate numbers of minority students being assigned to lower-ability classes.

OCR's title VI enforcement activities relating to within-school discrimination have been inadequate. For example, OCR has not met the regulatory requirement for undertaking compliance reviews when it has information of possible noncompliance. Additionally, in their ability-grouping and tracking investigations, OCR regional offices have been inconsistent in determining if student assignment practices are discriminatory. As a result, some ability-grouping and tracking investigations GAO reviewed permitted the same practices that others found in violation. A lack of internal OCR policy guidance contributed to such inconsistency. Finally, OCR has insufficiently monitored school districts' corrective actions; as a result, OCR has sometimes failed to determine if discriminatory practices it identified have been stopped.

In December 1990, OCR announced a national enforcement strategy that makes several within-school discrimination issues, including ability grouping, a high priority. This strategy also includes plans to develop written policy guidance for regional offices to use in investigating title VI issues and improve monitoring practices. OCR has informed GAO that these planned actions are being implemented. GAO believes that OCR's plans, as presented in its national enforcement strategy, are steps in the right direction.

Principal Findings

Evidence of Possible Within-School Discrimination

Research findings show that about 10 percent (or about 1,700) of the nation's middle schools assign students to ability-grouped classes for all academic subjects with no regrouping. In addition, OCR's biennial surveys of schools and districts indicate possible within-school discrimination.

Number of Within-School Discrimination Compliance Reviews Has Declined

The number of OCR compliance reviews is not commensurate with the evidence of possible within-school discrimination. OCR has conducted only one compliance review on ability grouping or tracking since 1985. Compliance reviews relating to all of the within-school discrimination issues have declined since fiscal year 1983. The total number of within-

school discrimination compliance reviews decreased from 60 in fiscal year 1987 to 7 in fiscal year 1990. OCR attributes this reduction to a lack of resources and a rising complaint investigation workload. (See pp. 26-27.)

Regulations and Policy Guidance for Within-School Discrimination Lacking

Federal regulations are silent on the practices schools should use when assigning students to classes on the basis of academic ability or achievement level. Consequently, there is no federal regulatory guidance for state and local education agencies to follow concerning practices that affect students' educational opportunities.

Additionally, OCR has issued little internal policy guidance for its regional offices to follow in within-school discrimination investigations. The lack of internal guidance contributed to the inconsistencies GAO found in how regional offices investigated and resolved ability-grouping and tracking cases. For example, OCR regional offices were inconsistent in how they determined if (1) the number of minority students in lower-ability classes was sufficiently disproportionate to warrant further investigation and (2) ability-grouping practices were educationally justified. (See pp. 30-31.)

Monitoring Often Delayed and Sometimes Incomplete

OCR may have allowed discriminatory student assignment practices to persist because of insufficient monitoring. OCR's monitoring of school districts' corrective actions was often delayed, sometimes never completed, and frequently considered by regional office staff to be a low priority. For example, in 11 of the 15 ability-grouping or tracking complaint investigations requiring monitoring that we reviewed, the regional offices did not complete their reviews of districts' monitoring reports until 3 months or more after they were received by OCR. These delays often ranged between 8 and 16 months. Further, in four cases, we were unable to find evidence that the required monitoring was completed or that discriminatory student assignment practices were stopped. OCR investigators reported that monitoring was not a high priority because a greater emphasis was given to completion of complaint investigations.

Without timely and complete monitoring, OCR cannot determine if school districts' corrective actions are sufficient to correct identified discriminatory practices. Ineffective monitoring jeopardizes OCR's ability to enforce school districts' compliance with federal civil rights laws and regulations. (See pp. 36-38.)

Recommendations

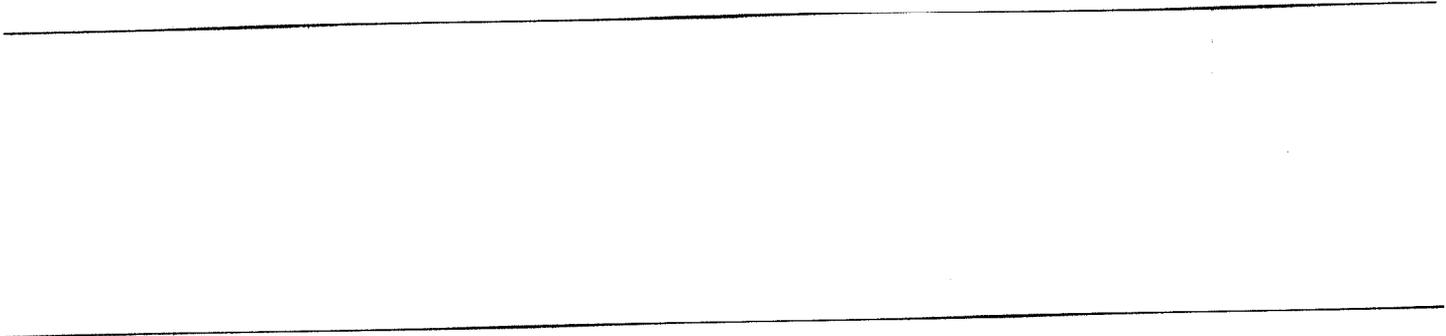
To provide needed federal regulatory guidance to state and local education agencies, GAO recommends that the Secretary of Education issue title VI regulations that identify procedures schools should follow for assigning students to classes on the basis of academic ability or achievement level. (See p. 34.)

To help ensure consistent determinations in complaint investigations among OCR regional offices, GAO recommends that the Secretary direct the Assistant Secretary for Civil Rights to develop written policy guidance that specifies the appropriate analytic approach to use in investigating and resolving within-school discrimination cases. (See p. 34.)

GAO makes other recommendations related to (1) improving OCR's monitoring of districts' corrective actions and (2) obtaining needed staff training and expertise. (See pp. 38 and 41.)

Agency Comments

Education generally agreed with GAO's recommended improvements, stating that some corrective actions were already underway. (See app. IX.) Education disagreed, however, that title VI regulations should be expanded to identify practices schools should use for assigning students to classes on the basis of ability or achievement level. In Education's view, existing regulations are adequate to prosecute ability-grouping cases. While that may be true, GAO continues to believe that the regulations should, but do not now, adequately inform state and local education officials about standards for making ability-based student assignments.



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Abbreviations

ESAA	Emergency School Aid Act of 1976
GAO	General Accounting Office
OCR	Office for Civil Rights

Background

A disproportionate number of minority students in our nation's public elementary and secondary schools are in lower-ability classes and special education programs. This has led to concern about student resegregation resulting from discrimination within schools. Such within-school discrimination may result when schools inappropriately use educational practices or intentionally treat students differently because of race, color, or national origin.

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in federally funded educational programs and activities. The Department of Education's Office for Civil Rights (OCR) is responsible for ensuring that educational institutions receiving federal funds comply with title VI and other federal civil rights statutes.¹

Ability Grouping and Tracking

Ability grouping and tracking are related processes in which students are divided into categories for assignment to different kinds of classes. Ability grouping is a practice in which elementary schools assign students, according to their academic ability or achievement level, to homogeneous classes or groups for all or a portion of their instruction. Tracking refers to the practice of grouping secondary school students by academic ability or achievement level into curriculum tracks—such as college preparatory, general, or vocational. Students may take all or some of their courses in a particular curriculum track. The ability group level to which students are assigned in elementary and middle-grade schools often influences the curriculum track they take in high school.

OCR Enforcement Activities

About 350 investigators in OCR's 10 regional offices conduct investigations of elementary, secondary, and postsecondary educational institutions that receive federal funds. Title VI implementing regulations require OCR to (1) investigate complaints of possible discrimination received from such sources as parents, students, school staff, and advocacy groups and (2) conduct self-initiated investigations called compliance reviews. The regulations require that OCR conduct compliance reviews when it has information, which it develops or is brought to its

¹The other civil rights statutes that OCR enforces are (1) title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; (2) section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicapping condition; and (3) the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age.

attention, about possible noncompliance with the regulations.² (See app. I for the number of OCR investigations by statutory authority.) The regulations also authorize Education to suspend or terminate federal funds received by educational institutions that refuse to comply with the regulations.

Investigative Process

If an investigation finds that no violation has occurred, the OCR regional office issues a compliance Letter of Findings to the school district and complainant.³ If a violation has occurred, the regional office attempts to achieve voluntary compliance by negotiating a settlement with the school district before issuing a Letter of Findings. OCR calls this a pre-Letter of Findings settlement; it includes an agreement on a corrective action plan. OCR issues a violation-corrected Letter of Findings if a pre-Letter of Findings settlement is achieved. A violation-corrected Letter of Findings states that OCR currently considers the school district to be in compliance although a violation was found. This presumption of compliance, however, is contingent on the district's completing the corrective actions that it agreed to take. OCR closes the vast majority of its investigations that identify violations in this manner.⁴

Following the issuance of a Letter of Findings, OCR requires its regional offices to monitor school districts that agree to take corrective actions. OCR policy requires regional offices to monitor school districts until the offices (1) verify that approved corrective action plans have been fully implemented and (2) confirm that implemented plans have corrected the violations found in investigations. Monitoring activities usually include reviewing periodic progress reports that school districts submit according to a schedule in the corrective action plan.

²OCR also conducts complaint investigations and compliance reviews under its other statutory authorities.

³We discuss OCR's investigative process in terms of an investigation of a school district for illustrative purposes. The same process is applicable to postsecondary educational institutions.

⁴Court decisions have affected OCR's investigative process in terms of jurisdictional limitations and time frames for completing investigations (see app. II).

Analytic Approaches Used by OCR in Title VI Investigations

When determining compliance with title VI and its implementing regulations in within-school student assignment investigations, OCR uses two different analytic approaches taken for court decisions for proving discrimination: (1) disparate treatment (which analyzes the manner in which students are treated to determine if different races receive different treatment) and (2) disparate impact (which analyzes the effect of criteria or policies that appear to be neutral, but may have a disproportionate effect on students of one race).⁵ OCR stated that the analytic approach used depends on the situation being investigated and that in most cases both approaches will be used.

Disparate treatment analysis is often associated with efforts to find intentional discrimination. Until 1983, there was some question about whether OCR was required to show intentional discrimination in title VI cases. In the 1983 *Guardians* decision,⁶ the Supreme Court ruled that the effects (disparate impact) standard articulated in the title VI regulation was valid and intent was not required to show a violation of the regulation.

How OCR Uses Disparate Treatment Analysis

A disparate treatment analysis in a title VI within-school student assignment investigation generally involves two stages. First, the investigator determines whether the school district's assignment practice is "facially neutral," that is, whether it treats students equally regardless of their race, color, or national origin. If the practice is not facially neutral, OCR finds a violation on the basis of disparate treatment. Second, if the practice is facially neutral, the investigator determines whether the school district uses the practice uniformly for minority and nonminority students. If not, OCR finds a violation on the basis of disparate treatment. OCR stated that if no disparate treatment is found, it next determines if the practice has a disparate impact.

How OCR Uses Disparate Impact Analysis

Disparate impact analysis, if used in an OCR title VI investigation, assesses whether facially neutral policies or practices have a discriminatory impact that cannot be justified. For OCR's purposes, a disparate impact analysis in a title VI within-school student assignment investigation generally involves three stages.

⁵See appendix III for background on OCR's use of these analytic approaches.

⁶*Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983).

In the first stage, the investigator determines whether the school district's assignment practice has a segregative effect, that is, whether the practice results in a statistically significant number of racially identifiable classrooms. Racially identifiable classrooms have a statistically disproportionate number of students of one race compared with the racial composition of the school or some other standard of comparison, such as a grade level. Each OCR regional office independently decides (1) the threshold percentage for determining racial disproportions (for example, 20 percent greater or less than the racial composition of the school), (2) the standard of comparison, and (3) what amounts to statistical significance. If the investigator finds no segregative effect, OCR finds no violation. If the investigator finds a segregative effect, the analysis proceeds to the second stage.

In the second stage, the investigator determines whether the student assignment practice can be educationally justified. OCR investigators frequently use the three criteria listed below to determine if ability-grouping practices are educationally justified. These criteria were included in Education's implementing regulations for the Emergency School Aid Act (see app. IV).⁷ OCR discussed the applicability of the three criteria in a 1983 memorandum providing policy clarification to OCR's Atlanta regional office.⁸

- Grouping must be based on nondiscriminatory objective measures that are educationally relevant for the purpose of the grouping. Such measures (1) treat minority and majority students equally, (2) provide an objective assessment of student ability or achievement level, and (3) pertain to the subject areas in which students are ability-grouped.
- Grouping must be determined by the nondiscriminatory application of the measures. This means that the measures are used consistently for minority and majority students so that, for example, students with the same test scores are ability-grouped at the same level.
- The grouping must be validated by test scores or other reliable objective evidence indicating the educational benefits of such grouping. Evidence

⁷The Emergency School Aid Act was repealed, and its implementing regulations removed, in 1981, when the Emergency School Aid program was consolidated with other categorical grant programs under the Education Consolidation and Improvement Act. This act consolidated 28 categorical grants into a single block grant known as chapter 2.

⁸Memorandum to William Thomas, Regional Civil Rights Director (Atlanta regional office), from Harry Singleton, Assistant Secretary for Civil Rights, November 9, 1983. This policy document discussed the applicability of the criteria in school districts that previously operated legally segregated schools. We found that OCR regional offices also used these criteria when investigating school districts that had not previously operated legally segregated schools.

of educational benefit, such as improved academic achievement or mobility to higher-level classes, demonstrates whether the ability-grouping practice benefits the students in the lower groups.

For example, under the first criterion for assessing educational justification, OCR has required that a student be assigned to ability-grouped classes on the basis of objective measures of the student's ability in each of the relevant subject areas (such as subject-specific tests). In contrast, it is not educationally justified, OCR has found, to assign a student to ability-grouped classes on the basis of (1) a single objective measure of ability across subject areas, such as a composite test score, or (2) subjective measures, such as teacher recommendations. Using the educationally justifiable approach of assigning students on the basis of objective measures relevant to specific subject areas, it is unlikely for a given student to remain with the same classmates for all subjects—as is the case with block scheduling. Under block scheduling, students are assigned to ability-grouped classes for all academic subjects with no regrouping; as a result, they remain with the same classmates throughout the day.

If the investigator determines that the student assignment practice is not educationally justified, OCR finds a violation. If the investigator establishes a sufficient justification, the analysis proceeds to the third stage.

In the third stage, the investigator determines if an alternative method of assigning students could be used that would have a less disparate effect on minority students than the current method. An example of an alternative method might be to ability-group students for reading and math classes only rather than for all subjects. If the investigator identifies no alternative method, OCR finds no violation.

Objectives, Scope, and Methodology

In December 1989, the Chairmen of the House Committee on Education and Labor and its Subcommittee on Select Education asked us to assess (1) the extent of possible within-school discrimination in the nation's schools and (2) the adequacy of OCR's title VI enforcement activities concerning within-school discrimination. Specifically, we were asked to focus on enforcement activities related to ability grouping and tracking in elementary and secondary schools.

In response to the request, we agreed to

- review and analyze evidence of possible within-school discrimination in the nation's elementary and secondary schools,
- describe the extent and outcomes of OCR's title VI within-school discrimination complaint investigations and compliance reviews during fiscal years 1983-90,
- determine if OCR conducts enough compliance reviews in light of OCR data and research findings on the extent of within-school discrimination in the nation's schools,
- determine the adequacy of OCR policy guidance to its regional offices on analytic approaches and investigative procedures for within-school discrimination investigations, and
- determine if OCR regional offices sufficiently monitor school districts' corrective actions to remedy violations.

To accomplish our objectives, we (1) interviewed Education officials, civil rights experts, and education researchers; (2) analyzed enforcement data from OCR's automated case-tracking system on title VI elementary and secondary school investigations; (3) reviewed and analyzed existing research findings on the extent of within-school discrimination in the nation's schools; (4) reviewed applicable OCR written policy guidance; (5) surveyed, using mail questionnaires and telephone interviews, OCR investigators, regional office directors, and directors of federally funded Desegregation Assistance Centers; and (6) reviewed the case files of selected within-school discrimination complaint investigations.

On the basis of OCR classifications, we identified the following seven title VI issues to be within-school discrimination issues:

- ability grouping,
- tracking,
- assignment of students to gifted and talented programs,
- assignment of students to special education programs,
- assignment of limited English proficient students,
- counseling and tutoring, and
- discipline.

Throughout this report, we refer to investigations that include any of these issues as title VI within-school discrimination investigations.

To obtain information related to each of our objectives, we mailed questionnaires to the 354 supervisory and nonsupervisory OCR investigators

employed as of September 1990⁹ and the 10 OCR regional directors. We received responses from 79 percent (280) of the investigators and all 10 regional directors. Their responses were limited to regional office enforcement activities for fiscal years 1983-89. Most of our analyses of questionnaire responses focused on the information provided by the 176 investigators who reported that they had been principal or supervisory investigators on at least one title VI elementary or secondary within-school discrimination investigation since fiscal year 1983. (See app. VIII for supporting data on questionnaire responses.)

To obtain information about the extent of within-school discrimination problems in the nation's schools, we reviewed recent research findings and analyzed the most recent nationally representative data available (1986) from the biennial OCR surveys of schools and districts. OCR conducts these surveys to gather evidence of possible noncompliance with federal civil rights statutes and regulations. We analyzed these data to determine how many of the nation's schools assigned students to racially identifiable classrooms.

We also did telephone surveys of the directors of the 10 regional Desegregation Assistance Centers funded by Education. These centers were created in response to title IV of the Civil Rights Act of 1964, which authorizes the federal government to assist schools and communities in matters related to school desegregation.

To determine the adequacy of OCR policy guidance on analytic approaches and investigative procedures, we reviewed all current written OCR policy guidance related to title VI within-school discrimination issues. To determine how analytic approaches (disparate impact and disparate treatment) were used in investigating and deciding cases, we reviewed the Investigative Plan, Investigative Report, and Letter of Findings for selected title VI elementary and secondary within-school discrimination investigations conducted during fiscal years 1983-89 and closed with a compliance or violation-corrected Letter of Findings.¹⁰ These included the 35 class-action complaint investigations that we identified as pertaining to ability grouping or tracking and a sample of

⁹OCR regional office branch chiefs and division directors are considered to be supervisory investigators.

¹⁰The Investigative Plan is prepared by the investigator. It contains, among other things, (1) a statement of the issues to be examined and (2) the approach to resolving the issues. After the needed information is collected according to the plan, the investigator prepares the Investigative Report, which presents analyses and conclusions regarding relevant findings and makes recommendations for appropriate action by OCR.

class-action complaint investigations dealing with student assignment to special education programs.¹¹

To determine if OCR regional offices adequately monitored school district actions to correct violations, we reviewed the corrective action plans and monitoring-related correspondence for 15 complaint investigations. These investigations were those among the 35 ability-grouping or tracking investigations that required monitoring and were closed with a violation-corrected Letter of Findings.

We conducted our review from November 1989 through December 1990 in accordance with generally accepted government auditing standards. Education provided written comments on a draft of this report. These comments were incorporated, as appropriate, in the final report and are presented in appendix IX.

¹¹Class-action complaints allege discrimination against a group of people rather than a single individual.

Number of OCR Compliance Reviews Not Commensurate With Evidence of Possible Within-School Discrimination

The number of OCR's self-initiated compliance reviews is not commensurate with the evidence of possible within-school discrimination in the nation's schools. For example, since 1985, OCR has conducted only one compliance review relating to ability grouping or tracking. Evidence of possible within-school discrimination in the nation's schools is cited by education researchers and OCR itself. Title VI regulations require OCR to conduct compliance reviews when it has information of possible non-compliance with the regulations.

Research Findings Indicate Problems With Ability Grouping and Tracking

Evidence indicates that many schools ability-group students in a possibly discriminatory manner known as block scheduling.¹ OCR has found block scheduling to ability-group classes in violation of title VI regulations when it results in disproportionate numbers of minority students assigned to lower-ability classes.²

Data from a nationally representative study conducted at Johns Hopkins University indicates that many of the nation's schools ability-group students using block scheduling.³ The study's survey data, collected from principals of schools with a seventh grade (middle-grade schools), indicate that about 10 percent (about 1,700) of the nation's middle-grade schools assign their 6th, 7th, or 8th grade students to ability-grouped classes using block scheduling.⁴ The survey data also indicate that the practice of ability grouping for all subjects is more often found in schools with enrollments of more than 20 percent African-American and Hispanic students.⁵ We found that schools that block-schedule students into ability-grouped classes most often rely on a single measure, such as a composite test score, as the basis for assigning students.

¹Under block scheduling, students are assigned to ability-grouped classes for all academic subjects with no regrouping; as a result, they remain with the same classmates throughout the day.

²See, for example, In the Matter of Dillon County School District No. 1 and South Carolina State Department of Education, Docket No. 84-VI-16 (1986), affirmed on appeal, Docket No. 84-VI-16 (1987).

³Education in the Middle Grades: A National Survey of Practices and Trends, Center for Research on Elementary and Middle Schools, Johns Hopkins University, 1988.

⁴This analysis excludes middle-grade schools with fewer than 31 students per grade.

⁵Jomills Henry Braddock II, Tracking of Black, Hispanic, Asian, Native American, and White Students: National Patterns and Trends, Baltimore: Johns Hopkins University Center for Research on Effective Schooling for Disadvantaged Students, 1989.

OCR Surveys Indicate Possible Title VI Noncompliance

OCR's biennial surveys indicate that many school districts' student assignment practices result in racially identifiable classrooms. The Acting Assistant Secretary for Civil Rights reported in February 1990 that the OCR survey data indicate school districts' possible noncompliance with title VI regulations. These data, he said, showed "...the disproportionate assignment of black and other minority students to classes for the educable mentally retarded and the excessive isolation of these students from white students within ... school system[s]."⁶ OCR was concerned, he also reported, that resource limitations would prevent it from conducting compliance reviews of institutions despite evidence of possible noncompliance.

OCR's 1986 biennial surveys of schools and districts indicate that about half of the nation's districts had elementary schools with one or more racially identifiable classrooms in their highest and/or lowest grade.⁷ OCR generally finds a classroom to be racially identifiable if the percentage of minority students is 20 percent greater or less than the racial composition of the whole school or particular grade level.

On the basis of OCR's 1986 nationally representative sample, the number of elementary schools and districts with one or more racially identifiable classrooms based on the racial composition of the applicable grade is shown in table 2.1. We provide data for disproportions at the 20-percent threshold level typically used by OCR as well as at the higher threshold levels of 30 and 40 percent.

Table 2.1: OCR Survey Data Show Many of the Nation's Elementary Schools Have Racially Identifiable Classes

Amount of disproportion ^a (in percent)	Elementary schools ^b		School districts	
	Number	Percent	Number	Percent
20	17,167	29	8,586	54
30	13,857	23	7,694	49
40	12,436	21	7,332	46

^aThese percentages should be read as the percentage given or greater.

^bSchools with both elementary and secondary programs are included under elementary schools.

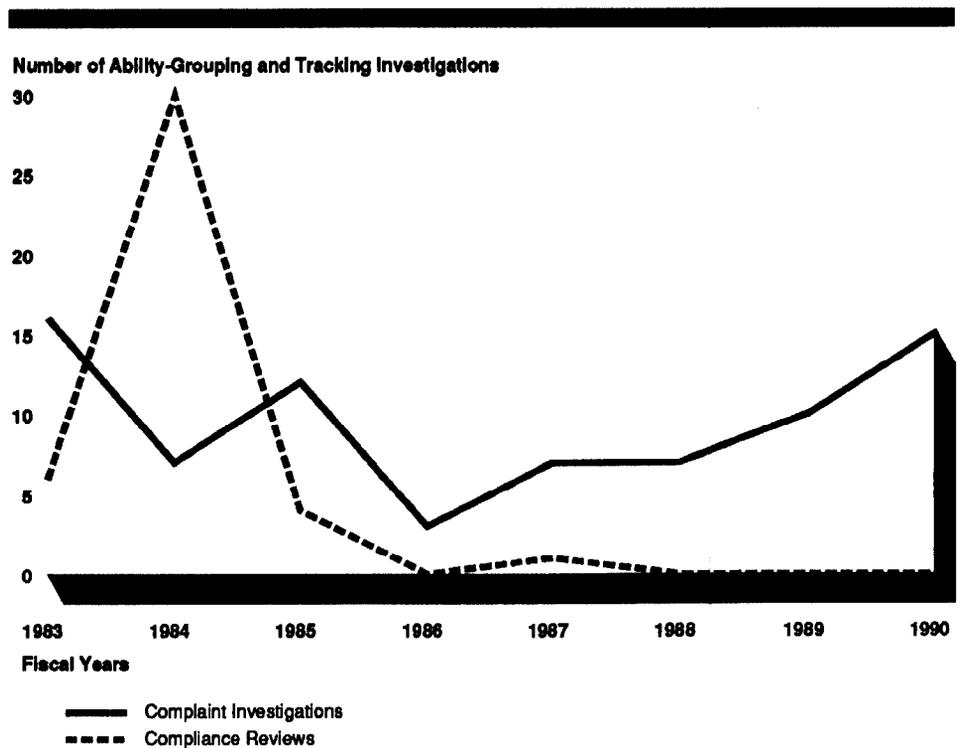
⁶Memorandum to Charles E.M. Kolb, Deputy Under Secretary, Office of Planning, Budget, and Evaluation, from William L. Smith, Acting Assistant Secretary for Civil Rights, February 16, 1990, p. 4.

⁷OCR collects data only for elementary schools' highest and lowest grade levels, not including kindergarten or grades above the 6th. Our analyses are, therefore, based on data from only two grade levels per school.

Number of Within-School Discrimination Compliance Reviews Declined

OCR's within-school discrimination compliance review efforts have declined since fiscal year 1983 despite evidence of possible noncompliance. In commenting on a draft of this report, Education stated that the decline in within-school discrimination and other compliance reviews is directly related to the rise in the number of complaints OCR has received. Education said that OCR cannot conduct the number of compliance reviews completed in past years given current complaint receipts and staffing levels. Since fiscal year 1985, OCR has conducted only one compliance review relating to ability grouping or tracking, while such complaint investigations have increased since fiscal year 1986 (see fig. 2.1).

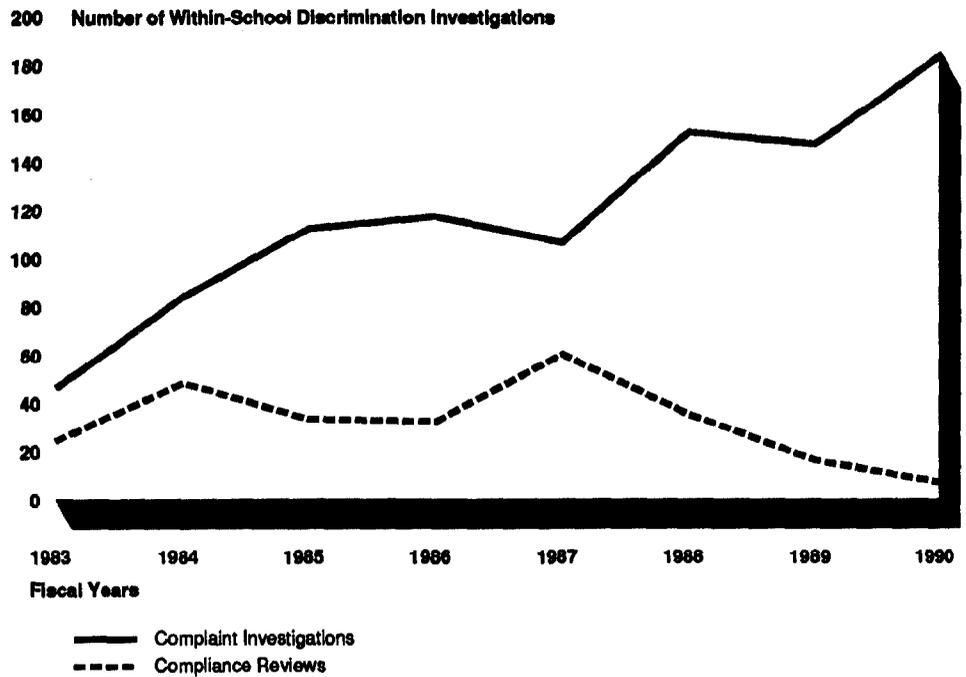
Figure 2.1: Ability-Grouping and Tracking Compliance Reviews Decreased



Compliance reviews relating to all of the within-school discrimination issues have declined since fiscal year 1983; such reviews decreased from a high of 60 in fiscal year 1987 to 7 in fiscal year 1990 (see fig. 2.2). Within-school discrimination complaint investigations increased from 46 in fiscal year 1983 to 183 in fiscal year 1990 (see fig. 2.2). (See app. VII for trends over the same period on investigations OCR conducted relating to the other within-school discrimination issues.)

Chapter 2
Number of OCR Compliance Reviews Not
Commensurate With Evidence of Possible
Within-School Discrimination

Figure 2.2: Within-School Discrimination Compliance Reviews Decreased and Complaint Investigations Increased

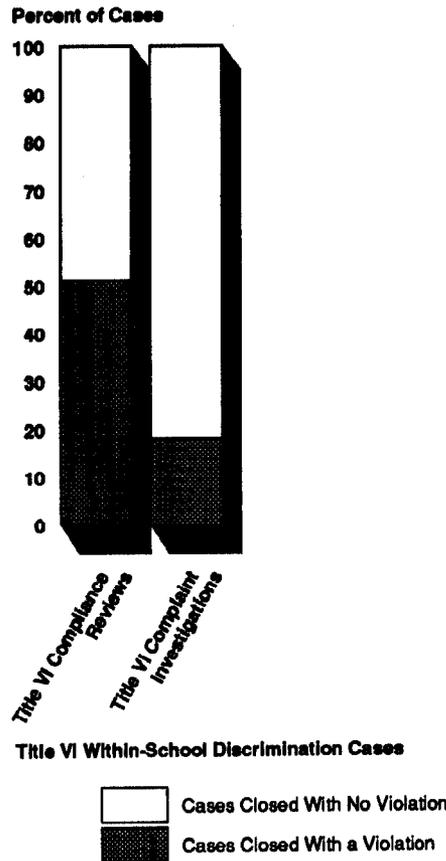


Compliance Reviews Found Violations More Often Than Complaint Investigations Did

OCR found violations in more than half of its within-school discrimination compliance reviews during fiscal years 1983-90, while it found violations in fewer than one-fifth of its complaint investigations (see fig. 2.3). Compliance reviews, OCR reported, find violations more often than complaint investigations because they are usually (1) targeted on known or potential problems and (2) broader in scope.

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Number of OCR Compliance Reviews Not
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Figure 2.3: Within-School Discrimination Compliance Reviews Found Violations More Often Than Complaint Investigations Did



OCR Declares Within-School Discrimination Issues High Priority

In December 1990, OCR announced that it intends to initiate a centrally coordinated compliance review program as part of its new national enforcement strategy.⁸ The program will focus on “high priority” areas, including several title VI within-school discrimination issues. For fiscal years 1991 and 1992, these issues include (1) ability grouping, (2) minority students in special education programs, (3) equal opportunities for students with limited English proficiency, and (4) discipline. For fiscal year 1991, OCR regional offices project that they will conduct 19 compliance reviews of these issues: ability grouping (3 reviews), minority students in special education programs (1), students with limited English proficiency (14), and discipline (1). During fiscal year 1990,

⁸U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, “National Enforcement Strategy, Office for Civil Rights, FYs 1991-1992,” December 11, 1990.

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OCR regional offices conducted 7 compliance reviews relating to the assignment of minority students to special education programs and none among the other within-school discrimination issues (see app. VII).

OCR's decision to make within-school discrimination issues a high priority for compliance reviews is consistent with the perceptions of OCR investigators and regional directors. About half of the 176 OCR investigators that had worked on within-school discrimination cases and 3 of 10 regional directors reported that within-school discrimination was a "very great" or "great" problem in the school districts in their regions (see table VIII.4).

OCR Regional Offices Varied in How Complaints Were Investigated and Resolved

OCR's regional offices varied in how they investigated and resolved complaints pertaining to ability grouping, tracking, and the assignment of minority students to special education programs. In the cases we reviewed, regional offices (1) inconsistently used disparate impact analysis and (2) sometimes required proof of disparate treatment, instead of disparate impact, to find violations of title VI regulations. These variations may have prevented OCR from identifying discriminatory practices.

There is little written OCR policy guidance on conducting within-school discrimination investigations. This lack of internal guidance contributed to OCR investigators' uncertainty about how to use analytic approaches and to inconsistency in their use. A lack of written policy guidance, investigators and regional directors reported, limited the ability of their regional offices to determine if school districts violated title VI regulations.

Additionally, title VI regulations include no provisions for the assignment of students within schools on the basis of academic ability or achievement level. Consequently, no specific federal regulatory guidance exists for state and local education agencies to follow regarding ability grouping and tracking.

Regional Offices Used Disparate Impact Analysis Inconsistently

In their investigations using disparate impact analysis, OCR regional offices were inconsistent in determining whether (1) school district practices had a segregative effect and (2) ability-grouping and tracking practices were educationally justified.¹ Some ability-grouping and tracking investigations we reviewed permitted practices that other investigations found to be in violation.

OCR Inconsistent in Methods Used to Determine Segregative Effect

OCR regional offices were inconsistent in how they determined if school district practices had a segregative effect. Such inconsistency may have affected the outcomes of investigations because OCR finds school districts in compliance with title VI regulations if a segregative effect is not established.

¹Of the 35 class-action ability-grouping or tracking investigations we reviewed, 23 used disparate impact analysis and 9 used disparate treatment analysis. In 3 investigations, we were unable to determine the kind of analytic approach OCR used because of inadequate documentation in the case files.

In the 23 investigations we reviewed that used disparate impact analysis, the OCR regional offices used at least 12 different methods to determine whether school district practices had a segregative effect. These methods included various combinations of different (1) threshold levels for determining statistical racial disproportions (including levels of 10, 15, and 20 percent), (2) standards of comparison (including the racial distribution of student enrollment in all sections of a subject, a specific grade, a school, and a school district), and (3) criteria to determine if the racial disproportions were statistically significant. Some investigations were decided without a determination of statistical significance.

**OCR Varied in Determining
If Assignment Practices
Were Educationally
Justified**

OCR regional offices varied in (1) how they determined if school districts' student assignment practices were educationally justified and (2) which practices they identified as violating title VI regulations.

We analyzed the educational justifications for 15 of the 35 class-action investigations pertaining to ability grouping and tracking.² In 10 of these investigations, the regional offices consistently determined the compliance of a school district's assignment practice on the basis of one or more of the three OCR criteria for educationally justified ability grouping (see pp. 19-20). In the other 5 they did not. The OCR regional offices found that school districts violated title VI regulations in all 10 of the investigations where the OCR criteria were consistently applied. (See app. V for the reasons OCR found violations in these cases.)

The five investigations in which regional offices did not consistently apply the OCR criteria either (1) permitted practices that other OCR investigations found in violation of title VI regulations (for example, the use of a single measure to assign students to all academic subjects) or (2) examined fewer than all three of the OCR criteria (for example, not determining whether an assignment measure was used in a nondiscriminatory manner). OCR found that a school district violated title VI regulations in one of these five cases.

²The 15 cases exclude investigations (1) closed because a segregative effect was not found, (2) in which OCR used disparate treatment analysis, and (3) in which we were unable to determine what analytic approach OCR used.

OCR Sometimes Required Proof of Disparate Treatment Instead of Disparate Impact to Find Violations

Regional offices' reliance on disparate treatment analysis instead of disparate impact analysis represents another inconsistency in OCR's investigations. OCR informed us that in most cases both analytic approaches will be used and that if disparate treatment is not found, OCR next determines if school district practices have a disparate impact. Because evidence of racially explicit student assignment criteria is often lacking, investigators are most likely to find violations on the basis of disparate impact rather than disparate treatment.

OCR regional offices, however, relied on disparate treatment analysis in reaching a finding of no violation in 6 of the 35 ability-grouping or tracking investigations we reviewed. The case files we reviewed did not contain evidence that OCR performed a disparate impact analysis in these cases. The use of disparate treatment analysis alone in reaching a finding of no violation was not isolated to ability-grouping and tracking investigations. We also found that OCR regional offices sometimes relied only on disparate treatment analysis in their class-action title VI complaint investigations pertaining to the assignment of minority students to special education.

Lack of OCR Policy Guidance Problematic for Within-School Discrimination Investigations

The lack of written policy guidance caused problems in cases pertaining to ability grouping, tracking, and the assignment of students to special education programs. Many investigators and several regional directors reported that a lack of policy guidance and uncertainty about how to use analytic approaches limited the capability of their regional offices to determine violations (see tables VIII.5-VIII.16). In an OCR management review conducted during 1989, 7 of the 10 regional directors identified a need for policy guidance for title VI within-school discrimination issues.

Little written policy guidance is available to OCR regional offices on investigative procedures related to specific within-school discrimination issues. In this regard, OCR has issued one policy document on ability-grouping investigations in school districts that previously operated legally segregated schools. This 1983 memorandum, providing policy clarification to the Atlanta regional office, discussed the three OCR criteria for determining if ability-grouping practices are educationally justified (see pp. 19-20). OCR has also issued some guidance on its investigative approach in cases relating to school discipline (one policy document) and the assignment of students with limited English proficiency (three policy documents).

There is no written OCR policy guidance, however, on investigating title VI cases pertaining to tracking, assignment of students to gifted and talented programs, assignment of minority students to special education programs, and counseling and tutoring. In addition, OCR has issued no written policy guidance for title VI within-school discrimination investigations on how and when to use disparate impact analysis or disparate treatment analysis.

Regulations on Within-School Student Assignment Lacking

Title VI regulations include no provisions concerning the practices schools should use in assigning students to classes on the basis of academic ability or achievement level. Previous education regulations, however, implementing the Emergency School Aid Act of 1976 (removed in 1981) had specified allowable practices (see app. IV). These required, among other things, that ability-grouping practices meet the three criteria that OCR later specified in its 1983 memorandum providing policy clarification to the Atlanta regional office.

In contrast to title VI, current regulations implementing section 504 of the Rehabilitation Act of 1973 specify practices schools should use in assigning students with physical or mental impairments. These regulations require, among other things, (1) validation of tests used for evaluation and placement, (2) placement of children in regular classes to the greatest extent possible, (3) parental notification of placement decisions, and (4) periodic reevaluation of students.

OCR Intends to Develop Written Policy Guidance

In December 1990, as part of its new national enforcement strategy, OCR announced that it intends to develop written policy guidance for use by its regional offices in their investigations of several title VI within-school discrimination issues. During fiscal years 1991 and 1992, OCR intends to develop policy guidance related to (1) ability grouping, (2) the assignment of minority students to special education programs, (3) equal opportunities for students with limited English proficiency, and (4) student discipline. As of May 1991, policy guidance on ability grouping and equal opportunities for students with limited English proficiency was in draft form and under review within Education. Additionally, OCR informed us that guidance on the assignment of minority students to special education and student discipline will be completed during fiscal year 1991.

Conclusions

There are no federal regulations and only minimal OCR policy guidance concerning practices for assigning students to classes on the basis of academic ability or achievement level. Consequently, state and local education agencies lack federal regulatory guidance to follow regarding ability-grouping or tracking practices. In addition, the lack of written OCR policy guidance on analytic approaches and investigative procedures limits OCR regional offices' ability to determine violations in certain title VI within-school discrimination investigations. The lack of OCR policy guidance contributes to regional office uncertainty about analytic approaches and to inconsistencies in how complaints are investigated and resolved.

Recommendations to the Secretary of Education

To provide federal guidance to state and local education agencies, we recommend that the Secretary issue title VI regulations that identify practices schools should use for assigning students to classes on the basis of academic ability or achievement level.

To help ensure that regional offices reach consistent determinations in their investigations, we recommend that the Secretary direct the Assistant Secretary for Civil Rights to develop and issue policy guidance that specifies how and when regional offices should use disparate impact analysis in title VI ability-grouping and tracking investigations. This policy guidance should specify the appropriate methods and criteria for determining (1) if district practices have a segregative effect, (2) if the practices are educationally justified, and (3) when and how to determine the availability of alternative methods of student assignment. Additionally, we recommend that policy guidance of similar specificity be developed on the appropriate analytic approaches to be used in investigations of each of the other within-school discrimination issues.

Agency Comments and Our Evaluation

Education did not agree with our recommendation to expand title VI regulations to identify practices schools should use for assigning students to classes on the basis of ability or achievement level. Education maintained that the current title VI regulations are sufficient to prosecute ability-grouping cases and that it would be unnecessary and cumbersome to develop regulatory standards for the assignment of students on the basis of ability or achievement level. Additionally, Education stated that OCR's outreach activities and its publication of ability-grouping policy guidance for its investigators in the Federal Register will adequately disseminate needed information to state and local education agencies.

We disagree with Education's position on our recommendation. While the existing regulations may be sufficient to prosecute ability-grouping cases, they do not provide the 50 state and approximately 16,000 local education agencies with needed standards on assigning students to classes on the basis of ability or achievement level. We also disagree that outreach activities and publication of an internal agency policy document in the Federal Register will adequately disseminate needed federal guidance. Expanded title VI regulations are preferable because they would be (1) specifically tailored for use by state and local education officials, unlike the guidance for use by investigators that Education expects to publish in the Federal Register; (2) made available for public comment before being promulgated; and (3) codified in a readily available form.

Education concurred with our recommendation regarding the need for improved internal OCR policy guidance. Education indicated that draft policy guidance and a model plan for ability-grouping investigations have been developed. Education said, however, that the analytic approach (disparate impact analysis) outlined in our recommendation regarding ability-grouping and tracking investigations is not necessarily appropriate for the other within-school discrimination issues. We agree with Education's position on this matter and have revised our recommendation accordingly.

OCR Monitoring of School District Corrective Actions Insufficient

In school districts where investigations had determined violations, OCR may have allowed discriminatory student assignment practices to persist because of insufficient monitoring. OCR's monitoring of school districts' actions to correct title VI violations was frequently delayed and sometimes not completed. Monitoring activities, OCR investigators reported, were often considered by regional offices to be a low priority during fiscal years 1983-89.

Monitoring Often Delayed and Sometimes Not Completed

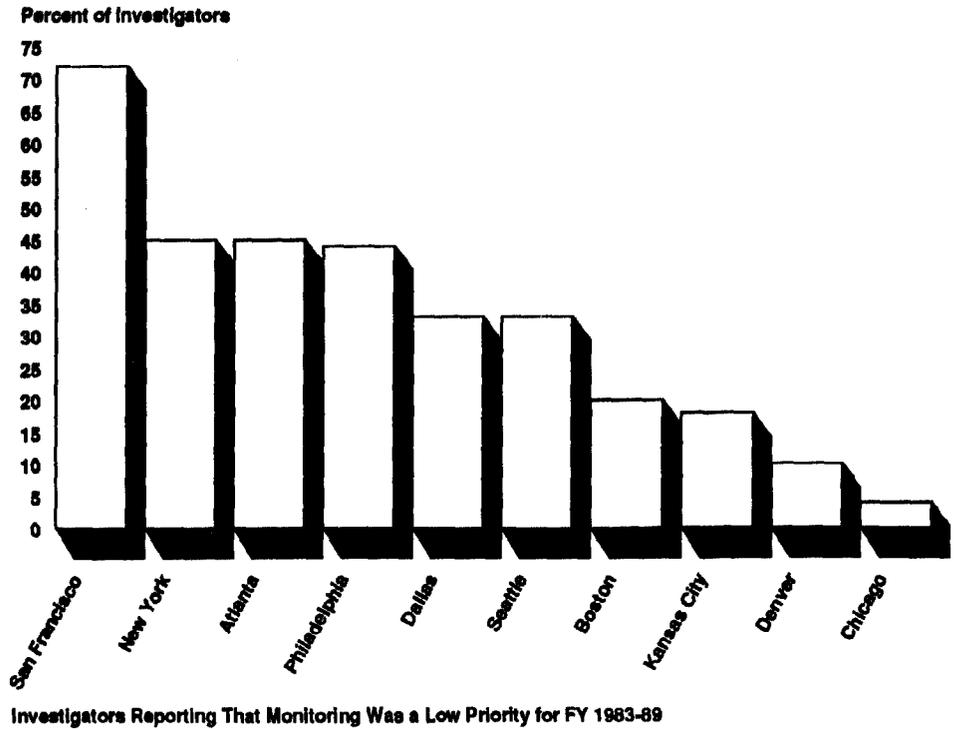
In 14 of the 15 ability-grouping or tracking cases requiring monitoring that we reviewed, regional offices' monitoring activities were delayed or not completed. In 11 of these 14 cases, the regional office's response to school districts regarding the adequacy of submitted monitoring reports occurred 3 months or more after they were received by OCR. These delays often ranged between 8 and 16 months. In 2 cases, we found no evidence in the case files that OCR had reviewed one or more required monitoring reports submitted by the violating district. Further, in 4 cases, we were unable to find evidence that required monitoring was completed or that discriminatory student assignment practices were stopped.

Of the investigators surveyed that had conducted monitoring of title VI within-school discrimination cases, about one-fourth reported that monitoring was "sometimes" or "almost always" discontinued before a school district completed actions necessary to remedy violations (see table VIII.17). In addition, 15 percent of the investigators reported that they had been instructed by their supervisors not to conduct monitoring activities in at least one case they investigated.

Monitoring Said to Be a Low Priority

About one-third of OCR's investigators responding to our survey indicated that monitoring was a "very low" or "low" priority in their regional offices (see table VIII.18). Investigators' responses indicate, however, that attention to monitoring varied considerably among regional offices (see fig. 4.1).

Figure 4.1: Reports of Monitoring as Low Priority Varied Among Regional Offices



Monitoring was not a high priority, OCR reported, because of the greater priority given to completing complaint investigations. A management review completed by OCR in February 1990 cited monitoring as an area to which the regional offices needed to devote more resources.

OCR Intends to Improve Monitoring

In December 1990, OCR reported that monitoring will be given a new emphasis and high priority as part of its new national enforcement strategy. Under this enforcement strategy, monitoring activities (1) have the same priority level as complaint investigation and (2) should not be reduced to carry out any other regional activity. Additionally, OCR has established the completion of monitoring activities as a performance standard for regional directors' annual performance appraisals.

Conclusions

Monitoring school districts that violated title VI provisions is essential for OCR to effectively enforce federal civil rights statutes and regulations. Without timely and complete monitoring, OCR cannot hold these

districts accountable for completing corrective actions needed to end discriminatory practices. Because of delays in its monitoring activities, OCR may have allowed discriminatory student assignment practices to persist in school districts where investigations had determined violations.

Recommendation to the Secretary of Education

We recommend that the Secretary direct the Assistant Secretary for Civil Rights to ensure that regional offices give monitoring high priority, as specified in OCR's enforcement strategy. The Assistant Secretary should enforce agency policy that requires OCR regional offices to monitor school districts until they verify that approved corrective action plans have been fully implemented and that the districts' actions have corrected the violations.

Agency Comments and Our Evaluation

Education indicated that OCR has addressed our recommendation through its national enforcement strategy and changes in regional directors' performance agreements. While we agree that these recent actions are steps in the right direction, continued oversight is needed to determine the extent of actual changes in OCR regional offices' monitoring practices.

Staff Training and Expertise Limit OCR's Enforcement Capability

Insufficient staff training and expertise limit OCR's ability to determine violations in title VI within-school student assignment investigations. OCR may be able to obtain needed training and technical assistance through the 10 regional Desegregation Assistance Centers funded by Education.

OCR Staff Training Insufficient

The capability of regional offices to determine violations was limited, many investigators and several regional directors reported, by a lack of training on how to investigate ability-grouping, tracking, or assignment to special education cases (see tables VIII.21-VIII.26). Of all nonsupervisory OCR investigators surveyed, 80 percent reported that the amount of job-related training available was "very poor" or "poor"; 64 percent reported that the quality of training they had received was "very poor" or "poor."

OCR suspended many training and staff development activities during the 1980s. For example, OCR's Denver Training Institute, which was established in 1977, has been closed since 1982. OCR's training expenditures fluctuated considerably during the 1980s, declining, for example, from \$129,000 in fiscal year 1984 to \$1,000 in fiscal year 1990 (see app. VI). In February 1990, the Acting Assistant Secretary for Civil Rights reported that large numbers of new staff, hired because of high staff turnover, were inadequately trained. Concerning staff turnover, OCR reported that it lost 482 staff through attrition during fiscal years 1986 through 1989—about half of its work force—while hiring 382 replacements.

OCR Lacks Expertise Regarding Tests and Alternative Methods

Both investigators and regional directors indicated that a lack of staff expertise limited the capability of regional offices to determine if school districts violated title VI regulations in ability-grouping, tracking, and assignment of students to special education investigations. For example, staff lacked expertise, they said, in assessing the validity of tests used for assigning students and evaluating test results for determining educational benefits (see tables VIII.27-VIII.36). Additionally, the capability of regional offices to determine violations was limited, many investigators and several regional directors reported, by the lack of expertise in determining the availability of alternative methods for student assignment (see tables VIII.37-VIII.42).

Desegregation Assistance Centers Could Be a Source for Needed Training and Assistance

The 10 regional Desegregation Assistance Centers, funded by Education, could train and assist OCR investigators, the directors said, in issues related to within-school student assignment. These issues include (1) determining alternative methods for student assignment, (2) analyzing data for assessing the educational benefits of ability grouping, and (3) evaluating the validity of tests used for student assignment. Education regulations, however, restrict centers' use of their grant funds to assisting public school personnel, students, parents, and other community members.¹ Thus, centers' assistance to OCR regional offices may require OCR funding.

In past years, two centers had provided some training to OCR on within-school student assignment issues, their directors said; eight directors said that their centers had not done so. Four centers currently have memoranda of understanding with OCR that contain agreements to share various information about, for example, OCR investigations, proposed corrective actions, and technical assistance. As part of these agreements, the centers have coordinated the planning of conferences and some joint participation in training sessions.

OCR Intends to Provide Training

In December 1990, OCR reported that it intends to provide regional office staff with investigation strategy workshops related to several title VI within-school discrimination issues. The first of these training sessions, OCR said, in which all regional division directors and chief civil rights attorneys participated, was conducted in January 1991. In commenting on a draft of this report, Education indicated that it will explore the feasibility of using the Desegregation Assistance Centers as a source of technical information.

Conclusions

Problems associated with insufficient training and staff expertise limited OCR's ability to determine violations in title VI within-school discrimination investigations. Regional Desegregation Assistance Centers have the expertise to provide some needed training and technical assistance to OCR, but efforts to obtain these services have been limited.

¹34 C.F.R. 272.11(b) (1990).

**Recommendation to
the Secretary of
Education**

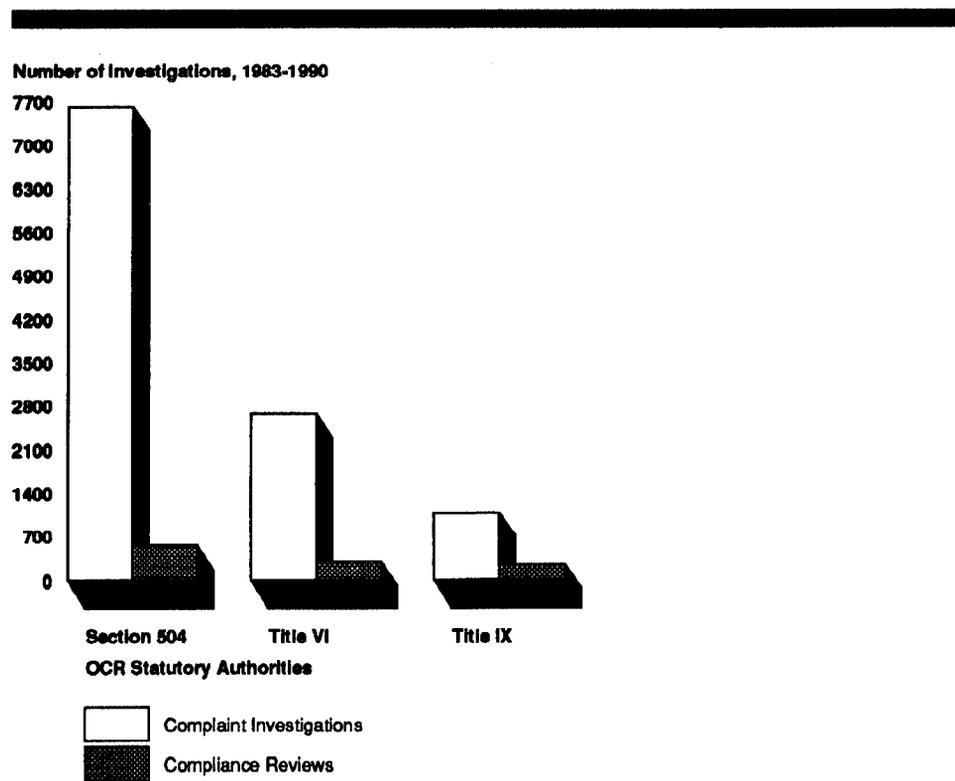
We recommend that the Secretary direct the Assistant Secretary for Civil Rights to

- identify the kinds of training and technical assistance related to within-school student assignment issues that could be provided by regional Desegregation Assistance Centers and
- enter into agreements, if possible, with the centers to obtain needed services for OCR investigators.

Number of OCR Complaint Investigations and Compliance Reviews by Statutory Authority (Fiscal Years 1983-90)

With respect to OCR's different statutory authorities, about a quarter of OCR's elementary and secondary school compliance reviews (299) and complaint investigations (2,660) involved title VI issues during fiscal years 1983-90 (see fig. I.1).

Figure I.1: Total Number of Elementary and Secondary Investigations by OCR Statutory Authority



More than three-quarters (255) of the total title VI compliance reviews included within-school discrimination issues, as did about one-third of the total title VI complaint investigations (947). The remainder of OCR's elementary and secondary school compliance reviews and complaint investigations pertained primarily to handicap discrimination issues under section 504 of the Rehabilitation Act, as well as sex discrimination issues under title IX (see fig. I.1).

Court Decisions That Affected OCR's Investigative Process

Two court cases significantly affected OCR's investigative process during the 1980s. These are Adams v. Weinberger,¹ a case that established time frames for OCR complaint investigations and compliance reviews, and Grove City v. Bell,² a Supreme Court decision that restricted OCR's jurisdiction.

From February 1975 until December 1987, OCR was required by various court orders to conduct all complaint investigations and compliance reviews according to specific time frames and procedures established in the case of Adams v. Weinberger. Among other things, the court orders required that preliminary determinations of compliance and attempts at conciliation and voluntary resolution take place within (1) 180 days after acknowledgement of a complaint³ and (2) 180 days after the start of a compliance review. The Adams litigation was dismissed in December 1987; however, OCR continues to adhere to similar time frames.

In 1984, the Supreme Court found in Grove City v. Bell that title IX's prohibition of sex discrimination at educational institutions receiving federal financial assistance extended only to the specific "program or activity" receiving the funds, and not to the entire institution. OCR extended the Grove City jurisdictional limitation to title VI, section 504, and the Age Discrimination Act because these civil rights laws used the same "program or activity" language as title IX.

As a result of Grove City, OCR investigators were required to first determine OCR's jurisdiction by tracing the educational institution's use of federal funds to determine if a complaint involved a specific program or activity that received federal financial assistance. OCR closed or narrowed the scope of many complaint investigations and compliance reviews because it could not establish jurisdiction under Grove City's limitations.

In 1988, in response to the Grove City decision, the Congress enacted the Civil Rights Restoration Act (P.L. 100-259). The act restated the intent

¹391 F. Supp. 269 (D.D.C. 1975).

²465 U.S. 555 (1984).

³The time frames gave OCR a 15-day period to acknowledge the receipt of a complaint.

**Appendix II
Court Decisions That Affected OCR's
Investigative Process**

of the Congress that title VI, section 504, title IX, and the Age Discrimination Act be interpreted broadly, and that funding received by any part of an institution would trigger institution-wide coverage.⁴

⁴On April 7, 1988, OCR regional offices contacted complainants whose complaints were closed or narrowed because of Grove City. The complainants were advised that they could refile their complaints if they believed the discrimination alleged in their previous complaints continued to occur or had occurred again after March 22, 1988.

OCR's Use of Disparate Treatment and Disparate Impact Analysis

OCR's authority to use a disparate impact analysis and/or a disparate treatment analysis in a title VI investigation is derived from title VI, its implementing regulations, and court decisions.

Title VI of the Civil Rights Act of 1964 provides that "[no] person...shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."¹ Education and the courts have interpreted this language to prohibit intentional discrimination.

Title VI implementing regulations, however, also prohibit school districts receiving federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin...[emphasis added]."² Education and the courts have interpreted this language to prohibit practices that, although not intentionally discriminatory, have a disparate impact or discriminatory effect.

In 1974, the Supreme Court held in *Lau v. Nichols* that title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those that have a disparate impact on racial minorities.³

The *Lau* decision, however, was thrown into question by the Supreme Court's 1978 *Bakke* decision, which suggested that title VI reached no further than prohibiting acts of intentional discrimination.⁴

In 1983, the Supreme Court's *Guardians* decision held that the title VI statute itself required proof of intentional discrimination.⁵ The Court, however, also upheld the section of the title VI regulations that incorporated a disparate impact approach to proving discrimination. The Court's decision in *Guardians* implies that while intentional discrimination is prohibited by statute, the prohibition of acts or policies resulting

¹42 U.S.C. 2000d.

²34 C.F.R. 100.3(b)(2) (1990).

³*Lau v. Nichols*, 414 U.S. 563 (1974).

⁴*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁵*Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983).

in disparate impact is discretionary with each agency that enforces title VI.⁶

⁶Guardians was not a unanimous decision. Five justices believed a violation of the regulations may be established by proof of disparate impact, while four justices believed that prohibiting such unintentional discrimination exceeded the Department of Education's discretion.

Provisions on Ability Grouping in the Emergency School Aid Act

The Emergency School Aid Act of 1976 (ESAA) provided financial assistance through a categorical grant to school districts undergoing desegregation. The act and its regulations were repealed by the Education Consolidation and Improvement Act of 1981, which consolidated 28 categorical grant programs into a single block grant known as chapter 2. ESAA provisions prohibited certain kinds of student assignment practices and procedures. Before qualifying for an ESAA grant, a school district had to demonstrate to OCR that it was in compliance with the act and its implementing regulations.

ESAA prohibited school districts that received ESAA funds from using procedures for student assignment that result in the separation of minority group children from nonminority group children for a substantial portion of the school day. The act also provided that this did not prohibit the use of bona fide ability grouping as a standard educational practice.¹ The act's implementing regulations defined bona fide ability grouping to be

- based on nondiscriminatory, objective standards of measurement that are educationally relevant to the purpose of such grouping;
- determined by the nondiscriminatory application of the standards and maintained for only that period of the school day necessary to achieve the purposes of the grouping;
- designed to meet the special needs of the students in each group and to bring the academic achievement of students in lower groups to or above the appropriate grade level; and
- validated by test scores or other reliable, objective evidence indicating the educational benefits of the grouping.²

¹20 U.S.C. 3196(c)(1)(C) (1976).

²34 C.F.R. 280.23 (1982) (removed effective Oct. 1, 1982).

Reasons OCR Found Title VI Violations Based on Lack of Educational Justification

OCR found violations in 10 of the 15 cases relating to ability grouping or tracking (discussed on p. 31) because school districts' assignment practices failed to meet one or more of the three OCR criteria for educationally justified ability grouping.

In each of the 10 cases, OCR determined that the school district failed to base its ability grouping on educationally relevant objective criteria. The most common violations were for using, as the primary basis for grouping, (1) a single measure of ability (for example, a reading subtest or composite score from a standardized test) for assigning students to all or most academic classes and (2) subjective measures, such as teacher recommendations.

In 3 of the 10 cases, OCR determined that the school district failed to base its grouping on the nondiscriminatory application of its measures. For example, OCR found a district that assigned students on the basis of test scores to be in violation when higher-ability and lower-ability groups included students with overlapping scores. In such cases, minority students placed in lower groups had scores comparable to those of nonminority students placed in higher groups.

In 2 of the 10 cases, OCR determined that the school district was unable to demonstrate that its assignment practices resulted in educational benefit for students in the lower-ability groups. For example, OCR found that school districts could not demonstrate that the placement of students in lower-ability groups resulted in (1) upward mobility to higher groups or (2) improved academic achievement.

OCR Appropriations and Training Expenditures (Fiscal Years 1981-91)

Figure VI.1: OCR Appropriations
(Fiscal years 1981-91)

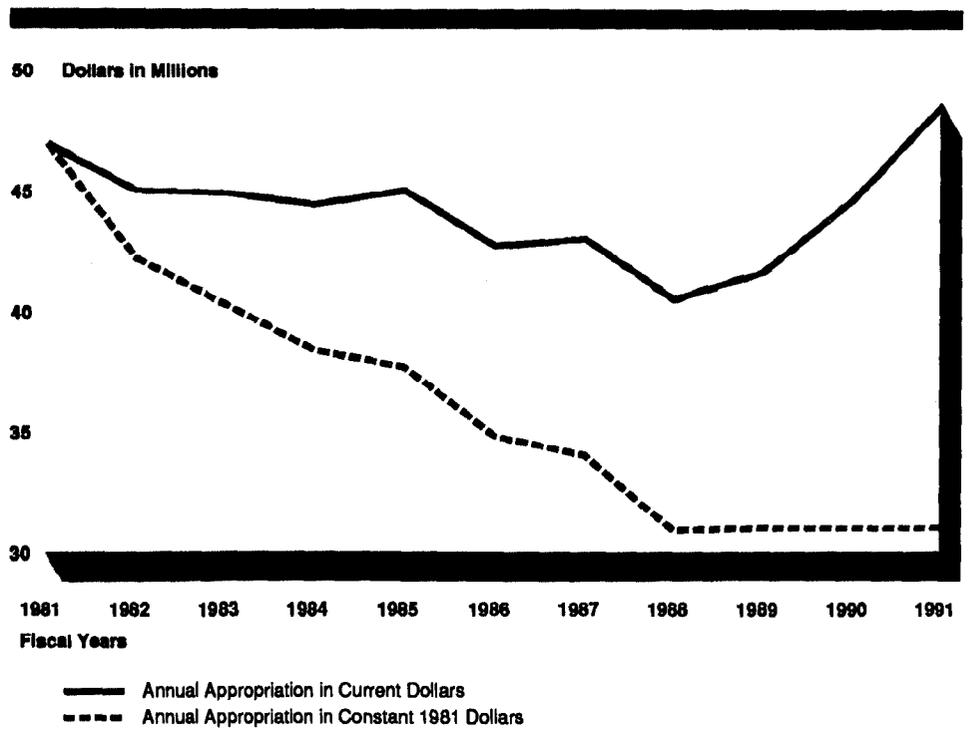
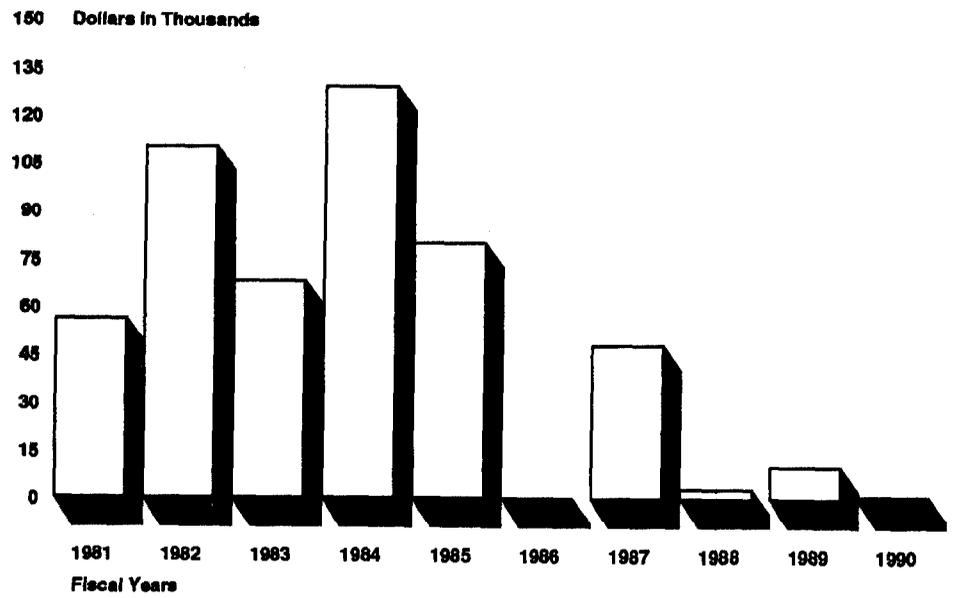


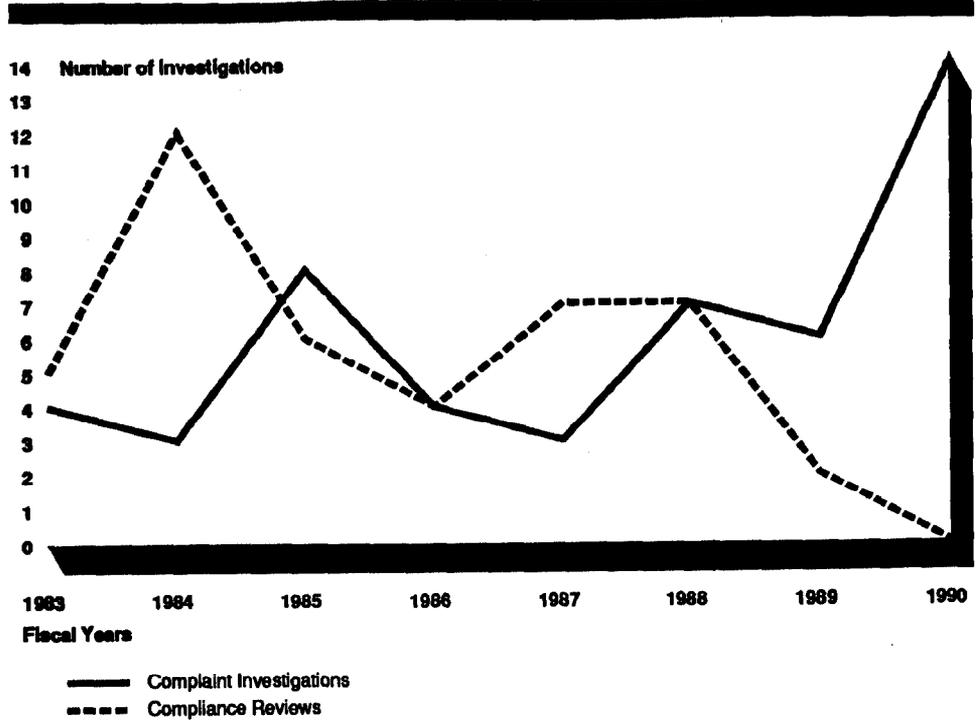
Figure VI.2: OCR Training Expenditures
(Fiscal years 1981-90)



Note: Fiscal year 1986 data unavailable.

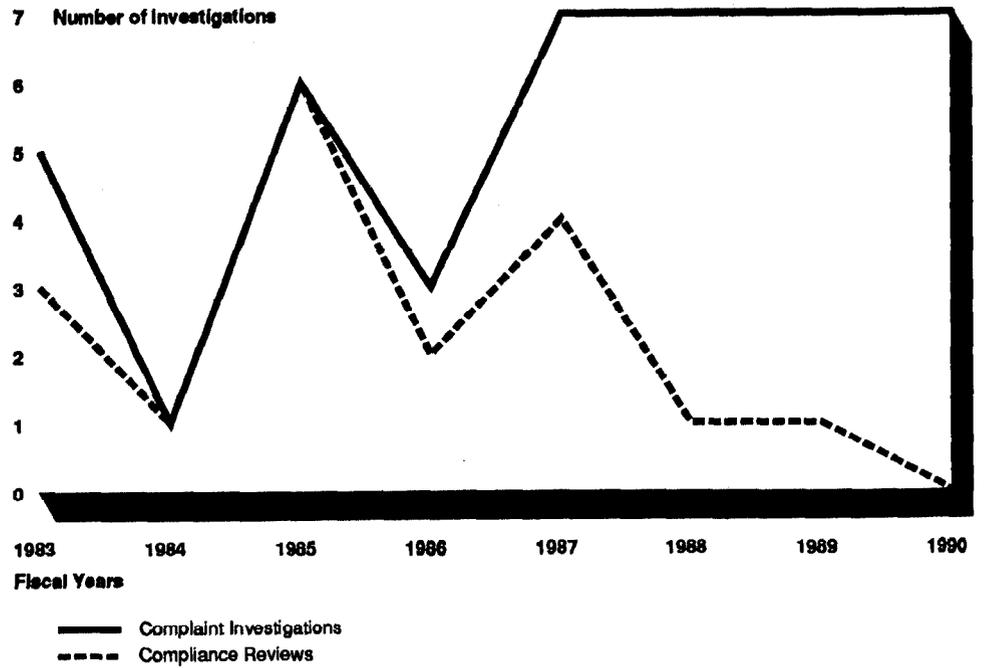
OCR Within-School Discrimination Complaint Investigations and Compliance Reviews (Fiscal Years 1983-90)

Figure VII.1: Assignment of Students to Gifted and Talented Programs



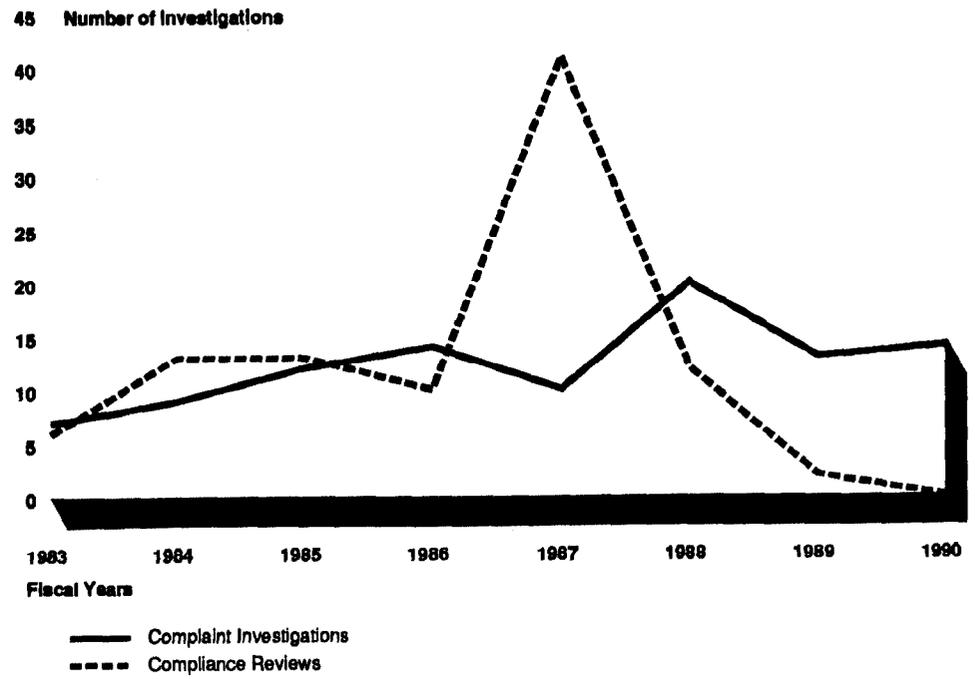
Appendix VII
OCR Within-School Discrimination Complaint
Investigations and Compliance Reviews
(Fiscal Years 1983-90)

Figure VII.2: Counseling and Tutoring



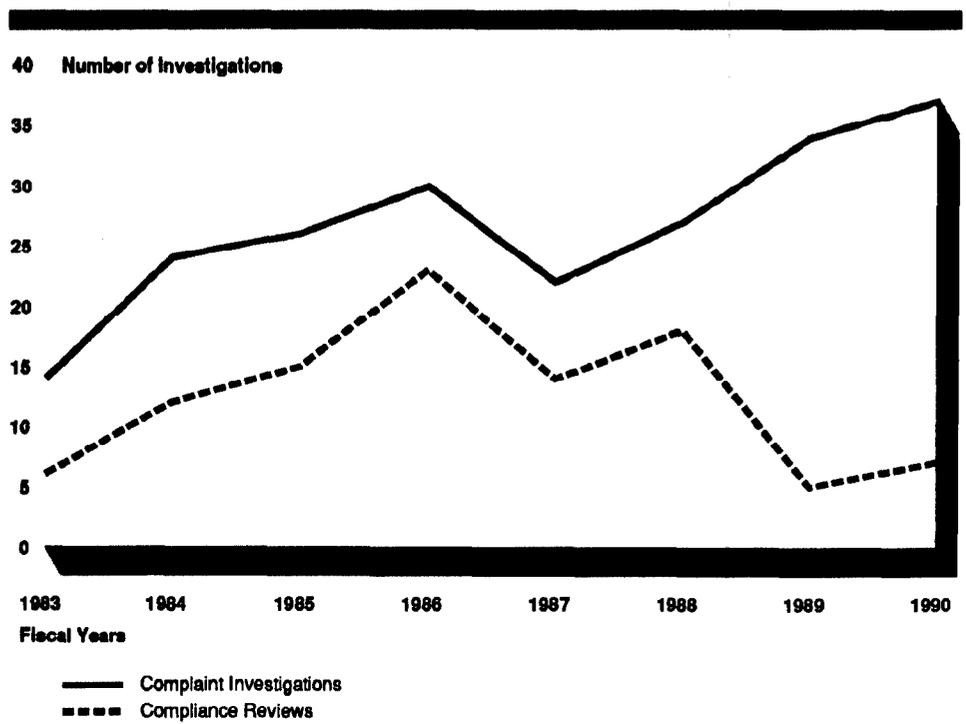
Appendix VII
OCR Within-School Discrimination Complaint
Investigations and Compliance Reviews
(Fiscal Years 1983-90)

Figure VII.3: Assignment of Students
With Limited English Proficiency



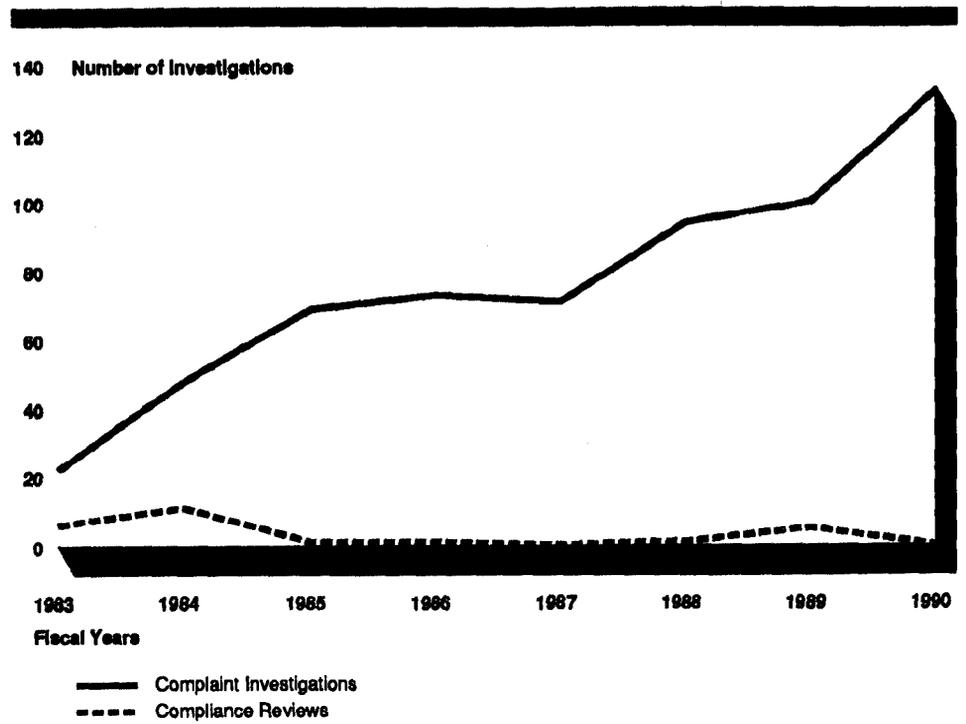
Appendix VII
OCR Within-School Discrimination Complaint
Investigations and Compliance Reviews
(Fiscal Years 1983-90)

Figure VII.4: Assignment of Students to
Special Education Programs



Appendix VII
OCR Within-School Discrimination Complaint
Investigations and Compliance Reviews
(Fiscal Years 1983-90)

Figure VII.5: Discipline



Tables Supporting Figures in Report Text and Supplementary Tables

Table VIII.1: Ability-Grouping and Tracking Compliance Reviews Decreased (Data for Fig. 2.1)

Fiscal year	Complaint investigations	Compliance reviews
1983	16	6
1984	7	30
1985	12	4
1986	3	0
1987	7	1
1988	7	0
1989	10	0
1990	15	0

Table VIII.2: Within-School Discrimination Compliance Reviews Decreased as Complaint Investigations Increased (Data for Fig. 2.2)

Fiscal year	Compliant investigations	Compliance reviews
1983	46	24
1984	84	48
1985	112	33
1986	117	32
1987	106	60
1988	152	35
1989	147	16
1990	183	7

Table VIII.3: Within-School Discrimination Compliance Reviews Found Violations More Often Than Complaint Investigations Did (Data for Fig. 2.3)

	Complaint investigations		Compliance reviews	
	Number	Percent	Number	Percent
Cases closed with a violation	171	18	129	51
Cases closed with no violation	776	82	126	49

Table VIII.4: How Great a Problem Within-School Discrimination Is in Elementary and Secondary Schools in Your Region

	Investigators	
	Number	Percent
Very great problem	33	19
Great problem	52	30
Moderate problem	43	25
Some problem	14	8
Little or no problem	15	8
Don't know	18	10
Total	175	100

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.5: Ability-Grouping Investigations: Extent to Which Lack of Written Policy Guidance Limited Regional Office Ability

	Investigators	
	Number	Percent
Very great extent	19	34
Great extent	20	36
Moderate extent	7	13
Some extent	2	4
Little or no extent	7	13
Total^a	55	100

^aExcludes respondents who reported that (1) they, or their regional offices, did not investigate such cases and (2) written policy guidance was available for the within-school discrimination issue.

Table VIII.6: Tracking Investigations: Extent to Which Lack of Written Policy Guidance Limited Regional Office Ability

	Investigators	
	Number	Percent
Very great extent	19	35
Great extent	22	40
Moderate extent	4	7
Some extent	5	9
Little or no extent	5	9
Total^a	55	100

^aExcludes respondents who reported that (1) they, or their regional offices, did not investigate such cases and (2) written policy guidance was available for the within-school discrimination issue.

Table VIII.7: Assignment of Students to Special Education Investigations: Extent to Which Lack of Written Policy Guidance Limited Regional Office Ability

	Investigators	
	Number	Percent
Very great extent	19	34
Great extent	9	16
Moderate extent	13	24
Some extent	7	13
Little or no extent	7	13
Total^a	55	100

^aExcludes respondents who reported that (1) they, or their regional offices, did not investigate such cases and (2) written policy guidance was available for the within-school discrimination issue.

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.8: Ability-Grouping Investigations: Extent to Which Lack of Written Policy Guidance Limited Regional Office Ability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	2
Some extent	2
Little or no extent	0
Not applicable ^a	6
Total	10

^aExcludes respondents who reported that (1) they, or their regional offices, did not investigate such cases and (2) written policy guidance was available for the within-school discrimination issue.

Table VIII.9: Tracking Investigations: Extent to Which Lack of Written Policy Guidance Limited Regional Office Ability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	1
Some extent	3
Little or no extent	0
Not applicable ^a	6
Total	10

^aExcludes respondents who reported that (1) they, or their regional offices, did not investigate such cases and (2) written policy guidance was available for the within-school discrimination issue.

Table VIII.10: Assignment of Minority Students to Special Education Investigations: Extent to Which Lack of Written Policy Guidance Limited Regional Office Ability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	1
Some extent	3
Little or no extent	2
Not applicable ^a	4
Total	10

^aExcludes respondents who reported that (1) they, or their regional offices, did not investigate such cases and (2) written policy guidance was available for the within-school discrimination issue.

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.11: Ability-Grouping Investigations: Extent to Which Uncertainty About How to Use Analytic Approaches Limited Regional Office Ability

	Investigators ^a	
	Number	Percent
Very great extent	23	28
Great extent	19	23
Moderate extent	10	12
Some extent	14	17
Little or no extent	15	18
No basis to judge	1	2
Total	82	100

^aIncludes principal or supervisory investigators for ability-grouping cases.

Table VIII.12: Tracking Investigations: Extent to Which Uncertainty About How to Use Analytic Approaches Limited Regional Office Ability

	Investigators ^a	
	Number	Percent
Very great extent	15	26
Great extent	15	26
Moderate extent	8	14
Some extent	11	19
Little or no extent	9	15
No basis to judge	0	0
Total	58	100

^aIncludes principal or supervisory investigators for tracking cases.

Table VIII.13: Assignment of Minority Students to Special Education Investigations: Extent to Which Uncertainty About How to Use Analytic Approaches Limited Regional Office Ability

	Investigators ^a	
	Number	Percent
Very great extent	19	17
Great extent	21	19
Moderate extent	12	11
Some extent	20	18
Little or no extent	36	32
No basis to judge	3	3
Total	111	100

^aIncludes principal or supervisory investigators for assignment to special education cases.

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.14: Ability-Grouping Investigations: Extent to Which Uncertainty About How to Use Analytic Approaches Limited Regional Office Ability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	2
Some extent	4
Little or no extent	4
No basis to judge	0
Total	10

Table VIII.15: Tracking Investigations: Extent to Which Uncertainty About How to Use Analytic Approaches Limited Regional Office Ability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	1
Some extent	4
Little or no extent	2
No basis to judge	0
Not applicable	3
Total	10

Table VIII.16: Assignment of Minority Students to Special Education Investigations: Extent to Which Uncertainty About How to Use Analytic Approaches Limited Regional Office Ability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	0
Some extent	3
Little or no extent	7
No basis to judge	0
Total	10

Table VIII.17: How Often Monitoring Was Discontinued Before a School District Completed All Actions Necessary to Remedy Identified Violations

	Investigators^a	
	Number	Percent
Always, or almost always	9	7
Some of the time	19	16
Never	93	77
Total	121	100

^aIncludes principal or supervisory investigators who had cases that required monitoring.

**Appendix VIII
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Table VIII.18: Priority Given Monitoring in Regional Offices for Cases Closed Across All of OCR's Statutory Authorities

	Investigators	
	Number	Percent
Very high priority	16	9
High priority	52	29
Neither high nor low	44	25
Low priority	45	26
Very low priority	19	11
Total	176	100

Table VIII.19: Reports of Monitoring as Low Priority Varied Among Regional Offices (Data for Fig. 4.1)

Regional office	Investigators	
	Number	Percent
San Francisco	13	72
New York	5	45
Atlanta	15	45
Philadelphia	7	44
Dallas	10	33
Seattle	2	33
Boston	2	20
Kansas City	2	18
Denver	1	10
Chicago	1	4

**Appendix VIII
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Table VIII.20: Extent to Which Factors Explain Why Monitoring Was Not Given a High Priority

	Investigators ^a	
	Number	Percent
Lack of resources		
Very great extent	40	38
Great extent	26	25
Moderate extent	11	10
Some extent	15	14
Little or no extent	14	13
Total	106	100
Conducting complaint investigations had greater priority		
Very great extent	80	75
Great extent	18	17
Moderate extent	5	4
Some extent	2	2
Little or no extent	2	2
Total	107	100

^aIncludes principal or supervisory investigators who did not believe that monitoring was a "very high" or "high" priority.

Table VIII.21: Ability-Grouping Investigations: Extent to Which Amount of Training Limited Regional Office Capability

	Investigators ^a	
	Number	Percent
Very great extent	27	33
Great extent	14	17
Moderate extent	11	14
Some extent	12	15
Little or no extent	15	19
No basis to judge	2	2
Total	81	100

^aIncludes principal or supervisory investigators for ability-grouping cases.

**Appendix VIII
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**Table VIII.22: Tracking Investigations:
Extent to Which Amount of Training
Limited Regional Office Capability**

	Investigators ^a	
	Number	Percent
Very great extent	14	24
Great extent	15	26
Moderate extent	12	21
Some extent	7	12
Little or no extent	8	14
No basis to judge	2	3
Total	58	100

^aIncludes principal or supervisory investigators for tracking cases.

**Table VIII.23: Assignment of Students to
Special Education Investigations: Extent
to Which Amount of Training Limited
Regional Office Capability**

	Investigators ^a	
	Number	Percent
Very great extent	19	17
Great extent	17	15
Moderate extent	23	21
Some extent	14	13
Little or no extent	33	30
No basis to judge	5	4
Total	111	100

^aIncludes principal or supervisory investigators for assignment to special education cases.

**Table VIII.24: Ability-Grouping
Investigations: Extent to Which Amount
of Training Limited Regional Office
Capability**

	Regional directors
Very great extent	0
Great extent	2
Moderate extent	2
Some extent	3
Little or no extent	3
Total	10

**Appendix VIII
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**Table VIII.25: Tracking Investigations:
Extent to Which Amount of Training
Limited Regional Office Capability**

	Regional directors
Very great extent	0
Great extent	3
Moderate extent	2
Some extent	1
Little or no extent	1
No basis to judge	0
Not applicable	3
Total	10

**Table VIII.26: Assignment of Students to
Special Education Investigations: Extent
to Which Amount of Training Limited
Regional Office Capability**

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	0
Some extent	7
Little or no extent	3
Total	10

**Table VIII.27: Ability-Grouping
Investigations: Extent to Which Lack of
Staff Expertise in Evaluating Tests Used
for Student Assignment Limited Regional
Office Capability**

	Investigators^a	
	Number	Percent
Very great extent	26	32
Great extent	18	22
Moderate extent	7	9
Some extent	9	11
Little or no extent	19	24
No basis to judge	2	2
Total	81	100

^aIncludes principal or supervisory investigators for ability-grouping cases.

**Appendix VIII
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**Table VIII.28: Tracking Investigations:
Extent to Which Lack of Staff Expertise
in Evaluating Tests Used for Student
Assignment Limited Regional Office
Capability**

	Investigators ^a	
	Number	Percent
Very great extent	23	40
Great extent	10	17
Moderate extent	5	9
Some extent	11	19
Little or no extent	7	12
No basis to judge	2	3
Total	58	100

^aIncludes principal or supervisory investigators for tracking cases.

**Table VIII.29: Assignment of Students to
Special Education Investigations: Extent
to Which Lack of Staff Expertise in
Evaluating Tests Used for Student
Assignment Limited Regional Office
Capability**

	Investigators ^a	
	Number	Percent
Very great extent	24	22
Great extent	15	14
Moderate extent	16	14
Some extent	19	17
Little or no extent	27	24
No basis to judge	10	9
Total	111	100

^aIncludes principal or supervisory investigators for assignment to special education cases.

**Table VIII.30: Ability-Grouping
Investigations: Extent to Which Lack of
Staff Expertise in Evaluating Tests Used
for Student Assignment Limited Regional
Office Capability**

	Regional directors
Very great extent	0
Great extent	1
Moderate extent	2
Some extent	2
Little or no extent	4
No basis to judge	1
Total	10

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Table VIII.31: Tracking Investigations: Extent to Which Lack of Staff Expertise in Evaluating Tests Used for Student Assignment Limited Regional Office Capability

	Regional directors
Very great extent	1
Great extent	0
Moderate extent	2
Some extent	1
Little or no extent	2
No basis to judge	1
Not applicable	3
Total	10

Table VIII.32: Assignment of Students to Special Education Investigations: Extent to Which Lack of Staff Expertise in Evaluating Tests Used for Student Assignment Limited Regional Office Capability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	2
Some extent	0
Little or no extent	7
No basis to judge	1
Total	10

Table VIII.33: Ability-Grouping Investigations: Extent to Which Lack of Staff Expertise in Evaluating Test Results for Showing Educational Benefit Limited Regional Office Capability

	Investigators^a	
	Number	Percent
Very great extent	26	32
Great extent	15	18
Moderate extent	9	11
Some extent	11	13
Little or no extent	18	22
No basis to judge	3	4
Total	82	100

^aIncludes principal or supervisory investigators for ability-grouping cases.

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**Table VIII.34: Tracking Investigations:
Extent to Which Lack of Staff Expertise
in Evaluating Test Results for Showing
Educational Benefit Limited Regional
Office Capability**

	Investigators ^a	
	Number	Percent
Very great extent	18	31
Great extent	13	23
Moderate extent	6	10
Some extent	11	19
Little or no extent	8	14
No basis to judge	2	3
Total	58	100

^aIncludes principal or supervisory investigators for tracking cases.

**Table VIII.35: Ability-Grouping
Investigations: Extent to Which Lack of
Staff Expertise in Evaluating Test
Results for Showing Educational Benefit
Limited Regional Office Capability**

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	2
Some extent	3
Little or no extent	4
No basis to judge	1
Total	10

**Table VIII.36: Tracking Investigations:
Extent to Which Lack of Staff Expertise
in Evaluating Test Results for Showing
Educational Benefit Limited Regional
Office Capability**

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	4
Some extent	0
Little or no extent	1
No basis to judge	2
Not applicable	3
Total	10

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.37: Ability-Grouping Investigations: Extent to Which Lack of Staff Expertise in Determining Alternative Methods Limited Regional Office Capability

	Investigators ^a	
	Number	Percent
Very great extent	24	30
Great extent	11	14
Moderate extent	10	12
Some extent	10	12
Little or no extent	22	27
No basis to judge	4	5
Total	81	100

^aIncludes principal or supervisory investigators for ability-grouping cases.

Table VIII.38: Tracking Investigations: Extent to Which Lack of Staff Expertise in Determining Alternative Methods Limited Regional Office Capability

	Investigators ^a	
	Number	Percent
Very great extent	17	30
Great extent	8	14
Moderate extent	7	12
Some extent	10	18
Little or no extent	13	23
No basis to judge	2	3
Total	57	100

^aIncludes principal or supervisory investigators for tracking cases.

Table VIII.39: Assignment of Students to Special Education Investigations: Extent to Which Lack of Staff Expertise in Determining Alternative Methods Limited Regional Office Capability

	Investigators ^a	
	Number	Percent
Very great extent	22	20
Great extent	14	13
Moderate extent	13	12
Some extent	18	16
Little or no extent	29	26
No basis to judge	14	13
Total	110	100

^aIncludes principal or supervisory investigators for assignment to special education cases.

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.40: Ability-Grouping Investigations: Extent to Which Lack of Staff Expertise in Determining Alternative Methods Limited Regional Office Capability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	1
Some extent	2
Little or no extent	7
Total	10

Table VIII.41: Tracking Investigations: Extent to Which Lack of Staff Expertise in Determining Alternative Methods Limited Regional Office Capability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	1
Some extent	2
Little or no extent	3
No basis to judge	1
Not applicable	3
Total	10

Table VIII.42: Assignment of Students to Special Education Investigations: Extent to Which Lack of Staff Expertise in Determining Alternative Methods Limited Regional Office Capability

	Regional directors
Very great extent	0
Great extent	0
Moderate extent	0
Some extent	0
Little or no extent	8
No basis to judge	2
Total	10

Table VIII.43: Total Number of Elementary and Secondary Investigations by OCR Statutory Authority (Data for Fig. I.1)

Statutory authority	Complaint investigations	Compliance reviews
Section 504	7,608	537
Title VI	2,660	299
Title IX	1,068	237

Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.44: OCR Appropriations
 (Data for Figure VI.1)

Fiscal year	Annual appropriation	
	In current dollars	In constant 1981 dollars
1981	46.9	46.9
1982	45.0	42.4
1983	44.9	40.9
1984	44.4	38.8
1985	45.0	38.0
1986	42.7	35.4
1987	43.0	34.4
1988	40.5	31.1
1989	41.6	30.5
1990	44.6	31.0
1991	48.4	N/A

Table VIII.45: OCR Training Expenditures
 (Data for Fig. VI.2)

Fiscal year	Expenditures (In thousands)
1981	\$56
1982	100
1983	68
1984	129
1985	80
1986	— ^a
1987	48
1988	3
1989	10
1990	1

^aFiscal year 1986 unavailable.

Table VIII.46: Assignment of Students to Gifted and Talented Programs
 (Data for Fig. VII.1)

Fiscal year	Complaint investigations	Compliance reviews
1983	4	5
1984	3	12
1985	8	6
1986	4	4
1987	3	7
1988	7	7
1989	6	2
1990	14	0

**Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.47: Counseling and Tutoring
(Data for Fig. VII.2)

Fiscal year	Complaint investigations	Compliance reviews
1983	5	3
1984	1	1
1985	6	6
1986	3	2
1987	7	4
1988	7	1
1989	7	1
1990	7	0

**Table VIII.48: Assignment of Students
With Limited English Proficiency**
(Data for Fig. VII.3)

Fiscal year	Complaint investigations	Compliance reviews
1983	7	6
1984	9	13
1985	12	13
1986	14	10
1987	10	41
1988	20	12
1989	13	2
1990	14	0

**Table VIII.49: Assignment of Students to
Special Education Programs**
(Data for Fig. VII.4)

Fiscal year	Complaint investigations	Compliance reviews
1983	14	6
1984	24	12
1985	26	15
1986	30	23
1987	22	14
1988	27	18
1989	34	5
1990	37	7

Appendix VIII
Tables Supporting Figures in Report Text and
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Table VIII.50: Discipline (Data for Fig. VII.5)

Fiscal year	Complaint investigations	Compliance reviews
1983	22	6
1984	48	11
1985	69	1
1986	73	1
1987	71	0
1988	94	1
1989	100	5
1990	132	0

Comments From the Office for Civil Rights

**UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Mr. Franklin Frazier
Director
Education and Employment Issues
United States General Accounting Office
Washington, D.C. 20548

MAY 10 1991

Dear Mr. Frazier:

Thank you for the opportunity to comment on your draft report (GAO/HRD-91-85) to Congress on the Office for Civil Rights' enforcement activities under Title VI of the Civil Rights Act of 1964 in the area of within-school discrimination, particularly ability grouping. While OCR receives relatively few complaints on this issue, the discriminatory assignment of minority students within a school is an important civil rights concern. Unfortunately, OCR must respond to a wide variety of equally important concerns, in a context of limited resources, and the narrow focus of your Report on just one area fails to convey the difficulty and complexity of resource allocation decisionmaking.

The draft report focuses on OCR's activities between FY 1983 and 1990. Generally, the factual information provided by the Department to GAO staff is accurately presented, with the exceptions noted below. However, the report conveys in only a very limited way a sense of the context in which OCR's enforcement activities were conducted during these years, and it does not fully reflect OCR's concerted efforts to address some of the very concerns the report raises. The draft report would be strengthened and would be of greater use to the Department and to Congress if this information were provided.

The report notes a decline in the number of Title VI within school discrimination compliance reviews, a lack of written policy guidance on this issue and insufficient monitoring of corrective action plans and staff training. These conclusions are based primarily on a review of investigations conducted between 1983 and 1989 and interviews with OCR staff.

Since 1988 there has been a decline in the number of compliance reviews conducted by OCR in all program areas. This decline is directly related to the dramatic rise in the number of complaints OCR has received, and in the percentage of those complaints over which OCR can exercise jurisdiction, following the passage of the Civil Rights Restoration Act. In FY 1990, OCR received 3,382 complaints, a 71 percent increase in the number of complaint

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receipts for the fiscal year prior to the passage of the Act. With current complaint receipts and staffing levels OCR cannot conduct the number of compliance reviews completed in past years. The massive influx of complaints, and OCR's continued determination to investigate each of them in a prompt and thorough manner, has also constrained its ability to conduct other activities, including monitoring and training.

Significant steps have been taken by OCR, however, to enhance its enforcement capabilities. The need for written policy and investigative guidance has been addressed. Draft policy guidance and a model plan for ability grouping investigations have been developed. A comprehensive, week long training session on this and several other within-school discrimination issues was conducted earlier this year, followed by training activities in each region.

All of these activities are an integral part of OCR's National Enforcement Strategy that I announced last fall. The underlying philosophy of that strategy is to concentrate and integrate all of OCR's available resources to maximize the impact of its enforcement capabilities. The strategy identifies a short list of priority issues, several of which are within-school discrimination issues, including ability grouping, and targets them for a variety of compliance initiatives throughout the year. While we have not been able to greatly increase the number of compliance reviews, we are making extensive efforts, through our outreach activities, to inform large groups of recipients about their obligations under the civil rights statutes we enforce.

The draft report contains specific recommendations to the Secretary. The Department's response to each of these recommendations is as follows:

RECOMMENDATIONS TO THE SECRETARY OF EDUCATION

1. To provide Federal guidance to state and local education agencies, GAO recommends that the Secretary of Education issue Title VI regulations that identify practices schools should use for assigning students to classes on the basis of academic ability or achievement level.

Department of Education Response

GAO's call for additional regulatory guidance appears to be premised on a belief that without specific regulations, "no legally binding federal guidance exists." We do not agree. The Title VI regulations apply to all activities of a recipient with respect to its federally assisted program, including all possible allegations of within-school discrimination. This

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agency has successfully prosecuted ability grouping cases using the existing regulation. Specific guidance on the parameters of an acceptable ability grouping program (or student discipline or Lau program) is essential, but it is unnecessary, and would be unduly cumbersome, to include specific standards for each within-school discrimination issue in the Title VI regulation. In this instance, effective enforcement is better served by a general regulation and specific, widely publicized policy guidance.

OCR's planned outreach activities are designed to convey policy guidance to a broad range of recipients and beneficiaries. By utilizing this format OCR will also be able to respond to specific questions and provide follow up technical assistance. We also anticipate that the ability grouping policy document will be published in the Federal Register. Like all of OCR's policy documents, the document will also be available to the public through a toll free request line.

2. GAO recommends that the Secretary of Education direct the Assistant Secretary for Civil Rights to develop and issue policy guidance that specifies how and when regional offices should use disparate impact analysis in Title VI within-school discrimination cases. For each within-school discrimination issue, this policy guidance should specify the appropriate methods and criteria for determining (1) if district practices have a segregative effect, (2) if district practices are educationally justified, and (3) when and how to determine the availability of alternative methods of student assignment.

Department of Education Response

The Department agrees that the Office for Civil Rights should develop and issue policy guidance on ability grouping that includes the referenced information. In fact, OCR has already prepared a draft of such guidance, which will be published in the Federal Register. However, if this recommendation is also intended to cover other within-school discrimination issues, e.g., Lau or student discipline, while the Department agrees on the need for policy guidance, it cannot agree that the analytical approach outlined in the recommendation necessarily would be appropriate.

3. GAO recommends that the Secretary of Education direct the Assistant Secretary for Civil Rights to ensure that regional offices give monitoring high priority, as

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specified in OCR's enforcement strategy. The Assistant Secretary for Civil Rights should enforce agency policy which requires OCR regional offices to monitor school districts until they verify that approved corrective action plans have been fully implemented and that the district's actions have corrected the violations.

Department of Education Response

This has already been accomplished. As the GAO report notes, the National Enforcement Strategy makes monitoring a priority for all OCR offices. OCR has also taken other steps to ensure its priority status, e.g., highlighting the importance of this activity in the Regional Director's performance agreements.

4. GAO recommends that the Secretary of Education direct the Assistant Secretary for Civil Rights to identify the kinds of training and technical assistance related to within-school student assignment issues that could be provided by regional Desegregation Assistance Centers and enter into agreements, if possible, with the centers to obtain needed services for OCR investigators.

Department of Education Response

The training of OCR staff is essential if the agency is to conduct high quality investigations. OCR has recently provided training to its legal and investigative staff on several within-school discrimination issues, including ability grouping. This training included not only general guidance, but specific advice, from experienced investigators and attorneys, on how to investigate allegations of discriminatory ability grouping.

While the Desegregation Assistance Centers are not authorized to provide training to Federal personnel, these centers may be a good source of informal technical advice, and we will look into the feasibility of their use as a technical resource for OCR staff. We have shared a draft of our ability grouping policy with each of the centers for their comment.

Additional Specific Exceptions

Clarification on policy development.

Page 35 of the draft report makes specific reference to OCR's development of written policy guidance on several within-school discrimination issues. As currently written,

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it sounds as though all such activity is in a planning stage. In fact, OCR has already developed or updated policy guidance on ability grouping and equal opportunities for students with limited English proficiency and these documents are under review within the Department. Guidance on the assignment of minority students to special education programs and student discipline will be completed during the current fiscal year.

Clarification on 1983 memorandum on ability grouping.

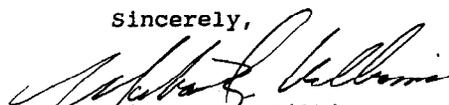
At the top of page 17, the discussion of the memorandum to the Atlanta Regional Office suggests that the use of subjective assessments, like a teacher's recommendation, in assessing a student's ability or achievement would not be permissible under Title VI. Subsequent case law (Montgomery v. Starksville Municipal Separate School District, 665 F. Supp. 487 (N.D. Miss. 1987), aff'd, 854 F.2d 127 (5th Cir. 1988)), suggests a contrary view. The holding in this case is reflected in OCR's current draft policy.

Conclusion

Thank you again for the opportunity to comment on this report. If you or your staff have any additional questions, please contact me at 732-1213 or my deputy, Richard D. Komer, at 732-1556.

Also, I would like to commend the performance of the GAO staff who conducted this review. They have been consistently courteous and professional in all of their interactions with OCR headquarters and regional staff.

Sincerely,



Michael L. Williams
Assistant Secretary
for Civil Rights

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Glossary

Ability Grouping	The assignment of elementary school students to groups or classes, for all or a portion of their instruction, on the basis of an assessment of their ability or achievement level.
Analytic Approaches	OCR uses two different analytic approaches devised by the courts when determining compliance with title VI and its implementing regulations. These are disparate impact analysis and disparate treatment analysis (see definitions below).
Block Scheduling	The assignment of students to ability-grouped classes for all academic subjects with no regrouping.
Complaint Investigation	OCR investigations of complaints alleging discrimination at educational institutions received from such sources as parents, students, school staff, and advocacy groups.
Compliance Letter of Findings	A Letter of Findings (see definition below) indicating that an OCR investigation found no violation of civil rights statutes or regulations at the educational institution.
Compliance Review	A self-initiated OCR investigation of an educational institution that receives federal financial assistance.
Corrective Action Plan	A written document specifying the actions that an educational institution must take—and when they must be taken—to achieve compliance with federal civil rights statutes and regulations.
Disparate Impact Analysis	This analytic approach assesses whether facially neutral policies or practices have a discriminatory impact that cannot be justified.
Disparate Treatment Analysis	Under title VI, this analytic approach assesses whether one or more individuals are treated differently on the basis of race, color, or national origin.

Facially Neutral	Under title VI, a policy or practice is facially neutral if it treats individuals equally regardless of their race, color, or national origin, for example, a culturally unbiased test.
Investigative Plan	The Investigative Plan is prepared by the OCR investigator. It contains, among other things, (1) a statement of the issues to be examined in an investigation and (2) the approach to resolving the issues.
Investigative Report	The OCR investigator prepares the Investigative Report after the needed information is collected according to the Investigative Plan. The Investigative Report presents analyses and conclusions regarding relevant findings and makes recommendations for appropriate action by OCR.
Letter of Findings	OCR issues different kinds of Letters of Findings (see compliance Letter of Findings and violation-corrected Letter of Findings). The purpose of the Letter of Findings is to notify the complainant and the educational institution of the determination OCR made on each issue in a completed investigation.
Monitoring	OCR's process of verifying whether a recipient institution is implementing an approved corrective action plan and confirming that the implemented plan has successfully corrected the violation.
Pre-Letter of Findings Settlement	If an OCR investigation finds a violation, the regional office attempts to achieve voluntary compliance by negotiating a settlement with the school district before issuing a Letter of Findings. Such a negotiated settlement is called a pre-Letter of Findings settlement; it includes an agreement on a corrective action plan (see definition above).
Racially Identifiable Classrooms	Classrooms with a statistically disproportionate number of students of one race as compared to, for example, the racial composition of the school or some other standard of comparison.
Section 504	The section of the Rehabilitation Act of 1973 that prohibits discrimination on the basis of handicapping conditions in educational institutions that receive federal funds.

Segregative Effect

A student assignment practice has a segregative effect if it results in a significant number of racially identifiable classrooms.

Title VI

The section of the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color, or national origin in educational institutions that receive federal funds.

Title IX

The section of the Education Amendments of 1972 that prohibits discrimination on the basis of gender in educational institutions that receive federal funds.

Tracking

The practice of grouping secondary school students by academic ability or achievement level into curriculum tracks—such as college preparatory, general, or vocational.

Violation-Corrected Letter of Findings

OCR issues a violation-corrected Letter of Findings if a pre-Letter of Findings settlement is achieved. A violation-corrected Letter of Findings states that OCR currently considers the school district to be in compliance although a violation was found. This presumption of compliance, however, is contingent on the district's successful completion of the corrective actions that it agreed to take. OCR closes the vast majority of its investigations that identify violations in this manner.

Within-School Discrimination Issues

On the basis of OCR classifications, GAO identified the following seven title VI issues to be within-school discrimination issues: tracking, ability grouping, the assignment of students to gifted and talented programs, the assignment of students to special education programs, the assignment of limited English proficient students, counseling and tutoring, and discipline.

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