Representing Formerly Incarcerated Women with Children
Drafting an Administrative Complaint to Be Filed with the U.S. Department of Health and Human Services' Office for Civil Rights

By Randal S. Jeffrey, Elisabeth Ryden Benjamin, and Constance P. Carden

Individuals subject to discrimination by government agencies and private institutions that receive federal funds through the U.S. Department of Health and Human Services may file administrative complaints against such agencies and institutions with the department's Office for Civil Rights (OCR). The office accepts these complaints, investigates them, and, if the investigation substantiates the complaints, seeks to resolve them.

In this article we first discuss how the OCR administrative complaint process has become more important since the U.S. Supreme Court's ruling in Alexander v. Sandoval.1 To supply the context in which OCR complaints are filed, we then outline OCR's structure and authority. Next we discuss the disadvantages and advantages of filing an OCR complaint and contrast this administrative process with filing a civil action in court. We discuss how to draft an OCR complaint most effectively and strategies for obtaining the best results. To demonstrate the implementation of some of these strategies, we give two examples of OCR complaints. In the last section, we consider briefly what advocates may do after filing an OCR complaint to help ensure a favorable outcome.

I. The OCR Complaint Process After Alexander v. Sandoval

The OCR complaint process is an important nonjudicial mechanism for addressing certain types of discrimination. This process has become even more important since the U.S. Supreme Court in April 2001 issued its 5-to-4 ruling in Alexander v. Sandoval.2 The Court held that private parties might not enforce the regulations that were issued pursuant to Title VI of the Civil Rights Act of 1964—one of the primary civil rights statutes that OCR enforces—and that prohibit disparate impact discrimination on the basis of race, color,

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2 Id.
or national origin. While this decision merits criticism and legislative override, it is nonetheless the law of the land. As such, this decision sharply curtails the ability of private parties to enforce certain civil rights regulations through the courts.

The Sandoval decision has potential impact beyond its precise ruling. Most important, the decision raises the question of whether Title VI disparate impact regulations are enforceable under 42 U.S.C. § 1983. The four dissenting justices in Sandoval argued that the disparate impact regulations that the Court held to be directly unenforceable still were enforceable under Section 1983. The first district court to address this issue post-Sandoval in a substantial, well-reasoned opinion found these regulations enforceable under Section 1983, but whether other courts will follow this lead is uncertain.

Even if Section 1983 remains available as a mechanism for enforcing the Title VI disparate impact regulations, it is

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3 Id. Title VI's section 601, which the U.S. Supreme Court held in Regents of University of California v. Bakke to prohibit only intentional discrimination, remains enforceable by private actors after the Sandoval decision. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Clearinghouse No. 21,922). However, as the dissent in Sandoval noted, most antidiscrimination litigation concerns disparate impact. Sandoval, 121 S. Ct. at 1532 (Stevens, J., dissenting). Disparate impact litigation may be viewed simply as a means to the end of remedying intentional, albeit subtle or otherwise hard to uncover, discrimination. See Sandoval, 121 S. Ct. at 1530 n.13 (Stevens, J., dissenting) ("It is important, in this context, to note that regulations prohibiting policies that have a disparate impact are not necessarily aimed only—or even primarily—at unintentional discrimination."). In this regard, failure to administer a test in Spanish even though a substantial number of those expected to take the test are Spanish-speaking, arguably constitutes intentional discrimination.

4 The dissent in Sandoval advanced a convincing argument that the Court's prior decisions in Lau v. Nichols, 414 U.S. 563 (1974) (Clearinghouse No. 3,321) (holding that defendant school district's teaching non-English-speaking, Chinese-speaking students in English violated Title VI), Cannon v. University of Chicago, 441 U.S. 677 (1979) (Clearinghouse No. 21,638) (holding that plaintiff had a private right of action under Title IX of the Education Amendments of 1972 to enforce Title IX's prohibition on discrimination on the basis of sex), and Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983) (Clearinghouse No. 26,638) (holding that plaintiffs need not prove discriminatory intent to establish a violation of Title VI but that discriminatory animus is necessary for compensatory relief to be awarded), compel finding that private actors may enforce the Title VI disparate impact regulations. See Sandoval, 121 S. Ct. at 1525-28 (Stevens, J., dissenting). Based on these decisions, all of the circuit courts to have addressed the issue before the Sandoval decision had found the Title VI disparate impact regulations enforceable. See Sandoval, 121 S. Ct. at 1524 n.1 (Stevens, J., dissenting). Legislative response to U.S. Supreme Court curtailment of civil rights is not unprecedented. E.g., the Civil Rights Act of 1991 legislatively overrode, among others, the Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), which had held that certain statistical evidence was insufficient to establish a prima facie case of disparate impact discrimination in violation of Title VII of the Civil Rights Act of 1964. See William N. Eskridge Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 333 n.4 (1991).

5 The Title VI disparate impact regulations, as is the case with other civil rights statutes and regulations, can be enforceable either directly under the governing statute or under the general civil rights statute, Section 1983. The U.S. Supreme Court has established two distinct yet similar tests to determine whether a statute or implementing regulation is enforceable either directly or pursuant to Section 1983. Compare Cort v. Ash, 422 U.S. 66 (1975), with Blessing v. Freestone, 520 U.S. 329 (1997) (Clearinghouse No. 50,109).

6 See Sandoval, 121 S. Ct. at 1527 (Stevens, J., dissenting) ("Litigants who in the future wish to enforce Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . . ."). The argument that the Title VI disparate impact regulations are enforceable pursuant to 42 U.S.C. § 1983 is based on the Court's decision in Guardians Association v. Civil Service Commission, 463 U.S. at 594 ("42 U.S.C. § 1983 [is] available to enforce the proscriptions of Title VI and Title IX where the alleged discriminatory practices were being carried on under the color of state law.").

limited to state actors; this guarantees that nongovernmental entities are not subject to private suits for violations of Title VI disparate impact regulations. Furthermore, although Sandoval only specifically applies to Title VI, the ruling may be extended to other statutes under OCR’s jurisdiction.9

Regardless of Sandoval’s impact on private enforcement of civil rights statutes and regulations, the OCR administrative complaint process remains open to the full range of disparate impact claims.

II. OCR’s Structure and Authority

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OCR is charged with enforcing a number of antidiscrimination statutes, including the following:

- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age;14
- Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with

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9 E.g., the Rehabilitation Act provides that “the remedies, procedures, and rights set forth in Title VI . . . shall be available to any person aggrieved by” a violation of the Act. Rehabilitation Act, 7 U.S.C. § 794a(a)(2) (1995). See section II for a list of some of the antidiscrimination statutes that federal law authorizes the Office for Civil Rights (OCR) to enforce.
12 See id. at 486–87. For a description of the U.S. Department of Education’s civil rights office, see www.ed.gov/ocr.
13 For a description of the U.S. Department of Agriculture’s civil rights office, see www.usda.gov/da/cr.html. See also Suhda Setty, Note, Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement, 32 Colum. J. L. & Soc. Probs. 331 (1999) (discussing the procedures of the U.S. Department of Education’s civil rights office for addressing complaints alleging violations of Title IX of the Education Amendments of 1972); Catherine D. Anderle, Helping Schools Make the Grade, 80 Mich. B.J. 52 (Feb. 2001) (discussing the role of the U.S. Department of Education’s civil rights office in resolving complaints concerning the provision of appropriate educational services to children with disabilities).
Disabilities Act, both of which prohibit discrimination on the basis of disability; 15

- Hill-Burton Act, which prohibits hospitals from denying emergency services to individuals living in their service areas, "even if those individuals are unable to pay for the services"; 16 and

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, or national origin." 17

These antidiscrimination statutes encompass a broad range of discriminatory policies and practices. This is reflected in OCR's handling of a broad spectrum of cases in enforcing these antidiscrimination statutes. Some of OCR's more recent cases include challenges to the following: 18

- redlining, that is, the refusal to supply services to predominantly minority geographic areas;
- discrimination, both intentional and disparate impact, on the basis of race;
- failure to comply with section 1808 of the Small Business Job Protection Act, which requires that foster care and adoption programs be administered so as not to place children on the basis of race; 19
- failure to supply interpreter services to limited-English-proficient clients at welfare offices and medical facilities;
- failure to supply sign-language interpreter services in hospitals using independent physicians;
- preemployment inquiries concerning credentials of physicians applying for staff privileges where the inquiries violated Section 504 of the Rehabilitation Act;
- discrimination on the basis of disability, such as HIV (human immunodeficiency virus) status, in county department of

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16 Hill-Burton Act, 42 U.S.C. §§ 291 et seq. (1991); id. § 291c(e) (2001) (quotation); see also Office for Civil Rights, U.S. Dep't of Health & Human Servs., Fact Sheet: Community Service Assurance (Aug. 1990); id., Fact Sheet: Your Rights Under the Community Service Assurance Provision of the Hill-Burton Act (June 2000), available at www.hhs.gov/ocr/hburton.html (Internet version differs slightly from published version). The Hill-Burton Act requires that an administrative complaint be submitted before filing a court case. The Act authorizes a private suit only if a complaint is filed with the secretary of the U.S. Department of Health and Human Services and either the secretary dismisses the complaint or the attorney general has not brought a civil compliance action within six months of the submission of the complaint. See 42 U.S.C. § 300s-6 (1991); Flagstaff Medical Ctr. v. Sullivan, 962 F.2d 879, 887 (9th Cir. 1992) (Cleaninghouse No. 44,758) (stating that plaintiffs were authorized to bring suit as private attorneys general to ensure Flagstaff's compliance with its assurances since plaintiffs filed complaints but the attorney general failed to bring a civil compliance action based on those complaints); Gillis v. U.S. Dep't of Health & Human Servs., 759 F.2d 565, 574 (6th Cir. 1985) (noting that a private right of action was available "in lieu of agency enforcement to provide an alternative avenue of relief for individuals adversely affected by agency inaction, dalliance, or backlog").


health services' placement programs for students;

- failure to make services accessible to persons with disabilities; and
- failure to "reasonably accommodate" persons with disabilities.

Federal law vests OCR with the authority to investigate complaints, attempt a voluntary resolution of the complaint if the investigation substantiates the complaint, and effectuate compliance if the parties do not achieve a voluntary resolution.20 The incentive for voluntary compliance is the threat that the Department of Health and Human Services may suspend or terminate federal financial aid to the noncompliant recipient or that OCR may refer the complaint to the U.S. Department of Justice for it to bring enforcement proceedings in court.21

III. Disadvantages and Advantages of Filing an OCR Complaint

For an advocate who is considering whether to file an OCR complaint, the first issue to resolve, when the option of filing a civil rights complaint in federal court is available, is whether submitting an OCR complaint would be the best method for addressing the civil rights violations.22 Advocates should base this determination on a number of factors, such as who will control the case, OCR's susceptibility to political pressure, who the preferable respondent is, what resources need to be devoted to the case, and what remedies the complainant is seeking for the violations. These factors relate to a court action being primarily a legal process and filing an OCR complaint being primarily an administrative process.

Because advocates generally are more familiar with the judicial process for resolving complaints than with the administrative process, in this section we will contrast these two processes. Although Sandoval has narrowed the scope of Title VI enforcement, the following discussion highlights some of the issues with filing a Title VI complaint generally.23

A. Disadvantages of Filing an OCR Complaint

Complainants and advocates confront several disadvantages of filing an OCR administrative complaint instead of a court complaint. These include loss of control over the case, OCR's susceptibility to political pressure, and the legal constraints that require OCR to deal with state officials rather than with local officials even when the local officials are causing the discrimination.

1. Control of the Case

The primary disadvantage of filing an OCR administrative complaint is that the complainant does not retain control of the case after filing it. Instead the appropriate regional OCR controls all aspects of the case, including whether and to what extent to devote resources to investigate the allegations in the complaint, how long to spend investigating the complaint, whether to issue a finding that the respondents are not in compliance with the applicable law, the course of any negotiations to resolve the complaint, and whether to settle with the respondents.24 While the complainant may have some influence over the case, a complaint filed with OCR becomes an OCR case.25

In contrast, after filing a complaint in court, the plaintiff and the plaintiff's attor-
ney retain full control of the case. This includes scheduling, deciding what discovery to conduct, conducting any settlement negotiations, and developing trial strategy. Of course, control of a court case ultimately is subject to constraints that the court imposes on it.

2. Political Pressure

Another difference between the OCR administrative process and the judicial process is the role that political pressure plays in a successful OCR complaint. The hallmark of an independent judiciary is its resistance to political pressure. While regional OCRs may strive for a similar degree of independence, they are part of the executive branch and thus are subject to political pressure. The awareness that political pressure becomes important after a complainant files a complaint is a factor influencing the decision whether to file an OCR complaint. Advocates or complainants who believe that their complaint will not garner political support justifiably may feel less confident about filing an OCR complaint. As we discuss in section VI, because this pressure may be exerted from many directions—such as complainants and their allies, respondents and their allies, and higher officials within OCR—political pressure from complainants and their allies becomes important in ensuring a successful outcome.

Considering the susceptibility of regional OCRs to political pressure is especially important in light of the new Republican administration. With OCR being part of the executive branch, a conservative administration may pressure regional offices to shy away from controversial or aggressive enforcement of civil rights laws. This could make nonmainstream claims especially vulnerable to those who oppose enforcement.

3. Preferable Respondents

In civil rights court cases, at least when state agencies have delegated primary responsibility for administering programs to local social service districts, those districts are often the primary defendants.26 This is so because the local districts, through their policies and practices, are generally those directly violating the applicable civil rights laws. However, federal regulations authorize regional OCRs to deal with state entities that are the direct recipients of federal funds.27 Mindful of this difference, an advocate would decide to take a route based on which defendants—those at the local versus the state level—would be more amenable to making the requisite changes and settling cases. For example, a complainant facing a relatively liberal social service district but a recalcitrant state executive might choose—in hopes of reaching a more favorable settlement with the social service district—to file suit in court.

B. Advantages of Filing an OCR Complaint

The main advantages of filing an OCR administrative complaint instead of a federal court lawsuit are that OCR commands extensive resources for conducting systemwide investigations and that OCR is likely to require more detailed remedies and engage in more follow-up monitoring than a federal judge.

1. Resources

The flip side of the complainant giving up control of an OCR complaint is the advantage that an OCR complainant may devote relatively fewer resources to a filed OCR complaint. In fact, while not advised, a complainant need not expend any resources after filing an OCR complaint, instead simply letting OCR do all of the work. Even the most aggressive complainant is unlikely to expend as many resources as a plaintiff engaging in discovery and settlement negotiations with a defendant and conducting a court trial.28

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26 Even when a state agency delegates administration to a local social service district, the state agency remains ultimately responsible for local social service district action. See Woods v. United States, 724 F.2d 1444, 1447-48 (9th Cir. 1984); California v. Block, 663 F.2d 855, 858 (9th Cir. 1981); Moore v. Perales, 692 F. Supp. 137, 139 (E.D.N.Y 1988).
28 Some of the steps a complainant should take in preparing to file and in following up on an OCR complaint are detailed in section IV.
In contrast, a plaintiff in a court case must devote substantial resources to litigating and settling the case. This is particularly true when the plaintiff challenges systemwide practices because the proof must be systemwide as well.

2. Remedy

Another advantage of filing an OCR complaint is that, assuming that OCR investigates the complaint and finds a violation, OCR policy guidance memoranda give OCR more specifics as to what remedies to impose. This is especially so in the area of language access, where OCR limited-English-proficient policy guidance is much more detailed than federal regulations.29 Aside from the policy guidance memoranda, OCR has broad authority to fashion equitable remedies after it finds discrimination.30 Also, OCR is likely to engage in more follow-up monitoring than a federal judge.

In contrast, a successful court case may lead only to a court ordering a remedy narrowly tracking the applicable regulations. Moreover, a more conservative judiciary, even after finding liability, may be less willing to order defendants to take specific steps to remedy the violations, thereby leaving defendants to formulate their own responses, at least initially.

C. Filing Simultaneous Complaints

Filing both an OCR administrative complaint and a judicial complaint—in essence, hedging one’s bets—has its own pitfalls. Regional OCRs most likely will not pursue a complaint if a judicial action concerning the same matter is proceeding.31 Similarly respondent-defendants may seek to have a court action stayed pending resolution of an OCR complaint. Confusion over whether OCR or the court would assert jurisdiction and order remedial action could lead to unnecessary delay in obtaining relief.

In Ramirez, a New York City limited-English-proficient case, plaintiffs filed both a federal court complaint alleging violations of food stamp regulations, Title VI, due process, and equal protection in defendants’ administration of the Food Stamp Program and an OCR complaint alleging Title VI violations in respondents’ administration of the public assistance and Medicaid programs.32 In so doing, plaintiffs were able to avoid submitting dual complaints asserting overlapping claims. While the facts giving rise to the complaints mostly overlapped, the food stamp regulatory claims in particular separated them.33 Thus,

29 The OCR’s Limited English Proficient Policy Guidance, which OCR revised in 2000, states that recipients must take the following steps to comply with the law: assess the language needs of clients that the recipient serves; develop a comprehensive written policy for ensuring that limited-English-proficient clients actually have access to the program; train staff on this policy; and monitor the policy’s effectiveness. The guidance describes a comprehensive written policy as including oral language interpretation through bilingual staff, staff interpreters, contract interpreters, community volunteers, and telephone interpreter lines; translation of written materials; and notice to clients of the availability of free interpreter services. See Office for Civil Rights, U.S. Dep’t of Health & Human Servs., Policy Guidance: Title VI Prohibition Against National Original Discrimination as It Affects Persons with Limited English Proficiency, 65 Fed. Reg. 52762, 52766–69 (Aug. 30, 2000), available at www.hhs.gov/ocr/lep/guide.html (Sept. 1, 2000). See also Memorandum from Dennis Hayashi, director, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., and Olivia Golden, principal deputy assistant secretary, Administration for Children and Families, to OCR Regional Managers and ACF [Administration for Children and Families] Regional Directors (June 4, 1997) (giving guidance concerning the Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996), www.hhs.gov/ocr/iepguide.htm (on file with Randal S. Jeffrey).

30 See 45 C.F.R. § 80.7(d) (2000) (authorizing the U.S. Department of Health and Human Services to resolve complaints through informal means).

31 Based on our discussions with OCR representatives.


33 See 7 C.F.R. § 272.4 (2000) (requiring states to provide interpreters and translate certain program documents into languages based on certain numerical thresholds).
when the respondent-defendants requested that the court stay the court complaint until after resolution of the OCR complaint, the court could deny the request on the basis that the court complaint sought different relief.34

A drawback of filing simultaneous complaints is illustrated by the Mendoza cases, the precursors to the Ramirez and New York City Human Resources Administration Medicaid and public assistance language access cases.35 In 1974 plaintiffs filed a federal court complaint alleging that New York City, New York State, and the federal government failed to supply interpreter services and translated documents in their administration of the public assistance, Medicaid, and Supplemental Security Income programs to limited-English-proficient, Spanish-speaking clients.36 In 1973 plaintiffs filed a similar administrative complaint with OCR.37 After the parties resolved the administrative complaint through settlement in 1980, some seven years after complainants filed the complaint, the district court granted defendants’ motions to dismiss the court case on the ground that the settlement met the demands set forth in plaintiffs’ complaint.38

IV. Drafting an OCR Complaint

Drafting a basic OCR administrative complaint is relatively straightforward. A complaint form is readily obtainable from OCR.39 However, one need not even use the OCR form to submit a complaint but instead may submit a letter that includes the appropriate information to the national or appropriate regional OCR.40 Only the following information is required: (1) the complainant’s name (including signature), address, and telephone number; (2) the name and address of the institution or agency that discriminated against the complainant; (3) how, why, and when the discrimination occurred; and (4) any other relevant information.41 Unless the complainant demonstrates good cause, the complainant must submit the complaint within 180 days of the discriminatory act.42 This process is intentionally easy to complete so that individuals or groups without legal representation may bring discrimination cases to the federal government’s attention.43

Despite the simplicity of the process, in order to be effective, an OCR complaint must be a factually persuasive document—even more so than a complaint in a court action.44 The regional OCR must be convinced that the complaint is one on which, given its limited resources, the office should spend time investigating and, if the allegations are substantiated, seeking compliance. This means that the complaint should include more than just bare allegations; it also should be well documented. Marshaling as much evidence as possible in support of the discrimination claim, an OCR complaint

35 Mendoza v. Lavine, 412 F. Supp. 1105 (S.D.N.Y. 1976) (Clearinghouse No. 13,984). We discuss the New York City Human Resources Administration case in section V.A.
36 See id. at 1106–7.
37 See id. at 1107.
39 Discrimination complaint forms are available from OCR headquarters and regional OCrs, 800.368.1019 (voice) or 800.537.7697 (TDD). See How to File a Discrimination Complaint, supra note 24 (listing the addresses and telephone numbers for regional OCrs).
40 See id. Whether a complainant files a complaint with the national office or the appropriate regional office, the regional office handles the complaint.
42 See How to File a Discrimination Complaint, supra note 24.
43 See id.
44 A civil complaint should contain only “a short and plain statement of the claim.” Fed. R. Civ. P. 8(a) (2001). A plaintiff subsequently presents the developed facts to the court on a summary judgment motion or at trial after full discovery.
should read more like a summary judgment motion than a court complaint.

At the same time, OCR complaints generally need not be legally persuasive. OCR does not need to be convinced of a legal theory that might be at issue in a court process. However, if relevant policy guidance memoranda exist, such as in the limited-English-proficient context, then tying the alleged discrimination to the standards that OCR set forth in the memorandum would assist the regional office.

Although not required, affidavits or declarations supporting the allegations of those who have been subject to the discrimination are crucial evidence for an OCR complaint to be successful. These individual instances of discrimination form the core of the complaint. Their presentation to OCR may take a form similar to affidavits or declarations submitted to a court. They should contain the specifics of who committed the discrimination and how the discrimination occurred, including names, dates, and places. Although technically a complainant need not demonstrate harm beyond the mere fact of discrimination, detailing such harm is important to make the documents persuasive.

Declarations from staff at community organizations whose clients have been subjected to the challenged discrimination are also helpful. These organizations, which serve clients affected by the discrimination on a daily basis, may bolster claims that the discrimination is not isolated.

The scope of the supporting evidence should be commensurate with the scope of the complaint. If the complaint is against a social service district or state, then documenting that the discrimination is systemic across the district or state is particularly important. This may be accomplished through several methods. Some of these methods focus on the respondent’s failure to take seriously its legal duty to avoid discrimination. For example, documenting that the respondent has no written or other formal policies addressing its legal duty may demonstrate a lack of commitment to prevent discrimination. Similarly documenting that the respondent has not trained its staff on the discrimination issue or does not effectively monitor whether its staff members are engaging in discrimination also may demonstrate that the respondent fails to take its legal duty seriously.

If available, audits, studies, surveys, or internal documents concerning the respondent’s practices also may demonstrate that the discrimination is systemic. Organizations involved in the complaint process may conduct surveys to document the discrimination. These types of evidence of systemic discrimination may be even more persuasive than individual instances of discrimination and evidence that the respondent failed to take seriously its legal duty to avoid discrimination.

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45 See How to File a Discrimination Complaint, supra note 24. Citing other cases that OCR pursued on the same legal basis should be sufficient. An exception to the general rule that OCR complaints need not be legally persuasive is when the complaint relies on a novel legal interpretation of the applicable antidiscrimination laws. In such cases the attorney should explain why this interpretation is appropriate.

46 See id. (regarding that complainant need not demonstrate harm beyond the mere fact of discrimination). E.g., the complaint we discuss in section V.A included three affidavits detailing the harm that respondents’ failure to comply with the applicable law caused, and OCR took it more seriously than the complaint we describe in section V.B; that complaint did not include affidavits.

court actions, complainants have no opportunity for discovery in the OCR process. Thus the complainant or advocate must obtain supporting documentation independently and should submit it with the complaint to have the most impact.

Before a complainant or advocate files a complaint, making contact with or establishing a relationship with OCR officials in the regional offices is helpful. The regional offices take the lead on complaints. Officials there can supply valuable information about the OCR process and become key contacts as a filed OCR complaint progresses.

Obtaining a broad range of organizations to sign onto a complaint is another strategy to ensure OCR action. This serves a dual purpose. First, having many organizations endorse a complaint is another sign to OCR that the discrimination is widespread. Second, demonstrating that the complaint is widely supported adds political weight to the complaint.

Reviewing other complaints that raise similar claims or rely on similar theories is helpful in drafting a complaint. These other complaints may give advocates insight into additional strategies for an effective complaint. Advocates may obtain them from reviewing OCR submissions or contacting national organizations that deal with the form of discrimination challenged.

V. Two Examples of OCR Complaints

The examples of OCR complaints in the next two subsections demonstrate the implementation of some of the strategies discussed in the preceding section and the effectiveness of filing an OCR administrative complaint.

A. Language Access to Medicaid and Public Assistance Offices

In 1999 four organizations submitted to a regional OCR a complaint challenging the failure of the New York City Human Resources Administration to supply interpreter services and translated material in its administration of the Medicaid and public assistance programs. The complainants and their attorneys used several strategies discussed in the preceding section.

The declarations of three limited-English-proficient clients who failed to receive interpreter services and translated documents from the respondent city agency were the heart of the complaint. Complainants also submitted the results of a survey that one of the complainant organizations conducted; the survey documented problems with interpreter services and found that 65 percent of the Spanish-speaking sample reported problems communicating with their case-workers. Allegations of a systemwide failure to establish procedures for limited-English-proficient services and to train staff on such procedures supplemented the declarations and survey results.

Complainants recruited many local and national organizations as endorsers to sign onto the complaint. Before filing the language-access complaint, the parties were aware that their regional OCR was particularly concerned about limited-English-proficient client access to welfare offices. Because the complainants completed this groundwork as part of their complaint, OCR took the complaint seriously. Initially it conducted a labor-intensive investigation. This involved making unannounced visits to several city welfare

48 See 45 C.F.R. pt. 80 (passim) (2000). However, OCR does have authority to access a recipient's information sources relevant to determining whether a recipient of federal funds through the Department of Health and Human Services is in compliance with the applicable law. See, e.g., 45 C.F.R. § 80.6 (2000) (establishing OCR's authority to obtain information relevant to Title VI complaints).

49 Discrimination Complaint (No. 02-99-3130). The four organizations were the New York Legal Assistance Group, Puerto Rican Legal Defense and Education Fund, Make the Road by Walking, and the New York Immigration Coalition.

50 MAKE THE ROAD BY WALKING, SYSTEM FAILURE: MAYOR GIULIANI'S WELFARE SYSTEM IS HOSTILE TO POOR AND IMMIGRANT NEW YORKERS 3 (1999).

51 See Discrimination Complaint (No. 02-99-3130), ¶ 6, at 2–3.

52 See id. at 5.
offices and interviewing clients and office staff.\textsuperscript{53} Based on the complaint and the investigation results, OCR declared in a letter of findings that New York State was out of compliance with Title VI and its implementing regulations in New York City and Nassau and Suffolk counties.\textsuperscript{54} OCR found specifically that the welfare offices failed to give clients adequate language assistance, including incorrectly instructing them to bring their own interpreters, and that the offices failed to have sufficient bilingual staff.\textsuperscript{55}

This example also highlights some of the drawbacks of the OCR process. Despite the regional OCR making this case a priority and issuing the letter of findings some six months after the complainants filed the complaint, OCR and New York State still had not reached a settlement more than eighteen months later. Thus the ultimate resolution of the complaint remains in doubt.

B. Language Access to Medicaid Managed Care

In December 1999 the Legal Aid Society of New York filed an OCR complaint alleging that New York City failed to give notices and other services to Russian- and Spanish-speaking Medicaid beneficiaries who were mandated to join Medicaid managed care plans.\textsuperscript{56} The complaint alleged that if the New York State Department of Health and New York City Medical Assistance Program required these beneficiaries to join Medicaid managed care plans, the beneficiaries would be threatened with disruptions in receiving medical care if they did not receive notices in their own language explaining that they must join a health maintenance organization (HMO).\textsuperscript{57} If they failed to select an HMO, the city would automatically assign them to an HMO and to doctors unknown to the beneficiaries. Eventually eleven complainants intervened in the original complaint.\textsuperscript{58} The complainants submitted an analysis of a New York State Department of Health audit, which revealed that the database of health providers who purportedly were available to Medicaid managed care enrollees was inaccurate nearly 50 percent of the time.\textsuperscript{59}

During summer 2000 the regional OCR interviewed all eleven complainants.\textsuperscript{60} These individual interviews took several hours per client and, ironically, OCR asked complainants' counsel to supply interpreters for at least one interview.\textsuperscript{61} In September 2000 the regional OCR contacted complainants' counsel to set up a meeting to discuss the parameters of a remedial order. Thus complainants' counsel was shocked to receive from the regional OCR at the end of September 2000 a letter stating that a "general compliance review is the most

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\item \textsuperscript{54} See id. at 10–11. OCR found the state out of compliance with Title VI and 45 C.F.R. § 80.3(a); (b)(1)(i), (ii), (iv), (v), (vi); (b)(2) (2000).
\item \textsuperscript{55} See N.Y. Human Res. Admin, (No. 02-99-3130), at 10.
\item \textsuperscript{56} Discrimination Complaint on behalf of Aleksandr G., No. 02-00-3068 (Office for Civil Rights, U.S. Dep’t Health & Human Servs., filed Dec. 30, 1999).
\item \textsuperscript{57} Id. ¶ 6E.
\item \textsuperscript{58} Letter from Elisabeth Ryden Benjamin, supervising attorney, Health Law Unit, The Legal Aid Society [complainants' counsel], to Michael Carter, director, OCR (Mar. 7, 2000) (on file with Elisabeth Ryden Benjamin).
\item \textsuperscript{59} Letter from Elisabeth Ryden Benjamin, supervising attorney, Health Law Unit, The Legal Aid Society [complainants' counsel], to Michael Carter, director, OCR, at 5 (Dec. 30, 1999) (accompanying Aleksandr G. complaint) (on file with Elisabeth Ryden Benjamin).
\item \textsuperscript{60} Based on reports from complainants to Elisabeth Ryden Benjamin, complainants' counsel.
\item \textsuperscript{61} Telephone call from an OCR investigator to Elisabeth Ryden Benjamin, complainants' counsel.
\end{itemize}
\end{footnotesize}
effective means of addressing ... the complaints." The letter stated that OCR would close the complaint and conduct this general review with the Health Care Financing Administration. (To the best of our knowledge, this general compliance review never occurred.)

In subsequent verbal communications with complainants’ counsel, regional OCR personnel indicated that, because the complainants’ individual cases had been resolved through the state fair hearing process, there was no “harm” to be investigated. This reasoning raises the following conundrum for advocates: Should you file a complaint and let your client be harmed as the case wends its way through the often-lengthy OCR process, or should you vigorously advocate on all levels for your client, even if this might ameliorate the harm that OCR is investigating? The regional OCR’s theory was patently inconsistent with its treatment of the complainants in the case against the New York City Human Resources Administration, discussed in section V.A; those complainants also had acquired interim individual relief, but OCR did not close that case.

However, all was not lost. As a result of this OCR complaint and other advocacy efforts, New York City has started issuing notices in four languages besides English to potential Medicaid managed care enrollees and has established a specialized exemption unit to process special cases, including requests for exemption from mandatory Medicaid managed care on the basis of language needs.

VI. After Filing an OCR Complaint

While in theory a complainant can file an OCR complaint and then leave the case to OCR without expending further effort, the most effective way to ensure that OCR addresses the complaint is to monitor closely the course of the OCR investigation. For example, complainants or their counsel should call or write OCR and inquire about the investigation’s status. They also should meet with OCR representatives directly to emphasize the importance of the complaint and submit to OCR additional documentation of civil rights violations.

As discussed in section III.A.2, the OCR complaint process is as much political as legal and therefore subject to certain pressures. Thus, after filing a complaint, complainants and their counsel may take measures such as contacting allies both inside and outside government concerning the importance of the discrimination issue, persuading additional community organizations to sign onto the complaint, publicizing additional instances of discrimination, creating public awareness through media campaigns to keep the issue current, holding demonstrations that receive press coverage, and persuading local politicians to hold public hearings on discrimination issues.

After OCR reaches a resolution with a respondent to an OCR complaint, as with court lawsuits, the case does not end. Instead a period of monitoring compliance begins to ensure that the resolution is effective. Monitoring compliance is most relevant when the settlement calls for the respondents to have ongoing responsibilities to comply with the applicable civil rights law.

The three cases, discussed in section V.A, illustrate the necessity of continual oversight even after OCR and a respondent reach a settlement. After having filed the complaint in 1974, OCR

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63 Telephone conversation of Elisabeth Ryden Benjamin (The Legal Aid Society) and Constance P. Carden (New York Legal Assistance Group) with an OCR Region II official (Oct. 2000).

64 The four languages are Spanish, Russian, Haitian Creole, and Chinese.

65 Like settlements of lawsuits, OCR settlements may contain a “sunset clause,” i.e., a time after which the settlement expires.

66 See supra notes 35-38 and accompanying text for additional discussion of the Mendoza cases.
finally reached a settlement with New York City and New York State in 1980. This settlement most notably included the hiring or promotion of 272 bilingual welfare case workers.\textsuperscript{67}

However, almost two decades later, advocates faced the same problems that gave rise to the Mendoza cases: the city failing to supply interpreter services, informing clients that they had to bring their own interpreters, and failing to staff welfare offices with sufficient bilingual personnel.\textsuperscript{68} Although the city had appeared to take its obligation to supply interpreter services seriously for a while after the Mendoza settlement, by the late 1990s the city was giving this issue little, if any, attention.\textsuperscript{69} Similarly advocates failed to maintain pressure on the city to comply with the settlement.\textsuperscript{70} Thus, without continued oversight, the OCR settlement became obsolete.

**FILING A CIVIL RIGHTS COMPLAINT WITH OCR**

may be an effective mechanism for advocates to remedy discriminatory policies and practices of entities receiving federal funds through the U.S. Department of Health and Human Services. The effectiveness of this mechanism depends on a multitude of factors. However, submitting a factually persuasive, well-supported OCR complaint, along with contacting OCR before and after submitting the complaint, may help ensure that OCR takes action on the complaint and may increase the probability of a favorable outcome.

Authors’ Acknowledgment

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\textsuperscript{67} See Mendoza, 91 F.R.D. at 96.

\textsuperscript{68} See Discrimination Complaint (No. 02-99-3130), at 2-3 (alleging that the New York City Human Resources Administration routinely failed to supply interpreter services and routinely informed clients that they had to bring their own interpreters). The one exception was the institutionalization of the process for translating documents into Spanish; translation of documents into Spanish, for the most part, continued after the Mendoza settlement.

\textsuperscript{69} See Discrimination Complaint (No. 02-99-3130), at 2-3.

\textsuperscript{70} Based on the experience of Constance P. Carden (New York Legal Assistance Group), who monitored the issue during this period.