

SECTION V

HUD's Enforcement of Section 504

A. Introduction

1. Scope of the Section 504 Discussion

The U.S. Department of Housing and Urban Development has multiple Section 504 responsibilities that affect the grants and contracts that it awards. The Offices of Public and Indian Housing, Single Family Housing, Multifamily Housing, and Community Planning and Development have issued regulations, notices, and handbooks that address civil rights issues, and each is responsible for coordinating its civil rights obligations with HUD's FHEO. FHEO has primary responsibility for enforcing the FHAA, Section 504, and the other civil rights laws that apply to recipients of federal funds.

This report is limited to FHEO's operations, and this section focuses on FHEO's Section 504 complaint investigations and its Section 504 post-grant award compliance reviews. It is important to note that FHEO's Section 504 responsibilities, however, are much more extensive. Since its creation, FHEO has been responsible for providing civil rights guidance to the entire agency and to HUD's thousands of grant recipients. It has done so by reviewing proposed regulations and handbooks, describing the civil rights implications of internal and external program guidance and proposed legislation, and reviewing thousands of responses to HUD's annual Notices of Funding Availability. This report will address those actions as they relate to FHEO's external enforcement responsibilities.

This report will not analyze how HUD's programs, practices, and policies have shaped and affected disability discrimination in the real estate and community development industries. HUD awards grants, contracts, and mortgages worth trillions of taxpayer dollars every year. HUD's influence is enormous, and it is critical to understand how its policies and practices affect the housing choices of people with disabilities. Another report that addresses those issues would

provide an important context for this focused report on FHEO's enforcement of the disability rights laws.

2. Section 504 Provides Relief Not Available Under the Fair Housing Act

Why is Section 504 important if the FHA also prohibits disability discrimination? While the FHA applies to all housing, including housing subsidized with federal funds, Section 504 adds requirements to the use of its funds that the FHA does not. Except for the accessibility requirements that the FHA applies to new multifamily housing, the FHA describes prohibited conduct, but it does not prescribe specific steps that must be followed.

Section 504's regulations do prescribe specific steps, and they impose specific requirements on the housing providers and political entities that accept federal funds. For example, recipients are required to conduct self-evaluations of their programs and make existing properties accessible. Section 504 regulations also require recipients to pay for the modifications and accommodations their tenants and beneficiaries require.

Because Section 504 requires HUD to ensure that its funds are being spent in nondiscriminatory ways, it does not have to wait for a complaint to be filed. Instead, it may initiate its own post-award reviews, called compliance reviews, that may lead the agency and the subject of the review to sign a Voluntary Compliance Agreement (VCA), through which the recipient agrees to specific actions, within specified time limits, to bring itself into compliance with Section 504.

Section 504 also gives HUD enforcement options that the FHA does not. For example, HUD may condition the receipt of any further funds; it may sue the recipient for specific performance; it may assign the recipient to a suspended or limited denial of participation status; it may initiate binding arbitration proceedings; it may initiate administrative proceedings before an ALJ; and it may, as its ultimate power, suspend or terminate the recipient's HUD funds. Thus, Section 504 is as important as and is potentially a more powerful civil rights tool than the FHA.

3. Section 504 Emphasizes Voluntary Compliance

Unlike the FHA, Section 504 applies *only* to those who receive federal funds. This difference has had a major impact on the structure of HUD's Section 504 enforcement program. Every federal agency has the authority to terminate the receipt of federal funds if the agency finds that the recipient has violated Section 504. To ensure that agencies use that remedy as a last resort, Congress has required them to give recipients extensive opportunities to correct the violation, even after a full hearing and an adverse decision.¹³⁶ Congress further requires that the Secretary notify the appropriate House and Senate committees before terminating any funds. HUD provided NCD with no document indicating that HUD has ever terminated federal funds on the basis of Section 504. In that regard, HUD's record is consistent with those of other executive agencies.¹³⁷

Section 504's emphasis on voluntary compliance has led HUD to be very deferential in its Section 504 enforcement activities. With the FHA, if the parties do not agree to conciliation and

¹³⁶ 42 U.S.C. 2000d-1(1988). Section 8.59(j) reflects HUD's emphasis on informal resolutions and voluntary compliance:

It is the policy of the Department to encourage the informal resolution of matters. The responsible civil rights official may attempt to resolve a matter through informal means at any stage of processing. A matter may be resolved by informal means at any time. If a letter of findings making a preliminary finding of noncompliance is issued, the responsible civil rights official shall attempt to resolve the matter by informal means.

¹³⁷ Reviewing the Federal Government's enforcement of Title VI, Section 504's model, the U.S. Commission on Civil Rights said:

Although the use of voluntary agreements is an important tool for effecting compliance under Title VI, total reliance on this mechanism by the Federal agencies, to the exclusion of administrative sanctions, appears to have seriously diminished their overall enforcement effectiveness and credibility.

Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, A Report of the U.S. Commission on Civil Rights, 1996, p.175.

HUD's investigation uncovers sufficient evidence to prove that the law was violated, the statute requires the agency to proceed to enforcement and spells out the remedies available to the fact finder. Under Section 504, if HUD determines that a violation has occurred, the ultimate remedy available is to withhold the violator's federal funds—a remedy fraught with so many hurdles that it has never been used.

The emphasis on voluntary compliance has affected not simply the conduct of complaint investigations and compliance reviews but also HUD's pre-award enforcement program. These "front-end reviews" involve FHEO staff determinations as to the grant applicant's civil rights compliance status. They are usually desk audits but may include on-site visits, and they have provided FHEO offices with valuable information about cities, housing developers, and other recipients of HUD funds.

A thorough analysis of this part of HUD's enforcement program was beyond the scope of this project. HUD did not provide any document to indicate that enforcement action resulted from these reviews, however, and HUD's discussion of actions regarding the reviews spoke instead of the value of technical assistance and voluntary compliance. This was consistent with both the statutory provisions for informal resolutions of adverse civil rights findings and the emphasis that HUD has placed on voluntary compliance throughout its Section 504 program.

B. Overview of Section 504 Enforcement

Until 1988, when HUD published its Section 504 rules, race discrimination accounted for the majority of its work, through Title VI of the Civil Rights Act of 1964, Section 109 of the Community Development Block Grant of 1974, and the FHA of 1968. When Congress enacted the FHAA in 1988, it added people with disabilities to the protected classes. HUD published its Section 504 regulations the same year, and its responsibilities for training its staff, publishing guidance, and providing technical assistance in and outside the agency increased dramatically.

By the mid-1990s, HUD had gained some experience in enforcing the disability rights laws, but it continued to face difficult resource and management issues. Not only was the FHA generating more than five times the number of Section 504 complaints it had been since 1988, but Congress was eliminating more and more of the funding for affordable housing. This

permitted cities and housing providers to blame tighter housing markets rather than discrimination for rising rates of homelessness among people with disabilities and families with children.¹³⁸ In 1994, FHEO reached its highest staffing and resource levels. It created a separate Disability Rights Division, and it expanded and reorganized its Fair Housing and Section 504 enforcement programs in the field and in Headquarters.

In 1995, HUD created an Office of Disability Policy at the secretarial level. Its purpose was to raise the visibility of disability rights throughout HUD. Its goals were to make HUD's funding policies consistent with the civil rights laws and to press the agency to require recipients of HUD funds to do the same.

In 1997, FHEO began its campaign to double its enforcement of the FHA. This effort resulted in an emphasis on FHA complaints, to the detriment of Section 504 staff and resources. Almost all complaint investigations slowed to a crawl, and staff that would have worked on Section 504 complaints and compliance reviews were drafted into the doubling effort.

Once the doubling effort ended in 2000, FHEO initiated a number of Section 504 enforcement training and departmentwide coordination efforts. It took these actions with reduced numbers of staff as HUD responded to the Administration's governmentwide downsizing initiative. FHEO moved the pre-award civil rights reviews of funding applicants out of FHEO to other HUD offices in an effort to focus its limited resources on enforcement efforts.¹³⁹ It joined with DOJ to combine training with a limited number of compliance reviews, and it began to focus on creating a credible data collection system. FHEO's staffing levels are lower now than they were 10 years ago, and the Administration had not named an Assistant Secretary for FHEO as of August 2001. The future direction of HUD's Section 504 enforcement program therefore remains uncertain.

¹³⁸ See, e.g., HUD's annual reports to Congress on worst-case housing needs. Also see *Priced Out in 2000: The Crisis Continues*, Technical Assistance Collaborative and Consortium for Citizens with Disabilities, Boston, MA, June, 2001; and *Out of Reach*, National Low Income Housing Coalition, Washington, DC, September 2000.

¹³⁹ "An Evaluation of the Fiscal Year 2000 Civil Rights Front-End and Limited Monitoring Review Process," May 2001, attached to a letter from David Enzel, FHEO, to Merrily Friedlander, DOJ, June 15, 2001.

C. Data

Unlike the previous section, which described HUD's enforcement of the FHA, this section is not replete with graphs and charts. In order to compare staffing ratios with numbers of complaints, to decipher enforcement trends, and to measure success in terms of numbers of beneficiaries helped, it is necessary to have data. The data must be reliable, consistent, and retrievable.

HUD has created the Title Eight Automated Paperless Office Tracking System (TEAPOTS) system to measure its enforcement of the FHA. TEAPOTS did not exist in 1988, when the FHAA was first enacted, and it took many years before a combination of leadership support, the assistance of an independent consultant, sustained and excellent staff work, and sufficient resources enabled FHEO to create its current fair housing data system. In contrast, HUD's enforcement of its Section 504 responsibilities is not reflected in a reliable, usable, and adequately funded data collection system.

FHEO did provide NCD with Section 504 data, and it is possible to glean some information from that data. But it is revealing that FHEO produced the data originally in response to external requests. It did not indicate that it used the data as a method of obtaining information about its own efforts to enforce Section 504. It did not provide any documentation to show that it used the data to plan compliance reviews or to correct under- or overemphasis on a particular set of recipients or for training, budgeting, or coordinating Section 504 and other civil rights efforts.

The failure to collect, maintain, and benefit from effective data was evident when FHEO and the Office of Public and Indian Housing undertook a joint enforcement effort in 1994. The goal was to help all of the 3,338 public housing authorities make their housing and programs accessible to and usable by tenants with disabilities. (This effort is described more fully later in this section.) Because FHEO had no existing method of collecting the results of the effort, it created a specific data collection survey.¹⁴⁰ The survey was staffed by a single person who, without sufficient resources or support, was unable to obtain responses from each of the field

¹⁴⁰ See footnote 197 and associated text.

offices. The report was never disseminated to the field; it was never shared with FHEO's enforcement offices; and its findings were not made part of FHEO's planning activities.

Shortly before HUD published the Section 504 regulations, FHEO established the Section 504 Complaints Computer Tracking System (TRACE). Assistant Secretary Judith Brachman sent a memo instructing all regional directors to enter all Section 504 complaint data into the system.¹⁴¹ Three months later, Headquarters sent another memo to the field, this time to the Section 504 coordinators, advising them that the computer system for tracking Section 504 complaints was called MCATS—Management and Complaint Automated Tracking System—and that all Section 504 complaint and compliance data were to be entered into this system.¹⁴²

Unfortunately, neither TRACE nor MCATS was user-friendly. FHEO staff in Headquarters and the field were frequently frustrated by their efforts to enter data into the systems. One of their many problems was that no matter how much data had been entered, if it was necessary to correct a mistake, all of the data had to be reentered.¹⁴³ The information technology staff was too small to be able to provide the support necessary to maintain the systems, and in the mid-1990s, Headquarters scrapped them. Data maintenance had always been inconsistent and unreliable, but it was not until the TEAPOTS system for fair housing complaints had been in use for several years (see Section IV) that FHEO began, in FY 2001, to incorporate Section 504 data into the TEAPOTS system. Even now, TEAPOTS collects complaint information only, when it could also collect compliance review data.

Finding V.C.1: TEAPOTS does not include enough information about Section 504 complaints and compliance reviews to permit it to be used as a planning and evaluation document. FHEO has just begun to add Section 504 to TEAPOTS. TEAPOTS may need to be expanded to include data about Section 504 compliance

¹⁴¹ TAG 88-1: Section 504 Complaints Computer Tracking System (TRACE) 10/16/87.

¹⁴² Memorandum, Peter Kaplan to Section 504 Regional Coordinators, "Section 504 Complaint System," January 27, 1988; Peter Kaplan to All FHEO Regional Directors, "Section 504 Management and Complaint Automated Tracking System (TRACE)," August 24, 1988.

¹⁴³ Interviews with HUD staff between December 2000 and May 2001.

reviews for it to be a fully effective data collection system. FHEO has not had sufficient resources to create effective data collection systems or to provide adequate IT support services to FHEO staff to enable them to provide reliable, consistent data or to use FHEO's data systems effectively.

Recommendation V.C.1: FHEO should make its data systems a priority. HUD should fund FHEO's data systems and resources adequately. FHEO should determine whether to add fields to TEAPOTS that would make it as effective a data system as possible for planning, coordinating, and evaluating purposes.

Instead of relying on TRACE and MCATS, FHEO's Section 504 enforcement data appears to have been generated from salary and expense reports developed as part of HUD's budget requests to Congress, civil rights implementation reports to the Office of Coordination and Review of the DOJ, Annual Reports to Congress pursuant to FHA requirements, and annual reports to the U.S. Commission on Civil Rights. Unfortunately, the data are not consistent from one report to the next. For example, one year's report may show complaints received while the next year's report tracks complaints investigated.¹⁴⁴ Nor has FHEO systematized its data collection in a way that controls for the variables that result when Headquarters staff ask for information at different times of the year, from different staff, in offices with varying levels of resources to devote to data collection. The differences among the various data sets is apparent from Tables V-1 and V-2, and they were too inconsistent to be used as the basis for any but the most general conclusions.

For some years, the salaries and expenses reports reflect the number of complainants assisted; in other years, the reports reflect the number of complaints received or the number of complaints investigated. For still other years, Section 504 complaints are listed as 504/age discrimination complaints or 504 complaint/compliance reviews, or simply as 504 complaints,

¹⁴⁴ Ibid.

with no indication as to whether the reported figure represents the number of complaints received, investigated, closed, or held over from the previous year.

It is also difficult to compare the number of complaints reflected in the salaries and expenses reports with the civil rights implementation reports that HUD transmitted to the DOJ Office of Coordination and Review annually. The numbers reported in the implementation reports vary from the numbers in the salaries and expenses reports and are themselves internally inconsistent. Some years, the numbers are simply estimates.

With sufficient time and resources, it may be possible to reconstruct the number of Section 504 complaints that FHEO received, the number that it investigated, and the number that it charged. It would then be possible to identify trends and compare hours of staff time with budget amounts and numbers of cases. Based on the data that FHEO supplied, however, it is not possible to provide that information in this report. The charts reproduced below, therefore, are subject to many interpretations.

HUD's annual reports to Congress, titled *The State of Fair Housing*, provide baseline information on complaints and compliance reviews (see Tables V-1 and V-2).

Table V-1: State of Fair Housing–Complaints

Category	FY 1990*	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995**	FY 1996	FY 1997	FY 1998
504 Complaints	212	146 (rec'd) 200 (closed)			568 (rec'd)		228 (accepted)	206	207
Title VI Complaints	113	248 (rec'd) 276 (closed)			251(accepted)		143 (accepted)	74	105
109 Complaints	27	13 (rec'd)			51		100 (accepted)		
109/ Title VI Complaints								141	153
Age Complaints							102 (accepted)		
ADA Complaints							9 (accepted)	4	4
ADA/504 Complaints								62	134
Total Complaints			547 (rec'd) 279 (closed)	513 (rec'd) 453 (closed)	870 (accepted)	no data available	582 (accepted)	487 (accepted)	613

* 1990 figures are for complaints that were investigated and resolved. ** Only Title VIII data reported in 1995. HUD reports that 417 investigations were completed in FY 1994 but does not specify the category of the complaints.

Table V-2: State of Fair Housing–Compliance Reviews

Category	FY 1990*	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995**	FY 1996	FY 1997	FY 1998
504 Compliance Reviews		12		22 (initiated) 17 (closed)	32 (initiated)				
Title VI Compliance Reviews		68		55 (initiated) 37 (closed)	53 (initiated)				
109 Compliance Reviews				1 (initiated) 2 (closed)	3 (initiated)				
Total Compliance Reviews (not by statute)							131	126	126

* 1990 figures are for complaints that were investigated and resolved.

** Only Title VIII data reported in 1995.

Table V-3 combines data from HUD annual budget submissions to Congress and data reported to the U.S. Commission on Civil Rights, yielding perhaps the most complete (and most accurate) information about the number of complaints and compliance reviews that FHEO handled from 1989 through 1999. Unlike Tables V-1 and V-2, this table does not show a remarkable rise in complaints in 1994. Instead, Table V-3 reflects half as many Section 504 complaints and either half as many Section 504 compliance reviews or an increase of two, depending on the data source. On the other hand, 1995 shows the highest number of Section 504 complaints and compliance reviews for the 10-year period (380 complaints and 155 compliance reviews). The Section 504 numbers continue to be higher for both complaints and compliance reviews from 1995 through 1999.

The other interesting data in Table V-3 reflect the generally increasing numbers of ADA complaints and compliance reviews. The table reflects none until HUD reports receiving 42 ADA complaints (and no compliance reviews) in 1994, 17 complaints in 1995, 107 in 1996, 150 in 1997, down to 62 in 1998, and 64 in 1999.

Since HUD's ADA responsibility is to enforce Title II, which concerns cities and other political entities, one would expect to see a rise in Section 109 complaints and compliance reviews for the same years that ADA activity increased. The table does seem to reflect that fact, although logic may not be the source of the coincident rise in numbers. By 1996, the largest number of Section 109 compliance reviews that HUD reports it conducted was six. Yet the number jumps to 30 in 1997, is 30 again in 1998, but drops to 3 in 1999.

**Table V-3: FHEO Salaries and Expenses Documents and
October 2000 U.S. Commission on Civil Rights Draft Report**

Category	FY 198 9	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999
504/Age Complaints	227	228	117	281	285	285	380	218	250	206	225
Title VI/109 Complaints	32	92	267	270	147	228	193	143	175	74	144
109 Complaints						48	38	103	175	67	21
504/Age Compliance Reviews	12	9	14	2		21 34	155 *	121 *	150	150	38
VI/109 Compliance Reviews	72	0									
VI Compliance Reviews		25	36	10	7	7 21	12	51	100	100	39
109 Compliance Reviews			0	0		2	2	6	30	30	3
ADA Complaints				0	0	42	17	107	150	62	64
ADA Compliance Reviews						0	0	10**	40	40	32
504 Complaints/Compliance Reviews					285						

* Includes 100 reviews conducted of Voluntary Compliance Agreements signed with housing authorities that had failed to implement needs assessments and transition plans as requested by 24 CFR 8.25(c), and includes 41 reviews for approval or dis-approval of designated housing allocation plans, submitted pursuant to the 1992 Housing and Community Development Act.

** Includes compliance reviews resulting from the accessibility campaign launched in FY 1996.

504 only Title VI only USCCR Started
Note: Beginning in 1996, each reported incident of discrimination is investigated under all applicable statutes. This will result in some incidents under investigation being counted under more than one category of complaint received or review conducted.

Table V-4 reflects HUD's implementation reports filed with DOJ. On the one hand, too much information is missing to be able to draw any conclusions from the numbers in this table. On the other hand, the data do reflect two important facts. First, for 1993, it appears that FHEO sent two implementation reports to DOJ a month apart, and the numbers differ. The February 1994 report indicates that HUD received a total of 492 complaints; the March 1994 report indicates that the number is 551. Both numbers were for 1993 and a year old. The reason for the discrepancy is unexplained but not unusual.

Second, the report consists of answers to detailed questions that DOJ asks of all Executive agencies responsible for enforcing program-related civil rights statutes. The questions ask for the number of unresolved complaints at the beginning and end of the fiscal year; the reasons for closing complaints; the number of complaints closed before investigation, after investigation, and with and without findings; the resulting enforcement actions; the number of findings for action that was and wasn't taken; the number of pre- and post-award reviews and their results; the number of housing units that were the subject of FHEO actions; and salary, expense, and workload data.

If it were possible to obtain implementation reports for each year from 1989 through 2000 and to confirm the accuracy of the answers that HUD provided to DOJ, it would be possible to create a detailed picture of HUD's program-related civil rights enforcement efforts for the past decade. Unfortunately, DOJ was not able to provide us with a complete set of documents, and the unreliability and inconsistency of the data would continue to pose serious research problems.

Table V-4: Implementation Reports (E.O. 12250)

Category of Complaint Received	FY 1989	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999
Section 504	286		472	253*	356* 325**			218			225
Title VI	3		430	157*	161* 141**			143			144
Section 109	12				N/R* 26**			2			1
Total Complaints				315*	551* 492**			582	487	431	730
Title VI and 109								101			164
Age								10			
504 & ADA								102			286
ADA				5*	34*			5			3

* From March 1994 implementation report, p. 46

** From 2/94 implementation report

Investigated

Field reports only

In 1998, FHEO created a system for collecting information about compliance reviews. The first report, issued on December 21, 1998,¹⁴⁵ provided the case number, the recipient's name, the jurisdiction of the review, the date it was initiated, the dates of the letters of finding, letters of determination, and Voluntary Compliance Agreements. It also included a column for "status/concerns." FHEO produced only this one report, and it is unclear if other reports exist.

In fiscal year 2000, FHEO began maintaining a List of Voluntary Compliance Agreements. These lists are arranged by HUB and identify the name and location of the recipient, the jurisdictional basis of the VCA, its expected date of expiration, whether Headquarters has a copy of the VCA, and whether the VCA resulted from a complaint or compliance review.

A review of FHEO's April 20, 2000, VCA list provides a snapshot of compliance activity around the country.¹⁴⁶ All of Seattle's VCAs are based on compliance reviews, while all of San Francisco's are based on Section 504 or Title VI complaints. Texas has many more VCAs than any other office, and the Colorado HUB has none. The Philadelphia office has VCAs with housing authorities, assisted housing providers, redevelopment agencies, and cities, while the Fort Worth and Kansas City HUBs have entered into VCAs only with housing authorities.

The February 1, 2001, list reflects the following information:

Boston HUB – Twenty-two VCAs; 21 based on complaints; 1 on compliance review of a housing authority. Twenty are Section 504 or Section 504 and Title VIII VCAs.

New York HUB – Six VCAs, all based on compliance reviews; 3 signed with housing authorities; 3 signed with assisted housing providers. Five are Section 504 VCAs.

Philadelphia HUB – Twenty VCAs; 14 based on housing authority reviews and 6 based on complaints. Seventeen are Section 504 VCAs and most are Section 504 and ADA.

¹⁴⁵ Memorandum from Cheryl D. Kent, Director, Program Compliance and Disability Rights Support Division, to Sara K. Pratt, Director, Office of Enforcement, re: Compliance Review Data, December 21, 1998.

¹⁴⁶ See Appendix for detailed data. The relatively large number of VCAs in Texas stems from the *Young v. Martinez* litigation discussed later in this section.

Atlanta HUB – Six VCAs; 4 based on reviews of housing authorities; 2 based on complaints. Two are Section 504 VCAs.

Chicago HUB – Sixteen VCAs; 5 based on reviews of housing authorities, 11 based on complaints. Fifteen are Section 504 VCAs.

Ft. Worth HUB – Twelve VCAs; 6 based on housing authority reviews, 6 on complaints. Seven are Section 504 VCAs.

East Texas Office – Fifty-two VCAs; all are Section 504, Title VI, and Title VIII.

Denver HUB – No active VCAs.

San Francisco HUB – Seventy-six VCAs (27 of which are with the Riverside, California, Department of Building and Safety),¹⁴⁷ all based on complaints. Forty-two are Section 504 VCAs; several are combined with Title VIII or ADA.

Seattle – Eleven VCAs; 6 based on reviews of housing authorities, 3 reviews of assisted housing providers, 1 cooperative, and 1 housing and community development council. All are Section 504 or Section 504 and Title VI VCAs.

Finding V.C.2: FHEO has not developed an adequate, consistent, and reliable data system for its Section 504 enforcement actions. As a result, it has not been able to learn from its successes or its mistakes, make the best arguments for adequate funding, plan or allocate resources in a reasonable way, or justify the actions that it has taken or proposes to take.

Recommendation V.C.2: FHEO should add the same Section 504 complaint and compliance review data to the data system it currently

¹⁴⁷ These VCAs result from a HUD investigation of complaints that Riverside County was selectively prosecuting building code violations against predominantly Latino trailer home parks.

maintains to track its enforcement of the FHA. In addition, FHEO should systematize the requests, timing, and storage of data that it must collect for its annual reports to Congress, to the Department of Justice, and to the U.S. Commission on Civil Rights.

Recommendation V.C.3: FHEO should review the data collection system that the Office of Coordination and Review uses to collect governmentwide Section 504 data from all federal agencies and consider how best to collect, maintain, and use the HUD data and make it available to the public. FHEO should provide adequate resources to its data collection system and to the IT staff that support it.

Recommendation V.C.4: Headquarters should involve field staff in solving the data collection and data maintenance problems. The data system should be able to identify common enforcement problems and discrimination trends to enable FHEO and HUD to target enforcement activities.

D. No Significant Section 504 Enforcement Occurred Before HUD Published Its Final Section 504 Regulations in 1988

Congress enacted Section 504 in 1973. However, HUD did not publish regulations until 1988. While some department officials believed that HUD had the authority and the responsibility to enforce the statute, others believed that it could not do so until HUD issued regulations. It was not a period of strong disability rights enforcement.

In 1976, the White House issued an Executive Order requiring the U.S. Department of Health, Education and Welfare (HEW) to issue general standards for other departments and agencies of the Federal Government to follow in developing their own regulations.¹⁴⁸ HEW did so in 1977. The following year, HUD published a proposed set of Section 504 regulations. Ten

¹⁴⁸ Executive Order 11914 (41 *Fed. Reg.* 17871, April 28, 1976).

years later, in June 1988, HUD issued final Section 504 regulations. (See Section III. B. for a discussion of the history of the regulations.)

Until HUD published its final Section 504 regulations, regional office responses to complaints were inconsistent and agency officials took few actions to enforce the statute, believing they could not do so until HUD had issued its own Section 504 regulations. In 1980, Paralyzed Veterans of America (PVA) sued HUD and other agencies¹⁴⁹ that had taken a similar position. The court agreed with PVA's argument and required the agencies to publish a notice in the *Federal Register* advising all of their recipients that they were required to comply with Section 504 and that they were to rely on HEW's model regulations for guidance.¹⁵⁰ HUD published the notice in 1981.¹⁵¹

Thereafter, HUD accepted and investigated Section 504 complaints. Pursuant to advice from the Office of General Council (OGC), however, FHEO did not enforce any findings resulting from its investigations. Instead, when an investigation resulted in findings that the recipient had violated the statute, HUD referred the case to DOJ. Furthermore, the OGC interpreted the *Paralyzed Veterans* decision as applying only to complaints that individuals had filed with FHEO. It therefore advised FHEO not to initiate compliance reviews, saying that neither the agency nor the recipients had sufficient guidance as to what would constitute a violation of the statute and the model regulations.¹⁵²

FHEO disagreed with the OGC's opinion and urged counsel to seek guidance from DOJ asking whether HUD had the authority not only to investigate complaints but to make and enforce Section 504 findings of noncompliance and to initiate compliance reviews in the absence of departmental regulations.¹⁵³ DOJ assured HUD that it did have enforcement authority. DOJ

¹⁴⁹ In addition to HUD, the Executive Order applied to the Departments of Defense, Commerce, Interior, and Agriculture, and to the General Services Administration, National Endowment for the Humanities, Civil Aeronautics Board, and National Science Foundation.

¹⁵⁰ *Paralyzed Veterans of America v. Smith*, 1981 WL 284 (C.D. Cal. June 17, 1981).

¹⁵¹ 46 *Fed. Reg.* 37088 (July 17, 1981).

¹⁵² Abstract of Secretarial Correspondence, Antonio Monroig to the Secretary, re: Action—Implementation of Secretarial Decision to Place All Section 504 Responsibilities in the Office of FH&EO, August 19, 1983.

¹⁵³ Letter from Stuart Sloame, Deputy General Counsel, to William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice, October 9, 1986.

recommended that HUD and its recipients rely on the model regulations as of 1981 and Section 504 case law before that.¹⁵⁴ In spite of the response, FHEO did not begin to conduct compliance reviews until two years later, after it had issued Section 504 regulations and had published a compliance review manual.¹⁵⁵

E. Budget and Staff

1. Budget and Staff Before Publication of Final Section 504 Regulations

Lack of money, lack of staff, and lack of interest in Section 504 at the secretarial level contributed to the difficulty that FHEO faced in administering any Section 504 activities before 1989. NCD received no information from HUD indicating whether any funds were used to enforce Section 504 before 1981. In 1981, Congress appropriated \$900,000 for HUD to spend on Section 504 implementation activities, but HUD returned it all to the Treasury.¹⁵⁶

In 1982, Congress again allocated \$900,000 for HUD's Section 504 enforcement and related independent living activities. HUD returned all but \$9,000 and announced that it intended to use the much smaller amount to produce a public service film starring Kermit the Frog and Miss Piggy, popular puppets from a children's television program. HUD abandoned its plan after negative responses from members of Congress and the disability community.¹⁵⁷

From 1981 through 1983, the Undersecretary for Intergovernmental Relations was responsible for "all advocacy and policy activity concerning the handicapped, including chronically mentally ill, alcoholics, and drug addicts, should they be included in that

¹⁵⁴ Letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice, to Stuart C. Sloame, Deputy General Counsel, HUD, February 5, 1987.

¹⁵⁵ FHEO Civil Rights Implementation Updates for FY 1988 and FY 1989, transmitted by letter from Judith Brachman, Assistant Secretary, FHEO, to Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, Department of Justice, February 7, 1989. Ms. Brachman describes HUD's 504 enforcement before 1988 as "minimally acceptable." (Introduction.)

¹⁵⁶ Memorandum from Laurence Pearl to William Wynn, re: Section 504 in FHEO: Past, Present, and Future, July 22, 1983.

¹⁵⁷ According to HUD Public Affairs staff at the time, the film was to be broadcast on the Christian Broadcasting Network. See Citizens' Commission on Civil Rights, *One Nation, Indivisible: The Civil Rights Challenge for the 1990's*, Govan and Taylor, editors, Washington, DC, 1989, p. 485.

definition.”¹⁵⁸ FHEO was responsible for “assisting on issues of discrimination,” and the Office of Housing was to draft the Section 504 regulations. It wasn’t until 1984 that Section 504 “policy and advocacy activity” was placed in FHEO.¹⁵⁹

Headquarters was to review and return all compliance review findings of Section 504 violations in an average of six months and all complaint findings of Section 504 violations in an average of three months.¹⁶⁰ FHEO Headquarters failed to meet those deadlines every year until it changed the policy in the mid-1990s to permit the field to make its own noncompliance findings. Until that happened, many noncompliance findings remained at Headquarters for years in suspended states of investigation and review.¹⁶¹

From 1984 through 1987, FHEO’s Section 504 implementation and enforcement budget, not including salaries, was \$100,000 annually. Two full-time staff in Headquarters managed all Section 504 activities, and each of the 10 regional offices was allotted one half-time professional slot for this purpose. During that period, staff conducted investigations, but did not initiate any enforcement actions.¹⁶² Instead, the field staff referred all noncompliance findings to the two staff in Headquarters for review and potential referral to DOJ. The two were also responsible for responding to all congressional and public inquiries about Section 504, technical assistance to HUD programs, Architectural Barriers Act complaints, proposed legislation, program guidance, and internal disability employment matters. They had no secretarial support.¹⁶³

¹⁵⁸ Memorandum from Philip Abrams, Assistant Secretary for Housing, to Dr. June Koch, Undersecretary for Intergovernmental Relations, re: Proposed Handicapped Program Regulations, July 7, 1981.

¹⁵⁹ Abstract of Secretarial Correspondence from Antonio Monroig, Assistant Secretary, FHEO, re: Implementation of Secretarial Decision to Place All Section 504 Responsibilities in the Office of FHEO, August 19, 1983.

¹⁶⁰ *Ibid.*, p.23.

¹⁶¹ Interviews with HUD staff between December 2000 and May 2001.

¹⁶² See “Program Compliance Accomplishments in Section 504, July 1981–July 1983,” and “OFHEO Section 504 Accomplishments and Activities, 1984 & 1985,” for descriptions of the training, technical assistance, policy development, and grant award activities. HUD did not provide NCD with enforcement data.

¹⁶³ Memorandum from Peter Kaplan to Judith Brachman, Implementation of Section 504 Program, Request for Staff Support for the Section 504 Unit, September 12, 1988.

In an effort to establish some Section 504 expertise in the regional and field offices, FHEO Assistant Secretary Antonio Monroig issued a memorandum August 1984 instructing regional field directors to designate a current staff person in each regional and field office as a Section 504 coordinator.¹⁶⁴ The memorandum listed the coordinators' duties as being the regional liaison with constituency groups; collecting information on complaints, compliance agreements, and outreach activities; providing technical assistance; coordinating all disability rights issues; and providing training. It states, "We anticipate that the Section 504 coordinators' responsibilities will not be time-consuming or burdensome."¹⁶⁵

Three years later, Monroig's successor, Judith Brachman, sent another memo to the regional directors, saying, "It has come to our attention, through performance reviews and conversation with regional staff, that this system has not been as effective as it must be if we are to have a successful Section 504 compliance program."¹⁶⁶ The memorandum requested the names of the coordinators and provided a new list of their responsibilities.

Conversations with various FHEO staff indicate that Headquarters lent minimal attention to the function and role of the coordinators, and their value in implementing the Section 504 enforcement program varied widely. In January 1988, FHEO headquarters staff used the proposed Section 504 regulation as the basis for training the 10 Section 504 coordinators on disability issues. Thereafter, most regional directors relied on the coordinators as resource staff for providing technical assistance to HUD staff and to the public, if the coordinators had the time, given their other responsibilities. In some offices, the coordinator had significant responsibility for shaping the Section 504 program; in others, the coordinator was criticized for working on disability at all.¹⁶⁷

2. Budget and Staff After Publication of the Section 504 Regulations

¹⁶⁴ Memorandum for Regional Administrators, from Antonio Monroig, re: Designation of Section Coordinators, August 8, 1984.

¹⁶⁵ *Ibid.*

¹⁶⁶ Memorandum from Peter Kaplan through Judith Brachman, Assistant Sec. for FHEO, to Regional Directors, TAG 87-10: Responsibilities of Regional Section 504 Coordinators, June 29, 1987.

¹⁶⁷ Interviews with HUD staff between December 2000 and May 2001.

Although Section 504 had been enacted in 1973, the Section 504 regulations and the FHAA regulations appeared in 1988 and 1989 within six months of each other. The resulting attention and willingness on the part of HUD to enforce its two sets of regulations produced twice the funding for Section 504 “implementation services,” from \$100,000 in FY 1987 to \$196,000 in FY 1988 and 1989, and \$532,000 in FY 1990. FHEO had to stretch that funding to cover a significant share of HUD’s Architectural Barriers Act responsibilities, internal Section 504 training, training and technical assistance to HUD recipients, policy development, an internal Section 504 self-assessment, internal employment issues, and management training.¹⁶⁸

According to HUD’s February 1989 Implementation report to DOJ, FHEO’s Section 504 goal was to conduct two public housing compliance reviews per region, process Section 504 complaints, provide training to HUD staff on Section 504 requirements, and conduct a public information campaign through town meetings. The change from “a minimally acceptable level of activity”¹⁶⁹ to a credible Section 504 enforcement program resulted in part from HUD’s having finally issued Section 504 regulations. It also resulted from the increased attention that the FHAA brought from Congress and the civil rights community to HUD.

Unfortunately, it has been impossible to draw many conclusions from the Section 504 data that HUD produced. From 1988 to 2000, HUD has not had one consistent data collection system. For example, starting in 1991, FHEO salaries and expenses data no longer used the term “implementation services” and instead listed the amount of funds received for “Section 504 technical assistance.” The funds budgeted for 1991 are listed at \$271,000 and, for succeeding years, \$94,000 (1993), and \$20,000 (1994). FHEO did not provide data that listed funding for Section 504–specific “implementation services” or “technical assistance” after 1994. The 1994 figure represented “contracts to provide the support needed to address in-house complaint investigations and provide technical expertise on more complex issues.”¹⁷⁰ It is not possible to determine what the Section 504 expenditures were for or how much HUD spent on Section 504 enforcement activities. Nor do the salaries and expenses reports break out either the number of

¹⁶⁸ R. Govan, W.L. Taylor, Report of the Citizens Commission on Civil Rights, *One Nation Indivisible: The Civil Rights Challenge for the 1990's*, Washington, D.C., 1989.

¹⁶⁹ See note 158.

¹⁷⁰ Salaries and Expenses, FHEO, Budget Activity 6, Actual [Budget]1994, Budget Estimate 1995, p. U-11.

dollars dedicated to or staff assigned to Section 504 enforcement activities. What does seem to be clear is that every field office, as well as Headquarters FHEO, has carried a backlog of Section 504 complaints since the issuance of the regulations.¹⁷¹

To ensure that Section 504 received at least some resources after the publication of the regulations, FHEO established a Section 504 Unit in its Headquarters Office of Program Compliance in 1988. The two full-time staff dedicated to Section 504 activities from 1984 through 1987 were joined by two more full-time employees, one full-time temporary, one contract interpreter, and one student intern.¹⁷² Unfortunately, the Section 504 Unit was assigned many more tasks than Section 504 enforcement. These included responding to Architectural Barriers Act complaints and complaints filed under Section 109 of the Community Development Block Grant Act, coordinating the Section 504 town meetings, providing technical assistance to the field and Headquarters on pre-award reviews, reviewing all departmental policies and regulations from a Section 504 perspective, responding to congressional inquiries, developing and providing Section 504 training for FHEO managers and staff, and creating a Section 504 federally conducted program.¹⁷³

In spite of the small size of the unit, FHEO succeeded in meeting its goal of conducting 13 three-day town meetings around the country from 1989 through 1991, as well as developing desk guides for Section 504 complaint investigations and compliance reviews, conducting training for managers on their Section 504 responsibilities and training for the Section 504 coordinators, producing training manuals, monitoring contracts for the production of technical guidance for specific HUD programs, and sponsoring a joint Public and Indian Housing/FHEO conference on the housing rights of individuals with mental disabilities.¹⁷⁴

Headquarters Section 504 staff were frequently reassigned to work on nonenforcement matters that were of urgent concern to the Secretary and the Administration. Thus, for example,

¹⁷¹ See Implementation Reports to the Department of Justice, 1988 through 2000.

¹⁷² HUD Civil Rights Implementation Updates, FY 1988 and FY 1989, February 7, 1989.

¹⁷³ FY 1988 and 1989 Implementation Plan Updates from Judith Brachman, FHEO Assistant Secretary, to Stewart Oneglia, Chief, Coordination and Review Section, Department of Justice, February 7, 1989, pp. 24–27, and conversations with HUD staff.

¹⁷⁴ FY 1988 and FY 1980 Implementation Updates, February 7, 1989; FY 1990 through FY 1993 Implementation Plan Update.

the National Association of Home Builders pressured HUD to clarify the accessibility requirements of the FHAA. The FHEO staff who were most familiar with accessibility issues were also the Section 504 staff. On June 15, 1990, HUD published proposed fair housing accessibility guidelines, and on March 6, 1991, it published the final guidelines. For most of the period leading up to the publication of the proposed guidelines until well after their publication in final form, at least one and sometimes two of the four-person Section 504 staff worked full time on them. The same staff have continued to act as resources for ongoing structural accessibility interpretations, and FHEO has not assigned or hired additional staff to address the unmet Section 504 enforcement work.

HUD issued its Section 504 regulations in 1994. (These regulations implemented Congress's 1978 amendment of Section 504. The amendment required federal agencies to conduct their own operations according to the same Section 504 mandates they applied to the recipients of their funds.) The same FHEO staff who were charged with providing guidance and support to field operations were also responsible for the drafting, publication, and implementation of these regulations. Information indicating how HUD has enforced these rules or how much FHEO time they have absorbed is limited to the data appearing in FHEO's implementation reports to DOJ. It seems clear from the documents that FHEO did not receive an increase in staff or other resources to enforce the new Section 504 regulations.

Recently, FHEO has tried to increase the number of investigators who enforce Section 504, while not losing any FHA staff. First, FHEO abandoned the specialist model in favor of training staff to be generalists. As one HUD official explained, "We got what we got. We do the best with what we got." Thus, all investigators are expected to be as comfortable conducting Section 504 compliance reviews as FHA complaint investigations.

To reinforce the generalist approach, Headquarters has undertaken several actions. It has initiated the creative concept of combining training and compliance reviews by walking trainees through actual compliance reviews. To enable FHEO staff to expand compliance reviews beyond housing authorities, it has published a draft manual on investigating private housing providers who receive HUD funds.

Headquarters' decision to work with field staff on specific compliance reviews and to add a training component to the effort was reinforced by DOJ in 1998. The DOJ Office of Coordination and Review published a massive *Investigation Procedures Manual for the*

Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes in September 1998. FHEO and DOJ staff developed a training and compliance review schedule that resulted in FHEO's initiating compliance reviews in several different locations that field staff subsequently and quickly completed, with letters of findings and voluntary compliance agreements.

In recent interviews, FHEO officials in Headquarters spoke enthusiastically about continuing to combine training with investigations. They indicated that field staff are supportive of the training and investigation approach but complained about the time constraints being too limiting. For these compliance reviews, on-site time has been limited to a single day, with FHEO emphasizing quick investigations and timely issuance of findings. The current theory is that some findings resulting in some relief for some complainants soon after the initiation of the compliance review is a better result than well-developed findings that are issued years after the on-site review.

The draft *Assisted Housing Provider Compliance Review Manual* that FHEO staff published on May 25, 2000, has been a useful component of FHEO's new coordinated training and investigation approach. The majority of compliance reviews, as this section discusses later, have focused on housing authorities and not on private owners of assisted housing. Because the number of assisted housing units dwarfs the number of public housing units, both should be monitored for civil rights compliance.

This manual is notable for its detailed and user-friendly approach. It is arranged in steps rather than chapters and includes forms that help the investigator understand the timing and relationship of the data while collecting it. The manual makes it clear that disability, race, and national origin data are to be collected. Simultaneously, this guidance reflects the multistatute policy that FHEO adopted in the mid-1990's, which is more fully described later in this section. The advantages of reviewing all of a recipient's civil rights responsibilities during one compliance review has made the reviews much more effective compliance and enforcement tools. The manual has translated the policy into easily understood tasks. It constitutes an important part of the training/investigation method that had been missing.

Finding V.E.2.a: **FHEO has drafted an *Assisted Housing Provider Compliance Review Manual* that provides a detailed approach, is easy to follow, and has been effectively combined with on-site**

compliance reviews. FHEO has not finalized the manual, nor has it developed similar manuals for reviews of other recipients, such as states, cities, and agencies that receive funding from the Office of Community Planning and Development. FHEO has combined compliance reviews with training.

Recommendation V.E.2.a: FHEO should finalize the *Assisted Housing Provider Compliance Review Manual* and should publish similar manuals for each type of recipient. The development of the manuals should accompany increased resources for continued training and compliance reviews. The manuals should contain instructions on contacting local advocacy groups, tenant organizations, and any other local group that has experience with the recipient; inviting the contacts to submit information before the compliance review or meeting with the compliance team before the review; and obtaining information from FHEO after the compliance review, for the purpose of developing methods of encouraging and helping the recipient to comply with Section 504.

Recommendation V.E.2.b: FHEO should continue to combine training with compliance reviews. It should review the merits and problems of the approach and address them both. Some of the issues to review are the amount of on-site time; the number of FHEO staff involved; coordination and staff from field and Headquarters program offices, and inclusion of general or regional counsel staff, Department of Justice staff, or staff from other federal or state agencies, such as the Environmental Protection Agency and the Departments of Education and Transportation.

Recommendation V.E.2.c: FHEO should continue to target its compliance reviews based on number of complaints, input from advocates and recipients, news articles, and current Department of Justice guidance.

Finding V.E.2.b: The Section 504 enforcement program has never been adequately staffed in Headquarters or in the field, nor has it been provided with adequate resources.

Recommendation V.E.2.d: The Section 504 enforcement program must be fully staffed in Headquarters and in the field, and should be adequately funded to support a departmentwide Section 504 enforcement program.

F. FHEO Reorganizations

During the mid-1990s, HUD twice reorganized FHEO. Both actions had major impacts on the enforcement of Section 504. As we noted earlier, when HUD published its Section 504 and FHAA regulations in 1988 and 1989, FHEO created a Fair Housing Enforcement Office. It conducted all of its other civil rights responsibilities, including Section 504 enforcement, through the Offices of Program Compliance, Program Standards and Evaluation, and later, in the early 1990s, the Office of Quality Assurance. In the field, one director was responsible for all enforcement and compliance work under all of HUD's civil rights laws.

The 1994 reorganization separated enforcement of the FHA from enforcement of the other civil rights laws. In Headquarters, the change resulted in the creation of the Program Compliance and Disability Rights Office, which included an office devoted entirely to disability rights.¹⁷⁵ In the field, the change was even more significant. For the first time, FHEO placed two directors in each field and regional office: one for fair housing enforcement (Fair Housing Enforcement Center) and the other for program compliance (Program Operations Compliance Center). The new organization resulted in 10 Fair Housing Enforcement Centers, 10 Program Operations and Compliance Centers, and 28 smaller Program Operations and Compliance

¹⁷⁵ *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, A Report of the U.S. Commission on Civil Rights* (June 1996), p. 328 ff., citing a letter from R. Achtenberg, Assistant Secretary, FHEO to F. Isler, Acting Assistant Staff Director, U.S. Commission on Civil Rights, November 10, 1994.

Centers. The staff of all the offices were no longer required to report to the HUD regional directors, reporting instead directly to FHEO.

Similar to Headquarters, the larger Program Operations Compliance Centers were divided again into compliance and enforcement divisions. Each compliance center conducted post-award compliance reviews and monitored VCAs. The Operations Division monitored program compliance with the civil rights laws through pre-award reviews, provided technical assistance to grantees, reviewed program applications, and reviewed the work of FHIPs.

The U.S. Civil Rights Commission criticized the reorganization for being too fragmented and too complex, especially with regard to coordinating enforcement of Title VI.¹⁷⁶ Nonetheless, FHEO adopted this reorganization for a variety of reasons. First, because the FHAA and the Section 504 regulations had been issued within six months of each other, some method was necessary to keep all of FHEO's Section 504 and other program-related civil rights enforcement resources from being swallowed by the much larger number of fair housing complaints.

Second, a variety of pressures convinced HUD to give increased attention to program-related civil rights enforcement. These pressures included HUD's efforts to resolve nearly 20 race discrimination lawsuits—some of them decades old—for establishing or maintaining racially segregated public housing around the country; the White House's promotion of "customer-friendly" government actions that required more effective working relationships between agencies and their constituencies; and increased publicity and pressure from civil rights advocates, especially disability rights activists and housing providers serving low-income and homeless families, making the heightened attention to program-related civil rights enforcement appropriate.

FHEO was not able to staff the Program Operations Compliance Centers at their promised levels. At least from 1994 to 1996, however, FHEO and HUD leadership gave Section 504 enforcement enough backing and support to enable its staff to generate some model and replicable enforcement actions. These included coordinated and complex compliance reviews that resolved long-standing interpretation conflicts and corrective relief from at least one large city that had never complied with several Section 504 requirements.¹⁷⁷

¹⁷⁶ *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, U.S. Commission on Civil Rights, Washington, DC, June 1996.

¹⁷⁷ See footnotes 205–207 and associated text.

In 1997, the White House had begun to pressure HUD to double its FHA enforcement efforts and simultaneously required it to reduce its staff. HUD reorganized FHEO's structure by eliminating the Program Operations Compliance Centers; returning to a single, regional enforcement director; cutting staff; and requiring all staff to be responsible for investigating all of FHEO's statutes. The plan's "reorganizational statement" describes the change:

Under the proposed structure, for the first time, field FHEO components will perform all core functions at the lowest organizational levels, thereby empowering field managers to choose from a range of civil rights actions when responding to local needs. All functions and services will now be conducted wherever FHEO has a presence. This creates a multidisciplinary service unit which will enable FHEO to deliver all of the program and statutory elements related to fair housing when it deals with housing providers and HUD program participants.¹⁷⁸

In fact, Headquarters devoted significantly fewer resources to Section 504 enforcement after the 1997 reorganization.¹⁷⁹ FHEO described the reorganization as a necessary response to the White House request that it double its fair housing enforcement effort. Headquarters staff who had been working with field staff on investigations stopped most of their Section 504 enforcement work. As one FHEO official said, "The doubling effort affected everything. We had to pull back on compliance reviews, monitoring, everything. It did have the effect of raising the Secretary's knowledge of fair housing cases, however."¹⁸⁰

Because of the pressure to double the enforcement numbers, many FHA complaints against recipients of HUD funds were resolved for the individual complainants but did not trigger the more time-consuming development of VCAs. Such agreements could have resulted in changes to the recipients' overall programs, policies, and practices. Some offices tried to meet the doubling effort while also generating VCAs, but the results were mixed.¹⁸¹ It was only when the doubling effort ended, in January 2001, that FHEO staff in Headquarters and the field began

¹⁷⁸ Susan M. Forward, General Deputy Assistant Secretary, FHEO, Memorandum for The Secretary: Proposed 2020 Management Reform Plan for the OFHEO, September 17, 1997.

¹⁷⁹ See Chart VI-4.

¹⁸⁰ Interviews with HUD staff between December 2000 and May 2001.

¹⁸¹ *Ibid.*

to devote attention to Section 504 again, this time to aged Section 504 complaints and to compliance reviews assisted by Headquarters staff.

1. Numbers

FHEO's data reflect what FHEO staff said: During the doubling effort, from 1997 to 2001, the resources available to Section 504 complaint investigation and compliance reviews were shifted to fair housing complaint investigations. In 1995, FHEO reported processing 380 Section 504 complaints. The number for 1999 was 225.¹⁸² HUD's October 6, 2000, TEAPOTS report showed 964 open Section 504 complaints.

The fact that FHEO reports a 400 percent increase in Section 504 complaints from 1999 to 2000 may be an accurate count of the number of aged Section 504 cases that accumulated while the doubling effort lasted, and the lower number may reflect the number of Section 504 complaints that FHEO received in 1999.

The compliance work that did continue during the doubling effort placed an emphasis on conducting a small number of joint Title VI and Section 504 compliance reviews, and were initiated by Headquarters staff. While some reviews resulted in monetary damages to remedy Title VI problems, the compliance reviews yielded policy and practice changes through VCAs for Section 504 violations but no monetary damages. FHEO's failure to assess recipients for monetary damages is puzzling. The regulations clearly authorize HUD to seek damages to make victims of discrimination whole,¹⁸³ and DOJ confirmed HUD's authority to seek damages under Section 504 when HUD's General Counsel was skeptical.¹⁸⁴

Even where Headquarters initiated and lent staff to specific reviews, FHEO devoted too few resources to this effort to make an impact with more than a few recipients. That is, when the office identified enforcement problems or opportunities, it would develop a plan, take action, and

¹⁸² U.S. Commission on Civil Rights, *Draft Report on Funding Federal Civil Rights Enforcement*, October 6, 2000.

¹⁸³ 24 CFR 8.52 and 8.58(j).

¹⁸⁴ Letter from William Bradford Reynolds, Department of Justice, to Peter Kaplan, FHEO/HUD, July 24, 1987, and letter from William Bradford Reynolds to Robert Kenison, Associate General Counsel, HUD, July 25, 1987, recommending the following regulatory language: "If a recipient has discriminated against persons in a program or activity funded under this part, the recipient must take remedial action to make whole all identifiable victims."

then fail to sustain the action or the necessary support. FHEO's limited staff, the short turnaround time for pre-award reviews, and the demand for higher numbers of FHA enforcement actions made it very difficult for FHEO to sustain, much less expand or monitor, its earlier Section 504 enforcement efforts.

Only in East Texas, when the plaintiffs in *Young v. Pierce*¹⁸⁵ brought HUD back into court for having failed to conduct Title VI compliance reviews of the 70 housing authorities in the lawsuit, was FHEO able to complete a significant number of compliance reviews. Although the case focused on race and Title VI, HUD applied its multistatute investigation policy. As a result, FHEO was able to identify and correct Section 504 violations as well.

Finding V.F.1: **HUD has not coordinated its Section 504 enforcement responsibilities to take advantage of critical program or departmental efforts. It does not have a method for conducting ongoing discussions about the impact of departmental actions and policies on Section 504 enforcement. It does not work with other federal or state agencies or with the Justice Department Office of Coordination and Review. It does not communicate regularly and effectively with consumers or their representatives or with the agencies and advocates who represent them on their discrimination, housing, or community development issues.**

Recommendation V.F.1: **FHEO should develop a Section 504 program that includes short-term and long-term strategies and goals for enforcing Section 504; a review of the successful ways FHEO has coordinated with other HUD offices; establishment of systems for communicating within HUD and with consumers and recipients; evaluation methods; coordination of its technical assistance branch, its FHA branch, and its Section 504 enforcement branch; review, evaluation, and plans for improving responses to, investigations of, and enforcement of**

¹⁸⁵ *Young v. Pierce*, 685 F. Supp. 975 (E.D. Tex. 1988), discussed later in section.

Section 504 complaints; review of, evaluation of, and plans for a compliance program that results in rational and effective use of compliance reviews; and sufficient resources to implement a Section 504 program.

G. Section 504 Enforcement Emphasis on Public Housing

HUD's civil rights laws apply to all of the recipients of its grant and contract funds. The recipients include city agencies, nursing homes, for-profit and nonprofit housing developments, retirement communities, and state housing finance agencies, among many others. Yet, in the past decade, HUD has predominantly focused its enforcement of recipients' civil rights obligations on public housing authorities. Many housing authorities receive all their funding from HUD, making them appropriate targets for investigation. This singular focus, however, has resulted in an overly limited Section 504 enforcement program.

The many reasons for and implications of HUD's enforcement emphasis on public housing authorities are beyond the scope of this report. One of the reasons for the emphasis, however, was the *Young v. Pierce* (now *Young v. Martinez*) litigation that was filed in 1980,¹⁸⁶ alleging that HUD was responsible for the racial segregation of public housing in East Texas. HUD allocated substantial staff and resources to defending the litigation and responding to court orders. HUD's desire to avoid similar lawsuits was one reason it chose to focus its enforcement on public housing authorities.

While federal agencies have broad discretion in selecting recipients and subrecipients for compliance reviews, they may not select only one type of recipient, such as housing authorities. According to DOJ regulations, federal agencies are required to maintain "an effective program of post-award reviews."¹⁸⁷ DOJ suggests specific criteria for agencies to consider for their compliance review program:

- Issues targeted in your agency's strategic plan.
- Issues frequently identified as problems faced by program beneficiaries.

¹⁸⁶ FY 1988 and 1989 Implementation Plan Update, p. 1.

¹⁸⁷ Department of Justice Civil Rights Division Coordination and Review Section, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes*, Washington, DC, September 1998, p. 174 (citing 28 CFR Sec. 42.407[c]).

- Geographical areas you wish to target because of the many problems you know beneficiaries are experiencing or because your agency has not had a “presence” there for some time.
- Issues raised in a complaint or identified during a complaint investigation that could not be covered within the scope of the complaint investigation.
- Problems identified to your agency by community organizations or advocacy groups that are familiar with actual incidents to support their concerns.
- Problems identified to your agency by its block grant recipients.
- Problems identified to your agency by other federal, state, or local civil rights agencies.¹⁸⁸

Several of FHEO’s field offices have used some of these criteria to plan their compliance reviews. Because HUD has focused almost exclusively on housing authorities, however, FHEO has not applied these criteria in an effective compliance program for other HUD recipients. Furthermore, HUD has selected different criteria for identifying targets of compliance reviews than those recommended by DOJ. HUD did not provide NCD with data to explain its more limited criteria or to indicate any communication between HUD and DOJ on this matter.¹⁸⁹

¹⁸⁸ Ibid., p. 176.

¹⁸⁹ In response to the draft of this report, HUD provided NCD with the following information:

Increasing/Expanding Section 504 Compliance Reviews: In FY 2001, FHEO will increase the number of compliance reviews conducted by 25 percent over the previous fiscal year. Also, FHEO will expand the universe of recipients for Section 504 compliance reviews beyond public housing authorities to include HUD assisted-housing recipients. These reviews will examine whether HUD recipients have designated a Section 504 Coordinator; have completed their Transition Plan; have made structural changes to achieve program accessibility; are providing reasonable accommodations; and have complied with other applicable provisions of Section 504. Where violations of Section 504 are found, HUD will take appropriate and necessary steps under Section 504 to effect voluntary compliance. If voluntary compliance cannot be achieved, appropriate enforcement action will be taken. FHEO anticipates including a similar goal in future Business Operating Plans that would increase the number and scope of such reviews.

Identification of Recipients for Reviews: FHEO Field Offices will select recipients for compliance reviews based on risk factors such as (1) number of claims or complaints received; (2) inspection scores from the Real Estate Assessment Center; (3) evidence of property rehabilitation; (4) newspaper articles; and (5) any other information.

Finding V.G.1: FHEO has not developed a standardized system for determining when compliance reviews of HUD recipients would advance FHEO's and HUD's civil rights goals. HUD and DOJ criteria for identifying targets of compliance reviews have not been used consistently by field offices and have not been used at all by field offices that have not conducted compliance reviews or have targeted only housing authorities.

Recommendation V.G.1: HUD's compliance program should include all HUD recipients and should be an integral part of its goal of affirmatively furthering fair housing. FHEO's compliance program must be based on articulated criteria that can be measured and communicated within FHEO and HUD and to recipients and the public. HUD must ensure that each of its program offices provides FHEO with relevant information about the compliance of its recipients and cooperates with FHEO in its compliance program.

Nonetheless, FHEO's emphasis on housing authorities has yielded important benefits for the Section 504 and fair housing enforcement programs. Through years of interaction with the Office of Public and Indian Housing (PIH), that office has achieved the most thorough understanding of its recipients' Section 504 obligations and a closer working relationship with FHEO. As we discuss later in this section, PIH and FHEO published joint guidance, issued joint notices, and initiated enforcement actions together. Rarely was FHEO successful in achieving this level of cooperation with other HUD programs.

Soon after HUD published the Section 504 regulations, FHEO's first significant interoffice cooperative publication resulted from a 1990 Federal District Court decision. In the Northern District of New York, the court relied on the Section 504 regulations to find that the Rochester housing authority had violated the law when it required applicants to meet a "capable of independent living" standard. The housing authority's defense rested on HUD's Public Housing Handbook, which conflicted with the Section 504 regulations. Secretary Jack Kemp publicly supported the Section 504 regulations on a radio broadcast, which resulted in

widespread publicity. Further, FHEO and PIH issued a joint memorandum to their staff to follow the Section 504 requirements, and PIH published a notice for public housing agencies about its correction of its handbook.¹⁹⁰

H. Joint Initiatives Between FHEO and Office of Public and Indian Housing

When each of the agencies issued Section 504 regulations, they understood that both technical assistance and time would be necessary before recipients could bring their facilities and programs into compliance with Section 504. HUD's regulations thus required that each recipient conduct a self-evaluation within a year of the date the regulations were published and correct any programmatic problems that it found.¹⁹¹ The rule also required recipients to evaluate their buildings and make any structural changes necessary to make them accessible.¹⁹² Public housing authorities were required to determine whether the needs of their tenants and applicants for accessible housing had been met and, if they had not, how to meet those needs by 1992.¹⁹³

FHEO continued its relatively successful relationship with PIH by publishing a Joint Notice to Housing Authorities about their Section 504-mandated self-evaluation, needs assessment, and transition plan responsibilities. The notice was published on August 15, 1994.¹⁹⁴ The goal of the PIH/FHEO Notice was to ensure that housing authorities had met these requirements or that they take immediate action to comply with Section 504. For housing authorities that had not yet complied, the notice advised that they had missed the deadline and could obtain a final extension until July 11, based on "extraordinary circumstances," if the Secretary granted it.

HUD notified all 3,338 housing authorities that they were required to meet the extension requirements of the notice if they had not already met their Section 504 responsibilities. Those who had not met their obligations were required to sign corrective action orders with PIH, and

¹⁹⁰ Handbook 7465.1, REV-2, *Public Housing Occupancy: Admission*, July 1991.

¹⁹¹ 24 CFR 8.51.

¹⁹² 24 CFR 8.21, 8.23, 8.24, 8.25.

¹⁹³ 24 CFR 8.25.

¹⁹⁴ HUD Notice, PIH 94-56, Section 504 Compliance and Extensions for Extraordinary Circumstances, August 15, 1994.

VCAs with FHEO. The corrective action orders made explicit the requirement that if a housing authority applied for modernization funding, it could use the funding only for work that was necessary to complete Section 504 structural changes. The number of Section 504 compliance reviews increased substantially from 21 in 1993 to 155 in 1994 (see Table V-3 for Section 504). The VCAs gave FHEO a basis for enforcing the regulatory requirements. That is, if the housing authority violated the terms of its VCA, FHEO was authorized to refer the authority to DOJ for having breached its agreement.

FHEO concluded that 66 percent, or 2,217 housing authorities, had completed the Section 504 process. Of these, 104 signed VCAs, but the field offices “closely followed” only 17 of the VCAs.¹⁹⁵ According to HUD data, HUD did not refer a single housing authority to DOJ, even when a housing authority breached its VCA.

FHEO was also not able to collect accurate data on this effort. When FHEO attempted to determine the outcome of its joint work with PIH by conducting a survey of the field offices in 1997, it received no information from FHEO field offices concerning 22 percent of the housing authorities. Nor were the data that were collected reliable. For example, data from all of Region I are missing, possibly because the office failed to respond to the survey questionnaire. Region II data were included in the report, but the VCA that office signed with the New York City Housing Authority in December 1996 was missing. Finally, by the time Headquarters collected the data, FHEO was already under a mandate to shift its focus, resources, and staff away from Section 504 and other federally assisted civil rights acts to enforcement of the FHAA. FHEO data do not reflect that it conducted any further study of the 1994 PIH/FHEO Notice.

The Joint Notice was an efficient way to communicate with recipients. It brought the program and enforcement offices together for the purpose of determining how well housing authorities understood their Section 504 responsibilities and how closely they were following them. It allowed PIH and FHEO to resolve problems of interpretation and implementation in the context of specific housing authority responses. It could have resulted in effective enforcement actions. It could have formed the basis for continuing PIH-FHEO implementation of the Section 504 regulations. It could have resulted in the creation of an invaluable body of data about every

¹⁹⁵ FHEO, Office of Program Operations and Standards, Status Report on Public Housing Section 504 Needs Assessment Transition Plans Rehabilitation, June 1997.

housing authority in the country. It could have formed one of the pillars of an organized Section 504 enforcement program. It did not.¹⁹⁶

Finding V.H.1: FHEO and PIH have conducted joint ventures that have not been documented. Their results are therefore not available for planning, budgeting, technical assistance, or further joint ventures.

Recommendation V.H.1: FHEO and its departmental partners should document and evaluate their joint efforts. FHEO and PIH should make their joint report available within HUD and to the public. To the extent possible, FHEO and PIH should issue documents reflecting past coordinated efforts. Both offices should institute a system to ensure that future efforts are similarly recorded and made public.

Finding V.H.2: Enforcement of Section 504 is a departmental responsibility. Without the support of HUD leadership and the cooperation of HUD's program offices, FHEO has limited ability to ensure the law's enforcement.

Recommendation V.H.2: HUD should establish a secretarial-level office whose responsibility is to conduct a "civil rights impact statement" for each of its initiatives. Similar to an environmental or

¹⁹⁶ As a result, newer HUD programs, such as HOPE VI, 42 U.S.C. 1437(f), are operating without information as to how many accessible public housing units were created because of the Joint Notice and are being lost and not replaced. The goal of HOPE VI was to raze "severely distressed" public housing. HUD promoted the use of townhouses to replace large, multistory apartment buildings. Unfortunately, HUD's FHA regulations exempt townhouses from accessibility requirements, a problem that HUD apparently ignored. According to PIH Notice 95-10, "HUD intends for HOPE VI to be the laboratory for the reinvention of public housing . . . by blending public housing units into more diverse and mixed-income communities." HOPE VI could have provided a perfect opportunity for HUD to expand the supply of affordable, accessible housing. Instead, HUD appears to have no idea how many accessible units it destroyed; how many of those were created as a result of PIH's and FHEO's cooperative efforts in 1994–1995 to encourage housing authorities to meet their Section 504 responsibilities; and how many tenants with disabilities have been permanently displaced because of the loss of accessible units. Like many private developers, HUD is now making limited efforts to correct its error. See footnote 226 and associated text.

business impact statement, the civil rights analysis will clarify whether a funding program's decision, action, or interpretation will affect its civil rights program and whether it will promote, hinder, or have no impact on the accomplishment of HUD's civil rights goals.

I. Broadening the Enforcement Agenda Through Coordination and Multistatute Reviews

During the mid-1990s, FHEO made a concerted effort to reach out to other departmental offices to resolve policy inconsistencies, generate departmentwide strategies, and incorporate fair housing goals in grant-making programs.¹⁹⁷ FHEO first tried to make its own program compliance enforcement strategy more efficient. Headquarters issued uniform procedures for reviewing Section 504 Letters of Determination; developed and conducted sessions on Advanced Disability Training, building on the training that had preceded it; and obtained the assistance of the OGC on a variety of legal and statutory issues¹⁹⁸ in order to buttress the broader scope that Congress returned to civil rights agencies through the Civil Rights Restoration Act of 1987. Headquarters also consulted with various field offices before it issued guidance on conducting multistatute complaint investigations and on identifying targets for compliance reviews. FHEO issued the latter guidance in 1995 and the multistatute guidance in 1996.¹⁹⁹

The intent of the guidance was to signal a change in the direction that compliance reviews had taken. Beginning with the publication of the Section 504 regulations, FHEO had focused on housing authorities and their compliance with either 504 or Title VI. The new guidance and assistance from Headquarters were intended to yield multijurisdictional compliance reviews. The intent was also to help the field initiate compliance reviews based on current complaints and information from FHEO reviews of funding applicants' and recipients' civil rights compliance. For example, the field offices of Community Planning and Development (CPD) waited for

¹⁹⁷ See 1994 and 1995 Annual Reports to Congress on Fair Housing Programs.

¹⁹⁸ Notice, FHEO 96-1: Multijurisdictional Complaints.

¹⁹⁹ Memorandum for All Directors, FHEO, from Roberta Achtenberg, Assistant Secretary, FHEO, re: Compliance Reviews for 1995, January 1995.

FHEO to certify that cities, states, and other recipients were in compliance with the civil rights laws. Without the certification, CPD would not approve entitlement grants, such as Community Development Block Grant (CDBG) funds, or competitive grants, such as (Housing for People with AIDS) HOPWA funds.

FHEO always provided the certifications and CPD always released the funds, certainly for the entitlement funds. But many field offices conducted time-consuming and thorough reviews of the recipients and provided valuable technical assistance to them explaining how they were violating the civil rights laws and suggesting corrective action. Often FHEO staff would tell CPD staff of their findings and their recommendations and would base their compliance certifications on the city's agreement to adopt corrective action. The same CPD staff and the same FHEO staffer often worked with the same recipients year after year, so that corrective action that wasn't taken in one year would be recommended again for the next.²⁰⁰

Surprisingly, this information was more freely shared between FHEO and CPD than between FHEO staff conducting pre-grant award reviews and FHEO enforcement staff. As a result, FHEO lost valuable enforcement opportunities to focus compliance reviews on data FHEO had already collected and often serious but complex civil rights violations that had already been identified. This problem was one of the reasons for the creation of the Program Operations Compliance Centers. With sufficient staff reporting to a director whose only responsibility was funding related civil rights laws, the theory was that he or she would be able to implement an enforcement program that took advantage of all available information, whether it was collected during front-end reviews or complaint investigations, and that could be coordinated with the FHA enforcement staff as well.

Many field offices believed that the correct goal was to conduct a compliance review of every housing authority in their jurisdiction, regardless of its size, its remoteness, its resources, or specific complaints and allegations about other recipients' civil rights violations. The new guidance alone was not enough to change that belief, but it was a necessary first step whose impact might have been greater if FHEO had the time and resources to follow through. Instead, at the end of 1996 and beginning of 1997, the effort to double the number of fair housing cases drew the majority of FHEO's enforcement resources.

²⁰⁰ Discussions with HUD staff.

For a brief time before the doubling effort, FHEO conducted a limited version of such a compliance review program that reflected its 1995 and 1996 guidance on targeting compliance reviews and conducting multistatute reviews. It began with Headquarters program compliance staff identifying recipients, typically housing authorities, that were the focus of litigation, a serious complaint, or a number of serious complaints. Headquarters staff contacted the lead office in the field and designed the compliance review with them. Headquarters staff assembled teams consisting of knowledgeable and productive investigators from around the country, added them to the local staff, created the schedule, identified the tasks for each part of the schedule, and joined in the investigation.

The goals of these compliance reviews were to make them multijurisdictional, if possible, expeditious, accurate, and responsive to the complaints. While the number of these compliance reviews was not large, they did accomplish their goals and reflected much better results, for several regions, than those generally conducted without Headquarters support and assistance. For example, a 1998 HUD Inspector General review of 33 compliance reviews in four field offices that did not follow the new model found that 17 remained incomplete “for long periods of time,” that “FHEO did not ensure that corrective action was actually taken,” that management and data collection systems “were lacking,” and that the compliance reviews were inefficient because they “did not result in resolving known discriminatory practices by program participants.”²⁰¹

Headquarters resumed this approach to compliance reviews after the doubling effort ended. Although the number of Headquarters- and field-coordinated reviews has remained small and the effort has been understaffed, FHEO has initiated a number of creative approaches to maximizing the resources that it does have.

Finding V.I.1.a: FHEO limited compliance reviews to housing authorities for many years. It investigated only Title VI or Section 504 compliance when it could have investigated both simultaneously. When FHEO adopted its multistatute approach and issued multijurisdictional guidance, compliance reviews became more efficient. Except for a brief period, FHEO’s compliance review strategy in many field offices was to review every housing authority and to review every one

²⁰¹ OIG, note 57.

again. FHEO's efforts to create a compliance review strategy that used reviews to focus on known civil rights problems was logical and effective. The effort ended when FHEO staffing levels were reduced and remaining staff and resources for compliance reviews were diverted to FHA complaint investigations.

Recommendation V.I.1.a: FHEO should adopt an expanded version of its previously successful compliance review strategy as part of its Section 504 program. It should target its compliance reviews according to enforcement strategies that have had the greatest likelihood of accomplishing specific programmatic goals, and it should conduct multistatute reviews. The goals should include expanding recipients' understanding of and compliance with Section 504 requirements; coordinating with HUD program offices and expanding their ability to ensure recipients' compliance with Section 504; and increasing the public's knowledge of and support for Section 504 and related civil rights laws.

1. Intradepartmental Cooperation Leads to More Accessible Units in New York

Under the aegis of the Program Operations Compliance Center organization, FHEO succeeded in identifying and addressing some of the most complex issues in its Section 504 enforcement history during this period. One of them was the New York City Housing Authority's (NYCHA's) compliance with Section 504. A group of public interest organizations had sued NYCHA on behalf of tenants and applicants with disabilities. Although HUD was not a party to the suit, FHEO, PIH, and General Counsel staff formed a Headquarters team to address the numerous and fundamental issues that the NYCHA litigation presented.

The housing authority disputed the regulatory requirement that at least 5 percent of its apartments be accessible to people with mobility impairments and that an additional 2 percent be

usable by tenants with vision and hearing impairments.²⁰² NYCHA contended that the number of tenants with disabilities, people with disabilities on the waiting list, and people with disabilities among the eligible population didn't justify the 5 percent and 2 percent thresholds. They insisted that enough of their 181,000 units were accessible to meet the need and that the New York PIH and FHEO offices had given them many waivers because of the age of the buildings. Finally, NYCHA had an undisputed backlog of more than 13,000 requests for reasonable accommodations from current tenants.

Although PIH and FHEO had coordinated on several Section 504 guidance and enforcement matters before, the OGC had never taken as active a role. With its assistance, it was possible to add a statistician from the Office of Policy, Development and Research to the team. He and NYCHA conducted simultaneous analyses that convinced both HUD and the housing authority that it needed a minimum of 9,000 fully accessible apartments. The age of the buildings and the size of the elevators led to more disputes that required a specific elevator accessibility study. The results of the study led to NYCHA's agreement to expand the number of accessible units in nearby buildings when the original buildings were too old or too narrow to generate the required 5 percent.

Similar issues arose during the course of nearly a year of negotiation, study, surveys, and policy clearance within HUD. The effort resulted in a VCA that put NYCHA on firm management reform and construction/rehabilitation schedules, and that included modification and accommodation tenant request forms that other housing authorities have since adopted.²⁰³ The members of HUD's NYCHA team hoped that they would be able to replicate their successful team approach that included FHEO, OGC, the Office of Policy, Development and Research, and the appropriate program office. Unfortunately, changes in Administration internal leadership and HUD's downsizing did not result in systematizing this approach.

Finding V.I.1.b: FHEO successfully obtained one of the most extensive VCAs in its history by working in conjunction with OGC and PIH. The team received full support from departmental and program leadership. Without that support, the team would not have had

²⁰² 24 CFR 8.32.

²⁰³ Voluntary Compliance Agreement between the New York Housing Authority and HUD, December 6, 1996.

the time, the resources, or the authority to develop solutions to enforcement and program interpretation problems that had prevented earlier compliance efforts. The NYCHA approach could have been replicated with other housing authorities, but HUD did not provide the necessary resources to do so.

Recommendation V.I.1.b: FHEO should review the approach that resulted in the NYCHA VCA and determine what resources and support would be necessary to apply it to other recipients. FHEO should also publish its evaluation of the NYCHA approach and use it to further its training, technical assistance, and enforcement efforts.

2. Broad Array of Enforcement Tools Protects Relief in Pinellas County, Florida

A more recent example of effective intradepartmental coordination was the compliance review and extensive VCA that FHEO and PIH developed for the Pinellas, Florida, Housing Authority in 1997. FHEO had received complaints that the housing authority awarded Section 8 vouchers on the basis of race; failed to provide the same maintenance services to its African-American tenants as its white tenants; failed to respond to requests for reasonable accommodations; required tenants with disabilities to pay for necessary accessibility modifications of housing authority property, including the purchase and installation of ramps and grab bars; and had not conducted the transition plan that the Section 504 regulations required.

The VCA was creative and extensive. HUD withheld the Comprehensive Grant funds from the housing authority until it conducted its accessibility survey and submitted a report to HUD indicating how it planned to meet the Title VI and Section 504 requirements of the VCA, with specific time deadlines. It required the housing authority to employ an “agreement monitor” to notify all tenants and Section 8 participants of the VCA as well as of the new policies the VCA required the housing authority to generate, and to invite members of the African-American and disabled communities to open meetings of the housing authority and to participate in its VCA activities. Finally, the VCA was unique in listing a much broader array of enforcement options available to HUD if the housing authority failed to comply with the terms of the

agreement. The options included binding arbitration, referring the housing authority to DOJ for violating its annual contributions contract with HUD or for civil rights violations or to seek specific performance of the agreement's terms; and withholding the housing authority's funds.

HUD did not provide NCD with documents indicating whether the housing authority complied with the agreement or whether the local HUD office fulfilled its monitoring responsibilities. If the housing authority did not comply, HUD also did not provide documentation indicating whether it invoked any of the enforcement mechanisms that it listed in the agreement. Because HUD could have referred the housing authority to DOJ for having failed to conduct the self-evaluation and needs assessment required by Section 504 (discussed earlier in this chapter), rather than developing a Voluntary Compliance Agreement, HUD probably decided that another VCA was as likely as a court order—and certainly easier to develop—to compel the housing authority to end decades of civil rights violations.

3. Working in Partnership with Local Advocacy Group Wins Broad Relief in Austin

Another highly effective but unreplicated VCA signed during this period followed a complaint about the failure of the city of Austin, Texas, to comply with its Section 504 obligations. The disability rights advocacy group Americans Disabled for Attendant Programs Today (ADAPT), located in Austin, filed its complaint in 1995. Two years later, after an investigation and lengthy negotiations with the city, FHEO and Austin signed a VCA. The city agreed to amend its Consolidated Plan to make housing needs for persons with disabilities a priority; to deny funding to housing projects that could not be made accessible; to develop incentives for city contractors to build or rehabilitate housing that contains more than 5 percent accessible units; and to provide Section 504 training to all management staff, among other provisions.

According to the city's May 15, 2000, Summary Report, the city complied with all of these requirements. In addition, it enacted a visitability ordinance requiring the entrance and one bathroom in newly built homes be usable by individuals with mobility impairments; contracted with an accessibility expert to ensure that current and future multifamily rental housing complies with the FHA and Section 504; established a barrier-removal fund for existing single-family homes; and established the SMART Housing Initiative. As the report explains,

SMART stands for Safe, Mixed-income, Accessible, Reasonably priced, and Transit-oriented. The Mixed Income component will provide incentives to projects that may provide upwards of 10 percent SMART Housing, bringing Visitability and Accessibility to units that receive no federal funding. This will expand accessibility beyond those projects receiving CDBG and HOME funds, particularly to single-family projects and multifamily projects that are not regulated by Section 504 standards.

HUD did not provide documentation indicating that it has required any other city to comply with Section 504 in similar ways. FHEO's efforts with Austin were successful because it worked with a strong local advocacy group, the field office received continuous support for its efforts from Headquarters, and the city was willing to work with both HUD and the local advocacy agency.

Finding V.I.3.a: FHEO's Austin VCA is replicable, but no other FHEO agreement with a city accomplishes as much. The probable reasons for the breadth of the VCA and its successful implementation are a combination of Headquarters support, dedicated field staff, willing city officials, and, possibly most important, a local advocacy group that knew the city, understood Section 504 and the FHA, and persisted with both FHEO and the city until it achieved the goals of its complaint.

Recommendation V.I.3.a: FHEO should replicate the resources and sustained support that were necessary to bring the city of Austin into compliance with Section 504. FHEO should encourage staff to work with local agencies and advocacy groups in identifying discrimination issues, forging solutions, and monitoring agreements.

Recommendation V.I.3.b: HUD should enforce the Section 504 responsibilities of cities, counties, and states to ensure that all of their programs and activities meet the regulatory requirements. For example, every city should ensure that 5 percent of the city's housing program is fully accessible to residents with mobility impairments. See,

for example, the city of Austin’s program. Every state should ensure that all its programs promote the ability of individuals with cognitive and mental disabilities to gain access to the same benefits and services as all other state residents.

J. HUD Has Often Failed to Enforce VCAs

In spite of the focus on housing authorities, FHEO did not refer any of them, or any other recipients who had signed VCAs, to DOJ for having failed to comply with the terms of the VCA. When recipients violate VCAs, FHEO’s response has been to “work with” the recipient and, if necessary, to draft a second VCA. FHEO staff are not trained, however, to treat VCAs as contracts that, once breached, may be the basis for administrative action, such as limiting, conditioning, or terminating further financial assistance, and for referral to DOJ. Instead, as the 1997 Accountability Report explains, “[a]s a result of [compliance] reviews, a large portion of HUD recipients are better informed about Title VI and 504, thus increasing the likelihood for increased compliance under these laws in the future with regard to the provision of accessible and desegregated housing.”²⁰⁴

As this report indicated earlier, FHEO’s failure to enforce VCAs results from several factors. Section 504 emphasizes voluntary compliance and negotiated settlements. In addition, disagreements between FHEO staff and regional counsel and the absence of good working relationships among many offices contributes to the problem (see Section IV for a discussion of this issue). Finally, enforcing VCAs requires a diversion of significant time and resources that, in an agency strapped for both, has been difficult to muster.

Finding V.J.1: When recipients violate VCAs, HUD does not take enforcement action against them. HUD treats VCAs as “educational documents” and the compliance review process as an “educational process” rather than as a means of enforcing civil rights laws.

Recommendation V.J.1: All VCAs must be enforced after their time limits expire and the recipient has not fulfilled the VCA’s terms. FHEO shall

²⁰⁴ HUD FY 1997 Accountability Report, p. 44, March 27, 1998.

immediately forward the VCA to the Office of General Counsel for enforcement. The OGC shall initiate administrative proceedings within two months of receiving the referral from FHEO. OGC and FHEO shall give the recipient one month to comply with the terms of the VCA before initiating enforcement actions.

Recommendation V.J.2: FHEO must develop protocols with the grant-award program to ensure that if funds are granted they be conditioned upon the recipient's correcting the violations according to an existing VCA. HUD should make clear that failure to comply with the terms of the VCA shall result in enforcement and temporary denial of all future funds to the recipient, including funds that have been approved but are awarded on a periodic basis.

Recommendation V.J.3: HUD should publish all VCAs on the HUD Web site and include the name of the FHEO contact for questions from the public and other recipients.

K. HUD Initiates Multistatute Compliance Reviews

FHEO also initiated a multistatute approach to its enforcement activities. Because investigators had to go on-site to investigate claims of racial discrimination, FHEO leadership saw the benefit of combining Title VI and FHA investigations with Section 504 investigations. This approach was successful in another major FHEO-PIH initiative that addressed race discrimination litigation in Texas. The *Young v. Pierce* [685 F. Supp. 975 (E.D. Tex. 1988)] case accused HUD of establishing and maintaining racially segregated public housing in East Texas. HUD decided to open a separate office in Beaumont, Texas, to work only with the East Texas housing authorities. Both FHEO and PIH staffed the office.

From 1998 to 2001, FHEO and PIH completed their investigations of the 70 housing authorities covered by the litigation. The housing authority properties ranged in size from 10 to

568 units. Although the litigation raised only Title VI claims, FHEO and PIH decided to investigate the housing authorities' compliance with Section 504. After issuing 54 Letters of Findings and executing 16 VCAs, the FHEO Beaumont office found 90 percent of the housing authorities had Section 504 violations, ranging from the absence of accessible units to debris making accessible paths non-navigable.²⁰⁵ There is no reason to believe that the East Texas housing authorities are not representative of Section 504 compliance by housing authorities nationwide.

Finding V.K.1: **FHEO has successfully operated under the multistatute guidance for several years. The results of investigating a recipient's compliance with two or more civil rights laws simultaneously has had obvious efficiency benefits for the recipient, the beneficiaries, and HUD.**

Recommendation V.K.1: **HUD should continue to follow the multistatute guidance. The agency should conduct an evaluation of how the field offices use the guidance, identify any differences, and develop guidance to address gaps and to reinforce successful outcomes. HUD should also define successful outcomes in terms of numbers of beneficiaries assisted, timeliness of the operation, satisfaction of the parties involved, funds and time spent, and replicability of the effort.**

Beyond the obvious enforcement benefits of the East Texas reviews, the approach helped FHEO and the new Beaumont Office accomplish important internal goals. It gave them an opportunity both to obtain baseline measures of racial and disability integration in its housing authorities and to apply the disability rights laws consistently over a specific geographic area, and it proved that the fair housing doubling effort could include Title VI and Section 504 compliance reviews as well as FHA complaint investigations.

HUD's 1997 Accountability Report indicates that 90 VCAs that had resulted from combined Section 504 and Title VI compliance reviews were signed in 1997, although the report

²⁰⁵ Conversation with FHEO staff, May 9, 2001.

does not indicate how many of those were signed with East Texas housing authorities.²⁰⁶ Because FHEO's data collection systems for compliance reviews, VCAs, and Section 504 enforcement generally has been inconsistent, it is difficult to draw any conclusions from these numbers. It seems fairly safe, however, to conclude that most of the Section 504 compliance reviews and VCAs concluded in the mid-1990s resulted from joint PIH-FHEO coordination. The other major program funding offices, Community Planning and Development and Housing, did not play significant roles in supporting or promoting HUD's fair housing or Section 504 regulations, according to HUD data.

Thus, apart from the two HUBs that are not conducting compliance reviews, six of the remaining eight HUBs continue to review only housing authorities, in spite of receiving complaints about city agencies, assisted housing providers, and other recipients of HUD funds. It is encouraging that two of the HUBs and Headquarters have initiated compliance reviews of recipients other than housing authorities. It is hoped that Headquarters will not only continue to collect this data from the field but will use it to further a compliance review program that is more closely connected with HUD's continuing devolution of discretion to its field offices.

L. Guidance

FHEO issued a fair number of technical assistance guidance (TAG) memoranda before HUD adopted Section 504 regulations. Some were published in the *Federal Register*, but the majority were guidance memoranda that Headquarters issued to the field. Of these, about half answered enforcement questions and the other half reflected either court decisions or legal analyses and conclusions that interpreted Section 504.²⁰⁷

After the publication of the Section 504 regulations, FHEO continued to publish TAGs, but instead of increasing, the number of TAGs decreased substantially.²⁰⁸ The last TAG that FHEO provided was dated October 10, 1991. FHEO continued to provide guidance within HUD

²⁰⁶ HUD, FY 1997 Accountability Report, pp. 44–45.

²⁰⁷ See Appendix V-1 for a complete list of guidance memoranda.

²⁰⁸ See Appendix V-1.

and between Headquarters and field offices, but in different venues and for different audiences. HUD did not replace TAGs with an alternative system of cataloging policy interpretations of Section 504. Moreover, the TAGs were never maintained, indexed, or cataloged to enable HUD staff or the public to use them to solve recurring or new problems. As a result, many of HUD's decisions, especially those that have not been published in the *Federal Register*, are not retrievable by HUD staff or by the public.

Having operated without a unified or retrievable guidance system, HUD staff throughout the department have addressed and solved some of the same issues over and over again, without knowing how the department addressed the issue before and without any guarantee that one office's solution was consistent with another's. For example, in 1986 and 1987, FHEO issued TAGs addressing the interface of Section 504 and the Section 202 Program for the Elderly and Handicapped.²⁰⁹ In spite of this guidance, and because it was not easily accessible, FHEO staff around the country and in Headquarters continued trying to balance Section 202 program requirements with Section 504 requirements.

When the Corporation for Supportive Housing tried unsuccessfully to get the Office of Community Planning and Development and FHEO to explain apparent contradictions between the civil rights laws and Section 202 and other assisted housing programs, the HUD offices declined to provide any answers in writing. Instead, all of the San Francisco regional office directors reviewed and commented upon the corporation's responses to its own questions.²¹⁰ Copies of the book are circulating within HUD, and it has become very popular among supportive housing providers around the country.

Finding V.L.1: FHEO has not maintained in any systematic way the Section 504 guidance that it has issued. It has not maintained the systems that once existed, and it has not created a system for maintaining such guidance now. It is critical that the source for policy decisions, the decisions themselves, and the resulting guidance be continually available to HUD staff and to the public.

²⁰⁹ See TAGs 86-9, 87-11, and 88-5.

²¹⁰ Corporation for Supportive Housing, *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing*, Oakland, CA, 2000.

Recommendation V.L.1: FHEO should create a method as soon as possible for collecting all Section 504 policies, guidance, notices, and interpretive materials in a single location. Each of the documents should be identified by issuance date, location (i.e., where it first appeared), history, and current force. FHEO should allocate sufficient resources to this project so that a system of locating and maintaining such information can be established and maintained. FHEO should make these historical documents and future documents available to HUD staff and to the public in a user-friendly format that is searchable by word or concept.

M. Civil Rights Conflicts Within the Department

1. HUD's Narrow Definition of "Recipient" Limits Civil Rights Enforcement

HUD has adopted policies that limit its ability to investigate recipients other than housing authorities. For example, when HUD defined "recipients" in its Section 504 regulations, it concluded that housing providers who accepted federal rent subsidies were not "recipients of federal funds." Instead, HUD adopted the position that the housing authorities responsible for administering rental certificate programs were the only recipients. Private and assisted housing providers who accepted the subsidies were contractors with the housing authorities (see 24 CFR 8.28). As a result of this decision, FHEO rarely conducted compliance reviews of any recipients other than housing authorities, in spite of information that HUD received and data that it collected that reflected ongoing violations of disability rights and race discrimination by private and assisted housing providers.²¹¹ HUD's protection of private, subsidized housing providers has led directly to the decreasing supply of affordable housing for which individuals with disabilities are eligible.

Finding V.M.1: HUD has too narrowly defined "recipient" to exclude housing providers who benefit from federal financial assistance. HUD's assigning housing authorities with the responsibility of

²¹¹ See, e.g., Citizens Commission on Civil Rights, *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term*, Chap. XXI and passim, Washington, DC, 1991.

monitoring private housing providers' compliance with the civil rights laws has been unworkable.

Recommendation V.M.1: HUD should review its policy decision and issue an interpretation of the responsibilities of federally subsidized private housing providers that is effective and enforceable.

2. Elders, Nonelders with Disabilities, and the Secretary's Office on Disability Policy

As with all Executive agencies, HUD has faced the difficult problems of coordinating its civil rights enforcement policies with its grant-making responsibilities. This issue has been exacerbated in HUD by a number of conflicting public policy goals. One of these has been the integration mandate of the civil rights laws and the mandate that public agencies ensure the safety of "vulnerable populations." This conflict attained national attention, beginning in the 1980s, in the context of HUD's housing programs for "the elderly and the handicapped."²¹² The conflict led to statutory, regulatory, advisory, and enforcement issues that have yet to be resolved.

During the 1980s, the numbers of nonelderly tenants with disabilities increased in housing that Congress had created for them and for tenants 62 and older. As funding decreased for low-income housing and as more and more individuals with disabilities sought affordable housing, the number of housing units available to accommodate low-income applicants dropped to one-third of the need.²¹³ The press carried sensational stories of elders threatened by individuals with disabilities and Congress's forsaking its promises of the 1970s to house low-income elders. In addition, a number of federal court decisions, beginning with *Brecker v. B'nai Brith Housing Development Fund*,²¹⁴ adopted HUD's argument that those who housed individuals with disabilities needed specific expertise for different kinds of disabilities.

²¹² See, e.g., Section 202 Housing, 12 USC 1701q; 24 CFR 885.1.

²¹³ HUD, Office of Policy Development and Research, *Worst-Case Housing Needs*, Reports to Congress, 1980–1990; statement of Barry Zigas, President, National Low-Income Housing Coalition, before the House Subcommittee on Housing and Community Development, March 31, 1992; and annual NLIHC reports.

²¹⁴ *Brecker v. Queens B'nai Brith Housing Development Fund*, 798 F.2d 52 (2d Cir. 1986).

HUD's position directly contradicted its own Section 504 regulations. The regulations prohibit limiting tenants with disabilities to programs created specifically for them (24 CFR Sec.8.4(b)(viii)(3)); denying a dwelling to a tenant because of a disability, which occurred in housing programs limited to people with specific types of disabilities (Sec. 8.4(b)(vii)); and providing different or separate housing to tenants or to a class of tenants without proof that doing so is "necessary" (Sec. 8.4(b)(iv)). Most important, Section 8.4(c)(1) permits individuals and classes of individuals with disabilities to be excluded from housing *only* if federal law or a presidential Executive Order limits the housing to a different class of individuals. An example of such a program is Housing Opportunities for Persons with AIDS (HOPWA), in which applicants with disabilities other than AIDS may be denied housing.

The impact of this position on FHEO's ability to enforce the Section 504 regulations was significant. If HUD had not taken this position, FHEO could have investigated complaints and helped HUD resolve internal policy and regulatory conflicts on the basis of objective and verifiable data. HUD could have developed a body of law that would have enhanced the civil rights protections of its beneficiaries and provided valuable guidance to its recipients. Unfortunately, confusion and misinformation persist within HUD and among recipients, providers, and beneficiaries.

The confluence of these issues led to changes that affected, and continue to affect, FHEO's ability to enforce the disability rights laws, especially against assisted housing providers. In 1990, with HUD and the Administration's support, Congress changed the definition of elderly to eliminate nonelders with disabilities from housing programs that had previously housed both populations.²¹⁵ Two years later, Congress amended the Section 202 program to eliminate the eligibility of nonelders with disabilities, and created the Section 811 program.²¹⁶ The new program provides funding for rental subsidies and for assisted housing for people with disabilities only. Consistent with the disability rights laws, the legislation does not allow providers to distinguish among disabilities in their application process unless they receive specific permission to do so.²¹⁷ Yet, across the country, HUD offices of housing are advising the

²¹⁵ Cranston-Gonzalez National Affordable Housing Act of 1990, Public Law 101-625.

²¹⁶ Housing and Community Development Act of 1992, Public Law 102-550.

²¹⁷ 24 CFR 891.410(c)(2)(ii).

811 providers that they are to follow pre-1990 Section 202 rules. As a result, housing for applicants with specific disabilities are the norm rather than the exception.

Having hobbled its own Section 504 enforcement program, HUD continued to recommend legislation that undermined those regulations. For example, HUD strongly supported, and Congress enacted, more changes in the Housing and Community Development Act of 1992 that have diminished the availability of housing for and the rights of nonelders with disabilities. Public housing authorities were permitted to designate their elderly housing as elderly only if HUD approved their plans to do so. Private housing providers who received HUD subsidies were given even more leeway and were permitted to cease accepting any but elderly tenants. They did not need HUD's approval to do so. Although the legislation required HUD to issue guidance for private housing providers, HUD never did so. As a result, HUD's Office of Housing did not enforce protections for low-income tenants, and FHEO and the Office of Housing gave private housing providers conflicting information as to their responsibilities.²¹⁸

Several studies have been commissioned to study the impact of these changes. The most recent concluded that housing providers accepted nonelders with disabilities most frequently in poor neighborhoods and into troubled housing. Elders, in contrast, were the exclusive tenants in good neighborhoods, in well-maintained housing, regardless of the laws and regulations and with little HUD oversight.²¹⁹ This practice has civil rights implications; yet, in spite of repeated requests to do so, HUD has never effectively reviewed and addressed or acknowledged the impact of its interpretations on HUD's own civil rights enforcement program and regulations or on the worsening housing crisis for low-income renters protected by the civil rights laws.²²⁰

The 1992 law also resulted in HUD's creation of the Occupancy Task Force. Congress required that the members of the task force represent elders, individuals with disabilities, public and assisted housing providers, HUD officials, and others who had been involved in the elder-disability debates. The task force issued consensus recommendations as to how HUD might conform its program and civil rights regulations and policies. The Office of Public Housing

²¹⁸ Report to Congress, *Assessment of the Loss of Housing for Non-Elderly People with Disabilities*, prepared for HUD by Abt Associates, Cambridge, MA, December 2000.

²¹⁹ Ibid.

²²⁰ See, e.g., Technical Assistance Collaborative, *Priced Out in 2000*, Boston, MA, June 2001.

adopted many of the recommendations, while the Offices of Housing and Community Planning and Development did not.²²¹

The task force recommended that both the public housing and the assisted private housing offices require landlords to develop written procedures for providing reasonable accommodations to tenants. It recommended that the Community Planning and Development Office condition the grant of funds on the community's submission of a credible fair housing plan and compliance with it. It recommended that all of HUD's program offices provide housing recipients with the marketing techniques developed by the task force to ensure that accessible units would be occupied by families with mobility impairments.

Finding V.M.2.a: HUD's Occupancy Task Force issued numerous recommendations in 1994 as to how the funding programs could incorporate disability rights requirements into their operations. The Offices of Housing and Community Planning and Development did not adopt the majority of the recommendations. The recommendations resulted from agreement among public and private housing providers, advocates for elders and people with disabilities, and management organizations.

Recommendation V.M.2.a: HUD should review and incorporate as many of the Occupancy Task Force recommendations as are applicable to HUD's current Housing and Community Planning and Development programs. It should determine whether the recommendations can be applied to programs and initiatives that did not exist in 1994 and the most effective ways of applying them.

These conflicts focused the disability community's attention on housing issues in several ways. In addition to the work that FHEO and PIH accomplished, HUD established the Secretary's Office on Disability Policy. Created in 1995, it was the first secretarial-level office in

²²¹ FHEO conducted two-day training sessions in 11 cities that incorporated many of the Occupancy Task Force recommendations that the Office of Public Housing had adopted. FHEO was unable to mount a similar training effort with the Offices of Housing and Community Planning and Development because these offices did not respond to the Occupancy Task Force recommendations.

HUD's history to focus on the rights of individuals with disabilities. While it did not address enforcement issues per se, it brought disability advocates into regular meetings with Secretaries Henry Cisneros and Andrew Cuomo. The meetings alone raised the visibility of the disability focus on HUD's programs. The office was also able to resolve some of the rights-program conflicts and succeeded in incorporating disability rights goals into both HUD staff performance reviews and Notices of Funding Availability.²²²

Finding V.M.2.b: **The Secretary's Office on Disability Policy brought Section 504 and fair housing disability issues to the attention of HUD's leadership. It encouraged the Secretary and his staff to meet with disability rights advocates, and it resulted in greater recognition among program staff of the implications of program regulations and guidance for individuals with disabilities.**

Recommendation V.M.2.b: **HUD should maintain the Secretary's Office on Disability Policy. HUD should assign it joint oversight with the Office of Administration, FHEO, and the Office of General Counsel for HUD's Section 504 federally conducted responsibilities insofar as necessary to ensure that no HUD program operates in inaccessible buildings; that HUD conducts an effective self-evaluation of its policies, regulations, guidance, and practices; and that HUD drafts an employment needs assessment, develops a transition plan to correct deficiencies, and secures sufficient funding to implement the recommendations from its assessments and evaluations.**

Recommendation V.M.2.c: **The Office on Disability Policy should have a director with experience in disability rights. The director should have at least one staff person for each of HUD's offices, including FHEO. Each staff person shall be familiar with the operations**

²²² For example, HUD Notice H 98-29, June 10, 1998, gives five bonus points to applicants for Section 811 funding if at least 51 percent of their boards are individuals with disabilities (p. 4). Also see note 236 for more examples.

and statutory responsibilities of the particular office. The staff person responsible for FHEO shall maintain continuing communication with the Assistant Secretary of FHEO and shall ensure that the two offices coordinate their activities. The office shall be responsible for conducting a “disability impact study” of HUD’s major initiatives, which will include specific recommendations for changes, expansions, and consultation with the civil rights community.

3. HOPE VI’s Adoption of Townhouses to Replace Large Public Housing Buildings Has Significantly Reduced the Number of Accessible Units in the Public Housing Inventory.

Congress created the HOPE VI program for the purpose of “transforming public housing projects into mixed income, diverse, and stable neighborhoods.”²²³ Unfortunately, HUD did not include individuals with disabilities in the design process, nor did it consider the impact of promoting the use of townhouses as the major design style to replace large, multifamily structures. Instead, HUD decided to replicate “the most stable and admired traditional neighborhoods,” or neighborhoods consisting “largely of two-story houses, often with raised front porches, which have been a barrier to people with mobility impairments.”²²⁴

As a result of the work of the Secretary’s Office on Disability Policy and pressure from disability advocacy groups, HUD is now recommending, but not requiring, that HOPE VI projects include modified single-story homes; condominiums; co-ops with first-floor accessible flats; and two-story homes with elevators or lifts.²²⁵

N. The Most Recent Years: 1998–2001

1. FHEO and Departmentwide Coordination

²²³ *Strategies for Providing Accessibility and Visitability for HOPE VI and Mixed Finance Homeownership*, Urban Design Associates, prepared for HUD’s Office of Public Housing Investments, Public and Indian Housing, January 2000.

²²⁴ *Ibid.*, p. 1.

²²⁵ *Ibid.*, p. 2.

The loss of resources and staff to the doubling campaign was only one of the pressures that forced FHEO to rethink its Section 504 enforcement efforts. The second source of pressure came from the disability community. Through FHEO directly and through the Secretary's Office on Disability Policy, the disability community was able to communicate its demands for more effective enforcement of the civil rights laws throughout HUD. While the community received far less than it requested, FHEO and HUD did make some changes.

FHEO joined the Offices of Housing and Community Planning and Development to issue notices to their recipients reminding them of their civil rights responsibilities. The first notice addresses recipients' responsibilities to "affirmatively further fair housing."²²⁶ The notice requires compliance with the new construction requirements of the FHA and warns recipients that if they fail to conduct an Analysis of Impediments to Fair Housing Choice and to take appropriate actions to address the findings of the analysis, HUD "may...reject the Consolidated Plan." Presumably, HUD will not award funds to a recipients whose plans have been rejected. HUD does not make that clear in the notice, nor does it explain the process it will adopt to deny funds to recipients. Because recipients include cities whose size entitles them, by statute, to Community Development Block Grant and other HUD funds, the notice's silence with regard to the procedure it will adopt or the weight of evidence that it will require to reject a city's Consolidated Plan undermines the credibility of the threat. It would be encouraging if either the offices of CPD or FHEO are permitted to hire staff to enforce the notice. Nonetheless, the message is welcome and long requested by civil rights advocates. The notice also responds to House Appropriations language by encouraging recipient cities and states to adopt building codes that incorporate the accessibility provisions of the FHA. That, too, is welcome.

The Office of Community Planning and Development recently issued two additional notices.²²⁷ Both address accessibility and program requirements of Section 504, the FHA, and the

²²⁶ 65 *Fed. Reg.* 76660, HUD-CPD Formula Programs: Assisting Persons with Disabilities—Recipients' Affirmatively Furthering Fair Housing Responsibilities and Involvement of Persons with Disabilities in Planning Actions, December 7, 2000.

²²⁷ Notice CPD-00-09, December 26, 2000, "Accessibility Notice: Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act and their applicability to housing programs funded by the HOME Investment Partnerships Program and the Community Development Block Grant Program"; Notice CPD-00-10, December 26, 2000, "Accessibility for Persons with Disabilities to Non-Housing Programs funded by Community Development Block Grant Funds – Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Architectural Barriers Act." The Office of Public and Indian Housing issued a similar notice in 1999, Notice PIH 99-52: "Accessibility

Americans with Disabilities Act (ADA). Because CPD grant recipients communicate most frequently with CPD staff and read CPD documents, HUD's inclusion of civil rights information in these notices is appropriate and may be effective if the offices are adequately staffed to, if necessary, monitor compliance, answer recipients' questions, provide technical assistance, and initiate enforcement actions.

These notices, along with a similar notice issued by the Office of Housing,²²⁸ follow DOJ guidance from January 28, 1999, to enlist recipients of block grant funding in civil rights enforcement efforts.²²⁹ The year before, HUD proposed rules pursuant to the FHA as to how recipients of CDBG funds could "affirmatively further fair housing."²³⁰ HUD withdrew the rules after a sustained negative response from CDBG fund recipients, led by the National League of Cities.²³¹ It is hoped that the current Administration will embrace DOJ's guidance and assist FHEO in enforcing these recent notices.

HUD has also begun to include civil rights guidance in its funding publications. For example, HUD created the SuperNOFA (Notice of Funding Availability) in 1998 for the purpose of consolidating the application process of dozens of grant programs.²³² Both FHEO and the

Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968; and the Fair Housing Act of 1988."

²²⁸ Notice H 01-02, 2/06/01, "Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988."

²²⁹ Memorandum from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, DOJ, to Executive Agency Civil Rights Directors, re: Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs, January 28, 1999.

²³⁰ Fair Housing Performance Standards for Acceptance of Consolidated Plan Certifications and Compliance With Community Development Block Grant Performance Review Criteria, Proposed Rule, 63 *Fed. Reg.* 57882 (October 28, 1998).

²³¹ In a December 16, 1998, letter to Sally Katzen, Office of Management and Budget, Frank Shafroth, on behalf of the League, the Conference of Mayors, the Council of State Legislators, and the National Governors' Association, complained that "this proposed rule would grant HUD the unilateral, unbridled, and unchecked authority to determine whether a city or state has cured impediments to fair housing, both within and outside of its control. ... and would allow the agency to withhold critical block grants." HUD has never issued regulations that specifically implement the 1974 law's requirement that CDBG funds be used "to affirmatively further fair housing."

²³² In the Foreword to the 1999 *Connecting with Communities: A User's Guide to HUD Programs and the 1999 SuperNOFA Process*, Secretary Cuomo described the SuperNOFA as a single

Secretary's Office on Disability Policy successfully encouraged HUD to incorporate civil rights guidance in the NOFAs.

This change had the salutary effect of notifying applicants for HUD funds of disability and other civil rights requirements in a way that was directly connected to the funding system.²³³ The drawback to this approach was that only those who applied for specific HUD grants in the specific year learned of HUD's policy. Had the policy been systematically codified, as TAGs had been in the 1980s, posted on the Web, or published in the *Federal Register*, the public and HUD staff would have been better served.

Finding V.N.1.a: HUD has, for the past three years, included specific civil rights information in its Notices of Funding Availability (NOFAs). The information is limited and is not preserved in any form other than NOFAs. It has also issued notices to program recipients about civil rights obligations in the context of specific HUD grant programs.

Recommendation V.N.1.a: HUD should continue to include civil rights requirements, especially Section 504 and other funding-related requirements, in NOFAs and other communications with recipients. HUD should maintain the information in a retrievable system for recipients and the public. HUD should assign sufficient staff

application containing "in one place, all of HUD's competitive grant programs in three areas: housing and community development, economic empowerment, and targeted housing and homeless assistance. That's a total of more than \$2.4 billion in available funds."

²³³ See, e.g., HUD's FY 2000 Continuum of Care and HOPWA [Housing Opportunities for Persons with Aids] Application. Providers had mistakenly required tenants in Safe Havens programs to participate in the provider's services program. The application addressed this issue saying, "Safe havens do not require participation in services and referrals as a condition of occupancy" (p.15). Even in the Supportive Housing Program description, the NOFA reverses years of contrary advice from the Office of Housing, saying, "to the extent possible [in the Supportive Housing Program], HUD encourages providers to develop housing programs which do not require participation in specific services as part of their tenancy requirements." (ibid.). Also see, Questions and Answers: A Supplement to the 2000 Continuum of Care Homeless Assistance NOFA and Application, in the same application package, for more examples of regulatory interpretation and guidance.

In the 1998 SuperNOFA for the same grants, HUD introduced the concept of "visitability," encouraging applicants to build and rehabilitate housing with an entrance at grade and with doors wide enough for wheelchair passage. 63 *Fed. Reg.* 23988, 23995 (April 30, 1998).

and resources to the grant programs and to FHEO, both to provide adequate technical assistance for voluntary compliance and to make the enforcement warnings credible.

Both before and after HUD issued policy guidance through the SuperNOFAs, various HUD offices, including FHEO, used a variety of different vehicles to construe the application of Section 504: letters from FHEO and from the Office of General Counsel in response to questions, notices circulated internally and published in the *Federal Register*, internal memoranda, guidance documents in Q&A format, training materials, and correspondence with other agencies.²³⁴ These materials, however, are not collected in one place, are not cross-indexed, and are not searchable.

In 2001, HUD established a Section 504 Web site on HUD's Web page: www.hud.gov/fhe/504/sect504.html. In a press release issued January 19, 2001, Secretary Cuomo described the site as providing valuable information for recipients of HUD funds and for consumers with disabilities. In fact, the site provides basic information, an FHEO complaint form, the means to file a complaint online, links to Section 504 handbooks and regulations, and a useful Q&A. The site does not provide the links to HUD's funding program regulations and handbooks or to non-FHEO policy guidance that would make it much more useful. The site is also difficult to find, requires searching through FHEO links, and is not identified by name on either the HUD or FHEO Web page. Nonetheless, this is a useful start.

Finding V.N.1.b: FHEO and HUD have begun to use the Web to provide information to the public about programs, regulations, notices, and related sources of information and assistance. The FHEO Web page is promising but is difficult to navigate and does not include all of HUD's past and current civil rights information and documents.

Recommendation V.N.1.b: HUD and FHEO should maximize their use of their Web sites. All HUD and FHEO information, guidance, and requirements

²³⁴ Some of the documents are likely to be available only through Freedom of Information Act requests. Others have been widely circulated in specific communities, however, and have become part of the public domain; they easily could serve a wider audience through publication on the Web or in the *Federal Register*. The "Questions and Answers Regarding Admissions and Evictions in Light of Section 504 and the Fair Housing Amendments Act of 1988" that FHEO included in its September 5, 1990, conference on mental disabilities is one such document.

related to civil rights compliance and enforcement should be on the Web sites. In particular, information that is not retrievable in any other way should be on the Web sites. This includes information in grant documents, such as the SuperNOFA, that defines eligibility for HUD funding in terms of civil rights compliance.

O. Conclusion

The history of Section 504 enforcement at HUD has been replete with good intentions, hard work, and partially fulfilled promises. It is discouraging to hear FHEO promise to conduct the same number of post-award compliance reviews in 2001 as it promised in 1989. The current Administration has the opportunity to provide strong support for meaningful enforcement of Section 504 and make Section 504 enforcement an effective tool in the mandate to make it possible for individuals with disabilities to live in the communities of their choice.