



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

January 11, 2010

Washington, D.C. 20531

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Ms. Lisa Bjergaard
Director, North Dakota Division of Juvenile
Services
North Dakota Department of Corrections and
Rehabilitation
3303 East Main
P.O. Box 1898
Bismarck, ND 58502

Re: Compliance Review of North Dakota Dep't of Corr. and Rehab., Div. of Juvenile
Servs. (09-OCR-0066)

Dear Ms. Bjergaard:

On June 18, 2007, the Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) initiated a compliance review of all State Administering Agencies, including the North Dakota Department of Corrections and Rehabilitation (DCR or Department), in accordance with federal regulation 28 C.F.R. § 42.206. The focus of the review was on the DCR's compliance with applicable federal civil rights laws along with the Department's monitoring procedures for ensuring the compliance of subrecipients with these laws. Of particular interest to the OCR was the DCR's implementation and monitoring of the DOJ's regulations, Equal Treatment for Faith-Based Organizations, 28 C.F.R. pt. 38 [hereinafter Equal Treatment Regulations].

On July 29, 2009, the OCR provided a training program for DCR representatives about the federal civil rights laws that the OCR enforces. On July 30, the OCR conducted an onsite visit with the DCR's Division of Juvenile Services (DJS or Division) in Bismarck, North Dakota to interview you and a representative of the North Dakota Association of Counties (NDACo or Association), which collaborates with the Division in administering DOJ-funded programs.¹ The OCR would like to thank you for assisting OCR attorney Christopher Zubowicz during his onsite visit.

¹ The DJS and the Division of Adult Services (DAS) are distinct divisions within the DCR that separately subaward funds through different DOJ programs. The OCR separately evaluated the DJS and the DAS, and issued a different compliance review report to each Division. However, in responding to specific recommendations contained in each report, several of which are similar, the DCR may wish to adopt policies or procedures that apply uniformly throughout the Department, including to both Divisions.

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In regard to the limited scope of this compliance review, the OCR concludes that the DJS appears to be taking measures to comply with the federal civil rights laws that the OCR enforces. Nonetheless, we have reservations about the adequacy of the Division's (1) guidance to subrecipients about their legal obligations regarding applicable federal civil rights laws, (2) onsite monitoring of subrecipients, (3) training for subrecipients, and (4) complaint procedures for responding to certain discrimination allegations against subrecipients. The following Compliance Review Report includes recommendations for improving the DJS's methods for monitoring the civil rights compliance of subrecipients.

Compliance Review Report: Overview and Recommendations

I. Overview

This Compliance Review Report first examines the DJS's procedures for monitoring whether subrecipients are meeting their obligations to comply with the federal civil rights laws that are a condition for receiving federal financial assistance. The Report then focuses on the Division's implementation of the DOJ's Equal Treatment Regulations.

A. General Monitoring Procedures to Ensure Subrecipient Compliance with Applicable Federal Civil Rights Laws

Recipients of federal financial assistance from the OJP are responsible for certifying that contractors and subrecipients under DOJ grant programs comply with applicable federal civil rights laws. In reviewing the DJS's general efforts to ensure subrecipients' compliance with their civil rights obligations, the OCR examined how the Division used the following four tools: (1) standard assurances; (2) onsite visits and other monitoring methods; (3) training programs and technical assistance; and (4) procedures for receiving, investigating, and resolving complaints alleging employment and services discrimination.

1. Standard Assurances

The OCR evaluated the standard assurances that the DJS uses in connection with the following DOJ-funded programs: the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) Title V Community Prevention Grants (Title V), the OJJDP's Title II Formula Grants (Title II), and the OJJDP's Juvenile Accountability Block Grants (JABG). In order to receive DOJ funds, a successful applicant must sign a grant agreement, which contains the following language regarding civil rights laws:

IV. GRANTEE ASSURANCES

The GRANTEE agrees to comply with the grant conditions and assurances established by OJJDP for sub-grant recipients of federal funds as detailed in the Office of Justice Programs Financial Guide and associated Federal Circulars.

The GRANTEE agrees to comply with the nondiscrimination requirements of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 USC 3789d(c); Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973, as amended; Title II of the Americans With Disabilities Act; Title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975; and the Department of Justice Non-Discrimination Regulations, 28 CFR Part 35, 28 CFR Part 38, 28 CFR Part 39, 28 CFR Part 42, Subparts C, D, E, G and I, and 28 CFR Part 54.

The GRANTEE further agrees to protect the rights of service recipients as required under all applicable State and Federal laws and regulations.

The GRANTEE agrees to provide DJS and the Office for Civil Rights, Office of Justice Programs, any finding of discrimination resulting from a due process hearing on the grounds of race, color, national origin, religion, sex, or disability.

(Grant Agreement at 1.) In a separate certifications document, the DJS also requires an applicant to designate a civil rights contact person and to certify to the DJS that it either has an Equal Employment Opportunity Plan (EEO) on file or is exempt from the EEO requirement. If a subrecipient has not prepared a required EEO at the time of the subaward, then the DJS requires it to detail how and under what timeframe it will develop an appropriate EEO.

When the DJS sends the signed grant agreement to a subrecipient, it encloses a cover letter that includes the following language regarding limited English proficiency (LEP):

Lastly, the federal government is committed to ensuring that entities that received federal funds take reasonable steps to provide meaningful access to services for individuals who are Limited English Proficient (primary language is not English and has limited ability to speak, read, write, or understand English). Therefore, if applicable, I would encourage you to access the new LEP resource document at <http://www.lep.gov/recip.html>. In addition, the Department of Justice has produced a video that shows

steps a service provider can take to offer LEP persons meaningful access to its programs or activities. If you would like a copy of the video, *Breaking Down the Language Barrier: Translating Limited English Proficiency into Practice*, please call (202) 307-0690.

(Letter from L. Jahner (North Dakota Juvenile Justice State Advisory Group) to M. Nelson (Grand Forks County).)

While the OCR commends the DJS for seeking to ensure that all subrecipients are notified of their federal civil rights obligations, the Division fails to comprehensively address certain applicable civil rights requirements. Specifically, the grant agreement does not but should:

- notify subrecipients of their obligation to designate a contact person who is responsible for meeting all civil rights requirements and serving as a liaison with the OJJDP and the OCR. 28 C.F.R. § 31.202(a)(1);
- notify subrecipients that they must submit to the OCR either an EEOP or the OJP's Certification Form stating that they are eligible for a full or partial exemption from the EEOP requirement. *See id.* § 31.202(b)(2); *id.* § 42.305; and
- inform subgrantees of affected persons' rights to file a complaint of discrimination with the OCR for investigation. *See id.* § 31.202(b)(3).

2. Onsite Visits and Other Monitoring Methods

The DJS, in conjunction with the NDACo, endeavors to conduct annual site visits of subrecipients, although it does not perform desk reviews. In federal fiscal year 2007, the Division and NDACo performed twenty-three onsite visits of twenty-two subrecipients (one subrecipient was visited twice); in federal fiscal year 2008, the Division and the NDACo conducted twenty onsite reviews. During the OCR's onsite visit, a representative of the NDACo noted that the Association prepared a program monitoring report, which it would begin to use in the fall of 2009 and which contains a section about civil rights compliance. In that section, the checklist asks whether the subrecipient: (1) has certified that it will comply with pertinent federal civil rights requirements; (2) requires training or technical assistance about its federal civil rights obligations; (3) has been the subject of a reportable adverse finding of discrimination and, if so, whether it was reported to the State Planning Agency or the OCR; (4) is in compliance with applicable EEOP requirements; (5) has taken steps to provide meaningful access to its programs and activities to LEP persons; and (6) ensures that religious organizations (a) provide services to eligible beneficiaries regardless of their religion, (b) do not use federal funds to conduct inherently religious activities, and (c) recognize that participation in religious activities is voluntary. The NDACo representative also noted that the Division and the Association would

begin to distribute a summary of applicable federal civil rights provisions, as detailed in the OJP's Financial Guide, to subrecipients during onsite visits.

3. Training and Technical Assistance

In its response to the OCR's data request, the DJS noted that subrecipients and contractors are notified of their duty to comply with applicable federal civil rights laws as a condition of receiving a grant award. The DJS and the NDACo also provide regular, ongoing technical assistance to subrecipients about various areas, including compliance with EEOP requirements.

4. Complaint Procedures

In reviewing complaint procedures, the OCR evaluated the processes in place for individuals to pursue complaints of employment and services discrimination against the DJS and its subrecipients. The DCR has an equal employment opportunity policy that specifically prohibits discrimination on the basis of race, color, religion, sex, national origin, age, or any physical or mental disability. The Department also has procedures that provide detailed guidance to employees about filing grievances, including those regarding discrimination. In addition, the State of North Dakota has an appeals process for employment discrimination grievances involving state employment. *See* N.D. Admin. Code 4-07-20.2-01 to -07 (2008). Further, North Dakota, through its Division of Labor (DOL), Human Rights Division, has procedures to respond to complaints of discrimination from DCR and subrecipient employees. The DOL is responsible for enforcing the provisions of North Dakota law that prohibit discrimination in employment on the basis of sex, race, color, national origin, religion, age, disability, marital status, an employee's receipt of public assistance, or an employee's participation in certain lawful, off-duty activity. N.D. Cent. Code §§ 14-02.4-01, -03 (2009). A DCR or subrecipient employee also can file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).

The DJS has a written policy in place that addresses receiving, investigating, and resolving services discrimination complaints from juveniles and their parents or legal guardians. In some cases, a Division or subrecipient beneficiary can file a services discrimination complaint with the DOL, which prohibits discrimination in providing public accommodations or public services on the basis of sex, race, color, national origin, religion, age, disability, marital status, or an individual's receipt of public assistance. *Id.* §§ 14-02.4-14, -15.

The Division does not require subrecipients to have a policy or procedure that addresses receiving, investigating, and resolving employment and services discrimination complaints they receive. However, during onsite monitoring visits, the Division and the NDACo review any procedures that subrecipients may have to handle discrimination complaints. If a subrecipient receives a discrimination complaint, the Division and the NDACo expect it to notify them about the complaint, although there is no formal reporting mechanism to receive timely notice of each employment or services discrimination complaint that may be filed against a subgrantee.

B. Monitoring Compliance with Faith-Based Regulations

The purpose of the Equal Treatment Regulations is to ensure that “[r]eligious organizations are eligible, on the same basis as any other organization, to participate in any [Justice] Department program for which they are otherwise eligible.” 28 C.F.R. § 38.1(a). The Regulations prohibit the DOJ and DOJ funding recipients from discriminating either for or against an organization on the basis of the organization’s religious character or affiliation. *Id.* In evaluating the DJS’s equitable treatment of faith-based organizations, the Compliance Review Report focuses on two issues: (1) the process for including faith-based organizations in the subaward process, and (2) procedures for ensuring that funded faith-based organizations comply with applicable federal civil rights laws.

1. The Process for Including Faith-Based Organizations In the Subaward Process

The DJS subawards Title V, Title II, and JABG funds. As discussed below, several of these programs limit the ability of faith-based organizations to apply directly to the OJJDP or the Division for funds. Despite these restrictions, the Division encourages faith-based groups to, where permissible, become involved in the subaward process by, for example, partnering with local units of government in providing program-specific services.

The Division participates in the OJJDP’s Title V program, which focuses on assisting units of local government to reduce risks and to enhance protective factors to prevent youth at risk from becoming delinquent and entering the juvenile justice system. Faith-based organizations are statutorily ineligible to apply directly to the OJJDP or the Division for Title V funds. However, the OJJDP and the Division encourage faith-based organizations to access such funds by partnering with units of local government in developing the required local delinquency prevention plan and implementing the proposed prevention activities. *See OJJDP FY 09 Title V Community Prevention Grants Program*, OJJDP, at <http://ojjdp.ncjrs.gov/grants/solicitations/FY2009/Title%20V.pdf> (last visited Jan. 5, 2010), at 3. During the DJS’s October 2008 – September 2009 grant period, Lutheran Social Services of North Dakota partnered with a local unit of government to implement Title V services.

The DJS also administers the OJJDP’s Title II program, which shares similar goals with the Title V program. Faith-based organizations are statutorily ineligible to apply directly to the OJJDP for Title II funds. *See OJJDP FY 09 Title II Formula Grants Program*, OJJDP, at <http://ojjdp.ncjrs.org/grants/solicitations/FY2009/TitleIIFormula.pdf> (last visited Jan. 5, 2010), at 3-4. However, the Division encourages faith-based organizations to collaborate with local units of government in providing Title II services. For instance, during the DJS’s July 2009 – June 2010 grant period, Lutheran Social Services of North Dakota is partnering with three counties under the Title II program.

Next, the Division participates in the OJJDP's JABG program, which supports state and units of local government in their efforts to strengthen juvenile justice systems. Faith-based organizations are statutorily ineligible to apply directly to the OJJDP or the Division for funding under the JABG program; however, Section 1806 of the Omnibus Crime Control and Safe Streets Act of 1968 permits units of local government to contract with such groups to implement appropriate JABG purpose areas. See *OJJDP FY 09 Juvenile Accountability Block Grants Program*, OJJDP, at <http://ojjdp.ncjrs.gov/grants/solicitations/FY2009/JABG.pdf> (last visited Jan. 5, 2010), at 3-4. As with the Title V and Title II programs, Lutheran Social Services of North Dakota has received funds through the JABG subaward process.

2. Procedures for Ensuring that Faith-Based Organizations Comply with Applicable Civil Rights Laws

In a general effort to ensure that faith-based organizations comply with the DOJ's Equal Treatment Regulations, the DJS cites 28 C.F.R. part 38 in its Title V and JABG program announcement materials, although it does not provide any information about what those Regulations address or how they apply to a faith-based subrecipient.² Despite the lack of clear guidance regarding the Equal Treatment Regulations during the award process, the Division and the NDACo use the onsite monitoring process to evaluate whether religious organizations (1) provide services to eligible beneficiaries regardless of their religion, (2) do not use federal funds to conduct inherently religious activities, and (3) recognize that participation in religious activities is voluntary.

II. Recommendations

The DJS already has in place a number of procedures for monitoring the civil rights compliance of its subrecipients. To strengthen the Division's monitoring efforts and its inclusion of faith-based organizations in the grant funding process, the OCR offers the following four recommendations: (1) modify the civil rights/nondiscrimination provisions in its grant agreement assurances, (2) refine its compliance checklist, (3) refine its training to subrecipients regarding their obligations to comply with federal civil rights laws, and (4) develop a comprehensive policy for addressing discrimination complaints against subrecipients.

A. Modify the Civil Rights/Nondiscrimination Provisions in Grant Agreement Assurances

The DJS should ensure that all DOJ subrecipients agree to grant agreement assurances that accurately reflect their federal civil rights obligations. To that end, the OCR recommends that the Division replace Part IV. of its grant agreement with the following language or substantially

² The DJS does not issue a program announcement about Title II.

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similar language, which would continue to apply to all applicants for and subrecipients of DOJ funding, regardless of the amount of federal financial assistance at issue:

Recipient will comply (and will require any subgrantees or contractors to comply) with any applicable federal nondiscrimination requirements, which may include the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3789d); the Victims of Crime Act (42 U.S.C. § 10604(e)); the Juvenile Justice and Delinquency Prevention Act of 2002 (42 U.S.C. § 5672(b)); the Civil Rights Act of 1964 (42 U.S.C. § 2000d); the Rehabilitation Act of 1973 (29 U.S.C. § 794); the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12131-34); the Education Amendments of 1972 (20 U.S.C. §§ 1681, 1683, 1685-86); the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101-07); 28 C.F.R. pt. 31 (U.S. Department of Justice Regulations – OJJDP Grant Programs); 28 C.F.R. pt. 42 (U.S. Department of Justice Regulations – Nondiscrimination; Equal Employment Opportunity; Policies and Procedures); Ex. Order 13279 (equal protection of the laws for faith-based and community organizations); and 28 C.F.R. pt. 38 (U.S. Department of Justice Regulations – Equal Treatment for Faith-Based Organizations).

Recipient will designate a civil rights contact person who has lead responsibility in insuring that all applicable civil rights requirements, assurances, and conditions are met and who shall act as a liaison in all civil rights matters with the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs and the Office for Civil Rights, Office of Justice Programs.

Recipient will inform the public and subgrantees of affected persons' rights to file a complaint of discrimination with the Office for Civil Rights, Office of Justice Programs for investigation.

In the event a Federal or State court or Federal or State administrative agency makes a finding of discrimination after a due process hearing on the grounds of race, color, religion, national origin, or sex against a recipient of funds, the recipient will forward a copy of the finding to the Office for Civil Rights, Office of Justice Programs and the North Dakota Department of Corrections and Rehabilitation, Division of Juvenile Services (DJS).

Recipient will provide an Equal Employment Opportunity Plan (EEOP) to the Office for Civil Rights, Office of Justice Programs

and the DJS, if required to submit one; otherwise, it will provide a certification to the Office for Civil Rights, Office of Justice Programs and the DJS that it has a current EEOP on file, if required to maintain one. For grantee agencies receiving less than \$25,000, or grantee agencies with less than 50 employees, regardless of the amount of the award, no EEOP is required. Information about civil rights obligations of grantees can be found at <http://www.ojp.usdoj.gov/ocr/>.

The DJS may also consider including in the grant agreement the following language or substantially similar language regarding language assistance services:

As clarified by Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination on the basis of limited English proficiency (LEP). To ensure compliance with the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964, recipient must take reasonable steps to ensure that LEP persons have meaningful access to its programs. Meaningful access may entail providing language assistance services, including oral and written translation, where necessary. Recipient is encouraged to consider the need for language services for LEP persons served or encountered both in developing its budgets and in conducting its programs and activities. Additional assistance and information regarding your LEP obligations can be found at <http://www.lep.gov>.

Finally, the Division may wish to add a sentence to the grant agreement stating that, in accordance with federal civil rights laws, the subrecipient shall not retaliate against individuals for taking action or participating in action to secure rights protected by these laws.

B. Refine Compliance Checklist

The DJS is to be commended for its efforts to monitor subrecipients through onsite visits, as well as for its use of a compliance checklist that seeks to address applicable federal civil rights requirements. Going forward, it should refine its checklist to ensure that it evaluates all of the various civil rights requirements that apply to DOJ-funded subrecipients (e.g., whether the subrecipient has posted nondiscrimination notices as required by section 504 of the Rehabilitation Act; and whether the subrecipient has a grievance procedure and a designated coordinator as required by section 504 of the Rehabilitation Act and Title IX of the Education Amendments of 1972). In an effort to assist the DJS in refining its checklist, the OCR has prepared a sample Federal Civil Rights Compliance Checklist, which is enclosed for the

Division's review.

C. Refine Training Program for Subrecipients Regarding Their Obligations to Comply with Federal Civil Rights Laws

The DJS should ensure that subrecipients in all DOJ-funded programs receive training about their obligations under applicable federal civil rights laws, such as to provide services to LEP individuals and to have procedures in place to receive and evaluate complaints alleging discrimination from employees and beneficiaries. The OCR is available to provide the Division with technical assistance in expanding its civil rights training programs.

D. Develop Comprehensive Policy for Addressing Discrimination Complaints Against Subrecipients

As previously noted, the DCR has procedures in place for responding to discrimination complaints from its own employees, as well as from juveniles and their parents or legal guardians, and the DOL provides a forum for resolving employment and services discrimination complaints filed by Department and subrecipient employees and beneficiaries. Nonetheless, the DJS has an obligation as a recipient of federal financial assistance to have in place a policy that comprehensively addresses how it responds to employment and services discrimination complaints that it receives from subrecipient employees and beneficiaries. Specifically, it should ensure that it has a policy for addressing discrimination complaints that includes at a minimum the following elements:

- designating a coordinator who is responsible for overseeing the complaint process;
- notifying appropriate DCR employees, as well as subrecipient employees, of prohibited discrimination in funded programs and activities and the Division's policy and procedures for handling discrimination complaints;
- establishing written procedures for receiving discrimination complaints from subrecipient employees and beneficiaries;
- referring each complaint to the appropriate agency for investigation and resolution, such as the DOL or the EEOC; or referring the complaint to the OCR, which will review the complaint and work with the DJS to resolve it; and
- training DJS program staff on their responsibility to refer discrimination complaints or potential discrimination issues to the Division's complaint

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coordinator for processing as soon as the alleged discrimination comes to their attention.

In an effort to assist the DJS in developing a comprehensive complaint policy, the OCR has prepared sample procedures for responding to discrimination complaints, which are enclosed for the Division's review. While the DJS's adoption of these procedures would satisfy the instant recommendation, the OCR also recognizes that there may be other, equally effective complaint procedures that accomplish the same objectives. Additional information about the applicable laws, complaint forms, and the investigative process can be found at <http://www.ojp.usdoj.gov/about/offices/ocr.htm>.

III. Conclusion

We find that the DJS should implement the OCR's recommendations to ensure substantial compliance with the federal civil rights laws that the OCR enforces. On request, the OCR is available to provide technical assistance to the Division in addressing the concerns raised in this Report. **Immediately upon receipt of this letter, we ask that a responsible DJS or NDACo official contact Attorney Advisor Christopher Zubowicz to develop a timeline and goals for implementing the OCR's recommendations.**

Thank you for your cooperation and the assistance of your staff during the compliance review process. If you have any questions, please contact Mr. Zubowicz at [REDACTED]

Sincerely,



Michael L. Alston
Director

Enclosures