No. 78-2720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EL CAMINO COMMUNITY COLLEGE DISTRICT, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

ANDREA SHERIDAN ORDIN,
United States Attorney.

DREW S. DAYS, III,
Assistant Attorney General,

WALTER W. BARNETT,
MARK L. GROSS,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes:

Regulations:

Miscellanous:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2720

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EL CAMINO COMMUNITY COLLEGE DISTRICT, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether an administrative agency, conducting an investigation of a college's compliance with statutory prohibitions against discrimination in federally-funded

programs, can obtain an injunction requiring the college to disclose information which may be relevant to determining whether any prohibited discrimination exists. 1/

STATEMENT

1. Procedural History

On December 12, 1977, the United States filed its complaint in this case (Clerk's Record on Appeal ("C.R.") 1). The complaint alleged that El Camino Community College (El Camino) is a recipient of federal funds, and had refused to comply with a request of the the United States Department of Health, Education and Welfare (HEW) for information. The request was made pursuant to an HEW investigation of El Camino's compliance with Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d et seq. (C.R. 4, 91). That refusal, the complaint alleged, was a violation of Title VI, of regulations (45 C.F.R. 80 et seq.) adopted by HEW pursuant to its authority under 42 U.S.C. 2000d-1, and of contractural assurances previously given HEW by El Camino (C.R. 5).

The United States' complaint sought (a) a declaration that El Camino's actions violated Title VI, the regulations, and the contractural assurances, and (b) an injunction requiring

1/ This question is different from that presented in the brief of El Camino (Br. 1). As summarized at p. 8, infra, and explained in more detail at p. 19 and p. 27, infra, we suggest that El Camino's articulation of the Question Presented is erroneous.

El Camino to provide information requested by HEW (C.R. 6). On December 27, 1977, the United States filed a motion for preliminary injunction (C.R. 23) seeking similar injunctive relief.

On January 9, 1978, El Camino filed a motion to dismiss the complaint or, in the alternative, for summary judgment (Supp. R. 264), arguing that HEW's Title VI authority was limited to federally funded programs of the college.

On February 24, 1978, the district court held a hearing at which both parties agreed that no facts were at issue (Reporter's Transcript ("R.T.") at 4, 18). At that hearing the court stated that the declaratory and injunctive relief requested by the United States would be granted (R.T. 18). On July 26, 1978, the court entered its findings of fact and conclusions of law (C.R. 236-251). Its injunction was entered July 28, 1978.[2/]

Notice of Appeal was filed on July 31, 1978 (C.R. 253). On August 23, 1978, this Court stayed the order pending appeal.

2. Facts

The facts in this case are not disputed. Title VI of the 1964 Civil Rights Act prohibits recipients of federal funds from discriminating on the basis of race, color or national origin

---

2/ The separate judgment is not in the Clerk's Record, but is at pp. 58-59 of the Appendix filed with El Camino's motion for stay pending appeal.

against any person in any federally funded program, 42 U.S.C. 2000d. HEW is statutorily authorized to insure that recipients to which it extends funds comply with Title VI. El Camino is a recipient of several different forms of federal funds (C.R. 73-75).

In October, 1973, HEW received a complaint from a private institution about El Camino's treatment of Spanish surnamed persons in both employment and educational services (C.R. 88). Representatives of HEW and El Camino met in June, 1974, to discuss information HEW wanted for its investigation of El Camino's Title VI compliance (R. 86). Following unsuccessful negotiations for the information, HEW, on December 10, 1974, sent El Camino a letter stating that (C.R. 91):

> the Office for Civil Rights [of HEW] has the responsibility to ensure that institutions receiving Federal funds comply with the provisions of Title VI of the 1964 Civil Rights Act which prohibits Federally assisted institutions from discriminating on the basis of race, color, or national origin in their provision of educational services and in employment where it directly affects the provision of services and/or benefits to students.

The letter requested data showing El Camino's workforce, by race and sex, over the past three years, and specific information about recruitment and hiring procedures affecting three Deanships and two other positions (C.R. 92). The letter also requested a breakdown, by race and sex, of the student body over the past three years, and information about student recruitment, and financial and academic assistance (C.R. 93-94). Subsequent

correspondence demonstrated that El Camino refused to provide the information requested by HEW (C.R. 96, 102-105, 112), based on El Camino's view that HEW could request only information about federally assisted programs (R. 112). HEW, on November 3, 1977, notified El Camino that HEW would be referring the case to the Department of Justice (C.R. 120-121) for the enforcement effort which is the subject of this appeal.

3. Opinion of the District Court

The district court held that HEW was entitled to the information it sought from El Camino.[3/] HEW, the court held, has authority to investigate the compliance by recipients of federal assistance with the nondiscrimination prohibitions of Title VI (C.R. 242-243). The court held that HEW's regulations give it authority to request any information necessary to enable it to determine whether there is noncompliance with Title VI (C.R. 244-245). The court held that the assurance of compliance executed by El Camino states that the college will abide by HEW's regulatory requirements, and that those assurances apply to all aspects of El Camino's operations (C.R. 245). The court held that when HEW is investigating, El Camino is therefore bound both by the regulations and the contractual assurances of compliance to provide information about all aspects of its operation.

3/ The court's opinion is reported at 454 F. Supp. 825.

The court rejected defendants' argument that information could be requested by HEW only on a "pinpoint" basis -- that is, that HEW can seek only information which refers directly to federally funded activities. The court held that discrimination in one aspect of an educational system (C.R. 247), including employment (C.R. 248-250), whether or not it falls directly within a federally assisted program may in some circumstances affect those students who are the beneficiaries of the federal programs (C.R. 248). Therefore, at the investigation stage, HEW is not limited to information on a "pinpoint" basis, but may seek information on a broad basis.

The court held that the United States had shown sufficient basis to support the injunctive relief it had requested (C.R. 251), and permanently enjoined El Camino from refusing to provide HEW with information requested pursuant to the investigation of El Camino's Title VI compliance.[4/]

SUMMARY OF ARGUMENT

This case arises from an attempt by an administrative agency, HEW, to secure judicial enforcement of its request for information. The request was made to El Camino Community College, a recipient of federal funds, and was intended to secure for HEW information which HEW deemed necessary to enable

4/ See n. 2, supra.

it to determine whether there was any discrimination practiced by El Camino which in any way affected the operation of federal programs, or the beneficiaries of these programs, which are under under HEW's jurisdiction.

The situation before this Court has previously been the subject of much litigation and one for which concrete standards exist. The case presents an instance of judicial enforcement of an administrative request for information. Thirty-five years ago, the Supreme Court held that such administrative requests must be judicially enforced when the administrative request is "not plainly incompetent or irrelevant to any lawful purpose" of the agency. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). Accordingly, the order below must be affirmed as long as (a) HEW's attempt to investigate is properly within the authority given it by Congress and (b) the information it seeks is in any way relevant to that investigation.

El Camino concedes, as it must, that HEW has authority to investigate to determine whether a recipient of federal funds is discriminating in any programs which utilize these funds. Accordingly, the only question is whether the information sought by HEW is relevant to that investigation.

The information HEW sought is of a general nature, including overall student enrollments and recruitment policies, and employee workforce, recruitment and hiring practices. Insofar as discriminatory

practices affecting all students may affect those students who are specific beneficiaries of federal programs, we contend that data describing general, college-wide practices are "not irrelevant" to determining whether students in federal programs are subject to discriminatory practices. Similarly, insofar as discrimination against minority faculty members and applicants may affect the education received by students, data about a college's employment practices are also "not irrelevant" to determining whether students in federal programs are also subjected to any discriminatory treatment. Accordingly, the district court properly ordered compliance with HEW's request for data.

As will be discussed, appellant El Camino contends that HEW's regulations, which along with the contractural assurances provide the authority for its requests for information, attempt to give HEW the authority to "regulate" educational and employment practices which are not directly related to federally funded programs. This argument misconstrues the case here on appeal, and for that reason is premature. HEW has made no attempt yet to "regulate" any practices of El Camino, and the order below does not purport to give HEW any such authority. All that has been made is a request for information, and the district court has merely ordered that information be disclosed to HEW. While El Camino's arguments concerning the proper scope and exercise of HEW's fund termination authority may be relevant when, and if, HEW takes such action, these arguments are inappropriate at this stage, where only investigatory requests have been enforced.

ARGUMENT

I

HEW HAS REGULATORY AND CONTRACTURAL AUTHORITY TO REQUIRE RECIPIENTS OF FEDERAL ASSISTANCE TO DISCLOSE INFORMATION PURSUANT TO AN ADMINISTRATIVE INVESTIGATION

In passing Section 601 (Title VI) of the 1964 Civil Rights Act, 42 U.S.C. 2000d, Congress prohibited any form of discriminatory or exclusionary practices affecting persons on account of race, color or national origin in any program receiving federal financial assistance. In Section 602, 42 U.S.C. 2000d-1, Congress specifically gave each agency which extends federal assistance the authority to issue "rules, regulations, or orders of general applicability" to insure that the substantive prohibitions of Section 601 are followed. Lau v. Nichols, 414 U.S. 563, 567 (1974).

The Department of Health, Education and Welfare, as an agency which disburses federal assistance under numerous federal programs, has passed regulations through which the agency attempts to insure that beneficiaries of federal programs are not subjected to discriminatory actions prohibited by Title VI. 45 C.F.R. 80.1. Any administrative attempt to insure compliance with Title VI starts with an investigation, and the regulations provide authority for the agency to require recipients of federal assistance to provide information which may be necessary to determine their compliance with Title VI.

These regulations specifically state that recipients of federal funds are obligated to supply to HEW "such information as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying" with Title VI. 45 C.F.R. 80.6(b). Accordingly, HEW has regulatory authority, pursuant to Congressional authorization, to seek such information it deems necessary to determine whether there has been compliance with the nondiscrimination prohibitions of Title VI.

In addition, each recipient of federal funds, such as El Camino, must execute an "assurance of compliance," see 45 C.F.R. 80.4, whereby it agrees to comply with all statutory and regulatory Title VI requirements.[5/] That regulation specifically states that for institutions of higher education, the assurances "extend to admission practices and to all other practices relating to the treatment of students", 45 C.F.R. 80.4(d)(1), and that the assurances "shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of

5/ El Camino's signed assurance appears at C.R. 85.

the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program." 45 C.F.R. 80.4(d)(2). The record shows that El Camino never attempted to show that certain parts of its operation could have no effect on those persons who are benefitting from federal programs.

Under this regulatory language, the assurance of compliance represents that the institutional recipient recognizes HEW's authority to seek, and the institution's obligation to provide,[6/] information HEW deems necessary to determine the recipient's compliance with Title VI. The regulations recognize that in certain circumstances an institution of higher education may prove that certain of its activities can have no effect on any beneficiaries of federal programs. With that one exception, the regulations and contractural assurances establish HEW's authority to require recipients of federal funds to provide a broad range of information to HEW when the agency attempts to determine whether the beneficiaries of federal programs are being treated in a nondiscriminatory manner.

6/ The assurance of compliance signed by El Camino states that El Camino "HEREBY AGREES THAT it will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education and Welfare (45 C.F.R. Part 80) issued pursuant to that Title * * *" (C.R. 85).

II

THE DISTRICT COURT CORRECTLY REQUIRED COMPLIANCE WITH THE AGENCY'S REQUEST FOR INFORMATION

A. A District Court Must Enforce An Agency Request for Information Which Is Relevant To A Proper Investigation

The Supreme Court and this Court have both addressed the question of judicial enforcement of administrative investigatory requests for information, and have developed standards to guide district courts faced with such requests. The district court's action in this case is perfectly consistent with the standards developed in these cases.

In Endicott Johnson Corporation v. Perkins, 317 U.S. 501 (1943), the Secretary of Labor, charged with enforcing minimum wage act provisions against federal contractors, 317 U.S. at 502-503, had issued a ruling stating that all of a manufacturer's employees connected with completion of a federal contract were covered by the terms of the Act. 317 U.S. at 503-504. The Secretary of Labor sought from Endicott Johnson payroll records for all of its manufacturing plants. Endicott Johnson refused to turn over all of its payroll records, contending that the government contracts were performed only at specific plants, and that the Secretary

was not entitled to payroll records from other plants. Endicott Johnson "denied that the payroll and similar records sought as to such plants were relevant to the determination of any matter confided to the Secretary's determination", 317 U.S. at 507, and the district court refused to enforce the Secretary's subpoena.

The Supreme Court held that the district court must enforce the administrator's request for information. The Court noted that the Secretary's statutory authority extended only to employees "within the benefits of the Act and contracts." 317 U.S. at 508. However, the Court held that the overall payroll is relevant to the question of coverage of the contracts, and possible underpayments, and it is the Secretary's function, in the first instance, to determine which employees are covered by the Act and the contracts. "[The Secretary's] scope would include determining what employees these contracts and the Act covered." 317 U.S. at 508.

The Court held, 317 U.S. at 508-509, that the Secretary need not determine what employees are covered, and therefore what information will be used in proving a violation, before seeking evidence of underpayments:

> [Such a] ruling would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision.

> The former would be of dubious propriety, and the latter of doubtful practicality. The Secretary is given no power to investigate mere coverage, as such, or to make findings thereon except as incident to trial of the issue of violation. No doubt she would have discretion to take up the issues of coverage for separate and earlier trial if she saw fit. Or, in a case such as the one revealed by the pleadings in this one, she might find it advisable to begin by examining the payroll, for if there were no underpayments found, the issue of coverage would be academic. On the admitted facts of the case, the District Court had no authority to control her procedure or to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding.

The Court then set out what has become the standard for judicial enforcement of administrative requests for information (317 U.S. at 509):

> The evidence sought by the subpeona was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration.

Endicott Johnson shows that an agency's authority to seek evidence for entities subject to its jurisdiction is quite broad. At the investigation stage, the agency is not expected, or required, to limit its request in terms of

ultimate violation. At that stage, the agency must be authorized to accumulate sufficient evidence on which to determine whether a violation of any kind exists. "The very purpose * * * of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so", Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 201 (1946). The Walling case re-emphasized that administrative requests for documents must be judicially enforced following "the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry" and are reasonably described, 327 U.S. at 209. See also United States v. Morton Salt Co., 338 U.S. 632, 652 (1950): "[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." See also United States v. Powell, 379 U.S. 48, 57-58 (1964); L. Jaffe, Judicial Control of Administrative Action (1965), at pp. 117-119; K. Davis, Administrative Law Treatise, §3.12 (1958).

The decisions of this and other Courts of Appeals have, of course, reflected the standards devised by the Supreme Court. In Federal Maritime Commission v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975), this Court reversed a district court which

refused to enforce a subpoena of the Federal Maritime Commission, based on a claim of the Port of Seattle that while one part of the Port's operation was clearly subject to FMC jurisdiction, other parts about which the FMC sought information were not. This Court (521 F.2d at 434) said:

> [T]he Congress and Supreme Court have effectively narrowed the scope of the district court's powers to ascertaining "whether the information sought is relevant to any lawful purpose of the administrative authority". * * * Or as * * * in Endicott Johnson Corp. v. Perkins, 317 U.S. at 509 * * * whether the evidence sought by the subpeona was not "plainly incompetent or irrelevant" to "any lawful purpose" of the agency. If it is not, the district court is obligated to compel production of the documents * * *.
>
> * * * [E]ach independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated. After the agency has determined its jurisdiction, that determination may be reviewed by the appropriate court.

An agency, at the investigation stage, need not conclusively show that the information will disclose violations which are within its jurisdiction. "[I]t is hardly a novel proposition that an administrative agency can utilize its investigatory or subpoena powers and that a federal court can grant relief to aid it in doing so without a prior conclusive showing of statutory coverage." Marshall v. Able Contractors, Inc., 573 F.2d 1055, 1057 (9th Cir. 1978). In Securities & Exchange Comm'n v. Brigadoon

Scotch Dist. Co., 480 F.2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974), the Second Circuit, relying on Supreme Court standards cited above, similarly rejected an argument that certain activities of a company under administrative regulation need not be disclosed because administrative jurisdiction over that aspect of the business had not yet been conclusively established. The court held that the material must be immediately disclosed, as "the Commission must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission's regulatory authority." 480 F.2d at 1053.

Accordingly, affirmance of the order below requires only that this Court find that the district court correctly determined that the request of HEW sought information relevant to a lawful inquiry.

B. The HEW Request Was For Information Relevant To A Proper Legal Investigation

1. The investigation is lawfully within HEW's jurisdiction

It is undisputed that HEW has authority to investigate actions of recipients of federal funds in order to determine whether the recipient is complying with the nondiscrimination provisions of Title VI. 42 U.S.C. 2000d-1. HEW may initiate

investigatory action following either receipt of a complaint, 45 C.F.R. 80.7(b), as in this case (R. 239), or based on an agency decision to conduct a periodic review of the recipient. 45 C.F.R. 80.7(a). El Camino makes no claim that HEW's attempt to make some investigation of federal programs is improper. El Camino objects only to the scope of the material sought.

Once the court finds that the investigation has a legal basis, the question whether certain material, or actions, may be within the scope of the agency's statutory authority and are therefore suitable for investigatory efforts is one initially for the agency to decide. As this Court said in Federal Maritime Commission v. Port of Seattle, supra, challenges to the agency's exercise of jurisdiction over the material sought to be investigated may be reviewed in federal court after the agency acts substantively. 521 F.2d at 434. See also Marshall v. Able Contractors, Inc., supra, 573 F.2d at 1057. Particularly where, as with Title VI, the agency will ultimately have to litigate its jurisdiction over specific actions of the contractor before it finally acts, see Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068 (5th Cir. 1969), the agency itself, not the court, should be to the entity to make the initial determination of its jurisdiction. Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621, 647 (1972).

In attempting to raise a jurisdictional deficiency, El Camino incorrectly describes the purpose for the HEW request, and the regulations which provide the legal authority for that request. El Camino argues that the HEW regulations "purport to authorize HEW to regulate all educational programs or activities at the College regardless of whether or not such programs or activities are Federally assisted," Br. 19, see also Br. 22, 30, 31, and suggests that HEW's request for information is an exercise of such authority. Ibid. This argument is both incorrect and premature. There has been no attempt at regulation by HEW of any actions of El Camino. The only action to date has been a request for information; the district court opinion orders only production of this information, and does not purport to give HEW authority to "regulate" practices beyond those affecting federally funded programs. Since El Camino, as a recipient of federal funds, is subject to HEW investigation of possible discrimination affecting the use of these funds, the investigation is authorized. Were HEW to attempt administratively to withhold federal funds based on actions not subject to proper Title VI regulation, that action could be challenged in court. See 45 C.F.R. 80.11. Since we are not now at that stage, El Camino's jurisdictional arguments are premature. Myers v. Bethlehem Corp., 303 U.S. 41, 51 (1938).[7/]

7/ The district court recognized that this case was limited to consideration of HEW's investigatory power, and did not present issues of exercise of HEW's authority to terminate federal assistance. "The distinction between the authority to investigate and the power to terminate should not be lost." R. 248.

Courts may, of course, terminate the administrative process when an agency is exercising authorty which had been "specifically withheld," Leedom v. Kyne, 358 U.S. 184, 189 (1959), a ground which is to be very narrowly interpreted. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). El Camino at no point argues that Congress withheld usual administrative investigatory powers from agencies given the statutory obligation to insure compliance with Title VI.[8/] As demonstrated by Endicott Johnson, supra, even when an agency has authority only over government contracts, its investigatory authority is broad, enabling it to seek any sort of information about a contractor which may be at all relevant to the issues over which the agency has regulatory authority. Accordingly, Endicott Johnson, supra, in which the Secretary of Labor was enforcing a statute with a similar jurisdictional base as Title VI -- enforcement of statutory prohibition attached to federal funds and applicable only to recipients of those funds -- fully supports the argument that the informational request of HEW is perfectly consistent with its Title VI investigatory authority, and El Camino cites no legislative language limiting that investigatory authority.

8/ El Camino's brief argues that Congress did not intend to permit HEW to withhold funds based on broad allegations of discrimination, but instead required HEW to withhold funds only from programs in which discrimination is practiced. Br. 11-18, 24-30. Since this case only presents questions of investigatory authority, and not authority to terminate funds, this discussion is irrelevant to the issue before this Court.

2. The material HEW sought was relevant to determining whether beneficiaries of federally assisted programs were subjected to any discrimination

HEW sought information about El Camino's employment and hiring practices, and student enrollment, recruitment, and financial and academic assistance programs. As stated above, Endicott Johnson and later cases state that a district court must enforce administrative requests for information which may be relevant to a proper administrative investigation. The district court correctly found the material sought by HEW was relevant to a proper Title VI investigation (C.R. 248).

Discrimination in many different areas of the operation of a college may effect those students who are the beneficiaries of federal programs. Providing HEW with information necessary to discover whether there is discrimination which generally affects student enrollment or employment practices is necessary if the agency is to be able accurately to determine whether beneficiaries of federal programs are free of any discriminatory practices. In Board of Public Instruction of Taylor Country, Florida v. Finch, supra, the Fifth Circuit explained that even though termination of federal funds must be directed to specific federal programs, discrimination elsewhere in the operation of a recipient may affect beneficiaries of federal programs therefore and justify termination of these federal programs. As the Fifth Circuit said, 414 F.2d at 1078-1079:

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper * * *.

> * * * In finding that a termination of funds under Title IV of the Civil Rights Act must be made on a program by program basis, we do not mean to indicate that a program must be considered in isolation from its context. To say that a program in a school is free from discrimination because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.

Accordingly, determination of discrimination affecting federally assisted programs requires HEW to determine if there is discrimination in any other activities which may affect the students in those programs. The information sought by HEW in this case may disclose, or lead to the discovery of, patterns of college-wide discrimination affecting student admissions, or assistance of a financial or academic nature. Insofar as discrimination of this sort could conceivably affect students who have benefitted from federal programs, this information, based on Taylor County, is clearly relevant to a proper Title VI investigation.

In many circumstances, discrimination in student admission or other institution-wide procedures affects all students in a discriminatory manner, including those who are the beneficiaries of federally assisted programs, and therefore supplies a predicate for termination of specific programs of federal funds.

For example, in Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), affirmed, 529 F.2d 514 (4th Cir. 1975), the court held that due to Title VI's prohibitions, Veterans' Administration benefits could not go to a college which practiced a racially discriminatory admission policy. Since the veterans' payments depend on admission to a qualified school, there was no limited "program" to examine; the entire admissions policy of the school was relevant to a determination whether the beneficiary of the federal funds -- the student granted the VA funds -- was subjected to any discrimination. "The nondiscriminatory participation of these schools is essential if the benefits of these [VA] statutes are to flow to beneficiaries without regard to race." 396 F. Supp. at 603.

Similarly, in Flanagan v. President & Directors of Georgetown Col., 417 F. Supp. 377 (D. D.C. 1976), the court held that a college's acceptance of federal funds for construction brought with it an obligation, under Title VI, to refrain from discrimination in any practices involving students. And in Lau v. Nichols, supra, the Supreme Court found a school district's failure to provide English training to Chinese pupils, which resulted in fewer benefits to those students than to English speaking students who could fully participate in school activities, was a violation of Title VI. The Court did not require a programmatic breakdown of students to find a violation of Title VI.

El Camino's argument that even at the investigation stage HEW is limited to receiving information only about specific federal programs would effectively prevent the agency from reaching an accurate determination whether the beneficiaries of federal programs are in fact treated on a totally nondiscriminatory basis. It does HEW little good to know the racial breakdown of students given assistance under one federal program, without being able to determine whether their enrollment in the college was based on application of discriminatory admissions criteria, or whether, following their enrollment, there are any practices which affect them a discriminatory manner. Common sense dictates that college-wide practices are quite relevant to a determination whether specific students at the college have been treated on a nondiscriminatory basis. As this Court stated in Federal Maritime Commission v. Port of Seattle, supra, 521 F.2d at 434, also within the context of administrative investigation,

> [E]fforts have never ceased to try to limit the scope of the agencies' powers. No better method can be devised than that of limiting the investigative power and thus crippling the effectiveness of the agency.

The employment material sought by HEW is also relevant to an administrative investigation to determine whether there are any discriminatory practices which affect the beneficiaries

of Title VI programs. To the extent that these beneficiaries are students (except where a federal program is designed specifically to provide employment, 42 U.S.C. 2000d-3), discrimination in employment of teaching and administrative personnel may affect these beneficiaries, and therefore is a proper area of HEW investigation.

The possible effect on students of discrimination against teachers is not a novel concept. In United States v. Jefferson County Board of Education, 372 F.2d 836, 883-884 (5th Cir. 1966), affirmed, 380 F.2d 385 (1967) (en banc), cert. denied sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967), the Fifth Circuit specifically held that desegregation of faculties, and nondiscrimination in hiring, is relevant to compliance with Title VI.

> Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers * * *.
>
> * * * The right of Negro students to be free of racial discrimination in the form of a segregated faculy is part of their broader right to equal educational opportunities.

See also Marable v. Alabama Mental Health Board, 297 F. Supp. 291 (M.D. Ala. 1969); United States v. Frazer, 297 F. Supp. 319 (M.D. Ala. 1968).

In fact, the Supreme Court has stated that a segregated faculty is itself an indication of a segregated school system. Swann v. Board of Education, 402 U.S. 1, 18 (1971). Certainly HEW is entitled to seek data about employment practices in order to determine whether discrimination in this area exists and, if so, whether it affects beneficiaries of federally funded programs.

El Camino argues (Br. 23-32) that HEW cannot seek any information about employment practices, based on Section 604 of Title VI, 42 U.S.C. 2000d-3, which states:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

El Camino's discussion is to the effect that, except where a federal program is intended to provide employment, Title VI does not authorize HEW to "regulate the employment policies of local educational agencies." (Br. 30).

El Camino again misconstrues the scope of this appeal. The district court's order does not purport to give HEW authority to "regulate" El Camino's employment practices, only to receive information HEW is clearly entitled to secure. This case deals

solely with the scope of HEW's investigatory authority. As stated in Federal Trade Commission v. Texaco, Inc., 555 F.2d 862, 874 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977),

> the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.

The district court in the case presently before this Court correctly refused to speculate about possible future charges and held that HEW was entitled to the material it sought as part of a proper Title VI investigation. It correctly rejected the idea that HEW must "pinpoint" its investigatory requests to correspond to specific programs which may ultimately be the subject of termination proceedings, holding that the "pinpoint" theory does not apply at this stage of the administrative process. C.R. 247. El Camino's speculation provides no basis for reversal of the decision below.

El Camino's reliance (Br. 36-37) on recent cases[9/] holding that HEW cannot seek to require nondiscrimination on the basis of sex in employment by entities covered under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., is similarly inapposite to the issue before this Court. Those cases hold that HEW cannot use Title IX as a basis for general regulation of employment practices. As explained supra, neither the court here, nor HEW, have made such representation concerning HEW's authority under Title VI.

CONCLUSION

For the reasons stated herein, the judgment of the district court should be affirmed.

Respectfully submitted,

ANDREA SHERIDAN ORDIN,
United States Attorney.

DREW S. DAYS, III,
Assistant Attorney General,

WALTER W. BARNETT,
MARK L. GROSS,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

9/ Romeo Community Schools v. United States Dept. of Health, Education and Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), appeal pending Nos. 77-1691, 1692 (6th Cir.); Seattle University v. Department of Health, Education and Welfare, 16 FEP 719 (W.D. Wash. 1978), appeal pending No. 78-1746 (9th Cir.), Brunswick School District v. Califano, 449 F. Supp. 866 (D. Maine 1978), appeal pending No. 78-1302 (1st Cir.).

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief for the United States on counsel of record by mailing two copies to the following address:

Leroy W. Blankenship, Esquire
Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

This 20th day of November, 1978.

Mark L. Gross

MARK L. GROSS
Attorney
Department of Justice
Washington, D. C. 20530