TENNESSEE JUSTICE CENTER
Advocates for Families in Need

211 7th Avenue North, Suite 100, Nashville, TN 37219
Phone: (615)255-0331 Fax: (615)255-0354
www.tnjustice.org

July 6, 2021

VIA ELECTRONIC SUBMISSION TO: https://www.regulations.gov/

Office of Management Budget
Executive Office of the President

Re: Response to Request for Information (RFI), Docket No. OMB-2021-0005
Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government

Ladies and Gentlemen:

Thank you for the opportunity to provide information to the Office of Management and Budget (OMB) regarding inequities in government policies and programs. The Tennessee Justice Center (TJC)[1] writes to provide information on Area 2, Barrier and Burden Reduction. Specifically, with respect to Area 2, we write to notify OMB that systemic failures in administrative enforcement by federal Offices for Civil Rights exacerbate inequitable barriers faced by underserved communities. We propose that the government conduct an audit of how Offices for Civil Rights across the federal government resolve administrative complaints and establish investigative standards for handling such complaints. We also propose that, where multiple federal agencies are involved in formulating a policy or taking action that may implicate the interests or wellbeing of underserved communities, review of potential impacts by the Office for Civil Rights and a determination that the proposed policy or action will not disadvantage underserved communities should be a prerequisite that is satisfied before final federal approval is granted, or action is taken.[2]

Founded in 1995, the Tennessee Justice Center (TJC) is a nonprofit organization that uses the law, education, and advocacy to ensure that vulnerable Tennesseans can meet their most basic needs and have a pathway to opportunity. Our mission is to advocate on behalf of low-income

[1] This comment was prepared by Clay Capp, Gordon Bonnyman, and Laura Revolinski of the Tennessee Justice Center, with the assistance of Samara Spence and Sean Lev of the Democracy Forward Foundation.

[2] TJC is also one of several signatories on a separate comment being submitted in response to this same RFI, and addressing Area 1, Equity Assessments and Strategies. In that comment, we note that the lack of racial and ethnic data collection on OMB-approved healthcare billing forms makes it difficult for researchers to assess the causes of and possible solutions for well-known inequities in healthcare. Requiring this data to be collected on standard billing forms is therefore a public policy that would advance equity.

Tennesseans and to defend programs and policies that provide health care coverage, nutrition and financial security, not only in Tennessee but nationwide. Our advocacy has included efforts to use our nation's civil rights laws to achieve equity for immigrants, people of color and individuals with disabilities.

Area 2: The Federal Government Should Conduct an Audit of Its Civil Rights Enforcement Offices and Establish Investigative Procedures for Administrative Investigations.

TJC works directly with clients to access healthcare and nutrition benefits. This includes working with them to obtain federal benefits under programs such as Medicaid, Medicare, Children's Health Insurance Program (CHIP), Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), Pandemic EBT (P-EBT) and other nutrition programs. We serve a diverse group of clients, including clients with disabilities and clients who were born outside the United States.

The clients we have assisted with healthcare and nutrition benefits frequently encounter barriers to accessing those programs on bases such as disability and national origin. We have attempted to remedy some of those barriers by filing complaints with the appropriate federal agency overseeing the programs. In the case of Medicaid, Medicare, CHIP and TANF, the enforcement agency is the Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS). In the case of SNAP, P-EBT and other nutrition programs, the enforcement agency is the Office of the Assistant Secretary for Civil Rights (OASCR) of the U.S. Department of Agriculture (USDA). However, our experience is that these complaints are routinely dismissed without any indication of a genuine investigation. The procedures followed and outcomes produced have been strikingly similar across those different departments and programs.

We therefore propose that investigative standards and procedures be established for how Offices for Civil Rights across federal agencies review complaints. To that end, an audit of discrimination complaints filed with all federal agencies over the past decade may help identify patterns of inadequate redress, and may help inform how the new standards for investigating potential discrimination can promote equity.

<u>Complaints to the Department of Health and Human Services' Office for Civil Rights Are Routinely Dismissed Without any Apparent Genuine Investigation.</u>

Our experience filing administrative complaints with OCR spans multiple decades and administrations. We have filed several complaints against public and private grantees of federal funds, including the following examples:

- An October 2003 complaint filed against Vanderbilt University Medical Center (VUMC) noted that the institution was a major recipient of Medicare, Medicaid, and other federal health grants. The complaint challenged the institution's explicit policy of routinely refusing to serve adults enrolled in Tennessee's Medicaid program, known as TennCare. The complaint cited state data that 42.7% of African-American Tennesseans, but only

20.4% of white Tennesseans, were enrolled in TennCare. We noted that because of the disproportionate reliance of African-Americans on TennCare, VUMC's discrimination against individuals on the basis of their TennCare status had a racially discriminatory impact. The complaint cited legal authority that discrimination against Tennessee Medicaid patients was racially discriminatory in violation of Title VI of the Civil Rights Act of 1964. *Linton v. Commissioner*, 779, F. Supp. 925 (M.D. Tenn. 1990), affd. on other grounds 65 F.3d 508 (6th Cir. 1995), cert. den. sub nom. *St. Peter Villa v. Linton*, 517 U.S. 1155 (1996). The complaint was summarily dismissed by OCR, although the allegations clearly fit one of the examples cited on the OCR website as violative of Title VI. ("A predominantly minority community is provided lower benefits, fewer services, or is subject to harsher rules than a predominantly nonminority community.")

VUMC continues to apply the same discriminatory policy to this day, subjecting adult TennCare patients to "preadmission authorization" requirements not applied to any other insured patients. Currently, VUMC receives over a billion dollars annually in public funding, the vast majority of which is federal. The discriminatory racial impact today is as great as it was when OCR dismissed our complaint nearly two decades ago. According to information released by the State of Tennessee's Division of TennCare, at least 29.6% (345,000) of Black Tennesseans are enrolled in TennCare. By contrast, only 13.9% (769,000) of white Tennesseans rely on TennCare as their source of care.[3] Another way to understand the racial impact of Vanderbilt's policy is to note that nonwhite Tennesseans account for only 21.6% of the state's population but slightly more than half (50.4%) of TennCare enrollees. This is the sort of stark violation one would expect that HHS would detect through its discharge of its responsibilities to monitor the Title VI compliance of its grantees, but as our experience shows, the agency is incapable of addressing the problem even when it is brought to OCR's attention through a well-documented complaint.

- In 2002, we filed a complaint against the TennCare program, challenging its request to the Centers for Medicare and Medicaid Services (CMS) to amend the state's Medicaid waiver to permit the state to reduce services and eligibility. The complaint noted that the specific reductions would disproportionately impact African-Americans, constituting a method of administration that would have the effect of discriminating on the basis of race, in violation of Title VI. *Cf.* 45 CFR 80.3(b)(2). While the complaint was pending, CMS proceeded to approve the state's implementation of the challenged policies. In a May 30, 2002 letter authorizing the reductions, the CMS Administrator congratulated the state and added, "Approval of this demonstration does not dispose of any issues that may

[3] Division of TennCare, TennCare Enrollment by Race & Ethnicity (April 5, 2021). Total TennCare enrollment is 1,551,000. Percentages do not include 262,000 enrollees who declined to state their race. Even if the entire 262,000 TennCare enrollees are assumed to be white, Black reliance on TennCare would remain markedly higher than for whites. In fact, because Black people are less likely than white people to disclose their race, the 262,000 are likely to have been disproportionately comprised of Black TennCare enrollees, making Black reliance on TennCare even greater than is disclosed by the available data.

be currently pending investigation by the Office of [*sic*] Civil Rights." Many months later, OCR summarily dismissed the complaint, but by then the reductions had long since become a *fait accompli* by virtue of the CMS authorization.

- On September 11, 2009, we filed a complaint against the TennCare program, challenging the program's policy regarding the provision of hearings to enrollees or applicants who pursue administrative appeals of denials or reductions of coverage or services. The complaint alleged that access to an in-person hearing, which is guaranteed by the 14th Amendment's Due Process Clause and by the Medicaid Act, was afforded only in certain cities. *Cf.* 42 USC § 1396a(a)(3); 42 CFR §§ 431.240(a) and 431.242(e). The complaint charged that TennCare violated the Americans with Disabilities Act by refusing to reasonably accommodate individuals whose severe disabilities made it difficult or impossible to attend a hearing in one of the half dozen Tennessee cities to which itinerant administrative judges travel to conduct TennCare appeal hearings. The complaint explained that the severity of a person's illness or of her functional incapacity is often relevant, or even determinative, in appeals where disability-based eligibility or the medical necessity of TennCare services is in dispute. In such cases, affording the individual the opportunity to interact with, and be observed by, the hearing officer can strongly affect the outcome of the appeal. This is especially true where the individual's disabilities limit her ability to effectively convey the relevant facts. The complaint set out the experience of several individuals with severe disabilities who had requested but been refused reasonable accommodation by asking that the administrative judge travel to their homes rather than to a distant site to conduct the hearings. *Cf.* 28 C.F.R. §35.150(b)(1). TennCare would only offer these individuals telephone hearings, seriously compromising their ability to effectively present their appeals.

  After receiving OCR's acknowledgement of receipt of the complaint, we sent OCR an email on November 5, 2009, to stress the urgency of the matter. We explained that the state continued to proceed aggressively with the termination or reduction of health benefits or eligibility without affording the complainants and others similarly situated the accommodation they needed in order to effectively appeal. We reported that one of the complainants had already lost her coverage. We requested that OCR ask state officials to delay such actions pending OCR's investigation of the complaint. We explained that "the combination of the State's aggressiveness and the delay in federal action on the complaint means that the situation on the ground continues to deteriorate and threatens to make any federal intervention too late to protect those affected." Two weeks later OCR responded that it could not make such a request of the state but would investigate the complaint.

  In mid-April 2010, we received a call from OCR investigators who asked for more information about the state's policies, which we provided. We also cited other states' practices of offering in-home hearings as necessary to reasonably accommodate appellants with disabilities. We also participated in phone calls between OCR and two of the complainants. We heard nothing more from OCR for more than three years. During

> that time, the state continued to refuse to accommodate appellants with disabilities seeking in-person hearings.
>
> On September 11, 2013, the fourth anniversary of the submission of our complaint, OCR sent us a letter advising us that, "Because of the corrective actions taken by the Covered Entity, OCR has closed this case." The letter contained a state policy, purportedly promulgated as a formal TennCare rule, stating that "TennCare shall inform enrollees that they have the right to an in-person hearing, a telephone hearing or other hearing accommodations as may be required for enrollees with disabilities." TennCare represented that "corrective action," might include in "rare instances" the "unique or special accommodation" of transporting the appellant to a distant hearing site or offering an internet hearing. The complaint had made clear that the individual complainants could not be safely transported to a distant site and could not effectively present their cases other than in person. In any event, the purported "rule" on which OCR based the closing of the case is nowhere to be found in TennCare's rules.

These examples are representative of our experiences, and those of the complainants we have represented on administrative complaints submitted to HHS OCR. In each case, we receive a acknowledgement from OCR that is has received the complaint. We usually hear nothing more until being notified that the case has been closed many months or years later. (The last example just described involving an ADA complaint on behalf of TennCare administrative appellants was unique, in that we had substantive communication, limited as they were, with investigators; in other cases, we have had no substantive communications.) In every case, OCR has said that after communicating with the respondent the agency had concluded that there had been no violation or that it had been corrected. In every case, OCR has accepted the respondent's representations without affording the complainants an opportunity to be aware of the representations, much less refute them. In some cases, as in the VUMC example, where the relevant facts cannot be disputed, OCR has ignored its own guidance in order to close the case without taking action.

In the face of ineffectual enforcement, our clients continue to encounter unlawful barriers in accessing HHS programs. We continue to observe barriers to healthcare benefits in violation of Title VI and the Americans with Disabilities Act (ADA). TennCare systematically fails to provide accommodations for disabilities even when expressly requested. As an example, a client of ours has vocal cord paralysis and struggles to communicate by phone. During a call with TennCare she explicitly stated that due to her condition she struggled to use the phone line's voice menu and requested a touch-tone menu as an alternative. The representative speaking to her during the call made no note of this request for an accommodation, and it was ignored.

Another client has limited use of his hands due to a disability and contacted TJC for help after he was erroneously terminated from the TennCare program. In the course of his appeal, TJC informed TennCare that the client was struggling to provide requested documents by mail or place phone calls due to his disability. But TennCare offers no option for in-person communication or delivery of documents which would have greatly reduced the burden on our client.

OCR's failure to adequately enforce against Tennessee agencies for similar problems has created a disproportionate barrier in access to needed HHS programs for our clients, especially those with disabilities and language barriers.

The Department of Agriculture's Assistant Secretary for Civil Rights Has Been Similarly Unhelpful.

TJC has also observed unacceptable barriers faced by families seeking pandemic EBT (P-EBT) nutrition assistance authorized by the Families First Corona Virus Response Act in March 2020. The Tennessee Department of Human Services (TDHS), which has responsibility for administering the program in Tennessee, required that children who had already been certified as eligible by local education agencies complete a new application to DHS. The application and explanatory materials were in English only. This prevented families from accessing vital information about the program based on their national origin, in violation of Title VI. In addition, TDHS administered the P-EBT program using an exclusively online application system, discriminating against many people with disabilities who were unable to use the online portal.

In July 2020, we and two other Tennessee-based organizations filed two complaints with the USDA OASCR. One complaint alleged that TDHS was violating Title VI, and the other alleged that TDHS was violating the ADA in its administration of the P-EBT program. A few weeks after filing, an investigator contacted TJC for more detail, which we provided. After we filed the complaints, TDHS made some P-EBT materials available in Spanish, Arabic and Somali and established a call center which was plagued by dropped calls and wait times exceeding 45 minutes. TDHS dropped the application requirement but imposed other requirements for the families of the 250,000 children who were missed by the error-prone application process (e.g., families had to go to schools, which were closed due to the pandemic, to pick up P-EBT benefits for the last school year) that created new barriers for both people with limited English proficiency or disabilities.

We did not receive any other communication until May 28, 2021, when OASCR sent us copies of letters of closure addressed to TDHS. Each letter referred to a voluntary agreement between the USDA and TDHS, which TJC has never seen, and stated that USDA was satisfied that TDHS had taken adequate actions to address the areas of concern in the complaints. We do not know what commitments TDHS made. USDA did not provide a report of investigation or any other supporting documents to TJC or to the other complaining organizations. And we were not notified of any right to appeal the decision to close our complaint. Had OASCR communicated with the complainants to confirm the factual claims made by the respondent, or to assess the sufficiency of the respondent's commitments, it would likely not have closed the cases. Even the most basic inquiry would have disclosed that, despite evolving TDHS policies and procedures, access to P-EBT benefits remains needlessly difficult for children whose parents have limited English or disabilities affecting their mobility, cognition or communicative capabilities.

OASCR's failure to adequately address complaints in a timely manner exacerbates the inequities already faced by our clients experiencing disabilities and language barriers due to the underlying Title VI and ADA violations in Tennessee.

The Federal Government Should Conduct an Audit of Its Practices Across Agencies for Reviewing Civil Rights Claims And Should Establish Investigative Standards for Administrative Civil Rights Investigations.

To improve access to administrative remedies by those facing inequities at the hands of state agencies, we propose that the federal government establish investigative standards for reviewing civil rights complaints across federal agencies.

The federal Equal Employment Opportunity (EEO) complaint process could serve as a model in this regard. When an individual files an EEO complaint against a federal agency, they are granted an opportunity to provide a full statement describing their allegations and any supporting documents. Employees at the agency who may have knowledge of the alleged events are then each asked to provide a statement and supporting documents of their own. These statements are provided to the complainant, who is able to provide a rebuttal statement for the record. The investigator then compiles all statements and documents into a report of investigation (ROI). The agency's EEO office reviews the ROI and issues a written decision determining whether unlawful discrimination occurred and, if so, what remedy is appropriate. The complainant is provided a copy of this decision along with the full ROI. EEO complainants have the right to appeal the agency's determination to the Equal Employment Opportunity Commission (EEOC) for review. Implementing transparency and investigative measures similar to those used in the EEO complaint process would greatly improve access to administrative remedies for those who have suffered inequitable treatment by recipients of federal funds. It would also improve trust in federal resolution of complaints of discrimination in benefits programs.

To inform the development of investigative standards, we also propose that the federal government conduct an audit of civil rights complaints filed with federal agencies for the past ten years. The audit should report on metrics such as the amount of time between the filing of a complaint and its closure and provide a breakdown of complaints by resolution. Such an audit should also review whether complaints were investigated thoroughly and closed properly.

Though our proposed audit would be large in scale, the nature of this audit is not unheard of for the federal government. Earlier this year, the Department of Education (DOE) Office of the Inspector General (OIG) conducted a narrow audit of DOE's Office for Civil Rights complaints. The audit identified improper complaint closures and recommended improvements to DOE's complaint dismissal processes.[4] In fact, the EEOC already conducts an annual audit of complaints filed with federal agencies. Every year, federal Offices for Civil Rights must submit EEOC Form 462 to provide data about employment discrimination complaints filed with the agency. This data includes information on the number of complaints filed, bases and forms of

[4] https://www2.ed.gov/about/offices/list/oig/auditreports/fy2021/a19t0002.pdf

discrimination alleged, and complaint outcomes. The EEOC-led annual audit could be expanded to account for the metrics identified above, or another appropriate agency could conduct such an audit with the advice of EEOC

In our 25 years of working with Tennesseans to access public benefit programs, we at TJC have observed numerous barriers to equitable access to these programs, often in violation of Title VI and the ADA. Since the Supreme Court issued *Alexander v. Sandoval*, 532 U.S. 275 (2001), precluding private enforcement of Title VI, administrative complaints through federal Offices for Civil Rights are usually the only means to seek a remedy. We have pursued complaints with the appropriate Offices for Civil Rights on numerous occasions only to be rebuffed or dismissed without an adequate investigation or explanation. Because this has been consistent across agencies and administrations, we believe a thorough audit of administrative complaints is necessary to identify shortcomings in the process. If the federal government does not provide recourse for those suffering from violations of Title VI, then the law is, sadly, reduced to a dead letter.

The Government Should Ensure That Federal Agencies Do Not Undermine or Preempt OCR Investigations of Civil Rights Compliance

As illustrated by the example, described above, of CMS approving implementation of Medicaid reductions before OCR had investigated a complaint that the reductions would violate Title VI, federal agency action can effectively render civil rights enforcement moot. We suggest that OCR, and its civil rights enforcement counterparts in other federal agencies, should have a duty to notify their agency when a proposed agency action will preempt or render moot a civil rights complaint investigation. That notice should halt the implementation of the agency action until the civil rights complaint is investigated and resolved.

Even if such a notification process is not adopted, the Government should ensure that challenged actions do not go forward when the potential effect is to inflict harm on underserved communities before OCR or its counterparts can investigate and act on a complaint of discrimination. To this end, OCR and its counterparts should be empowered to make recommendations to their agency Administrator or Secretary about whether to maintain the status quo by halting a pending agency action pending the outcome of a civil rights investigation .

Thank you for your consideration of our comment. We ask that you include the full text of each of the regulations cited in our comment in the formal administrative record of any rulemaking for purposes of the Administrative Procedures Act. Please contact us at ccapp@tnjustice.org if you have any questions or if we can be of further assistance.

Respectfully submitted,

Clay Capp
Legal Director
Tennessee Justice Center